Written by **Selwyn Duke** on January 21, 2016

Tenn. Bill to Nullify Supreme Court Marriage Ruling Dies — but Fight Lives on

With "each decision … unabashedly based not on law" the Court moves "one step closer to being reminded of [its] impotence," Supreme Court Justice Antonin Scalia wrote last year. The warning was issued in his dissent from the *Obergefell v. Hodges* ruling, which sought to compel states nationwide to recognize faux marriage. But that inevitable reminder to the Court will have to wait in Tennessee, as a bill that would have directed state officials to defy the Supreme Court's unconstitutional 2015 decision died in committee Wednesday. Nonetheless, the fight continues. Reports the *Tennessean*:

> The vote does not mean the issue will disappear. Already other bills and lawsuits have been announced that seek to challenge the ruling from the nation's highest court.
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> The House Civil Justice subcommittee members heard about 90 minutes of testimony on Wednesday from pastors and lawyers and former legislators — much of it surrounding religious grounds and issues of states' rights to nullify a Supreme Court decision — before it killed the Tennessee Natural Marriage Defense Act.
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> Rep. Mike Carter, R-Ooltewah, said he did not support the Tennessee Natural Marriage Defense [TNMDA] Act as the right way to correct what he called overreaching by the court.
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> "You're asking us to step out where no one has stepped before," he said, adding that the bill to nullify the decision by the nation's highest court should be the last resort.
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> He said the court did not interpret law but created it, a concern expressed by the dissenting Supreme Court justices themselves. Carter is a former judge in Hamilton County.

The bill, HB 1412, was just part of a growing nullification movement, one also marked by efforts to defy ObamaCare and unconstitutional federal gun-control laws. And, as such, it raises important issues to ponder beyond marriage.

One is a reason why, according to some, the TNMDA failed: Tennessee stood to supposedly lose $8.5 billion in federal funding if it had passed. While some question this figure, it certainly didn't deter one of the bill's main sponsors, Rep. Mark Pody (R-Lebanon), who believed the effort was worth any cost, reported ABC News. And, for sure, his side may wonder what happened to the spirit of that early American war cry, "Millions for defense, not a penny for tribute." But what should be defended here?

The reality is that while "marriage" is the most common answer, there's another issue: states' rights. Americans may part company on policy regarding matrimony, guns, health care, or something else, but

we ought to be able to agree to abide by our founding document, the Constitution. But since the Supreme Court has ruled on marriage, isn't its determination, as Ohio governor John Kasich put it last June, now "the law of the land"?

If this is so, why is it that Scalia, a Supreme Court (SC) justice, warned that rulings such as *Obergefell* would result in the SC being reminded of its "impotence"? Scalia was clearly referencing nullification, which in the realm of states' rights amounts to states recognizing a federal action as unconstitutional and thus null and void — in accordance with the Tennessee legislators' efforts. But isn't this "against the law"? Isn't it, as Rep. Carter said, to "step out where no one has stepped before"?

Not exactly. What do you think is happening when localities refuse to abide by federal drug or immigration ("sanctuary cities") laws?

Nullification is happening.

Yet no federal troops are dispatched to bring the localities to heel. In fact, since facilitating drug use and illegal migration is fashionable, no one pays much mind to the action or even notes that it is in fact "nullification." But should constitutionalists dare propose it explicitly as a remedy for fashionable federal usurpation, a federal case is made of it.

Should the nullification achieve a constitutional end, however, the law is on the side of those pursuing it. And there are two myths bearing examination here: that of judicial supremacy and of the supremacy of all federal law.

The Supreme Court is not the Supreme Being; in fact, it is only supreme *among courts*. The notion that it is to be the ultimate arbiter of laws' meaning and that its rulings must constrain not just government's judicial branch but also its legislative and executive is *not prescribed by the Constitution*. Rather, it was *unilaterally declared* by the Court itself in the 1803 *Marbury v. Madison* decision.

And to abide by it is to allow the Supreme Court to trump the supreme law of the land. It transforms us from a government of, by, and for the people into a government of, by, and for a panel of nine lawyers acting as a super-legislature of last resort. Thus did Thomas Jefferson warn that accepting the doctrine of judicial supremacy would make our Constitution a "suicide pact." He went on to explain, as I wrote last year:

> "For intending to establish three departments, co-ordinate and independent, that they might check and balance one another, it has given, according to this [judicial review] opinion, to one of them alone, the right to prescribe rules for the government of the others, and to that one too, which is unelected by, and independent of the nation.… The constitution, on this hypothesis, is a mere thing of wax in the hands of the judiciary, which they may twist, and shape into any form they please."
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> Jefferson also pointed out, correctly, that "Our judges are as honest as other men and not more so. They have with others the same passions for party, for power, and the privilege of their corps." …Judicial review is "a very dangerous doctrine indeed," Jefferson warned in 1820, "and one which would place us under the despotism of an oligarchy."

Then there is the matter of the Supremacy Clause. Advocates of unbridled federal power often claim it makes all of Washington's laws supreme, but what it actually states is, "This Constitution, and the Laws of the United States which shall be made *in pursuance thereof*…shall be the supreme law of the land" (emphasis added). "In pursuance of" — it's a phrase often overlooked but that speak volumes. It means "in conformity with"; thus, laws not in conformity with the Constitution are *invalid*.

And what should be the response to such laws? As Jefferson also wrote, nullification is the "rightful remedy" for all central-government usurpation of states' powers. As the Tenth Amendment Center informs, "Jefferson counsels the states to be vigilant against violations of the Constitutions and not hesitant to strike down unconstitutional measures by Congress or the president; he writes that 'free government is founded in jealously and not in confidence' and therefore urges that 'no more be heard of confidence in man, but bind him down from mischief by the chains of the Constitution.'" An unconstitutional law is no law at all.

There is much talk today of having a Convention of the States to tame the federal beast. But if the feds will blatantly and blithely violate the clear letter of the Constitution now, why should we think they wouldn't do so after its alteration? Some may say that certain matters will be clarified, and maybe so. But words and provisions don't counteract power — power counteracts power. And if governors and state legislators will not stand up against clear federal usurpation today, for fear of losing money, career, and position, why should we expect them to do it under a different Constitution tomorrow?

It's clear that what we need far more than new laws are new leaders.

Photo: Tennessee state capitol