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I. INTRODUCTION

The constitutional amendment of article V, section three (effective January 1, 1972), reduced the categories of cases which must be appealed directly to the Missouri Supreme Court:

> The supreme court shall have exclusive appellate jurisdiction in all cases involving the construction of the Constitution of the United States or of the state, the validity of a treaty or statute of the United States, or any authority exercised under the laws of the United States, the construction of the revenue laws, the title to any office under this state, in all appeals involving offenses punishable by a sentence of death or life imprisonment, in other classes of cases provided by supreme court rule unless otherwise changed by law. The court of appeals shall have general appellate jurisdiction in all cases except those within the exclusive jurisdiction of the supreme court.

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** The metaphor in the title derives from the often not-so-affectionate reference to the student symposium project of which the writer was editor, *The Allocation of Original Appellate Jurisdiction in Missouri*, 1964 WASH. U.L.Q. 420-738 [hereinafter cited as *Symposium*], which collected most of the opinions relating to exclusive appellate jurisdiction reported for the years 1875 through 1964. We were relieved of the "albatross" by publication, but the Missouri appellate courts have not been so fortunate. The purposes of the project were to: (1) "[R]eflect the complexity and unworkability of the case law and thereby indicate the need for fundamental changes," and (2) "[S]erve as an aid to judges and lawyers who are researching the case law to decide jurisdictional questions." *Symposium*, at 441. The frequent citation of the symposium by the Missouri appellate courts and the amendment to MO. CONST. art. V, § 3, are some evidence that it accomplished its goal.

Pierce Hasler, who authored the scholarly Chapter 9 and overshadowed all others in the symposium's preparation, was responsible for the "albatross" label of Missouri appellate jurisdiction. Judge Clem Storckman, who encouraged and inspired our efforts, would have thought it apt. *See, e.g.*, Feste v. Newman, 368 S.W.2d 713, 719 (Mo. En Banc 1963); State v. Harris, 321 S.W.2d 468 (Mo. En Banc 1959). Regrettably, untimely deaths deprived the legal profession of further fruits of their labor.

Many have hailed the change as a significant part of an improved appellate court system.[1] The purpose of the amendment of section three and other parts of article V was to enhance the prestige of the supreme court and make it "truly a court of the last resort, concentrating on the decision of important cases" and "achieving uniformity in judicial interpretation throughout the state."[2] Unfortunately, the surgery performed on article V, section three, has not eliminated the problems inherent in a system of "by-pass" appellate jurisdiction based on prospectively-defined categories. Although reduction of the number of categories of exclusive supreme court appellate jurisdiction has decreased the number of appeals the court must decide on the merits, the retention of some assures the Missouri appellate courts of more confrontations with the task of line-drawing in defining the limits of their respective jurisdiction. The category that continues to be troublesome and accounts for a large portion of the supreme court's workload[3] is "all cases involving the construction of the Constitution of the United States or of the state."[4] Constitutional question appellate jurisdiction arises in more cases now than before the amendment because felony cases which previously were directly appealable as a class are now appealable, if at all, under allegations of constitutional error.[5]

Since the raison d'etre of a constitution is its function as the ultimate source of, and restraint on, the exercise of governmental power,[6] any case in which the propriety of governmental action is challenged could con-

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1. *SJR 16: A First Step Toward Judicial Reform*, 26 J. Mo. B. 341 (1970). *See* Garrett v. State, 481 S.W.2d 225, 227 (Mo. En Banc 1972) (Finch, C. J., concurring). For opinions that problems still remain, *see* Neidhart v. Areaco Inv. Co., 499 S.W.2d 929, 930 (Mo. 1973); Blackmar, *Judicial Article for the Voters*, 25 J. Mo. B. 476, 479-80 (1969).

2. Garrett v. State, 481 S.W.2d 225, 229 (Mo. En Banc 1972) (Finch, C. J., concurring).

The dissection of the real estate, felony, and amount in dispute categories has eliminated wasted hours spent in hearing insignificant and routine cases that are clearly within the categories or in deciding whether other cases are within those categories. *Foreword* to *Symposium*, *supra* ** at 421-23; Blackmar, *Missouri Appellate System—Is It Adequate for the 21st Century?*, 24 J. Mo. B. 380, 381-82 (1968).

3. *See generally Symposium*, *supra* ** at 432-500.

4. Neidhart v. Areaco Inv. Co., 499 S.W.2d 929, 931 (Mo. En Banc 1973) (Finch, J., concurring); *see also* Finch, *The State of the Judiciary in Missouri*, 27 J. Mo. B. 514 (1971). The term "constitutional question" is used herein as a shorthand reference to questions "involving a construction of the constitution." The categories other than constitutional question provide the potential for supreme court jurisdiction in a smaller number of cases because they are by their terms limited to special classes; they have been restricted even further by the supreme court. Nevertheless, even these categories pose a threat to what the Missouri Supreme Court obviously views as its primary functions.

5. Neidhart v. Areaco Inv. Co., 499 S.W.2d 929, 931 (Mo. En Banc 1973) (Finch, J., concurring); *see* Jenner & Tone, *Historical and Practice Notes*, in ILL. ANN. ch. 110A, § 302 (1968) at 483.

6. M. FORKOSCH, CONSTITUTIONAL LAW 7-9, 26-28 (1963).

ceivably involve a question of constitutional construction. But under the Missouri Supreme Court's interpretation of its constitutional mandate, the mere implication of a constitutional provision in the proceedings and judgment of the trial court, while a *sine qua non* of constitutional question jurisdiction, is not in itself sufficient. The presence or intimation of the constitutional question must meet the restrictive tests developed in a long line of Missouri appellate court cases that have grappled with the problem. Notwithstanding the apparent lack of discretion, these courts have found considerable leeway to adopt tests and rules that severely limit supreme court jurisdiction. They have been hampered only by the necessity of rationalizing those tests under the vague rubric of article V, section three. The twisting and pulling of the terminology involved in the rationalization process has made the literal language of the constitutional mandate useless as a guide for decision and has left the outlines of constitutional question appellate jurisdiction unclear.

II. The Jurisdictional Equation: Basic Concepts

The Missouri Supreme Court has derived its tests of constitutional question appellate jurisdiction from a technical interpretation of "all cases involving the construction of the Constitution." It has seized on the concepts of "involving" and "construction" as the focal points of its jurisdictional analysis. In the first step, the Missouri Supreme Court has focused on the concept of a *dispute* to limit its jurisdiction. To be "involved" in a case, constitutional construction must be in "dispute," *i.e.*, preserved on appeal.[7] Thus, in this first stage of the analysis, referred to herein as the preservation formula, the court determines if the parties are disputing the effect or result of an application of constitutional language. If reference to a constitutional provision is required to resolve the issue, they are in dispute, and the court moves to the second step, the *construction formula.*

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7. It is not surprising that the notion of dispute is a magnetic point of the courts' inquiry into jurisdiction as it is fundamental to any litigation, civil or criminal. The parties to a lawsuit bring a controversy into court because it cannot be settled out of court.

> [I]n deciding a case a court may announce general principles which will guide other people later involved in similar controversies. . . . This constant resort to precedent tends, however, to becloud the proposition that the essential purpose of a lawsuit is to decide a flesh-and-blood dispute between flesh-and-blood people, and, where possible to settle it once and for all.

R. Field & B. Kaplan, Materials for a Basic Course in Civil Procedure 1-2 (2d Ed. 1968). In the lawsuit, the real dispute must be identified so that the parties will be confined to presentation of relevant material and the controversy may be settled as fairly and expeditiously as possible. This narrowing to the questions actually disputed is the function of rules of procedure, which deal with the mechanics of litigation and the technical form in which the parties must present claims and contentions to the court if they are to be ruled on. Because the focus of the jurisdictional rules is the identification of genuinely disputable constitutional claims on appeal, these rules have a distinctly procedural (and even technical) flavor.

> The concept of "construction" has been defined as
> determining the meaning and proper effect of language by a consideration of the subject-matter and attendant circumstances in connection with the words employed. In other words, it does not stop with interpretation, but applies the language as interpreted to both the subject-matter and the attendant circumstances.[8]

Thus, constitutional construction is viewed as including two basic components: (1) Interpretation—determining the *meaning* of constitutional language; and (2) Application—deciding the effect of the language *as interpreted* by applying it to the facts of the case.[9] The "construction" step thus requires that the claim at issue be characterized as requiring a resolution of a disputed (and disputable) *meaning* of constitutional language.

This two-step process is only formally descriptive of the Missouri appellate courts' approach to the constitutional question jurisdiction issue. Although superficially distinct, the two steps often merge when the courts characterize the claims of the parties to determine whether a constitutional construction question is in the appeal. Moreover, the rationale of the courts' jurisdictional decision is often not completely articulated.

III. The Preservation Formula

Perhaps the most significant opinion in the modern history of Missouri constitutional question appellate jurisdiction is *City of St. Louis v. Butler Co.*[10] *Butler* provides a useful starting point for consideration of the troublesome problems a court encounters in applying the preservation formula, which has been defined as follows:

> To raise and preserve a federal or state constitutional question for appellate review the question must (1) be raised at the first available opportunity (or ruled on by the trial court), (2) the section or sections of the constitution claimed to be violated must be specified, (3) the question must be kept alive at every stage of the proceeding, (4) the question must be presented in a motion for new trial and (5) it must be adequately covered in the briefs.[11]

In *Butler,* the city appealed from a judgment dismissing its actions to condemn land for an allegedly public street. It had acted on an ordinance reciting that defendant asphalt company's property was being condemned pursuant to the city charter, which authorized condemnation by the city of

8. Dorrance v. Dorrance, 242 Mo. 625, 644, 148 S.W. 94, 98 (En Banc 1912).

9. The distinction is criticized in *Symposium, supra* ** at 442-43.

10. 358 Mo. 1221, 219 S.W.2d 372 (En Banc 1949).

11. Kansas City v. Howe, 416 S.W.2d 683, 686-87 (K.C. Mo. App. 1967) (language in parenthetical added). *Accord,* St. Louis Teachers Ass'n v. Board of Educ., 456 S.W.2d 16, 18 (Mo. 1970); Kelch v. Kelch, 450 S.W.2d 202, 204 (Mo. 1970); Missouri Util. Co. v. Scott-New Madrid-Miss. Elec. Cooperative, 450 S.W.2d 182, 185 (Mo. 1970); Kansas City v. Miller, 463 S.W.2d 565, 566 (K.C. Mo. App. 1971); State v. Brown, 446 S.W.2d 498, 499 (St. L. Mo. App. 1969).

property for a "public use." The defendant's answer and motion to dismiss did not expressly contend that the charter or ordinance was unconstitutional. Instead, it contended that the land was not subject to condemnation because the proposed street was a cul-de-sac solely for private use and that an attempted condemnation would violate "its constitutional rights under the Constitution of the United States and the State of Missouri" and the city charter. The trial court sustained the motion to dismiss without stating its reasons. The city's motion for new trial, contending that the cul-de-sac was a public highway for a public use, was denied. The city appealed, but not until it filed a supplemental brief with the supreme court en banc did it attempt to specify any applicable provision of the state or federal constitution.[12]

The majority of the supreme court concluded that the requirements for raising and preserving a live constitutional question on appeal had not been met; the trial record did not reveal that a constitutional question had either been raised by the parties or decided by the trial judge. Perhaps the majority recognized the technical nature of its holding that the issue of "public use" did not present a constitutional question, particularly since phrases such as "double jeopardy," "due process," and "interstate commerce" had previously been held to be sufficient designations of constitutional provisions.[13] Whatever the reason, the majority filed a lengthy opinion in which it attempted to justify its conclusion that a constitutional question supporting the supreme court's assumption of jurisdiction had not been preserved.

A. *Avoidability (the ruled-on requirement)*

The opinion in *Butler* stated:

> We are unwilling to say that merely because the case involves a question of eminent domain we should treat these vague references to the Constitution as referring to Sec.'s 26 and 28, Art. I, Const. 1945, on the same subject—*especially since the trial court's order did not state whether it was ruling on the constitutional question or not.* We think we should not depart from the practice now in force. Its purpose has not been alone to insure that we *understand* the exact constitutional question presented. A further purpose has been to prevent "afterthoughts" on appeal—the raising of new issues which had not been presented below on questions of such dignity and importance.[14]

Cases involving situations in which constitutional and nonconstitutional bases for relief are both possible have caused difficulty for the Missouri

12. The parties apparently had assumed that the supreme court had jurisdiction, until doubt was expressed when the case was first heard on appeal by division two of the supreme court. The constitutional provision finally specified was article 1, section 28, which prohibits condemnation for a "private use". (MO. CONST. art. 1, § 26, authorizes condemnation for "public use".)

13. *See Symposium, supra* ** at 457-58. *See also* St. Louis v. Butler Co., 358 Mo. 1221, 1227, 219 S.W.2d 372, 376 (En Banc 1949).

14. 358 Mo. at 1227-28, 219 S.W.2d at 376 (emphasis added).

appellate courts. In many cases, the record will reflect that the trial court decided the case on a nonconstitutional ground. A party may still argue the constitutional ground raised but not ruled on in the trial court as an alternative basis for relief on appeal. The supreme court has previously denied appellate jurisdiction in these cases by literal application of the ruled-on requirement.[15] The court also has refused to take jurisdiction of cases in which the judgment of the trial court does not reflect which of the alternative issues presented in the trial court entered into the judgment, *i.e.*, whether the constitutional issue was decided by the trial court.[16] This situation normally arises when a cause of action or defense is based on a statute or ordinance. One of the parties will contend that the legislative provisions, if interpreted properly, entitle it to a decision, and in the alternative, that the provision is unconstitutional. This is the so-called "avoidability" concept: "When the record does not indicate which issue was decided, the appellate courts will infer that the constitutional issuse has been avoided."[17]

The difficulty the alternative constitutional contention can cause is illustrated by *Cohen v. Ennis*.[18] This case was appealed to the supreme court, which ordered a transfer to the court of appeals, holding that the issue presented was whether a decision of the Board of Zoning Adjustment was supported by competent and substantial evidence and by necessary findings of fact. In the transferring opinion,[19] the court stated that a constitutional question was not involved even though appellant had contended that the Board's order violated due process. The Kansas City Court of Appeals, after transfer,[20] decided there was no competent and substantial evidence in the record to support the Board's order. But, it also decided that it could not simply reverse and remand the case because of the respondent's alternative contention that a statute made the Board decision final when the appellant did not appeal within 30 days. The appellants contended that this statute, so construed, was unconstitutional. Because the court of appeal's decision for appellant on the issue of the merits of the Board order brought the court to the question of the constitutionality of the statute, a question it had no constitutional authority to decide, the court retransferred the case to the supreme court, which finally decided the case.[21]

State ex rel. State Highway Comm'n v. Wiggins,[22] seems to have eliminated the anomaly posed by the *Cohen*-type cases. There, the State Highway

15. *See, e.g.*, Cox Chapel School Dist. No. 4 v. Atchison County Sup't of Schools, 426 S.W.2d 913 (Mo. 1967); *Symposium, supra* °° at 462.
16. *See, e.g.*, Kersting v. Ferguson, 388 S.W.2d 794 (Mo. 1965); *Symposium, supra* °° at 462-63.
17. *Symposium, supra* °° at 462.
18. 308 S.W.2d 669, *trans'd*, 314 S.W.2d 239 (K.C. Mo. App.), *retrans'd*, 318 S.W.2d 310 (Mo. En Banc 1958).
19. 308 S.W.2d 669 (Mo. 1958).
20. 314 S.W.2d 239 (K.C. Mo. App. 1958).
21. 318 S.W.2d 310 (Mo. En Banc 1958).
22. 454 S.W.2d 899 (Mo. En Banc 1970).

Commission brought suit to enjoin the allegedly unlawful operation of a junk yard. The operators defended on the ground that the junk yard statute did not apply to them, and that if it did, they were within its Grandfather clause. Finally, they argued that in any event the statute was unconstitutional. The trial court found "the issues against the Highway Commission and in favor" of the defendants and decreed the "petition for injunction be denied and dismissed." Both parties apparently contended that appellate jurisdiction was in the supreme court. The appellant Highway Commission's theory was that the trial court's finding of "the issues" in favor of the respondents constituted a sustaining of respondents' contention that the statutory provisions were unconstitutional. (The respondents had briefed the constitutional issues.)

In its majority opinion, the supreme court sustained jurisdiction:

> As a general rule, in the absence of evidence to the contrary, a general judgment for one party involves a finding in that party's favor on all issues before the court. 49 C.J.S. Judgments § 441. The issue of the constitutionality of §§ 226.650-226.720 was before the circuit court, and we necessarily conclude that the trial court held adversely to appellant on that issue. It may be that this appeal can be decided without reaching the constitutional issue, but jurisdiction once acquired is not lost because the appeal may be disposed of on other grounds.[23]

The court indicated that the result was justified because of the practical problems which could result if the supreme court held that jurisdiction was lacking. If the case were transferred to the court of appeals and affirmed because that court agreed with the respondents' nonconstitutional defense, it would be disposed of. But if the court of appeals rejected the respondents' nonconstitutional argument, the issue of constitutionality of the statutes, which the court of appeals could not decide, could not be avoided. In that event, the court of appeals would have to transfer the case back to the supreme court, as was required in *Cohen.*

Wiggins is based on an assumption, not made in earlier jurisdiction decisions, that a general judgment is presumed to have been based on a ruling of all issues properly before the court in favor of the party obtaining judgment. The only authority the court cited for this proposition is *Corpus Juris Secundum.* In prior decisions, the court had indulged in the fiction that the trial court had decided the case on a nonconstitutional ground if the record did not state otherwise. The court announced this fiction, sometimes referred to as the "avoidability" concept, as the law as late as 1965 in *Kersting v. City of Ferguson:*[24]

> In a case such as this where a motion to dismiss raises issues both constitutional . . . and nonconstitutional . . . and the record does not indicate which issue was decided, it will be deemed that the trial court ruled the case on applicable nonconstitutional grounds

23. *Id.* at 901-02.
24. 388 S.W.2d 794 (Mo. 1965).

> and that the constitutional grounds were *avoided* in the trial court and are therefore not in the case on appeal.[25]

The majority opinion in *Wiggins* did not mention either the *Kersting* or *Butler* opinions, nor the "avoidability" notion for which they stand. But the terse dissenting opinion did.

> There is nothing in the record to affirmatively indicate that the trial court ruled the constitutional question raised in respondent's answer. Therefore, I respectfully dissent because I do not believe this Court has jurisdiction of this appeal. [Citation to *Kersting* and *Butler* cases.][26]

Judge Finch, who wrote a separate concurring opinion,[27] also perceived the inconsistency between the majority's decision and the requirement of previous cases that a decision by the trial court on the constitutional issue affirmatively appear in the record. He did not agree with the majority's decision to replace one fictional presumption, the "avoidability" concept, with another to the opposite effect that, in cases of doubt, a properly raised constitutional issue would be presumed to have been decided. To Judge Finch, the existence of a constitutional issue in the case, and thus supreme court jurisdiction, was "due to the fact that the defendants pleaded the issue" and "perserved it at every available opportunity,"[28] not that it had been (or could be assumed to have been) ruled on. He concluded that the ruled-on requirement should not be absolute, and "that any prior decisions inconsistent with such a conclusion no longer should be followed."[29]

All the judges who concurred in the majority opinion also concurred in Judge Finch's separate opinion,[30] notwithstanding the apparent conflict in rationale. This concurrence is important because Judge Finch's reasoning, unlike that of the majority en banc opinion, would support supreme court jurisdiction even when the trial court clearly had *not* decided the constitutional issue, if the issue had been properly raised and preserved. That this was the thrust of Judge Finch's opinion is indicated in *Kansas City v. Graybar Electric Co.*,[31] a case decided by division two while the *Wiggins* appeal was pending.

In *Graybar*, the city brought an action based on city ordinances against a local merchant to collect an occupation license tax on the merchant's gross receipts from sales of merchandise outside the city. Defendant asserted that the ordinances did not contemplate a tax on shipments outside the city, and

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25. *Id.* at 796.
26. State *ex rel.* State Highway Comm'n v. Wiggins, 454 S.W.2d 899, 908 (Mo. En Banc 1970) (dissenting opinion).
27. *Id.* at 905 (concurring opinion).
28. *Id.* at 908.
29. *Id.* at 907.
30. The opinion of Commissioner Stockard, adopted as the opinion of the court en banc, had been written in division two. Judge Finch's concurring opinion was not officially adopted as part of the banc opinion but presumably is entitled to the same weight.
31. 454 S.W.2d 23 (Mo. 1970).

that they were unconstitutional if they did. After the trial court entered judgment for defendant, the city appealed to the supreme court, alleging that the court had jurisdiction because defendant's "constitutional defense once raised and pursued cannot be waived"[32] and was in the case on appeal. Division two of the Missouri Supreme Court disagreed and transferred the case to the court of appeals. The basis of the majority opinion apparently was that an examination of the trial court's findings of fact, conclusions of law and judgment revealed that the trial court had *not* ruled on the constitutional issue, but had ruled against the city solely on the basis of "lack of intention on the part of the City to tax sales outside of its territorial limits."[33] Commissioner [now Judge] Pritchard's majority opinion, however, was not based solely on a finding that the constitutional issue had not been decided. He stated further that "Graybar here, although not the appealing party, has not attempted to preserve any constitutional question presented in the trial court *in the event it does not prevail on the merits.*"[34] This suggests that the constitutional issue could have been preserved, notwithstanding the absence of a decision of that issue by the trial court. It was on this explicit understanding that Judge Finch concurred with the majority.[35] He agreed that the constitutionality of the ordinances had neither been decided nor alleged as an alternative basis for relief on appeal. However, he disagreed with certain "statements" in the majority opinion that he expected the then-pending *Wiggins* appeal to resolve. The statements were:

> 1. In order for this court to have appellate jurisdiction based upon the existence of a constitutional question, it must appear that the trial court considered and passed on same.
> 2. It is only when a constitutional question has been properly raised, and passed upon by the trial court, and ruled adversely to the party appealing, that this court acquires jurisdiction upon account of such constitutional question being involved [citation omitted].[36]

Taken literally, these statements mean that the court has no appellate jurisdiction when 1) the trial court did not rule on the constitutional issue, or 2) even if it did, it ruled the issue for the party appealing. After *Wiggins,*

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32. *Id.* at 25.

33. *Id.* at 26. After the case was transferred to the Kansas City Court of Appeals, it was affirmed and retransferred to the supreme court under the authority of article V, section ten, of the Missouri Constitution, because of the general interest and importance of the question involved. Kansas City v. Graybar Elec. Co., 485 S.W.2d 38 (Mo. En Banc 1972). Referring in its decision to the earlier decision to transfer for want of direct appeal jurisdiction, the supreme court said that "the issue involved was as to the correctness of the interpretation by the trial court of the coverage of the ordinance." *Id.* at 39.

34. Kansas City v. Graybar Elec. Co., 454 S.W.2d 23, 25-26 (Mo. 1970). Thus it appears that Commissioner Pritchard had receded from his earlier position, reflected in his opinion in Kersting v. Ferguson, 388 S.W.2d 794, 796 (Mo. 1965), that the "ruled-on" requirement was absolute.

35. Kansas City v. Graybar Elec. Co., 454 S.W.2d 23, 26-27 (Mo. 1970).

36. *Id.* at 25.

it seems that neither proposition is accurate as a rule of general application, if either ever were.[37]

The courts view the "raised" and "ruled-on" requirements as mutually exclusive; either, if satisfied, may support a conclusion that the issue is disputed at the trial level. Thus, appellate courts usually will consider what the trial court refused to do at the request of a party as well as what it did over his objection.[38] And, although a constitutional question cannot properly be ruled on unless raised, a trial judge might inject such an issue on his own motion.[39] In many cases, parties raise issues without them being ruled on because the trial court disposes of the case on the alternative nonconstitutional ground. In either case, the supreme court may have jurisdiction if the question is disputed on appeal, whether or not it will ultimately enter into the decision on appeal.[40] An exception would be the situation in which the court disposes of the case at the trial level on a procedural ground prior to hearing on the merits.[41] In such a case the trial court may not have been able to pass on the question even if it had wanted. Hence, there is jusification for holding that a constitutional question is not involved on appeal. Therefore, if the trial judge is reversed on the nonconstitutional ground, the appellate court cannot reach the constitutional question and must remand the case to give the parties a chance to develop a record on the constitutional issue.[42]

The statement that the supreme court will not have jurisdiction because the trial court has not considered and passed on the question "adversely to the party appealing"also is not accurate. The constitutional issue may be in the case on appeal even if it was not decided or was decided in favor of the

37. The language in the cases is confusing. *Compare* St. Louis Teachers Ass'n v. Board of Educ., 456 S.W.2d 16, 17-18 (Mo. 1970) ("whether this point was considered *and* ruled by it or not"); State *ex rel.* Beeler v. City of Raytown, 439 S.W.2d 481, 482 (Mo. 1969) ("no pleading before the trial court . . . *and* the trial judge did not by its judgment purport to rule any constitutional question"); Cox Chapel School Dist. No. 4 v. Atchison County Sup't of Schools, 426 S.W.2d 913, 915 (Mo. 1967) ("trial court must have considered *and* passed upon a constitutional question"), *with* Missouri Util. Co. v. Scott-New Madrid-Miss. Elec. Cooperative, 450 S.W.2d 182, 185 (Mo. 1970) ("constitutional question was raised in *or* considered by the trial court"); Georg v. Koenig, 370 S.W.2d 356, 358 (Mo. 1963) ("presented to *or* decided by the trial court") (emphases added).

38. *See* Mo. Sup. Ct. R. 79.03. Of course, the appellate court has discretionary authority to review "plain errors affecting substantial rights" not raised in the trial court or preserved for review if the court decides that they would cause "manifest injustice or miscarriage of justice." Mo. Sup. Ct. R. 79.04.

39. *See, e.g.*, Kansas City v. Hammer, 347 S.W.2d 865 (Mo. 1961).

40. Pearson v. City of Washington, 439 S.W.2d 756, 758 (Mo. 1969) and cases cited therein.

41. In these cases, the party seeking relief on constitutional and nonconstitutional grounds may have his petition dismissed because of failure to state a cause of action, lack of a justiciable controversy, lack of a remedy, or other procedural ground.*See, e.g.*, Henkel v. Pevely, 488 S.W.2d 949 (Mo. App., D. St. L. 1972).

42. Otherwise, the opinion of the appellate court would be merely advisory. Clay & Bailey Mfg. Co. v. Anderson, 344 S.W.2d 46 (Mo. 1961); *see* Sta-Whip Sales Co. v. St. Louis, 307 S.W.2d 495 (Mo. 1957).

appealing party. The appellant obviously cannot base its appeal on an issue that was not in fact decided adversely to it. The appealing party may, however, keep the constitutional issue alive on appeal by briefing and arguing it as an alternative disposition if the court affirms on the nonconstitutional ground.[43] Likewise, the nonappealing party also may keep the issue in the case on appeal by presenting it to the appeals court as a basis for affirming the judgment in the event the court reverses the trial court's decision of the nonconstitutional issue.[44] Of course, if neither party argues the constitutional issue on appeal, it cannot be reached by the appeals court nor provide a basis for appellate jurisdiction.[45]

B. *The Indirect Challenge of the Constitutionality of a Statute*

> The court in *Butler* makes this statement in support of its holding: Furthermore, respondent cannot validly make the contention that *if* the Charter means a cul-de-sac can be condemned, *then* it is unconstitutional. On the contrary, respondent's position must be that the Charter "is unconstitutional whatever it means and under any construction of which it is susceptible."[46]

Numerous cases before and since *Butler* have stated that for a challenge to a statute to vest jurisdiction in the supreme court it must be direct and must involve a contention that the statute is unconstitutional in any event.[47] The

43. *See* Kansas City v. Graybar Elec. Co., 454 S.W.2d 23 (Mo. 1970), discussed in text accompanying notes 35-36 *supra.*

44. Pearson v. City of Washington, 439 S.W.2d 756 (Mo. 1969). In *Pearson* the defendants appealed from a judgment holding a city ordinance invalid because it conflicted with state statutes. The plaintiffs had pleaded at trial, and argued in their brief on appeal, that the ordinance also was unconstitutional. The Missouri Supreme Court held that because the alternative issue "would require adjudication if a reviewing court ruled that the ordinance did not violate the statutes," it had jurisdiction. *Id.* at 758.

45. *See* Gavosto v. Normandy, 442 S.W.2d 533 (Mo. 1969). Plaintiffs had attacked a zoning ordinance in a declaratory judgment action, and on plaintiff's appeal the supreme court found "that the constitutional issue was presented and was ruled favorably to plaintiffs." *Id.* at 534. "In such case there is no constitutional question before this court, defendants not having filed a cross-appeal raising this issue." *Id.* In other words, the parties on appeal did not dispute the trial court's decision on the constitutional issue. This is consistent with the *Wiggins-Graybar* rationale. Not consistent is the court's statement that to invoke supreme court jurisdiction on the basis of constitutional construction the party must show "some constitutional right which was denied him or that a constitutional question was ruled to his disadvantage . . . ."

46. St. Louis v. Butler Co., 358 Mo. 1221, 1231-32, 219 S.W.2d 372, 379-80 (En Banc 1949).

47. *See* Community Fire Protection Dist. v. Board of Educ., 312 S.W.2d 75, 77 (Mo. 1958) and cases cited therein. *See, e.g.,* Nickell v. Kansas City St. L. & C. R.R., 326 Mo. 338, 32 S.W.2d 79 (1931):

> [T]he position of defendant is that the courts may erroneously construe the statute to hold that the defendant . . . is liable for the acts of the receivers, and if it does so, the statute is invalid, but this does not constitute an averment that the statute is inherently and totally invalid.

Id. at 341, 32 S.W.2d at 81.

cases have apparently made a distinction between these two challenges: (1) that the act was authorized by the statute, but it was improper because the statute is unconstitutional; and (2) that the act was not authorized by the statute, but to hold that it was makes the statute unconstitutional as applied. The first kind of challenge could be characterized as a claim of facial voidness; its application to the particular facts of the case is unimportant. The second is a claim of unconstitutionality of the statute as applied. Very few statutes are constitutionally void on their face, *i.e.*, plainly authorize unconstitutional activity or plainly were enacted in excess of constitutional authority. But neither is a statute "constitutional on its face" if that expression means that any action now or later thought to fall within the terms of the statute is *ipso facto* within constitutional limits.[48] However, if the statements, so often repeated, to the effect that the challenge must be direct and involve a contention that the statute is invalid in any event are taken literally, the supreme court would have jurisdiction of only those cases challenging the statute as void on its face.

Cotton v. Iowa Mutual Liability Ins. Co.[49] is an example of the so-called conditional and indirect challenge (unconstitutional as applied). It involved a declaratory judgment action against defendant insurer and its insured, to obtain a declaration that if the automobile collision was later established to be the result of insured's negligence the policy issued by the insured covered plaintiff's injury. A statute exempted members of the Reserve Military Force from liability for injury to persons or property damage of action "while engaged in and pursuant to the performance of lawfully ordered duties as members of the Reserve Military Force." Plaintiff denied that insured was relieved of liability by the statute. He also alleged that "if" said statute "attempts, by its terms, to relieve" insured from negligence it was void and unconstitutional.[50] The trial court held that insured was not exempted by the statute and that "insofar as said statute purports to exempt said defendant from legal and civil liability for negligence . . . said statute is unconstitutional."[51] The supreme court denied jurisdiction of defendant's appeal. The apparent basis was that a contention that a statute, if interpreted in a certain way, is unconstitutional, is a conditional and not a direct attack on the statute. The court could have explained the result more satisfactorily by stating that the trial court simply construed the statute to save its constitutionality. This is implied in the opinion:

> In no event could said statute have the effect of making defendant [insured] immune to civil liability for negligence in the circumstances here involved, since such construction would cause said statute to contravene State and Federal constitutional provisions; that is, that properly construed the statute is constitutional or,

48. Sibron v. New York, 392 U.S. 40, 71 (1968) (Harlan, J., concurring).
49. 363 Mo. 400, 251 S.W.2d 246 (1952).
50. *Id.* at 403, 251 S.W.2d at 248.
51. *Id.* at 403-04, 251 S.W.2d at 248.

further, is subject to a construction preserving its constitutionality.[52] The trial court purported to rule on the constitutionality of the statute, but, in effect, merely adopted a constitutional interpretation.[53]

The holdings in the cases announcing the necessity of alleging the "general unconstitutionality" or the "unconstitutionality of the act in any event" are consistent with the court's approach to jurisdiction. This language is misleading. In zoning cases, for example, in which it is alleged that the trial court's interpretation results in taking of property without due process. Although supreme court jurisdiction has been denied on occasion because the general constitutionality of a zoning ordinance is not challenged,[54] the real basis for decision is found in the following language:

> [I]f the evidence shows appellants have been deprived of constitutionally protected rights, they may have those rights protected. It may be that appellants will be able to convince an appellate court that had the trial court properly applied undisputed constitutional provisions, the application for the permit should have been denied; but applying established constitutional principles does not involve the *construction* of either constitution.[55]

That the constitutional question is raised as an alternative "if" contention, and hence is not a direct challenge to the constitutionality of a statute, is no longer enough in itself to deny supreme court jurisdiction. The effect of *State ex rel. State Highway Comm'n v. Wiggins*[56] is to eliminate for jurisdiction purposes any distinction between a direct and indirect constitutional attack on a statute. An argument for what is contended to be a constitutional interpretation of a statute coupled with a claim that any other interpretation is unconstitutional may vest jurisdiction in the supreme court.[57]

C. *The Inherency Doctrine*

Courts frequently cite the *Butler* decision for its holding concerning the so-called "inherency" doctrine. This doctrine allowed a defectively raised or preserved constitutional question to vest appellate jurisdiction in the Missouri Supreme Court when "the decision of the constitutional question [was] *essential* to the determination of a cause, or when there was a single issue," so that it could be "*assumed* that the trial court [passed] on

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52. *Id.* at 405, 251 S.W.2d at 250.

53. Hence, the trial court did not actually rule on the constitutionality of the statute. Moreover, since the court also indicated that the issue of constitutionality had not been properly raised (at the earliest opportunity), it could have denied jurisdiction for noncompliance with the preservation formula.

54. *See* Bartholomew v. Board of Zoning Adjustment, 307 S.W.2d 730, 732 (K.C. Mo. App. 1957) and cases cited therein.

55. Dunbar v. Board of Zoning Adjustment, 380 S.W.2d 442, 444 (Mo. 1964). *See generally* the discussion of the construction formula in zoning cases note 69 *infra*.

56. 454 S.W.2d 899 (Mo. En Banc 1970).

57. Of course, application of the construction formula may still yield a conclusion that the question, although in the case, does not involve a "construction of the constitution." *See* Pt. IV of this article.

it."[58] In the context of *Butler*, this would mean that because the only issue was whether land was being taken for a "public use," the standard used in both the state and federal constitutions, the trial court must have decided the case by reference to either or both constitutions. The court's holding that the requirements for raising and preserving a constitutional question are absolute *a fortiori* eliminated the inherency doctrine because it was nothing more than an exception to the preservation formula. But the court went on to expressly hold the inherency exception unconstitutional, saying that it had "erred in preserving for forty years (nearly) the fiction of an appellate jurisdiction based on an inherent constitutional question not raised below, without applying it in a single case."[59] No longer would it "assume a fact which the record shows is not a fact, or even fails to show is a fact" regardless of "whether there was only one or more than one issue below."[60] The court suggests it was merely overruling a seldom applied fictional doctrine.[61]

The court's action in requiring compliance with the preservation formula appears to be merely a routine and logical extension of the normal rule that an appellate court may consider only those points sufficiently preserved for review.[62] But the court's action was far more significant than might appear at first glance. It discussed extensively why the "public use" issue was not necessarily a constitutional question. The court articulated, perhaps inadvertently, a rationale for characterizing some issues with constitutional overtones as nonconstitutional questions for jurisdictional purposes.

The court noted that the cause of action in *Butler* was based on the authorization of the city charter, not the constitutional provisions.[63] Although the charter provisions used the same language, no contention was made that the meaning of the term "public use" in the charter conflicted with the meaning of that term in the constitution. In fact, the parties had "asserted throughout that the words 'public use' in both Constitution and the Charter have the same meaning, and stated what that meaning is."[64] The court in effect held that although only one issue was in the case, whether the condemnation was for a "public use," it involved potentially two ques-

58. St. Louis v. Butler Co., 358 Mo. 1221, 1229, 219 S.W.2d 372, 378 (En Banc 1949).
59. *Id.*
60. *Id.*
61. The doctrine was often verbalized previously, and it has been since. *See, e.g.*, Kelch v. Kelch, 450 S.W.2d 202, 206 (Mo. 1970), where the court, after stating the preservation formula, quoted this language from an earlier case:
> There is an exception to this rule [raising-preserving]; namely, where, on the whole case, some provision of the constitution was either directly or by inexorable implication involved in the rendition of the judgment and decided against the appellant.

62. *See* Mo. Sup. Ct. R. 84.12(a).
63. St. Louis v. Butler Co., 358 Mo. 1221, 1231, 219 S.W.2d 372, 379 (En Banc 1949).
64. *Id.*

tions, one constitutional and another nonconstitutional. Since the focal point of the dispute was "a construction of those words *in the Charter,*" the court was able to characterize the question presented as "a pure question of statutory (or Charter) construction."[65]

Further language in *Butler* suggests the ramifications of its underlying rationale. Judge Ellison notes that

> the mere fact that Sections 26 and 28, Article I of our Constitution, and Article XXI, Section 1 of the St. Louis Charter all use the *same words* "public use", and that Section 28 of the Constitution also uses the antihetical words "private use", does not make a constitutional question inhere in a case. Would we be willing to say we have inherent appellate jurisdiction in *all* instances where a statute adopts constitutional language? No doubt there are a great many such instances.[66]

This excerpt supports two propositions: 1) many statutes exist that have language identical to the constitution; and 2) the Missouri Supreme Court is unwilling to adopt any rule that means automatic constitutional question jurisdiction whenever the language is at issue. A large amount of statutory or nonstatutory law is traceable to the federal or state constitution, whether phrased in identical language or not. Whatever an issue might be labelled in a given case, constitutional language or cases interpreting constitutional language may be referred to in deciding the case. But mere reference to the constitution or cases interpreting it in resolving a disputed issue does not in itself make the issue a constitutional question for jurisdiction purposes.

IV. The Construction Formula

The rationale of the *Butler Co.* majority for its holding that there is no such thing as an inherent constitutional question for appellate jurisdiction purposes lies at the heart of the construction formula. As acknowledged in *Butler Co.*, numerous cases could involve constitutional language in a general sense because the statute or rule of law at issue owes its source or is

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65. *Id.* An illustration of how a constitutional question may be treated as a nonconstitutional question for jurisdiction purposes is Racine v. Blackwood Bros. Quartet, Inc., 448 S.W.2d 922 (St. L. Mo. App. 1969). The question presented on appeal was whether a foreign corporation not licensed to do business in Missouri was subject to jurisdiction and hence amenable to service of process. The court of appeals noted that the question whether a foreign corporation was "doing business in this state" was "a question of due process of law, under the Federal Constitution, and is not one of local law or of statutory construction." *Id.* at 925. The defendant corporation, however, had not alleged in the trial court that an assumption of jurisdiction over it would violate due process, but only that it was not doing business in the state. Thus, the court of appeals, not without "some misgivings," decided the case on the merits. In doing so, it noted that *Butler Co.* had overruled the "inherency doctrine." Hence, the question presented could not be viewed as constitutional, because the issue of due process had not been raised in the trial court.

66. St. Louis v. Butler Co., 358 Mo. 1221, 1231, 219 S.W.2d 372, 379 (En Banc 1949).

traceable to the constitution. But the focal point or referent for application of the construction formula is not whether a standard or rule for decision is a constitutional standard or is to be derived from the constitution. Rather, it is whether the meaning of a constitutional standard is in dispute, thereby requiring the appellate court to *interpret* the constitution.

Although a constitution is the ultimate and fundamental standard for judging the validity of a governmental act, in the actual decision of cases it is primarily a source of rules. In some aspects it resembles the fixed language in particular words of a statute or other piece of "non-court-created law," containing provisions that are "framed in terms of specific and more or less detailed command."[67] On the other hand, numerous constitutional provisions bear little similarity to the typical statute or other legislation, but instead consist of broad generalizations resembling court-created general principles. This is particularly true of the constitutional guarantees and immunities of personal liberty and property. Hence, it might be said that parts of a constitution look more like "rules" and others like general "principles." In any case, the basic premise of the construction formula is that a constitutionally derived standard for decision may be so definite and well-settled that its meaning is indisputable, and hence it is not subject to construction.[68]

A. *The Well-Established Constitutional Principle Limitation*

Assume in *Butler Co.* that the issue of public use had been adequately denominated and preserved by the parties as a constitutional issue. The court then could have characterized their dispute as centering on the propriety of the taking under the constitutional provisions as distinguished from the charter language. Nonetheless, the court could still have held under the construction formula that it was not required to treat the issue as a constitutional question for purposes of appellate jurisdiction, because the constitutional principle nominally at issue was well-established or undisputed. Thus, the court would only have to routinely apply the law to the facts.[69]

The "well-established" constitutional standard limitation is an outgrowth and amalgam of several other tests which operate to exclude from the supreme court's docket cases alleged to present constitutional question on appeal. These tests are: (1) the merely colorable constitutional claim;

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67. Stone, *The Common Law in the United States*, 50 HARV. L. REV. 4, 23 (1936).

68. Garrett v. State, 481 S.W.2d 225 (Mo. En Banc 1972); State v. Holley, 488 S.W.2d 925 (Mo. App., D.K.C. 1972).

69. The zoning cases in which a property owner contends that a zoning ordinance as applied to his property constitutes a confiscation or unconstitutional taking without due process of law have used this approach. The courts say that the standard to be applied in resolving this contention is whether the application of the zoning ordinance is unreasonable. Hence, only an application of a well-established principle, "essentially a question of fact," is involved; the construction of the due process clause of the Constitution is not. Ewing v. Springfield, 449 S.W.2d 681, 684 (Spr. Mo. App. 1970).

(2) the already-decided constitutional contention; and (3) the clear constitutional provision.

1. The Merely Colorable Claim

The Missouri Supreme Court has announced repeatedly that it has jurisdiction based on a constitutional question "even though the constitutional question [ultimately proves to be] in fact without merit or unnecessary to a disposition of the cause."[70] But, because the existence of jurisdiction must affirmatively appear on the record, the Missouri Supreme Court has always retained "the right to look within the shell of briefs, pleadings and records to the kernel of the thing, to see if the jurisdictional question is of substance and not merely colorable."[71] If the claim presented is merely colorable—fictitious, spurious, frivolous, or patently without merit—it cannot enter into the court's decision on the merits, and therefore, it will not provide a basis for the exercise of supreme court jurisdiction.

The court may characterize a constitutional claim as merely colorable for jurisdiction purposes either because the allegedly constitutional claim is itself clearly without merit,[72] or because, although potentially meritorious, it could not possibly present a question of constitutional construction.[73] For example, assume a city ordinance declares a city official immune from liability for official acts. At a party in his home, he strikes a guest in an argument about his favorite football team. When sued, he argues that he is immune from suit because of the ordinance. The plaintiff's contention that he could sue the city official because the ordinance is unconstitutional would be a colorable constitutional claim. The defense based on the ordinance is so patently without merit and its disposition such a foregone conclusion, that it could raise no genuinely disputed issue between the parties, constitutional or otherwise.

Numerous claims on their face may present a plausible argument with constitutional overtones, such as the claim that a judgment violates due process of law because it is unsupported by any evidence in the record. Courts often characterize such a claim as merely colorable for appellate jurisdiction purposes. This is because it could not possibly involve the *construction* of a constitutional provision.[74] In many of these cases, the conclusion that the claim is merely colorable is a shorthand conclusion that all that is required is the application of a well-established constitutional prin-

70. University City v. Diveley Auto Body Co., 417 S.W.2d 107, 109 (Mo. En Banc 1967); note 40 *supra.*

71. Lohmeyer v. St. Louis Cordage Co., 214 Mo. 685, 691, 113 S.W. 1108, 1110-11 (1908).

72. State v. Jackson, 444 S.W.2d 389 (Mo. 1969); *cf.* State v. Hasler, 449 S.W.2d 881 (St. L. Mo. App. 1969).

73. Smith v. Smith, 485 S.W.2d 143 (Mo. App., D.K.C. 1972).

74. *Id. See also* Zurheide-Hermann, Inc. v. London Square Dev. Corp., 504 S.W.2d 161 (Mo. 1973); State v. Euge, 349 S.W.2d 502 (St. L. Mo. App. 1961).

ciple or statutory standard.[75] Of course, many claims lie on the spectrum between the obviously constitutional or nonconstitutional. The point at which a claim presents questions that are so settled that they are patently incapable of dispute, and hence colorable, cannot be clearly defined and depends on the facts in each case.

2. Already-Decided Constitutional Claim

A closely related situation is the refusal to take jurisdiction of claims that are deemed to present constitutional questions that have already been decided.[76] The courts can, and often do, denominate such a claim as colorable.[77] Obviously, if the Missouri Supreme Court has just recently decided the constitutionality of a statutory provision presently under attack, the claim on its face could be spurious because it would stretch credulity to conclude that the court would reverse itself so soon—hence, a colorable claim. However, it may not always be so clear that persons have made the identical claim before under substantially identical circumstances. In addition, because courts do reverse themselves with some frequency, a "bona fide" attack on a previous decision of an identical claim could provide a basis for jurisdiction.[78] But it is unclear just what the court would consider a bona fide attack. Several possibilities are apparent. For example, although the Missouri Supreme Court has held that a defendant has no right to counsel

75. *See, e.g.,* Smith v. Smith, 485 S.W.2d 143 (Mo. App., D.K.C. 1972). In Kansas City v. Douglas, 473 S.W.2d 101 (Mo. 1971), an appeal of two traffic misdemeanor convictions had been transferred to the supreme court on the ground that construction of the state and federal constitutions was involved. The defendant argued that the driving while intoxicated ordinance was unconstitutional on equal protection grounds because its penalty for a first offense was heavier than that of the state statute for the same offense. The supreme court retransferred the case to the court of appeals, holding that "the purported constitutional issue is not real and substantial, but is colorable merely." Apparently the court held that the issue was fictitious or colorable because "the conceded facts make it abundantly clear that appellant has no standing to assert that he has been injured by such exposure." Lack of standing, as indicated by the court, is nothing more than a conclusion that the appealing party's rights were not affected, *i.e.,* the error, if any, did not injure him. Although it has been concluded that lack of standing is a "discretionary standard" for limiting supreme court jurisdiction of constitutional question cases (*Symposium, supra* ** at 480-82), it more easily fits under the preservation formula. For jurisdiction purposes, a party cannot raise or preserve an error that did not adversely affect him.

76. *See, e.g.,* Kansas City v. Howe, 416 S.W.2d 683 (K.C. Mo. App. 1969). This rule is normally applied in cases in which the constitutionality of statutes is challenged. *See* State v. Davis, 462 S.W.2d 178, 180-81 (St. L. Mo. App. 1970). *See generally Symposium, supra* ** at 493-94. The distinction is made herein between the already-decided claim and the well-established principle notwithstanding their treatment elsewhere under one head—"debatability." State v. Harris, 321 S.W.2d 468, 472 (Mo. En Banc 1959) (dissenting opinion); *Symposium, supra* ** at 491-96. Conceptually, the two motions are distinct.

77. *See Symposium, supra* ** at 491 n.156.

78. *See* White v. State, 430 S.W.2d 144, 148 (Mo. 1968); Schneider v. Bi-State Dev. Agency, 447 S.W.2d 788, 789-90 (St. L. Mo. App. 1969).

in a misdemeanor case, the court would not deny jurisdiction if a defendant appealed based on a United States Supreme Court decision that places its previous holding in doubt.[79]

Litigants face a dilemma in cases where circumstances occurring since the Missouri Supreme Court's earlier decision do not clearly compel its reversal. If the litigant appeals to the court of appeals, the court is bound by the previous decision and cannot question the merits of the rule he desires changed; the court of appeals cannot change the meaning of the constitutional provision. But, if he appeals to the Missouri Supreme Court, he must convince that court that it should reconsider or change the law before it will even take jurisdiction and hear the alleged errors, constitutional or otherwise.[80] If he fails, the court will transfer the appeal to the court of appeals with the constitutional claim effectively decided against him.[81]

For example, in *State v. Holley*,[82] a criminal defendant appealed his conviction to the Court of Appeals on two grounds; one was that the imposition of a greater sentence by a jury on retrial was constitutional error. This contention would have required reconsideration of two earlier Missouri Supreme Court cases,[83] which had held that the constitutional prohibition of enhanced punishment applied to cases where resentencing was by the trial judge who had imposed the original sentence and did not apply to resentencing by a jury. The court of appeals noted that if reconsideration were required, it would have to transfer the case to the Missouri Supreme Court because it had "no jurisdiction with respect to constitutional construction."[84]

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79. State v. Jones, 487 S.W.2d 586 (Mo. App., D. St. L. 1972). The court held that Missouri's rule requiring a showing of advice of right to counsel only in felony cases (MO. SUP. CT. R. 29.01) was inadequate in view of the United States Supreme Court decision of Argersinger v. Hamlin, 407 U.S. 25 (1972). *Argersinger* was held to be retroactive and to require counsel in the absence of an intelligent and knowing waiver in misdemeanor cases. *Quaere* why this case was decided by the court of appeals?

80. For two recent examples where appellant did convince the Missouri Supreme Court to assume jurisdiction to reconsider its previous rule, see Morris v. State Dep't of Pub. Health & Welfare, 504 S.W.2d 170 (Mo. En Banc 1974); Hill v. State Dep't of Pub. Health & Welfare, 503 S.W.2d 6 (Mo. En Banc 1973).

81. Obviously, numerous jurisdictional determinations are influenced by the court's impression of the merits of the case. In fact, to determine the question of jurisdiction, the court often must sift through the record and the claims of the parties as if deciding the merits. This is particularly true when the jurisdictional determination is based on a conclusion whether the question has already been decided or is governed by the application of well-settled principles. Although a conclusion of lack of jurisdiction, or even of the existence of jurisdiction is supposedly a separate determination, it may be so closely tied to a decision on the merits as to be practically indistinguishable. In Hill v. State Dep't of Pub. Health & Welfare, 503 S.W.2d 6 (Mo. En Banc 1973), for example, a decision that the court lacked jurisdiction because the question had already been decided or the principle was well-established would have foreclosed the decision on the merits.

82. 488 S.W.2d 925 (Mo. App., D.K.C. 1972).

83. Kansas City v. Henderson, 468 S.W.2d 48 (Mo.), *cert. denied*, 404 U.S. 1004 (1971); Spidle v. State, 446 S.W.2d 793 (Mo. 1969).

84. State v. Holley, 488 S.W.2d 925, 927 (Mo. App., D.K.C. 1972).

The court held, however, that the transfer was unnecessary because the constitutional argument "was not specifically presented to the trial court" (not raised), and secondly, and more importantly, the constitutional question involved was merely a question of constitutional application rather than constitutional construction. The Missouri Supreme Court had already ruled on the precise issue. Thus, the legal doctrine was settled, and all that was left was its application to the particular facts. In these circumstances, the court of appeals had jurisdiction but, of course, would have to follow the rule decided by the Supreme Court.[85] Although the court noted that at least two federal circuits had adopted a different view than the Missouri Supreme Court, it was bound to follow the Missouri court's rule "unless and until there is an authoritative contrary ruling by the United States Supreme Court."[86]

3. The Clear Constitutional Provision

Statements like the following are often found:

> It is only when constitutional provisions are not clear that resort must be had to construction, and if no construction of the constitution is called for, but only its application, appellate jurisdiction is vested in one of the courts of appeals, and not in the Supreme Court.[87]

The *City of Joplin v. Village of Shoal Creek*[88] was an action for declaratory judgment undertaken by the City and the Village. The principal issue on appeal was the validity of a proposed annexation by the City of Joplin and the Village. Both had annexed the same property at the same time. A critical question was whether Joplin, a constitutional charter city, could properly proceed to amend its charter to annex. The court of appeals said:

> Section 20, Article 6 clearly prescribes the methods by which a constitutional charter city may amend its charter. In this case, we are *only required to look to that section to determine what the methods of charter amendment are,* and which of these methods was employed by the City of Joplin in this instance. It is not necessary to go further and determine the *contextual meaning* of a word or phrase, as was required, for example, in State ex rel. Voss v. Davis, Mo., 418 S.W. 2d 163.[89]

The court concluded that a construction of section 20, article 6 of the Missouri Constitution was not required. The court referred to *State v. Metcalf,*[90] an 1895 decision of the Missouri Supreme Court. In *Metcalf,* a criminal prosecution, the boundary line of the state became an issue. The supreme court refused to take jurisdiction, stating:

> The fact that the constitution of this state would have to be consulted, like any other instrument in writing, in order to determine the boundary line of this state or a county thereof, would not in-

85. *Id.*
86. *Id.*
87. Joplin v. Shoal Creek Drive, 434 S.W.2d 25, 28 (Spr. Mo. App. 1968).
88. *Id.*
89. *Id.* at 28.
90. 130 Mo. 505, 32 S.W. 993 (1895).

> volve a constitutional question, any more than would such question be involved were it to become necessary to consult a statute of this state in reference to such boundary.[91]

Therefore, if the constitutional language is straightforward and unambiguous the Missouri Supreme Court is not required to interpret it, and the court of appeals can mechanically apply it.

B. *The Construction Formula in Criminal Cases*

Criminal appeals have posed a unique problem in the definition of the direct appeal jurisdiction of the Missouri Supreme Court under article V, section three. Under the new jurisdictional grant, the only felony appeals directly appealable to the supreme court are those "involving offenses punishable by a sentence of death or life imprisonment."[92] The Missouri Supreme Court has limited direct appeals further by its interpretation of the constitutional language. In *Garrett v. State*[93] it concluded that the "intent" of article V, section three was that only appeals of convictions for offenses in which the *only* authorized punishment was death or life imprisonment were directly appealable to the supreme court. This eliminated all but appeals of first degree murder convictions.[94] After the invalidation of the death penalty by the United States Supreme Court,[95] the Missouri Supreme Court ruled that even first degree murder no longer met the constitutional description of a felony conviction directly appealable to the supreme court.[96]

Elimination of direct appeals of criminal cases as a class has not removed the potential for supreme court jurisdiction in many criminal cases. This is because "constitutional questions or contentions are raised in many, if not most, criminal cases today."[97] The nature of constitutional challenges

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91. *Id.*
92. Mo. CONST. art. V, § 3.
93. 481 S.W.2d 225 (Mo. En Banc 1972).
94. Divining legislative "intent" is an elusive task. As indicated by Judge Finch in Parks v. State, 492 S.W.2d 746, 748 (Mo. En Banc 1973) (dissenting opinion), judicial determination of legislative intent is really a euphemism for the court's attaching what it considers to be the most "fair, rational and reasonable" interpretation to the language at issue. Arguably, it would have been just as reasonable in *Garrett* to conclude that the phrase "punishable by a sentence of death or life imprisonment" meant punishable by either death or life imprisonment or both. This was the interpretation the West Virginia Supreme Court adopted when considering similar language in State *ex rel.* Campbell v. Wood, 151 W. Va. 807, 155 S.E.2d 893 (1967). This case was cited by the Colorado Supreme Court in Jaramillo v. District Court, 480 P.2d 841, 842 (Colo. 1971), the only case relied on by the Missouri Supreme Court in *Garrett.*
95. Furman v. Georgia, 408 U.S. 238 (1972).
96. Parks v. State, 492 S.W.2d 746 (Mo. En Banc 1973). Because after *Furman,* murder in the first degree is punishable only by life imprisonment, the Missouri Supreme Court does not have jurisdiction of the appeal of a first degree murder conviction; *Garrett* held it had jurisdiction only when the offense had alternative punishments of death or life imprisonment.
97. Neidhart v. Areaco Inv. Co., 499 S.W.2d 929, 931 (Mo. 1973) (concurring opinion).

in criminal cases aggravates the problem for Missouri appellate courts. Constitutional standards, particularly in criminal cases, are not specific standards.[98] The provisions of the Bill of Rights, most of which concern criminal procedure, are not self-defining.[99] The state and federal constitutions do not set forth the step-by-step process that law enforcement officials must take in criminal cases.[100] In addition, in many areas, the rules implementing the constitutional standards are not much more definite than the constitutional standard.[101]

Garrett v. State[102] indicates the attitude of the Missouri Supreme Court toward appellate jurisdiction of criminal appeals. The court feels that it is neither constitutionally compelled nor does it intend to be a "court of criminal appeals."[103] It has expressed a commitment to restriction of its direct appeal jurisdiction of criminal convictions even in those cases in which constitutional error is alleged. The court's unqualified acceptance of *State v. Kiplinger*[104] in the *Garrett* case[105] manifests its intention to accomplish a circumspection of jurisdiction in these cases by use of the construction formula and its stepchild, the well-established principle limitation.[106]

In *Kiplinger*, the defendant claimed that the denial of assistance of counsel and the admission into evidence of an involuntary confession

98. Stone, *The Common Law in the United States*, 50 HARV. L. REV. 4, 23 (1936); Wechsler, *Toward Neutral Principles of Constitutional Law*, 73 HARV. L. REV. 1, 17-18 (1959). The most obvious is "due process," but phrases such as "unreasonable searches and seizures," "twice put in jeopardy," or "speedy and public trial" are not much more definite.

99. J. ISRAEL & W. LA FAVE, CRIMINAL PROCEDURE IN A NUTSHELL 2-3 (1971).

100. *See* note 98 *supra.*

101. *See, e.g.*, MO. SUP. CT. R. 29.01(a), concerning the appointment of counsel if the defendant is indigent and "unable to employ counsel."

102. 481 S.W.2d 225 (Mo. En Banc 1972).

103. This feeling is expressed specially by then Chief Justice Finch in his concurring opinion in *Garrett. Id.* at 229.

104. 414 S.W.2d 547 (Mo. 1967).

105. The court disposed of appellant's claim of supreme court jurisdiction on the basis of a constitutional claim as follows:

> Appellant's challenge to invocation of the Habitual Criminal Act, on the assertion that he was without counsel when he entered a plea of guilty in Mississippi County in 1959, raises issues which are governed by well-established principles and do not involve " . . . the construction of the Constitution of the United States or of this state . . . ." State v. Kiplinger, Mo. Sup. 414 S.W.2d 547 . . . .

481 S.W.2d 225, 226 (Mo. En Banc 1972).

106. The court also may decline jurisdiction of a criminal appeal because of failure to meet the preservation formula. However, violations of constitutional rights may nevertheless be considered by the appellate court under the "plain error" rule, even when not raised or properly preserved by the parties. MO. R. CRIM. P. 27.20(c). Although the plain error determination, like its counterpart harmless error, is a decision on the merits of the constitutional claims, it apparently is within the competence of the court of appeals whether it requires a technical "construction" of the constitution or not. State v. Harms, 507 S.W.2d 29 (Mo. App., D. St. L. 1974). *Compare* the discussion of "inherency" at note 60-67 *supra.*

deprived him of his rights under the fifth and sixth amendments of the federal constitution and similar provisions of the Missouri Constitution. The court ruled that neither claim involved a constitutional question for jurisdictional purposes because neither required a determination of the "meaning" of a constitutional provision. The opinion offers several verbalizations of the test. They emphasize the absence of a real dispute concerning the meaning of the constitutional provisions invoked:

> 1) the meaning of the constitutional provision relied upon by defendant is not disputed by the parties . . . . Both the state and the defendant agree that the state is constitutionally prohibited from using any but a voluntary confession against an accused . . . .
> 2) [It is] not an open question, no open issue, nothing calling for a constitutional construction by this court . . . ; [it] turns on the application of the facts to well established principles and does not involve construction of the Constitution in the sense required to give this court jurisdiction it would not otherwise have in an appeal involving a misdemeanor conviction . . . ; [and] the assertion of this established principle as a basis for relief does not fix jurisdiction in this court as thereby involving a construction of the constitution.[107]

The *Kiplinger* court primarily relied on *State v. Harris*,[108] a landmark opinion. There the issue involved and asserted as vesting the supreme court with jurisdiction was whether officers seized "policy paraphernalia" in violation of the provision in the Missouri Constitution against unreasonable searches and seizures.[109] The issue more specifically was whether the search was incident to a lawful arrest and, therefore, concededly proper. Commissioner Coil speaking for the majority states:

> Thus, it appears to us that the only question in the instant case involving the *construction* of the constitution is whether a search and seizure which is not incident to a lawful arrest violates the provision of the Missouri Constitution, supra, against unreasonable searches and seizures. It is the settled law of this state . . . that the search of one's person is justified, and thus not an unreasonable search, only if it is incident to a lawful arrest. . . . And, as noted, instant defendant not only concedes, but affirmatively asserts, that the constitutional provision in question has been so construed. Now, it would appear that whether the search in the instant case was or was not incident to a lawful arrest depends, of course, upon whether there was a lawful arrest, and, of course, whether there was a lawful arrest depends upon the application of the law relating to "arrest" to the particular facts and does not depend upon the construction of any constitutional provision.
>
> As noted, the only question involving the construction of the constitution has been heretofore adjudicated, viz., that the search of one's person not incident to a lawful arrest is violative of Article 1, Section 15, Missouri Constitution 1945. And this court does not

107. *Id.* at 548-49.
108. 321 S.W.2d 468 (Mo. En Banc 1959).
109. Mo. CONST. art. I, § 15. This is substantively similar to U.S. CONST. amend. IV.

> take jurisdiction on the ground that the construction of the constitution is not involved when the precise constitutional question has been priorly adjudicated by decisions of this court. Swift & Co., v. Doe, Mo., 311 S.W. 2d 15, 20[2].[110]

State v. Jackson,[111] a curious case, illustrates the potential for difficulty. The defendant, after conviction for providing inadequate care for his children, appealed on three assignments of error involving alleged constitutional questions. The first two related substantially to the alleged unconstitutionality of his arrest.[112] The third claim, however, was that the prosecuting attorney's argument that the defendant's presence in the courtroom indicated he was able-bodied violated defendant's constitutional privilege against self-incrimination. The court stated that

> This asserted ground, even though not necessary to a disposition of the appeal, raises a constitutional question in a jurisdiction sense and confers jurisdiction on this court. State v. Civella, Mo., 368 S.W. 2d 444; State v. Poelker, Mo., 378 S.W. 2d 491; State v. Harris, Mo. App., 313 S.W.2d 219; State v. Dean, Mo., 181 S.W. 1135.[113]

At least three of the four cited cases were cited for the proposition that a constitutional issue may provide a basis for supreme court jurisdiction even if consideration of the issue is not required for a decision on the merits. They did not involve claimed violations of the privilege against self-incrimination. The constitutional error claimed in *Poelker* and *Civella,* tax evasion cases, was that an interpretation of the venue statute supporting venue in the trial court would be unconstitutional. The citation to *Harris* was to the court of appeals opinion that was subsequently overturned by the supreme court decision holding that the alleged constitutional question of unlawful search and seizure did not provide a basis for jurisdiction in the supreme court. Of the cases cited, only *Dean* involved an allegation of violation of the privilege against self-incrimination. But it involved testimony which was compelled to be made before a grand jury investigating the defendant.[114] The court noted that it was "happily saved from the necessity of determining so interesting a question . . . by the filing . . . of a joint stipulation . . . that this case may be affirmed."[115] The issue of a stay had become moot and the court said: "We content ourselves in affirming this case . . . since the point presented . . . is not . . . so preserved and presented upon the record here as to allow a ruling upon its merits."[116]

Obviously, the self-incrimination question was much different in *Dean* than in *Jackson.* While the question in *Jackson* related to the propriety of prosecutor comment, *Dean* involved the contention that forced testimony

110. 321 S.W.2d 468, 469-70 (Mo. En Banc 1959).
111. 444 S.W.2d 389 (Mo. 1969).
112. The court found the unconstitutional arrest claims merely colorable, having no foundation whatsoever in the record. *Id.*
113. *Id.* at 391.
114. State v. Dean, 181 S.W. 1135-36 (Mo. 1916).
115. *Id.* at 1136.
116. *Id.*

at a grand jury resulted in the obtaining of admissions and physical evidence which were inadmissible.

Does this mean that the Supreme Court will determine whether certain kinds of claims, such as search and seizure, will not on precedent provide a basis for jurisdiction, while others, like violation of self-incrimination privilege, will? This is not the approach indicated by Judge Finch.[117] In *State v. Russo*,[118] defendant had been convicted of the misdemeanor of having and keeping on licensed premises three bottles of intoxicating liquor. Defendant claimed as erroneous the trial court's overruling of her motion to suppress the liquor that liquor control agents, without either arresting defendant or having a search warrant, had seized after seeing it behind the bar on the floor. The majority noted that prior to *State v. Harris* the court had

> entertained jurisdiction of a long list of cases involving misdemeanor liquor convictions on the theory that, allegedly, they involved illegal searches and seizures and an invasion of constitutional rights. In 1959, in State v. Harris . . . the court en banc . . . overruled the line of cases and held that jurisdiction of such misdeameanor cases was in the courts of appeal. . . . This is not to decide the substantive question of whether there was an unlawful search and seizure (citing cases) . . . . it is to say, however, that *the right* invoked no longer confers jurisdiction of misdemeanor appeals on this court . . . . [emphasis added][119]

The implication of this opinion—that a claim of constitutional error based on unlawful search and seizure would not in any case support supreme court jurisdiction—did not escape Judge Finch. He stated in his concurring opinion, relying on *Kiplinger* and *Harris* and another case not cited by the majority, *White v. State*,[120] that:

> I concur in the principal opinion with the understanding that we are transferring this case on the basis that it involves only *application* of already established constitutional principles to particular facts and does not involve the *construction* of constitutional provisions.[121]

Judge Finch has since reiterated his belief that the Missouri Supreme Court cannot categorize the kinds of constitutional claims that vest jurisdiction in the supreme court and that "the question of which court has jurisdiction in a particular case is determined on a case by case basis."[122] The recent assumption of jurisdiction to decide a claim of constitutional error in the admitting

117. *See* text accompanying notes 27-31 *supra.*
118. 463 S.W.2d 832 (Mo. 1971).
119. *Id.* at 833.
120. 430 S.W.2d 144 (Mo. 1968). The discussion whether constitutional construction was involved in the *White* case arose in consideration of defendant's motion for rehearing and to transfer to the court en banc on the ground of "federal question." This ground in the transfer provision of the Mo. CONST. art. V, § 9 is interpreted by the standard of art. V, § 3. *Id.* at 148; Zurheide-Hermann, Inc. v. London Square Dev. Corp., 504 S.W.2d 161, 166 (Mo. 1973).
121. State v. Russo, 463 S.W.2d 832, 834 (Mo. 1971) (concurring opinion).
122. Neidhart v. Areaco Inv. Co., 499 S.W.2d 929, 931 (Mo. 1973).

of evidence of a police officer's identification of defendant allegedly obtained as a result of an unconstitutional arrest[123] indicates that the court is continuing to use the case-by-case approach.

The Missouri Court of Appeals may be deciding constitutional questions in criminal appeals in violation of the supreme court's tests.[124] For example, in *State v. Jackson*,[125] the appellant asserted in the Kansas City District that the reading into evidence of a deposition at his trial violated his constitutional right of confrontation. The court considered his claim even though it had not been properly raised and preserved nor alleged as plain error on appeal "for the reason that federally guaranteed constitutional rights of the defendant are involved."[126] The court asserted that the appellant's claim "presents factual problems and questions of law never before directly ruled on by the appellate courts of the state."[127] It then held that the deposition was taken in violation of the defendant's rights of personal confrontation and cross-examination and hence its use by the state was unconstitutional. On its face, one cannot justify the decision by the court of appeals in *Jackson* of an admittedly constitutional issue of first impression in the state. The Missouri Supreme Court continues to exercise direct appeal jurisdiction of claims in appeals that constitute an attack on the constitutionality of a statute[128] or which require the appellate court to determine the *meaning* of constitutional provisions.[129] But perhaps one may rationalize the *Jackson* decision under the supreme court's jurisdictional rules. The claim in *Jackson* was that, because the defendant was not present at its taking as required by Missouri Constitution, article I, section 18(b), the admission of a deposition had been improper. The court of appeals noted that: "Two recent decisions of the Supreme Court of Missouri, *while not factually the same* as the case now before us, do *express judicial concepts helpful* in the solution of this appeal."[130] It appears that the "helpfulness" of these two Missouri Supreme Court opinions lies in their support of the

123. State v. Britton, 444 S.W.2d 465 (Mo. 1969). *See also In re* J.R.M., 487 S.W.2d 502 (Mo. En Banc 1972) (standing to assert and validity of search).

124. A glance through recent advance sheets reveals that the Missouri Court of Appeals is disposing of numerous criminal appeals containing allegations of constitutional error without discussion in the opinions whether these errors involve "construction of the Constitution." *E.g.*, State v. Summers, 506 S.W.2d 67 (Mo. App., D.K.C. 1974) (reversed on right of confrontation grounds for improper limitation of defense cross-examination of witness); State v. Jordan, 506 S.W.2d 74 (Mo. App., D. St. L. 1974) (question whether identification by police was unnecessarily suggestive); State v. Stavricos, 506 S.W.2d 51 (Mo. App., D. Spr. 1974) (vagueness of controlled substances act and validity of search).

125. 495 S.W.2d 80 (Mo. App., D.K.C. 1973).

126. *Id.* at 83.

127. *Id.* at 81.

128. *See, e.g.*, Kraus v. Board of Educ., 492 S.W.2d 783 (Mo. 1973).

129. *See, e.g.*, Hill v. State Dep't of Pub. Health & Wel., 503 S.W.2d 6 (Mo. En Banc 1973).

130. State v. Jackson, 495 S.W.2d 80, 85 (Mo. App., D.K.C. 1973).

absolute and unqualified requirement that, for the deposition to be admissible, the parties must comply with the procedure set forth in the constitution.[131] Neither case dealt with the meaning of the words "personal confrontation" and "cross-examination" and whether they require *both* counsel and defendant to be present at the deposition. But the court of appeals nonetheless was able to conclude that recent cases of the United States Supreme Court "seem to emphasize the fact that confrontation and the right of the defendant to cross-examine the witness are synonomous and inseparable."[132] Further, the court noted that "it would seem obvious that in most situations adequate satisfaction of both the rights of confrontation and of cross-examination cannot be accomplished by either the defendant or his counsel *alone*."[133] The court concluded that both defendant and counsel were necessary, and that this was recognized and stated in article I, section 18(b) of the Constitution of Missouri.[134]

How can we conclude that the court in *Jackson* was not both interpreting and applying constitutional language as contemplated under the construction formula? One can hardly say that the constitutionally-derived principle applied by the court of appeals was well-established; the Missouri Supreme Court had never announced it. Obviously the state and the defendant disputed whether it was established or not, the state arguing that presence of counsel was sufficient. Although the language on its face appears to compel physical presence of the defendant as well as his attorney, it does not specifically require it.[135] And, if it were patently clear from the plain meaning of the language, the court would not have need to refer to Missouri Supreme Court cases interpreting it in different contexts. However, if the intermediate appellate court can justify its exercise of appellate jurisdiction at all, it must do it on this ground: that the constitutional provision at issue was so clear as to exclude any other interpretation.[136]

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131. The two decisions were State v. Brookins, 478 S.W.2d 372 (Mo. 1972) and State v. Granberry, 491 S.W.2d 528 (Mo. 1973).

132. State v. Jackson, 495 S.W.2d 80, 84 (Mo. App., D.K.C. 1973).

133. *Id.*

134. *Id.* The court then cited 23 C.J.S. *Criminal Law* § 1001 (1961).

135. Mo. CONST. art. I, § 18(b), reads:

> Upon a hearing and finding by the circuit court in any case wherein the accused is charged with a felony, that it is necessary to take the deposition of any witness within the state, other than defendant and spouse, in order to preserve the testimony, and on condition that the court make such orders as will fully protect the rights of personal confrontation and cross-examination of the witness by defendant, the state may take the deposition of such witness and either party may use the same at the trial, as in civil cases, provided there has been substantial compliance with such orders. The reasonable personal and traveling expenses of defendant and his counsel shall be paid by the state or county as provided by law.

136. *See* text accompanying notes 89-93 *supra*.

C. *Critique of the Construction Formula*

State v. Jackson is only one of many examples of situations in which a court encounters extreme difficulty in settling the question of appellate jurisdiction "with any degree of certainty."[137] The Missouri Supreme Court has charted a course that is doomed to failure if its ultimate objective is to make the jurisdictional determination rational and efficient. This is because the jurisdictional tests adopted to restrict constitutional question jurisdiction are based on a faulty premise; that premise is that the decision of appellate cases is a mechanical, slide-rule process. Accordingly, a case is decided by simply picking out a rule (expressed in the constitution, a piece of legislation, or previous cases) that governs the case and mechanically applying that rule to the facts to reach a decision. The process, in cases in which constitutional claims are made, works something like this: when the issue is the propriety of the exercise of authority purportedly pursuant to a statutory standard, the legislation itself provides the rule of decision.[138] Unless the rule established by the legislation (presumed to be constitutional)[139] is challenged as unconstitutional, the court merely applies it to the facts. Only if a party challenges the statute as being unconstitutional could a *construction* of the constitution be involved and only then if no one has challenged it before.[140] If the court rejected the previous challenge to the statutory rule, the court need only apply it as if it were a clear constitutional rule.[141] The case presents a different, but not much more difficult, problem when no statute specifically authorizes nor is contended to authorize challenged governmental action. Again the court must find a rule or major premise for decision, but in the absence of a legislatively-announced rule, it must find the rule by looking to the constitution iteslf. If the constitution's wording provides a clear standard, then it has a ready-made rule of decision to *apply* to the facts, with no need for construction of the constitution.[142] The situa-

137. Neidhart v. Areaco Inv. Co., 499 S.W.2d 929, 932 (Mo. 1973) (concurring opinion).

138. The leading case is State *ex rel.* Doniphan Tel. Co. v. Public Serv. Comm'n, 369 S.W.2d 572 (Mo. 1963).

> Since *Doniphan* does not complain of any procedural matter affecting due process, and makes no attack upon the validity or constitutionality of the statutes defining the powers of the Commission in this type of case, the only conceivable complaint remaining within the scope of the instant contention is that the Commission exceeded its authority . . . . It is not necessary to construe any constitutional provision in order to determine that contention. It may be decided by a construction of the applicable statutes for the purpose of ascertaining whether the Commission exceeded its authority in making the orders.

Id. at 575.

139. State v. Crawford, 478 S.W.2d 314, 316 (Mo. 1972).

140. *See* Florissant v. Rouillard, 495 S.W.2d 418 (Mo. 1973); State v. Lauridsen, 312 S.W.2d 140 (Mo. 1958) (whether the interpretation of a statute by the trial court is right or wrong is not a constitutional question).

141. *See* notes 76-86 *supra.*

142. *See* text accompanying notes 87-91 *supra.*

tion is more difficult where the contention refers to a constitutional provision couched in general language. The court then must determine if it has established a standard in prior cases. This presents no real problem for judges trained in the common law, because the development of rules of decision using a case-by-case approach is their stock-in-trade. If the court determines that a rule is so well-established by past decisions that it is indisputable and has an existence of its own outside the constitution, it is treated like a statute with a fixed meaning that has passed constitutional muster.[143] The courts already have interpreted the constitution to arrive at the case-established standard; now, a court need only apply it to the facts to reach a decision.[144]

The defect in this approach, as Judge Storckman observed, is that it results in "jurisdictional uncertainties which are always troublesome and wasteful."[145] It confuses the "establishment of standards" for determination of constitutional questions with the "adjudication of constitutional questions."[146] He would have "restricted the use of the debatability doctrine to cases in which a *statute* was challenged," and would not have extended its use to cases involving the application of constitutional standards not implemented by legislation.[147] There may appear to be justification for its use with reference to statutes, because a statute may be viewed as providing a

143. *See* text accompanying notes 107-23 *supra*.

144. *See, e.g.*, State v. Holley, 488 S.W.2d 925 (Mo. App., D.K.C. 1972).

145. State v. Harris, 321 S.W.2d 468, 472 (Mo. En Banc 1959) (dissenting opinion).

146. *Id.* Judge Storckman further observed that:

> If we limit "construction" to the *interpretation* of constitutional provisions, as the majority opinion seems to do, and abandon the application, then it would seem our appellate jurisdiction would not exist in cases where the meaning of the constitutional provision is clear and would cease to exist when ambiguous or doubtful provisions have been adjudicated.

Id. at 472.

Judge Storckman suggests that determination of an applicable rule will not automatically dispose of the case. "One search and seizure case does not adjudicate another where the facts are different." *Id.* But the majority is able to discern a difference between the "question of construction" (*i.e.*, what the constitution *means*) and the determinative question appeal (*i.e.*, whether the search was unreasonable). *See* discussion of the two-pronged nature of constitutional questions notes 65-68 *supra*. Hence, the court was able to apply the identical-question-had-already-been-decided test (*supra* notes 76-86) to the defendant's contention: "the defendant has limited the question involved, insofar as the construction of the constitution is concerned, to the precise question heretofore settled by decisions of this court . . . ." *Id.* at 470. Of course, even though the rule was settled—evidence which is the product of an unlawful arrest is inadmissible—the question whether the arrest was unlawful was not. This could be decided, according to the court, by the court of appeals.

147. Judge Storckman apparently would be willing to admit that a decision as to the constitutionality of a statutory provision might be identical in a subsequent case, because it might be decided as an abstract question of law. Aside from statutes, however, the question must be decided on the particular facts of each case.

verbalized and certain standard of conduct and only when that standard is questioned is a constitutional question presented, and then only once. But even that conclusion should not be accepted without question.[148]

Unfortunately, the courts have not perfected a "slide-rule" method of deciding cases.[149] Some rules are certain and undisputed; they may be easily applied to the facts. For example, a rule that an indictment is void unless signed makes for an easy decision of a case in which the indictment is not signed. However, most rules either cannot, or should not, be precisely worded and cannot be mechanically applied. They may never become absolutely settled in meaning.[150] For example, it may be impossible (or at least undesirable) for a court to define the right to a speedy trial in terms other than a rather vague "balancing test, in which the conduct of both the prosecution and the defendant are weighed."[151] Even a rule seemingly clear —an indigent defendant must have appointed counsel unless waived— may contain elements, "indigency" and "waiver," which are not clear in all cases.[152]

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148. Arguably, even in the case of statutes that have been upheld as constitutional, their application to a different set of facts could raise questions concerning their constitutionality.

149. *See* Merryman, *The Authority of Authority*, 6 STAN. L. REV. 613, 645-46, 672-73 (1954). The author says it is an "illusion that all there is to decision of a case is location of the appropriate rule . . . ." *Id.* at 673. As Professor Llewellyn put it in his famous little book: "*If wishes were horses, then beggars would ride.* If rules were results, there would be little need of lawyers." K. LLEWELLYN, THE BRAMBLE BUSH 18 (1951).

Often, of course, a determination that a case is to be resolved by application of a settled legal principle will be tantamount to a decision on the merits. However, that is often not the case. Even if the rule of law is certain, its application may be doubtful.

Benjamin Cardozo said:

> "Of the cases that come before the court in which I sit, a majority, I think, could not, with semblance of reason, be decided in any way but one. The law and its application alike are plain. Such cases are predestined, so to speak, to affirmance without opinion. In another and considerable percentage, the rule of law is certain, and the application alone doubtful. A complicated record must be dissected, the narratives of witnesses, more or less incoherent and unintelligible, must be analyzed, to determine whether a given situation comes within one district or another upon the chart of rights and wrongs. The traveler who knows that a railroad crosses his path must look for approaching trains. That is at least the general rule. In numberless litigations the description of the landscape must be studied to see whether vision has been obstructed, whether something has been done or omitted to put the traveler off his guard. Often these cases and others like them provoke difference of opinion among judges.

B. CARDOZO, *The Nature of the Judicial Process*, in SELECTED WRITINGS OF BENJAMIN NATHAN CARDOZO 177 (1947).

150. *See generally* M. ROMBAUER, LEGAL PROBLEM SOLVING 50-64 (1973).

151. Barker v. Wingo, 407 U.S. 514, 530 (1972).

152. *See* State v. Martin, 411 S.W.2d 215 (Mo. 1967); State v. Gee, 408 S.W.2d 1 (Mo. 1966).

A rule of decision in a case is simply a generalization in words which have content (and relevance to future cases) because it represents a fact-grouping which, when applied to a future case having the same salient facts, compels a certain result. A decision whether the facts in a given case are within the fact-grouping represented in the prior rule gives shape and content to the rule. In this respect, judicial opinions applying statutes are doing much the same thing that a court applying court-created rules does.[153] Application of a statute or fixed language is hardly more simple a "mechanical" process than the application of precedent.[154] "[T]he *range* of techniques correctly available in dealing with statutes is roughly equivalent to the range correctly available in dealing with case law materials."[155] Indeed, at least in form, opinions construing legislative materials involve the same formal logic and reasoning process as opinions in cases controlled by common law. One can state the issue (or issues) in cases requiring construction of a statute or constitutional provision in the same form: "Does [quoted language from the statute] mean—or include, or apply to—[a specific feature of the case before the court *or* a general class encompassing such a specific feature]?" One finds language to the effect that it is possible to "identify a 'plain' (and hence, indisputable) meaning for language."[156] But the "courts ultimately fix the meaning of statutes through their construction and application thereof" in relation to specific problems, *i.e.*, by deciding whether a statute applies to a particular set of facts and what it means in relation to them.[157] One may view application of a rule of law as giving it meaning, even it it only reinforces the meaning by applying it in similar cases.[158] Therefore it is erroneous to attempt to decide jurisdiction by distinguishing between the application of constitutional language to the facts and the

153. M. ROMBAUER, LEGAL PROBLEM SOLVING 57 (1973).
154. *Id.* at 51, 57.
155. K. LLEWELLYN, THE COMMON LAW TRADITION: DECIDING APPEALS 371 (1960).
156. M. ROMBAUER, LEGAL PROBLEM SOLVING 57 (1973).
157. *Id.* at 61.
158. This is perhaps best expressed in the following:

> The question [as to the meaning of the phrase settled legal principles] has to do with the degree of difference between the state of facts before the court and states of fact passed upon in previous decisions. If this difference be sufficiently great, the case cannot fairly be regarded as covered by the previous cases. If on the other hand the difference is sufficiently small, so that no reason of policy can fairly be said to exist for differentiating the present situation from those previously passed upon, we may fairly regard the case in hand as governed by "settled legal principles." The chief practical difference is, that in the one case the court has for the first time to pass upon the policy of a decision one way or the other, while in the other it has previous determinations as to the policy to rely upon. Inasmuch, however, as the court may in any case refuse to follow the past adjudications, ultimately the function of the court in both cases is the same.

Cook, *Privileges of Labor Unions in the Struggle for Life*, 27 YALE L.J. 779, 796 n.51 (1918).

interpretation of its meaning. Although possibly separable in the abstract, the two are inseparable under a system which grounds its decisions in specific factual situations.[159]

V. Discretionary Review by the Missouri Supreme Court

The Missouri Supreme Court's distaste for the device of prospectively-defined categories, particularly that of constitutional construction, as a means of allocating original appellate jurisdiction is obvious. Because it is inflexible, it has been condemned as wasteful of the time and effort of both judges and counsel. However, it is an oversimplification to conclude that the major defect of the system is inflexibility. The Missouri Supreme Court has considerable discretion in selecting cases for appellate review, both under the facially mandatory language of article V, section three, and the explicit discretionary authority under the transfer provision of article V, section ten.

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159. Judge Storckman's observation concerning the potential difficulties of the meaning-application distinction (*see* text accompanying notes 145-48 *supra*) was prophetic. This distinction, which looks suspiciously like the old fact-law dichotomy, involves the court in an abstract and artificial determination whether a rule has become specific enough to be characterized as immutable. The philosophical view that a constitution is a fixed set of immutable principles that may simply be discovered and applied to the immediate case has been discredited. Jacobsohn, *Constitutional Adjudication and Judicial Statemanship: Principle, Fact, and Doctrine*, 23 Emory E.J. 137 (1974).

Most questions concerning general constitutional principles are "a blend of fact and constitutional law." First Nat'l Bank & Trust Co. v. City of Evanston, 197 N.E.2d 705, 708 (Ill. 1964). What the court in reality appears to be doing is deciding the extent the decision of the alleged constitutional issue in the case will be a novel precedent. For example, a general constitutional principle is that unreasonable searches are prohibited. Numerous rules have been derived from that principle, such as that a search incident to a lawful arrest or a limited protective search ("frisk") for weapons based on reasonable suspicion is not unreasonable. In a given case, the real dispute might involve whether an admitted frisk was actually based on a reasonable suspicion that the defendant was armed and dangerous. *See, e.g.*, Kansas City v. Butters, 507 S.W.2d 49 (Mo. App., D.K.C. 1974). Resolution of the dispute would turn on the "concrete factual context," *id.* at 51, and would not involve disagreement concerning the rule to be applied or any component of the rule. Hence, the case could properly be decided by the court of appeals.

On the other hand, cases may arise in which the dispute may be partly factual but also involve whether the facts, if established, are governed by a constitutionally derived rule. This case may be characterized as involving a "construction" of the rule and vest jurisdiction in the supreme court. For example, the Missouri Supreme Court has taken jurisdiction of the question whether an identification in the course of an arrest is a "search" within the rule that the fruits of a search pursuant to an unlawful arrest are inadmissible. State v. Britton, 444 S.W.2d 465 (Mo. 1969). Unlike the question whether adequate grounds for an arrest existed, the dispositive issue in *Britton* could not be decided by reference to a well-established and non-disputed standard such as probable cause. The troublesome problem in this analysis is that no objective test exists for deciding when a rule has become so specific as to eliminate the need for interpretation. It would be much simpler for the court if it could candidly admit that the determination is qualitative (a question of degree). But, it obviously feels that the latter approach is constitutionally impermissible.

The problem is not the absence of freedom in the selection of cases for appellate review; it is the legalistic legerdemain in which the court must indulge to exercise that freedom.

A. *Discretion Under the "Obligatory" Grant of Jurisdiction*

Unlike the United States Supreme Court, the Missouri Supreme Court does not have a frankly subjective and discretionary standard such as "substantial question" to limit its "obligatory" direct appeal jurisdiction.[160] The Illinois Supreme Court utilized such a concept under its since-abandoned mandate of direct appeal jurisdiction in cases "involving a question arising under the constitution of the United States or of this state."[161] Under that provision, the Illinois court had more flexibility and discretion, at least superficially, than does the Missouri Supreme Court under its constitutional "construction" jurisdictional grant. The Illinois court noted "that the 'substantial question' concept has enabled the Supreme Court to focus attention on major constitutional issues and has preserved its energies from dissipation upon a host of cases that lacked major constitutional significance . . . ."[162] On that basis, the Illinois court held that the typical zoning case, although involving constitutional issues, was not appealable to the supreme court when it involved "only the application of a zoning ordinance to a particular parcel of property."[163] The court held that it did not present "a substantial question arising under the Constitution of the United States or this State" and that it potentially would only if there were present "novel and substantial issues of concern to every community in the State. . . ."[164]

The Missouri Supreme Court, however, does not have the freedom to decide its constitutional question jurisdiction solely and candidly on the basis of the substantive importance or novelty of the case. The legislature retained direct appeal jurisdiction of cases "involving a construction of the constitution" apparently because it thought that it was possible to define a class of cases in advance that are of sufficient importance to be heard promptly and by the highest court of the state in the first instance.[165] But experience has shown that prospectively-defined categories, if interpreted literally, yield jurisdiction over numerous cases either of little importance or which involve only routine application of the law to the facts.[166] Also, liberal interpretation of the mandatory jurisdiction provision places a disproportionate workload on

160. *See* R. STERN & E. GRESSMAN, SUPREME COURT PRACTICE 81, 116 (4th ed. 1969).
161. ILL. ANN. STAT. ch. 110A, § 302(a) (Smith-Hurd 1968).
162. First Nat'l Bank & Trust Co. v. Evanston, 30 Ill. 2d 479, 483, 197 N.E.2d 705, 707 (1964).
163. *Id.* at 486, 197 N.E.2d at 709.
164. *Id.*
165. *Symposium, supra* ** at 720.
166. *Id.*; *see* Bosselman, *Substantial Constitutional Questions: Are Zoning Cases Sui Generis?*, 53 ILL. B. J. 752, 756 (1965).

the supreme court.[167] Therefore, the Missouri Supreme Court has tended to circumscribe its constitutional question jurisdiction within narrow limits. It has accomplished this restriction by a technical interpretation of the constitutional mandate, that is, by narrowing the definition of constitutional construction for purposes of jurisdiction. Hence, it has denied jurisdiction of cases involving claims of confiscatory application of zoning ordinances, not because constitutional principles were not involved, but because their "construction" was not.[168]

The inability of the Missouri Supreme Court to rationalize its jurisdictional determinations on an importance-of-the-case basis does not mean that it has no freedom in selecting cases for review under the constitutional question category of direct appeal jurisdiction. The jurisdictional tests evolved under that category provide the court with considerable discretion (albeit camouflaged) to characterize a question on appeal as either constitutional or nonconstitutional. A prime example is the pivotal requirement of a disputed meaning of constitutional language as a jurisdictional predicate. It involves an almost metaphysical determination of whether constitutional language is either so clear or has such a well-established (and, *a fortiori*, indisputable) meaning that the court need not interpret or construe it. The court's leeway in applying this test is illustrated by the recent case of *Hill v. State Dep't. of Public Health & Welfare*.[169] It was before the court as a direct appeal from an affirmance by the trial court of a decision by the Division of Welfare to suspend disability welfare payments. The decision of the trial court was based partly on an earlier decision of the Missouri Supreme Court that welfare benefits of the type in question were not "private rights" under article V, section 22 of the Missouri Constitution. The supreme court accepted jurisdiction of the appeal because appellant's argument presented "a question of constitutional construction, namely, the meaning of the term 'private rights' as contained in article V, § 22," and required a determination of whether it "should overrule [its] previous construction thereof."[170] This result seems consistent with the "disputed meaning" requirement of construction. However, if the court had not been inclined to overrule its previous decision, it could have held that the constitutional question presented had already been decided, and the rule that welfare payments based on disability were not private rights was settled or well-established.[171] Hence, the case would involve only an application of the

167. *See Symposium, supra* ** at 621.

168. *See, e.g.*, Wrigley Properties, Inc. v. Ladue, 369 S.W.2d 397 (Mo. 1963); Ewing v. Springfield, 449 S.W.2d (Spr. Mo. App. 1970); *cf.* Dunbar v. Board of Zoning Adjustment, 380 S.W.2d 442 (Mo. 1964).

169. 503 S.W.2d 6 (Mo. En Banc 1973).

170. *Id.* at 8.

171. *See* text accompanying notes 143-44 supra.

Another recent case illustrating the flexibility of the construction-mere application distinction is Peters v. Board of Educ., 506 S.W.2d 429 (Mo. 1974). In *Peters*, the court concluded that it had jurisdiction to decide a dispute concerning

settled rule to the facts and would require no constitutional construction.

The flexibility of the supreme court is illustrated further by examination of cases involving the Missouri Long Arm Statute.[172] Assume that a defendant foreign corporation appeals a case in which it has contested service of process and the assertion of in personam jurisdiction on the ground that it was not "doing business in this state" under the statute. The Missouri Supreme Court has held that the limit of the state's jurisdiction over nonresidents under the statute is identical to the limits imposed by the due process clause of the federal constitution.[173] But the test of what constitutes "doing business" under the statute could be held to be clearly defined in the cases, and, thus, a court could apply it routinely without construing constitutional language.[174] The effect of its holding would be that these cases are no longer important enough for the supreme court to decide them in the first instance.[175]

The Missouri Supreme Court's ultimate problem is not that the obligatory jurisdiction of article V, section three, is inflexible to the point of not allowing the court freedom in its selection of cases. The court has, almost surreptitiously, through the process of interpretation pursued a policy of limited selection to restrict its direct appeal mandatory jurisdiction. The conceptual framework for restriction has accomplished a workable, if not always rational and logical, division of workload between the highest court and the court of appeals.[176] However, the court is required to spend considerable time and effort in the pesky task of an ad hoc determination of jurisdiction (and justification by written opinion) on each appeal in which constitutional error is alleged.[177] It has attempted to inject clarity and certainty into the jurisdictional determination by formulating rules concerning the constitutional construction provision. But the court's policy of restricting its constitutional question jurisdiction has resulted in a concept of constitutional construction that is technical and abstract in meaning.[178] As a result,

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the enforcement of a written agreement between a teachers association and a board of education based on a claim that the constitutional rights of the teachers had been violated. It did so even though the defendant board conceded that the teachers, as public employees, had a clearly established right to organize and select representatives.

172. § 506.500, RSMo 1969.

173. State *ex rel.* Deere & Co. v. Pinnell, 454 S.W.2d 889 (Mo. En Banc 1970).

174. *Cf.* Servco Equip. Co. v. C. M. Lingle Co., 487 S.W.2d 869 (St. L. Mo. App. 1972); State *ex rel.* Birdsboro Corp. v. Kimberlin, 461 S.W.2d 292 (K.C. Mo. App. 1970).

175. Of course, the court is not free to articulate the denial of jurisdiction on the basis of lack of importance. However, the language that jurisdiction is denied because the case involves only a "routine" application of the law to the facts is close.

176. No better example of irrationality exists than Parks v. State, 492 S.W.2d 746 (Mo. En Banc 1973).

177. Neidhart v. Areaco Inv. Co., 499 S.W.2d 929, 931-32 (Mo. 1973); *see* Kempf v. Lee's Summit, 504 S.W.2d 167 n.1 (Mo. 1974).

178. *See* text accompanying notes 8-10 *supra.*

the jurisdictional tests evolved by the court are difficult to understand and apply.[179]

This situation may have been tolerable before the most recent amendment of article V, section three. Now the court encounters separate jurisdictional determinations in that vast number of felony appeals in which supreme court jurisdiction is no longer automatic,[180] while still facing a steadily increasing number of civil and misdemeanor appeals in which constitutional error is alleged.[181] Moreover, it must do so with a decreased number of judges.[182] The judges have spoken out in increasing numbers criticizing mandatory appellate jurisdiction, particularly in the constitutional construction category.[183] No doubt this is because the judges have been frustrated in their expectation that the court could finally effectively exercise its proper and primary function of general superintending control over the whole Missouri appellate court system.[184]

B. *Section Ten and the Foremost-McKesson Doctrine*

In addition to the camouflaged discretion exercised under the preservation and construction formulas, the Missouri Supreme Court has express constitutional authority for discretionary review in article V, section ten. That section authorizes the transfer of appeals from the court of appeals to the supreme court, both before and after opinion, when those appeals involve questions of particular importance or general interest.[185] The supreme court clearly would like to exhaust the full potential of this authority to assure uniformity in the law and to equalize the workload of the appellate courts.[186] The court cannot fully exploit section ten, however,

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179. *See* Neidhart v. Areaco Inv. Co., 499 S.W.2d 929, 931-32 (Mo. 1973); *Foreword* to *Symposium, supra* ** at 422. Witness the almost plaintive wish expressed by Commissioner Higgins in Kempf v. Lee's Summit, 504 S.W.2d 167 n.1 (Mo. 1974):

> This case is an example of the difficulty in applying present criteria for determination of jurisdiction in the Supreme Court on the ground construction of the Constitution is involved. It would be desirable if jurisdictional criteria of Article 5, Section 3, Missouri Constitution, V.A.M.S., were more definitive.

180. Prior to the amendment, the supreme court simply accepted direct appeal jurisdiction of felony convictions and decided them on the merits. Seldom did it need to spend any time inquiring whether it did in fact have jurisdiction. *See Symposium, supra* ** at 607-13.

181. Neidhart v. Areaco Inv. Co., 499 S.W.2d 929, 932 (Mo. 1973).

182. Garrett v. State, 481 S.W.2d 225, 228 (Mo. En Banc 1972). The commissioners on the supreme court are being phased out, and the court will become a court of seven judges "with no provision for expansion."

183. *See* note 179 *supra.*

184. *See* the remarks of Judge Finch in his concurring opinions in Neidhart v. Areaco Inv. Co., 499 S.W.2d 929 (Mo. 1973) and Garrett v. State, 481 S.W.2d 225 (Mo. En Banc 1972).

185. Mo. CONST. art. V, § 10 has been implemented by Mo. SUP. CT. R. 83.01-.03, 83.06.

186. *See* Garrett v. State, 481 S.W.2d 225, 229 (Mo. En Banc 1972) (concurring opinion).

because of its constitutionally-required preoccupation with mandatory jurisdiction.[187] Nevertheless, it has demonstrated an inclination to use the discretionary transfer provision to the extent feasible under the existing appellate framework.

In *Foremost-McKesson, Inc. v. Davis*,[188] the supreme court decided that it did not have direct appeal jurisdiction based on constitutional construction. Nevertheless, the court concluded that, because of the

> general interest and importance of the other questions in the case and the need for adjudication at this level, [it would] retain and decide the case, rather than go through the time-consuming procedure of sending the case to the Court of Appeals and then transferring it back prior to opinion.[189]

The supreme court has since retained jurisdiction in a number of cases on the authority of article V, section ten, for the reasons stated in *Foremost-McKesson*.[190] These cases suggest a theory of appellate review for resourceful counsel. If counsel wants to appeal a case to the Missouri Supreme Court, he can allege not only that it is within a class directly appealable, but alternatively, that it is of such general interest and importance that it should be decided initially by the highest court of the state. Because "it is not possible to draw a clear line of demarcation"[191] between those cases in which supreme court jurisdiction is mandatory and those in which it is not, the allegation that the case is of general interest and importance could be a decisive factor in the court's jurisdictional determination. In fact, the allegation could provide the court with an escape from a potentially knotty jurisdiction question under article V, section three.[192] However, one should resist the temptation to conclude that something in the nature of a petition for certiorari in the supreme court now exists in Missouri appellate procedure.[193]

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187. Note the language of Judge Finch in Parks v. State, 492 S.W.2d 746, 749 (Mo. En Banc 1973) (dissenting opinion):

> The purpose of Art. V, § 3, as I pointed out in my concurring opinion in State v. Garrett, supra, was to cut down substantially on the mandatory appellate jurisdiction of this Court. Under the constitutional change, the Court was to be reduced from a court of seven judges and six commissioners to a court of seven judges, which would act more as a supervising and reviewing court than previously, concentrating on deciding important cases and reconciling divergence in decisions of our various appellate courts. As a corollary, the mandatory appellate jurisdiction of this Court was reduced.

188. 488 S.W.2d 193 (Mo. En Banc 1972).

189. *Id.* at 196.

190. State v. McClain, 498 S.W.2d 798 (Mo. En Banc 1973); State v. Ford, 495 S.W.2d 408 (Mo. En Banc 1973). *See also* Kempf v. Lee's Summit, 504 S.W.2d 167 (Mo. 1974) ("retained for decision in the interest of conserving time").

191. Neidhart v. Areaco Inv. Co., 499 S.W.2d 929, 931 (Mo. 1973).

192. *Cf.* Kempf v. Lee's Summit, 504 S.W.2d 167 (Mo. 1974).

193. There is no explicit authority in the Missouri Supreme Court Rules for a petition for direct review by the supreme court on the basis of the general interest or importance of the case. They only authorize this as a basis for transfer from the court of appeals. Mo. SUP. CT. R. 81.08, 83.02, .03, .06. For direct appeals to the

The burden of mandatory direct appeal jurisdiction in the supreme court puts a damper on the court's ability to accept more than a few cases on the basis of general importance or public interest. Even if the court did not have any mandatory jurisdiction, it would necessarily be required to exercise its discretionary review authority with considerable restraint, lest it be swamped by petitions for supreme court review and a commensurate increase in paper work.[194] Furthermore, the supreme court would, consistent with the spirit of the transfer provision, tend to defer to the court of appeals' expertise in deciding whether a case should be certified.[195]

Whatever the future of mandatory appellate jurisdiction in the Missouri Supreme Court, the court likely will move cautiously in expanding its discretionary authority under section ten to select cases for review. It also is difficult to determine what the precise factors[196] would be in determining whether an appeal is "certworthy", *i.e.*, within its discretionary review authority. The court has already determined that where the death penalty was imposed at trial, the case is presumptively important enough under section ten to be heard first by the supreme court.[197] Past Missouri cases may provide some general guidance,[198] and United States Supreme Court and other state supreme court decisions, granting or denying discretionary review will help too.[199] However, it seems clear that the supreme court will

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supreme court, the rules require only that the appellate brief contain a statement of jurisdiction. Mo. Sup. Ct. R. 84.04. Rule 81.08 simply condemns "bare recitals" of a conclusionary nature and provides examples of brief one-paragraph statements of jurisdiction that "are examples of sufficient explanations." Parties may file a statement with their application, but the rules appear to contemplate filing of the appeal in the court of appeals first. Mo. Sup. Ct. R. 83.05. Presumably, the court would not object to more elaborate arguments by counsel in support of direct appeal jurisdiction under any of the categories of article V, § 3, Mo. Sup. Ct. R. 81.08. However, whether the court would allow an argument for jurisdiction based on the grounds for transfer—general interest or importance of the case or need for reexamination of existing law—is not clear.

194. The opinion has been expressed that "if the court adopted a policy of considerable restraint in the selection of cases for review, litigants would be discouraged from petitioning in unimportant cases." *Symposium, supra* ** at 722 n.46; *see also id.* at 721.

195. Obviously, the court of appeals is intended to be the terminal court in most cases. The importance of an intermediate court of appeals in screening cases is highlighted by recent proposals to limit the workload of the United States Supreme Court. *See* Federal Judicial Center, Report of the Study Group on the Case Load of the Supreme Court (1972).

196. A century's experience of mandatory appellate jurisdiction should be lesson enough. The categorical allocation of exclusive appellate jurisdiction in the Missouri Supreme Court may be traced to the Constitution of 1875. *See Introduction* to *Symposium, supra* ** at 424-29.

197. Garrett v. State, 481 S.W.2d 225 (Mo. En Banc 1972).

198. Although the opinions of the Missouri Supreme Court rarely articulate its reasoning for denominating a case to be of general interest and importance, counsel could find in them some precedent for assumption of jurisdiction in future cases.

199. *See generally* R. Stern & E. Gressman, Supreme Court Practice 149-93 (4th ed. 1969); Lilly & Scalia, *Appellate Justice, A Crisis in Virginia?*, 57 Va. L. Rev. 3, 47-51, 55-56 (1971).

studiously avoid formulation and publication of any rigid criteria for selection of cases.

VI. Conclusion

The albatross of constitutional question appellate jurisdiction still hangs heavy on the Missouri appellate court system. In its struggle over the years to lessen the load, the Missouri Supreme Court has unwittingly added to its own burden by restricting its jurisdiction through use of a technical rule-oriented approach, thought to be compelled by the mandatory language of the Missouri constitution. Its load was increased by the constitutional amendment of article V, section three, in which the category of mandatory jurisdiction of "cases involving a construction of the constitution" was retained. The only acceptable solution, which many have advocated for years and which is clearly dictated by the Missouri experience and that of its sister states,[200] is to eliminate mandatory direct appeal jurisdiction based on constitutional construction.

200. *See Conclusion* to *Symposium, supra* ** at 710-27.