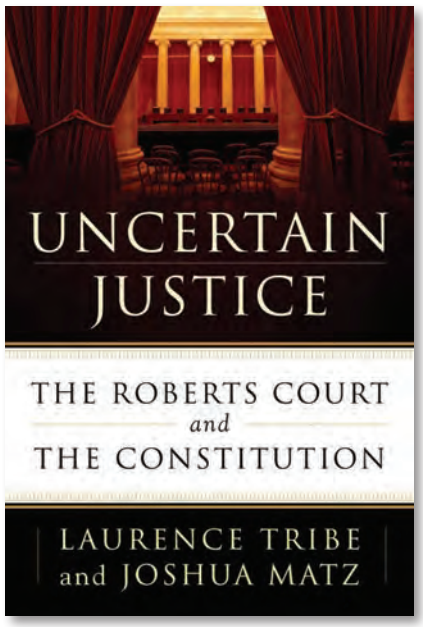
BOOK REVIEW

By M. KELLY TILLERY

Accuracy, Reality and Nuance

A Thorough Evaluation of the Relationship Between the Roberts Court and the Constitution

Uncertain Justice – The Roberts Court and The Constitution
Written by Laurence Tribe and Joshua Matz
401 pages
$ 32, Henry Holt and Co., 2014



Harvard Law Professor and U.S. Supreme Court scholar Laurence Tribe and co-author Joshua Matz masterfully distill the debacle that is the Roberts Court's first decade into only a few hundred pages of quite readable, informative and entertaining prose.

Those who attended Tribe's recent PBI CLE presentation in Philadelphia, for which this book served as the handout, will find the professor's remarks lifted almost verbatim therefrom, but also a further cornucopia of political and constitutional philosophy, thoughtful analysis of the Roberts Court key opinions, and a variety of court trivia.

Professor Tribe knows whereof he speaks and writes. He served as a law clerk to Associate Justice Potter Stewart (1967-1968), has taught constitutional law at Harvard for almost 50 years, co-founded the American Constitution Society, and has written at least seven books on the Constitution. He has argued 36 cases in the Supreme Court with a record of 19 wins, 15 losses and two draws.

Tribe taught constitutional law to Chief Justice John Roberts, Associate Justice Elena Kagan and President Barack Obama. While judiciously refraining from public comment on Roberts' mettle as a student of the Constitution, he has remarked that Obama, his research assistant for two years, was "the best student I ever had." If Hillary Clinton wins in 2016, do not be surprised if Obama's post-presidency includes a seat on the Supreme Court, a la William Howard Taft.

Co-author Matz, a recent Harvard law grad (and Penn undergrad), is clearly a man who deserves attention. After clerking for a district court judge in New York, and a Ninth Circuit judge in Los Angeles, he now serves as a law clerk to Associate Justice Anthony Kennedy, arguably the most important voice on the Constitution on the court and in the nation.

Tribe is well known as a liberal and tough critic of the Roberts Court, particularly of the new four horsemen (Roberts, Scalia, Thomas and Alito), but his work is a sober, measured, temperate and balanced review, analysis and critique of the court's most important decisions over the last nine years.

The authors' prologue tells readers that they "… aim to bring to life the nine lawyers who gather in a conference room and create the rules by which we live." And they do so, quite nicely.

There are other excellent works on the Roberts Court, such as reporter Marcia Coyle's "The Roberts Court: The Struggle for The Constitution" (Simon & Schuster, 2013, 464 p.) and Tribe's fellow Harvard Law School Professor Mark Tushnet's "In The Balance: Law and Politics on The Roberts Court" (W.W. Norton & Co., 2013, 352 p.), but this one does the most, the best, in the fewest pages.

While this court has had more than its fair share of 5-4 decisions with Justice Kennedy the deciding vote between the right of Roberts, Scalia, Thomas and Alito and the left of Breyer, Ginsburg, Kagan and Sotomayor, neither ideological 'block' is entirely monolithic or predictable. Nor is the pivot, Justice Kennedy. Thus, "Uncertain Justice."

Even the most jaded liberal critic of this court will be surprised to find that although it is, by tradition, called the "Roberts Court," the chief justice is less in control than he is herding cats most of the time. As Tribe and Matz write, even the new Four Horsemen disagree, and sometimes vehemently. For example, in *Maryland v. King* (2013) we find originalist Scalia in the company of liberals Ginsburg, Kagan and Sotomayor arguing that arrestees cannot be constitutionally DNA-tested without a warrant.

This work provides fascinating insights into each justice's style, philosophy, predilections, and, yes, agenda. Originalists may not view the Constitution as a "living, breathing document," but none can deny that this court is very much alive and changing. And, as it does, so do our rights as U.S. citizens.

The prose is unlively, but sometimes witty and always well thought out and footnoted. Only in a book about the Supreme Court would one find expressions such as "an aggressive footnote," "muscular dissent," "head-fake argument" or "the influence

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of Immanuel Kant in evidentiary approaches in 18th Century Bulgaria." And while there are lighter moments such as why Justice Ginsburg is "The Frozen Yogurt Justice" or the awkward moment of the Phillie Phanatic embracing Justice Alito in chambers, it is remarkable to see how some of the justices can be so petty, personal, juvenile, and, on occasion, arguably rude and unprofessional. Easy to see why Alexander Bickel's "nine scorpions in a bottle" label is rather apt.

While the Roberts Court has issued 725 opinions, the authors focus on fewer than 40 (or 5 percent), selecting those concerning our most fundamental rights such as voting, free speech, affirmative action, health care, gun ownership, privacy, marriage and campaign finance. In each, the Roberts Court has made striking changes in the fundamental fabric of constitutional law. Some argue, with ample evidence, that this court is decidedly pro-business, anti-consumer, hostile to civil rights, averse to criminal defendants, and too deferential to the government on national security issues. But the authors make clear that while such is not an unfair or inaccurate picture, the reality is much more nuanced.

The good news is that this court grants only 1 percent of petitions for cert and now only issues about 75 opinions per term. Most "law" in the federal courts is still made/found in the trenches by the 678 district court judges who handle the almost 400,000 cases filed each year.

At his 2005 Senate confirmation hearing, Roberts famously said, "It's my job to call balls and strikes." No one in the legal community, much less Tribe and Matz, took his umpire analogy seriously, even if a bevy of Republican senators did. As Justice Kagan opined at her confirmation hearing, "… I do not think that that is right, and it is especially not right at the Supreme Court level, where the hardest cases go."

As disturbing as some of this court's rulings and the future decisions they portend are, the chief justice's unilateral non-judicial decision on May 4, 2010 to seal the great bronze doors at the front entrance to the court may be the most disconcerting. Justices Breyer and Ginsburg wrote at the time, "This court's main entrance and front steps are not merely only a means to, but also a metaphor for, access to the court itself."

This court, and the justice it dispenses, may now be accessible and beneficial only to the rich and powerful. ■

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