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Mootness in Moore v. Harper?

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There is a new twist in Moore v. Harper, the big election case implicating the Independent State Legislature (ISL) theory. The U.S. Supreme Court heard argument in *Moore* in December. Last Friday, the North Carolina Supreme Court issued an order to rehear the underlying state court case. Various commentators have said that, as a result, at the U.S. Supreme Court *Moore* may become moot. I asked my colleague Vik Amar--co-author of the best brief in *Moore*--his thoughts on the possibility of mootness. He provided a characteristically sophisticated response which he has given me permission to share.

Here is what Vik says:

Mootness is, of course, a notoriously manipulable (and manipulated) doctrine. But I think the notion that *Moore v. Harper* should necessarily be rendered moot if the North Carolina Supreme Court reverses course on the extent to which the state constitution proscribes excessively partisan gerrymandering is not remotely as clear as (some, at least) commentators seem to suggest. (If the North Carolina Supreme Court were to wholeheartedly embrace ISL and overturn its past decision on the ground that Article I of the U.S. Constitution renders state constitutional limitations inapplicable, then a different situation might be presented -- and the *Moore* Respondents then might seek cert. to the U.S. Supreme Court from that ruling – but I am assuming for these purposes that the NC Supreme Court does no more than revisit the substantive interpretation of the state constitutional provision requiring free and equal elections.)

First, of course, is the possibility that the case could fall into the "capable of repetition yet evading review" category, insofar as the elected legislature is the quintessential repeat player when it comes to election regulation, and many state bills regulating federal elections may be prevented by the state courts from being implemented in the elections for which they are intended before the U.S. Supreme Court could realistically step in. But perhaps even more fundamentally, I'm not entirely sure that the injury of which the state legislators complain in *Moore* would be fully redressed by a reinterpretation of the free-and-equal-election provision. I concede the question is complex and that there are arguments that could be marshalled on both sides, but it seems to me the fundamental harm the legislators assert under the ISL theory is having to be subject to state judicial review under the state constitution's substantive limits at all.

Consider this analogy (admittedly drawn from the flip-side of the mootness concept, ripeness): if one wanted to challenge a completely standardless and thus facially unconstitutional ordinance requiring a permit to be issued before a parade could take place, would someone who has held parades in the past and who could credibly contend they want to hold a parade in the near future need to submit an application and have it denied before mounting a challenge? Or instead could one argue that having to even submit an application under a facially invalid statutory framework imposes injury that a court could/should redress? The relatively recent (and unanimous) *Susan B. Anthony List v. Driehaus* case to me suggests the latter, even without a plaintiff having to make much of showing that the permit would be likely to be denied. (The fact that the government "may try" to deny the permit, in the words of the *Driehaus* Court, and the costs of navigating an unconstitutional permitting process, should be sufficient.) And if First Amendment chilling effects are doing work in my hypo or in *Driehaus*, it's hard for me to see why legislative chill -- to say nothing of the costs resulting from a delay in the implementation of valid enactments by elected legislators -- wouldn't be similarly important.

To be sure, the legislators in *Moore* were not the original plaintiffs who brought suit to redress their asserted injuries the way my hypothetical parade holder would be trying to redress hers. But the legislators in *Moore* are the Petitioners at

the U.S. Supreme Court, and they have to have an Article III injury to invoke the power of the Supreme Court. Perhaps their injury must be limited to the state-law basis that allowed them to intervene in the first place in the lower courts (about which I know little), but the injury they allege at the cert. stage arguably does go beyond their interest in the particular district lines that were undone/replaced by the North Carolina courts below. The question presented in the Cert. Petition begins with a very broad framing: "Whether a State's judicial branch may nullify the regulations governing the "Manner of holding Elections for Senators and Representatives . . . prescribed . . . by the Legislature thereof," U.S. CONST. art. I, § 4, cl. 1 and replace them with regulations of the state courts' own devising" . . . The first part of this question – whether state courts have any role here – is certainly enduring, and the second part also seems to focus not just on the particular maps drawn in the courts below but more generally with the power of the elected legislators going forward. Indeed, in the Petition, the legislators argue that "this case presents an ideal vehicle for this Court to 'carefully consider and decide the issue' not in an emergency posture but rather 'after full briefing and oral argument.' [citation omitted]. *For while the 2022 congressional elections in North Carolina will take place under a judicially created map, that map is good for 2022 only. This Court should intervene now, resolve this critically important and recurring question, and ensure that congressional elections in 2024 and thereafter are conducted in a manner consistent with our Constitution's express design"* (my italics).

These last sentences suggest to me that the argument, pressed by Petitioners in their merits brief, that under no circumstances does Article I permit state courts to draw maps of their own was, if we cognize the Petitioners' injury only as the enforceability of the particular maps drawn by the courts below, already moot in some narrow sense in December 2022 when oral argument was held. And yet, I don't necessarily think the Court would be running afoul of mootness limitations if it were to say in an opinion issued tomorrow (even before the North Carolina Supreme Court takes any action) something like: "While we decline to decide whether a state court can enjoin implementation of an elected legislature's map, we do hold that the court below violated Article I because state courts are simply not permitted under Article I to draw maps themselves." To be clear, I think the argument distinguishing between judicial invalidation and judicial district-line-drawing is an implausible one on the merits. But I don't think the Court lacks jurisdiction to consider that argument even though the state-court-drawn district lines involved in the case have no application going forward. For me, though, the reason the Court has the power to decide the case as I hypothesize in the sentence above is that it is perfectly legitimate to cognize Petitioners' injury relating to improper state-judicial meddling in more (temporally) broad terms.

All of that is a very quick reaction as to what the Court should or should not do; what the Justices will in fact do might, as you (Jason) suggested to me, depend on whether five of them have coalesced around an approach/opinion that they feel is coherent enough to resolve the ISL silliness without unduly offending those who have (without the benefit of much thought or research) supported ISL notions in the past.

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