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...
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major social networking sites by convicted sex offenders.

And it held unlawful under the First Amendment's free-exercise 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, a sign of a broadly divided court.

For one thing, Chief Justice John G. Roberts, who expressed a strong interest in consensus-building at the time of his nomination, has since left himself 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 since left himself from the court's most conservative or liberal justices.

As noted above, the court is poised to address the constitutionality of the president's travel ban orders. It also will decide whether business owners may exempt themselves from state anti-discrimination laws on grounds of religious objection to same-sex marriage. 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.

Second, for those hoping that Justice Gorsuch might prove to be a more consensus-seeking jurist than Justice Scalia – who famously de-lighted in writing strong separa-tion 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.

The court has discretion 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 precedential 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 conserva-tive 5-4 majority. So there is no longer a need for special concern about cases fizzling in evenly split rulings.

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

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