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## The 1978 Supreme Court Law Review

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## THE 1978 SUPREME COURT REVIEW

Edited by PHILIP B. KURLAND and GERHARD CASPER  
The University of Chicago Press, 1979. Pp. 409.

If reviewing a law review seems a fruitless task, why, one might ask, should any attempt be made to review the *Supreme Court Review*? The only answer satisfactory to this "reviewer" is that it provides an opportunity to explain to those otherwise unfamiliar with this unique annual publication what of value and interest can invariably be found within its covers.

In a sense, the *Supreme Court Review* defies description other than to say that it is an annual collection of legal and law-related articles that, for the most part, spring from decisions of the immediately preceding term of the United States Supreme Court.<sup>1</sup> As with many things, the *Review* can best be explained by reference to what it is not:

- It is not a traditional law review;
- It is not a survey or review of the preceding Supreme Court term as its name might suggest;
- It is not limited in coverage to cases decided during a given term; and
- It is not a journal preserved solely for the work of lawyers.

The 1978 edition, which is the subject of this review, provides ample evidence of the breadth and scope of content that can be expected in any given edition. The 1978 edition covers the 1977 Term of the Supreme Court, and it highlights a number of the decisions and issues that involved the Court during that Term.

In classic *Supreme Court Review* style, two of the articles begin with decisions of the Term and use those decisions as vehicles for discussing underlying problems of law and policy. Professor Polsby uses the decision in *FCC v. National Citizens Committee for Broadcasting (NCCB)*<sup>2</sup> as a springboard for what is in essence an essay on the allocation of substantive policy-making discretion between administrative agencies and the reviewing court.<sup>3</sup> Focusing on this issue, Professor Polsby concludes that the court of appeals may have to "refine and rationalize" its role, but that a partnership role for the court in this field provides "an influential and constructive presence within administrative agencies."<sup>4</sup>

1. The *Supreme Court Review* is the brainchild of Professor Philip B. Kurland, who has served as its editor since its inception in 1960. Professor Kurland was joined in 1977 by co-editor Professor Gerhard Casper.

2. 436 U.S. 775 (1978).

3. Polsby, *F.C.C. v. National Citizens Committee for Broadcasting and the Judicious Uses of Administrative Discretion*, 1978 Sup. Ct. Rev. 1 (1979).

4. *Id.* at 36.

On a closely related topic, Professor Scalia discusses the implications of *Vermont Yankee Nuclear Power Corp. v. National Resources Defense Council*.<sup>5</sup> He is critical of the D.C. Circuit Court of Appeals' role in reviewing decisions of administrative agencies and seeks to discern the proper role of the court of appeals in shaping administrative procedures. He also suggests reform in the Administrative Procedure Act itself.<sup>6</sup> Both of these articles depart from specific cases of the 1977 Term to explore serious and complex aspects of cutting-edge scope-of-review questions that are of great moment in modern administrative law.

Two other articles focus on problem areas that were the subject of concern in a series of cases decided during the Term. The Westen and Drubel article<sup>7</sup> formulates a theory of double jeopardy and seeks to apply it using a number of double jeopardy cases from the Term to demonstrate the need for and the application of that theory. The authors theorize that the double jeopardy clause "protects three distinct values, each of which is independent of the others and possesses its own respective weight."<sup>8</sup> This theory, the authors believe, "is useful . . . in resolving double jeopardy problems generally . . . [and] is particularly useful in resolving complex cases."<sup>9</sup>

In her article on the privileges of the press,<sup>10</sup> Margaret Blanchard extrapolates from a series of press cases decided during the 1977 Term a clear principle of constitutional doctrine: there is no "unique First Amendment privilege for the institutional press."<sup>11</sup> After documenting the rebuff of the plea for special first amendment treatment for the institutional press, Ms. Blanchard demonstrates how the single first amendment standard is firmly rooted in the historical development of first amendment cases. She concludes that "the argument for a special press privilege is of dubious value at best and dangerous at worst."<sup>12</sup>

A third group of articles in the volume focuses more directly on particular cases and the impact or importance of those cases. In one article,<sup>13</sup> Professor Marty explores two religion cases, finding in the

5. 435 U.S. 519 (1978).

6. Scalia, *Vermont Yankee: The APA, the D.C. Circuit, and the Supreme Court*, 1978 Sup. Ct. Rev. 345 (1979).

7. Westen & Drubel, *Toward a General Theory of Double Jeopardy*, 1978 Sup. Ct. Rev. 81 (1979).

8. *Id.* at 155.

9. *Id.*

10. Blanchard, *The Institutional Press and Its First Amendment Privileges*, 1978 Sup. Ct. Rev. 225 (1979).

11. *Id.*

12. *Id.* at 296.

13. Marty, *Of Darters and Schools and Clergymen: The Religion Clauses Worse Confounded*, 1978 Sup. Ct. Rev. 171 (1979).

Court's handling of one<sup>14</sup> "at least the 'striving for coherence,'" <sup>15</sup> while in the other<sup>16</sup> "any principle is as hard to find as is, beyond a single dam site, the endangered and elusive snail darter."<sup>17</sup> In another article,<sup>18</sup> Professor Sperlich reviews *Ballew v. Georgia*,<sup>19</sup> and applauds its holding that state court juries in criminal cases must, as a matter of constitutional compulsion, be comprised of at least six persons.<sup>20</sup> As an unabashed defender of twelve-person juries, Professor Sperlich welcomes Justice Blackmun's use of empirical data but concludes that "the evidence which condemns the five-person jury equally condemns the six-person jury."<sup>21</sup>

In a third article highlighting individual case treatment, Professor Schwartz reviews *Zenith Radio Corp. v. United States*.<sup>22</sup> While approving of the result, which was to preclude a countervailing duty intended to cover the Japanese remission of a tax on exported goods, Professor Schwartz takes the Court to task for lack of analysis and provides his own.<sup>23</sup> Despite the lack of analysis he decries, Professor Schwartz concludes in part by conceding that "where the concerns which move the Court are difficult to generalize and systematize into doctrine, there may be a place for superficial orderliness combined with sensitivity to political reality."<sup>24</sup>

The 1978 edition includes two interesting historical pieces that elaborate on past cases and eras in a way that furthers our understanding of modern constitutional doctrine. In his article,<sup>25</sup> Professor Benedict seeks to demonstrate that the Waite Court is unjustly viewed as gutting the post-Civil War amendments. He argues that the Waite Court sought to protect civil rights but within the context of a "State-centered nationalism"<sup>26</sup> that would preserve the federal system. In Benedict's view, the Waite Court "left a heritage of sanctioned congressional power over civil rights that was ignored by their immediate successors and only recently resurrected, without credit to them, by the new abolitionists of the mid-twentieth century."<sup>27</sup>

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14. *McDaniel v. Paty*, 435 U.S. 618 (1978).

15. Marty, *supra* note 13, at 189.

16. *New York v. Cathedral Academy*, 434 U.S. 125 (1977).

17. Marty, *supra* note 13, at 190.

18. Sperlich, *Trial by Jury: It May Have a Future*, 1978 Sup. Ct. Rev. 191 (1979).

19. 435 U.S. 223 (1978).

20. Sperlich, *supra* note 18, at 191.

21. *Id.* at 223.

22. 437 U.S. 443 (1978).

23. Schwartz, *Zenith Radio Corp. v. United States: Countervailing Duties and the Regulation of International Trade*, 1978 Sup. Ct. Rev. 297 (1979).

24. *Id.* at 312.

25. Benedict, *Preserving Federalism: Reconstruction and the Waite Court*, 1978 Sup. Ct. Rev. 39 (1979).

26. *Id.* at 56.

27. *Id.* at 79.

Finally, in perhaps the most novel of the articles,<sup>28</sup> Kitch and Bowler look behind the facts of *Munn v. Illinois*<sup>29</sup> "in the hope that the commercial and political context of the litigation will illuminate the case."<sup>30</sup> And illuminate it does as the following facts are made clear: (1) the grain elevators at issue in the case were run as adjuncts of the railroads and therefore did not directly compete with one another; (2) inspection rather than price was the major feature of the statute; and (3) the statutory price in effect was not significantly different from the going rate.<sup>31</sup> The authors observe that this "elevator price-fixing conspiracy is one of the rare reported cases of a stable price fix and is, interestingly enough, explainable on plausible efficiency grounds."<sup>32</sup> They conclude that Chief Justice Waite made much of this minor case, thereby making it easier for the Supreme Court to hold later that "[r]ailroad companies are carriers for hire . . . [and] under . . . *Munn* subject to legislative control as to their rates of fare and freight . . ."<sup>33</sup>

What links the nine articles of the 1978 *Review* is the consummate attention given to critical analysis of the Court's opinions and the rationale (or lack thereof) underlying those opinions. In this, the *Review*, fast approaching its twentieth anniversary, has remained true to its central reason for being. In the preface to the inaugural issue, Professor Kurland described the need for a publication to overcome what had been described as a lack of a "tradition of sustained, disinterested and competent criticism of the professional qualities of the Court's opinions."<sup>34</sup> As these articles and those of the prior eighteen issues ably demonstrate, that tradition is now well established within the pages of the *Supreme Court Review*.

Professor Kurland also recognized that the disciplines of political science and the law often merge in Supreme Court opinions and therefore the *Review* should serve as a "medium for the exchange of ideas between [political scientists and lawyers] that will enlarge the competence and understanding of both."<sup>35</sup> The last two articles discussed here demonstrate how clearly the historical and political science perspectives have been merged with legal analysis to heighten

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28. Kitch & Bowler, *The Facts of Munn v. Illinois*, 1978 Sup. Ct. Rev. 313 (1978).

29. 94 U.S. 113 (1877).

30. Kitch & Bowler, *supra* note 28.

31. *Id.* at 315-20.

32. *Id.* at 340.

33. *Chicago, Burlington & Quincy R.R. v. Iowa*, 94 U.S. 155, 161 (1877); see Kitch & Bowler, *supra* note 28, at 343.

34. P. Kurland, *Preface* to 1960 Sup. Ct. Rev. at vii (1960) (quoting H. Hart).

35. *Id.*

understanding. It is also noteworthy that this secondary interdisciplinary goal of the *Review* has expanded over the years, so that in this nineteenth annual issue four of the nine pieces are ably written by persons from four different disciplines outside the law.

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