

The Role of the Judiciary in a System of Separation of Powers and Checks and Balances

(In conjunction with the Judicial Track of the Checks and Balances Project)

By Millie Aulbur, Director of Law-Related Education, The Missouri Bar

Objectives:

1. To reinforce the concepts discussed in the telecast on the role of the judiciary on a system of separation of powers and checks and balances.
2. To demonstrate the role of judiciary in our system of government.

Suggested grade levels: 9-12

Materials needed: Handouts for and access to either a writing board or a flip chart.

Procedures:

1. Distribute the student handout—*What is the Role of the Courts in a System of Separation of Powers and Checks and Balances?* This is reprinted from the Constitutional Rights Foundation website (www.crf-usa.org from the Online Lessons section) with edits and additions provided by The Missouri Bar.
2. Have the students read the handout either silently or together as a class.
3. As a class or in groups of three to four, have the students complete the charts on the student handout—*Checks and Protections*. The purpose of this handout is to show both the “separation” of the branches and the checks and balances between the judicial branch and the other two branches.

Possible answers for legislative and executive checks on the judiciary:

- Missouri legislative checks on the judiciary include the power of the purse—each year the legislature decides the budget for every state branch and agency, including the judiciary.
- Federal legislative checks include the power of the purse and the Senate must approve any federal judge nominated by the president.
- Missouri executive checks include the governor chooses appellate court judges, including Missouri Supreme Court judges, from a panel of three nominated by a special commission. In Missouri, unlike the federal government, the chief executive—the governor—has line item veto and can veto all or parts of the judiciary budget.
- Federal executive check is the power to nominate federal judges.

Possible answers for protections the judicial branch has from the other two branches of government:

- Federal legislative protections—Congress cannot reduce a judge’s salary while he/she is on the bench, Congress may not nominate a judge—only confirm a presidential nominee, the Congress has no control over the cases the Court hears and Congress cannot overrule the Court.
- Federal executive protections--the president cannot demand loyalty from a judge he/she nominates and has no control over the cases that the Court hears.
- Missouri legislative protections—The Missouri General Assembly has no part in selecting judges under Missouri’s Non-Partisan Court Plan and has no power over the cases that the Courts hear.
- Missouri executive protections—the governor chooses a judge from a panel presented to him/her and does not nominate or choose judges and the governor has no control over the cases the Courts hear.

4. Follow up activities:

- a. Distribute the student handout—*The Least Dangerous Branch?* or make it into a transparency and project it where all students can see it. Have the students react to Hamilton’s belief that the judiciary will be the least dangerous to individual freedoms. Discussion questions follow the quote on the handout.
- b. Do the case study of *State v. Rowe*. (Attached)

5. Debrief:

- What did you learn from this lesson?
- What information do you still need?
- Where might you go to find out this information?

What is the Role of the Courts in a System of Separation of Powers and Checks and Balances?

The United States Court System

When the framers of the Constitution arrived in Philadelphia in 1787 to consider a new form of government for the United States, it was a foregone conclusion that it would have three branches. Well-educated students of history, the framers had been influenced by great political thinkers of the past, including the Frenchman Montesquieu. Central to his ideas about government was the concept of separation of powers. He believed that the best way to preserve individual liberty and avoid tyranny was to divide the powers of government into the legislative, executive, and judicial function. (See Articles I, II and III of the United States Constitution.) In this way, none of the branches would possess all of the power and each would balance one another off.

Those at the Constitutional Convention worried about power, too. Fresh from the revolutionary experience, they wanted to make sure that the government had enough power to solve the country's problems, but not too much power to ride roughshod over the states or individual citizens. Many viewed the judicial branch as, in the words of Alexander Hamilton, "the least dangerous to the political rights of the Constitution" and as a necessary buffer between the powerful presidency and Congress.

Article III of the Constitution states: "The judicial Power of the United States shall be vested in one Supreme Court and in such inferior Courts as the Congress may from time to time ordain and establish." The article goes on to describe what kinds of cases the "judicial Power" would be empowered to hear. Language in the article suggests that the framers wanted the judicial branch to serve an independent role free from political pressure. It stated that judges should "hold their Offices during good Behavior." This meant a judge could only be removed for misconduct. It also stated that judges should receive a salary that could not be reduced during the time they held office. This would assure that judges could not be punished by salary reductions if they made unpopular decisions.

Though the framers created an independent judiciary in Article III, they also included some checks and balances against too much judicial power. The Constitution gave the president the power to appoint judges with the "Advice and Consent of the Senate." (Article II, Section 2.2) (*See more on how the Senate's power to give "advice and consent" to the president has evolved in Lesson 3—The Selection of Judges.*) It gave Congress the power to create or eliminate lower federal courts and determine what cases could be appealed to them.

Oddly, the Constitution says nothing about the one job the Supreme Court is most known for today. That is the power to review federal and state laws to determine whether or not

they are constitutional. (See the Lesson Plan 2—Judicial Review.) Some scholars have argued that the framers assumed that the Supreme Court would have this power without having to spell it out in the Constitution. They cite, for example, Alexander Hamilton in *The Federalist Papers*, a series of articles published to support the ratification of the Constitution. He wrote:

The interpretation of the laws is the proper and peculiar province of the courts. A constitution is, in fact, and must be regarded by judges, as fundamental law. It therefore belongs to them to ascertain its meaning, as well as the meaning of any particular act proceeding from the legislative body.

Once the Constitution was ratified, the First Congress of the United States went about establishing the rest of the federal courts under the powers given to it. The Federal Judiciary Act of 1789 laid out a plan that today has grown into an extensive system of federal trial and appeal courts. It also gave federal courts the power to take appeals from state decisions. The U.S. Constitution attempts to ensure judicial independence.

Missouri's Court System

Missouri has the same separation of powers system of government as the United States and grants its courts have the same powers as the federal courts. (See Articles II, III, IV and V of the Missouri Constitution.) Unlike the federal constitution, Missouri's Constitution grants the power of judicial review to Missouri's courts (Article V, Section 3) and extensively lays out how many courts there will be, how many judges there will be and what their qualifications will be. (Article V)

Missouri also has a system of checks and balances—balanced power between the three branches and each branch has checks on the other two. In Missouri, the Governor appoints some circuit court judges and all appellate judges from a special non-partisan panel. The legislative branch (Missouri's General Assembly) has the power of purse—it decides the budget of the judiciary. The Governor also has the power to approve or veto all or part of the budget. (The President of the United States does not have the power of line item veto like the Governor of Missouri.) The judicial check on the executive and legislative branches is the power to declare laws and executive acts unconstitutional, which means the laws and acts are null and void.

Checks and Protections

Legislative and Executive Checks on the Judiciary

	Missouri	United States
Executive		
Legislative		

Judicial Protections from the Executive and Legislative Branches

	Missouri	United States
Executive		
Legislative		

The Least Dangerous Branch?

From Federalist Paper # 78 by Alexander Hamilton:

Whoever attentively considers the different departments of power must perceive that, in a government in which they are separated from each other, the judiciary, from the nature of its functions, will always be the least dangerous to the political rights of the Constitution; because it will be least in a capacity to annoy or injure them. The executive not only dispenses the honors but holds the sword of the community. The legislature not only commands the purse but prescribes the rules by which the duties and rights of every citizen are to be regulated. The judiciary, on the contrary, has no influence over either the sword or the purse; no direction either of the strength or of the wealth of the society, and can take no active resolution whatever. It may truly be said to have neither FORCE nor WILL but merely judgment; and must ultimately depend upon the aid of the executive arm, even for the efficacy of its judgments.

Discussion questions:

1. Do you agree with Hamilton's statement that the judiciary is the least dangerous to our political rights (think of the rights guaranteed in the Bill of Rights)? Why or why not?
2. What does he mean by "sword of the community"?
3. Why do you think Hamilton felt that the "power of the purse" is more dangerous than anything the judiciary might do?
4. Supreme Court judges—both Missouri and United States—are not elected. Why doesn't this make them the "most dangerous" branch of all? How does the fact they are not elected insure everyone's political rights? How does the fact that they do not have to raise money for elections make for a more independent judiciary?

State v. Rowe, 63 S.W.2d, 847 (Mo banc 2002).

(In conjunction with the Judicial Track of the Checks and Balances Project)

By Millie Aulbur, Director of Law-Related Education, The Missouri Bar

Description: This lesson uses the case of *State v. Rowe* to explore how the legislature makes the law, the executive branch enforces the law and the judicial branch interprets the law.

Objectives:

3. To explore the concepts of separation of powers and checks and balances.
4. To see how the concept of separation of powers and checks and balances applies in an actual situation.

Suggested grade levels: 9-12

Materials needed: Handouts and access to either a writing board or a flip chart.

Procedures:

1. As a class read the case of *State v. Rowe*. (Attached and may be found at www.osca.state.mo.us by going to “Opinions” and then putting “*State v. John Rowe*” in the search box.)
2. Possible vocabulary words to define prior to the lesson: revoked, felony and plaintiff.
3. After reading the case, have the students discuss this case and fill in the handout:
Possible answers to the questions in the handout:
 - John Rowe was arrested for driving while his license was revoked.
 - In court he was found guilty of the Class D felony (least severe of felony classes) of driving with his license revoked and sentenced to three years in prison and given a fine of \$1,000.00.
 - The State of Missouri is the plaintiff because John Rowe is accused of breaking a Missouri law. The prosecutor is the state lawyer in this case.
 - This was a jury tried case.
 - It was in Clark County because that is where he was arrested.
 - John Rowe (through his lawyer) argued that the law said he would be guilty of driving while his license was revoked if it had been revoked under the laws of “this” state (meaning Missouri) and his license had been revoked by the state of Iowa.
 - The role of the legislature was to pass this bill.
 - The role of the executive branch was twofold: the governor signed this bill into law and law enforcement officials arrested Mr. Rowe.
 - The role of the judiciary is two fold: the trial court provided Mr. Rowe with a place to have his case heard and then convicted and

sentenced him and now the Supreme Court is reviewing the trial court's action to make sure the trial court applied the law correctly.

- §302.321. (See www.moga.state.mo.us for access to Missouri's statutes.)
- A person commits the crime of driving while revoked if such person operates a motor vehicle on a highway when such person's license or driving privilege has been canceled, suspended, or revoked under the **laws of this state**...
- The Court believed the intention of the legislature was to make it illegal for anyone with a revoked license from any state to drive on Missouri's roads and highways.
- The Supreme Court reversed Mr. Rowe's conviction because the statute's clear language was that it was illegal only when the license had been revoked by Missouri law and since Mr. Rowe's had been revoked under Iowa law, the Missouri law could not apply to him.
- Because "this court...cannot rewrite the statute." This is the role of the legislative branch, not the judicial branch.
- It does—"The legislature may wish to change the statute to cover out-of-state multiple offense drivers such as Rowe."

DISCUSSING *STATE V. ROWE*

1. Establishing the facts:

- a. What did John Rowe do to get in trouble with the law?
- b. John Rowe is the defendant in this case. Who is the plaintiff? Why?
- c. What happened to him in court? Was it a judge tried or jury tried case? What county did he go to court in? Why?
- d. Why does John Rowe think that he should not have been convicted of driving while his license was revoked?

2. How were all three branches of the government involved?

- a. What role did the Missouri legislature have in this case?
- b. What role did the executive branch have in this case?
- c. What role did the judiciary have in this case?

3. What did the Supreme Court of Missouri decide?

- a. What statute is the court looking at to make its decision?
- b. What wording in the statute particularly concerns the parties?
- c. What did the Supreme Court think the intention of the legislature was when it passed this law? What do you think?
- d. Did the Supreme Court find in Mr. Rowe's favor or agree with the trial court?
- e. Since the Supreme Court thinks the legislature intended for the law to apply to anyone who had a license revoked in any state, why didn't the court just let Mr. Rowe's conviction stand?
- f. Why doesn't the Supreme Court change the law to what it thinks the legislature intends?
- g. Does the Court tell the legislature how it can fix the law?

Supreme Court of Missouri,
En Banc.
STATE of Missouri, Respondent,
v.
John ROWE, Appellant.
No. SC 83880.
Jan. 8, 2002.

Driver was convicted in the Circuit Court, Clark County, [Gary Dial](#), J., of driving with a canceled license. Defendant appealed. On transfer from the Court of Appeals, the Supreme Court, [Wolff](#), J., held that driver could not be prosecuted for driving with license canceled "under the law of this state," as license had been canceled in Iowa. Reversed and remanded.

[Emmett D. Queener](#), Asst. Public Defender, Columbia, for Appellant.
[Jeremiah W. \(Jay\) Nixon](#), Atty. Gen., [Evan J. Buchheim](#), Assistant Atty. Gen., Jefferson City, for Respondent.

[MICHAEL A. WOLFF](#), Judge.

John Rowe, an Iowa resident who had his driver's license cancelled in Iowa, appeals his conviction under [section 302.321 \[FN1\]](#) for driving in Missouri when his license or driving privilege "has been canceled, suspended or revoked under the laws of this state...." The state asks this Court to construe the statutory words "under the laws of this state" to include the laws of Iowa.

[FN1](#). All references are to RSMo 2000 unless otherwise specified.

The meaning of the statute's words is plain. They cannot be construed to mean anything other than what they say. Rowe's conviction is reversed, and the case is remanded.

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The Case Against Rowe

On October 2, 1999, Rowe pulled his car off the road onto a shoulder near a checkpoint that police in Clark County were operating at the intersection of two highways. Police saw Rowe get out of the car and a passenger, later identified as his wife, move over into the driver's seat. The officers arrested Rowe for driving without a valid license.

The state charged Rowe with the class D felony that is included in [section 302.321](#): driving while his license was canceled, suspended or revoked, after multiple prior such offenses. At trial, Rowe's Iowa driving record was admitted. The Iowa record showed that he was barred from having a driver's license because he was a habitual offender and that his license had been indefinitely suspended and revoked. Section 302.321.2 makes the offense a class D felony where there are multiple instances of driving while revoked. The

jury found Rowe guilty of the class D felony and, upon the jury's recommendation, the trial court sentenced Rowe to three years in prison and a fine of \$1,000. Rowe appealed. This Court granted transfer after opinion by the court of appeals. We have jurisdiction. [Mo. Const. art. V, sec. 10.](#)

The Law

The statute under which Rowe was convicted, section 302.321.1, provides:
A person commits the crime of driving while revoked if he operates a motor vehicle on a highway when his license or driving privilege has been canceled, suspended *649 or revoked *under the laws of this state* and acts with criminal negligence with respect to knowledge of the fact that his driving privilege has been canceled, suspended or revoked. (Emphasis added.) [\[FN2\]](#)

[FN2.](#) Section 302.321.2 provides that a violation is a class A misdemeanor but enhances the offense to a class D felony where there are multiple driving while revoked offenses. Section 302.321.2 provides:



Any person convicted of driving while revoked is guilty of a class A misdemeanor. Any person with no prior alcohol-related enforcement contacts as defined in section 302.525, convicted a fourth or subsequent time of driving while revoked and any person with a prior alcohol-related enforcement contact as defined in section 302.525, convicted a third or subsequent time of driving while revoked is guilty of a class D felony. No court shall suspend the imposition of sentence as to such a person nor sentence such person to pay a fine in lieu of a term of imprisonment, nor shall such person be eligible for parole or probation until he has served a minimum of forty-eight consecutive hours of imprisonment, unless as a condition of such parole or probation, such person performs at least ten days involving at least forty hours of community service under the supervision of the court in those jurisdictions which have a recognized program for community service. Driving while revoked is a class D felony on the second or subsequent conviction pursuant to [section 577.010, RSMo](#), or a fourth or subsequent conviction for any other offense.

Rowe's sole contention on appeal is that his license was not canceled, suspended, or revoked "under the laws of this state" and, thus, he cannot be found guilty of the felony offense set forth in [section 302.321](#). Rowe apparently concedes that he had no privilege to drive on Missouri roads and that he violated section 302.020, a misdemeanor offense of driving without a valid license. [\[FN3\]](#)

[FN3.](#) Section 302.020.1 provides in pertinent part:

Unless otherwise provided for by law, it shall be unlawful for any person, except those expressly exempted by section 302.080, to: (1) Operate any vehicle upon any highway in this state unless he has a valid license; ...

Missouri extends to residents of other states the privilege of driving here. Section 302.080. Missouri participates in the "Driver License Compact" with other states; the policy of the compact is to make "reciprocal recognition of licenses" and to help achieve compliance with motor vehicle laws of the participating states. Section 302.600. But nowhere in the compact or other statutes is a provision that includes the laws of another state in the phrase "under the laws of this state."

[\[1\]](#)  [\[2\]](#)  Section 302.321.1 would mean precisely what the state says it means if the phrase "under the laws of this state" were omitted. If that were the case, Rowe would be guilty of driving while his license was canceled, suspended or revoked regardless of

which state's licensing agency took away his license. The state wants this Court to construe the statute to achieve this result. Courts apply certain guidelines to interpretation, sometimes called rules or canons of statutory construction, when the meaning is unclear or there is more than one possible interpretation. [\[FN4\]](#) When the words are clear, there is nothing to construe beyond applying the plain meaning of the law. [State ex rel. Missouri Pacific Railroad v. Koehr, 853 S.W.2d 925, 926 \(Mo. banc 1993\)](#).

[FN4](#). See generally, Karl Llewellyn, *Remarks on the theory of Appellate Decision and the Rules or Canons About How Statutes Are to be Construed*, 3 VAND. L.REV. 395, 398-406 (1950).



[\[3\]](#) Despite the phrase "under the laws of this state," it seems unlikely that the Missouri legislature intended to let out-of-state drivers with multiple offenses suffer only the consequences of a misdemeanor for driving after revocation while subjecting *650 Missouri drivers to a felony for the same act. Legislative intent can only be derived from the words of the statute itself. [Spradlin v. City of Fulton, 982 S.W.2d 255, 258 \(Mo.1998\)](#).



[\[4\]](#) Courts do not have the authority to read into a statute a legislative intent that is contrary to its plain and ordinary meaning. [Kearney Special Rd. Dist. v. County of Clay, 863 S.W.2d 841, 842 \(Mo. banc 1993\)](#). The legislature may wish to change the statute to cover out-of-state multiple-offense drivers such as Rowe. But this Court, under the guise of discerning legislative intent, cannot rewrite the statute.



[\[5\]](#) This is not an application of the rule of lenity. The rule of lenity gives a criminal defendant the benefit of a lesser penalty where there is an ambiguity in the statute allowing for more than one interpretation. See [State v. Stewart, 832 S.W.2d 911, 912 \(Mo.1992\)](#) citing [Bifulco v. United States, 447 U.S. 381, 100 S.Ct. 2247, 65 L.Ed.2d 205 \(1980\)](#). There is no ambiguity in the words of the statute.

Conclusion

Rowe's license or driving privilege has not been "canceled, suspended, or revoked under the laws of this state;" thus, he cannot be found guilty of violating [section 302.321](#). The judgment of the circuit court is reversed, and the case is remanded.

All concur.

Mo.,2002.

State v. Rowe

63 S.W.3d 647

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