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A Balance Wheel On The Court

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Moderate, swing vote, pithy and witty writer—these were the characteristics of Potter Stewart seen by the public.

What was harder to see—because Justice Stewart was a modest and self-effacing man not given to theorizing in his opinions—was his shrewd and sophisticated view of the Supreme Court and the way constitutional law is, and should be, made.

In essence, Justice Stewart used a "common law" approach to the great open-ended guarantees of the Constitution: due process, equal protection, freedom of speech and press. These guarantees are not self-executing and, according to most scholars and jurists, must be adapted to a modern society. Yet that still leaves the great puzzle of judicial review: when is it appropriate for the Supreme Court to invoke the Constitution in invalidating laws enacted by federal or state legislatures?

Justice Stewart believed deeply in history and in precedent. Yet he recognized that neither may have complete answers to contemporary constitutional issues. He was an advocate neither of strict judicial restraint nor inveterate judicial activism. He was neither a strict constructionist nor a loose constructionist. He was neither a conservative nor a liberal. To him, those labels implied an approach to constitutional decision making which was wrong—imposition of a rigid set of personal beliefs on the specifics of each case.

For Justice Stewart, the solution to the riddle of judicial review under the great open-ended constitutional guarantees was a "common law" approach in which principles emerged slowly and organically from the facts of each case. Cases should, as a general matter, be decided narrowly, and broader principles should emerge only as precedents accumulated.

In deciding individual cases on the facts, Justice Stewart thought it crucial to find an appropriate balance between the competing constitutional values at issue. The Court, in his view, could not go far wrong if it stayed close to the particular controversy presented and reached a sensible balance between the legitimate values in conflict.

For Justice Stewart, this approach stemmed from two fundamental beliefs. First, as a person of the world who had served in war, practiced law,

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and been an elected official (and whose father had been a prominent Ohio politician), he knew that economic and social reality was far more complex than judicial rules. In deciding individual cases on the record presented by the parties, the Supreme Court is often ill-equipped to announce broad prescriptions, because, necessarily, it does not have access to a broad set of "legislative" facts.

Justice Stewart also believed, however, that the Supreme Court's fundamental role was to be a balance wheel in American society. He was enough of a politician not to extol in unrealistic measure the virtues of city councils or state legislatures or, for that matter, the Congress of the United States. The Court sat to ensure a crucial degree of balance between majority rule and minority rights, between Congressional and Presidential power, between federal authority and state and local autonomy, between robust public debate under the First Amendment and necessary governmental order.

Is it any surprise then that Justice Stewart was himself a balance wheel on the Court? Take the abortion issue. Justice Stewart, along with Justice Hugo Black, dissented from the Court's seminal case establishing a right to privacy, *Griswold v. Connecticut*,[1] because he could find no such right in the Constitution. Yet, once the Court had found such a right, he accepted that doctrine and applied it in *Roe v. Wade*,[2] joining the Court in holding that the constitutional privacy guarantee encompassed a woman's right to decide whether or not to terminate her pregnancy. But in *Harris v. McRae*,[3] Justice Stewart wrote for the Court that, while a right to an abortion existed, there was no right to have the government pay for the procedure, the constitutional right did not create an entitlement to public funding. Whether or not one agrees with Justice Stewart's opinions in these three cases, they are all models of lucidity that reflect a careful balance between past precedent and present realities, between individual rights and important governmental concerns.

Despite the attention given to the Black-Frankfurter debates of the 1950's, when Justice Stewart began his service on the Court, or to the "liberal-conservative" debates which marked his last decade on the Court in the 1970's, an argument could be made that the "common law" approach of Justice Stewart has been a dominant, perhaps *the* dominant, method of constitutional decision making in the last quarter century.

On the day Justice Stewart died, a friend said to me: "Great judge, good Justice." Yes and no. Great judge, great Justice. He was a man of extraordinary intelligence and wisdom who, along with a colleague whom

1. 381 U.S. 479 (1965).
2. 410 U.S. 113 (1973).
3. 448 U.S. 297 (1980).

he revered, John Marshall Harlan, was the exemplar of an important Supreme Court tradition. Because that tradition cannot be easily summarized, it is easily overlooked. But the Stewart approach will endure.