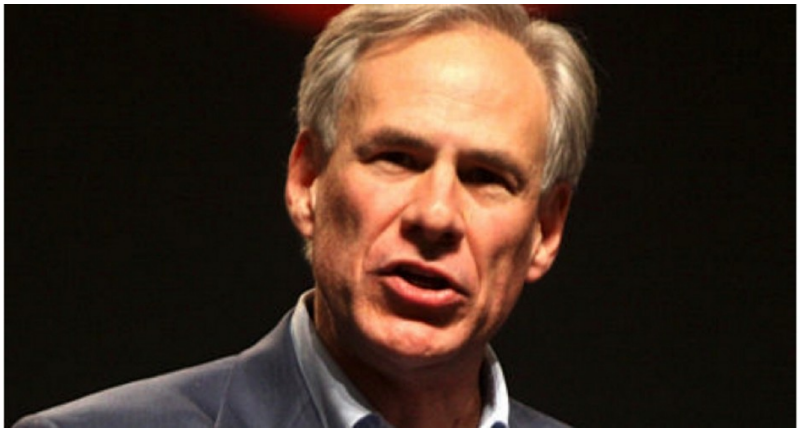
Written by **Christian Gomez** on January 11, 2016

Abbott's Constitutional Convention Plan Ignores Existing Nullification



Delivering his keynote address at the Texas Public Policy Foundation's Annual Policy Orientation on Friday, January 8, Texas Governor Greg Abbott (shown) unveiled his 92-page "Texas Plan," promising to return "lawmaking to the process enshrined in the Constitution" and to restore states' rights by adding nine new amendments to the Constitution through a constitutional convention.

"I want legislation authorizing Texas to join other states in calling for a convention of states to fix the cracks in our broken Constitution," Abbott said in his address.

According to the website of the office of Governor Abbott, his plan offers the following constitutional amendments:

1. Prohibit Congress from regulating activity that occurs wholly within one State.
2. Require Congress to balance its budget.
3. Prohibit administrative agencies — and the unelected bureaucrats that staff them — from creating federal law.
4. Prohibit administrative agencies — and the unelected bureaucrats that staff them — from preempting state law.
5. Allow a two-thirds majority of the States to override a U.S. Supreme Court decision.
6. Require a seven-justice super-majority vote for U.S. Supreme Court decisions that invalidate a democratically enacted law.
7. Restore the balance of power between the federal and state governments by limiting the former to the powers expressly delegated to it in the Constitution.
8. Give state officials the power to sue in federal court when federal officials overstep their bounds.
9. Allow a two-thirds majority of the States to override a federal law or regulation.

Article V of the Constitution outlines two methods for amending the Constitution. The first and only method used since the ratification of the Constitution and the Bill of Rights (the first 10 amendments) is the congressional method, in which, as the name suggests, Congress proposes an amendment by a two-thirds vote in both the House of Representatives and the Senate. After passage in both congressional chambers, the amendment is then submitted to the states for ratification. A minimum of three-fourths of the states is necessary to ratify the proposed amendment. The second and seldom-attempted method is the convention method. This approach requires at least two-thirds of the states to apply to Congress for a convention for proposing amendments. Upon the application of two-thirds of the states, Congress then is vested with the power and authority to call the convention. At the convention delegates gather and propose amendments, which must in turn be ratified by three-fourths of the states.

In both the congressional and convention methods, Congress is authorized to decide whether any proposed new amendments are ratified by the state legislatures or by special state conventions. The 21st

Amendment, which repealed the disastrous18th Amendment, was the only constitutional amendment ratified by special state ratifying conventions. Ratified in 1919, the 18th Amendment prohibited the manufacture, sale, or transportation of liquor and alcoholic beverages within the United States, as well as their importation into or exportation from the country. Otherwise known as prohibition, this constitutional amendment fostered the conditions for a thriving violent alcohol black market, in which notorious gangsters and mobsters, rather than law-abiding businesses, profited from selling alcoholic beverages. This amendment continued on the books until 1933 with the ratification of the 21st Amendment.

However well intended Governor Abbott's plan may be to empower the states with new constitutional amendments, such as his nullification amendments (see amendment proposals five, six, and nine above), the plan unfortunately fails to recognize that states already posses the power of nullification and have successfully utilized this power even in recent years.

Article VI of the Constitution reads, in part:

> *This Constitution, and the laws of the United States which shall be made in pursuance thereof*; and all treaties made, or which shall be made, under the authority of the United States, *shall be the supreme law of the land*; and the judges in every state shall be bound thereby, anything in the Constitution or laws of any State to the contrary notwithstanding. [Emphasis added.]

According to Article VI, only the Constitution itself *and the laws that are "made in pursuance thereof" to the Constitution* "shall be the supreme law of the land." In other words, the only U.S. laws that are constitutionally legitimate, or "the supreme law of the land," are those that are "made in pursuance," or in accordance/agreement with the Constitution. Simply put, constitutional laws are the law of the land; unconstitutional laws are not the law of the land.

Likewise, Alexander Hamilton, in *The Federalist*, No. 33, wrote:

> But it will not follow from this doctrine that acts of the large society which are *not pursuant* to its constitutional powers … will become the supreme law of the land. These will be merely acts of usurpation, and will deserve to be treated as such. [Italics in original.]

According to Hamilton, laws passed not in pursuance of or accordance to the Constitution are nothing more than "acts of usurpation" and are to be regarded as such. Thus they should not be obeyed but ignored.

Furthermore, Article VI further states:

> The Senators and Representatives before mentioned, and the members of the several state legislatures, and all executive and judicial officers, both of the United States and of the several states, shall be bound by oath or affirmation, to support this Constitution.…

In other words, all elected officials in both Congress and the various state legislatures, as well as "executive officers" (the president and his Cabinet) and "judicial officers" (judges in the courts, both state and federal), are required to take an oath to the Constitution because they are bound to it.

Even if members of a "broken" and "runaway Congress" pass unconstitutional laws, i.e. laws that are not in pursuance of the Constitution, such as ObamaCare or gun control legislation, those laws are not only not the law of the land, but state legislators and governors such as Greg Abbott still remain bound to their oath to the Constitution and thus are constitutionally obliged not to follow through on those laws or cooperate with their implementation.

Also, the 10th Amendment of the Constitution states, "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."

If Congress passes a law that it should not, because the law is not in pursuance of the Constitution, and it is signed by the president — and even upheld by the courts — the states, which are already vested with the powers not reserved or specifically enumerated to the federal government by the Constitution, are within their right to pass proper state legislation to ignore or disregard those "acts of usurpation," as Hamilton called them. This is what is known as nullification, a process that has again come into use with states passing legislation not to comply or cooperate with the unconstitutional REAL ID Act of 2005 and with states nullifying federal laws outlawing marijuana use.

Likewise, Texas and all other states within the Union have the constitutional authority to disregard those laws that represent a clear breach of enumerated constitutional power. Already existing nullification is the solution to problems with federal overreach, not further tampering with the Constitution. With all due respect to Governor Abbott, the Constitution is not broken; however, elected officials' commitment to it is — hence the need for further education about the Constitution and constitutional remedies such as nullification.

Photo of Greg Abbott: Gage Skidmore

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