

Existing Constitutional Means for Resisting Unconstitutional Actions of the Federal Government

To help you appreciate how unconstitutional exercises of federal power can be “nullified” without new legislation, let me group them into two broad categories: (1) U.S. Supreme Court decisions prohibiting a state official from enforcing a state law against a person who has sued (a “plaintiff”), and (2) impositions by either Congressional statutes or executive orders by the executive branch.

Here is how they are “nullified” without the need for a “bill of nullification.”

I. Nullifying U.S. Supreme Court Decisions (or those of lower federal courts)

1. Distinguish and Counter Bad Decisions

The easiest way to “nullify” a judgment based on bad legal reasoning or unsound constitutional reasoning was articulated by Justice Scalia in his dissent in *United States v. Windsor*.

[L]ower federal courts and state courts can distinguish” a U.S. Supreme Court . . . opinion with . . . scatter-shot rationales,’ and when such rationales are offered, as is often the case, [s]tate and lower federal courts should . . . distinguish away.”

Of course, not just other courts, but the legislature can distinguish away, too, which I’ll come to later.

This kind of nullification only takes a knowledge of the power already possessed, coupled with the courage and conviction to exercise it.

Sadly, the absence of such knowledge or conviction by all three branches of state government is too often on display. For example, the absence of one or the other has been demonstrated by all three branches of state government by their refusal to limit the Supreme Court’s decision on same-sex marriage in *Obergefell v. Hodges* to government-licensed marriages.

2. Don’t Treat a Judgment as Law.

A second way to “nullify” an erroneous Supreme Court decision is for the state official to uphold and insist on the limited nature of the judicial power and its reach in accord with Article III.

In other words, and without going into details, the state should not treat the *judgment* of a federal court in favor of a person in the courtroom *as a law* extending to persons outside the courtroom.

On this point, I am in agreement with an [opinion](#) written by Justice Gorsuch (“[W]hen a court . . . order[s] the government to take (or not take) some action with respect to those who are strangers to the suit, it is hard to see how the court could still be acting in the judicial role of resolving cases and controversies,” citing Article III).

But a few quotations from Jeff Shafer, director of the Hale Institute and former constitutional litigator, should suffice to explain further what I mean:

Judicial actors do not make law; they apply law that has already been made by another branch. And the principal role and the purpose of the judiciary is precisely to apply the law that the legislature enacts, and to identify the particular outcomes and persons upon which then the executive branch would bring to bear its enforcement powers.

So the judicial power is not a means for giving remedies or changing the circumstances of people outside of the courtroom. Its act is to apply the big law to the particulars that are found with the people that are within the courtroom.

As he so aptly put it, “Governing people outside of the courtroom is a legislative function, not a judicial one.” The Court only has the power to make judgments in favor of one party or another (see Scalia quote above), not law.

II. How to nullify an unconstitutional executive order or federal statute.

The answer here is simple: Don’t comply.

Non-compliance will result in the federal actor reversing its decision or suing the non-complying state actor. If the latter, the constitutional dispute can be decided by the judicial branch.

Once judgment is entered in that dispute, the state can examine the soundness of the Court’s rationale. If sound, the state can comply with the judgment. If unsound, it can proceed under one of the ways listed above.

This process can go on until one side is willing to relent.

III. How to nullify a governor’s acquiescence to federal overreach?

If the governor wants to comply with the federal edict and the legislature disagrees, it can “nullify” the governor by enacting a statute that removes from him any power to act or eliminating any funding necessary to act in accord with the federal edict.

Make non-compliance with the act subject to a criminal sanction and, if the law is broken, impeach him or her under the Tennessee Constitution for “commit[ting] a crime in [his or her] official capacity” in accord with Article V, Section 4