Contest held June 2011 in North Carolina

“A Law Repugnant to the Constitution is void.” These words are the heart of Marbury v. Madison, decided unanimously in 1803 by the United States Supreme Court. We accept—at times happily and other times with frustration—that the Supreme Court can and should decide if our laws contradict the Constitution, our fundamental law of the land.

At least one member of the Marshall Court, Alfred Moore, probably experienced a sense of “déjà Vu” as he listened to Justice Marshall read the decision establishing the court’s right of review. Moore hailed from North Carolina where he had lived a life of service, as a captain in the Continental Army, a colonel in the patriot militia and as state Attorney General. And at one time in his private law practice Moore defended a New Bern man in a property case, a Mr. Singleton.

While Colonel Moore was fighting was fighting for the patriot cause, other North Carolinians chose a different course. Many of you will be familiar with the Ben Franklin cartoon, “Join or Die.” The cartoon depicts a snake chopped into thirteen pieces, one for each colony. It reminded the colonists that if they did not unite, they would separately perish. Patriots made a bold choice to rebel and they wanted their neighbors beside them. One patriot is easy to hang. A whole countryside, however, is far more anonymous, far more difficult to hang.

Imagine then, given the pressure to rebel, the daring that it took in 1776 to be a loyalist. Patriots feared what would happen at war’s end, if they lost; loyalists feared their rebel neighbors every day. In this light, loyalists too made a bold choice, to be loyal to a government often without means to protect them from dangers to their lives and property.

One such bold man was Samuel Cornell, a merchant in New Bern, North Carolina. Worried that he would be required to finance patriot acts and with threats against him growing, Cornell fled to England 1775. In 1777, under a flag of truce Cornell was allowed back into New Bern where he registered deeds transferring his property, to his daughters, and Raw Hide for McGiver. The family sailed to New York awaiting a victory that would not come.

Cornell ‘s actions were for naught as the North Carolina government seized the family property under the Confiscation Act which required oaths of loyalty or forfeiture. In 1786 Cornell’s daughter Elizabeth, bythis time Mrs. Bayard, sued. Mrs. Bayard wanted her property returned, nit first she wanted a trial. North Carolina’s 1776 Constitution guaranteed a trial by jury in any case that could result in the loss of land or property, yet no trial had been held. The Confiscation Act did not require it.

Bayard’s attorneys, future governors Samuel Johnston and William Davie, argued that the Confiscation Act was unconstitutional because it allowed property to be taken without a trial.

North Carolina Court of Conference judges Samuel Ashe, Samuel Spencer and John Williams were flummoxed by this seemingly clear violation of the state constitution. No true precedent existed for a court's refusal to enforce legislative acts. Hoping for a settlement or for the state legislature to fix the problem, they delayed—some say even played sick_____ to avoid making a decision.

The North Carolina Assembly, however, chose not to act during their session in November 1787. The court could wait no longer, but heard the case. With a boldness which belied its reluctance, the court recognized that if the legislature could take away a persons' constitutional right to a trial by jury regarding property they "might with as much authority require his life to be taken away or render themselves the Legislators of the State for life, without any further election of the people." The court wrote that the state constitution was "standing in full force as the fundamental law of the land."

Mrs. Bayard won a trial. In that trial, however, the court found that as an alien, her father Samuel Cornell could not own property in North Carolina nor deed it to others and the house remained Singleton's property. After the ruling, Mr. Singleton no longer worried about losing his home and Elizabeth Bayard returned to her life in New York. The opinion in Bayard v. Singleton also traveled, it was widely distributed to attorneys throughout the states.

The North Carolina court established a precedent of judicial review in Bayard v. Singleton in 17878, sixteen years before the United States Supreme Court justices heard the case of the undelivered commission in Marbury V. Madison. This brings us back to North Carolina Attorney Alfred Moore. He had been on the losing side of the judicial review question in Bayard. Sixteen years later Moore voted with Justice Marshall in establishing that the very proposition for the United States Supreme Court. Perhaps he had a change of heart. It is not unlikely that he well remembered the arguments in Bayard v. Singleton.

Judicial review is, perhaps, the greatest power that the judicial branch has in our system of checks and balances. Today the relevance, the necessity of judicial review is seeped into our National character. It shapes our history. A loyalist seeks to hold onto his property, some patriots acknowledge that even former enemies have right and a court recognizes that legislative acts must agree with the "Fundaments Law of the Land. "Bayard v. Singleton, arising from the Revolutionary War impacts us all today and will continue to help define American justice for generations to come.