Supplementary Material

Chapter 7: The Republican Era—Foundations/Sources/Constitutions and Amendments/the Nineteenth Amendment

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Leser v. Garnett, 258 U.S. 130 (1922)

Opponents of the Nineteenth Amendment raised two objections to granting women the constitutional right to vote. Some objections were objections to women's suffrage per se—that women would not vote intelligently and that granting women the ballot would obliterate the distinctions between the sexes. Other objections were rooted in claimed limitations on the amendment power. Proponents of state rights insisted that the principles underlying constitutional federalism prohibited the federal government from changing a state electorate without state permission. The Supreme Court rejected this latter claim in a unanimous opinion. Did, however, Justice Brandeis give any reasons for rejecting the claim of an unconstitutional constitutional amendment? Is there any validity to the claims made by the petitioner in this case?

Argument of THOMAS F. CADWALADER and WILLIAM L. MARBURY

The only power to amend the Constitution is contained in Article V, and is a delegated power. . . . It is a power to "amend," granted in general terms.

In a series of decisions rendered soon after the Civil War, this court established the doctrine propounded by Mr. Lincoln in his first inaugural address, that the Union was intended to be a perpetual Union,—"an indestructible Union of indestructible States,"—and that no power was conferred upon any of the agencies of government provided for in the instrument to defeat that intention,—that "great and leading intent" of the people, . . . by destroying any of the States, by taking away in whole or in part any one of the "functions essential to their separate and independent existence" as States. . . . Obviously Article V must be so construed as not to defeat the main purpose of the Constitution itself.

A "State" within the meaning of the Constitution is not merely a piece of territory, or a mere collection of people. It is, as this court has said, "a political community." Who constitute the State in that sense? Clearly the people who exercise the political power. That is to say, the electorate and those whom the electors of a State choose to clothe with the governmental power of the State. When an amendment is adopted, therefore, which changes the electorate, the original State is destroyed and a new State created.

The power to amend is granted in no broader language than that in which the taxing power is granted in sec. 8, Art. I. Yet this court held, in *Collector v. Day* (1871) . . . that it would not construe that language, broad as it was, as sufficient to authorize Congress to levy a tax upon the salary of a state judge, for the same reason we urge here. If the power to maintain a judiciary whose salaries shall be exempt from taxation by Congress be one of the "functions essential to the existence" of a State of the Union, a power without which it would not be an indestructible State, surely the power to determine for itself, by the voice of its own voters, who shall and who shall not vote in the election of that judiciary is not less so.

It is argued that there is no provision in the Constitution forbidding the submission or the ratification of such an amendment. But even so, as said in *Collector v. Day*, exemption from such an amendment "rests upon necessary implication, and is upheld by the great law of self-preservation."

It may be argued, perhaps, that the fact that there are two express limitations upon the amending power contained in Article V indicates that power was intended to be unlimited in other respects. It might be a sufficient answer to that contention to say that the maxim *expressio unius exclusio alterius* [the

express inclusion of one thing does not exclude others], while sometimes very persuasive, is never conclusive as a rule of interpretation, and that, before adopting it in so doubtful a matter as this, the courts would certainly look to the consequences which might follow such an interpretation. . . .

The decision of this court in the *National Prohibition Cases* (1920) constitutes no precedent for holding valid the Nineteenth Amendment. The Eighteenth Amendment did not attack or interfere with the government of the State—"the structure of the state government"—or deprive it of any function "essential to its separate and independent existence."

It is easy to see that, if any interference with the electorate of a State be permitted, its power to refuse its consent to any amendment which may hereafter be proposed, including an amendment reducing the number of its Senators, may be taken away.

The consent of the State cannot be given or refused except by the will expressed either directly or indirectly of the State's own voters. Therefore it follows necessarily that the right of the State's own electorate to vote is a right reserved and withheld from the scope and operation of the amending power altogether. . . .

JUSTICE BRANDEIS delivered the opinion of the Court.

. . .

The first contention is that the power of amendment conferred by the Federal Constitution and sought to be exercised does not extend to this Amendment, because of its character. The argument is that so great an addition to the electorate, if made without the State's consent, destroys its autonomy as a political body. This Amendment is in character and phraseology precisely similar to the Fifteenth. For each the same method of adoption was pursued. One cannot be valid and the other invalid. That the Fifteenth is valid, although rejected by six States including Maryland, has been recognized and acted on for half a century. . . . The suggestion that the Fifteenth was incorporated in the Constitution, not in accordance with law, but practically as a war measure which has been validated by acquiescence, cannot be entertained.

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