



THE GILDER LEHRMAN
INSTITUTE *of* AMERICAN HISTORY

TEACHING CIVICS THROUGH HISTORY

Unit Supplement: Federalism and Challenges from the Early Years of the Republic

by Rhonda Kemp Webb

OVERVIEW

In this lesson, students will examine the United States' constitutional framework through weighing evidence from an early debate over federalism that culminated in the 1813 *Fairfax's Devisee v. Hunter's Lessee* ruling. This case provides an early Supreme Court interpretation of the property rights of Revolutionary War loyalists, as challenged by Virginia's confiscation efforts. The ruling also involves the US Supreme Court overturning a Virginia State Court of Appeals ruling, adding to further early debate over federalism.

Student groups will weigh opposing perspectives on the issue by examining a robust document set pertaining to the case. They will then engage in the Structured Academic Controversy process to evaluate the competing evidence and, through effective communication within the small group, form a consensus opinion predicting the court's ruling in *Fairfax's Devisee v. Hunter's Lessee*.

OBJECTIVES

Students will be able to

- Compare government documents to determine similarities and differences
- Evaluate the opposing arguments presented in a Supreme Court case
- Interpret private letters and newspaper editorials to determine their purpose

ESSENTIAL QUESTIONS

- How is federalism built into the US government?
- How were property rights subject to challenges related to federalism?

MATERIALS

- Pre-Lesson Homework Assignment: Post-Revolutionary War Loyalist Land Policies Document Set and Critical Analysis activity sheet

- o A Bill for Withholding British Property, Virginia Assembly, June 18, 1779, Founders Online, National Archives, founders.archives.gov/documents/Jefferson/01-02-02-0132-0004-0036. [Original source: *The Papers of Thomas Jefferson*, vol. 2, 1777–18 June 1779, ed. Julian P. Boyd. Princeton: Princeton University Press, 1950, pp. 435–437.]
- o Treaty of Paris, Article V, 1783, *Milestone Documents*, National Archives, [archives.gov/milestone-documents/treaty-of-paris](https://www.archives.gov/milestone-documents/treaty-of-paris)
- o Jay Treaty [Treaty of Amity, Commerce and Navigation], Article IX, 1794, Founders Online, National Archives, founders.archives.gov/documents/Jay/01-06-02-0086
- *Fairfax’s Devisee v. Hunter’s Lessee* – Structured Academic Controversy Capture Sheet
- Document Set for Structured Academic Controversy Pairs
 - o Pair A (Pro-state documents)
 - “Thursday, November 27, 1777,” *Journals of Congress, 1777–1782*, pp. 540–541, The Gilder Lehrman Institute of American History, GLC00219.03.
 - “Letter from James Madison to James Monroe,” December 24, 1785, Founder’s Online, National Archives, founders.archives.gov/documents/Madison/01-08-02-0238. [Original source: *The Papers of James Madison*, vol. 8, 10 March 1784–28 March 1786, ed. Robert A. Rutland and William M. E. Rachal. Chicago: The University of Chicago Press, 1973, pp. 455-457.]
 - Judge William Cabell’s Opinion, *Hunter v. Martin, Devisee of Fairfax*, February 1813, Supreme Court of Appeals of Virginia, 18 VA. 1, 4 Munf. 1, February 1813, Case Law Access Project, Harvard Law School, cite.case.law/va/18/1/.
 - Judge William Fleming’s Opinion, *Hunter v. Martin, Devisee of Fairfax*, February 1813, Supreme Court of Appeals of Virginia, 18 VA. 1, 4 Munf. 1, February 1813, Case Law Access Project, Harvard Law School, cite.case.law/va/18/1/.
 - o Pair B (Pro-national documents)
 - “Letter from George W. Fairfax to George Washington,” December 5, 1779, Founders Online, National Archives, founders.archives.gov/documents/Washington/03-23-02-0395. [Original source: *The Papers of George Washington, Revolutionary War Series*, vol. 23, October 22–December 3, 1779, ed. William M. Ferraro. Charlottesville: University of Virginia Press, 2015, pp. 527-528.]
 - “Parliamentary Debates in House of Commons,” June 20, 1783, *The Political Magazine*, October 1783, p. 272, The Gilder Lehrman Institute of American History. GLC08820.
 - William Humphrey, *The Savages Let Loose, Or The Cruel Fate of the Loyalists*, London, 1783, Library of Congress, loc.gov/item/97515386/

- “Letter from John Marshall to James Marshall,” July 9, 1822, *The Papers of John Marshall Digital Edition*, Charles Hobson, editor. Charlottesville: University of Virginia Press, Rotunda, 2014, rotunda.upress.virginia.edu/founders/JNML-01-09-02-0087. [Original Source: *The Papers of John Marshall*, vol. 9, *Correspondence, Papers, and Selected Judicial Opinions, January 1820–December 1823.*]
- Debrief and corresponding Key Phrase/Critical Analysis activity sheet
 - Excerpt from Supreme Court Justice Story’s 1813 Majority Opinion in *Fairfax’s Devisee v. Hunter’s Lessee*, *U.S. Reports*: 11 U.S. (7 Cranch) 603 (1813), pp 618–628. Available from the Library of Congress, loc.gov/item/usrep011603/.
 - Excerpt from *Martin v. Hunter’s License*, 14 U.S. 1 Wheat. 304 (1816). Available from the Library of Congress, loc.gov/item/usrep014304/.

PROCEDURE

What is a Structured Academic Controversy (SAC)?

SAC is a form of discussion that allows students in small groups to wrestle with the many sides of a controversial issue. By functioning in a small group, all students participate rather than a few students dominating a discussion. Ultimately, there will be multiple groups (each composed of four students) engaged in deep discussion within a classroom. This approach was originally created by Professors David W. Johnson (Education Psychology) and Roger T. Johnson (Curriculum and Instruction) from the University of Minnesota. Paula McAvoy of North Carolina State University adapted their research to create the format upon which this SAC activity is based.

Pre-SAC Preparation: Background Assignment (Homework)

Distribute Post-Revolutionary War Loyalist Land Policies Document Set for all students to read and analyze before the in-class SAC activity.

In-class Structured Academic Controversy Activity

Assign students to groups of four and subdivide each group of four into two pairs. One pair is assigned the pro-state position (Group Pair A) and the other pair takes the pro-federal position (Group Pair B).

Project a countdown timer to ensure the discussions are structured and equitable for both group pairs throughout the activity.

Step 1: Preparing the Arguments (15 minutes)

Each pair in each group should complete the SAC Capture Sheet using their own document set. During the argument preparation time, the each pair reads their documents and formulates a persuasive 2-minute presentation citing evidence to support the pro-state or pro-national position in the case.

Step 2: Presentation of the Arguments (4 minutes)

Pair A presents to Pair B (2 minutes). Pair B listens/takes notes – no challenges allowed.

Pair B presents to Pair A (2 minutes). Pair A listens/takes notes – no challenges allowed.

Step 3: Reversing the Arguments (5 minutes total – 3-minute preparation time and then 1-minute presentation time for each pair)

Pairs within each group now reverse their positions: Group Pair A develops and then presents an argument to support the pro-national side and Group Pair B develops and then presents an argument to support the pro-state side.

Step 4: Open discussion (5 minutes)

All participants drop their assigned roles and have free discussion about the issue. In particular, they should consider

- the challenges each pair noted during the other pair’s original presentation
- the broad implications of the issues framing the case.

Step 5: Consensus Building (5 minutes)

Each group of four should come to a consensus and complete the corresponding section of the SAC Capture Sheet using textual evidence to support sound arguments: Is there common ground anywhere concerning the issue?

Step 6: Debrief (16 minutes)

Whole class discussion:

- What consensus did each group develop?
- Are there groups within the classroom that differ in their consensus view?
- What arguments were the most compelling?
- Did anyone change their mind about the issue?

Provide students with the Debrief excerpts from the final Supreme Court opinion in *Fairfax’s Devisee v. Hunter’s Lessee* rendered by Justice Story in 1813. Use the SAC Debrief Sheet to help guide students through the ruling. Ask student groups to compare their consensus statement with the arguments presented by Justice Story.

Student groups should add an additional paragraph to their consensus statement that evaluates the Supreme Court ruling. Are there arguments the group agrees with and/or are there arguments the group disagrees with? Elaborate on what precedent this might set for future cases.

Teacher Assessment of SAC

- a. You may use the Post-Revolutionary War Loyalist Land Policies Document Set Key Phrase and Critical Analysis homework sheet to assess understanding of the foundational documents related to regulation of loyalist land during the post-Revolutionary War era.
- b. You may use the SAC Capture Sheet used by students to prepare their SAC arguments to assess understanding of the evidence presented in the document sets.
- c. You may use the Final Group Consensus paragraph to assess the use of evidence to support an argument.

** Adapted from Paula McAvoy's work on Structured Academic Controversy.

Post-Revolutionary War Loyalist Land Policies Document Set

Document 1: Virginia Bill for Withholding British Property (1779)

For securing to the citizens of this commonwealth an indemnification out of the property of British subjects here, in case the sovereign of the latter should confiscate the property of the former in his dominions, as well as to prevent that accession of strength which the enemy might derive by withdrawing their property from hence: Be it enacted by the General Assembly, that the lands, slaves, stocks, implements of husbandry, and other estate, except what is otherwise herein after provided for, within this commonwealth, of British subjects, shall be sequestered, and remain in possession of the commissioners heretofore for that purpose appointed, or be put into the possession of such as shall be from time to time, appointed, by the Governor, with advice of the Council of State. . . .

Clarification of Terms:

Commonwealth – Referring to Virginia

Indemnification – Protection from loss

Sequestered – Seized and held

Source: Founders Online, National Archives, founders.archives.gov/documents/Jefferson/01-02-02-0132-0004-0036

Document 2: Treaty of Paris, Article V, 1783

In the Name of the most Holy & undivided Trinity.

It having pleased the Divine Providence to dispose the Hearts of the most Serene and most Potent Prince George the Third, by the Grace of God, King of Great Britain . . . and of the United States of America, to forget all past Misunderstandings and Differences that have unhappily interrupted the good Correspondence and Friendship which they mutually wish to restore; and to establish such a beneficial and satisfactory Intercourse between the two countries upon the ground of reciprocal Advantages and mutual Convenience as may promote and secure to both perpetual Peace and Harmony. . . .

Article 5th:

It is agreed that Congress shall earnestly recommend it to the Legislatures of the respective States to provide for the Restitution of all Estates, Rights, and Properties, which have been confiscated belonging to real British Subjects; and also of the Estates, Rights, and Properties of Persons resident in Districts in the Possession on his Majesty's Arms and who have not borne Arms against the said United States. And that Persons of any other Description shall have free Liberty to go to any Part or Parts of any of the thirteen United States and therein to remain twelve Months unmolested in their Endeavors to obtain the Restitution of such of their Estates – Rights & Properties as may have been confiscated. And that Congress shall also earnestly recommend to the several States a Reconsideration and Revision of all Acts or Laws regarding the Premises, so as to render the said Laws or Acts perfectly consistent not only with Justice and Equity but with that Spirit of Conciliation which on the Return of the Blessings of Peace

should universally prevail. And that Congress shall also earnestly recommend to the several States that the Estates, Rights, and Properties of such last mentioned Persons shall be restored to them, they refunding to any Persons who may be now in Possession the Bona fide Price (where any has been given) which such Persons may have paid on purchasing any of the said Lands, Rights, or Properties since the Confiscation.

And it is agreed that all Persons who have any Interest in confiscated Lands, either by Debts, Marriage Settlements, or otherwise, shall meet with no lawful Impediment in the Prosecution of their just Rights.

Source: *Milestone Documents*, National Archives, [archives.gov/milestone-documents/treaty-of-paris](https://www.archives.gov/milestone-documents/treaty-of-paris)

Document 3: Jay Treaty {Treaty of Amity, Commerce and Navigation}, Article IX, 1794

. . . His Britannick Majesty and the United States of America, being desirous by a Treaty of Amity, Commerce and Navigation to terminate their Differences in such a manner, as without reference to the Merits of Their respective Complaints and Pretensions, may be the best calculated to produce mutual satisfaction and good understanding: And also to regulate the Commerce and Navigation between Their respective Countries, Territories and People, in such a manner as to render the same reciprocally beneficial and satisfactory; They have respectively named their Plenipotentiaries, and given them Full powers to treat of, and conclude, the said Treaty, that is to say; His Brittanick Majesty has named for His Plenipotentiary, The Right Honourable William Wyndham Baron Grenville of Wotton, One of His Majesty's Privy Council, and His Majesty's Principal Secretary of State for Foreign Affairs; and The President of the said United States, by and with the advice and Consent of the Senate thereof, hath appointed for Their Plenipotentiary The Honourable John Jay, Chief Justice of the said United States and Their Envoy Extraordinary to His Majesty, who have agreed on, and concluded the following Articles. . . .

Article IX

It is agreed, that British Subjects who now hold Lands in the Territories of the United States, and American Citizens who now hold Lands in the Dominions of His Majesty, shall continue to hold them according to the nature and Tenure of their respective Estates and Titles therein, and may grant Sell or Devise the same to whom they please, in like manner as if they were Natives; and that neither they nor their Heirs or assigns shall, so far as may respect the said Lands, be and the legal remedies incident thereto, be regarded as Aliens.

Source: Founders Online, National Archives, founders.archives.gov/documents/Jay/01-06-02-0086.

Name(s) _____ Period ____ Date _____

Analyzing the Documents

Doc 1: VA Property Bill	Doc 2: Treaty of Paris, 1783	Doc 3: Jay Treaty
<p>Write the main provisions of this 1779 Virginia law <u>in your own words</u>.</p>	<p>Write the main provisions created in Article V of this 1783 treaty <u>in your own words</u>.</p>	<p>Write the main provisions of Article IX of this 1794 treaty <u>in your own words</u>.</p>
<p>Why might the Virginia Assembly have thought this policy necessary in 1779? Cite evidence from the text to support your answer.</p>	<p>Does the main provision of this document support or oppose the Virginia Bill from 1779? Cite evidence from both texts to support your answer.</p>	<p>Does the main provision of this document most support the Virginia Bill from 1779 or the Treaty of Paris of 1783? Cite evidence from the text to support your answer.</p>

SAC Capture Sheet

Should the Supreme Court grant authority to the national or state government in the case *Fairfax's Devisee v. Hunter's Lessee* given the constitutional framework for federalism?

PREPARATION

Land Dispute: Northern Neck of Virginia (over 5 million acres between Potomac and Rappahannock Rivers)

Highlight your assigned position in the case:

Pair A: Support the authority of the Virginia government in the case and uphold Hunter's land claim.

Don't Forget the Rules of Successful Academic Controversy!

- Practice active listening
- Challenge ideas – not each other
- Try your best to understand the other positions
- Share the floor: Each person in the pair **MUST** have an opportunity to speak during the position arguments

Pair B: Support the authority of the national government in the case and uphold Fairfax's land claim.

<i>Fairfax's Devisee</i>	v	<i>Hunter's Lessee</i>
<p>Virginia's Northern Neck land was originally granted to Thomas Culpepper in 1649 from King Charles II and was eventually inherited by Robert Fairfax, who lived in Great Britain and died in 1781. Upon his death, the land was devised (left by terms of his will) to his nephew, Denny Martin Fairfax, who was also a British citizen and not part of the Revolutionary movement in America. The Fairfax descendant landholder also sold some of the lands to individual buyers (including the family of Justice John Marshall, who recused himself from this case).</p> <p><i>** Devisee simply means a person who was left land in a will, in this case Denny Martin Fairfax.</i></p>		<p>Virginia confiscated part of the Northern Neck land in the late 1770s through state law. The state subsequently granted a tract of the land (though still claimed by Denny Martin Fairfax) to David Hunter in 1789. Hunter brought a "<u>suit in ejectment</u>" in the Virginia court in 1791. The court ruled in favor of Fairfax. The matter was appealed to the Virginia Court of Appeals and later ruled on in 1810 in favor of Hunter's land claim. The US Supreme Court reviewed the case in 1812 to determine if a <u>writ of error</u> (based on ideas related to federalism) should be issued against the Virginia Court of Appeals, which would require reversal of their 1810 ruling.</p> <p><i>** Lessee is a person who rents land. In this case there are people occupying the land and paying rent to David Hunter.</i></p> <p><i>**Suit in Ejectment is an effort to stop someone from claiming land as their own when both parties claim legal right to land.</i></p>

Name(s) _____ Period ____ Date _____

Use your Document Set (Pair A or Pair B) to develop support for your assigned position's argument.

<i>Doc. #</i>	<i>In your own words . . . What is the <u>MAIN IDEA</u> of this document?</i>	<i>Cite specific evidence from the document . . . What <u>DETAILS SUPPORT</u> your position?</i>

Name(s) _____ Period ____ Date _____

ACADEMIC CONTROVERSY

Work with your partner to summarize the arguments for your assigned position based on your documents.

You and your partner will present your position to the opposing group members and listen to their presentation of their position.

While you are listening to your opponents' position, write down the main details of their argument here.

What clarifying questions do you need your opponents to answer about their position?

How did they answer your questions?

REVERSING THE ARGUMENTS

Review your notes about the opposing pair's position. Work with your partner to develop one new reason to support your opponent's position.

Name(s) _____ Period ____ Date _____

You and your opposing pair will each present your new argument supporting the opposing position. Take notes during the other pair's presentation.

CONSENSUS BUILDING

Starting now, you may abandon your assigned position. Imagine that you live in this time period and do not know the future implications of the decision. With your entire group (both Pair A and Pair B) look at the evidence and the arguments that have been made and make the fairest, most unbiased judgment possible.

Which side should win the law suit (circle one): Fairfax's Devisee or Hunter's Lessee?

Outline the reasoning for your group's verdict in the case. Your group should address the evidence and arguments from both sides. It is acceptable to write in bullet points.

SUMMARIZATION

Write a paragraph to answer the question below. Use at least 3 pieces of evidence from the SAC.

Should the Supreme Court grant authority to the national or state government in the case *Fairfax's Devisee v. Hunter's Lessee* given the constitutional framework for federalism?

Structured Academic Controversy

Fairfax's Devisee v. Hunter's Lessee Document Set A (Pro-State)

"Thursday, November 27, 1777," Journals of Congress

. . . Congress resumed the consideration of the report of the committee on the letter from S. Hopkins, esquire, &c whereupon

8. Resolved, That it be earnestly recommended to the several states, as soon as may be, to confiscate and make sale of all the real and personal estate therein of such of their inhabitants and other persons who have forfeited the same and the right to protection of their respective states; and to invest the money arising from the sales in continental loan office certificates, to be appropriated in such manner as the respective states shall hereafter direct. . . .

Source: *Journals of Congress, 1777–1782*, pp. 540–541, The Gilder Lehrman Institute of American History, GLC00219.03

Letter from James Madison to James Monroe, December 24, 1785

Dear Sir

Richmond Decr. 24. 1785

The proceedings of the Assembly since my last dated this day week have related 1. to the Bill for establishing Religious freedom . . . 2. a Bill concerning British debts 3. a Bill concerning the Proprietary interest in the Northern Neck. 4. for reforming the County Courts. The first employed the H. of Delegates several days; . . . The Bill for the payment of British debts is nearly a transcript of that which went thro' the two Houses last year. . . . The general cry is that the Treaty ought not to be executed here until the posts are surrendered, and an attempt will be made to suspend the operation of the Bill on that event or at least on the event of a positive declaration from Congs. that it ought to be put in force. . . . The Bill relating to the N. Neck passed the H. of D. yesterday. It removes the records into the Land Office, here, assimilates locations of surplus land to the general plan, and abolishes the Quitrent. It was suggested that the latter point was of a judiciary nature, that it involved questions of fact, of law, and of the Treaty of peace, and that the Representatives of the late proprietor ought at least to be previously heard according to the request of their agent. Very little attention was paid to these considerations, and the bill passed *almost* unanimously. With sincere affection I am Your friend & Servt.

J. Madison Jr.

Source: Founder's Online, National Archives, founders.archives.gov/documents/Madison/01-08-02-0238.

Judge William H. Cabell's Opinion, Hunter v. Martin (1813), Supreme Court of Appeals of Virginia

. . . Our system of government is . . . unlike any other that now exists, or that has ever existed. . . . To the federal government are confided certain powers, specially enumerated, and principally affecting our foreign relations, and the general interests of the nation. These powers are limited, not only by their special enumeration, but by the positive declaration that, all powers not enumerated, or not prohibited to the states, are reserved to the states, or to the people. . . . The free exercise, by the states, of the powers reserved to them, is as much sanctioned and guarded by the constitution of the United States, as is the free exercise, by the federal government, of the powers delegated to that government. . . . The two governments, therefore, possessing, each, its portion of the divided sovereignty, although embracing the same territory, and operating on the same persons and frequently on the same subjects, are nevertheless separate from, and independent of, each other. . . .

[T]o give to the general government or any of its departments, a direct and controlling operation upon the state departments, as such, would be to change at once, the whole character of our system. The independence of the state authorities would be extinguished, and a superiority, unknown to the constitution, would be created, which would, sooner or later terminate in an entire consolidation of the states into one complete national sovereignty. . . .

Source: Supreme Court of Appeals of Virginia, *18 VA. 1, 4 Munf. 1*, February 1813, Case Law Access Project, Harvard Law School, cite.case.law/va/18/1/.

Judge William Fleming's Opinion, Hunter v. Martin (1813), Supreme Court of Appeals of Virginia

. . . The question now to be decided, is not whether this court erred in the case of *Hunter v. Fairfax* – but, whether, if so, the Supreme Court of the United States has jurisdiction to correct the error? . . . The only article . . . brought in question in the case of *Hunter v. Fairfax*, on which the mandate under consideration was founded, was the validity of the treaty between the United States and Great Britain, in the year 1783 – and does it appear on the face of the record that the decision was against its validity? – In my apprehension it does not so appear; for the very reverse was the fact: and if that cause had depended altogether on the validity of the treaty, the judgment, on the appeal to this court, would have been in affirmance of that of the court below, in favour of *Fairfax*, or rather, of his heir *Philip Martin*, the appellee.

It is worthy of remark, too, that when *Denny Fairfax* was impleaded by *Hunter* in the District Court of *Winchester*, he had an election to remove the cause into the nearest circuit court of the United States; of which privilege he did not think proper to avail himself, but choose to rest his cause with the state courts. . . . And am of the opinion, therefore, upon both points, that it is inexpedient for this court to obey the mandate under consideration. . . .

Source: Supreme Court of Appeals of Virginia, *18 VA. 1, 4 Munf. 1*, February 1813, Case Law Access Project, Harvard Law School, cite.case.law/va/18/1/.

Structured Academic Controversy
Fairfax's Devisee v. Hunter's Lessee
Document Set B (Pro-National)

Letter from George William Fairfax to George Washington, December 5, 1779

My Dear Sir.

December 5th 1779

I have lately received a Letter . . . informing me, that our Assembly had very unexpectedly past an Act to Confiscate the property of British Subjects, and of all Persons, in any part of the World, other than the united States of America. This my good Sir, you must suppose is truly alarming, as at this instant of writing, I may not have a single Acre of Land in the Country I have so much espous'd; however I trust, and hope, that the Legislature has not as yett proceeded to the Sale of all Absentees Estates; and when they come to Consider, and make inquiry into my Conduct here, that I shall not come under the Description & meaning of the Act. . . .

But now, as this unforeseen Event is likely to take place, I think it absolutely necessary . . . that you'l be so good as to Vouch, that I was not a Fugitive, nor withdrew myself to avoid taking the Oaths &c. &c., or any thing else, you may be pleas'd to represent in my behalf. Tho' from the Extract I have seen, I am hopeful, I am not comprehended in the dreaded Act, yett it is perplexing to think how tottering my Estate stands, for want of their knowing what a steady, and faithful Adherent, I have been from the very beginning, and how many innocent Individuals, (now residing in their State) will suffer by the Sale of my property.

I trust my Dear Friend, that it will not be long before you . . . enjoy a Series of uninterrupted Domestic happiness, being truly the ardent prayer, and wish of Dear Sir Your Affecte and ever Obliged humble Servant.

Source: Founder's Online, National Archives, founders.archives.gov/documents/Madison/01-08-02-0238.

Parliamentary Debates in House of Commons, June 20, 1783

House of Commons

Friday, June 20 [1783]

American Loyalists

His Lordship then moved for leave to bring in a petition from the Agents of his Majesty's loyal subjects late belonging to the several provinces of New Hampshire, Massachusset's Bay, Rhode Island, New York, Jersey, Pennsylvania, Maryland, Virginia, North Carolina, South Carolina, and Georgia, on behalf of themselves and the said loyal subjects. . . .

The petition was then brought up, read, and set forth,

"That at the commencement of the late war in America, great numbers of the inhabitants, and amongst them some of the first characters, fortune, and consequence, were actuated by the purest principles of loyalty to their Sovereign, by the grateful sense of the happiness they enjoyed under the British Government, and by an abhorrence of every measure which tended to destroy the union between Great Britain and the Colonies; and, impressed with this just sense of their duty as subjects, they either openly opposed, or steadily refused, during the whole progress of the contest, to join in the measures which have since unfortunately terminated in a dismemberment of the empire; and that, notwithstanding many allurements held out to seduce them from their allegiance, and a variety of losses and distress sustained in consequence of their loyalty, their zeal for restoring the authority of the crown, and preserving the union between the two countries, remained not only undiminished, but was greatly stimulated by the hopes of protection and relief, founded on a series of acts and resolutions . . . calling on the loyalists to assist in suppressing the rebellion, and giving the most solemn assurances that they might depend at all events, on his Majesty's paternal regard and protection . . . many of the principal inhabitants who had taken an open and decided part, in obedience to the calls of their Sovereign, were obliged to abandon their families and estates, and to seek an asylum in the King's garrison, or in some other part of his dominions; and that these unfortunate men, in consequence of their fidelity to the Crown, have been attainted, and their estates confiscated, by laws passed by the legislatures of the several American states; . . . [B]y the events of war, . . . the losses sustained, and the sacrifices made by the state for the publick safety of the property of individuals, who have been solemnly called upon by their sovereign, and have particularly distinguished themselves by their zeal in the common cause, ought, by the principles of natural justice, and the fundamental laws of the British Government, to be equitably distributed among, and borne by, the whole society; and therefore praying the House to take their case into consideration, and to grant them such relief, as their peculiarly hard and distressing situation may appear to merit."

Source: *The Political Magazine*, October 1783, p. 272, The Gilder Lehrman Institute of American History. GLC08820.

William Humphrey, *The Savages Let Loose, or The Cruel Fate of the Loyalists*, London, 1783



Library of Congress, Prints and Photographs Division

Letter from John Marshall to James Marshall, July 9, 1822

My dear brother

Richmond July 9th. 1822

Judge White . . . must admit that the supreme court is the proper tribunal for expounding the treaties of the United States, & that its deci[si]ons on a treaty are binding on the state courts, whether they possess the appellate jurisdiction or not. . . . Thus the exposition of any state law by the courts of that state, are considered in the courts of all the other states, and in those of the United states, as a correct exposition, not to be reexamined. The only exception to this rule is where the statute of a state is supposed to violate the constitution of the United States, in which case the courts of the Union claim a controuling & supervising power. . . .

The Supreme court of the United States has settled the construction of the treaty of peace to be that lands at that time held by British subjects were not escheatable or grantable by a state. . . .

I am my dear brother your affectionate

J. Marshall

The effect of the principle I have stated is that we hold not under the compromise but under the treaty. . . .

Source: *The Papers of John Marshall Digital Edition*, Charles Hobson, editor. Charlottesville: University of Virginia Press, Rotunda, 2014, rotunda.upress.virginia.edu/founders/JNML-01-09-02-0087.

Structured Academic Controversy Debrief

Justice Joseph Story's Majority Opinion in Fairfax's Devisee v. Hunter's Lessee, US Supreme Court, 1813

. . . The royal charter expressly conveys all that entire tract . . . to the grantees and their heirs and assigns, to their only use and behoof, and to no other use, intent or purpose whatsoever. . . . We are therefore satisfied, that by virtue of the charter . . . lord Fairfax at the time of his death, had the absolute property of the soil of the land in controversy . . . the legal seizing must be, upon principle, considered as passing with the title. . . .

Let us now consider the several acts which have been referred to in the argument, from which we think it will abundantly appear that, during the war, the lands in controversy were never, by any public law, vested in the commonwealth. . . . "So far as the treaty of peace might be deemed material in the case, this distinction would deserve consideration."

. . . Consistent therefore with the manifest intention of the legislature, grants were to issue for lands in the Northern Neck, precisely in the same manner as for lands in other parts of the state, and under the same limitation, viz. that the commonwealth should have, at the time of the grant, a complete title and seizin. . . .

The real fact appears to have been, that the legislature supposed that the commonwealth were in actual seizin and possession of the vacant lands of lord Fairfax, either upon the principle that an alien enemy could not take by devise, or the belief that the acts of 1782 . . . had already vested the property in the commonwealth. In either case it was a mistake which surely ought not to be pressed to the injury of third persons. . . .

[W]e are well satisfied that the treaty of 1794 completely protects and confirms the title of Denny Fairfax; even admitting that the treaty of peace left him wholly unprovided for.

The 9th article is in these words: "It is agreed that British subjects who now hold lands in the territories of the United States, and American citizens who now hold lands in the dominions of his majesty, shall continue to hold them according to the nature and tenure of their respective estates and titles therein, and may grant, sell or devise the same to whom they please in like manner as if they were natives, and that neither they nor their heirs or assigns shall, so far as respects the said lands and the legal remedies incident thereto, be considered as aliens."

Now, we cannot yield to the argument that Denny Fairfax had no title. . . . In our judgment, by virtue of the devise to him, he held a fee simple in his own right. At the time of the commencement of this suit (in 1791) he was in complete possession and seizin of the land. That possession and seizin continued up to and after the treaty of 1794, which being the supreme law of the land, confirmed the title to him, his heirs and assigns, and protected him from any forfeiture by reason of alienage. . . .

It becomes unnecessary to consider the argument as to the effect of the death of Denny Fairfax pending the suit, because admitting it to be correctly applied in general, the treaty of 1794 completely avoids it. The heirs of Denny Fairfax were made capable in law to take from him by descent, and the freehold was not, therefore, on his death, cast upon the commonwealth.

On the whole, the Court are of opinion that the judgment of the Court of appeals of Virginia ought to be reversed. . . .

Source: *U.S. Reports*: 11 U.S. (7 Cranch) 603 (1813), pp 618–628, [loc.gov/item/usrep011603/](https://www.loc.gov/item/usrep011603/)

The Rest of the Story

The US Supreme Court ruling in the *Fairfax's Devisee v. Hunter's Lessee* case reversed the earlier ruling from the Virginia Supreme Court on the Northern Neck property title dispute between the descendants of Lord Fairfax and the claims made by David Hunter, who had acquired the land from the state of Virginia after it had been confiscated during the American Revolution. The Virginia Supreme Court is the highest state-level appellate court in Virginia. The reversal of the state court ruling by the US Supreme Court touched off a federalism debate concerning the federal court's authority over state court rulings.

The Virginia State Court of Appeals did not recognize the authority of the US Supreme Court in this matter and wrote the following in its refusal to comply with the mandate from the federal court:

The following is the judgment of the court of appeals, rendered on the mandate: "The court is unanimously of opinion that the appellate power of the supreme court of the United States does not extend to this court under a sound construction of the constitution of the United States; that so much of the 25th section of the act of congress, to establish the judicial courts of the United States, as extends the appellate jurisdiction of the supreme court to this court, is not in pursuance of the constitution of the United States. That the writ of error in this cause was improvidently allowed under the authority of that act; that the proceedings thereon in the supreme court were *coram non iudice* [without jurisdiction] in relation to this court, and that obedience to its mandate be declined by the court."

The refusal of the Virginia court to comply with the mandate of reversal by the US Supreme Court led to the *Martin v. Hunter's Lessee* case of 1816. While the land dispute over the Fairfax holding was still the basis for the 1816 case, the greater constitutional issue of the US Supreme Court's authority to overturn a state court's ruling makes the *Martin v. Hunter's Lessee* case pivotal in the development of federalism precedent.

In *Martin v. Hunter's Lessee*, the state of Virginia argued that the US Supreme Court did not possess the authority to overturn the Virginia Supreme Court of Appeals' ruling in *Fairfax's Devisee v. Hunter's Lessee*. After reviewing the case, the US Supreme Court issued a unanimous ruling to require the state to reverse its previous decision and allow the descendants of Lord Fairfax to maintain their control of the land in question. Justice Joseph Story wrote the unanimous opinion for the US Supreme Court in *Martin v. Hunter's Lessee*, which relied on the US Constitution's supremacy clause to justify the power of the national court to overturn the ruling in error of the state court. Story said, in part, that

The questions involved in this judgment are of great importance and delicacy. Perhaps it is not too much to affirm that, upon their right decision, rest some of the most solid principles which have hitherto been supposed to sustain and protect the constitution itself. . . .

The constitution of the United States was ordained and established, not by the states in their sovereign capacities, but emphatically, as the preamble of the constitution declares, by "the people of the United States." There can be no doubt that it was

competent to the people to invest the general government with . . . a paramount and supreme authority. . . .

The third article of the constitution is that which must principally attract our attention. The 1st. section declares, “the judicial power of the United States shall be vested in one supreme court, and in such other inferior courts as the congress may, from time to time, ordain and establish.”

. . . [I]t is plain that the framers of the constitution did contemplate that cases within the judicial cognizance of the United States not only might but would arise in the state courts, in the exercise of their ordinary jurisdiction. With this view the sixth article declares, that “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.”

. . . On the whole, the court are of opinion, that the appellate power of the United States does extend to cases pending in the state courts; and that the 25th section of the judiciary act, which authorizes the exercise of this jurisdiction in the specified cases, by a writ of error, is supported by the letter and spirit of the constitution. We find no clause in that instrument which limits this power. . . .

We have thus gone over all the principal questions in the cause, and we deliver our judgment with entire confidence, that it is consistent with the constitution and laws of the land. . . . It is the opinion of the whole court, that the judgment of the court of appeals of Virginia, rendered on the mandate in this cause, be reversed, and the judgment of the district court, held at Winchester, be, and the same is hereby affirmed.

Source: *U.S. Reports*: 14 U.S. 1 Wheat. 304, 1816, [loc.gov/item/usrep014304/](https://www.loc.gov/item/usrep014304/), pp 304–362.