Tradition! (Supreme Court Style)

Welcome to CONSTITUTIONAL CONTEXT. This is Professor Glenn Smith with another "five-minute bite of background about the Court and Constitution."

Tradition! No -- you don't need to worry that I'm going to break into Tevye's song from *Fiddler on the Roof*!

Rather, I refer to another tradition recently taking place at the Supreme Court chamber in Washington, D.C. On June 12, 2017, newest Justice Neil Gorsuch delivered his first written judicial opinion, reflecting the unanimous view of all nine justices.

Unanimous opinions aren't unheard of. Although Court watchers and the media tend to focus on the most highly controverted opinions dividing the justices and often prompting long and spirited dissents, in each Term a substantial minority of the Court's decisions are unanimous. (According to the statistical wizards at scotusblog.com, a very useful site for following the Supreme Court developments, in the Term ending in June 2016, 48 % of cases were decided unanimously; another 11% featured only one dissenter.)

But it was 100% certain that Justice Gorsuch's first opinion for the Court would be unanimous. This is one of the many interesting traditions by which the Supreme Court socializes its members. Perhaps in recognition that future opinion writing may bring many rhetorical bruises, every new member to the Court is given a unanimous, non-controversial decision as his or her first writing project.

Many important features of Supreme Court procedure and dynamics are the product of traditions. The Constitution merely provides a barebones outline of the Court's jurisdiction and place in the governmental structure. Congress has filled in some important details by statute. For example, statutes provide that the Court has virtually full control over its case-review docket and that the Court's Term begins on the "First Monday in October."

Still, fully understanding the Court requires attention paid to a wide range of venerable traditions, large and small.

Many of these traditions promote collegiality or remind justices of their solemn responsibilities. One good example occurs at the Court's case conferences, the regular justices-only meetings at which they discuss and decide cases recently argued. Before the start of each case conference, the justices exchange handshakes all around. In between morning and afternoon oral arguments, the justices meet for lunch. Interestingly, by another tradition these luncheons feature wide-ranging conversations about everything (grandchildren, movies, etc.) *except* controversial points of law.

One very important and longstanding Court tradition is the "Rule of Four" – the policy that it takes four justices to agree to grant a petition for certiorari to review and decide

on a lower-court decision. The venerable “Rule of Four” ensures that the justices have reached a just-one-less-than-a-majority consensus before committing themselves, their clerks and the legal community to time consuming and expensive oral argument and case decision. This “Rule of Four” tradition thus promotes the wise use of Court resources while preventing the justices from being at the effect of a “tyranny of the majority.”

One further tradition about majorities and the Rule of Four was in evidence last Summer. In a highly controversial case involving Obama Administration protections for transgender-student rights, Justice Breyer announced that he would provide the fifth vote to “stay” (or place on hold) the court of appeals ruling in the controversy, pending his colleagues’ decision about whether to grant review. Had Breyer not voted to stay the ruling, the lower-court’s pro-transgender-rights ruling would have gone into effect, a result likely consistent with Breyer’s views on the merits. By instead helping to preserve the options of his more skeptical colleagues, Breyer’s gesture of comity showed the extent to which the third branch of government – in marked contrast, alas, to the executive and legislative branches – has managed to retain substantial collegiality and a constructive let’s-work-together approach.

No doubt the Court’s many traditions help to reinforce this refreshing attitude.