

Roberts Court Reaches Toward Unanimity

By Brian J. Paul

As the October 2005 term of the U.S. Supreme Court approached its final week, the court had issued 31 unanimous opinions, representing more than half of all signed decisions, an astonishing statistic when one considers that less than a third of the court's opinions were unanimous last term. It's probably no accident that this greater degree of accord coincides with John Roberts' ascension to the court's center seat.

Contrast this term with the October 1986 term, the first term that William Rehnquist served as chief justice, when only 18 percent of the court's opinions were unanimous. And just this May, in a commencement speech at Georgetown, Roberts extolled what he believes to be the primary virtue of greater unanimity, namely, decisional clarity. Clearly, Roberts not only desires greater unanimity, he will use his position so far as is possible to accomplish it, something prior chiefs haven't always done.

But is the court really entering into what Dean Kenneth Starr recently called "an era of good feeling," in which old ideological differences are suppressed in favor of a new search for common ground? Time will tell, but it's unlikely.

One term does not make a trend. For more than 50 years the percentage of unanimous opinions has hovered around the 30s; only rarely has the degree of unanimity varied more than 10 points from one term to the next. Unanimity bottomed out during the Burger years (1969-1986), averaging 22 percent per term. The Warren (1953-1969) and Rehnquist (1986-2005) courts fared better, averaging 35 percent and 31 percent, respectively. Several terms broke 40 percent during the Warren era. The highest degree of unanimity the Burger Court ever reached was 32 percent. Despite these statistical variations, however, the degree of unanimity during the last half-century has remained remarkably stable. Inertia thus is not on Roberts' side.

Other obstacles exist to greater unanimity. For instance, the Rehnquist court issued a relatively high percentage of 5-4 decisions, with two, four-justice coalitions (one liberal, one conservative) flanking Justice O'Connor as the decisive vote. Regardless of where on the liberal-conservative continuum Roberts and the court's newest member, Samuel Alito, end up falling, the justices who were at the furthest ends of that continuum during Rehnquist's tenure remain on the court. At the conservative end, Scalia and Thomas agree with each other more than 85 percent of the time, as do Souter and Ginsburg, both at the liberal end, but Scalia and Thomas typically do not vote with Souter and Ginsburg more than half of the time. These four Justices (and Breyer if not Ginsburg) are likely to serve on the court for a decade hence. It is difficult to imagine that even Chief Justice Roberts – intelligent, collegial, a leader by all accounts – will be able to convince these blocs to agree more often not only with the court's judgment but its reasoning as well, the sine qua non of unanimity.

There may also be intractable philosophical differences between Roberts and his conservative brethren, particularly Justice Scalia, which could thwart greater unanimity.

In his Georgetown address, Roberts observed that an inverse relationship exists between the breadth of the court's agreement and the scope of its opinions: "The broader the agreement among the justices, the more likely it is that the decision is on the narrowest possible ground." This, suggested Roberts, is quite appropriate. "If it is not necessary to decide more to dispose of a case, then in my view it is necessary not to decide more," he said.

Scalia rejects such common-law minimalism. He has argued that judicial restraint actually compels the court to announce broad rules which constrain lower courts in future cases – and he has proved willing to take this stand even in cases involving fairly mundane issues, where

unanimity is at its most achievable. Just this term, in a case concerning whether the 7th Circuit had properly heard an appeal from a remand order (*Kircher v. Putnam Funds Trust*), Justice Scalia, although agreeing with the court's judgment and nearly all of its reasoning, filed a lone concurrence rejecting part of the court's opinion because it didn't go far enough in repudiating the 7th Circuit's methodology. Scalia advocated laying down a blanket rule, something the rest of the court declined to do because the result – in the specific case before the court – would have been the same whether it adopted Scalia's rule or not. This basic jurisprudential schism has the potential for stymieing unanimity in any number of cases each term.

The point is not that Roberts can't negotiate a peace on the court beyond this term, or even that he won't. It is, rather, that there are considerable forces beyond his control that are likely to inhibit him from doing so. If he can achieve greater unanimity still, in spite of these forces, Roberts will have accomplished something of truly historic proportion.

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