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"Law and History Reject Unlimited  
Legislative Power"

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For the generation that framed and adopted the Constitution, legislative despotism was not merely theoretical, but real. The Founders' fears were drawn from their experience under Parliament, which saddled an aspiring Republic with laws that violated their rights and liberties and denied their goal of independence. Henry Adams, the preeminent historian of the founding period, observed, "a great majority of the American people shared the same fears of despotic government."

Suspicion of legislative power was exacerbated in the years following the Declaration of Independence by the fact that early state constitutions vested virtually unchecked powers in the state legislatures. The untested confidence of Americans that "their" legislators, elected by the "people," unlike English representatives, would not betray fundamental values, principles and freedoms, was soon shaken.

Thomas Jefferson, writing in 1781, blamed Americans' inexperience and naivete in "the science of government" for writing state constitutions that concentrated power in the legislative branch which, he noted, represented "precisely the definition of despotic government." He added, "an elective despotism was not the government we fought for," in undertaking the revolution.

The corruption of early state legislatures, it was widely acknowledged at the time, constituted a primary reason for convening the Constitutional Convention. James Madison noted that there had been a tendency to "throw all power into the legislative vortex. If no effective checks be devised for restraining the instability and encroachments of the latter, a revolution would be inevitable." In a letter to Jefferson, written on October 24, 1787, Madison stated that the "injustice" of state laws represented a "frequent and flagrant alarm to the most steadfast friends of Republicanism."

Among the "effective checks" on what delegates to the Convention variously described as legislative usurpation, tyranny and despotism, was the power of judicial review. This pillar of constitutionalism and the rule of law countered the lingering but significant influence in the United States of Sir William Blackstone's emphasis on the "legislative absolutism" of Parliament in England. The availability of judicial review, the Framers believed, would check both the theory and practice of legislative supremacy.

There is, in our time, irony in the fact that delegates to the Philadelphia Convention and the North Carolina State Ratifying Convention were among the most passionate champions of curbing legislative power. Their enthusiasm and advocacy resonate today, as the nation closely watches the U.S. Supreme Court in its handling of a North Carolina case, *Moore v. Harper*, in which the Speaker of the North Carolina House of Representatives, on behalf of the state legislature, claims that North Carolina courts and, indeed, the North Carolina Constitution, are disabled by the Independent State Legislature theory from limiting the legislature's exercise in flagrant gerrymandering.

*Moore v. Harper* is a case layered with various legal issues. The North Carolina Supreme Court held the

legislature's redistricting map as an exercise in extreme, partisan gerrymandering, "egregious, flagrant and unconstitutional." The legislature is appealing the decision to the U.S. Supreme Court.

Our immediate interest is with the question of whether state legislatures, in this case, North Carolina, may create congressional redistricting maps and, more broadly, pass laws governing the time, place and manner of elections that are unconstrained by the state constitution and state courts. North Carolina's theory—Blackstone's theory of legislative supremacy—was demonstrably rejected by the Framers of the Constitution, yet it is in full sprint in North Carolina.

The implications for American Constitutionalism are grave. If the Supreme Court decides, probably in June of 2023, to uphold the legislature's assertions, then the legislature's preferences on matters of federal elections will be unimpeded by judicial review, as well as the text, structure and history of the Constitution. Consequently, state courts, state governors and redistricting commissions could be deprived of their respective roles in the election process, including their participation in invalidating, vetoing and drawing congressional maps. Once a political party obtained a majority, it would be extremely difficult to dislodge it from power, essentially ending competitive races.

If the U.S. Supreme Court were to overrule the state supreme court decision, it would mark a historic break from the principles and traditions of federalism which, among other practices, reflects a 200-year-old understanding that the High Tribunal will defer to state court interpretations of state law. Given that state authority is at its highest pitch when a state's highest court contemplates and rules on its own constitution and state laws, it would be extremely

awkward for the U.S. Supreme Court to say to the high court in North Carolina: You are wrong about your constitution.

There is a better authority on the meaning of the North Carolina Constitution than the current state legislature. In 1786, James Iredell, one of the nation's most acute legal theorists, a leading member of the state's ratifying convention and one of the first Justices on the U.S. Supreme Court, remarked on the formation of the state constitution: We "considered how to impose restrictions on the legislature, to guard against the abuse of unlimited legislative power. We should have been guilty of the grossest folly, if in the same moment when we spurned at the insolent despotism of Great Britain, we established a despotic power among ourselves."