General Discussion
LESER v. GARNETT, 258 U.S. 130 (1922)

Brandeis

Leser v. Garnett, 258 U.S. 130 (1922) (hereafter Leser) was delivered by Louis D. Brandeis, (Associate Justice 1916-39) and addressed whether the 19th Amendment granting women the right to vote had become part of the federal Constitution. Objections were raised that the ratification of the proposed amendment conflicted with statutory and constitutional provisions of several states which had ratified the amendment. Therefore, it was argued, ratification by these states was invalid as the state laws or constitutional provisions nullified the ratification of the proposed amendment. In a concise two-page opinion the Court addressed three objections to ratification of the 19th Amendment and determined the objections meritless.

The first objection raised was the power of the amendment, allowing women the vote, "destroys [the state's] autonomy as a political body…if made without the state's consent." The Court stated the 15th Amendment, prohibiting disenfranchisement on the basis of race, color or previous condition of servitude, was similar in language to the 19th Amendment. The Court stated the same method of adoption used to ratify the 15th Amendment was also used to adopt the 19th Amendment. As one amendment was valid, the Court said, the other was valid.

The second objection raised in Leser was that the constitutions of several of the 36 states named in the federal proclamation of ratification of the 19th Amendment by the Secretary of State rendered "inoperative the alleged ratifications by their Legislatures." The Court stated, "The argument is that by reason of these specific provisions the Legislatures were without power to ratify." The Court responded, "But the function of a state Legislature in ratifying a proposed amendment to the federal Constitution, like the function of Congress in proposing the amendment, is a federal function derived from the federal Constitution; and it transcends any limitations sought to be imposed by the people of a state." This response reiterated the precedent-setting Hawke decision that neither state laws, nor state constitutional provisions, can affect the federal amendment process.

The Court addressed the final objection; that the legislative procedures in two states, Tennessee and West Virginia rendered the ratifying resolutions of those two states inoperative. The Court noted "As the Legislatures of Tennessee and of West Virginia had power to adopt the resolutions of ratification, official notice to the Secretary, duly authenticated, that they had done so, was conclusive upon him, and, being certified to by his proclamation, is conclusive upon the courts."

Several conclusions can be drawn from the reasoning employed by the Court in Leser.

First, equal protection under the law usually reserved to statute was extended by the Court to include constitutional provisions. The Court declared equal validity exists between all constitutional clauses. Unless specified in the Constitution therefore, no clause, nor its effect, is subservient to any other clause. The clause creating the convention is therefore not subservient to the clauses creating Congress or the states meaning neither may regulate the convention unless prescribed by the Constitution. The convention is therefore an independent, autonomous constitutional body. Its constitutional authority of amendment proposal and other reasonable powers associated with that task are neither subject to prior restraint nor redaction by Congress or the states except as prescribed in the Constitution. Therefore neither the states nor Congress may regulate the convention *unless* under the principle of equal protection such regulation equally applies to Congress and the states.

Second, Leser concluded the subject matter (or "character") of a proposed amendment has no bearing on the amendment process prescribed in Article V. Further, the Court determined no state law, process or constitutional provision can affect the amendment process. The Court noted the function of ratification, is a federal function derived from the federal Constitution. This function transcends any limitation sought be imposed on it by the people of a state. The function of amendment proposal is limited to two specified constitutional bodies: Congress and the convention. The Constitution does not empower states to propose amendments by any means including inserting proposed amendments in application language for a convention call as no amendment subject can affect the amendatory process of Article V. Article V does not describe subject matter as the basis for a convention call but instead requires a simple numeric count of applying states to cause a call regardless of any subject matter in their applications.

Third, Leser affirmed states cannot nullify or rescind ratification of a proposed amendment once the state has so ratified. Ratification, the Court has stated, is the approbation by the people acting through their representatives, to affirm a proposed amendment as part of the Constitution. Each step of the amendment process requires deliberative representative affirmation before moving forward. These representatives cannot disavow the approbation of the people by any means such as state law, process or constitution. If federal constitutional clauses are equal, then parts of the same clause are equal. If approbation by the people prohibits nullification or rescission by representatives in one part of a clause how can these representatives nullify or rescind in another part of the same clause where no such discretion is described? The Court's equal validity of constitutional clauses and its "federal function" determination rules out this possibility. Logically therefore, under the doctrine of equal protection, if states

cannot rescind or nullify ratifications, they cannot rescind or nullify applications for a convention call.

The process of ratification and application employed by the states is nearly identical and equally valid as they are both part of the same amendment process. The state legislatures, as representatives for the people, cite the identical constitutional authority for both amendment functions in the text of ratification and application messages. Both ratification and application messages are certified as an official state enactment. Both are recorded by the secretary of state of each state as official state record. Both ratification and application messages are transmitted to Congress. Both ratification and application are federal functions derived from the federal Constitution. Therefore both functions transcend any limitation sought to be imposed by the people of a state. Both application and ratification messages are recorded in the same congressional record. Therefore the two Article V functions are equal in source of authority, process, validity, transmission, verification, and constitutional effect. As the circumstance of language and purpose are similar this means both are equally valid and "conclusive" on the courts. Thus a court ruling interpreting ratification equally applies to application.

Moreover the question of rescission of applications is moot. As the examination of the full record of applications shows the states achieved the two-thirds requirement long before any state attempted any nullification of a previous application. The record also shows three amendment issues have achieved the required two-thirds count on their own merits meaning even if subject matter of an amendment were the correct standard, the states have already satisfied it three times over. As admitted by Congress in 1930 there is no question that once the two-thirds numeric count of applying states is reached, Congress is peremptorily required to call a convention. This peremptory requirement, by definition, excludes all excuses which might otherwise thwart a convention call. This includes rescission of applications meaning such rescissions can have no effect on the constitutional obligation of Congress. The fact time has passed since the peremptory event occurred does not diminish the obligation or its exclusion as contemporaneousness has no bearing on the amendatory process as no such standard can be attached until Congress calls a convention and an actual amendment is proposed by a convention.

The Constitution also addresses the issue of nullification or rescission of applications. The Tenth Amendment prohibits the states from nullifying a federal record. The Constitution expressly assigns Congress the responsibility and authority to keep a record of proceedings, referred to as a "Journal." The Tenth Amendment reads, "The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people." Article 1, Section 5, Clause 3 requires "each house" of Congress keep a Journal of its proceedings and from time to time publish this Journal. Madison and other members of Congress, beginning with

the submission of the first application for a convention call in 1789 established all applications were to be recorded in the Journal, now known as the Congressional Record, a process which continues to this day.

As the Tenth Amendment expressly assigns the "power" of keeping a journal to Congress such power is excluded from the states and the people. Therefore any record entered in that record *cannot* be modified, nullified or otherwise affected by the states or by any subsequent action of the states *unless* Congress accepts the theory that, contrary to the express text of the Constitution, states have the right to nullify federal record. All actions of Congress, whether they are a record of a state application or the creation of federal law, ultimately, are federal record. If the theory of state nullification of federal record for this type of federal record is valid, then that theory, particularly as the courts have repeatedly ruled states operate under the federal Constitution and derive their power to function from that document, must exist within the Constitution and extend to *all* federal records. The states therefore can nullify any federal record including federal law for whatever the reason the state wishes. Yet the courts have repeatedly ruled no such power exists in the Constitution. The only conclusion possible is the theory of nullification is unconstitutional particularly in the case of applications for a convention as such rescission is expressly prohibited by constitutional text.

Moreover as the Court expressed in Leser, where a ratification vote is certified by the secretary of state of the state in question and is certified as representing an official action on the part of the state legislature the Court has repeatedly stated such act becomes "conclusive on the courts." Under such circumstances the Court has refused to grant a state the right to rescind its ratification vote. As applications for a convention also are certified by the secretary of state of the state under the principle of equal protection of law it is reasonable to assert if an application by a state for a convention call has been certified by a secretary of state or other comparable state official it cannot be rescinded as Article V describes no process of rescission of state applications or ratifications. The repeated actions of the Court to refuse to engage where the opportunity is repeatedly presented, clearly establishes the Court views the ratification, and therefore the application process, as a one-way street allowing for submission of applications and ratifications by the states but once executed, unable to be withdrawn by the states.