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SCOTUS's 2016-17 Term: The Calm Before the Storm?

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We have become accustomed to having the Supreme Court wrap up its terms with the release of blockbuster opinions. For example, over the past decade, the court has issued late-term rulings on abortion rights, gun rights, affirmative action, the right to same-sex marriage and the constitutionality of the Affordable Care Act.

The court's just-completed 2016-17 term contained no such blockbusters. Its highest profile ruling was an unsigned opinion that modified preliminary injunctions issued by lower courts to prevent President Donald Trump's “travel ban” orders from going into immediate effect.

But that ruling did not decide whether the president's orders are in fact unconstitutional. Instead, the court put that important question off until the fall, by which time further factual developments - for example, the executive branch completing its review and deciding to lift or modify the bans - may well render the issue moot.

To be sure, the court did decide several significant cases this term. It applied the First Amendment's free-speech clause to invalidate both a federal statute that authorized the patent and trademark office to deny trademark applications deemed “disparaging” of others, and a state statute that criminalized the use of
Why did Supreme Court justices search so hard for common ground?

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major social networking sites by convicted sex offenders.

And it held unlawful under the First Amendment's free speech clause a state policy of denying requests for state facility-improvement funds from schools run by religious organizations.

In addition, the court decided a number of issues of substantial importance in the areas of criminal law (in particular, issues of racial bias in the criminal justice system), patent law, education law, housing law and federal court practice.

But for the most part, the court ducked the big issues. It decided fewer cases this term than in any term over the past 70 years. And in those cases that it did take up, it often issued very narrow rulings, compromising the needed broad agreement.

Indeed, Adam Liptak of the New York Times, citing a study by law professor Lee Epstein, reports that the court's level of consensus — as measured by the percentage of total votes cast for majority or plurality opinions — was its highest in at least 70 years.

So why did the court embrace minimalism and search so hard for common ground?

Is the court likely to continue to behave this way in the future?

The answer to the first question is certainly heavily informed by the fact that, for most of the term, the court was operating with only eight justices. Justice Neil Gorsuch was not sworn in to replace Justice Antonin Scalia until April 10, 2017 — well after most of the term's cases had already been argued.

The court has discretion over most of its docket, meaning that it usually gets to decide which cases it will take and which cases it will turn away. And the justices were acutely aware that, in all cases in which Justice Scalia would have been part of a 5-4 majority, the court would have found itself evenly split 4-4.

In such situations, the lower court's judgment is affirmed in a one-sentence order that lacks precedent effect. From the court's perspective, cases that yield evenly divided decisions are a waste of time and resources.

The more interesting question is the second one: Is the court's restrained approach likely to last?

Many close court observers believe that the answer is no. And there certainly are reasons to think that they are correct.

First, obviously, the court now has a full complement of nine justices with a conservative 5-4 majority. So there is no longer the need for special concern about cases fizzling in evenly split rulings.

Second, for those hoping that Justice Gorsuch might prove to be a more consensus-seeking jurist than Justice Scalia — who famously delighted in writing strong separate opinions blasting his colleagues — the initial returns are not promising.

While Justice Gorsuch's early opinions suggest that he will employ a softer rhetorical tone than Justice Scalia, they do not demonstrate much of an interest in finding common ground with those holding a different perspective.

In his first two months, Justice Gorsuch wrote several non-majority opinions — most of which staked out positions far to the right of the court's center.

Third, the court has already accepted a number of cases for next term that raise deep questions likely to spawn profound disagreements between the court's conservative and liberal justices.

As noted above, the court is poised to address the constitutionality of the president's travel ban orders. It will also decide whether business owners may exempt themselves from state anti-discrimination laws on grounds of religious objection to same-sex marriage. And it will determine whether there are judicially enforceable constitutional limits on partisan gerrymandering by state legislatures.

All of these cases could yield blockbuster rulings by a deeply divided court.

And yet, there also are reasons to believe that the court might continue to seek consensus a bit more than it did prior to Justice Scalia's death.

For one thing, Chief Justice Roberts, who expressed a strong interest in consensus-building at the time of his nomination, has separated himself from the court's most conservative members with greater frequency in recent terms. And for another, Justice Anthony Kennedy, the court's most centrist justice, did not retire, as had been strongly rumored.

It is not difficult to imagine that Chief Justice Roberts and Justice Kennedy might wish to minimize conflicts on the court during this time of bitter partisan division and political tumult. If so, they may continue to join with the court's (otherwise outnum­bered) liberal justices to find narrow grounds for disposing of cases with a bit more frequency than in the past.

Our system of government requires compromise. Perhaps the court will model it for the political branches.

(John Greabe teaches constitutional law and related subjects at the University of New Hampshire School of Law and which staked out positions far to the right of the court's center.)