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SCOTUS's 2017-2018 term: More of the 'passive virtues'

John M. Greabe
UNH Law School, john.greabe@law.unh.edu

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Constitutional Connections

At the end of last month's column on the Supreme Court's decision to strike down the federal law that prevented states from authorizing sports betting, I stated that this month's column would discuss the court's history of using judicial review to tell Congress that it had gone too far in intruding on the rights of the states.

But with the nation bitterly divided over the policies and conduct of the president, I'm going to postpone that discussion and instead examine a timelier topic: the court's decision to effectively punt on the major religious freedom and partisan gerrymandering cases it was poised to decide this term. For the court's restraint in these cases may have some relation to our turbulent political times.

Let's start by returning to last summer. A year ago, I titled my column reviewing the court's yawner of a 2016-17 term "The calm before the storm?" The question mark was intended to challenge the conventional wisdom that the confirmation of Justice Neil Gorsuch would bring a swift end to the narrow, technical, consensus-seeking rulings that the eight-member court frequently issued between Justice Antonin Scalia's death (on Feb. 13, 2016) and Justice Gorsuch's formal elevation to the court (on April 10, 2017).

To be sure, there were a number of reasons to believe that the court's recent string of narrow rulings was not likely to continue. First and foremost, the confirmation of Justice Gorsuch returned the court to its full complement of nine members. So controversial cases were no longer likely to flame out in evenly split 4-4 rulings that accomplished nothing.

Moreover, Justice Gorsuch had shown little indication that he, personally, would be interested in finding common ground with his more liberal colleagues. As he settled into his new job during the spring of 2017, he surprised many observers by issuing several separate opinions that took aggressive positions far from the court's center. It is uncommon for a new justice to come out swinging like this.

Finally, the court had already decided to hear several potential blockbuster cases this year, including *Gill v. Whitford* and *Masterpiece Cakeshop v. Colorado Civil Rights Commission*. *Gill* involved whether there are judicially enforceable constitutional limits on partisan gerrymandering – the practice of redrawing of electoral districts to favor the incumbent majority; *Masterpiece Cakeshop* involved whether a business owned by religious persons might be partially exempt from state anti-discrimination law on grounds of religious liberty. A positive answer to either question would seriously impact our political and social orders and almost certainly trigger strong reactions from opponents.

And yet, there also were a couple of reasons to doubt that the court was preparing to issue a slew of broad constitutional rulings. First, Chief Justice John Roberts – who is deeply committed to maintaining the court's reputation as a legal (and not political) institution – has frequently praised judicial modesty and declined to join the conservative bloc with which he usually votes in order to fashion a majority consensus. Second, Justice Anthony Kennedy – the court's most centrist jurist – had surprised many by not retiring last June.

And sure enough, the 2017-18 term has not featured the transformative rulings that many had anticipated. True, at the time of this writing, there are still a few high-profile cases pending, and the court may have a genuine game-changer or two up its sleeve. But even so, the exceedingly narrow grounds on which the court resolved *Gill* and *Masterpiece Cakeshop* will prevent this term from being characterized as the "storm" that many anticipated last summer.

In *Gill*, a unanimous court, in an opinion authored by Chief Justice Roberts, invoked "standing" doctrine to hold that the plaintiffs had failed to establish the sort of injury needed in order to obtain the ruling they sought. But the court did not hold that the plaintiffs lacked sufficient injury altogether. Rather, it sent the case back to the lower court to consider whether an alternative theory of injury (spelled out by Justice Elena Kagan in a concurring opinion) could open the door to relief.

In *Masterpiece Cakeshop*, the court held by a 7-2 vote, in an opinion authored by Justice Kennedy, that statements made by members of the civil rights commission that originally heard the case revealed impermissible religious bias. Therefore, established law required reversal of the lower court, which had ruled in favor of a same-sex couple and against a bakery that had refused to make a cake for the couple's wedding. The opinion did not break any major new legal ground.

Both rulings are examples of the court exercising what constitutional law professor Alexander Bickel famously called the "passive virtues." Those who favor a passive-virtues approach believe that the court usually is wiser to proceed incrementally, to avoid deeply-theorized constitutional rulings, to push controversial matters back to the political branches and to guard against damaging its prestige by avoiding unnecessary conflicts with the politically accountable branches of government.

So why did the court take these approaches in *Gill* and *Masterpiece Cakeshop*? Why did it disappoint those who were looking for some clarity on whether and when courts might address the problem of partisan gerrymandering, and whether and when the constitutional guarantee of religious liberty frees citizens from having to comply with otherwise generally applicable federal and state anti-discrimination laws? Won't these pressing public policy issues continue to fester until the court provides us with some guidance?

One never knows for certain, of course. But it is natural to wonder whether the justices who believe in the passive virtues may have been especially motivated to take things slow, given our troubled political climate. A special counsel is investigating the president for potentially impeachable offenses, and the court soon may be called on to decide questions of immense significance. I do not wish to draw a direct line between the special counsel and *Gill* and *Masterpiece Cakeshop*; that would overstate the point. But I do think it fair to suggest that we are living in a time when the court's minimalist justices might be particularly interested in keeping the court's powder dry.

(John Greabe teaches constitutional law and related subjects at the University of New Hampshire School of Law. He also serves on the board of trustees of the New Hampshire Institute for Civics Education.)