ConSource

The Constitutional Sources Project

THE CONSTITUTION IN ACTION: THE EARLY REPUBLIC

State Challenges to Federal Authority: The Kentucky and Virginia Resolutions

TIME AND GRADE LEVEL

One 45 or 50 minute class period in a **Grade 9-12** US history, civics, or government course. NOTE: To address the issues presented here in greater depth, teachers might wish to devote two days to this lesson.

PURPOSE AND CRITICAL ENGAGEMENT QUESTIONS

History is the chronicle of choices made by actors/agents/protagonists in specific contexts. Students in this simulation, as Republican members of the Kentucky and Virginia legislatures in 1798 and 1799, consider how they will oppose the Alien and Sedition Acts. Constitutionally, can a state legislature "nullify" a federal act if it violates the Constitution? Who is to decide what violates the Constitution? Can a state, acting on the people's behalf, "interpose" between the federal government and the people? Students will then act as members of other state legislatures and consider how to respond to Kentucky and Virginia. By engaging in this historical moment, students will wrestle with the ongoing tension between the Article VI, Clause 2, of the Constitution, which establishes the federal government as the "supreme Law of the Land," and the Tenth Amendment, which reserves powers "not delegated to the United States" to the states or the people.

LESSON OBJECTIVES

*Students will be able to state the basic provisions of the Sedition Act, Alien Friends Act, and Alien Enemies Act of 1798.

*Students will be able to summarize the partisan divide in the 1790s, the historical context of the Alien and Sedition Acts.

*Students will be able to explain how the Sedition Act targeted political opponents.

*Students will be able to define the concept of "nullification" and articulate its possible consequences.

*Students will be able to cite the differences between Jefferson's original draft of the Kentucky Resolutions, the final form of those resolutions, and the Virginia resolutions.

*Students will be able to state arguments for and against each form of resistance.

*Students will be able to explain why other Republican state legislatures did not follow the lead of Kentucky and Virginia.

*Students will be able to discuss the historical legacy of the Kentucky and Virginia Resolutions: the "Nullification" crisis of 1830, segregationists' call for state's rights, and attempts by states today to counter federal legislation.

OVERVIEW OF THE LESSON

Prefatory homework:

Handout A: "Background for the Kentucky and Virginia Resolutions"
Handout B: "Excerpts from Jefferson's draft of the Kentucky Resolutions."

In class:

1. Homework review: 5-10 minutes

2. Students, as Kentucky legislators, debate Jefferson's draft: 10 minutes

3. Presentation of the final drafts of the Kentucky and Virginia Resolutions: 10 minutes

4. Students, as legislators in other states, debate whether to follow the lead of Kentucky and Virginia: 10 minutes

5. Presentation of historical outcomes and begin a discussion on what this means for us today: 10 minutes

Summary Homework / Extended Activities

MATERIALS

Background Handouts:

A. Background for the Kentucky and Virginia Resolutions
B. Excerpts from Jefferson's draft of the Kentucky Resolutions

Classroom Handouts

C. Excerpts from the Kentucky and Virginia Resolutions
D. Legacy of the Kentucky and Virginia Resolutions
E. Vocabulary List

PREFATORY HOMEWORK

Distribute Handout A: "**Background for the Kentucky and Virginia Resolutions**" and Handout B: "**Excerpts from Jefferson's draft of the Kentucky Resolutions**." Go over the instructions on those sheets.

CLASS ACTIVITIES: 45-50 MINUTES

1. Homework Review: 5-10 minutes

Read and discuss the supremacy clause (Article VI, Clause 2) and the Tenth Amendment. Make sure students understand how they work together: Supremacy applies only for "delegated" powers. Remind students that the First Federal Congress, when drafting the Tenth Amendment, had rejected Thomas Tudor Tucker's motion that would have required powers to be "*expressly* delegated," and that the issue of "implied" powers was hotly contested. (See ConSource lesson "Strict v. Loose Construction.")

Ask for any comments or questions concerning the Alien and Sedition Acts. Then start in on Jefferson's draft.

Teacher: *Find the statements using the terms "void, & of no force," "nullification," and "nullify." These are extreme rejections of federal authority. How, then, does Jefferson justify overriding the supremacy clause?*
RESPONSE: Jefferson argues that the Constitution was a contract between the states and the new federal government they created, and that either party, if it believes the other party has violated the contract, has the right to determine "the mode & measure of redress"—and even to terminate the contract. Cite this key passage, noted in the homework assignment: "**As in all other cases of compact among powers having no common judge, each party has an equal right to judge for itself, as well of infractions, as of the mode & measure of redress**."

2. Students, as Kentucky legislators, debate Jefferson's draft: 10 minutes

Teacher: *Now imagine that you are members of the Kentucky legislature in 1798. Consult the notes you made on your homework and discuss Jefferson's draft. Do you agree with the basic argument? Do you think states have the constitutional right to nullify federal law? Might they have a moral right that is not specified in the Constitution? If you think they have a right, either constitutional or extra-constitutional, do you agree that Kentucky should do this now? What is to be gained, and what are the potential dangers? Might this mark the end of the union? Are there alternatives to nullification? If people in a republic don't like a law, what can they do about it? Finally, if you don't agree with everything Jefferson says, are there any changes you would like to make in his draft?*

Break into discussion groups to consider all this.

3. Presentation of the final drafts of the Kentucky and Virginia Resolutions: 10 minutes

Distribute Handout C: "**Excerpts from the Kentucky and Virginia Resolutions**." Allow time for students to read these, either silently or aloud, and for students to ask what words or phrases mean.

Initiate a discussion on the differences between Jefferson's draft and these two documents.

In what ways are the three documents in agreement?
RESPONSE: They all agree that the Alien and Sedition Acts overreach the powers of the federal government, as set forth in the Constitution. They agree that the Acts should not be considered valid. They also agree that other states should be encouraged to take actions against the Acts.

Although they agree that the Acts are not valid, they present different ideas for what states should do about it. What path does each promote?
RESPONSE: Jefferson says that each state should nullify the laws so they won't take effect within that state. The Kentucky legislature calls for all states to ask Congress to repeal the laws. The Virginia legislature says the states should "*interpose* for arresting the progress of the evil."

What do you think the Virginia legislature meant by "interpose"?
Responses will likely vary. Use this to suggest that the Virginia legislature might deliberately have chosen an ambiguous word. Radicals might think that states should intervene if federal authorities try to enforce the Acts. Moderates might think that states could "interpose" by registering a complaint with Congress on behalf of the people. In the end, we don't really know.

4. Students, as legislators of other states, debate whether to follow the lead of Kentucky and/or Virginia: 10 minutes

Instruct students: *Imagine you are now a Republican member of a different state legislature, not Kentucky or Virginia. Your body has received the appeals from Kentucky and Virginia and must decide whether to join with them in their resistance efforts. Because you are a Republican, we assume that you disapprove of the Alien and Sedition Acts — but will you push your state to join with Kentucky or Virginia? Consult the notes you took for your homework assignment, and remember that few Americans at the time, whether Federalists or Republicans, wanted to dissolve the union or start again from scratch with a new constitution.*

After students have deliberated on that issue for a few minutes, ask them to respond to this argument that James Madison presented to Thomas Jefferson:

Jefferson's argument starts by saying the Constitution was a contract between the states and the federal government, and either party to that contract, if it believed the other side had broken the agreement, could declare it "void, & of no force." But were the *states* the parties that agreed to the Constitution? That was true of the Articles of Confederation, but the Constitution was a contract between the *people* of the states and the new federal government. Consider the preamble, "We, the People," and also the method required for ratification: the framers submitted the Constitution not to state legislatures but to conventions chosen by the people for the sole purpose of expressing the people's will. (See ConSource lesson "Amendments and Ratification.") If the people consented to the Constitution, nullifying the contract could only be accomplished by conventions chosen by the people for the sole purpose of expressing their collective will, or by referendums in which the people themselves vote on nullification.

Ask students: *In theory, do you agree with this argument? If so, does it change your response to the Kentucky and Virginia Resolutions? Is it realistic that special conventions would be formed in all the states to determine the will of the people?*

Allow some discussion, but then move on to the historical outcomes.

5. Presentation of historical outcomes and begin a discussion on what this means for us today: 10 minutes

Present Handout D, "**Legacy of the Kentucky and Virginia Resolutions**."

Discussion: Apply this today. Now, federal laws alleged to be unconstitutional are challenged in courts, where such disputes are settled. (One example is the Patient Protection and Affordable Care Act—see question 5 below.) Are nullification or interposition still relevant? Could the union of 50 states survive if federal acts, having survived court challenges, are declared "void, & of no force" by states?

Open discussion on any of the questions listed below.

SUMMARY HOMEWORK/EXTENDED ACTIVITIES

1. In 1787, shortly before the Constitutional Convention, James Madison wrote to George Washington about his vision for a new federal government. "The national Government," he wrote, should possess a negative *in all cases whatsoever* [Madison's emphasis] on the legislative acts of the States, as heretofore exercised by the Kingly prerogative."[1] If Madison had his way, the Constitution would have granted the federal government the power to "nullify" any state law. In the fall of 1787, Madison complained to Jefferson that the new government was too weak precisely because it had not been granted an absolute negative over state law. Without a central authority capable of nullifying local law, he stated, there would always be "a continual struggle between the head and inferior members" of government.[2] But early in 1799, Madison authored an address to the people of the United States, which the Virginia Senate adopted. There, he *complained* that if the Alien and Sedition Acts were allowed to stand, "Congress will be endowed with a power of legislation *in all cases whatsoever*, and the states will be stripped of every right reserved." [Emphasis added.][3] Comment on Madison's change of heart. Why do you think he soured on federal powers?

2. Comment on the similarities and differences between Jefferson's proposed nullification in 1798 and later historical applications (the nullification crisis on the 1830s, protection of slavery in the mid-Nineteenth Century, protection of segregation in the mid-Twentieth Century). Do you think the differing circumstances affect the validity of the argument in favor of nullification?

3. Is there an alternative to state nullification of federal law that does not endanger the union? Historically, have periodic elections and/or the Supreme Court corrected federal overreach? Can they do so now?

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[1] Madison to Washington, April 16, 1787: http://press-pubs.uchicago.edu/founders/documents/v1ch8s6.html
[2] Madison to Jefferson, October 24, 1787: http://press-pubs.uchicago.edu/founders/print_documents/v1ch17s22.html
[3] Virginia Senate, Address to the People, January 23, 1799: http://press-pubs.uchicago.edu/founders/documents/amendI_speechs21.html

4. How might state nullification of federal law play out today, in our partisan environment?

5. During the Obama administration, several states sued the federal government over the Patient Protection and Affordable Care Act. Might this count as states "interposing" in matters of federal law?

6. Discuss the possibility that the Alien Enemies Act might be applied today in the fight against terrorism.

7. Article III, Section I, Clauses 1 and 2 of the Constitution state that the judicial authority of the United States, vested in the Supreme Court, includes all cases of federal law, "controversies to which the United States shall be a Party," and "controversies between two or more States." For more than two centuries, Americans have accepted the Supreme Court as the final adjudicator of disputes between states and the federal government. But Supreme Court justices serve "during good behavior," which in practice means for life. Would the nation be better served if Supreme Court justices served specified terms, or would that make the Court even more politicized than it already is?

State Challenges Handout A: Background for the Kentucky and Virginia Resolutions

Article VI, Clause 2, of the Constitution, known as the *supremacy clause*, says this: "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, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding."

During the ratification debates, many Americans worried that the federal government, citing this clause, might take all power away from the states. Several state ratifying conventions pushed for an amendment that defined the *limits* of federal powers, and the First Federal Congress complied by fashioning what is now the Tenth Amendment: "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." This did not contradict the supremacy clause but defined it. Supremacy of the federal government applied only to powers "delegated to the United States by the Constitution."

But deciding which powers are delegated to federal government, and which are not, is no simple matter. (See ConSource lesson "Strict v. Loose Construction.") Who is to make that determination? Can Congress be trusted to define the extent of its powers? Or can states determine, on their own authority, that certain powers were *not* delegated to the federal government and therefore belong to the states or the people?

Further, if states believe that the national government has overreached its powers, what recourse do they have? Constitutionally, can state governments ever defy federal law?

In the late 1790s, this question led the union to the brink of collapse. The first decade following ratification of the Constitution featured crisis after crisis. Americans split over the desirability and constitutionality of a national bank. (See ConSource lesson "Strict v. Loose Construction.") They split again over whether to support Britain or France and over Jay's Treaty with Great Britain. (See ConSource lesson "Who Shapes Foreign Policy?") Such fissures resulted in two embryonic political parties. In 1796, in the first contested presidential election, those calling themselves Federalists supported John Adams, while those calling themselves Republicans backed Thomas Jefferson. Each side believed it alone could save the nation from ruin.

In 1797 the ruling French Directory complained that Jay's Treaty violated the 1778 alliance between the United States and France and that the United States had not yet paid its wartime debts. France then declared that American vessels trading with Britain would be considered fair prey for privateers. In May President Adams, in a special address to a joint session of Congress, rebuked France and called on lawmakers to rejuvenate the navy and raise a "Provisional Army," poised to fight against France. This infuriated Republicans, who unleashed a frontal assault in the press and fought against military preparations in Congress.

It would only get worse. The hawkish Secretary of State Timothy Pickering announced to Congress that France had seized over 300 American vessels. Adams's three new envoys to France were met by agents who tried to bribe them, an incident known as the "XYZ affair." France's belligerence

favored Federalists, who took advantage of the militaristic mood to pass legislation that suppressed dissent (Sedition Act), allowed for the expulsion of immigrants considered "dangerous to the peace and safety of the United States" (Alien Friends Act) or simply hailed from an enemy nation (Alien Enemies Act), and made it more difficult for foreigners to become American citizens (Naturalization Act).

Republicans viewed this legislative package as an extreme overreach of federal authority. They took particular offense by the Sedition Act, aimed directly at them. Here is the key provision:

> "That if any person shall write, print, utter or publish, or shall cause or procure to be written, printed, uttered or published, or shall knowingly and willingly assist or aid in writing, printing, uttering or publishing any false, scandalous and malicious writing or writings against the government of the United States, or either house of the Congress of the United States, or the President of the United States, with intent to defame the said government, or either house of the said Congress, or the said President, or to bring them, or either of them, into contempt or disrepute; or to excite against them, or either or any of them, the hatred of the good people of the United States, or to stir up sedition within the United States, or to excite any unlawful combinations therein, for opposing or resisting any law of the United States, or any act of the President of the United States, done in pursuance of any such law, or of the powers in him vested by the constitution of the United States, or to resist, oppose, or defeat any such law or act, or to aid, encourage or abet any hostile designs of any foreign nation against United States, their people or government, then such person, being thereof convicted before any court of the United States having jurisdiction thereof, shall be punished by a fine not exceeding two thousand dollars, and by imprisonment not exceeding two years."

Today, dissenters would challenge such a measure in court, but courts in the 1790s were dominated by Federalists, who had yet to overturn an act of Congress. (In 1796, in *Hylton v. United States*, the Supreme Court had asserted its authority to consider the constitutionality of laws, but it upheld the law in question.) Thomas Jefferson, among others, thought it was time for radical measures. But what, exactly, should be done?

STUDENT RESPONSE: If you were a Republican at the time, you would naturally oppose the Sedition Act, but what *actions* might you take, short of physical violence? Compile a list of possible responses, then arrange them from moderate to radical. You don't need to argue for any of them here; we are just trying to establish the range of options. Try to stay true to the times, and remember that the nation was yet young; few Americans, whether Federalists or Republicans, wanted to dissolve the union or start again from scratch.

State Challenges Handout B: Excerpts from Jefferson's Draft for the Kentucky Resolutions

"Resolved that the several states composing the US. of America are not united on the principle of unlimited submission to their general government; but that, by a compact under the style & title of a Constitution for the US. and of Amendments thereto, they constituted a general government for special purposes, delegated to that government certain definite powers, reserving, each state to itself, the residuary mass of right to their own self-government; and that whensoever the General government assumes undelegated powers, it's acts are unauthoritative, void, & of no force…

"The government created by this compact was not made the exclusive or final judge of the extent of the powers delegated to itself; since that would have made its discretion, & not the constitution the measure of it's powers: but that, as in all other cases of compact among powers having no common judge, each party has an equal right to judge for itself, as well of infractions, as of the mode & measure of redress.

"… [W]here powers are assumed which have not been delegated a nullification of the act is the rightful remedy: that every state has a natural right, in cases not within the compact to nullify of their own authority all assumptions of power by others within their limits: that without this right, they would be under the dominion, absolute and unlimited, of whosoever might exercise this right of judgment for them…

"… [T]his commonwealth does therefore call on it's co-states for an expression of their sentiments, … and it doubts not that their sense will be so enounced as to prove their attachment unaltered to limited government … and that the costates, recurring to their natural right in cases not made federal, will concur in declaring these acts void & of no force & will each take measures of its own for providing that neither these acts nor any others of the genl. government not plainly & intentionally authorised by the constn [Constitution] shall be exercised within their respective territories."

Source: https://jeffersonpapers.princeton.edu/selected-documents/jefferson's-draft

STUDENT RESPONSE: Ask yourself: If you were a member of the Kentucky legislature in 1798, would you approve Jefferson's draft? You don't need to make your decision until the class discusses the issues involved. **For now, circle phrases in the passages above you wish to support, challenge, or question. Jot down notes for class discussion**. In particular, consider this statement: *"As in all other cases of compact among powers having no common judge, each party has an equal right to judge for itself, as well of infractions, as of the mode & measure of redress."* Does this apply to the United States Constitution, or does it violate Article VI, Clause 2 (the supremacy clause)?

State Challenges Handout C: Excerpts from the Kentucky and Virginia Resolutions

The Kentucky legislature approved most of Jefferson's draft, but it made some significant revisions. It deleted the statement that "a nullification of the act is the rightful remedy," and also the claim that states possessed the right to "to nullify of their own authority" acts of Congress. (See the third paragraph in Handout A.)

Kentucky's legislature altered another key passage. Jefferson hoped that other states would "concur in declaring these acts void & of no force & will each **take measures of its own for providing that neither these acts nor any others of the genl. government not plainly & intentionally authorised by the constn [Constitution] shall be exercised within their respective territories.**" (See the final paragraph in Handout A.) The legislature changed the second part of Jefferson's conclusion. It hoped that other states would "concur in declaring these acts void and of no force, and will each unite with this Commonwealth in **requesting their repeal at the next session of Congress."**

Source: https://jeffersonpapers.princeton.edu/selected-documents/resolutions-adopted-kentucky-general-assembly

James Madison introduced similar resolves to the Virginia legislature. Although that body proclaimed that states had the right to declare federal acts not "valid," it shied from using words like "nullification," "nullify," or "void." What, then, should states do about it? Here are two key passages:

> "That this Assembly doth explicitly and peremptorily declare, that **it views the powers of the federal government, as resulting from the compact, to which the states are parties**; as limited by the plain sense and intention of the instrument constituting the compact [the Constitution]; **as no further valid that they are authorized by the grants enumerated** in that compact; and that in case of a deliberate, palpable, and dangerous exercise of other powers, not granted by the said compact, **the states who are parties thereto, have the right, and are in duty bound, to *interpose* for arresting the progress of the evil, and for maintaining within their respective limits, the authorities, rights and liberties appertaining to them**…
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> "That the good people of this commonwealth, having ever felt, and continuing to feel, the most sincere affection for their brethren of the other states; the truest anxiety for establishing and perpetuating the union of all; and the most scrupulous fidelity to that constitution, which is the pledge of mutual friendship, and the instrument of mutual happiness; the General Assembly doth solemenly appeal to the like dispositions of the other states, in confidence that they will concur with this commonwealth in declaring, as it does hereby declare, that the acts aforesaid, are unconstitutional; and that the necessary and proper measures will be taken by each, for co-operating with this state, in maintaining the Authorities, Rights, and Liberties, referred to the States respectively, or to the people."
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> Source: http://avalon.law.yale.edu/18th_century/virres.asp

State Challenges Handout D: Legacy of the Kentucky and Virginia Resolutions

According to James Roger Sharp in *American Politics in the Early Republic: The New Nation in Crisis* (at page 200):

> Reaction to the Virginia and Kentucky resolutions from the other states was either overwhelmingly critical or deafening in its silence. State after state north of the Potomac denounced the doctrines set forth in them. The House of Delegates in Maryland condemned Kentucky's action as 'highly *improper*' and maintained that, in regard to both Kentucky and Virginia, 'No State government by a Legislative act is competent to declare an act of the Federal Government unconstitutional and void.' …
>
> Defense of the resolutions even by the Northern Republicans was mild and hesitant. Afraid of being cast as disunionists, they supported Virginia's and Kentucky's opposition to the Alien and Sedition Laws but opposed the idea that state legislatures could rule on the constitutionality of a federal law. …
>
> While the states south of the Potomac did not join the chorus of denunciation, they did remain tellingly silent. To many Southern Republicans outside of Virginia and Kentucky, the resolutions of those two states had passed beyond the point of political acceptability and, although these Southern Republicans virtually all probably agreed with the *end* sought, the repeal of the Alien and Sedition Laws, they feared that the *method* employed would lead to political disorder.
>
> Anticipation of the election of 1800 softened dissent. With the election looming, most Republicans chose electoral politics over direct confrontation; playing too strong a hand, they reasoned, would only hurt their chances at the ballot box. Here was a payoff for free and reasonably frequent elections, which not only prevented dictatorship but also provided an alternative to revolutionary upheavals. The Sedition Act was not repealed but allowed to expire in 1800, and the Alien Friends Act met the same fate the following year. The Alien Enemies Act remained on the books and was used to justify internment of Japanese, Germans, and Italians during WW II. It is still in force today, and some suspect it might soon be applied again.

The ideas embodied in the Kentucky and Virginia Resolutions lived on. In 1830s South Carolina's John C. Calhoun declared, in Jefferson's words, that "every state has a natural right … to nullify of their own authority" federal law. This argument was used in defense of slavery in the mid-Nineteenth Century and carried to its logical conclusion: secession. In the mid-Twentieth Century, Southern states nullified federal law by refusing to execute federal orders to integrate schools.

Some historians have claimed that Jefferson's call to nullify federal law in 1798 should not be treated in the same light as these later calls for nullification. Jefferson was standing up for liberty, they say, while later adherents were trying to preserve slavery or racial inequality. Others say that Southerners in both instances were standing up for regional interests and for the right to protect *their* liberty (albeit not the liberty of slaves).

State Challenges Handout E: Vocabulary List

1. Nullify: To make legally null and void; invalidate.
2. Interpose: To exert or use power, influence, or action in order to alter or intervene; to insert between one thing and another.
3. Sedition: Conduct or speech inciting people to rebel against the authority of a state.
4. Ratification: To confirm by expressing consent, approval, or formal sanction.
5. Referendum: A general vote by the electorate on a single political question that has been referred to them for a direct decision.
6. Adjucator: Someone who presides, judges, and arbitrates during a formal dispute.
7. Privateers: An armed ship owned and officered by private individuals holding a government commission and authorized for use in war.
8. Defame: To damage the good reputation of a person or entity.
9. Jurisdiction: The official power to make legal decisions and judgments.
10. Commonwealth: An independent country or community, especially a democratic republic.
11. Enumeration: The action of mentioning a number of things one by one.