VERDICT

LEGAL ANALYSIS AND COMMENTARY FROM JUSTIA

The Court Should Maintain Optionality in Resolving the So-Called "Independent State Legislature" (ISL) Theory by Granting Cert. in *Huffman v. Neiman* Right Away as the Justices Chew on Whether *Moore v. Harper* is Moot

1 MAY 2023 | VIKRAM DAVID AMAR AND JASON MAZZONE

POSTED IN: ELECTION LAW

On Friday the North Carolina Supreme Court pulled what the *Wall Street Journal* editorial board called a "switcheroo." The court (by a 5-2 vote with all five Republicans in the majority and both Democrats in dissent) undid a February 2022 ruling—a decision that itself had featured a partisan lineup in the other direction, the fall 2022 election having flipped the partisan makeup of the court. The 2022 ruling had invalidated the elected North Carolina legislature's enacted congressional maps on the ground that the maps violated

provisions of the North Carolina Constitution that forbid excessive partisanship in the drawing of district lines in both state and federal elections. Friday's ruling didn't say the North Carolina Constitution does *not* forbid excessive partisan gerrymandering, but instead held that North Carolina state courts simply lack the power to hear and decide such claims. As the majority declared: "we hold that partisan gerrymandering claims present a political question that is nonjusticiable under the North Carolina Constitution."

Putting aside the implications this development has for North Carolina's congressional and state legislative representatives, the overruling of the 2022 decision creates, in the eyes of some commentators, complications for the U.S. Supreme Court, because it was this 2022 decision that the U.S. Supremes are reviewing in the pending *Moore v. Harper* case. As most readers already know (and for more background on *Moore* see here), *Moore* involves the so-called "Independent State Legislature" (ISL) theory and the uber-important question of whether state constitutions can bind elected state legislatures in the realm of federal (as opposed to state) election regulation.

It is possible that the U.S. Supreme Court will conclude that *Moore* (which was extensively briefed last fall—there were over 60 amicus briefs filed, including a brief that one of us co-wrote—and argued in December) is now "moot" because, on the one hand, the congressional-district maps at issue in *Moore* are (by virtue of Friday's ruling) no longer relevant. On the other hand (and more powerfully, we believe), the basic question that *Moore* (and the ISL theory central to the case) raises—whether elected state legislatures must respect state constitutional limits when those legislatures regulate federal elections—remains of enduring interest to the elected North Carolina legislature. This is true because Friday's state-court ruling contains a lot of language rejecting the core of ISL—the notion that the U.S. Constitution somehow frees elected state legislatures of state constitutional constraints in the domain of federal-election

regulation—and because the state court opinion does not say that *all* claims under the North Carolina Constitution involving federal elections are nonjusticiable, merely that partisan gerrymandering claims are. Indeed, the same North Carolina Supreme Court issued another ruling last Friday rejecting, on the merits, a claim that state statutes requiring voter IDs in state and federal elections violated the North Carolina Constitution. Moreover, even putting aside the enforceability of state constitutions in state courts, conscientious state legislators who take their oaths of office seriously have an interest in knowing whether state constitutions can apply of their own force in the realm of federal elections or not. And, of course, ISL theory also remains of enduring relevance to the other side in *Moore v. Harper*, because the individuals and groups that challenged the partisan gerrymandering may very well desire to challenge, on state constitutional grounds, other state statutes that regulate federal elections.

These factors, along with the notoriously malleable character of federal mootness doctrine, especially in cases where the events that might create mootness happen after the Supreme Court has already granted review (a consideration astutely analyzed by Chief Justice Rehnquist in the 1988 case of *Honig v. Doe*), mean the Court could (and we think should) decide *Moore* on the merits notwithstanding Friday's developments. (Another factor we believe should be in the mix is avoiding perverse incentives for state courts to manipulate the U.S. Supreme Court's docket by belatedly rehearing cases that have already been briefed and argued at the high Court—incentives that we were surprised to see the U.S. Solicitor General's office downplay in earlier briefing; the fact that the North Carolina Supreme Court waited a full year before granting rehearing seems troubling to us.)

Some analysts seem to believe a finding of mootness in *Moore* is likely, and in this vein point to the fact that there is a pending cert. petition in an Ohio case

raising the ISL question, *Huffman v. Neiman*, that the Court seems to be "holding" for now and that the Court could use in the event *Moore* turns out to be moot and the Justices still want to weigh in on ISL.

Importantly, deciding whether *Moore* is truly moot may take the Court some time (and could involve the Court asking for additional briefing, as it did when the North Carolina Supreme Court first granted rehearing two months ago). A delay in resolving the mootness of a case ordinarily isn't a big deal. But the merits issue raised in *Moore* is far from ordinary. There is relatively broad agreement among analysts (and among many Justices themselves) about two important things: (1) ISL needs to be resolved by the U.S. Supreme Court; and (2) such a resolution should be handed down as far in advance of a federal election cycle as possible. If *Moore* is found to be moot, say, two months from now in June, and cert. is granted in *Huffman* at that time (the end of the current Term), then oral argument in *Huffman* wouldn't be likely to take place until November or later. On that schedule, the Court's ultimate resolution of ISL would probably come down in 2024, smack dab in the middle of a presidential election campaign. (As of now, it appears some primaries/caucuses are scheduled to begin as early as the end of January or early February 2024.) Whatever the Court were to decide, a decision in 2024 could significantly disrupt the preparation for and administration of the various elections in the states.

So what should the Court do? It should grant cert. in *Huffman* right away. And we mean right away: this week. (Had we known about *Huffman* a few months ago, we would have suggested that the Court grant cert. in February, as soon as the North Carolina court ordered rehearing of the underlying case in *Moore*.) If the Court ends up resolving the merits of *Moore*, the petition in *Huffman* can at that time be dismissed as improvidently granted, or the *Huffman* case can be vacated and remanded, as appropriate. But if *Moore* ends fizzling, a prompt

grant in *Huffman* now will enable the Court to nonetheless be able to resolve ISL in a timely manner. If the Court does grant review in *Huffman* this week, even if normal briefing timelines are respected (45 days for Petitioner, 30 days for Respondent and 30 days for Petitioner's Reply), briefing would be complete in mid-August, and the Court could hear arguments at a special sitting in September, allowing the Justices to easily get their opinions handed down before Thanksgiving. Better still, the Court should grant in *Huffman* straight away, expedite the briefing schedules (say, 30 days for Petitioner, 30 days for Respondent, and 10 days for a Reply), and hear oral argument in July, again, making it easy for the Court to decide the matter in the fall of 2023 rather than next year.

Deciding whether to expedite briefing of course involves a balance of considerations, including being fair to the parties and wanting to ensure that the briefs are of high quality. But since *Huffman* has already been briefed on the merits in the lower courts, and since the whole world (including the parties in *Huffman* as well as the Supreme Court Justices) has the benefit of the voluminous briefing on ISL in *Moore*, expediting (since it means likely getting an opinion down earlier) makes very good sense.

There is strong precedent for expediting monster cases involving fundamental questions about American democracy, and hearing argument on them outside the Court's normal October-June cycle. In *Citizens United,* for example, the Court granted (re)hearing at the end of June 2009 (the last day of the 2008-2009 Term), ordered expedited briefing, and heard arguments on September 9. That schedule enabled the Court to issue its decision in January 2010, not the end of the Term several months later when big cases ordinarily get handed down. That mattered for the 2010 congressional-election cycle.

An even more dramatic example is *United States v. Nixon* (the famous Nixon

tapes case). There, the Supreme Court granted review on June 1, 1974, ordered expedited briefing, heard oral arguments on July 8, and ruled on the case at the end of July. The country benefitted immensely from prompt resolution.

Some might argue that the tight timeline in *Nixon* reduced the quality of the Court's ultimate opinion resolving the matter. (And certainly the same could be said for *Bush v. Gore* in 2000, where the briefing schedule was also very tight.) But the somewhat shortened timeline we suggest above for *Huffman* wouldn't be nearly so compressed. And, again, briefing in *Huffman* benefits tremendously from the full and regular briefing on the same issue in *Moore*. That feature was not present either in *Nixon* (where the briefing in the lower courts had also been time-constrained) or *Citizens United* (where the First Amendment question that was the focus of re-argument had not ever been meaningfully briefed the first time around).

Of course, it is possible that *Huffman* suffers from justiciability problems of its own. The *Huffman* Respondents in their cert. papers claim the ISL issue wasn't presented to the Ohio Supreme Court. That argument didn't seem convincing when we read it, though of course the U.S. Supreme Court will examine it carefully. But even if *Huffman* ends up after close inspection not to be a good vehicle to address ISL, there is still nothing to be lost in granting cert. now and then dismissing the grant of cert. down the road. Moving another ISL vehicle (besides *Moore*) ahead is prudent to maintain maximal optionality in the light of real-world election timing. Indeed, to the extent that the mootness question in *Moore* may be thorny, perhaps the truly best course would be to grant in *Huffman* right now, and then order that *Moore*—including the mootness question—be re-argued alongside *Huffman* in either July or early September.

We don't know if the Court has often (or ever) granted cert. in a case it was "holding" for resolution of another "main" case already on its docket before the

"main" case has been resolved. But even if our suggestion is novel, we live in unusual times. Never before have federal elections been under such intense litigation pressure; resolving theories like ISL in as calm an environment as possible is of paramount importance. It also bears mention that the Court's stature and character have rarely been under as much attack as they are now. If the Justices were to stay in DC over the summer (or return earlier than usual in September) to hear an ISL case, so that the case could be resolved sooner rather than later, such a gesture—putting the nation's business ahead of any personal travel plans—might earn the Court some goodwill.

POSTED IN: COURTS AND PROCEDURE, ELECTION LAW
TAGS: GERRYMANDERING, INDEPENDENT STATE LEGISLATURE THEORY, ISL THEORY, NORTH CAROLINA, SCOTUS

VIKRAM DAVID AMAR

Vikram David Amar is the Dean and Iwan Foundation Professor of Law at the University of Illinois College of Law on the Urbana-Champaign campus. Immediately prior to taking the position at Illinois in 2015, Amar served as the Senior Associate Dean for Academic Affairs and a Professor of Law at the UC Davis School of Law. He has also had teaching stints at three other law schools affiliated with the University of California: the UC Berkeley School of Law; the UCLA School of Law; and UC Hastings College of the Law.

JASON MAZZONE

Jason Mazzone is the Albert E. Jenner, Jr. Professor of Law at the University of Illinois at Urbana-Champaign and Director of the Illinois Program in Constitutional Theory, History, and Law. His primary field of research and teaching is constitutional law and history and works principally on issues of constitutional structure and institutional design.

Comments are closed.
