Despite his nationalism, da Cunha was honest enough to admit that the Brazilian system was no picnic, either. The tellingly few passages in which he stops mauling the Peruvians to examine the alternative scarcely depict the decent yeoman-farmer society he hints at elsewhere; instead, they bewail the iniquities of *latifundismo* and debt peonage. Faced with the predicament of the *seringueiro*, trapped both physically and economically, da Cunha betrays a horrified empathy with "the tapper's torment: a man confined to the same trail, tethered to the same trees, for his entire life, setting off each day from the same point along…the endless circuit of this wall-less dungeon." But not to worry, because improved legislation and communications will fix "evils…[that] prove above all the mere fact of distance."

Focusing on da Cunha's holistic approach, his socialization of nature, and his championing (albeit for Darwinian reasons) of a "bronzed" popular class whose enforced transformation from *sertanejo* to *seringueiro* he cast as a triumph of creole resilience, Hecht fairly presents da Cunha as a proto-political ecologist. On the other hand, his xenophobia remains a bit shocking—more so than his supposedly superseded environmental determinism, forms of which we still intuitively espouse (nobody gasped when David Cameron said recently of the British Isles that "our geography has shaped our psychology"). Da Cunha's more progressive theories failed to influence Brazil's self-concept as a nation, which turns Hecht's eulogy to this remarkable writer and thinker into the melancholy exhumation of a counterfactual dream. His Amazonia notebooks, inaptly titled *Á margem da história* (At the Margin of History), were published to little fanfare in 1909. The sociologist Gilberto Freyre, who supported António de Oliveira Salazar's dictatorship in the mid-twentieth century, was exceptional in rescuing his ideas of miscegenation and environmental adaptability—a connection that did little for da Cunha.

And, in any event, such ideas did not catch on even then. Given the persistent white racism and fixed constructs of folksy "authenticity," perhaps only the Tropicália movement of the 1960s dared to embrace the kind of dynamic, mongrel, nativist-modernist culture of which da Cunha might have approved (right down to its claim to be in the "evolutionary line" of Brazilian popular music). A half-century later, progress continues to be slow. Two-thirds of Brazil's poor are black or *pardo*. And the Amazon is still a site of myth, desire and despoilment, of controverted self-definition and international dispute. ■

THE COLLECTION OF THE SUPREME COURT OF THE UNITED STATES

The Supreme Court, 2010

# Roberts's Rules of Order

**by MICHAEL O'DONNELL**

**The Roberts Court**
*The Struggle for the Constitution.*
By Marcia Coyle.
Simon & Schuster. 407 pp. $28.

In his impeccable Senate confirmation performance in 2005, John Roberts provided for himself a sort of mission statement. As chief justice, he pledged to be restrained, modest, and deferential toward precedents and legislatures; he would seek consensus and not decide more than was necessary to resolve a case. Modesty, he testified, "means an appreciation that the role of the judge is limited, that a judge is to decide the cases before them, they're not to legislate, they're not to execute the laws…. It is their job to say what the law is." Congressional Republicans, ecstatic about President George W. Bush's selection of such an impressive nominee, perceived that the conservative legal revolution was finally at hand. They proudly presented Roberts to the nation as the very model of a Supreme Court justice.

The Roberts Court is now completing its eighth term. What do we know about it? For one, its membership has been fluid. Since Chief Justice Roberts assumed his duties, three new justices have joined the Court: Samuel Alito, Sonia Sotomayor and Elena Kagan. By contrast, the Court's membership under his predecessor, Chief Justice William Rehnquist, remained constant for its final eleven years, lending a degree of stability—if not always predictability—to its decisions that the Roberts Court has so far lacked. The Roberts Court also has a different political composition than the Rehnquist Court. Although Sotomayor and Kagan vote much like their moderately liberal predecessors in politically sensitive cases, Alito is far more conservative than the justice he replaced, Sandra Day O'Connor. The result has been a more reliable but not ironclad conservative majority, with swing justice Anthony Kennedy siding more frequently with the conservatives than with the liberals. Yet this new momentum has not extended to all areas of the Court's business. Notably, the addition of Alito and Roberts did not arrest the Court's remarkable disruption of the Bush administration's aggressive assertions of executive power in the "war on terror." The most important of these decisions, *Hamdan v. Rumsfeld* and *Boumediene v. Bush*, were issued over the conservatives' dissent.

The Roberts Court has also given itself a few black eyes. Ten years after the Supreme Court issued its most notorious decision in modern times, the nakedly partisan *Bush v. Gore*, the Roberts Court handed down *Citizens United v. FEC*, which invalidated key parts of the McCain-Feingold campaign-finance reform law. The decision's holding that corporations have the same free speech rights as people—and therefore the right to unlimited spending on political advertising—has proven immensely unpopular, calling into question the conservative justices' political motivations, as well as their grip on reality. Last summer, the Court had another

*Michael O'Donnell is a lawyer in Chicago.*

chance to do violence to its reputation in *National Federation of Independent Business v. Sebelius*, which concerned the Obama administration's Affordable Care Act. There was a real prospect that the five Republican appointees would invalidate the signature legislative achievement of a Democratic president in the middle of an election year. But Roberts shocked his colleagues and the legal world by joining the liberals for the very first time in a 5–4 decision to uphold the heart of the ACA. Those who worry about the fate of the uninsured poor breathed a sigh of relief. So, too, did those who worry about the Supreme Court's legitimacy.

Above all, we know that the Roberts Court has a chief justice of intellect, talent, poise and charm who is also staunchly conservative—more so, perhaps, than his predecessor, Rehnquist, who at the time of his appointment in 1972 was by far the most conservative justice on the bench. Roberts is a writer of great clarity and persuasiveness who frequently punctuates his opinions and speeches with tart phrases and deliberate tautologies: "The way to stop discrimination on the basis of race is to stop discriminating on the basis of race." "If it is not necessary to decide more to a case, then in my view it is necessary not to decide more to a case." These rhetorical maneuvers utilize Republican messaging tactics by reducing complex issues to emotionally charged slogans. Are integration measures really race discrimination in the same way that segregation was? Do not trouble Roberts with such nuances. He has made his point with elegance and wit, persuading those he needs to persuade. Now that John Paul Stevens has retired, Roberts's effectiveness as a writer is unmatched.

In *The Roberts Court*, Marcia Coyle sets out to evaluate Roberts's performance as chief justice against his 2005 testimony before the Senate Judiciary Committee. This is a fair enterprise, and a good idea. Roberts's testimony, by virtue of its coherent structural vision and presentation, is one of the touchstones of modern legal conservatism. Roberts eloquently described, and personified, the conservative ideal of what a judge ought to be. During decades in the wilderness, while complaining bitterly about the excesses of the Warren Court, the Republican Party carefully planned its next move, grooming a perfect conservative for judicial service. Roberts made all the right career moves: he was a law clerk for Rehnquist, a staffer in the Reagan Justice Department, a lawyer for George W. Bush during the Florida recount and, if the membership rolls are to be believed, a Federalist Society leader. He came of age with *Roe* and *Miranda*; he knew the stakes of the game and how it is played. He would, conservatives promised, return the federal judiciary to its proper role in American life.

Coyle is well situated to appraise Roberts's performance against his ambitious sales pitch. The chief Washington correspondent for *The National Law Journal*, she is perhaps best known as the Supreme Court analyst for the *PBS NewsHour*, where her straightforward, cogent discussions of Court arguments and decisions are a model of lucidity. Coyle has been covering the Court for twenty-five years, yet this is her first book. It is a welcome addition to the popular literature on the Court—which, while necessarily lacking the rigor of academic studies, still serves an essential function. Because the Supreme Court is such an opaque institution, basic facts about the justices and their work are revealed either by scholars years after the fact or, short of that, by journalists. Coyle is more earnest and less breezy than *The New Yorker*'s legal affairs writer, Jeffrey Toobin, and does not quite have the eye for personal detail of *The New York Times*'s Linda Greenhouse. Yet what the book lacks in dish, it more than makes up for in smart, straightforward reporting and analysis.

Her conclusions about the Roberts Court are at times damning, but at others subject to revision. On Roberts's much-vaunted promise of modesty, however, Coyle is definitive: he leads "a confident conservative majority with a muscular sense of power, a notable disdain for Congress, and a willingness to act aggressively and in distinctly unconservative ways." Coyle focuses on cases in which Roberts and the conservatives had a chance to follow a precedent, decide a case narrowly, avoid a constitutional question or defer to the judgment of elected officials, yet brazenly refused to do so. Where these criticisms might come across as Coyle's own preference for a less conservative Court, it's more likely that she is simply measuring Roberts on the terms that he himself set out. Her book prompts a question: What happens when a model Supreme Court justice abandons the very qualities that supposedly made him an ideal judge? If the conservatives' model justice practices restraint, deference and a minimalist approach to decision-making, then the conclusion must be that Roberts has failed so far as chief justice. Instead, the neutral principle of judicial restraint seems to matter less to him than the chance to reverse decisions on issues like race, guns and civil rights.

Even so, Coyle tempers her criticisms with praise for Roberts's decision on the Affordable Care Act. In the most important case of his career to date, she argues, Roberts did act with restraint. Rather than join his fellow conservatives in striking down a loathed Democratic initiative, the chief justice, in the tradition of earlier judicial conservatives like Felix Frankfurter and Henry Friendly, found a way to uphold its constitutionality. What does this portend for the rest of his tenure—for the upcoming decision on the Voting Rights Act, for instance? Coyle does not venture a guess, but many liberals are understandably skeptical. Some whisper darkly that Roberts cynically used the healthcare decision as a vehicle to constrain Congress's power to legislate under the commerce clause, making the approval of the ACA under the taxing power a "lose the battle to win the war" maneuver. Others—and this seems more plausible—view Roberts's vote as a realpolitik sacrifice on behalf of the Court as an institution. He may have realized that the Court's badly damaged prestige could not endure another *Bush v. Gore* or *Citizens United*. But this theory would also mean that his vote was a one-off rather than a change of tack: he will abandon his conservative brethren only in extraordinary circumstances where the Court's reputation is on the line. Such cases are rare.

Coyle organizes *The Roberts Court* around four marquee decisions: *Parents Involved in Community Schools v. Seattle School District No. 1*, from 2007, which invalidated school affirmative-action programs in Seattle and Louisville; the *District of Columbia v. Heller* decision in 2008, which declared for the first time an individual right to bear arms under the Second Amendment; *Citizens United* in 2010; and, of course, the healthcare case. The Court was sharply divided along ideological lines in each of these decisions. They are four of the most politically charged cases of the Roberts Court, although not necessarily the most important: all involve civil rather than criminal matters, and they do not include *Hamdan* or *Boumediene*, the "war on terror" decisions. (Before the first decade of the twenty-first century, the Court handed down its last major executive-power ruling in 1952, which gives a sense of how significant the more recent decisions have been.) The book is in no sense an empirical study; Coyle does not, for instance, measure the Roberts Court's fealty to precedent in comparison to its predecessors. Instead, her narrative suggests that Roberts abandons judicial restraint precisely in those cases where the temptation to reach a conservative result beckons. He is like a man who swears off hamburgers only to pull over whenever he passes a McDonald's.

In *Parents Involved* and *Heller*, the Roberts Court worked in stealth mode. In both decisions, the conservative majority disregarded long-settled precedents without overruling them outright. In *Parents Involved*, the Court enumerated the circumstances in which state actors may, consistent with the equal-protection clause, classify citizens on the basis of race, and concluded that two school districts' modest integration efforts fell outside those boundaries. But as Justice Stephen Breyer pointed out in a passionate dissent, the Court had for generations approved much more intrusive school integration plans, including the busing of students. Stevens wryly opened his dissent by noting that the rhetoric of color-blindness in Roberts's opinion—equating integration plans with the nefarious discrimination outlawed in *Brown*—reminded him of Anatole France's observation: "The majestic equality of the law forbids rich and poor alike to sleep under the bridges, to beg in the streets, and to steal their bread." Breyer was more poignant—and bitter. Summarizing his dissent from the bench, he said, "It is not often in the law that so few have so quickly changed so much."

In *Heller*, the majority was even bolder. Confronting the question of whether the Second Amendment confers an individual right to bear arms or instead ties that right to militia service (as the text suggests), the conservatives, led by Antonin Scalia, effectively overruled a seventy-year-old precedent. *United States v. Miller*, a 1939 decision, found the militia component integral to the amendment's meaning, rejecting out of hand a claim of an individual right to bear arms. For generations, the matter was considered settled, and courts around the country relied on *Miller* as decisive. But rather than declining to revisit a resolved issue, the conservatives took the case, gutting *Miller* with a wink and a flash of the knife: *Miller* applied only to sawed-off shotguns, Scalia in essence concluded. The temptation to achieve the long-desired conservative goal of establishing an individual right in the Second Amendment was too great. Roberts signed on to the majority opinion, which conservative intellectuals like Judges Richard Posner and J. Harvie Wilkinson have criticized as overt judicial activism.

Throughout her discussion of both cases, Coyle presents fascinating background information on the litigation, the parties and the machinations behind the Court's decision-making. *Parents Involved* was decided 4–1–4, with Kennedy concurring in the conservative majority's judgment but rejecting its most extreme reasoning. Coyle reveals, based on an interview with an unnamed law clerk, that Kennedy appealed to Roberts to moderate the tone of his opinion so that he could join it, but that Roberts refused; the siren song of "colorblindness" apparently plays in the chief justice's key. In *Heller*, Coyle tracks the nasty rivalry that emerged between the Cato Institute, which brought the suit, and the turf-jealous National Rifle Association, which tried to stymie it at multiple turns. Coyle also discloses that Stevens drafted and circulated among his colleagues a version of his devastating dissent before Scalia completed his majority opinion, in an unsuccessful effort to pick up a fifth vote.

In *Citizens United*, the Roberts Court stopped playing coy and started openly striking down precedents. Not only had federal election law regulated corporate expenditures for a hundred years, but the Court had upheld such regulations from constitutional challenges in 1990 and 2003. Kennedy's majority opinion overruled those decisions—including 2003's ruling upholding the very McCain-Feingold provision at issue in *Citizens United*. The conservative majority starkly demonstrated the power of five: when the composition of the Court changes, they will reverse disfavored decisions at the first opportunity. Indeed, the Roberts Court has shown an unseemly willingness to upset decades of settled law in order to advance conservative priorities. Other notable cases in this regard include decisions in the fields of employment discrimination (*Gross v. FBL Financial Services*), antitrust (*Leegin Creative Leather Products, Inc. v. PSKS, Inc.*), abortion (*Gonzales v. Carhart*) and religious freedom (*Hein v. Freedom From Religion Foundation*).

*Citizens United* defied judicial modesty in other respects. The parties did not ask the Court to declare McCain-Feingold unconstitutional on its face; the Court decided to tackle that issue itself, taking the unusual step of ordering reargument on matters that had neither been fully aired in the lower courts nor contested by the parties. Moreover, at the moment of decision, the Court could easily have avoided deciding the constitutional question with a statutory ruling—for instance, by holding that the anti–Hillary Clinton documentary at issue in the case was not an "electioneering communication" (such as a political advertisement) under the act. *Citizens United* was not only remarkably obtuse in allowing unlimited flows of anonymous money back into the election system; it was also one of the most overreaching Supreme Court decisions of modern times.

The point of Coyle's analysis is not that liberal justices are modest and conservatives are activists. Those labels stick easily but peel off quickly; the losing side in a politicized Supreme Court case usually invokes them, often with some justification. Liberals certainly have their share of judicial activism to answer for from the Warren years, just as conservatives do from the reviled Lochner era of the early twentieth century, when the Court struck down progressive legislation as interfering with the so-called right to freedom of contract. The issue, instead, is that conservatives have been insisting on a return to judicial restraint for decades. They found their cause's avatar in Roberts, who before the world professed his wholesale devotion to that principle, only to abandon it when it got in the way of the big kill. Roberts has made this cynical play repeatedly: not always, as the healthcare case shows, but often enough that, despite what he told the Senate, he clearly places politically conservative results above judicially conservative methodology. Kagan pointed out in her own confirmation testimony that when Roberts used a "judge as umpire" metaphor to encapsulate his ethos of restraint, he was oversimplifying matters: Supreme Court justices must exercise judgment, and they often reach different conclusions in a case. In other words, Republicans' professed devotion to judicial modesty is a sham.

Liberals can choose to bide their time until a future Court with a majority of liberal justices allows them to reverse the conservatives' disastrous work. But that would prove them no better than Roberts. After all, Scalia's defense of *Citizens United* is that although it overturned two precedents, it merely reinstituted the law articulated under the 1976 decision *Buckley v. Valeo*. This is a potent defense; liberals could similarly justify overruling *Heller* by claiming that they were returning to principles settled in *Miller*. But even though both sides can play this game, that doesn't mean both sides should. After all, respect for precedent is not merely a conservative shibboleth: it is one of the institutional doctrines separating law from politics. As the Court has said, "*stare decisis* reflects a policy judgment that in most matters it is more important that the applicable rule of law be settled than that it be settled right." If each fresh majority undoes the work of its predecessors according to ideology, the Supreme Court's legitimacy will keep spiraling downward from *Bush v. Gore* and *Citizens United*. The tougher but better path is to accept the bad decisions of the Roberts Court as the law of the land, but to install justices on the Court who won't render bad decisions in the future. ■