

## Maryland's Right of In Banc Review

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# Comment

## MARYLAND'S RIGHT OF IN BANC REVIEW

*The judiciary system was further discussed to the hour of adjournment, without any important action upon its provisions.*<sup>1</sup>

### INTRODUCTION

Maryland is perhaps the only state in the country that gives litigants a constitutional right to have their cases reviewed by a panel of *trial* judges.<sup>2</sup> Most Marylanders appear unmoved by that fact, however, because comparatively few invoke their right to an in banc review.<sup>3</sup> Whatever else might cause their neglect, it is not the pedigree of the in banc rule: it comes from no less an authority than the Maryland Constitution of 1867, and it stands virtually unchanged in today's constitution as article IV, section 22.

The conventional wisdom—what there is of it on this mostly ignored provision—suggests that in 1867 the constitutional delegates provided in banc review as a “poor person's appeal”: a simplified appeal for those who could not afford to travel to Annapolis or produce appellate briefs.<sup>4</sup> Most authorities seem to assume that the

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1. AMERICAN AND COMMERCIAL ADVERTISER (Baltimore), July 23, 1867, at 1 (commenting on the news of the constitutional convention on the day Richard H. Alvey introduced a provision guaranteeing Marylanders a right to in banc review).

2. See MD. CONST. art. IV, § 22; MD. R. 2-551. Compare PA. R. CIV. P. 227.2 (allowing Pennsylvania trial judges discretion to have post-trial motions decided by a court en banc of up to three judges); VT. STAT. ANN. tit. 4, § 112 (1988) (three-judge trials).

3. See *infra* notes 147-150 and accompanying text. In Maryland we spell it *in banc*—not *en banc*, *in bank*, or even *in banco*. We are not the only state to spell it this way, see, e.g., *Spur Indus. v. Del E. Webb Dev. Co.*, 494 P.2d 700 (Ariz. 1972) (*in banc*), although the Maryland spelling is much rarer than *en banc*. BRYAN A. GARNER, A DICTIONARY OF MODERN LEGAL USAGE 213 (1987). Some Maryland authorities are unable to appreciate the local peculiarity. See *Smith v. County Executive*, 47 Md. App. 65, 69 n.4, 421 A.2d 979, 980 n.4 (1980) (*per curiam*) (saying the various forms are used interchangeably and then using *en banc*, notwithstanding the Maryland Constitution). Judge Paul Niemeyer and Linda Richards, in their definitive commentary on the Maryland Rules of Civil Procedure, confronted the problem head on: “There is no justification for the spelling *in banc* other than the fact that it was used by the drafters of the Maryland Constitution.” PAUL V. NIEMEYER & LINDA M. RICHARDS, MARYLAND RULES COMMENTARY 339 (1984).

4. See *Washabaugh v. Washabaugh*, 285 Md. 393, 396, 404 A.2d 1027, 1029 (1979); MARYLAND RULES COMMITTEE, MINUTES OF THE MEETING OF THE RULES COMMITTEE 65 (Mar. 12-13, 1982) [hereinafter MINUTES OF THE MEETING OF THE RULES COMMITTEE] (comments of Judge McAuliffe); 4 GEORGE W. LIEBMANN, MARYLAND PRACTICE: CIVIL PROCEDURE FORMS § 1271, at 154 (1984); NIEMEYER & RICHARDS, *supra* note 3, at 338.

rule is an anachronism,<sup>5</sup> created as it was many years before the invention of the automobile, the word processor, and the Court of Special Appeals. Surely today no litigant is worried about the expense or delay of driving to Annapolis. But the authority for the rule is the state constitution, so it cannot be ignored entirely. Hence use of the rule should be restricted where possible and in no case expanded beyond its constitutional boundaries.<sup>6</sup>

This Comment is an historical and legal study of the right to in banc review in Maryland. Part I contains a general description of the in banc provision as it operates in Maryland. Part II re-examines the original purpose of the rule. Although there is some support for the poor person's appeal theory, a close look at the Constitutional Convention of 1867 suggests that the framers intended in banc review to be much more: it probably was a central component of the new, "three-judge" judiciary formulated at the convention, and it may have been an important compromise provision that made the proposed three-judge system more palatable to an opposing contingent of delegates who supported a "one-judge" system.

Part III describes current in banc practice as it has been implemented by the Maryland Rules of Civil Procedure and summarizes the modern constitutional issues concerning article IV, section 22, such as whether the in banc rule violates equal protection and whether the Court of Appeals may constitutionally alter the provisions of section 22 through its rulemaking powers. Part III reconsiders the value of the right to in banc review in light of the historical findings from Part II. This section also discusses whether in banc review has a place in the modern Maryland judiciary, or whether it is a useless anachronism that lawyers should continue to ignore and that the Court of Appeals should continue to circumscribe. Finally, Part III suggests several ways the Court of Appeals could change in banc practice to make it both more valuable to Maryland litigants and more faithful to the original intent of section 22.

## I. DESCRIPTION OF THE IN BANC RULE

The Court of Appeals set out the details of in banc practice in rule 2-551 of the Maryland Rules of Civil Procedure.<sup>7</sup> Although the

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5. See NIEMEYER & RICHARDS, *supra* note 3, at 339 ("The original and historical function for including the *in banc* provision in the Constitution has long passed.")

6. See MD. R. 2-551(a); HARRY M. SACHS, JR., *POE'S PLEADING AND PRACTICE* § 19, at 25 (1970).

7. In banc review is also available in criminal proceedings. For the most part when I

reason for the constitutional in banc provision may not be clear, it is evident that the reason for the procedural in banc provision is the constitutional provision. The Rule begins, "When review by a court in banc is permitted by the Maryland Constitution,"<sup>8</sup> and then lays out the applicable procedure for taking an in banc review. Plainly the Court of Appeals included the provision to restrict the right to its constitutional dimensions.<sup>9</sup>

When the constitution permits in banc review,<sup>10</sup> rule 2-551 provides that parties "may have a judgment or determination of any point or question reviewed by a court in banc."<sup>11</sup> The standard procedure to preserve objections for appeal also suffices to reserve issues for in banc review.<sup>12</sup> An aggrieved party has ten days after

refer to rule 2-551, I mean both that Rule and its criminal counterpart, rule 4-352, which specifically incorporates rule 2-551:

In banc review of a circuit court's judgment or determination is governed by the provisions of Rule 2-551, except that the right of review does not apply to criminal actions exempted under the Maryland Constitution. In applying Rule 2-551, references to Rules 2-517, 2-520, and 2-533 shall be construed as references to Rules 4-323, 4-325, and 4-331(a) respectively.

MD. R. 4-352; *see also* *Dean v. State*, 302 Md. 493, 489 A.2d 22 (1985) (relying on civil cases to decide a point of law arising from a criminal in banc review).

8. Md. R. 2-551(a). The Maryland Constitution provides:

Where any Term is held, or trial conducted by less than the whole number of said Circuit Judges, upon the decision or determination of any point, or question, by the Court, it shall be competent to the party, against whom the ruling or decision is made, upon motion, to have the point, or question reserved for the consideration of the three Judges of the Circuit, who shall constitute a court in banc for such purpose; and the motion for such reservation shall be entered of record, during the sitting, at which such decision may be made; and the several Circuit Courts shall regulate, by rules, the mode and manner of presenting such points, or questions to the Court in banc, and the decision of the said Court in banc shall be the effective decision in the premises, and conclusive, as against the party, at whose motion said points, or questions were reserved; but such decision in banc shall not preclude the right of Appeal, or writ of error to the adverse party, in those cases, civil or criminal, in which appeal, or writ of error to the Court of Appeals may be allowed by Law. The right of having questions reserved shall not, however, apply to trials of Appeals from judgments of the District Court, nor to criminal cases below the grade of felony, except when the punishment is confinement in the Penitentiary; and this Section shall be subject to such provisions as may hereafter be made by Law.

MD. CONST. art. IV, § 22.

9. *See also* MD. R. 2-551(g) ("The panel . . . shall dismiss an in banc review if (1) in banc review is not permitted by the Maryland Constitution . . .").

10. *See supra* note 8.

11. MD. R. 2-551(a).

12. *Id.*; *see also* MD. R. 2-517 (contemporaneous objection rule). The provision allowing normal objections for in banc practice appears to contradict earlier interpretations of section 22, and this became the subject of a major appellate debate. *See Montgomery County v. McNeece*, 311 Md. 194, 533 A.2d 671 (1987), in which the provision was upheld, albeit in dicta. *See infra* Subpart III.E.

judgment or ten days after disposition of certain post-judgment motions to file for in banc review.<sup>13</sup> The in banc panel consists of three trial judges. The judge who heard the case at trial may not serve as a panel judge, however.<sup>14</sup>

In banc reviews are relatively informal. The party seeking review files a "memorandum" rather than a brief, and responding parties need file a memorandum only if they dispute the statement of questions or facts; memoranda of argument are optional for responding parties.<sup>15</sup> Transcripts are not always required; rather, one of the panel judges decides whether a transcript is "reasonably required for decision of the questions presented."<sup>16</sup> A "hearing," as opposed to an argument, is automatically scheduled, but may be waived by consent of all parties.<sup>17</sup> Best of all, an in banc panel "shall file a brief statement of the reasons for the decision or shall dictate the reasons into the record."<sup>18</sup> Thus, in banc panels have no reason to delay justice in order to draft a publishable opinion.

In banc reviews under rule 2-551 are designed to proceed relatively quickly, in part because of amendments made to the Rule in 1986. A motion for in banc review is due ten days after entry of judgment,<sup>19</sup> the movant's memorandum is due thirty days later,<sup>20</sup> and the optional reply memorandum fifteen days after that.<sup>21</sup> Hearings are scheduled "as soon as practicable," and the decision, which theoretically could come at the hearing, should take considerably less time than a normal appeal because of the absence of a written opinion.<sup>22</sup>

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13. MD. R. 2-551(b).

14. MD. R. 2-551(a).

15. MD. R. 2-551(c); *see also* MINUTES OF THE MEETING OF THE RULES COMMITTEE, *supra* note 4, at 65-66 (suggesting that there was a conscious decision in committee to differentiate in banc reviews from ordinary appeals by requiring memoranda rather than briefs).

16. MD. R. 2-551(d); *see also* MINUTES OF THE MEETING OF THE RULES COMMITTEE, *supra* note 4, at 68 ("In explanation of section (d) Judge McAuliffe noted that one member of the panel will be designated chairman and the chairman will then designate the judge who will decide, in accordance with section (d), whether a transcript is required. Conferring with counsel, when deemed necessary, can be accomplished by telephone.")

17. MD. R. 2-551(e).

18. *Id.*

19. MD. R. 2-551(b). Note that if there is a pending post-judgment motion for judgment notwithstanding the verdict, or for a new trial, or to alter or amend a judgment, the time for filing for in banc review is extended to ten days after disposition of the motion. *See id.*

20. MD. R. 2-551(c).

21. *Id.*

22. *See* MD. R. 2-551(e).

The most important provision of the in banc rule for lawyers to understand states that “[a]ny party who seeks and obtains review under this Rule has no further right of appeal.”<sup>23</sup> The responding party, on the other hand, may appeal to the Court of Special Appeals.<sup>24</sup> Thus, filing for in banc review essentially waives the filer’s right to the normal appellate process, at least with regard to the specific issues reserved for the in banc panel. Because the responding party is free to pursue further appeals, it is not immediately apparent why any modern lawyer would file for in banc review. This question will be considered in Part III.

## II. HISTORY AND PURPOSE OF IN BANC REVIEW

### A. *The Poor Person’s Appeal*

The only modern attempt to understand why the Maryland Constitution provides for in banc review appears in Judge Digges’s opinion for the Court of Appeals in *Washabaugh v. Washabaugh*.<sup>25</sup>

Although the reason for section 22’s inclusion in the constitution is not altogether clear, it appears to have been, as its commonly recognized nickname of “the poor person’s appeal” suggests, a response to a fear of the framers of the Constitution of that year that the distance to Annapolis and the concomitant delay and expense incident to prosecuting an appeal in the Court of Appeals would discourage or preclude many litigants from seeking justice by means of appellate review.<sup>26</sup>

Later authorities cite *Washabaugh* for the poor person’s appeal rationale, if they cite anything.<sup>27</sup> But Judge Digges himself suggested that the origin of the in banc rule was unclear, and the *Washabaugh* opinion is thin on historical authority. After noting that delegate Richard Alvey introduced section 22 at the Constitutional Convention of 1867, Judge Digges cited only one authority for the poor person’s appeal rationale: a page from a Court of Appeals opinion written by Alvey himself two years after the convention.<sup>28</sup> In the

23. Md. R. 2-551(h).

24. See Md. R. 8-202(d) (extending appeal deadline to Court of Special Appeals to 30 days following withdrawal or disposition of in banc review petition).

25. 285 Md. 393, 404 A.2d 1027 (1979).

26. *Id.* at 396, 404 A.2d at 1029.

27. See *Smith v. County Executive*, 47 Md. App. 65, 71 & n.6, 421 A.2d 979, 981 & n.6 (1980); 4 LIEBMANN, *supra* note 4, § 1271, at 154; NIEMEYER & RICHARDS, *supra* note 3, at 339.

28. See *Washabaugh*, 285 Md. at 396, 404 A.2d at 1029 (citing *Roth v. House of Refuge*, 31 Md. 329, 333 (1869)).

single relevant sentence from that opinion, Alvey was really explaining how the Baltimore City court system worked. He discussed in banc review only by analogy:

[T]he relation of the Supreme Bench to the other Courts of the city is that of a Court *in banc*, where parties can have questions of law deliberately considered by at least three judges, without the delay and expense of an appeal to the Court of Appeals, and where they can have the benefit of such review in many important cases where an appeal will not lie.<sup>29</sup>

Richard H. Alvey, the protagonist in the development of in banc review, was forty-one years old when the Convention of 1867 assembled. He had already earned a name for himself by authoring a resolution in Washington County that expressed some support for President Lincoln's federal government but repudiated war as a means to protect that government.<sup>30</sup> That resolution earned him a place in federal prison for several months during the Civil War.<sup>31</sup>

Alvey was first elected to the bench in the fall following the adoption of the Constitution of 1867. He served as a judge for the next thirty-eight years, first as an associate on the Maryland Court of Appeals, later as Chief Judge, and finally as the first Chief Justice of the District of Columbia Court of Appeals.<sup>32</sup> During President Cleveland's tenure, there were several reports that Alvey would be named to the Supreme Court of the United States, but for unknown reasons he never was.<sup>33</sup>

During his time on the bench, Alvey reportedly wrote over 3000 opinions.<sup>34</sup> He probably would be surprised to know that the only substantive explanation ever offered by the Court of Appeals as to the purpose of the constitutional right to in banc review came from his opinion describing the Baltimore City court system<sup>35</sup>—a court

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29. *House of Refuge*, 31 Md. at 333.

30. See Alexander Armstrong, *Reminiscences of Judge Richard Henry Alvey*, 52 MD. HIST. MAG. 124, 137 (1957). This article, which is really an editing of a speech given by an Alvey contemporary in 1934, probably contains the best biographical information on Alvey. The original is in the manuscript collection at the Maryland Historical Society. For other biographical information, see 1 *DICTIONARY OF AMERICAN BIOGRAPHY* 234 (1927); 2 THOMAS J.C. WILLIAMS, *A HISTORY OF WASHINGTON COUNTY, MARYLAND* 618-22 (1906).

31. Armstrong, *supra* note 30, at 128.

32. *Id.* at 129-30.

33. *Id.* at 131.

34. 1 *DICTIONARY OF AMERICAN BIOGRAPHY* 234, 235 (1927).

35. *Roth v. House of Refuge*, 31 Md. 329 (1869).

system which he and the other delegates probably never intended to be covered by section 22 anyway.

The fact remains, however, that only two years after adoption of the constitution, the man who introduced the in banc provision thought that it might reduce the "delay and expense of an appeal to the Court of Appeals."<sup>36</sup> That certainly is some evidence suggesting that in fact the framers intended section 22 to operate as a poor person's appeal. Moreover, research from contemporaneous records of the Constitutional Convention of 1867 yields additional evidence that the delay and expense of appeals were on the delegates' minds, and that some of them thought that section 22 might help alleviate those problems.<sup>37</sup> On the other hand, contemporaneous records also suggest that the expense and delay of appeals were not the only reasons that Alvey introduced section 22, and they may not have been the principal ones.<sup>38</sup>

### B. *The Judiciary and the Constitutions of Maryland*

Maryland citizens wrote three new constitutions between 1851 and 1867. The Constitution of 1867, which survives today and which created the in banc rule, in many ways returned the judiciary to the system that existed before the Constitution of 1851. Thus, to understand the judiciary issues at the Convention of 1867, one must look at the structure of Maryland's judiciary in the first half of the nineteenth century.

An 1805 amendment to the Constitution of 1776 divided Maryland into six judicial districts, each of which contained three judges.<sup>39</sup> Judges were appointed by the governor and held their offices during good behavior. One judge in each district was the chief judge, and the six chief judges together constituted the Court of Appeals.<sup>40</sup> The three district judges *sitting together* comprised the county courts in the counties within their districts.<sup>41</sup> At the time, it was not unusual to have three judges preside at many trials, including jury trials.<sup>42</sup>

Little has been written about the operation of Maryland's three-

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36. *Id.* at 333.

37. *See infra* Subpart II.C.

38. *See id.*

39. ELBERT M. BYRD, JR., *THE JUDICIAL PROCESS IN MARYLAND* 9 (1961).

40. The judge who heard the case below was not allowed to sit in the appellate proceedings, so ordinarily the bench consisted of five judges. *See* Act of Jan. 12, 1803, ch. 55, § 5, 1804 Md. Laws.

41. BYRD, *supra* note 39, at 9.

42. *Cf.* G. KENNETH REIBLICH, *A STUDY OF JUDICIAL ADMINISTRATION IN THE STATE OF*



judge trial courts during this period. One sarcastic, turn-of-the-century practitioner thought the two associate judges were superfluous, comparing them to "alabaster busts on each side of a clock over a chimney piece. The middle machine, it is true, tells the time, but it may tell it wrong. The silent figures . . . are yet insensible of its errors."<sup>43</sup> At that time, only the chief judge was required to have legal training, so it is easy to imagine the associates as alabaster busts. An amendment to the constitution in 1805, however, required that all three judges have legal training.<sup>44</sup>

In any event, the Constitution of 1851 transformed Maryland's judiciary. All judges were to be elected rather than appointed, and their terms were limited to a number of years.<sup>45</sup> The total number of judges was decreased, apparently in response to persistent complaints about the expense of the judicial process to the taxpayers.<sup>46</sup> The new Court of Appeals consisted of one elected judge from each of four districts, and its judges had only appellate authority. At the trial level, one judge was to be elected for each of eight districts. The single judge of the district would circulate to the individual county courts.<sup>47</sup> Baltimore City, on the other hand, became a distinct judicial entity, and various new courts were formed there.<sup>48</sup>

The Maryland Constitution of 1851, which condoned slavery,<sup>49</sup>

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MARYLAND 54 (1929) (suggesting that, by the early part of this century, single-judge trials were the rule except in "grave criminal cases").

43. CARROLL T. BOND, *THE COURT OF APPEALS OF MARYLAND* 93 (1928) (quoting Memoir of John Leeds Bozman, in the files of the Maryland Historical Society).

44. *See* Act of Jan. 12, 1803, ch. 55, § 1, 1804 Md. Laws (authorizing the appointment of "three persons of integrity and sound legal knowledge" for each of the six judicial districts). Vermont has a version of this system that has survived to this day. Each court has one presiding judge and up to two "assistant judges," who are not lawyers and who are popularly elected. These "side judges," as they are called, have voting power over issues of fact, although the presiding judge decides all questions of law. *See* VT. STAT. ANN. tit. 4, § 112 (1988). Recent changes may have limited the influence of the side judges. *See* Richard H. Coutant, Note, *A Farewell to Side Judges; or, Are We Available?*, 10 VT. L. REV. 321 (1985).

45. BYRD, *supra* note 39, at 10.

46. *Id.*

47. REPORT OF THE CONSTITUTIONAL CONVENTION COMMISSION 47-48 (1967). There seems to have been little debate at the Convention of 1851 about changing from a three-judge to a one-judge system. There was a fair amount of discussion about the value of requiring judges to ride circuit within their districts, as opposed to allowing one judge to sit per county. *See, e.g.*, 2 DEBATES AND PROCEEDINGS OF THE MARYLAND REFORM CONVENTION TO REVISE THE STATE CONSTITUTION 564-65 (1851). Interestingly, there was considerable debate on whether the Orphans' Courts should have one or three judges. *See, e.g.*, 2 *id.* at 593-94.

48. *See* BYRD, *supra* note 39, at 11-13.

49. MD. CONST. of 1851, art. III, § 43 ("The legislature shall not pass any law abolishing the relation of master or slave, as it now exists in this State.").

could not survive the pressures of the Civil War. Although the war deeply divided Maryland residents, the federal government ensured that Maryland remained officially neutral. Federal troops intervened in important ways at the state-wide elections in 1863, which was probably the cause of the election of a disproportionate number of pro-Union legislators.<sup>50</sup> When these "Unconditional Unionists" took office they immediately called for a new state constitutional convention.<sup>51</sup> At the subsequent election of convention delegates in 1864, the federal military was not quite so conspicuous; nevertheless, it is likely that a disproportionate number of Unionists became delegates to that year's constitutional convention.<sup>52</sup> The Democrats, who would be the dominant party in the next convention, brought a states' rights platform to the convention, but they constituted only thirty-five of the ninety-six delegates and thus were unable to implement their ideas.<sup>53</sup>

The battles that led to the Convention of 1864 were not fought over judiciary issues,<sup>54</sup> and the changes to the judiciary in the new constitution were not radical. The one-judge system was retained, although the number of districts (now "circuits") was increased from eight to thirteen.<sup>55</sup> The judges were again required to sit (individually) in each county within their respective circuits, thereby forming the circuit court for that county.<sup>56</sup> Perhaps what was most important about the Convention of 1864 was that after the war, many Marylanders felt that the constitution it begat had been forced upon them by federal troops, which created a ground swell for yet another constitutional convention. It is interesting, however, that the delegates in 1867 decided to return not to principles of the pre-Civil War judiciary, but to those preceding the Constitution of 1851—particularly to the principles (if not the practice) of the three-judge judiciary.

The moving political forces behind the calling of the Convention of 1867 were the Democrats and the Conservatives, who allied to conduct a vigorous campaign for a new convention based largely on the idea that their opponents, the "radicals," were a minority group who had imposed their own liberal agenda on the state dur-

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50. WILLIAM S. MYERS, *THE MARYLAND CONSTITUTION OF 1864*, at 10 (1901).

51. *Id.* at 15, 31.

52. *Id.* at 34-35.

53. *Id.* at 35-36, 39.

54. For a complete discussion of the Constitution of 1864, see generally *id.*

55. BYRD, *supra* note 39, at 14.

56. *Id.*

ing the war.<sup>57</sup> The Democrats, having attained a majority of the legislative seats after the war, also sent a majority of the delegates to the convention.<sup>58</sup> The Democratic agenda was generally conservative, although the convention produced its share of liberal reform.<sup>59</sup> Nevertheless, the Democrats arrived in Annapolis intending generally to return the state to an earlier system of government, in the judicial branch as well as in the others.

### C. *The Constitutional Convention of 1867*

The delegates to the 1867 Convention decided in their wisdom not to keep a record of their debates.<sup>60</sup> They were concerned not with confidentiality or with promoting free exchange of radical ideas, as was the case at the federal constitutional convention,<sup>61</sup> but with something much less ethereal: money. The members decided that \$2.50 per day was too much for the State of Maryland to spend on a professional reporter.<sup>62</sup> Additionally, some of the members believed that the newspaper reporting of the early days of the convention had been so superior that an official reporter would add little.<sup>63</sup> Consequently, the principal contemporaneous authority cited today, Perlman's *The Constitution of 1867*, is nothing more than a collection of newspaper reports of the convention printed by *The Sun*. This is unfortunate because newspapers at the time could be quite partisan in their views of the convention,<sup>64</sup> and because, as *The Sun*

57. See DEBATES OF THE MARYLAND CONSTITUTIONAL CONVENTION OF 1867, at 29-32 (Phillip B. Perlman ed. 1923) [hereinafter Perlman].

58. *Id.* at 6 (reprinting a letter from Frank A. Richardson to the Editor of *The Sun*, May 12, 1923).

59. See REPORT OF THE CONSTITUTIONAL CONVENTION COMMISSION 61 (1967) (citing a provision declaring that persons are not incompetent to testify on account of color).

60. Perlman, *supra* note 57, at 83-84. The delegates did keep a journal of the "proceedings," which consists mostly of the delegates' votes on individual provisions and official reports of the convention. See PROCEEDINGS OF THE STATE CONVENTION, OF MARYLAND, TO FRAME A NEW CONSTITUTION (1867) [hereinafter PROCEEDINGS OF THE STATE CONVENTION].

61. See CATHERINE D. BOWEN, MIRACLE AT PHILADELPHIA 22-23 (1966).

62. See Perlman, *supra* note 57, at 74. The Baltimore *American* rather acidly observed:

The Democratic Convention at Annapolis yesterday distinguished itself by resolving, by a vote of sixty nine [sic] to thirty-five—almost two to one—to dispense with the services of an official reporter of the debates. The discussions of this remarkable body will therefore be lost to future generations—unless its action be reconsidered. We would not be astonished if the next proposition adopted would be that their sessions be secret . . . .

AMERICAN AND COMMERCIAL ADVERTISER (Baltimore), May 18, 1867, at 1.

63. See Letter from Frank A. Richardson to Editor of *The Sun* (May 12, 1923), reprinted in Perlman, *supra* note 57, at 6.

64. See, e.g., BALTIMORE COUNTY UNION (Towsontown, Md.), Aug. 3, 1867, at 2 ("We

itself now seems to admit,<sup>65</sup> its man at the convention was not the most thorough reporter who attended.<sup>66</sup> The result is that searching for original intent in the Maryland Constitution is uncertain and often disappointing, particularly on a provision as unclear as section 22. Nevertheless, there are sources beyond Perlman that provide some insight on the in banc rule.

1. *Judiciary Issues at the Convention.*—Reforming the judicial system was one of the principal issues at the Constitutional Convention of 1867. The convention delegates met from May 8 to August 18, with a ten day recess in July.<sup>67</sup> Various delegates brought up issues concerning the judiciary early in the convention,<sup>68</sup> but there was no sustained debate on any of these issues until after June 26, when the Judiciary Committee made its report.<sup>69</sup> That report included a return in substance to the three-judge judiciary,<sup>70</sup> a necessary predicate to the in banc rule. Unfortunately, not only were there no official reports of committee deliberations, there were no unofficial

really believe now the democratic convention, in session at Annapolis to be the most despicable body of copperheads ever assembled in council.”); BALTIMORE COUNTY UNION (Towsontown, Md.), June 29, 1867, at 2 (“The democratic convention now in session at Annapolis, is still laboring hard to tinker up a Constitution which, while it will be perfectly satisfactory to their party friends, may totally exclude all decent men from holding office under it.”); THE CECIL WHIG (Elkton, Md.), June 1, 1867, at 2 (describing the group as the “Slavery Constitutional Convention”); AMERICAN AND COMMERCIAL ADVERTISER (Baltimore), May 9, 1867, at 1 (“At Annapolis yesterday a Convention called in defiance of the Constitution, and with the approval of less than one-third of the white voters of Maryland, assembled to change the organic law of the State, and to further deplete the treasury and increase taxation . . .”).

By comparison, *The Sun* was a voice of reason during the convention, but it was generally considered to be a pro-south and pro-Democrat paper during this period, see HAROLD A. WILLIAMS, A HISTORY OF THE BALTIMORE SUN, 1837-1987, at 66-68 (1987), and so it had much less to scream about than the newspapers cited above. Indeed, *The Sun*'s reporter at the convention, Francis Asbury Richardson (whose dispatches compose the bulk of Perlman's seminal book), had been kicked out of Baltimore during the war for his southern sympathies and was later jailed when he tried to sneak back into town. Theo Lippman, Jr., *Journalism 101*, THE SUN (Baltimore), Apr. 11, 1983, at A6.

65. See WILLIAMS, *supra* note 64, at 68; Lippman, *supra* note 64, at A6.

66. *The Baltimore Gazette* and particularly the *Baltimore American and Commercial Advertiser* often published more detailed accounts of a particular day's events at the convention. Microfilm of the former is available in the Maryland Historical Society; the latter is available in the main branch of the Enoch Pratt Free Library.

67. Perlman, *supra* note 57, at 34, 45, 489-90.

68. See, e.g., *id.* at 68 (order to collect data from circuit courts); *id.* at 85 (Alvey asks the judiciary committee to consider a two-judge system).

69. See PROCEEDINGS OF THE STATE CONVENTION, *supra* note 60, at 333-43. In fact, most of the debating on judiciary issues occurred in the end of July and the beginning of August. See generally *id.* at 478-656 (covering the period of July 27 through August 14).

70. See *id.* at 337 (suggesting, however, that one judge would be sufficient to constitute a quorum).

newspaper reports either, so it is very hard to guess precisely what was on the mind of the Judiciary Committee when it drafted its initial report.

Nevertheless, inferences can be made based on both the debates that followed the committee's report and the perceived problems of the judiciary at the time of the convention. Perhaps the best illustration of the latter is a speech given in May of 1867, apparently by Orville Horwitz,<sup>71</sup> who was a prominent lawyer of the time but not a convention delegate.<sup>72</sup> Horwitz identified three pressing issues for the delegates to consider: the mode of appointment of judges; the tenure and salary of judges; and "[t]he system of administering the laws."<sup>73</sup>

With regard to the appointment of judges, Horwitz said that "the Election of Judges by the people has proved a melancholy failure all over the country."<sup>74</sup> His views on the perils of an elected judiciary echo even today, albeit in a strange accent:

Ought not he, who will yield to the requirements of party and to the promises exacted by whippers-in, who will consent to travel, up to his knees in mire, the filthy road to promotion that now lies before the aspirant,—ought not he to be at once rejected as utterly unfitted for the ermine?<sup>75</sup>

To Horwitz, the elective system meant that "mere politicians and place-hunters" would become judges, and the \$3000 salary limit could not "command a very high order of politician" at that.<sup>76</sup>

71. I say "apparently" because I have found only one copy of the speech, in the collection of the Maryland Historical Society. The speech is in monograph format and titled "Views for the Consideration of the Convention in regard to the Judiciary." It is signed "O.H., Baltimore, May, 1867." "O. Horwitz" is handwritten in pencil on the front page, probably the notation of an early librarian since the name appears next to a note saying, "From J.J. Cohen, 8/13 1879."

It should be noted that various other conventions took place in Baltimore around this time. While it is not known which convention Horwitz was addressing, plainly his subject was the constitutional convention then meeting in Annapolis. The speech begins, "Of all the subjects that will be presented to the consideration of the Convention now assembled at Annapolis . . ." Orville Horwitz, *Views for the Consideration of the Convention in Regard to the Judiciary* 1 (May 1867), in MARYLAND HISTORICAL SOCIETY RECORD [hereinafter Horwitz].

72. Horwitz, along with S. Teackle Wallis, had successfully represented the defendants in a famous action to enjoin the constitutional convention. See Perlman, *supra* note 57, at 9-27. For other biographical information, see BIOGRAPHICAL CYCLOPEDIA OF REPRESENTATIVE MEN OF MARYLAND AND DISTRICT OF COLUMBIA 227 (1879).

73. Horwitz, *supra* note 71, at 1.

74. *Id.* (emphasis omitted).

75. *Id.* at 2.

76. *Id.*

Horwitz advocated the creation of a twelve-member "Judicial Commission," which would recommend judges to the senate for confirmation.<sup>77</sup> Judges would be paid at least \$5000—"[i]t has always seemed strange to us that the Judge of a Court should receive less than his clerk"<sup>78</sup>—and they would serve during good behavior—"absolutely essential to the independence of a Judge [is] that he should not be liable to lose his place on every change of politics in the majority of the people."<sup>79</sup>

Horwitz explained how competent judges would improve the administration of the judicial system:

Having obtained competent and independent Judges, the next inquiry is as to the best mode of distributing the Courts so as to administer the laws with the greatest efficiency and in the best way to secure the confidence of suitors. The object of this confidence is to prevent, not to increase litigation. If parties to a suit are satisfied of the learning, wisdom, and impartiality of the Bench, they will be willing to abide by the decision of the Court, and appeals will be rare. Now everything is appealed from, and the decisions of most of the inferior courts (if the cases are at all complicated) are sure to be reversed on some of the points by the appellate tribunal. In this way the chances are in favor of the appellant, and the losing party below is sure to take those chances.<sup>80</sup>

Horwitz clearly wanted to decrease the number of appeals, which he thought could be done by improving the quality of the trial courts. He reiterated this point when he discussed his plan for the state judicial system as a whole, which was similar in important ways to the final plan adopted at the convention. Horwitz proposed that one judge be appointed from each county to serve as a trial judge. In addition, he proposed dividing the state into six "Judicial Districts" and appointing one additional judge from each.<sup>81</sup> These six judges would constitute the Court of Appeals—although they would also sit in trials that involved over \$1000. The judges of two adjoining counties together with the district judge from that district would form a circuit court.<sup>82</sup> Horwitz thought that, "[a]s . . . the Courts

77. *See id.* at 3-5 (also suggesting that the commission be selected in a manner so as to lose its political character).

78. *Id.* at 5-6.

79. *Id.* at 5.

80. *Id.* at 6.

81. *See id.* at 7. The City of Baltimore alone would constitute one of the six districts.

82. *Id.*

below will consist, in all cases of importance, of three able and efficient Judges, and of two Judges in all other cases, it is believed that the number of appeals will be greatly diminished . . . ."<sup>83</sup>

Horwitz's plan for Baltimore City called for, among other things, two separate common-law courts, each of which would have three-judge benches. Here, Horwitz was even more explicit on the value of three judges:

A tribunal presided over by three able and impartial Judges will command the respect of the community and will diminish litigation. Errors that might well creep into a court composed of a single Judge, would be avoided where an opportunity for consultation is afforded. Qualities, too, that might be wanting in one Judge would in all probability be supplied by another. The fulness of the learning of one might very well be compensated by the clearness with which that learning would be applied by another, or the practical experience that the third might bring to bear on the question. A court composed in this wise of learning, ability and experience, would satisfy the public wants and insure the public confidence.<sup>84</sup>

At this point it is fair to ask what Orville Horwitz's thoughts on three-judge courts have to do with the introduction of the in banc provision. After all, Horwitz never spoke about in banc reviews, nor is it certain that his ideas were communicated to the delegates at Annapolis.<sup>85</sup> But Horwitz's justifications for a three-judge trial court are equally applicable to an in banc review panel consisting of three trial judges. Because the convention adopted a modified three-judge system,<sup>86</sup> in which all three judges could sit but only one would constitute a quorum, it is possible that the delegates intended the in banc panel to solve the same problems Horwitz intended to solve with his three-judge courts.<sup>87</sup> It is useful, therefore, to note that Horwitz never mentioned a concern that poor persons were loath to press appeals because of the delay and expense of a trip to Annapolis. On the contrary, he was concerned that there were too many appeals already, and that this was expensive for the

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83. *Id.*

84. *Id.* at 8.

85. See *supra* note 71.

86. See MD. CONST. of 1867, art. IV, § 21, reprinted in EDWARD O. HINKLEY, THE CONSTITUTION OF THE STATE OF MARYLAND 68-70 (1868).

87. See *infra* Section II.C.3 for a discussion of the introduction of the in banc section at the convention.

state.<sup>88</sup>

Horwitz's ideas were not all original; in fact many had been discussed only three years before at the Convention of 1864. Delegates at the Convention of 1864 voiced other complaints about the one-judge judiciary as well. There were, for instance, frequent complaints about contacting a judge who covered such a large area. One delegate complained that "if an injunction were needed . . . [m]en have ridden fifty, sixty or one hundred miles, in an inclement season, over roads which were almost impassable, then to find that the judge had gone to another part of his circuit."<sup>89</sup> Delegates also complained that the one-judge system inevitably required a number of "special judges"—temporaries who were both expensive and incompetent.<sup>90</sup>

2. *Mr. Syester's Speech on the Judiciary System.*—Conventional sources imply that the in banc provision sprang full-grown from the head of Richard H. Alvey on July 22, 1867, and slipped into the constitution without much discussion.<sup>91</sup> In fact, there does not appear to be any model of in banc review under earlier Maryland judicial systems, and neither the delegates nor the Court of Appeals ever referred to an out-of-state analogue, although there was a similar statutory provision that had applied to the Philadelphia District Court since 1835,<sup>92</sup> which was extended to other Pennsylvania trial courts in 1863.<sup>93</sup> Moreover, Alvey, who was not a member of the Judiciary Committee, introduced section 22 as a fairly complete amendment to the initial Judiciary Committee Report without any

88. See Horwitz, *supra* note 71, at 8 (justifying the increased salaries of judges under the Horwitz system by noting that "[t]he costs of one hundred cases finally disposed of without appeal would save the increased expenditure").

89. 3 THE DEBATES OF THE CONSTITUTIONAL CONVENTION OF THE STATE OF MARYLAND 1438 (1864) (statement of Mr. Stockbridge) [hereinafter 1864 DEBATES].

90. See 3 *id.* at 1439 (statement of Mr. Jones).

91. See *Washabaugh v. Washabaugh*, 285 Md. 393, 396, 404 A.2d 1027, 1029 (1979); see also Perlman, *supra* note 57, at 333.

92. See Act of Mar. 28, 1835, No. 63, § 8, 1835 Pa. Laws 88. The Pennsylvania version, which survives today, see PA. R. CIV. P. 227.2, has always had an emphasis on motions for new trials. The 1835 version read as follows:

The motions for new trials, and in arrest of judgment, and questions on reserved points, which may be made and sustained before any one of the judges of the said District Court, shall be reserved by the said judges, and heard and decided by the three judges of the said court, or any two of them, sitting together for that purpose.

Act of Mar. 28, 1835, No. 63, § 8, 1835 Pa. Laws 88.

93. Act of Apr. 22, 1863, No. 545, 1863 Pa. Laws 554.



apparent provocation.<sup>94</sup> But the context of the debates from the preceding sessions suggests a clear reason why Alvey introduced the in banc provision, and, moreover, suggests that the idea might not have been Alvey's after all.

July 22, Alvey's big day, was a Monday. On the preceding Thursday and Friday, July 18 and 19, the delegates had taken up consideration of section 20 of the Judiciary Committee Report, which was the blueprint for a three-judge judiciary.<sup>95</sup> The committee's version called for eight circuits, seven of which were covered by the three-judge system of section 20.<sup>96</sup> Each circuit consisted of two associate judges and one chief judge. The seven chief judges plus one judge from Baltimore City composed the Court of Appeals.<sup>97</sup> Section 20 also provided that one judge from each of the seven three-judge circuits would constitute a quorum, which presumably would mean that most trial benches would consist of only one judge, although all three judges could sit together at their discretion.<sup>98</sup>

Toward the end of the day on Thursday, July 18, Henry W. Archer, an attorney and farmer from Harford County,<sup>99</sup> moved to strike out all of section 20.<sup>100</sup> Archer was an influential advocate of the one-judge system at the convention and he had written and introduced a minority report of the Judiciary Committee about three weeks earlier.<sup>101</sup> The minority report divided the state into twelve judicial circuits, with one judge for each circuit except the one constituting Baltimore City.<sup>102</sup> Archer's plan would have required all judges except those in Baltimore City to ride circuit by holding court at various times in each of the counties of their circuit.<sup>103</sup>

According to *The Sun*, Archer "addressed the Convention at considerable length"<sup>104</sup> concerning his motion to strike out section 20. Unfortunately, there is no detailed record of what Archer said. The Baltimore *American* did print a brief summary, in which Archer

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94. Perlman, *supra* note 57, at 333. Alvey's original provision was changed in several important ways, however. See *infra* text accompanying notes 135-142.

95. Perlman, *supra* note 57, at 266, 327-31.

96. *Id.* at 266. Baltimore City was a circuit, but probably was not covered by the three-judge rule.

97. *Id.*

98. *Id.*

99. PROCEEDINGS OF THE STATE CONVENTION, *supra* note 60, at 848.

100. See Perlman, *supra* note 57, at 327.

101. PROCEEDINGS OF THE STATE CONVENTION, *supra* note 60, at 360-64.

102. *Id.* at 361-62.

103. *Id.* at 362.

104. Perlman, *supra* note 57, at 327.

complained, in a modification of the alabaster-bust theory, that “when three Judges were on the bench it generally happened that the one superior mind controlled the others.”<sup>105</sup> Further, he wished that his fellow delegates would consider “the expense of a three Judge system, where, if they gave them enough salary, the expense would be great, and if they did not pay enough salary they would have bad Judges.”<sup>106</sup> Archer “believed in giving good salaries and giving Judges plenty of work.”<sup>107</sup>

Additional sources suggest other complaints expressed by Archer and his fellow delegates. For instance, during the drive to ratify the constitution, a newspaper in Cecil County, which would have been part of Archer’s district under the new constitution, published an attack on the three-judge concept:

The new judiciary professes to be a three Judge system, which the people abolished in 1850, but in fact we pay for three Judges and only get one. One Judge of the three is to set on the Court of Appeals. *He can't stay at home to hold court.* If the two others sit together, then as two counties are put together where now each has its own court, each county must sit only half as many days of court as now although it pays more for it. If each of the two Judges hold court in each county separately, then we have got the only one Judge system at last, only we pay the Judges more—that’s all.<sup>108</sup>

Archer also might have echoed the logic of a one-judge proponent at the Convention of 1864, who had argued that “business is more rapidly transacted under one-judge [sic],” because “of the very time consumed in consultation about the propositions submitted before [three judges] can decide upon them.”<sup>109</sup> This particular critic would hear nothing of the complaint of sixty-mile rides to find a judge in another part of the circuit:

[W]hat different state of things do you have under this system from that under the one-judge system? The court is sitting in Allegany county, for instance. Must not the three judges be there? . . . And when the court went to Frederick county, would not the citizens of Washington and Allegany have the trouble of coming over the mountains to

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105. AMERICAN AND COMMERCIAL ADVERTISER (Baltimore), July 19, 1867, at 4.

106. *Id.*

107. *Id.*

108. *The New Constitution*, THE CECIL WHIG (Elkton, Md.), Sept. 7, 1867, at 1.

109. 3 1864 DEBATES, *supra* note 89, at 1549-50.

Frederick . . . ?<sup>110</sup>

Archer was the last speaker on July 18. The next day virtually all the debates concerned section 20. The first substantive speaker was Andrew K. Syester, who was probably a friend of Alvey—both were Democratic delegates, both were lawyers from Hagerstown, in Washington County, and both had been Southern sympathizers during the Civil War.<sup>111</sup> Syester was known at the convention for his oratorical ability,<sup>112</sup> so it is likely that his speech on the judiciary was influential. *The Sun* and the *American* apparently were unimpressed, however, because they each printed only a paragraph-long summary of his speech.<sup>113</sup> The paragraph in the *American*, however, included an important detail that *The Sun* omitted: “[Mr. Syester] proposed that the three Judges should also hold a court of revision in each district, and to this the poor man could take an appeal when he could not afford to go up to the Court of Appeals of the State.”<sup>114</sup> So Syester appears to have articulated the idea of in banc review before Alvey, and according to the *American*'s report, Syester's purpose was indeed to protect the appeal rights of poor persons.

In fact, Syester's hometown newspaper, *The Hagerstown Mail*, printed a much more detailed account of his speech.<sup>115</sup> That account reveals that Syester started off with a passionate defense of

110. 3 *id.* at 1550.

111. 2 WILLIAMS, *supra* note 30, at 985 (giving biographical information about Syester); see 1 DICTIONARY OF AMERICAN BIOGRAPHY 234-35 (1927) (discussing Alvey). Like Alvey, Syester also lived a rich life at the bar. In 1871 he was elected Attorney General of Maryland, and in 1882 he became a judge on the circuit court for Washington, Allegany, and Garrett counties, where he served with Chief Judge Alvey. 2 WILLIAMS, *supra*, at 985. As an attorney Syester was involved in several notable cases, including the prosecution of Mrs. Elizabeth G. Wharton for poisoning General Ketchum, in which he became known for the following cross-examination of a prominent Baltimore physician:

Syester: “Are not doctors' mistakes sometimes buried six feet under ground?”

Dr. Warren: “Yes, and lawyers' mistakes are sometimes hung six feet above ground.”

2 *id.*; see generally *The Wharton Trial*, 68 U.S. L. REV. 359 (1934).

112. See Perlman, *supra* note 57, at 210 (delegate describing the “sonorous voice and mellifluous tones” of Mr. Syester); 2 WILLIAMS, *supra* note 30, at 984.

113. See Perlman, *supra* note 57, at 328 (reprinting the summary that appeared in *The Sun*); AMERICAN AND COMMERCIAL ADVERTISER (Baltimore), July 20, 1867, at 4.

114. AMERICAN AND COMMERCIAL ADVERTISER (Baltimore), July 20, 1867, at 4.

115. See *Mr. Syester's Speech on the Judiciary System*, THE HAGERSTOWN MAIL, Aug. 2, 1867, at 2 (available on microfilm at the Maryland Historical Society). The *Mail* did not give a date for Syester's speech, but cross-references to *The Sun* and the *American* make it likely that it was the speech of July 19. In addition, the *Mail* admitted that “[t]his report is necessarily imperfect, as there are no regular short-hand reporters employed; but imperfect as it is, it is a speech of great power, and demonstrates the inefficiency and expensive character of the present system . . . .” *Id.*

the three-judge system, and there is no doubt that he tried to convince his colleagues of the merits of that system with, among other things, a rather grandiloquent resort to the poor person's appeal logic:

But there was a large class of people humble in life, with but scanty means, struggling on with adversity, and misfortune too poor [to] pay the uncommon fees necessary to be paid counsel in prosecuting appeals.

There were thousands of people who have toiled along the weary journey of life with but small gains, and limited accumulations, people to whom the loss of a few hundreds of dollars would produce bankruptcy, and whose families would be beggared. To all such, the prosecution of an appeal was a measure of so much hazard that a conscientious lawyer would always advise a submission to even an unlawful ruling of the one judge, rather than put in jeopardy the little all that his client possessed in the world.<sup>116</sup>

According to the *Mail*, however, poor people were not Syester's only concern. He mentioned two other reasons that review by a three-judge panel was desirable. First, Syester argued that appeals were not allowed in criminal cases, and that a criminal defendant's life should not rest solely on the decision of one judge.<sup>117</sup> Syester acknowledged that a motion for a new trial was a form of revision, but he believed that it was an ineffective means of correcting a single judge's erroneous ruling that might take the life of a defendant. The new trial motion "requires the judge to say today that he was wrong yesterday," and "[v]ery few Judges have ever admitted that."<sup>118</sup> To Syester, providing three-judge review of criminal decisions was a basic issue of fairness.

Syester was technically correct in proclaiming that *appeals* were not allowed in criminal cases;<sup>119</sup> however, the Court of Appeals could review criminal cases upon a writ of error, which was a com-

116. *Id.*

117. *Id.*

118. *Id.*

119. See 2 JOHN P. POE, PLEADING AND PRACTICE IN COURTS OF COMMON LAW § 822, at 773 (1882). In 1872, the legislature granted a limited right of appeal in criminal cases, but it came with a qualification that seems quite alien to modern criminal procedure:

In all trials upon any indictment or presentment in any court of this State having criminal jurisdiction, it shall be lawful for any party accused, or for the State's Attorney . . . to except to any ruling or determination of the court . . . and the party tendering such bill of exceptions, may appeal from such ruling or determination to the Court of Appeals; *provided* that the counsel for the accused shall make oath that such appeal is not taken for delay; and such appeal shall be

mon-law method that had about the same scope as the statutory right of appeal.<sup>120</sup> But to Syester there must have been some difference between civil and criminal appellate rights, because he was quite clear in his complaint: "You give the right of appeal to suitors, where \$50 are involved, in a civil case . . . and yet where a citizen's life is at stake, it is denied."<sup>121</sup> It is hard to say exactly what difference Syester was referring to. It is clear, for instance, that the Court of Appeals had no jurisdiction over habeas cases,<sup>122</sup> but Syester was not explicitly referring to habeas. More likely, however, he was simply referring to the fact that it was much more convenient to obtain appellate review by appeal than by writ of error.<sup>123</sup>

In any event, it seems clear that Syester intended in banc review to be available especially when appellate review was not available or was difficult to obtain. This view reinforces a forgotten clause in Alvey's explanation of the in banc rule in *Roth v. House of Refuge*.<sup>124</sup> In that case, Alvey launched the poor person's appeal theory by suggesting that in banc review would cut the delay and expense of a normal appeal. The neglected message from Alvey's passage, however, is that in banc review would give parties "the benefit of such review in many important cases where an appeal will not lie."<sup>125</sup>

Syester also worried about the new judiciary's burden on the taxpayer, and it was in this context that he turned to the idea of a three-judge court of revision, thus clearly foreshadowing the introduction of section 22:

It is intended, that all [ill-considered rulings of one judge] shall be reserved at the instance of the party, for the consideration of the three judges. And these reserved points are to be taken without the addition of one dollar's

heard by the Court of Appeals at the earliest convenient day after same shall have been transmitted to the said court . . . .

Act of April 1, 1872, ch. 316, 1872 Md. Laws 503. In one of the first cases interpreting this law, the Court of Appeals dismissed an appeal of a conviction for "selling lager beer to a minor" because no counsel took the oath. *See Weir v. State*, 39 Md. 434, 434 (1874). In fact, no counsel appeared for the defendant at all in the Court of Appeals. The State was represented by its Attorney General, Andrew K. Syester. *Id.*

120. 2 POE, *supra* note 119, § 822, at 773.

121. *Mr. Syester's Speech on the Judiciary System*, *supra* note 115, at 1.

122. *See, e.g., Roth v. House of Refuge*, 31 Md. 329, 331 (1869); HUGH D. EVANS, A TREATISE ON THE COURSE OF PROCEEDING IN THE COMMON LAW COURTS OF THE STATE OF MARYLAND 538 (2d ed. 1867).

123. EVANS, *supra* note 122, at 545; *see also* HUGH D. EVANS, MARYLAND COMMON LAW PRACTICE 421-32 (1839) (comparing writ of error to appeal).

124. 31 Md. 329 (1869).

125. *Id.* at 333; *see also infra* Subpart III.D.

cost to the party, and heard and decided, without *the addition of one dollar's cost to the public*. For they are questions of law, and the public are at no expense in keeping juries in Court to hear them.

And just here it is very important to remember that the expenses of a judicial system are not only the salaries paid to Judges. That which falls heaviest on the people, is the enormous costs of Jurors, Bailiffs, and States' Witnesses. Long and anxious discussions on questions of law, consuming days, take place before the single Judge, the Jurors, bailiffs and witnesses, all the while spectators of the contest, receiving their per diem. These discussions are intensified, and lengthened out, because it is often felt by both parties, that as it is the first, so it must be the last discussion. The suitors on each side, are often too poor to warrant the hope that an appeal can be resorted to.<sup>126</sup>

The language in the first paragraph is quite similar to that in section 22, and this indeed appears to be the birth of the in banc provision. Interestingly, Syester's concern at this point is not with the poverty of the people, but with the poverty of the state. It is important to point out that perhaps the fiercest judiciary battles at the convention were fought over costs. The delegates collected a startling amount of financial and statistical information on the court system at the beginning of the convention, and they continually bickered over salaries and expenses of the judiciary throughout the summer. Three-judge proponents like Syester were sensitive to accusations of financial extravagance, and they were under pressure to limit the costs of their new judiciary, which, after all, would require taxpayers to pay more judges. One way they limited costs was by recreating the circuit-riding Court of Appeals—requiring appellate judges to sit at trials saved eight trial-judge salaries. It was Syester, in fact, who calculated that the new judiciary would cost only \$12,000 more than the minority's proposed system, which appeared to undercut the most powerful argument of the one-judge proponents.<sup>127</sup>

Thus when Syester argued that the in banc rule would reduce trial expenses for taxpayers, he probably sensed that he had found an important compromise position. It would mollify the concerns of absolute three-judge supporters like Orville Horwitz (who at the beginning of the convention urged the delegates to adopt a complete

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126. *Mr. Syester's Speech on the Judiciary System, supra* note 115, at 1.

127. *See id.* *See generally* Perlman, *supra* note 57.

three-judge system), because three-judge revision panels would reduce appeals as effectively as three-judge trials. It would be somewhat attractive to one-judge advocates like Henry Archer, because it might reduce trial fees, which were paid by taxpayers, and it would allow the three judges more time to be in separate parts of the circuit, which would minimize the sixty-mile rides through inclement weather in pursuit of an injunction.

Mr. Syester's speech probably took a good portion of the Friday morning session. After he sat down, the delegates spent the remainder of the day discussing the merits of the three-judge system. A delegate from Queen Anne's County promoted the three-judge system because "[i]t was harder to have three men act under a corrupt influence than to have one man do so."<sup>128</sup> On the other side, Henry Farnandis, who, like the prominent Henry Archer, was an attorney and farmer from Bel Air, stood to say that "the three Judge system had been fairly tried and reasonably rejected."<sup>129</sup> But a third delegate questioned, "If one man's judgment be sufficient sitting upon the bench, why not have only one man in the jury box?"<sup>130</sup> The last speaker, William N. Hayden of Carroll County, reported that in his informal poll of twenty-three "legal gentlemen," eighteen supported the three-judge system.<sup>131</sup> According to the *American*, the Convention adjourned at 3:00 p.m. "until Monday morning at half past 10 o'clock."<sup>132</sup>

3. *The Introduction of Section 22.*—It is not known whether Syester spoke with Alvey before the Monday session. It is possible that the two men caught the same train back to Hagerstown for the weekend. Alvey's habit when he was later a judge on the Court of Appeals was to return home to Hagerstown by train every weekend.<sup>133</sup>

In any event, it is clear that Alvey and Syester were on the same wavelength, because early in the session on Monday, Alvey introduced what was then known as section 21, and what eventually became section 22 of the constitution.<sup>134</sup> There seems to have been

128. *AMERICAN AND COMMERCIAL ADVERTISER* (Baltimore), July 20, 1867, at 4.

129. *Id.*

130. *Id.*

131. *Id.*

132. *Id.*

133. See *Armstrong*, *supra* note 30, at 140.

134. *The Sun* reported Alvey's original motion as follows:

Where any term is held or trial conducted by one of said judges alone, upon decision or determination of any point or question by him, it shall be

little controversy over Alvey's amendment at its introduction. It is clear that Alvey spoke in favor of the amendment, but there is no record of what he said.

The proposed amendment, however, was different in several ways from its final form; these differences illuminate Alvey's original intent. For instance, Alvey's original amendment appears to have articulated more clearly the relationship between in banc review and an appeal to the Court of Appeals. He initially proposed that litigants could choose in banc review, "or . . . elect to have [the court's] decision or determination reserved on appeal to the Court of Appeals, *where by law an appeal will lie.*"<sup>135</sup> The implication was that the scope of in banc review would be broader than that of appellate review. Although in banc review clearly would be a substitute for an appeal in most cases, the italicized language suggests that there were some cases in which a litigant's only right of review would be by an in banc panel.

For the next eight days there was no activity on the in banc provision. But the rules of the convention required multiple readings of proposed sections,<sup>136</sup> and on July 31, Alvey read his original amendment again and then immediately submitted a substitute version. The substitute did not include the election-of-appeal clause, although there is no indication that the delegates intended to narrow the scope of in banc review by the deletion. The clause might have been considered superfluous because section 22 never limits

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competent to the party or parties against whom the ruling or decision is made, upon motion, to have the point or question reserved for the consideration of the three judges of the circuit, who shall constitute a court in banc for such purpose, or said party or parties may elect to have said decision or determination reserved on appeal to the Court of Appeals, where by law an appeal will lie; but in all cases of points or questions reserved, the motion therefor shall be entered of record during the sitting at which such ruling or decision was made, and such motion shall be a waiver of the right of appeal to the Court of Appeals from such decision or judgment; and in order that the points or question reserved may be fairly presented to the judges in banc, the said circuit judge trying the cause shall make full and fair notes of such of the proceedings before him, other than the pleadings, as will fully present such points or questions; and the decision of the said judge in banc shall be effective determination of the point or question reserved, and judgment or other proceedings shall be had therefor. The right of having questions reserved shall not, however, apply to trials of appeal from justices of the peace.

Perlman, *supra* note 57, at 333.

135. *Id.* (emphasis added).

136. See RULES AND ORDERS FOR THE REGULATION AND GOVERNMENT OF THE CONSTITUTIONAL CONVENTION OF 1867, at 5 (1867) ("Every report from a committee, containing articles or sections proposed to be made a part of the Constitution shall receive three readings in the Convention, on three different days . . .").



the right of in banc review to cases where an appeal will lie; on the contrary, it says that “[w]here *any* term is held, or trial conducted by less than the whole number of said Circuit Judges,”<sup>137</sup> a party may have in banc review.

Alvey’s amended section was amended yet again by several small but important clauses. According to one newspaper’s report, after Alvey read the amended section, “Mr. Syester moved to insert after the words ‘all cases’ the words ‘civil and criminal,’ which was accepted by Mr. Alvey.”<sup>138</sup> Apparently Syester again was concerned about the review rights of criminal defendants, because the section clearly addressed civil appeal rights. Syester’s brief amendment is perhaps more interesting, however, in that it tends to subvert the theory that Syester and Alvey were working together on section 22—if they were, surely they would have decided upon this language before the delegates met.

Mr. Hayden, another three-judge proponent, added a section that limited criminal in banc review to felonies (or lesser crimes in which punishment was confinement in the penitentiary).<sup>139</sup> More importantly, his amendment allowed section 22 to “be subject to such provisions as may hereafter be made by Law.”<sup>140</sup> The power to change the section by law became quite controversial,<sup>141</sup> and it does seem a strange provision to put into a constitution. Interestingly, *The Baltimore Gazette*, which probably reported more thoroughly than other papers on this day’s proceedings at the convention, printed Hayden’s amendment in a way that suggested that the power-to-change provision applied only to the limitation of in banc review to felonies.<sup>142</sup> But the other newspapers and the official report of the convention all reported Hayden’s amendment as it

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137. Perlman, *supra* note 57, at 502 (emphasis added). See also *infra* Subpart III.D for a discussion of how the Court of Appeals now treats the scope of in banc review as compared with appellate review.

138. THE BALTIMORE GAZETTE, Aug. 1, 1867, at 1; see *supra* note 8 for the current text of the provision. We can assume that Syester said “those cases” rather than “all cases” because the latter words do not appear in section 22. Also note that the official proceedings of the convention do not say that Syester introduced this amendment—the “civil and criminal” language appears in Alvey’s substitute. See PROCEEDINGS OF THE STATE CONVENTION, *supra* note 60, at 502.

139. Perlman, *supra* note 57, at 383.

140. *Id.*

141. See *Montgomery County v. McNeece*, 311 Md. 194, 533 A.2d 671 (1987); *Washabaugh v. Washabaugh*, 285 Md. 393, 404 A.2d 1027 (1979); see also *infra* Subparts III.E and III.F.

142. The *Gazette* reported it thus: “Add to the end of the section ‘nor to criminal cases below the grade of felony, except where the punishment is confinement in the penitentiary, and this shall be subject to such provisions as may hereafter be made by law.’”

ultimately appeared, so it is hard to believe that the clause slipped into the constitution through a misunderstanding.

Apparently, the final word on section 22 at the convention went to Mr. Archer, the leading proponent of the one-judge system. His comment, reported only in the *Gazette*, was that "the adoption of this additional section was absolutely necessary to the proper working of the three-judge system."<sup>143</sup> This may be the most revealing comment available on section 22 because it suggests that the provision was in fact a compromise between the two sides, which in turn supports the theory that Syester's original speech was largely a search for a compromise position.

Recall that the delegates had already tentatively decided that one judge would constitute a quorum,<sup>144</sup> so it was clear that one-judge courts would be possible, if not the norm, under the new constitution. The in banc review provision would placate many three-judge supporters, especially the most ardent ones who may have subscribed to Horwitz's ideas,<sup>145</sup> because it solved most of the problems that they saw with one-judge courts. If one judge was corrupt or incompetent, a litigant could always call for in banc review and have that corruption or incompetence tempered by two other judges. Additionally, in banc panels presumably would reduce the number of appeals and promote respect for the judiciary and finality in litigation. After all, a three-judge panel would necessarily include one judge from the Court of Appeals.

On the other hand, the one-judge advocates could assume that section 22 would reduce the demand for three-judge trials, because the parties would know they could obtain three-judge review if they chose. Therefore, ordinarily at least one judge could remain in each county to tend to judicial business and hence to save the many lawyer-delegates from the burden of sixty-mile horseback rides through inclement weather in search of an emergency injunction. The one-judge supporters were also worried about the expense of the three-judge system, but perhaps these concerns were satisfied by the assertion that three judges would cut state expenditures by reducing the number of appeals.<sup>146</sup> A three-judge review panel would be as

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THE BALTIMORE GAZETTE, Aug. 1, 1867, at 1. The differences here are the lack of a semicolon after "penitentiary" and the lack of the word "Section" after "and this."

143. *Id.*

144. See Perlman, *supra* note 57, at 266.

145. See *supra* notes 71-84 and accompanying text.

146. The battle over the expense of the judiciary had been settled by another compromise: while it was true that the three-judge system cost more, the requirement of double

effective as a three-judge court in that respect. Moreover, there could be no dispute that the right of reserving points of law, rather than arguing them at trial, would cut down on the various per diem expenses of jurors and court staff.

#### D. Summary

The in banc provision may have had several original purposes. Certainly the three mentioned by Alvey in his 1869 *House of Refuge* opinion have support. First, the notion that appeals were too expensive for some parties to prosecute seems to have concerned some of the framers, and hence the poor person's appeal logic has some credence. Second, the framers thought that the normal appeals process delayed justice unreasonably, and they probably thought that in banc review would alleviate that problem. Third, the framers probably intended that in banc review provide for appeals in some cases where appeals would not lie.

But Alvey did not exhaust the purposes of the in banc provision in his *House of Refuge* aside. Most likely the provision was intended as part of a compromise between a one-judge and a three-judge system—one of the central judiciary debates in three of the four Maryland constitutions—and as such it surely was intended to serve the purposes of the three-judge judiciary without demanding all of the attendant expenses. Three judges were thought to increase popular respect for the judiciary, and thereby to reduce the number of appeals. Many delegates believed that the three-judge system would save money for the state, and there is in fact more evidence suggesting that the delegates wanted to save state money than there is suggesting that they wanted to save litigants' money. Additionally, many delegates probably felt that three-judge review could counterbalance single judges who might be corrupt or incompetent. Finally, the modified three-judge system would make individual judges more accessible.

The question remains whether modern in banc practice usefully serves any of these purposes, or whether it serves other useful purposes, or whether it is just useless.

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duty by Court of Appeals judges limited the total number of judges and thereby reduced salaries.

### III. IN BANC PRACTICE TODAY

#### A. *Why Take an In Banc Review?*

It seems clear that, at least on the civil side, the option of in banc review is largely ignored. Although there are no statewide statistics on in banc reviews, jurisdictional and anecdotal evidence suggest that in banc review is not near the top of most litigators' minds. For instance, telephone calls to administrators of major Baltimore-area trial courts brought such responses as "Oh, yes, I know what you're talking about—we do maybe a one or two of those per month." The Prince George's County administrator was able to be more specific: eight civil in banc reviews were scheduled there in 1990, although it was not clear how many actually occurred.<sup>147</sup> The circuit judge in Garrett County, the most distant jurisdiction from Annapolis, said he has participated in four in banc reviews since he joined the court in 1977.<sup>148</sup> On the other hand, there is a place for criminal three-judge practice. There were 206 "applications for review of criminal sentences" in fiscal year 1990,<sup>149</sup> although these appear to be based more upon a separate statutory provision than upon section 22.<sup>150</sup>

Of course, it is not obvious why any modern lawyer would choose in banc review over the normal appellate route. It is true that in banc review is both faster and cheaper than an appeal, just as the delegates intended in 1867.<sup>151</sup> In fact, the speed of in banc review is due in large part to a wise series of changes made to rule 2-551 in the 1980s, which the Court of Appeals promulgated partly in recognition of the delegates' intent. Thus, initially one might think that in banc review would be strategically attractive either when a client did not have the time to wait for the Court of Special Appeals or the money to prosecute an appeal there.

The problem is that parties seeking in banc review lose their right to further appeal on the reviewed issues, but their opponents do not. Thus, the opposing party controls the overall speed and

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147. Telephone conversation with Pearl Morrisette, Office of the Chief Judge of Prince George's County, Sept. 6, 1991.

148. Telephone conversation with Office of Judge Fred A. Thayer, Oct. 28, 1991. Interestingly, all four were in the past two years.

149. 1989-1990 ANN. REP. MD. JUDICIARY 55 (1990).

150. See MD. ANN. CODE art. 27, § 645JA (1987).

151. In fiscal year 1990, the average time from docketing to decision in the Court of Special Appeals was about five and one-half months. 1989-1990 ANN. REP. MD. JUDICIARY 35 (1990). An appeal to the Court of Appeals adds another ten and one-half months from the time certiorari is granted. *Id.* at 26. An in banc review should take less than three months. See MD. R. 2-551.

expense of the appellate process: if the party seeking in banc review wins, his opponent may (and likely will) delay the process and increase the expense by appealing to the Court of Special Appeals. The net effect of the in banc review is an increase in delay and expense, precisely the opposite of what was sought.

Nevertheless, there are at least three ways that an in banc review might be useful outside the normal appellate process. First, if an in banc panel remands to a circuit court for further proceedings, one might argue that there is no final judgment for an opponent to appeal. This would make in banc review attractive when the losing party at trial believes the trial judge erred egregiously and any subsequent tribunal will reverse and remand—an in banc panel will do it more quickly and economically than the Court of Special Appeals. Second, a trial judge's order for a new trial, ordinarily interlocutory and thus not appealable, might be immediately reviewable by an in banc court. Third, because the right to in banc review is constitutional, and because the legislature may restrict appellate jurisdiction by statute,<sup>152</sup> in banc review might be available even when appellate jurisdiction is not.

The Court of Appeals, however, has judicially terminated all three of these possibilities. The question is whether such decisions make sense, and whether the Court of Appeals had constitutional authority to make them.

### *B. The Appealability of an In Banc Order of Remand*

Ordinarily a trial judge's order for a new trial is not immediately appealable,<sup>153</sup> but an intermediate appellate court's remand for a new trial is immediately appealable to a higher court.<sup>154</sup> The question arises whether an in banc panel of trial judges is a trial court or an appellate court. The Court of Appeals has unequivocally held—quite recently—that a remand by an in banc panel is im-

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152. See, e.g., MD. CTS. & JUD. PROC. CODE ANN. § 12-202 (1989) (stating that certiorari will not be granted by the Court of Appeals when the Court of Special Appeals has denied review from certain post-conviction proceedings); *id.* § 12-302(a) (generally barring appeal from courts reviewing district court or administrative dispositions).

153. See, e.g., MD. CTS. & JUD. PROC. CODE ANN. § 12-301 (1989) ("The right of appeal exists from a *final judgment* entered by a court . . . ." (emphasis added)); *A.S. Abell Co. v. Skeen*, 265 Md. 53, 59-60, 288 A.2d 596, 599 (1972); *Feinberg v. George Washington Cemetery, Inc.*, 233 Md. 440, 441, 197 A.2d 147, 147 (1964). Note, however, that new trial orders are reviewable on appeal when they accompany a disposition on a motion for judgment notwithstanding the verdict. See MD. R. 2-532(f)(1), 2-533(c).

154. See, e.g., *Estep v. Estep*, 285 Md. 416, 421 n.5, 404 A.2d 1040, 1043 n.5 (1979).

mediately appealable by the losing party.<sup>155</sup> The logic of that opinion rests on the assumption that an in banc panel is, by long-settled law, an appellate tribunal. It is enlightening to track the cases backward to find just what authority the Court of Appeals has relied upon in reaching that finding.

The court affirmed the doctrine most recently in *Dabrowski v. Dondalski*,<sup>156</sup> in which a trial judge had granted a defendant's motion for judgment in a slip-and-fall case.<sup>157</sup> An in banc panel reversed and remanded for a new trial, and the defendant appealed. The Court of Special Appeals held that the panel's order was not final, and consequently was not appealable. Thus, the appeal was dismissed.<sup>158</sup> The court relied on language in rule 2-551 saying that the "decision of the panel does not preclude an appeal to the Court of Special Appeals by an opposing party *who is otherwise entitled to appeal*."<sup>159</sup> Evidently the court decided that an opposing party was not entitled to appeal because there was no final judgment.

The Court of Appeals relied exclusively on earlier cases in holding that an in banc panel's remand was appealable. Specifically, it said that *Estep v. Estep*<sup>160</sup> was dispositive.<sup>161</sup> Procedurally, *Estep* was equivalent to *Dabrowski*: the Court of Special Appeals had denied review of an in banc panel's remand.<sup>162</sup> *Estep* also was substantively equivalent, because it relied exclusively on an earlier case, *Buck v. Folkers*,<sup>163</sup> in which, according to the *Estep* opinion, the court had "clearly indicated that the court in banc acts only as an appellate tribunal so that its decisions are not those of a reconsidering trial court but are reviewable as final appellate judgments."<sup>164</sup>

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155. See *Dabrowski v. Dondalski*, 320 Md. 392, 395, 578 A.2d 211, 213 (1990) (per curiam); see also *Board of License Comm'rs v. Haberlin*, 320 Md. 399, 403, 578 A.2d 215, 217 (1990) (reaching the same conclusion on the same day as *Dabrowski*, and relying on it).

156. 320 Md. 392, 578 A.2d 211 (1990) (per curiam).

157. *Id.* at 393, 578 A.2d at 212.

158. *Dabrowski v. Dondalski*, 77 Md. App. 747, 749-50, 551 A.2d 933, 934-35 (1989), vacated, 320 Md. 392, 578 A.2d 211 (1990).

159. Md. R. 2-551(h) (emphasis added); see also Md. CONST. art. IV, § 22 ("[B]ut such decision in banc shall not preclude the right of Appeal, or writ of error to the adverse party, in those cases, civil or criminal, in which appeal, or writ of error to the Court of Appeals may be allowed by Law.").

160. 285 Md. 416, 404 A.2d 1040 (1979).

161. See *Dabrowski*, 320 Md. at 395, 578 A.2d at 213.

162. The Court of Special Appeals issued no opinion. The Court of Appeals guessed that the reason for the dismissal was that the in banc panel's order was interlocutory. *Estep*, 285 Md. at 420-21, 404 A.2d at 1043.

163. 269 Md. 185, 304 A.2d 826 (1973).

164. *Estep*, 285 Md. at 421, 404 A.2d at 1043.

*Buck v. Folkers* appears to be the root of the doctrine; however, that case does not clearly indicate that the court in banc acts only as an appellate tribunal. What the *Buck* court did say was that “[t]he decision of the court en banc [sic] is conclusive, final, and non-appealable by the party who sought the en banc [sic] review,”<sup>165</sup> and that “[a]s to that party, a reservation of points or questions for consideration by the Court en banc [sic] is a substitute for an appeal to the Court of Appeals.”<sup>166</sup> Presumably the *Estep* court leapt from *Buck*'s proposition that an in banc panel is a “substitute for an appeal” to the idea that the in banc panel acts only as an appellate tribunal.

It is quite clear that an in banc review is a substitute for an appeal—in the sense that the party seeking review waives certain rights of appeal to the courts of appeal. This is made clear by the language of section 22 itself,<sup>167</sup> as well as by case law interpretations of that section.<sup>168</sup> What is not clear, and what is not explained in any Court of Appeals opinion, is why the fact that in banc review is a substitute for an appeal makes an in banc panel an appellate tribunal. After all, parties may waive their rights of appeal without actually appealing.

It appears that no court has ever addressed this issue by looking for the original intent of the delegates at the Convention of 1867. The first part of this Comment introduced some evidence suggesting that the in banc panel was intended to be more of a trial court than an appellate court. For instance, in Syester's original speech on the in banc provision, he seems to have envisioned the in banc rule as a way to speed up trials by reserving the many lengthy arguments on legal issues for a later time, when the three judges would be available to resolve them. (Syester never used the word *appeal* when speaking of in banc review; nor, for that matter, did any other delegate.) Alvey wrote the “reservation” language into the original constitutional provision, where it remains today. The pro-

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165. *Buck*, 269 Md. at 187, 304 A.2d at 827.

166. *Id.*

167. See MD. CONST. art. IV, § 22 (“and the decision of the said Court in banc shall be the effective decision . . . and conclusive, as against the party, at whose motion said points, or questions were reserved; but such decision in banc shall not preclude the right of Appeal . . . to the adverse party”). Alvey's original version of § 22 was even clearer: “[I]t shall be competent to the party . . . against whom the ruling . . . is made . . . to have the point or question reserved . . . or said party or parties . . . may elect to have said decision or determination reviewed on appeal to the Court of Appeals . . . .” Perlman, *supra* note 57, at 333.

168. See, e.g., *Shueey v. Stoner*, 47 Md. 167, 170 (1877).

vision says that parties may “have [a] point or question reserved for the consideration of the three Judges of the Circuit”<sup>169</sup>—which seems a strange way to express the concept of an appeal to a higher court, if that is what was intended.

It is important to remember that when section 22 was introduced, the three judges of the circuit had the discretion to sit together at many trials.<sup>170</sup> When all three judges sat at trial, there was no need, and hence no right, to in banc review because all judges were immediately available to settle difficult questions of law. If, as is suggested above,<sup>171</sup> the in banc provision really was part of a compromise between the one- and three-judge systems, then it is easy to imagine in banc review as an extension of a trial rather than as an appeal. The absolute three-judge proponents, those who wanted three judges to sit for the full trial, at every trial,<sup>172</sup> might have acquiesced to a de facto one-judge system so long as litigants had a right to convene the three judges to answer difficult questions of law. In many cases, presumably, no need for three judges would arise. Therefore the judiciary would work more economically with a single judge sitting in most cases, provided that the right of review by an in banc panel was preserved.

In light of this context, section 22 may be read to mean that the in banc review was really an extension of the trial. As pointed out above, the reservation-of-points concept suggests that the real trial decision is not made until disposition of the points reserved.<sup>173</sup> Moreover, the reservation had to be made “during the sitting” (later interpreted to mean on the same day<sup>174</sup>), which may suggest that the record of the trial court was to be left open until the panel decided the reserved points. Indeed, Alvey’s initial version of section 22 said that “the decision of the said judges in banc shall be the effective determination of the point or question reserved, and judgment or other proceedings shall be had therefor.”<sup>175</sup> The implication again is that when points had been reserved, judgment came after the in banc proceedings, not after the trial. The final version of section 22 suggests the same concept: “[T]he decision of the said

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169. MD. CONST. art. IV, § 22.

170. See Perlman, *supra* note 57, at 266. Section 20 of the original judiciary report fixed three judges per circuit and provided that one would constitute a quorum.

171. See *supra* Subpart II.D.

172. See *supra* text accompanying notes 71-84 for the views of one such advocate.

173. See *supra* text accompanying note 169.

174. See *Costigin v. Bond*, 65 Md. 122, 124, 3 A. 285, 285 (1886).

175. Perlman, *supra* note 57, at 333.



Court in *banc* shall be the effective decision in the premises."<sup>176</sup> The term *premises* probably is used in its pleading sense, where it means "[t]hat which is put before."<sup>177</sup> Thus, the *effective* decision of the matters put before (the reserved point) is the decision of the in banc panel.

This interpretation is supported by a standard nineteenth-century definition of the term *point reserved*:

A point or question of law, which the court, not being fully satisfied how to decide, in the trial of a cause, rules in favor of the plaintiff, but *subject to revision on a motion for a new trial*. If, after argument, it be found to have been ruled correctly, the verdict is supported; if otherwise, it is set aside.<sup>178</sup>

Under this definition it seems quite clear that reserved points ordinarily stayed within the jurisdiction of a trial court. Given Alvey's fondness for dictionaries and verbal precision,<sup>179</sup> it seems unlikely that he would have used this term if he intended the in banc panel to act in an appellate capacity. Moreover, this definition squares with one of Syester's original purposes for the in banc rule: to prevent long arguments on questions of law at trial, when the jury and court staff were drawing pay.<sup>180</sup>

There are no relevant Court of Appeals cases early enough to illuminate the delegates' intent regarding whether an in banc panel acts as an appellate or trial court. There are a few early cases involving the Supreme Bench of Baltimore City that support the theory of in banc panel as a trial court extension. For instance, in *Merrick v. Baltimore and Ohio Railroad Co.*,<sup>181</sup> a Baltimore City trial judge refused a motion to strike a judgment that had been obtained by default. The Supreme Bench reversed, ordering that the judgment be stricken and the case remanded for trial.<sup>182</sup> Judge Alvey dismissed the appeal taken to the Court of Appeals.<sup>183</sup> He relied on a case

176. MD. CONST. art. IV, § 22.

177. BLACK'S LAW DICTIONARY 1062-63 (5th ed. 1979); see also 2 JOHN BOUVIER, BOUVIER'S LAW DICTIONARY 729 (Francis Rawle ed., 1897) (defining "premises" as: "That which is put before. The introduction. Statements previously made").

178. 2 BOUVIER, *supra* note 177, at 689 (emphasis added).

179. Judge Alvey did not choose his words casually, however haphazardly he may have strung them together at times. See Armstrong, *supra* note 30, at 137 ("My younger brother's outstanding recollection of the Judge is that he was always reading the dictionary. It is true that he was constantly consulting that work, in his search for synonyms and finer shades of meaning.").

180. See *supra* text accompanying notes 126-127.

181. 33 Md. 481 (1871).

182. *Id.* at 484-85.

183. See *id.* at 487.

that held that, so long as the motion to strike was made during the same term as the judgment, no appeal to the Court of Appeals would lie if the motion was granted because "the rights of neither party are determined, and the case stands for trial immediately, and the plaintiff may proceed with the trial at the same term."<sup>184</sup> Of course, the Supreme Bench was not equivalent to an in banc panel, but in *Merrick* as in *House of Refuge*, Judge Alvey invoked the analogy between the two.<sup>185</sup>

Nevertheless, whether the delegates intended the in banc panel to act as a trial or appellate court is an open question at best. The question today is not so much whether the Court of Appeals has the authority to disallow immediate appeal of an in banc panel's remand, but whether it should. It seems that if the court has an interest in meaningful in banc review, it should. In many cases, the most a litigant can hope for on post-trial proceedings is a new trial. As in banc practice now stands, in such cases it is foolish to seek in banc review because a victory only means that the opponent will appeal to the Court of Special Appeals, and a loss means no further appeal at all.

On the other hand, if the Court of Appeals disallowed immediate appeal of in banc remands, the state judicial system would have to endure a few more trials that the appellate courts would deem unnecessary. But in fact such a rule might conserve total judicial resources because some of the parties who seek in banc review are going to lose, which will mean neither a new trial nor an appeal to the courts of appeal.

### C. *Immediate Review of New Trial Orders*

The argument that the in banc panel is really an extension of a trial court supports another idea that could make in banc review more useful. If the in banc panel is really part of the trial court, then the trial judge's orders are not necessarily interlocutory with respect to the panel, and therefore the panel would have authority to review immediately a trial judge's order of a new trial.<sup>186</sup> Thus, a party

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184. *Hall v. Holmes*, 30 Md. 558, 561 (1869); cf. 1 JOHN P. POE, MARYLAND PLEADING AND PRACTICE 669 (1880) (an appeal from an order arresting a judgment lies immediately).

185. See *Merrick*, 33 Md. at 485.

186. For a statutory basis of the final judgment rule, see MD. CTS. & JUD. PROC. CODE ANN. § 12-301 (1989) ("The right of appeal exists from a final judgment entered by a court . . .").

I do not mean to suggest that litigants should be allowed to take continuous interlocutory reviews to an in banc panel throughout the course of the trial. Plainly the con-

who won a jury verdict but faced a new trial after losing on a post-verdict motion would have immediate review before incurring the expense of a second trial.

The value of allowing such review is debatable, of course, but that debate has been moot since at least 1985, when the Court of Appeals definitively ended any speculation. In *Dean v. State*,<sup>187</sup> a jury convicted Dean of various crimes and the trial judge granted Dean's motion for a new trial.<sup>188</sup> The state sought in banc review, and the in banc panel vacated the new-trial order, reinstated the convictions, and remanded for sentencing.<sup>189</sup> Dean's appeal went straight to the Court of Appeals, which held that:

Whatever the theory of the State's Attorney for Montgomery County may have been in seeking review by the in banc court, the Attorney General says before us that he does not contend that there is any different standard of appealability to a court in banc from that to the Court of Special Appeals. There is no different standard.

. . . .  
It is clear that the order from which the State sought to appeal in this case was not an appealable final order and thus the in banc court was without jurisdiction to consider the point reserved.<sup>190</sup>

The problem with such a broad holding is that it "appear[s] to narrow the right that the Constitution granted to review 'any point or question.'"<sup>191</sup> Indeed, if the original delegates viewed the in banc panel as an extension of the trial, it makes sense to assume that they granted the panel immediate authority to review points or questions that were otherwise interlocutory to an appeals court. Trial judges have authority to reverse themselves during the trial. The concept that an in banc panel only overruled its own (rather than a lower court's) decisions was perhaps easier to grasp in 1867 than it is today—remember that in 1867, at least one of the judges

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vention delegates never intended the trial to be suspended while someone rounded up the other two judges, who may have been in far-flung parts of the circuit. Indeed, the point of the provision was, at least in part, judicial economy. But a new trial order is unlike most other interlocutory orders—it occurs, as Hemingway once wrote, at the end of something.

187. 302 Md. 493, 489 A.2d 22 (1985).

188. *Id.* at 494, 489 A.2d at 22.

189. *Id.* at 495-96, 489 A.2d at 23. It is not clear why the state sought in banc review.

190. *Id.* at 497, 499, 489 A.2d at 24, 25; *see also* *Estep v. Estep*, 285 Md. 416, 421, 404 A.2d 1040, 1043 (1979) (reaching essentially the same conclusion in less forceful language).

191. NIEMEYER & RICHARDS, *supra* note 3, at 84 (Supp. 1988).

on the three-judge panel would have sat at the trial and made the initial ruling, because there were only three judges in each of the circuits.<sup>192</sup>

The Supreme Bench of Baltimore City, which Alvey analogized to in banc courts in *Roth v. House of Refuge*,<sup>193</sup> did have jurisdiction "to hear and determine all motions for a new trial" from any of the various city courts.<sup>194</sup> It is not clear, however, whether at that time a city trial judge could hear the motion first, and if he granted the motion, whether the Supreme Bench could rule on the motion as well.<sup>195</sup>

Thus, the history of the in banc provision provides a plausible, though not airtight, rationale for the Court of Appeals to allow immediate in banc review of new trial orders. The question is whether the Court of Appeals should invoke either its rule-making or judicial powers to implement such a policy. It would be quite valuable in some situations to have immediate review of a new trial order, particularly those situations in which the trial judge has made a clear error and a new trial will be long, complicated, and expensive—both to the parties and to the state. In such situations it might be worthwhile to have a relatively fast review by three trial judges who have time to focus on the particular error. If the in banc panel vacates the order for a new trial, the opposing party would of course have a right of appeal—but the appeal might have occurred anyway, after the second trial. If the in banc panel upholds the order, the new

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192. This system excluded Baltimore City, to which the in banc rule did not apply. See *infra* Subpart III.F.

In 1979, the Court of Appeals decided that "the three Judges of the circuit" meant only three judges, and not all the judges of the circuit. *Washabaugh v. Washabaugh*, 285 Md. 393, 411, 404 A.2d 1027, 1037 (1979) (discussed *infra* Subpart III.F). Although the court made several arguments, probably the most important was its textual one: "the constitutional drafters' specific use of the term 'three,' as opposed to a reference to 'all' the judges of the circuit, demands that any ambiguity be resolved in favor of treating 'three' as a numerical rather than a descriptive term." *Id.* at 411, 404 A.2d at 1037. While the court's result is not at all implausible, it seems that among Maryland lawyers in the middle nineteenth century the "three" in "three Judges" was used more descriptively than numerically—or at least that is one of the premises of this Comment. In any event, as a practical matter the court was wise to limit in banc review to three judges. In *Washabaugh*, one of the cases on appeal came from the Seventh Judicial Circuit, in which all fifteen judges of that circuit sat together. One wonders how such a meeting was ever scheduled. Surely if circuits made a regular practice of sitting in toto to hear garden variety in banc reviews, the process would lose its advantage of speed.

193. 31 Md. 329 (1869).

194. BALTIMORE CITY CODE art. XIII, § 7 (1869).

195. The Supreme Bench appears to have had a system similar to one that still exists in Pennsylvania, in which a trial judge may decide whether to submit new trial motions to a court in banc or to decide them alone. See PA. R. CIV. P. 227.2.

trial would continue, but the party who sought review by the in banc panel would be precluded from appealing the new trial motion (and the issues it included) at the end of the second trial.

D. "Many Important Cases Where No Appeal Will Lie"

In banc practice would be substantially more powerful if it were allowed in certain cases in which no appeal is available. This possibility, however, was probably eliminated by the recent case of *Board of License Commissioners v. Haberlin*.<sup>196</sup> In that case, Haberlin contested the transfer of a neighboring business's liquor license and lost at both the administrative and circuit court levels.<sup>197</sup> He then sought in banc review, and the in banc panel reversed and remanded on one of the issues.<sup>198</sup> The License Board appealed, and the Court of Appeals on its own raised the issue of whether the in banc panel had statutory authority to review the case.<sup>199</sup> The statute at issue did not allow appeal of administrative cases beyond the circuit court level unless separate circuit courts disagreed on an issue.<sup>200</sup>

The Court of Appeals held that, as a general proposition, an in banc panel does not have jurisdiction unless it is expressly authorized by the legislature under section 12-301 of the Courts and Judicial Proceedings Article.<sup>201</sup> The court's logic derives from a two-step argument made in the *Estep* case: First, an in banc panel is an appellate court, and second, an appellate court's jurisdiction is entirely statutory.<sup>202</sup> Therefore, according to *Haberlin*, if the legislature did not authorize appellate authority in a given case, or if "appeal to a court in banc would be inconsistent with special appellate statutory provisions,"<sup>203</sup> an in banc panel could have no jurisdiction. In *Haberlin*, because the relevant statute expressly cut off most appellate jurisdiction, the court held that in banc jurisdiction was cut off as well.<sup>204</sup> To overcome the possible constitutional problem with section 22's right of review over "any point or question," the court cited that section's troublesome final passage saying that in banc review is "subject to such provisions as may hereafter

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196. 320 Md. 399, 578 A.2d 215 (1990).

197. *Id.* at 401-02, 578 A.2d at 216.

198. *Id.* at 402-03, 578 A.2d at 217.

199. *See id.* at 405, 578 A.2d at 218.

200. MD. ANN. CODE art. 2B, § 175(f) (1990).

201. *See Haberlin*, 320 Md. at 407, 578 A.2d at 219.

202. *Estep v. Estep*, 285 Md. 416, 421-22, 404 A.2d 1040, 1043 (1979).

203. *Haberlin*, 320 Md. at 408, 578 A.2d at 219.

204. *See id.* at 409-10, 578 A.2d at 220.

be made by Law.”<sup>205</sup>

Before considering the effect of the court’s opinion and whether it has historical basis, it should be pointed out that the court could have cited at least one other textual argument to support its holding. Section 22 currently reads, “The right of having questions reserved shall not . . . apply to trials of Appeals from judgments of the District Court . . . .” Originally the exception applied to trials of appeals from justices of the peace.<sup>206</sup> One might argue that the original intent of the provision was to prevent or limit in banc review of decisions by trial courts when acting in their appellate capacity. There was little state administrative law in 1867, so it was relatively rare for trial courts to act in an appellate capacity, and the delegates’ explicit retraction of in banc jurisdiction in one situation in which the circuit court was actually an appellate court might suggest an intent to remove it in later, similar situations as well.

On the other hand, there are several reasons why one might think that the delegates did intend in banc review to be available in cases that were procedurally equivalent to *Haberlin*. The first is the argument made in the preceding two sections: If the in banc panel is not an appellate court but an extension of a trial court, then the *Estep* logic disintegrates. Because the in banc panel would not be seen as an appellate court, its jurisdiction comes from the constitutional provision that created it—in this case, article IV, section 22—and under that section the grant of jurisdiction appears to be quite broad.<sup>207</sup> Under this theory, in banc review of appeals to a circuit court would generally be allowed under the broad right of review granted by section 22; the final passage in section 22 might allow the legislature to remove this jurisdiction, but only if it did so explicitly.

Second, there is some evidence suggesting that the delegates did foresee cases like *Haberlin* and would not have decided them the same way. The most important evidence comes from the often-quoted opinion in which Alvey wrote that in banc review was available in part so that parties could have “the benefit of such review in many important cases where an appeal will not lie.”<sup>208</sup> Unfortunately, Alvey did not describe the types of cases in which an appeal would not lie, but it seems clear that, at minimum, he thought that there was a different standard of appealability to a court in banc

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205. *Id.* at 410, 578 A.2d at 220.

206. See PROCEEDINGS OF THE STATE CONVENTION, *supra* note 60, at 744-45.

207. See *supra* note 191 and accompanying text.

208. *Roth v. House of Refuge*, 31 Md. 329, 333 (1869).

when compared to that of the Court of Appeals.<sup>209</sup> As we have already seen, Syester too thought that in banc review would provide revision in at least some cases in which appellate review was not available.<sup>210</sup>

There is also some support for this view in the early case law. For example, the case of *Roth v. House of Refuge*,<sup>211</sup> already familiar because of Alvey's dictum on the purpose of in banc review,<sup>212</sup> actually held that the Supreme Bench of Baltimore City had power to review a trial judge's determination of a habeas corpus petition even though the Court of Appeals had no power to do so.<sup>213</sup> Of course, the Supreme Bench operated under a different constitutional authority than the county circuit courts,<sup>214</sup> and section 22 probably never applied to the Baltimore City courts anyway. But Alvey's logic in *House of Refuge* rested in part on an analogy of the Supreme Bench to a court in banc.<sup>215</sup> The implication, circuitous though it may be, is that an in banc panel also had authority to review some kinds of cases that the Court of Appeals could not hear.

In any event, *Haberlin* is another important step in the judicial limitation of in banc practice. The text of section 22 implies that the scope of in banc review perhaps was intended to be broader than that of appellate review. *Dean* was on questionable ground in holding that "[t]here is no different standard" of appealability to the two forums.<sup>216</sup> *Haberlin* goes still further by holding that in fact there is a different standard of appealability—in banc review is substantially narrower than regular appellate review.<sup>217</sup> The Court of Appeals in *Haberlin* went out of its way to include a nonexhaustive list of legislative jurisdictional provisions that now will have the ancillary effect of cutting off in banc jurisdiction.<sup>218</sup> For instance, the court decided that when the legislature provided for automatic appeal to the Court

209. See *supra* text accompanying notes 135-137 (suggesting that Alvey's original motion shows that he intended the scope of in banc review to be broader than that of the normal appellate process); cf. *Dean v. State*, 302 Md. 493, 497, 489 A.2d 22, 24 (1985) (finding the standard of appealability to be the same for in banc review and review by the Court of Special Appeals).

210. See *supra* notes 118-126 and accompanying text.

211. 31 Md. 329 (1869).

212. See *supra* text accompanying note 29.

213. *House of Refuge*, 31 Md. at 332-33.

214. See PROCEEDINGS OF THE STATE CONVENTION, *supra* note 60, at 743-46.

215. See *House of Refuge*, 31 Md. at 333.

216. See *Dean v. State*, 302 Md. 493, 497, 489 A.2d 22, 24 (1985).

217. See *Board of License Comm'rs v. Haberlin*, 320 Md. 399, 407-08, 578 A.2d 215, 219 (1990).

218. See *id.*

of Special Appeals within five days of judgment, it intended to eliminate in banc jurisdiction, and the court will assume that it did.<sup>219</sup> Whether the legislature can alter a constitutional right by implication—even where the constitution provides for legislative alteration<sup>220</sup>—is still an open question, and one considered in the next section.

*E. McNeece and the Power to Change Section 22*

Just why Mr. Hayden of Westminster decided to make section 22 “subject to such provisions as may hereafter be made by Law” remains a mystery.<sup>221</sup> He was a proponent of the three-judge system,<sup>222</sup> so surely he was not trying to dilute the power of an in banc panel with a last-minute amendment. Yet it is hard to read his amendment as doing anything but that. In fact, read broadly, his amendment appears to grant the legislature, and perhaps the Court of Appeals as well, the power to do what they choose to in banc review, notwithstanding that the right issues from the constitution. And the Court of Appeals has been wont to read the amendment broadly.

The Court of Appeals’ interpretations of Hayden’s amendment culminated in the great opinion of *Montgomery County v. McNeece*.<sup>223</sup> The *McNeece* opinion is great not in the sense of what it does for the law, but in what it reveals about the judicial process. The substance of the opinion reflects a pitched battle among cerebral judges on a relatively minor point of law, incorporating questions of history, constitutional theory, and judicial philosophy, with a quasi-realist majority carefully changing the law to meet the demands of modern litigation, and a spirited, quasi-formalist dissent<sup>224</sup> insisting that rules are rules. And the bulk of the opinion is pure dicta.

The facts, unfortunately, are not as great as the opinion. McNeece was a Montgomery County firefighter who thought a salary increase should have accompanied his promotion.<sup>225</sup> He lost in an administrative hearing and on administrative appeal, but the cir-

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219. *Id.* at 408, 578 A.2d at 219; see MD. CTS. & JUD. PROC. CODE ANN. § 3-706 (1989).

220. See MD. CONST. art. IV, § 22 (“and this Section shall be subject to such provisions as may hereafter be made by Law”).

221. See *supra* text accompanying note 140-142.

222. See *supra* text accompanying note 131.

223. 311 Md. 194, 533 A.2d 671 (1987).

224. The “dissent” was technically a concurrence, but on the only important issue it was clearly a dissent.

225. *McNeece*, 311 Md. at 195-96, 533 A.2d at 671.



cuit court reversed and directed an increase in salary.<sup>226</sup> The County sought in banc review, and McNeece moved to dismiss because the County had “failed to reserve its points or questions . . . in accordance with” section 22. The in banc panel agreed with McNeece and dismissed, leaving the circuit court order standing.<sup>227</sup> On appeal, the Court of Special Appeals also dismissed, but this time it did so because the County was the party who sought in banc review and thus section 22 precluded further appeal by the County. The Court of Appeals affirmed the dismissal on the section 22 ground that the County was not entitled to further review.<sup>228</sup>

The Court of Appeals did not stop there, however. It noted that the in banc panel had declared part of rule 2-551 unconstitutional, and, as Judge McAuliffe wrote, “[a]lthough we ordinarily do not express our views on any question raised by a dismissed appeal, we occasionally do so to resolve a matter of substantial importance.”<sup>229</sup> The part of the Rule declared unconstitutional by the in banc panel allows points or questions to be reserved by the ordinary means of objection rather than by formal exceptions.<sup>230</sup> Although section 22 itself does not say how points are to be reserved for in banc review,<sup>231</sup> an 1886 case suggested that formal exceptions were required,<sup>232</sup> and the court subsequently assumed that they were.<sup>233</sup> That meant that after an objection was overruled, counsel had to ask the judge to save an exception, whereupon the judge would “‘stop the trial and call the scrivener who, with his quill pen, would make a record on parchment.’”<sup>234</sup> The trial judge bound, signed, and certified these exceptions at the end of the trial and they became a Bill of Exceptions for purposes of appeal or in banc review.<sup>235</sup>

The Court of Appeals pointed out that formal exception prac-

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226. *Id.* at 196, 533 A.2d at 671-72.

227. *Id.*

228. *See id.* at 197-200, 533 A.2d at 673-74.

229. *Id.* at 200, 533 A.2d at 674.

230. *See* Md. R. 2-551(a).

231. Interestingly, an early version of section 22 does suggest how points would be reserved, and it appears that Alvey intended that the trial judge should take “full and fair notes of such of the proceedings before him . . . as will fully present such points or questions . . . .” PROCEEDINGS OF THE STATE CONVENTION, *supra* note 60, at 502.

232. *See Costigin v. Bond*, 65 Md. 122, 124, 3 A. 285, 285 (1886).

233. *See McNeece*, 311 Md. at 215, 533 A.2d at 681 (Eldridge, J., concurring) (“[T]he *Costigin* interpretation of § 22 had been consistently recognized and adhered to by the General Assembly and this Court, until the unfortunate adoption of rule 2-551(a) in 1984.”).

234. *Id.* at 202, 533 A.2d at 675 (quoting MILTON D. GREEN, BASIC CIVIL PROCEDURE 254-55 (2d ed. 1979)).

235. *Id.*

tice had gone out of style in other Maryland court proceedings in 1945,<sup>236</sup> pursuant to a Court of Appeals rule of procedure,<sup>237</sup> and that in 1984 an amendment to rule 2-551 had finally eliminated the requirement of exceptions for in banc review.<sup>238</sup> The problem was that earlier case law had held that formal exceptions were *constitutionally* required.<sup>239</sup>

Judge McAuliffe invoked two constitutional provisions to support his finding that the amended rule 2-551 was constitutional: Hayden's amendment allowing changes to section 22, and the provision that grants the Court of Appeals authority to adopt rules of procedure.<sup>240</sup> The majority's theory was that section 22 allows in banc review to be changed by law, and the Court of Appeals has constitutional authority to make procedural changes, which "shall have the force of law."<sup>241</sup> Because the changes made to rule 2-551 were promulgated by the Court of Appeals and were merely procedural in nature, they had the force of law and thereby effected a valid change to the original requirements of section 22.<sup>242</sup>

Although the majority's logic appears almost syllogistic, there are a number of problems with it and it is hard to believe that the majority was unaware of them. Before looking at those problems, it is worth pointing out that the majority probably wrote what it thought was the only reasonable opinion it could have written if in banc review was not to be rendered completely useless. As Judge McAuliffe intimated, not many modern lawyers or judges know how to make formal exceptions properly. It is hard to imagine a circuit court judge having much patience for a lawyer who requested formal exceptions after every ruling, not because he wished to preserve the issue for appeal, but "because, your honor, I want to make sure I leave open the possibility of in banc review." So it seems that Judge McAuliffe in *McNeece* did what good judges are sometimes required to do: He ignored the problems and wrote the opinion.

Judge Eldridge and two other concurring judges, however, could not avert their eyes. Preliminarily, Judge Eldridge took thorough and cogent exception to the majority's tactic of reaching a

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236. *See id.* at 204, 533 A.2d at 676.

237. *See* Md. R. 2-517 (modern contemporaneous objection rule).

238. *See* Md. R. 2-551(a) ("Issues are reserved for in banc review by making an objection in the manner set forth in Rules 2-517 and 2-520.").

239. *See* *Costigin v. Bond*, 65 Md. 122, 124, 3 A. 285, 285 (1886).

240. *See* Md. CONST. art. IV, § 18(a).

241. *Id.*

242. *McNeece*, 311 Md. at 206-07, 533 A.2d at 677.

constitutional issue after dismissing an appeal.<sup>243</sup> More importantly, he pointed out that formal exception practice is not required by the text of section 22.<sup>244</sup> Section 22 merely requires that the “*reservation* shall be entered of record, during the sitting, at which such decision may be made.”<sup>245</sup> As Judge Eldridge wrote, “Since [section] 22 relates to the time for an election between appellate courts, and not the matter of appellate preservation, it is no more obsolete today than it was in 1867.”<sup>246</sup> Moreover, it was only an appellate decision that held that the reservation had to be made on the same day as the decision,<sup>247</sup> and the Court of Appeals has authority to overrule its own decision.<sup>248</sup>

Judge Eldridge also was displeased with the majority’s insistence that it had the power to alter section 22. He quite correctly pointed out the fallacy of the majority’s apparent procedural-substantive distinction—all of section 22 is procedural, so it is difficult to see what part of the section the Court of Appeals cannot now change under the majority’s logic.<sup>249</sup> More importantly, he thought that the majority had overstepped its authority even on the procedural side:

As far as I am aware, this is the first time in the history of American constitutional jurisprudence that any appellate court has taken the position that an authorization for legislative implementation of a constitutional provision includes an authorization to contradict or amend the mandatory requirements of the constitutional provision itself. I flatly disagree with the majority’s view that the judges of this Court have been empowered to amend the Maryland Constitution.<sup>250</sup>

While the concurrence perhaps overstated its case,<sup>251</sup> it did

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243. *See id.* at 209-13, 533 A.2d at 678-80 (Eldridge, J., concurring).

244. *See id.* at 213, 533 A.2d at 680 (Eldridge, J., concurring).

245. MD. CONST. art. IV, § 22 (emphasis added).

246. *McNeece*, 311 Md. at 215, 533 A.2d at 681 (Eldridge, J., concurring).

247. *See Costigin v. Bond*, 65 Md. 122, 124, 3 A. 285, 285 (1886).

248. *McNeece*, 311 Md. at 215, 533 A.2d at 681 (Eldridge, J., concurring). Judge Eldridge, however, would not have chosen to overrule *Costigin*. *See id.*

249. *Id.* at 217, 533 A.2d at 682 (Eldridge, J., concurring).

250. *Id.* at 209, 533 A.2d at 678 (Eldridge, J., concurring).

251. The concurrence’s argument implies that the Court of Appeals has in some way usurped the legislature’s authority. But the change provision in section 22 is not limited to legislative change; it merely says “such provisions as may hereafter be made by Law.” MD. CONST. art. IV, § 22. There is no doubt that the Court of Appeals in some instances can issue rules that have the force of law. *See* MD. CONST. art. IV, § 18(a). Additionally, it is not clear that the change provision in section 22 is an “authorization for legislative

make a powerful point. The procedural provisions at issue were written into section 22 in mandatory language, yet the court decided, without any need to do so, that a general clause making section 22 subject to provisions of law empowered the court to alter the specific, mandatory language of the section.<sup>252</sup> As a matter of statutory construction, this logic seems suspect.

In any event, Judge Eldridge may have missed one argument. Neither he nor Judge McAuliffe considered the history of section 18—the constitutional provision that gives the Court of Appeals power to make procedural rules. Had they done so they would have found some intriguing similarities between that section and section 22. For instance, both sections were amendments to original judiciary reports, introduced at the same convention, in the same week, and by the same man—Richard H. Alvey.<sup>253</sup> When Alvey introduced section 18 four days after he introduced section 22, the one- vs. three-judge debate was ongoing. Alvey's intent with regard to section 18, unlike his intent for section 22, seems clear because he included it in the provision itself: "to prevent delays, and promote brevity in all records and proceedings brought into said Court, and to abolish and avoid all unnecessary costs and expenses in the prosecution of appeals therein."<sup>254</sup> Alvey, it seems, was not very happy with the time and expense of appeals to the Court of Appeals. If his intent with regard to the two sections was so similar, it seems unlikely that he would have intended to enable the Court of Appeals to use section 18 to change the terms of section 22 concerning either how or when points should be reserved.<sup>255</sup>

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implementation," and not an authorization for something more, although it might be construed that way. See *McNeece*, 311 Md. at 209, 533 A.2d at 678 (Eldridge, J., concurring). Moreover, the United States Constitution provides an example, although not perfectly analogous here, of how the terms of a constitution may sometimes allow the legislature to contradict an apparently mandatory constitutional requirement. Article III vests the judicial power of the United States in "one supreme Court," U.S. CONST. art. III, § 1, and gives the Court only appellate jurisdiction in most cases, *see id.* § 2, but it gives Congress the power to make exceptions to and regulations of that jurisdiction, *see id.* There is, of course, a great debate on just how far Congress can go in restricting Supreme Court jurisdiction, but *Ex parte McCordle*, 74 U.S. 506 (1868), makes it at least arguable that Congress could go far enough to infringe on the vesting and appellate-jurisdiction clauses. See generally PAUL M. BATOR ET AL., HART AND WECHSLER'S THE FEDERAL COURTS AND THE FEDERAL SYSTEM 378-82 (3d ed. 1988).

252. See *McNeece*, 311 Md. at 206, 533 A.2d at 677.

253. See Perlman, *supra* note 57, at 357-58. For the text of the amendment, see PROCEEDINGS OF THE STATE CONVENTION, *supra* note 60, at 461-62.

254. PROCEEDINGS OF THE STATE CONVENTION, *supra* note 60, at 462.

255. Of course, when Alvey introduced section 18, Hayden had not yet proposed his amendment to section 22 that would allow changes to be made by law.

In fact, there is a clearer reason why Alvey could not have intended this. As originally adopted, section 18 only allowed the Court of Appeals to regulate its own appellate procedure. It was not until much later that section 18 was amended to allow the Court of Appeals to regulate rules "in the other courts of this State."<sup>256</sup> Moreover, section 22 itself states that the local circuits "shall regulate, by rules, the mode and manner of presenting such points."<sup>257</sup> Whether the amendment to section 18 gave the Court of Appeals authority to alter the terms of section 22 is open to question, but it is clear that Messrs. Hayden, Alvey, and Syester, and the other delegates in 1867, never thought that the changes "as may hereafter be made by Law" would issue from the Court of Appeals.

The practical significance of *McNeece* is that formal exceptions are not required to reserve points for in banc review—at least for now. Thus, those few lawyers who may be interested in in banc review probably do not have to worry about two different procedures for preserving objections. But they may have to worry about making a trip to Annapolis to prove it. The *McNeece* issue arose again before the Court of Appeals in a recent case,<sup>258</sup> and although the court never reached the issue, Judge Eldridge—this time in the majority—noted that "[t]his Court's judgment in [*McNeece*] . . . was not based upon a resolution of the constitutional issue."<sup>259</sup>

The broader significance of *McNeece*—if its reasoning is followed in subsequent cases—is that the Court of Appeals apparently now has authority to alter at least some of the provisions of section 22. The court suggested that this power was limited to procedural alterations and it made clear that it had no intention of impairing the "basic right" to in banc review.<sup>260</sup> Nevertheless, the concurrence suggested that the court may now have the power to do just that.<sup>261</sup> Even a procedural change could have a fatal effect on the right; for instance, if the court required full, appellate-style arguments and briefs before the in banc court, there would be little use

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256. See Act of Apr. 26, 1977, ch. 681, 1977 Md. Laws 2763; see also *Washabaugh v. Washabaugh*, 285 Md. 393, 412 n.14, 404 A.2d 1027, 1037-38 n.14 (1979) (leaving open the question of whether the Court of Appeals could by rule alter the number of judges that constituted a court in banc); 63 Op. Att'y Gen. 498 (1978) (deciding that the Court of Appeals' rulemaking power extends to all courts of the state).

257. MD. CONST. art. IV, § 22.

258. See *Dabrowski v. Dondalski*, 320 Md. 392, 578 A.2d 211 (1990) (per curiam).

259. *Id.* at 395 n.1, 578 A.2d at 213 n.1.

260. See *McNeece*, 311 Md. at 206, 533 A.2d at 677.

261. See *id.* at 217, 533 A.2d at 682 (Eldridge, J., concurring).

for in banc review.<sup>262</sup> Moreover, there is nothing in the court's logic that would prevent the legislature from making "substantive" changes to section 22, which presumably could include a de facto repeal of the right.<sup>263</sup> Of course, there is nothing inherently bad about either the court or the legislature restricting the right; after all, other states seem able to get by without in banc review.

#### F. *In Banc Review in Baltimore City*

The Court of Appeals' power to alter the terms of section 22 also affects one other curious (but dormant) constitutional issue regarding in banc practice. For many years the in banc rule by its terms did not apply to Baltimore City.<sup>264</sup> The rationale was that the city's judiciary structure was completely different from that of the other circuits, and the availability of review by the Supreme Bench made in banc panels unnecessary in the city.<sup>265</sup> Moreover, the judiciary article of the Maryland Constitution is divided into clear sections, one of which addresses the county circuits and includes the in banc provision, and another of which addresses only the city and does not include the in banc provision.<sup>266</sup> Further, section 22 refers to "the three Judges of the Circuit" as composing a court in banc, and in 1867 Baltimore City was the only circuit that did not have three judges.<sup>267</sup>

In the 1979 case of *Washabaugh v. Washabaugh*,<sup>268</sup> several litigants challenged this geographical application of the in banc rule as a violation of federal equal protection. The Court of Appeals curiously declined to decide whether in banc practice in Baltimore City was valid under the Maryland Constitution,<sup>269</sup> but the court did decide that even if it was not, the resulting unequal treatment across

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262. This might raise an issue similar to the question of the scope of Congress's power to regulate Supreme Court appellate jurisdiction via the exceptions and regulations clause. See *supra* note 251.

263. Of course, the court never affirmatively suggested that the legislature may make such changes; it simply did not consider the question. The point is that the "Law" that the Court of Appeals is allowed to make is limited by section 18 to "rules and regulations concerning the practice and procedure" in the courts of Maryland. The legislature has no such restriction.

264. MD. R. 510d (1977) (current version at MD. R. 2-551).

265. See generally *In re Grand Jury Investigation*, Misc. No. 94 (Supreme Bench Baltimore City 1977) (in banc) (discussing why section 22 is not applicable to Baltimore City), reprinted in THE DAILY RECORD (Baltimore), Oct. 27, 1977, at 3.

266. See MD. CONST. art. IV.

267. See *In re Grand Jury Investigation*, reprinted in THE DAILY RECORD, *supra* note 265, at 3.

268. 285 Md. 393, 404 A.2d 1027 (1979).

269. See *id.* at 403, 404 A.2d at 1033.

jurisdictions would not violate federal equal protection. The court found two rational bases for treating the city differently: "the desire to avoid the additional encumbrance such appeals might impose upon Baltimore City's heavily burdened judicial machinery,"<sup>270</sup> and "the complex nature of Baltimore City's court system."<sup>271</sup>

The entire issue would best be forgotten except that shortly after *Washabaugh* was decided, the state constitution was amended to give Baltimore City exactly the same judicial structure as the rest of the state.<sup>272</sup> Among other things, the city's new judicial structure resurrected the question *Washabaugh* left open—whether the in banc rule applies to Baltimore City—because the elimination of the Supreme Bench arguably left some need for in banc review in the city. The Maryland Rules Committee was aware of the issue but apparently thought it would be better resolved by case law than by rule.<sup>273</sup> But that seems unlikely. The Court of Appeals is going to have trouble interpreting section 22 to apply to Baltimore City if it uses any sort of originalist analysis, because it seems quite clear that the delegates never intended that it would apply there. As a practical matter, however, it seems unlikely that the court would decide that the Rule does not apply to the city: for one thing, in banc reviews *are* occurring in Baltimore City,<sup>274</sup> and for another, explicitly making the Rule inapplicable might revive the equal protection argument, because one of the two rational bases cited in *Washabaugh* disappeared with the reconstitution of the city's court system. In the end, then, if the Court of Appeals finds a need to declare that in banc practice applies to Baltimore City, it may be best for it to amend rule 2-551 rather than to make a pronouncement from the bench. Proceeding by rule would allow the court to rely on the same logic the majority relied on in *McNeece*—section 22 contemplates its own amendment by law, and the Court of Appeals has constitutional authority to promulgate court rules; therefore a Court of Appeals rule that alters section 22 may be constitutional. Whether this logic itself is constitutional is, of course, another question.

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270. *Id.* at 409, 404 A.2d at 1036.

271. *Id.* at 410, 404 A.2d at 1036.

272. MD. CONST. art. IV, §§ 27-39, *repealed by* Act of May 20, 1980, ch. 523, 1980 Md. Laws 1869.

273. See MARYLAND RULES COMMITTEE, MINUTES OF THE MEETING OF THE RULES COMMITTEE 9 (Nov. 20-21, 1981) (comments of Judge McAuliffe).

274. See, e.g., *Dabrowski v. Dondalski*, 320 Md. 392, 578 A.2d 211 (1990) (*per curiam*).

## CONCLUSION

The misunderstanding of section 22 is due not only to the framers' failure to keep a journal of their proceedings, but also to the scarcity of early appellate decisions interpreting the section. The Court of Appeals' erroneous interpretations—if indeed they are erroneous—show that the interstitial method of constitutional development creates problems when the interstices become too long. By the time the Court of Appeals had occasion to interpret section 22 substantively, most of the framers were dead, and they left behind little record of their intent. Hence it is hard to blame the Court of Appeals for veering off course with respect to the purpose of section 22.

Interestingly, the question of the Court of Appeals' power to change section 22 affects more than just the necessity of taking formal exceptions in order to secure in banc review. In fact, it threatens to render moot one of the premises of this Comment: that the Court of Appeals has eviscerated useful in banc practice in part because it has ignored the original intent of section 22. After all, if the court can change the terms of section 22 by using its rulemaking authority, who cares about the original intent of that section?

On the other hand, that conclusion bolsters a second premise of this Comment: that the Court of Appeals should give some teeth to in banc practice by allowing in banc panels to perform certain interlocutory reviews,<sup>275</sup> or by disallowing certain interlocutory reviews *from* in banc panels,<sup>276</sup> or by expanding the in banc panel's jurisdiction.<sup>277</sup> If the Court of Appeals' rulemaking power allows it to change the terms of section 22, then the same question applies: Who cares whether these suggestions comport with the original intent of section 22?

It would be ironic if the court were to invoke its rulemaking authority and Hayden's amendment both to justify its own departures from the original intent of section 22, and also to undo some of those changes in order to return in banc practice to something both more practical and more attuned to the original wishes of Messrs. Alvey, Syester, and Hayden. Unless it does, however, the in banc rule will continue to be a reminder that in fact, on July 22,

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275. See *supra* Subpart III.C.

276. See *supra* Subpart III.B.

277. See *supra* Subpart III.D.



1867, there was no important action upon the provisions of the Maryland judiciary.

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