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Symposium: This case is moot

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By Jessica Bulman-Pozen and Adam Samaha
on Nov 19, 2019 at 10:00 am

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Forget guns for a moment. Imagine that, once upon a time, Boca Raton had a rule that prohibited its residents from transporting their golf clubs to driving ranges outside the city. Boca's finest golfers challenged the constitutionality of the rule in court. Now imagine that the city thought twice and repealed the rule and that Florida then passed a statute authorizing people to transport their clubs to the driving ranges of their choice. The golfers could live happily ever after.

What about the pending litigation? That story is over, too. However much Boca and the golfers might continue to dispute the merits of golf-club transport, there would be no live case or controversy under Article III of the Constitution. Even if the city and state had acted after the Supreme Court agreed to consider Boca's rule, there is no question the case would be dismissed as moot.

Just as clearly, *New York State Rifle and Pistol Association v. City of New York* is moot. If we attend to Article III limits on federal-court jurisdiction, the case has become more fairy tale than real. The court simply doesn't have power to reach the merits of the petitioners' claims, regardless of anyone's views about guns, or golf clubs or anything else.

The petitioners challenged a New York City rule that prevented them from transporting their handguns from their city homes to second homes or shooting ranges outside the city without an additional license. They did not seek damages, nor did they challenge any aspect of the city's licensing regime other than the transport restriction for individuals who possess premises licenses but not carry licenses. After the Supreme Court granted certiorari, the city revised its rule. And in July, the state of New York passed a law that permits premises-license holders, including the petitioners, to transport their handguns directly to second homes, shooting ranges or other authorized locations. This law provides a state-wide transport rule and preempts any conflicting municipal regulation.

As a result, the petitioners have already received all the relief they sought in court: They may lawfully transport their handguns from the city to second homes or shooting ranges outside the city. Moreover, no other jurisdiction has a rule similar to the city's repealed rule. The challenged regulation does not exist anywhere in the country.

Although the court denied the city's Suggestion of Mootness in October, telling the parties they "should be prepared to discuss" justiciability at oral argument, the court should readily conclude the case is moot after a full airing of the issue. Scholars continue to debate whether mootness is properly understood as jurisdictional, but the court has long understood it as a nondiscretionary Article III constraint. "No matter how vehemently the parties continue to dispute the lawfulness of the conduct that precipitated the lawsuit," the court recently stated, "the case is moot if the dispute 'is no longer embedded in any actual controversy about the plaintiffs' particular legal rights.'"

As explained in our amicus curiae brief for federal courts scholars, the court has repeatedly recognized that new legislation satisfying a plaintiff's claim renders litigation moot, even when that new legislation is adopted during an appeal. For example, in *U.S. Department of Treasury v. Galioto*, the court held moot a challenge to a federal firearms statute after Congress rewrote the applicable provision following oral argument. In *Hall v. Beals*, the court likewise held moot a challenge to a state statute that was amended while the appeal was pending. And in *Kremens v. Bartley*, it held moot a challenge to state statutes that were amended after the court had noted probable jurisdiction. In these and many other cases, the court has recognized that adhering to Article III limits can mean sunk costs for litigants and the judiciary as well as postponement of a decision on important legal questions. But the court has insisted that such concerns do not confer power to decide a case.

Recognizing that mootness doctrine does guard against certain kinds of manipulative behavior, the petitioners argue that New York City has engaged in "extraordinary maneuvers designed to frustrate this Court's review." But lawmaking is not the sort of "machination" mootness doctrine guards against. The voluntary cessation doctrine precludes defendants from strategically pausing their challenged conduct, only to resume such conduct after receiving a declaration of mootness. To foreclose this game of whack-a-mole, a party claiming mootness because it has voluntarily ceased a challenged activity must show that it is clear the activity "could not reasonably be expected to recur." New legislation almost always satisfies this test, absent indication that the government plans to repeal the legislation. New York City's amended rule, standing alone, would thus likely moot this case.

But the court need not consider that question at all. In this case, the voluntary cessation doctrine does not apply: The petitioners challenged a city regulation, and state law has now furnished relief. The state of New York and New York City are distinct legal actors, and state law preempts any inconsistent municipal regulation. Even if the city wished to reinstate its previous transport restriction, it would be powerless to do so.

Perhaps recognizing that the voluntary cessation doctrine does not apply, the petitioners now seek to add new issues and new parties to the case. For example, they pose broader questions about legal limits on public carry, but they did not raise any such challenge below. Nor did they raise allegations involving hypothetical parties they now describe, including people who live outside New York City and wish to bring their handguns into the city and people who might have violated the repealed city rule in the past and might suffer adverse consequences at some point in the future.

Ultimately, the petitioners would prefer to have the claims they raised—and some they didn't—satisfied by judges rather than legislators. They contrast "what petitioners seek (a judicial declaration of a constitutional right) and what the City offers (a unilateral modification of prospective licensing terms)," but as Chief Justice John Roberts recently reminded, "the federal courts exist to resolve real disputes, not to rule on a plaintiff's entitlement to relief already there for the taking." The court should be wary of establishing new constitutional doctrine based on nonexistent regulations.

Indeed, the petitioners have it backward. Legislative resolution of disputed issues should be preferred to judicial resolution. Mootness and related justiciability doctrines limit the exercise of power by unelected judges and are "founded in concern about the proper—and properly limited—role of the courts in a democratic society." The petitioners should welcome a victory through democratic processes rather than deride lawmaking as a form of manipulation. And the court should respect the primacy of representative government by holding this case moot.

Posted in Symposium before oral argument in New York State Rifle & Pistol Association v. City of New York

Cases: New York State Rifle & Pistol Association Inc. v. City of New York, New York

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