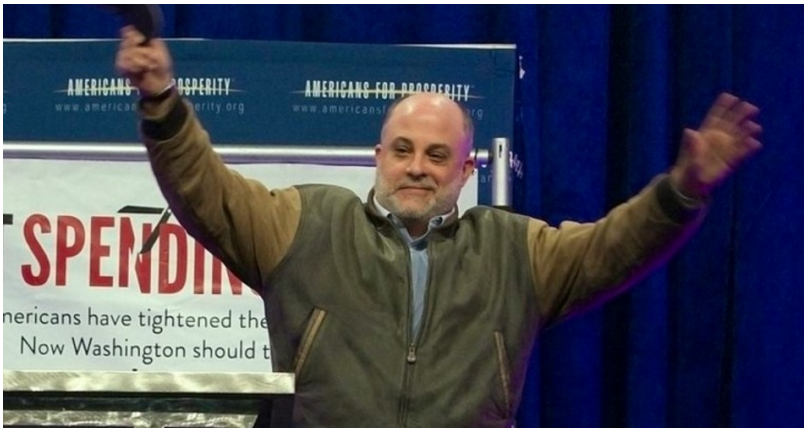
Written by **Joe Wolverton, II, J.D.** on January 9, 2014

Correcting Mark Levin's Repeated Misrepresentation of James Madison



Mark Levin (shown) is at it again. During an appearance on CSPAN's *Book TV* program, the talk-show host went on a rhetorical rampage against those who prefer nullification over a constitutional convention as a tactic in the war against federal tyranny.

Given that Levin is little more than an entertainer who gets richer the more provocatively he behaves, it isn't surprising that he would refer to the legitimate constitutional scholars who promote nullification (Thomas Woods, Kevin Gutzman, Walter Williams, Andrew Napolitano, among others) as "neo-confederates, fringe, idiotic, and crazy."

Levin apparently believes that he can boost his credibility as a respectable constitutional authority by resorting to school-boy name-calling.

Although his interpretation (willful or ignorant) of a letter written by James Madison has now been exposed as incorrect, Levin continues perpetuating this fraudulent view of Madison's opinion of state nullification of federal acts.

Levin's comments demonstrate he knows little about the Constitution and less about context.

The con-con's college of academics should know better, however. They should know that by removing a word from its original and intended context they put false words in an author's mouth and commit fraud against those who are unfamiliar with the original source of the word or concept they claim to be quoting.

Take the word "killing," for example. While I might write that "killing" is acceptable in one circumstance or another (self-defense and in war, for example), that does not mean that I support killing in every situation. Context is key.

With that in mind, it is disingenuous (at best) for self-promoting "constitutional scholars" and "historians" to claim that James Madison opposed nullification, period. That is a gross mischaracterization and one that needs to be once and for all corrected.

This article will restore necessary context to the word "nullification" as used by James Madison in an 1834 letter called "Notes on Nullification."

First, we have to put Madison's role in the formulation of the concept of nullification into some context of its own.

As indispensable as he was to the development of our Constitution, James Madison is not the father of

nullification. The idea that a smaller division (a state, a county, a city, etc.) is justified — even obliged — in refusing to obey unlawful edicts of the larger society (the federal government, in the case of the United States) was not original to Madison, Jefferson, or any of America's Founding Fathers. The doctrine we call nullification was known for generations before the Kentucky and Virginia Resolutions were written.

Our Founders drew wisdom and inspiration from a variety of sources, including a group of continental natural law theorists, one of whom was Samuel Pufendorf of Germany (read of the importance of Pufendorf to the Founders here).

In his book *The Whole Duty of Man, According to the Law of Nature*, written in 1673, Pufendorf explained that for a law "to exert its force," that is to say, for it to be legitimate, first, the law must be "plainly and openly made." Can we say that about ObamaCare, the NDAA, the scores of executive orders infringing on the right to keep and bear arms? Absolutely not.

Second, Pufendorf writes that a law may be enforceable only if the subject of the proposed law "belongs to that office" of the lawmaker and it contains "nothing derogatory to the sovereign."

In the United States, the Constitution is the sovereign law of the land. If, then, any act of Congress (the constitutional lawmakers) exceeds the power given to that body, then the states (Pufendorf uses the term "country or city") may exercise their natural right to refuse to "pay obedience" to those acts.

Madison makes references to this "right" in his "Notes on Nullification," the document so often quoted by those who argue that the author of the Virginia Resolution walked back from his support for state nullification of unconstitutional acts of the federal government.

In his "Notes," Madison attempts to describe "the essential distinction between a constitutional right and the natural and universal right of resisting intolerable oppression."

The "constitutional right" he speaks of is that being asserted by South Carolina. This is the critically important context mentioned above. In its effort to resist what it deemed federal overreach, the legislature of South Carolina was in fact overreaching itself.

As Mike Maherry of the Tenth Amendment Center explains, "South Carolina essentially asserted that once a single state nullified a federal act, it was annulled within that state and it could not be legally enforced there until three-quarters of the other states overruled the nullification. Furthermore, South Carolina claimed that a state's act of nullification was 'presumed right and valid' until overturned. In other words, a single state could effectively control the entire country."

That's not the sort of nullification that Madison described as a "duty" of states, one necessary for "arresting the progress of evil."

In the "Notes," Madison writes:

> But it follows, from no view of the subject, that a nullification of a law of the U. S. can as is now contended, belong rightfully to a single State, as one of the parties to the Constitution; the State not ceasing to avow its adherence to the Constitution. A plainer contradiction in terms, or a more fatal inlet to anarchy, cannot be imagined.

Modern advocates of nullification understand, as did James Madison, that the legislative will of one state is not binding on the others. In fact, a state bill voiding a federal act has no effect on the federal government, either. That is to say, even though a state legislature deems a federal act unconstitutional, that doesn't make it so, at least anywhere other than in the nullifying state itself.

As constitutionalists, supporters of contemporary efforts to nullify unconstitutional acts of the federal government also demand that the letter of that document be followed precisely. Therefore, it is important to point out that the Constitution does not permit the government of a single state to render a federal act void on its face or to make it so that the rest of the states must bow to the will of the would-be nullifying state and be forced to refuse to enforce the mandates of the federal act.

This is the application of "nullification" that Madison rightly found constitutionally indefensible.

However, Madison consistently defended the type of state nullification that is "the natural right, which all admit to be a remedy against insupportable oppression." It would be difficult to argue that James Madison would not consider ObamaCare, for example, to qualify as an "insupportable oppression" worthy of resistance.

Given the letters behind the names of so many of the so-called conservative scholars denouncing nullification and rejecting it as an effective defense against the federal assault on the Constitution, it seems unlikely that they do not understand this nuance of nullification.

Thankfully, there is a growing number of state and local lawmakers who do understand it and are working within the constitutionally sound sphere of nullification to strike back at the federal usurpation.

As greater numbers of legislators, governors, and citizens learn of the immense power of nullification, they will more readily and fearlessly work to reverse the trend of constant federal overreach by insisting that the states resume their role as what Madison called the "sure guardians of the people's liberty."

An added benefit of nullification is that its persistent practice builds trust between the elected and the electorate by encouraging the recognition of reliable patterns of interaction between state and local authorities and the federal government. By consistently demanding that Washington confine itself to its small, well-defined zone of influence, everyone — citizen, state lawmaker, president, and congressman — knows where he stands and can act knowing they enjoy the good will of those whom they serve.

Over time, even occasional deviations from the constitutional straight and narrow would evoke instant reprisals from the states and the people, savvy to the restrictions on the federal government's authority as imposed by the enumeration of powers in the Constitution.

In fact, if states corrected every federal misstep — purposeful or accidental — then federal legislators might eventually be disabused of their shared delusion that their counterparts on the state level are dumb and docile pack animals that can be easily burdened and herded into the corrals of despotism.

Finally, of all the legal, constitutional, and moral reasons to support nullification, there is one that sits at the pinnacle of them all.

Nullification, as described by Madison in the Virginia Resolution, is a nearly fail-safe and foolproof protection of popular sovereignty and limited government.

Mark Levin and the rest of the con-con collaborators might not understand this, but thousands of constitutionalists across the country do, and they are nullifying unconstitutional acts of the federal government in a way in which James Madison would undoubtedly approve. Without exposing the delicate gears of the Constitution to the monkey wrench of an Article V constitutional convention.

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