

**The Supreme Court Review.** Edited by PHILIP B. KURLAND. Chicago: The University of Chicago Press, 1960. Pp. 326, \$6.00; 1961, pp. 332, \$6.50.

The 19th and 20th centuries have evolved two remarkable institutions, neither of which could have been created save by tradition and history. Both of the institutions are autocratic in theory and yet without them the orderly transition that is necessary for a democracy to work might well go by the boards. The two institutions are similar in many ways. They differ in that one is formally accorded great power and yet has none. That institution is the English Monarchy. The other institution, formally accorded little or no power, has great power. That institution is the Supreme Court of the United States.

Because of this power difference, and because the Court's power, which grew without being given, is limited only by self-restraint, the two institutions are treated quite differently by purportedly serious writers. In fact, it would not be incautious to say that more purportedly serious writers are producing more pure humbug about the present Court than about any other institution in the world. There are the anti-Court point of view writers whose bias and purpose can be politely summed up only by way of euphemism. Then there are the writers who take the Court seriously, but who either get the Court mixed up with its members or vice versa.<sup>1</sup> When one excludes the histories because they are not written about the present Court, and turns to what is being written about the present Court, not much of worth is found besides the writings of Freund, Hart, Wechsler and Bickel, an occasional law review article and the two volumes here being reviewed.

The *Supreme Court Review* represents, with two minor exceptions, precisely the kind of approach that is necessary to an intelligent comprehension of the present Court. In the first place, the collected articles deal with the Court, which is to say the United States Reports. In the second place, by their very makeup, they recognize the several different functions that the Court exercises and the different areas in which it works. Lastly, they contain some really excellent work. The 1960 volume consists of seven articles, and the one for 1961 contains eight. The lead-off article in the *1960 Review*, written by Professor Harry Kalven, Jr., is entitled "The Metaphysics of the Law of Obscenity."<sup>2</sup> It is a *tour de force* which sets the stage for the subsequent text of the two volumes by emphasizing "the extraordinary difficulty of [the Court's] task."

Professor Kalven deals with an area of the law (the extent to which sex may

<sup>1</sup> In attempting to write about the Court and serve Stone, Alpheus Mason wrote about Stone and did disservice to the Court. Even greater disservice is done by those authors who for some reason are either anti-Black and pro-Frankfurter or vice versa, as for example the recent "conflict" written by Mendelson. The number of such authors is as high as their myopia, which prevents their realizing that Mr. Justice Black and Mr. Justice Frankfurter are equally great jurists, and they are very great indeed.

<sup>2</sup> 1960 SUP. CT. REV. 1.

receive special treatment under the First Amendment) that is not important in and of itself, but which is certainly one of the most difficult. Also, it is the only area of high comedy in which the Court performs. Professor Kalven distills out of the *Roth* case<sup>3</sup> the present two stage test of obscenity: what would the average man say, and is there any sort of merit or utility to the work apart from what the average man says? As Kalven points out, this is no test at all simply because one man's sex may not be another's. However, since the small and ludicrous problem of pornography, which Kalven pinpoints beautifully,<sup>4</sup> is continually dressed in legal jargon and presented to the Court, we are perhaps fortunate to have nothing worse than the two stage test of *Roth*.

Without cataloging the other six articles and authors appearing in the *1960 Review*, all of which are necessary reading for students of the Court, special mention should be made of Edward L. Barrett, Jr., and his excellent piece on the Fourth Amendment,<sup>5</sup> which was written prior to the decision in *Mapp v. Ohio*,<sup>6</sup> and which asks the very questions that must have brought about the result in that case. Even more special mention must be made of Bernard D. Meltzer who has written the best study in depth of a single decision that I have ever read.<sup>7</sup> His treatment of *Order of Railroad Telegraphers v. Chicago & North Western Railway Co.*,<sup>8</sup> illustrates the case law method in the hands of a great teacher. Also, it is worthwhile to state that Professor Meltzer has written a paragraph<sup>9</sup> that should stand for some time as the way in which Mr. Justice Black can be respectfully taken to task when he produces one of his unsatisfactory opinions.

Professor Francis A. Allen opens the *1961 Review* with an illuminating piece on the remarkable case of *Mapp v. Ohio*, which, as mentioned above, seems to reach the natural result of Professor Barrett's inquiry.<sup>10</sup> Until the *Mapp* opinion was announced, the case had been thought to involve a rather sad little bit of obscenity, but after the opinion, the case was no more concerned with that problem than *Erie v. Tompkins*<sup>11</sup> was with the law of negligence. The two cases are also related in that they represent the Court at work on the timeless problem of federalism. Professor Allen traces the origins of

<sup>3</sup> *Roth v. United States*, 354 U.S. 476 (1957).

<sup>4</sup> Kalven, *supra* note 2 at 4 n. 21.

<sup>5</sup> Barrett, *Personal Rights, Property Rights, and the Fourth Amendment*, 1960 SUP. CT. REV. 46.

<sup>6</sup> 367 U.S. 643 (1961).

<sup>7</sup> Meltzer, *The Chicago & Northwestern Case: Judicial Workmanship and Collective Bargaining*, 1960 SUP. CT. REV. 113.

<sup>8</sup> 262 U.S. 330 (1960).

<sup>9</sup> Meltzer, *supra* note 7 at 119.

<sup>10</sup> Allen, *Federalism and the Fourth Amendment: A Requiem for Wolf*, 1961 SUP. CT. REV. 1.

<sup>11</sup> 304 U.S. 64 (1938).

*Mapp* from *Wolf v. Colorado*,<sup>12</sup> where the Court had recognized one's constitutional right to be protected against unreasonable searches and seizures and at the same time refused to disapprove the admission in state courts of the evidence obtained in violation of that right. Under *Mapp* the admission of such evidence by a state court violates the defendant's right to due process of law under the Fourteenth Amendment.

Professor Allen's analysis of the relevant case law makes it seem clear that no student of the Court should have been surprised by the *Mapp* decision. Interestingly enough, the *Mapp* result appears to have surprised no one except students of the Court, as only they had taken the time to view *Wolf* as a step backward rather than a half step forward.

As suggested earlier, two of the articles are subject to some question. Both appear in the 1961 volume. One is the article by Walter F. Murphy on Mr. Chief Justice Taft and Supreme Court appointments.<sup>13</sup> The saving grace of this article, if any there be, is that as an inside story it does not purport to be concerned with the present Court. For that matter it is not even concerned with the Taft Court.

The second article that should have been blue-pencilled for purposes of uniform excellence is Alexander Meiklejohn's piece entitled "The First Amendment is an Absolute."<sup>14</sup> One wonders about the inclusion of this bit of civilized conclusion, if only because it concerns people and political science rather than the Court and the law. Moreover, in writing about people, *i.e.* Messrs. Justice Black, Frankfurter and Harlan and Alexander Meiklejohn, the author describes three people that do not exist. Professor Meiklejohn starts by setting forth Mr. Justice Black's "absolutist thesis": the purpose of the Constitution is to "withdraw from the Government all power to act in certain areas—whatever the scope of those areas may be . . ."<sup>15</sup> Nonsense. By his own definition, Meiklejohn's absolute Justice is as relative as the next. Moreover, his selection of Mr. Justice Harlan and his *Konigsberg*<sup>16</sup> opinion as an example of a Justice and an opinion that represent the school of thought of the "non-absolutists," 'balancers,' or 'operationalists' is as free and easy as it is inaccurate. Lastly, there is Meiklejohn's solution to his problem which he sincerely believes is presented by the members of the Court that are not "absolutists." He would limit the "absolute" protection accorded by the First Amendment to thought and communication concerned with governing. Professor Meiklejohn is a great teacher of freedom, but in offering his solution he is a student of neither the law nor the Court for he has not learned what the

<sup>12</sup> 338 U.S. 25 (1949).

<sup>13</sup> Murphy, *In His Own Image: Mr. Justice Taft and Supreme Court Appointments*, 1961 SUP. CT. REV. 159.

<sup>14</sup> 1961 Sup. Ct. Rev. 245.

<sup>15</sup> Black, *The Bill of Rights*, N.Y.U.L. REV. 882, 875 (1960).

<sup>16</sup> 366 U.S. 36 (1961).

balance of the articles in the *Supreme Court Review* bring home: that the case by case approach to specific situations is the manner in which the Court works. This is, of course, the greatness of the Court.

As noted earlier, the unlimited but self-limited power of the Court sets it apart not only from other courts but also from other democratic institutions. The wonder of it is that this power has been used so as to demonstrate that there is at least one exception to Lord Acton's much quoted maxim. While responsible criticism of the Court is needed so that the reader may be educated as to the form and function of the forum, the two volumes here being considered are also important for quite another reason. Stated shortly, this is so because they contain the only sort of criticism to which the Court pays any heed.

The Court is remarkably uninfluenced by the traditional pressures and interests that influence (and thus defend) our other governing institutions. The Court is, of course, influenced by its Bar in its case by case workaday, and it is influenced in a broader sense by that very remarkable handful of men who make up the Office of the Solicitor General. The only other source of influence is that which makes the *Supreme Court Review* important: responsible criticism. Since a definition of "responsible" is in order, for want of space let it be said that no Justice gives a fig for the Meiklejohn type of contribution which imposes a point of view on analysis, unless of course the Justice already agrees with the point of view, in which case he may be pleased. But the Meltzer article is made of the stuff that changes votes. To a lawyer, this is indeed important.

ROBERT L. RANDALL\*

\* Member of the Washington, D.C. Bar.