

**General Discussion**  
**MISSOURI PAC. RY.CO. v. STATE OF KANSAS,**  
**248 U.S. 276 (1919)**

Missouri Pac. Ry. Co. v. State of Kansas, 248 U.S. 276 (1919) (hereafter Missouri) delivered by Edward Douglass White, Jr. (Chief Justice 1910-21, Associate Justice 1894-1910, United States Senator 1891-94), was the first in a series of rulings extending nearly two decades which ultimately defined nearly all questions involving Article V of the Constitution. These series of rulings primarily occurred because of political opposition to the adoption of two constitutional amendments: the 18<sup>th</sup> Amendment (outlawing consumption of liquor in the United States and the 21<sup>st</sup> Amendment (repealing the 18<sup>th</sup> Amendment). In nearly all cases brought before the Supreme Court raising objections either to liquor being prohibited or consumption liquor being allowed, the parties in question raised various issues of procedure vis-à-vis Article V. While all of the rulings dealt with Congress, in no ruling did the Court exclude the convention portion of Article V from its determination. Therefore given the circumstance of the absence of a reasonable basis upon which to exclude the convention process from the Court rulings expressed in *Gulf*, coupled with the fact the Court, neither by implication nor expression, excluded the convention from the effects of its rulings, it is reasonable to state these rulings equally apply to Congress *and* the convention.



White

Chief Justice White summarized the issue before the Court,

“The proposition is this, that as the provision of the Constitution exacting a two-thirds vote of each house to pass a bill over a veto means a two-thirds vote, not of a quorum of each house, but of all the members of the body, the Webb-Kenyon Act was never enacted into law, because after its veto by the President it receive in the senate only a two-thirds vote of the Senators present (a quorum), which was less than two-thirds of all the members elected to and entitled to sit in that body.”

While the issue before the Court (quorum of members versus full member needed to overturn a presidential veto) does not relate to Article V, Chief Justice White primarily based his opinion on that portion of the Constitution and wrote, “The identify between the provision of article 5 of the Constitution, giving the power by a two-thirds vote to submit amendments, and the requirements we are considering as to the two-thirds vote necessary to override a veto makes the practice as to the one applicable to the other.”

The Court first cited the actions of Congress in proposing the first ten amendments to the Constitution “embodying a bill of rights.” The Court noted that in both House and Senate the record indicating approval of the proposed amendments was based on a two-thirds vote of the members “present concurring therein.”

Chief Justice White then said, “When it is considered that the chairman of the committee in charge of the amendments for the House was Mr. Madison, and that both branches of Congress contained many members who had participated in the deliberations of the convention or in the proceedings which led to the ratification of the Constitution, and that the whole subject was necessarily vividly present in the minds of those who deal with it, the convincing effect of the action cannot be overstated.”

Given the endorsement of the Supreme Court regarding Mr. Madison and his knowledge of the amendment process, Madison’s remarks as to the obligation of a convention call by Congress and that such call shall not involve debate, vote or committee the convincing effect of that action also cannot be overstated. Thus, if Madison’s (and others in Congress) remarks require Congress to call a convention on such basis, their interpretation of Article V for that portion of the article must have as equal effect and bearing as does their interpretation and action regarding amendment proposal, quorum and two-thirds vote of Congress.

As quoted by Chief Justice White,

“The settled rule, however, was so clearly and aptly stated by the Speaker, Mr. Reed, in the House, on the passage in 1898 of the amendment to the Constitution providing for the election of senators by vote of the people, that we quote it. The ruling was made under these circumstances: When the vote was announced, yeas, 184, and nays, 11, in reply to an inquiry from the floor as to whether such vote was a compliance with the two-thirds rule fixed by the Constitution, as it did not constitute a two-thirds vote of all the members elected, the speaker said:

“The question is one that has been so often decided that it seems hardly necessary to dwell upon it. The provision of the Constitution says ‘two-thirds of both houses.’ What constitutes a house? A quorum of the membership, a majority, one-half and one more. That is all that is necessary to constitute a house to do all the business that comes before the House. Among the business that comes before the House is the reconsideration of a bill which has been vetoed by the President; another is a proposed amendment to the Constitution; and the practice is uniform in both cases that if a quorum of the Houses is present the House is constituted, and

two-thirds of those voting are sufficient in order to accomplish the object. ...' 5 Hinds' Precedents of the House of Representatives, pp.1009-1010."

Thus Missouri establishes several important rules of amendment proposal for Congress and the convention. First, for any business to be conducted, a quorum of the membership ("one-half and one more") must be present. Second, in order to propose an amendment, a two-thirds vote of the membership present (assuming a quorum) is required. From these two rules is derived other rules.

The third rule concerns the one question remaining as to the composition of the convention: upon what basis shall the count of "membership" for quorum or vote on amendment be determined? Shall the quorum be based on representation of population (district) or representation by state? The answer is not as difficult as might be imagined. It again relates to the Gulf decision which can be summed as, where there is no reason for discrimination, there is no discrimination.

The answer begins with the most basic of observations. Each member of Congress has one vote. The reason for this limitation is to prevent any one member of Congress from having more authority on any question before Congress than any other member of Congress. Thus, all elected representatives of Congress whether they are in the House or Senate, represent those who elected them equally in that any power of vote that representative of the people shall exercise is equal to all other members of the Congress. Hence, the principle of equality extends to electorate as well as the member. *However the electorates which choose a member of the House of Representatives and choose a member of the Senate are not identical.* In the selection of a House member, a portion of a state (in most cases) chooses a representative for that portion of the population called a *district*. In the case of the Senate however *without exception* the entire population of the state selects its representative(s) for that body.

Thus two distinct types of electoral representation exist in Congress. In Congress this distinction, in regards to proposing amendments is of little significance as each House of Congress represents one category of electoral selection—district or state. The 17<sup>th</sup> Amendment, while changing the method of selection of a senator from appointment by state legislature to electorate did not alter the fact that once a representative was selected, he still represented the state as a whole as opposed to representing a portion of it as does a member of the House. However, Article V mandates that Congress call "a" convention proposing amendments—singular. Thus, the Constitution mandates that any representation must be held within a single convention, that is, a single house rather than in two houses as is the case with Congress.

There is no basis of argument that portion of population in a particular state is unequal in rights to the rest of the population of that same state or that a state population of one state is unequal in rights to that of another state. How, in light of Gulf, can it be argued that because of mass of numbers, a citizen of California shall have more “say” in the fate of an amendment proposal at the convention than a citizen from Rhode Island? Is there any reasonable basis for such discrimination simply because more citizens reside in one state than another? How does this unequal distribution of population and hence unequal representation at convention translate that one state shall carry more weight in the decision of an amendment than another which, if ratified, shall equally effect all? Moreover how is such discrimination substantiated in light of the fact that in ratification each state is equal in its effect regardless of population. Hence, it is well established by the terms of Article V that in matter of amendment, states are equal. Equal treatment for the states and the people comprising those states cannot be ignored. State legislatures, authorized by the Constitution, propose the applications which cause Congress to call the convention. The two thirds requirement of Article V means each state is permitted one “vote” or application to cause a convention call. No application can be preferred over another meaning the purpose as well as the contents must be treated equally.

Ratification of proposed amendments from the convention is determined by *state* action either in legislature or convention. Each state casts one ratification “vote” and no vote may be preferred over another meaning all ratification votes at treated equally. These two examples demonstrate an irrefutable fact. The states are integral part of the convention process and therefore cannot be discriminated against by denying them equal representation at the convention. If both application and ratification for the states are equal in treatment, that is, precisely identical in both affect and effect as all other sister states, how can it be argued that a state is equal in one portion of the amendment process but not equal in another part of the same process when no means of discrimination exists in the process to permit such discrimination? The Gulf makes it clear no such discrimination is permitted.

The Constitution, as well as history, provides solution. In 1787, the various states sent representatives to the 1787 Federal Convention in Philadelphia. There the delegates determined that as all states were equal, each state delegation should vote as a unit and have a single vote. This state vote concept was extended first in Article II, § 1(3) and later in the 12<sup>th</sup> Amendment both of which required in the process of selecting a president if the Electoral College were tied, that the House of Representatives shall “be taken by States the Representation from each State having one Vote...” The members of the House are therefore transformed into state delegations and these delegations become an *artificial person* in the House to accomplish a constitutional task.

As stated in *Gulf*, discrimination cannot be allowed against a group any more than it can be permitted against individuals comprising that group. Consequently, the artificial persons in Congress must be treated equally under the law while engaging in their constitutional business. The precedent that members chosen by the electorate to perform a constitutional task may be comprised into artificial persons to accomplish that task is well-established as it was ratified as the 12<sup>th</sup> Amendment to the Constitution meaning ultimately it received two-thirds support from Congress and three-fourths support from the states.

It is also established in the formation of the Constitution itself, people such as Madison to whom the Court placed great reliance, relied on the creation of these artificial persons in order to allow for equal representation by all attendees. Based on these two precedents, the mandated equality for both electorate and state and the fact no reasonable basis exists to other discriminate, it is clear a convention must be composed of elected delegates who then are grouped into artificial persons known as state delegations. In this manner both the populace and the states are equally represented. As there is no basis to assert any citizen, without cause can be discriminated over another, so too must this rule apply to states. Hence, no state may be discriminated over another state nor may the procedures of a convention discriminate against Congress. The Constitution provides no means whereby such discrimination is justified. So each state and therefore each state delegation must be equal meaning each state receives one vote on any question before the house. As Congress is limited to passage of an amendment by two-thirds vote (assuming a quorum in each house) so must the convention be equally limited. Hence, for an amendment to be proposed in convention, two-thirds vote, or 34 state delegations, each delegation representing one state, must approve the proposal, assuming a quorum of 26 state delegations present.

Moreover, in order to be consistent with parliamentary rules of procedure and the requirements of equality, it is clear that any motion made by any delegate within the artificial person cannot be seconded by another delegate within that same state delegation or person as this would effectively be the same person seconding his own motion. The motion must receive a second from a member of another state delegation. If each state delegation is viewed as a human body, and parliamentary rules dictate any motion must first be made by one member then seconded by another, it's clear this process *must* involve two *independent* bodies, that is, two humans, artificial or otherwise. If a delegate within a delegation proposed a motion and another delegate within that same delegation seconded it, it would be the same as a single member proposing and seconding his own motion which parliamentary rules do not allow.