



Episode 583: Would Constitutional Amendments Do Any Good?

Guest: Brion McClanahan

WOODS: All right, let's talk about what's going on with Greg Abbott. I was just telling people about his proposals for constitutional amendments. He's proposing that there be some kind of amendment convention whereby these particular amendments get proposed and added to the U.S. Constitution ultimately.

Now, I've already talked on this show about the subject of whether it's desirable to have a so-called Article V convention or not, so I don't want to get into that right now. I'm going to link at TomWoods.com/583, today's show notes page, to the episode in which we discussed that. As a matter of fact, it was a debate between your colleague Kevin Gutzman — our colleague — and Bill Jasper of *The New American* magazine, and they had a very, very interesting and lively exchange on that subject.

Instead, I just want to assess this on the merits of the particular proposals. There are nine of them. I will link to those also on the show notes page so people can look at them for themselves, but I just thought you and I might go through the nine and see what we think of them. So you're game for this?

MCCLANAHAN: I'm absolutely game for this. It'll be fun.

WOODS: All right, here we go. And oddly enough — I feel weird saying this about a sitting governor or any other kind of governor — I think these are sort of okay.

MCCLANAHAN: Yeah.

WOODS: (laughing) So it's very interesting. When somebody wrote to me to suggest that I discuss this on the show, the note made it sound kind of like, well, some of them are okay, some are unnecessary, and some of them are kind of weird. And I looked and I thought, boy, I must be really weird, because I find them all okay (laughing), so all right.

MCCLANAHAN: Yeah, absolutely. I had the same reaction. So actually, on the list if you go to the page, there is a full plan. You can read an outline of why the governor wanted to propose all of these things. It's quite interesting actually.

WOODS: Okay. In fact, I'm glad you said that. I'm jotting down for the notes that I'll also add that longer document. All right, here we go. Number one: Prohibit Congress from regulating activity that occurs wholly within one state. Now, suppose somebody came from Mars and knew nothing about the U.S. Constitution and saw this proposed amendment prohibiting Congress from regulating activity that occurs wholly within one state. Explain to that person with no constitutional background what that means or where that's coming from. Why would that be something that somebody would want to propose?

MCCLANAHAN: Right, so according to the Constitution, you have what's called the so-called Commerce Clause, which allows Congress to regulate commerce between the states and within foreign entities and also with the Indian tribes. But what it doesn't say is that Congress can regulate commerce within a state.

But of course, we know what's happened over all the years that we've had the Supreme Court get involved in this issue. They've decided that anything that might be considered commerce can be regulated by the general government, including economic activity by individuals. If I were to walk to Kansas, which would be a long walk — but if I were to drive or fly to Kansas, I'm committing interstate commerce, because I have crossed state lines, and therefore I am the state, and I'm commerce.

Now, we all know that's not what the founding generation meant by that. I mean, they were looking to prohibit tariffs between Virginia and Maryland on goods imported between the states. But what's happened over time, of course, is the government's decided because it can regulate commerce, they can regulate anything — anything that I manufacture in the state of take-your-pick, they can regulate that.

So if I'm building desks in the state of Alabama, they can regulate everything about that. But if I'm only selling them in Alabama, they should have no legal recourse to regulate any of that economic activity. Now, if I tried to sell them to Georgia, well then maybe you could run into an issue there, but that would still be between Georgia and Alabama. So it's an interesting concept that the government has expanded on this power. They say they can regulate anything that might be considered commerce, even among individuals.

But what Abbott is trying to do here is say — this comes out of firearms manufacturing or light bulbs — we've seen the incandescent light bulbs. There are some companies just trying to produce incandescent light bulbs within their state now. I think it was Montana was going to manufacture firearms and only sell them in Montana. And so there was an effort to try to keep that activity from being regulated, and this is what that's doing. It's restricting that definition of the Commerce Clause.

WOODS: Okay, well I agree with everything you just said. That's my analysis of the situation, so to see that addressed would be very nice. Now, maybe that's one of the things that the person who sent this to me had in mind when he said that it would be unnecessary. And what he might mean by that would be that, given that the original Constitution clearly indicated that something that took place in one state obviously

can't be regulated by the federal government, that's true that in theory we shouldn't have to restate this. You're right; it's already there. But apparently it being already there ain't quite enough, so sometimes it needs to be clarified.

MCCLANAHAN: Well, that's right. Even John Marshall said that the federal government couldn't regulate activity within a state. And this is John Marshall. And so where are we from here, right? I mean, if the guy that's the archnationalist Supreme Court Chief Justice in the early 19th century said you can't do this, but now they can do it, I mean, this is why these things are necessary, because the Supreme Court and the Congress just does it anyway. So you've got to have some way to spell it out that even a lawyer can understand (laughing), as Sam Ervin used to say. Even a federal judge can understand this.

WOODS: Right. Well, there's some rule that's been developed that if the activity that's going on in the one state has substantial effects on another state, then suddenly we can ignore the original intent. But that's just a — that's completely made up out of whole cloth. There's no support for that.

MCCLANAHAN: Right, and where does it say that in the Constitution? There's no qualification on it. It just says what it says, so it's preposterous to think that this power can somehow be expanded the way it has.

WOODS: All right, let's look at number two: Require Congress to balance its budget. Now, this is the one that I'm less convinced by, simply because, I mean, I know there are people who like balanced budget amendments. I know Kevin Gutzman favors them, but my view is I would rather have an unbalanced budget of \$1 billion than a balanced budget of \$5 trillion. And I'd also like to have an unbalanced budget with 5% taxes than a balanced budget with 85% taxes. I mean, maybe Bernie Sanders wants a balanced budget, but who would want to live under that? That's my concern.

And then secondly, there's always some emergency escape clause for these balanced budget amendments, whereby they can say, oh, it's an emergency, so we can't have a balanced budget now. I just feel like this would give people a lot more — it would give people a false sense of confidence, is my feeling. Now, do you have a different view on that?

MCCLANAHAN: Well, I mean, I think your argument is valid, and of course back in the '90s, the late 80s, actually — '86 into '90 — and I talk about this in my forthcoming book with Gramm Rudman — you had the Congress pass a requirement that they had to balance the budget, and then H.W. Bush becomes president, and it was the Congress who was supposed to decide how to make cuts or raise taxes, and they couldn't figure it out. So then the Supreme Court stepped in and said, well, you know what, that's really an executive function. Now, how they decided that, I'm not certain — how the executive branch is supposed to determine taxes and spending. But that's your Supreme Court for you. So now this was put on Bush, and then he couldn't figure it out, so what we got were very little spending cuts and a huge tax increase. So you're

right, when you start talking about a balanced budget, this can be a monumental problem.

And I remember back in the '90s when I was an undergraduate, I had a Marxist professor who assigned a book entitled *Deficit Politics*, and it was all about how we don't ever need to balance the budget, because we'll just need to spend. It's never going to be a problem. We'll just spend, spend, spend, and it'll never hurt the economy. Well, we know that's not the case either. When you have your debt now, servicing the debt is your entire budget, that does create a problem. So I think the key to this would be some way that you could restrict this to say, well, you have to have some type of rider attached to this where you can't increase taxes; you know, you have to have spending cuts to achieve it or whatever the case may be.

And yes, but you're right; an emergency will always come up. It'll be a domestic emergency; we've got this economic crisis and we've got to unbalance the budget. Or a foreign policy disaster; we have to unbalance the budget. It's going to be very hard to get this thing into effect.

The states wrestle with this all the time. They're always balancing their budgets with dark money, money coming in from the federal government that they don't get out of their own taxpayers. So I'm not certain how this would work in practice, but it's a good idea to have a balanced budget. It would help save the dollar so we're not borrowing so much money and wrecking our currency, so I think that's part of it.

WOODS: All right, that's fair enough. I accept that. Let's look at numbers — I still have my — I still am stuck in my view, but I accept yours as a legitimate point of view as well. Let's look at numbers three and four together. Three is prohibit administrative agencies and the unelected bureaucrats that staff them from creating federal law. And then number four is prohibit administrative agencies and the unelected bureaucrats that staff them from preempting state law. What do they mean by "administrative agencies"?

MCCLANAHAN: Well, this is everything like the EPA, OSHA, all of these regulatory agencies that have been created really in the last 60 years that have gone out, I mean, since the Great Society — now, you did have some regulatory agencies obviously before that, even going back to the late 19th century, and one of my favorite presidents, Grover Cleveland, unfortunately signed one of those into law, and that was the Interstate Commerce Commission. But you have these regulatory agencies that act as the executive branch, because they execute the rules, but not only that. They write the rules and decide if you've broken the rules, so they're also the judicial branch. And because they're all three branches of government, it's really hard to have any recourse in this. And they create law.

So these unelected bureaucrats, these EPA officials sitting back saying CO₂ is a pollutant. So my gosh, are we going to wear masks on our face that now have to capture the CO₂ and then we have to pay taxes on that, or something along those lines. I mean, this stuff could potentially happen. If you start labeling carbon dioxide a

pollutant, where do you stop? Or whether it's, you know, OSHA going around saying, well, because you had four employees who weren't wearing their hard hat in this obviously safe area, we're going to fine you for something, and then what do you do about it?

So they create the laws, and then some of the times these laws preempt state law. The states already have regulations or rules, and the federal government will come in and just rewrite all the rules for the states. This issue is a hot button topic right now because of environmental policy obviously, but there's other things that you can see a problem with this and all these regulatory agencies, and I think that's what Abbott's trying to cut out here: getting rid of the unelected bureaucrats, as he says, from being able to write law. That's the job of Congress, and obviously, if you look at the original Constitution, these regulatory agencies are vastly unconstitutional, but nobody really cares anymore.

WOODS: I want to skip ahead to number nine, because number nine I think would be — it's a little easier for people to get on board with than number five. Maybe some people might be scandalized by number five, although I don't know what they're doing listening to The Tom Woods Show if they're so easily scandalized. But for people with delicate ears, we'll start with number nine first: Allow a two-thirds majority of the states to override a federal law or regulation.

Now, that I very much support. I've favored something like that for a long time. I remember Kevin Gutzman talking about this in a roundtable discussion on Mike Church's old show with Randy Barnett, and they had originally been talking about three-quarters of the states, and then they decided, well, what about two-thirds. And my view is, given that the federal government is always up to no good, maybe 50% plus 1 or maybe just plus 1 is all we need. But certainly something whereby the states can act as an additional check would be a very valuable thing.

And by the way, a lot of times when you say let's amend the Constitution, people say what's the point; they don't listen to the Constitution the way it's written now. But what's wrong with that argument is that they do listen to the structural aspects of the Constitution. We do have presidential elections every four years. We do have senators who serve six-year terms. There are plenty of things in the Constitution that are obeyed all the time, all the structural aspects. Well, so the question is is there a structural change that can be made to the Constitution that would allow us to have a little bit more control over the federal government, and I think this proposed amendment that would give the states some kind of a veto power collectively, a majority of them or whatever or a supermajority, that would be a welcome change.

MCCLANAHAN: Absolutely, and I mean, you mentioned the plus 1, I mean, that's Calhoun's argument. So if one state can nullify everything and just shut it all down. But I think this would be a great thing. Actually what this is doing is putting teeth in the Tenth Amendment. We can run around saying, well, the Tenth Amendment says you can't do this, and I've made that argument before. I made it with Obamacare. Of course, I wasn't thinking that they were going to call it a tax, but obviously the

Affordable Care Act is completely unconstitutional. It violates the Tenth Amendment. The states can come up with all the healthcare stuff they want to, all the healthcare regulations and policies, but the federal government cannot unless you call it a tax. Well, there's a perversion of the Constitution itself.

But this puts some teeth in the Tenth Amendment, and I actually think that two-thirds is too high. Why not three-fifths, right? Why not just go to 60%? If you're going to have to have over a majority, I think 60% would be easier to get, and this would allow the states to have some type of oversight.

Again, the states are a co-equal branch of government. We sometimes forget that. We always say there's only three branches of government. Actually, there's four, because you have the three branches in the federal government and then you have the states. And the states created the federal government, so they are a co-equal branch, and according to the Constitution, according to the original Constitution, all powers not delegated to that central government are reserved to the states except for Article I, Section 10, and there's really not a whole lot in that. So everything else they should be able to do, and this was argued up and down, every way to Sunday in the ratifying debates, but yet we just don't follow that Constitution anymore. So this just gives that argument some teeth and allows the states to check the power of the central authority, which is what we need to do.

WOODS: All right, before I reveal the fifth item, I'll keep people in suspense a minute and pause for this quick message.

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All right, we're back; we're talking about number five, item number five in Greg Abbott's proposed amendments to the Constitution: Allow a two-thirds majority of the states to override a U.S. Supreme Court decision. Now wait a minute here. I thought the Supreme Court gets to tell everybody what to do and what to think, so it seems vaguely un-American to want to override the Supreme Court. Plus, isn't the Supreme Court there to protect my rights against the states and against all the bad guys in government? Why would we ever want to override a U.S. Supreme Court decision?

MCCLANAHAN: Well, obviously there's times the Supreme Court makes the wrong decision. They do it quite a lot.

WOODS: No. Nope, I refuse to believe that.

MCCLANAHAN: (laughing) I know. I mean, this is going to be the response from everyone, Joe American across the land, because you hear people say, well — I remember when Obamacare was being debated, and John McCain very famously said we're going to take this to the courts; we'll let the courts decide. Well, how'd that work out for us, right (laughing)? So this gives the states, again, some teeth. It gives them a recourse. It's basically the same thing as number nine; it's just that you're overriding an obviously unconstitutional Supreme Court decision.

I think back to 1798 and the sedition law, and we've of course had another sedition law in the 20th century, and how the court has essentially said this is legal. I mean, they didn't say that in 1798, but Wilson's sedition law has really never been challenged. And you think of all the things out there that you could point to and say that is obviously unconstitutional. There's no way that — even though the Supreme Court has said it's constitutional, there's just no way.

And so this would allow the states to have some type of recourse there and say we all know it's not; you all are just unelected judges, political appointments, and you're appointed because the person that appointed you liked you and thought you would go their way. And we can see this all throughout the 20th century in Supreme Court decisions. So this gives the states, who really, again, have the power, to try to cut down the Supreme Court.

And we have to also remember that this idea of judicial review was not settled. There were some in the founding generation that were for it, some who weren't. They all thought this would be a — well, not all, but probably a majority thought it would be at least a decent idea to curtail the power of the central government, but what this is really getting at here is state law, and so the ability of individuals to nullify state laws in federal court. And some of these other amendments do that too, but that's the real problem: when the Supreme Court rules on state laws that they really should have no jurisdiction anyways, and then it creates all kinds of chaos because of that. And so I think Abbott's right on line here. We've got to have some control over the Supreme Court.

WOODS: Number six is also related to the Supreme Court: Require a seven-justice supermajority vote for U.S. Supreme Court decisions that invalidate a democratically enacted law. Now presumably he means any time the Supreme Court is overriding state laws, which is really not the role the Supreme Court was supposed to have. That was pretty clear from the start. There are some things the states can't do, but there are very few of them listed in Article I Section 10, and that's almost never what the Supreme Court is talking about. So that's what's being discussed here. Okay, so what's your response to that?

MCCLANAHAN: Well again, I think this is going after the idea that the Supreme Court can come in, when like the state of California amends their constitution and says, okay, we're not going to allow affirmative action, and through the legal process of amending their constitution — which in reality the federal government has no control over — I mean, legally they really don't. And so then somebody will challenge that and say, well, you've just violated my First Amendment rights or you're violating the Fourteenth Amendment, you know, for equal protection under the law. And so the Supreme Court comes in and says yep, obviously that's a problem. Your constitution now is unconstitutional (laughing). And so this is always the funniest thing to me, when the Supreme Court says that state constitution is unconstitutional. Well, how? But this is the issue they're getting into.

And I can't think of a situation where a federal law would be challenged this way, but it definitely gets into state constitutions, state ballot initiatives, state amendments that people, generally on the Left, get very upset about, because they think they're violating some federal civil right, and they challenge it in federal court and they win, so the people of the state are wholly ignored by the federal court system making up law on the spot. And we all know incorporation, it just was never contemplated by the people that wrote the Fourteenth Amendment, and the founding generation rejected it in 1791. So this is a very strong amendment I think that could really help restore that balance of power between the states and the federal government in the court system.

WOODS: All right, let's see. We've got two more, because we already skipped ahead to nine, so seven and eight. Number seven: 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. Okay, so that's returning to the idea that was made very clear at many of the ratifying conventions that the federal government would only have the powers expressly delegated. They used that word "expressly," so it doesn't matter that the Tenth Amendment doesn't have the word "expressly"; expressly was the original understanding, and now we're reaffirming it.

MCCLANAHAN: That's exactly right. Again, this is putting teeth in the Tenth Amendment. It's restating the Tenth Amendment, really, is what you look at here. But that word "expressly" is thrown around a lot. And you're right, in the ratifying debates it was used. When it was actually brought forth, the Bill of Rights were being debated in Congress, there was a question about this. Should we assert "expressly" before "delegated," and their response is actually interesting, because everyone said, well, it's unnecessary because we all know that's what "delegated" means (laughing). We don't need to write "expressly"; that's what we mean by "delegated." You can't have any other kind of delegate power. What other kind of power is there? What kind of delegated power? Is it something that we just kind of imply when we delegate it? What do you mean by that?

So this is just putting that word back in it and limiting the powers of the general government that are confined in Article I Section 8 or some other parts of the Constitution as well. But saying if it doesn't say you can do it, you can't do it — exactly what James Wilson, who had the first major speech on what the Constitution meant in October of 1787 said and what everyone followed along with from that point forward. It just so happens that they were used car salesmen, particularly Hamilton, in selling this bill of goods to somebody, and when we got it back it was a lemon, because they all did what they said they weren't going to do, and we've got this great big monster that we have in D.C. now.

WOODS: And finally, number eight: Give state officials the power to sue in federal court when federal officials overstep their bounds. Giving them the power to sue — how does that change the current state of affairs?

MCCLANAHAN: Well, first of all, suing in federal court, I'm not sure what good — this is the one that I think, well, I don't know how much good that's going to do —

WOODS: Yeah, me too.

MCCLANAHAN: — because if you're going to sue the federal government in federal court, you're playing on a — I mean, the field is stacked against you, right? It's like playing the — we'll just use a football analogy — this year the Carolina Panthers, who look unbeatable, and you're the Russell County High School football team. You don't really have a shot. So I'm not certain this is going to be the case, but the idea, of course, is when you have, say, a federal marshal come into your state, and they're trying to enforce federal gun control legislation that is obviously unconstitutional, so you can actually sue them and stop them from doing this in federal court. You can't really do that now.

We had this issue back in the 1850s. You had marshals trying to go into northern states, rounding up fugitive slaves. You talked about that in your book *Nullification*. And so that was an issue. You know, how do you stop these guys from doing it? And so this puts some teeth into the idea that the states can actually have a block on federal law enforcement, essentially; whether it's Bureau of Land Management; whether it's the federal Marshals Service; whether it's the ATF. Whatever it is, these people can be stopped in some way, without actually resorting to violence, but you do of course have to go to federal court, which I'm not certain that's going to work anyways, because they'll probably just side with the federal agency.

WOODS: All right, so when we look at this whole package, it's actually a pretty decent program. Nothing crazy about it, I don't think. There's nothing really objectionable about it. The worst I think you could say about it is that a few of the parts of it might be a little on the naive side, let's say, but, well, there are certainly a lot worse things than being naive, I suppose. So I would love to see any of these things be implemented. And here I am of course talking to the author of *The Founding Fathers' Guide to the Constitution*, so the fact that you also take this position, well, fills me with still greater confidence.

I want you to say something about — before we let you go for today — the book you have coming out very, very soon. And it's an interesting topic, and I'm no doubt going to have you on to talk about it.

MCCLANAHAN: Well, sure. Actually, two things wrapping up what we just talked about. You know, you and I have been doing this same kind of stuff for over 20 years in the same circles, and I'm fairly optimistic. 20 years ago, you never would have seen anything like this coming out of a governor of a state, and I try to tell Mike Church this. You know, I've talked to him; he's so pessimistic at times. And I'll say, look, be optimistic. I mean, this is good. How many people are out there talking about this when nobody talked about this before? How many people are talking about nullification or Austrian economics or the power of all the things that are happening now. And you look at what's going on, and you think, yeah, people are finally starting

to get it. And so when you have it come out and say we need these things, it's a sitting governor, that's a good thing. So it's great to talk about these things.

But on the other thing, you asked me about the book, it's *Nine Presidents Who Screwed Up America and Four Who Tried to Save Her*, and what I tried to do in this particular book — and I'm actually producing the class for you for Liberty Classroom for it, so that's going to be great, so your listeners can get out there and see that too. But what I tried to do is take the original Constitution and how the executive branch was sold to the states and what the founding generation, what the ratifiers said the executive branch would mean, and apply that to how presidents have followed their oath to preserve, protect, and defend the Constitution.

And what I came out with that was that there were a lot of really bad ones, generally in the 20th century. It's slim pickin's in the 20th century to find anyone who's any good. And then there were a few good ones. And in the nine — there's actually 13 instead of nine that have screwed things up, but they combined some in a couple of chapters there. And it starts with actually George Washington himself in his second term and goes all the way up to Obama. There's of course Obama and both Bushes and Clinton in the 20th century, Johnson and Nixon, Roosevelts. But one of course that is going to be controversial is Lincoln, but this is Regnery History. They put it in there. They allowed me to have a chapter on Lincoln in there, so that was great.

And the four that tried to save her, these are people that generally followed their oath fairly well. You know, Thomas Jefferson and of course Grover Cleveland and Calvin Coolidge. The one that most people don't know about is John Tyler, who I actually say is the best president in American history in terms of following his oath. He did a very good job with that. Now, in the course that I'm producing there'll be a few more in that good bunch. There'll be six more.

But this is going to be a lot of fun, and I think it's going to be an interesting book, and we'll see what comes out of it and see what the reaction is among mainstream "conservative" readers.

WOODS: So far, I'm glad to say that people who have joined LibertyClassroom.com have had nothing but good things to say about Brion McClanahan. They love your material; they love the courses that you've done for us so far. You've done U.S. History to 1877. Then you did the Vietnam War lecture in the U.S. History from 1877. And then you worked with Kevin on your course on American Constitutional History, so you are one of our go-to historians definitely at LibertyClassroom.com. If people haven't joined yet, I would like them to know that listeners of this show get access to a secret page on the site where we have coupon codes. Ooh, never pay retail. So check that out at LibertyClassroom.com/coupons. And Brion, thanks for your time today.

MCCLANAHAN: I appreciate it, Tom. It's been fun. Looking forward to talking to you again.