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‘The Roberts Court’ by Marcia Coyle

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As the Supreme Court prepares to decide the fate of affirmative action, voting rights and same-sex marriage by the end of June, interest in the ideological and institutional fault lines among the justices remains high. Ever since Chief Justice John Roberts took the helm in 2005, a series of books and articles have examined the court in partisan terms. The standard narratives, which tend to be politically polarized, paint the conservative majority either as a group of ideologues eager to impose their policy preferences on a divided nation or as a group of principled jurists struggling to resist judicial activism on the left.

Now comes Marcia Coyle with “The Roberts Court,” an account that largely avoids these oversimplified extremes. The great strength of Coyle’s book is the depth and balance of her reporting. She interviewed several justices on background and one, Antonin Scalia, on the record. She also interviewed the lawyers and litigants on both sides of the four highest-profile cases of the Roberts era — involving affirmative action in public schools, gun rights, campaign finance and health care. By allowing all the participants to speak in their own voices, she gives us a nuanced sense of how conservative and libertarian lawyers strategically litigated these cases and transformed the law.

As Coyle puts it, “All four landmark Roberts Court decisions had at their inception very smart and talented conservative or libertarian lawyers who, when necessary, handpicked the most sympathetic clients for their lawsuits, strategized over the best courts in which to file, and with an eye toward their ultimate target — an increasingly friendly and conservative Supreme Court — framed the winning arguments.”

Coyle, the chief Washington correspondent for the National Law Journal, begins with the 2007*Parents Involved* case, a challenge to race-based public school assignments in Seattle and Louisville. With scrupulous behind-the-scenes reporting, she reveals that, initially, there weren’t the required four votes on the court to take the case. But Justice Clarence Thomas’s dissent from the denial of review, according to one justice, was so powerful that it persuaded a third and then a fourth vote: Justice Samuel Alito.

Coyle also interviews Kathleen Brose, a Seattle parent who was the driving force behind the lawsuit. Brose emerges, in Coyle’s account, as a sympathetic figure: Her daughter, who is white, didn’t get into her top three school choices because of the district’s race preferences, and because her fourth choice didn’t have an orchestra, she transferred to an even less desirable school, farther from her home.

“These kids weren’t looking at skin colors; they were just friends,” Brose told Coyle. “When the school district said, ‘You are going to the right and you to the left,’ all of a sudden these kids are asking, ‘Why does it matter?’ ”

Coyle is critical of the 5 to 4 majority opinion by Roberts striking down the racial assignment plan, and she quotes a justice on background who attributes the outcome to Sandra Day O'Connor's replacement by Alito. "Every five-to-four decision the term after [O'Connor] left, I think would have been five-to-four the other way if she had stayed," the justice said.

But Coyle also quotes the lawyer for the Seattle school district, who acknowledged the good faith of his opponents. "The universal thing for the parents is they're there trying to achieve what they think is best for their kids," he told Coyle.

Coyle turns next to *District of Columbia v. Heller* , the 2008 case striking down the District of Columbia's ban on handgun possession in the home as a violation of the Second Amendment right to bear arms. She interviews Bob Levy, chairman of the boardof the Cato Institute, who explained that he bankrolled the lawsuit himself, rather than accepting outside money, because he wanted not to expand gun rights but to "vindicate the Constitution." Adopting Thurgood Marshall's incremental approach to ending segregation as his model, Levy first challenged D.C's ban as part of a long-term strategy of applying the Second Amendment to Congress and the states and then determining which gun restrictions would pass constitutional muster.

Coyle includes fascinating details about the behind-the-scenes battles among conservative gun rights advocates. Levy pressed ahead even when the National Rifle Association objected that the timing of the suit wasn't right. And Alan Gura, whom Levy chose to argue the case before the Supreme Court, told Coyle of his frustration with George W. Bush's Justice Department under John Ashcroft, who was attorney general when the case first arose, for not pressing the Supreme Court hard enough. "Clearly there are government lawyers who are very jealous of their authority and they don't need any more constitutional rights out there restricting their freedom of operation," Gura said.

After Scalia wrote the 5 to 4 decision striking down the District's handgun ban, he told Coyle in his chambers that he considered the opinion the greatest vindication of his originalist approach to constitutional interpretation. Coyle reports that Justice John Paul Stevens, by contrast, had been so confident of his ability to win a majority that he "circulated his draft dissent before Scalia circulated his draft majority opinion," on the mistaken belief that his argument would carry the day.

Coyle's next case study is *Citizens United* , the blockbuster 2010decision that struck down limits on corporate campaign spending in federal elections. After the first oral argument, Malcolm Stewart, who argued the case for the Obama administration, was widely criticized for fatally undermining his case by conceding that the McCain-Feingold campaign finance law might prohibit corporations from funding not only movies (the case had to do with a documentary about Hillary Rodham Clinton) but also books. But three justices told Coyle that the conventional wisdom was wrong — that Stewart's concession had not led the court to order a reargument of the case. Instead, she reports, the reargument was triggered by Justice Anthony Kennedy's draft opinion reaching out to protect corporate speech rights expansively, an opinion that provoked Justice David Souter to draft a dissent criticizing the majority for, in Coyle's words, "moving aggressively to decide issues that . . . had not been fully briefed and argued before the justices."

In his book “The Oath,” Jeffrey Toobin called Roberts’s push for reargument a “brilliant strategic move” and an effort to help the Republican Party. Coyle offers a more charitable and persuasive explanation: When Souter told Roberts that reargument was necessary to “protect the institution,” the chief justice was moved by the same concerns about institutional legitimacy that would lead him to cast a tiebreaking vote to uphold the Obama health insurance mandate.

As for the health-care decision itself, Coyle has no new reporting on the reasons that led Roberts, who initially voted to strike down the mandate, to change his vote. But she does quote one justice on background confirming that Roberts may indeed have been swayed by concerns about the Supreme Court’s long-term institutional legitimacy: “The institution moves you, and perhaps even more a chief justice.” Other justices denied that Roberts’s change of heart would lead to any lasting bad blood between him and his conservative colleagues. “Who on the Court is the sort of person who is going to carry a grudge?” one asked rhetorically.

Throughout the book, Coyle includes other illuminating background quotations in which the justices describe their largely collegial relations and deny that they view their colleagues as self-consciously political. “There’s a lot of mutual esteem and mutual affection,” one justice said.

“To a large extent on a large number of subjects, we are the only choice of friends we have, so you find a way to get along,” said another.

If these comments make the court sound like something of a bipartisan love fest, at least on a personal level, they’re at odds with the more tendentious framework that Coyle offers in her opening chapter. There, she accuses the conservative majority of acting “with a muscular sense of power, a notable disdain for Congress, and a willingness to act aggressively, and in distinctively unconservative ways,” by reaching out to decide unnecessary questions, refusing to defer to decisions by elected officials and overruling precedents. Coyle neglects to note that the same criticisms could be offered against the liberal justices in cases when they are in the 5 to 4 majority.

But any one-sidedness in her framing chapter is generally redeemed by the thoroughness and balance of her reporting throughout this insightful book. As she concludes with admirable even-handedness, the health-care litigation shows that “reasonable judges and justices have different ways of finding the answers, and often in ways that defy ideology and politics.”

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