Potter Stewart: Supreme Court Justice and Cincinnatian

I have passed by the Sixth Circuit Court of Appeals building downtown many times noticing the name of Potter Stewart inscribed over the entrance. But I have neither heard his name spoken by anyone in the thirty-three years that I have lived in the city, nor have I read anything about him in the local media. Why had he been so honored, and then strangely, *seemingly* forgotten? A good topic for my next Literary Club paper, I decided. I soon realized though that, in my ignorance, I may have bitten off more than I could chew.

I am not a lawyer as will become apparent to those of you who are. I am a historian, but I don't research the law or the legal profession, despite the fact that I published, with Cambridge University Press, a monograph on Florentine criminal justice during the Renaissance. When I realized what I had gotten myself into, I did not want to just drop the subject, and I am very glad that I didn't. But I did need to carefully circumscribe my research and the presentation of the results. I am not in a position to collect, contextualize, and analyze Stewart's opinions as a Supreme Court Justice, so I have largely relied on the analysis and conclusions of others much more qualified that I.

Potter Stewart served as an Associate Supreme Court Justice on the Earl Warren and the Warren Burger courts. Decisions of both, but especially the Earl Warren court, have been of great legal, social, and political significance over the last seventy years or so. As we will see, Stewart served at a pivotal moment in the life of the Court. So why has he faded so much into the background, even in his hometown, when he served in the midst a judicial revolution? The Earl Warren Court was certainly revolutionary compared to previous Courts, and the Warren Burger Court was designed by President Richard Nixon to be the correction. Nixon interviewed Stewart for a possible appointment as Chief Justice to lead that correction, but

Stewart declined the opportunity. I will join Stewart in his own words in arguing that the primary reason is that he never wanted to be part of a faction, neither as leader nor as a follower.

His most famous quote is drawn from his concurrence as part of the majority, in the obscenity case of *Jacobellis v. Ohio* (1964), "…I may not be able to define obscenity, but I know it when I see it…" He didn't want this to be his judicial epitaph, so to speak, but it has become so. Instead, I would say that his most defining statement would be what he said in a post- retirement interview: To paraphrase, his approach was not liberal or conservative but to work like a lawyer, deciding each case on its merits, not according to an ideology. That is how he thought and worked in his twenty-three years on the court, and it is why he is ignored today.

First, a little about his family background. Potter Stewart was born in 1915 in Jackson, Michigan while his family was on vacation at their summer home. He died December 7, 1985 at his family summer home in Vermont, at the tender age of sixty-six. He was married to Mary Ann Bertles of Grand Rapids, Michigan, who died in 2013, in Brattleboro, Vermont at age ninety-three. They produced a daughter, Harriet, and two sons, Potter and David. Journalist Bob Woodward describes him as having been a man of average height, somewhat shy, average in appearance. Stewart was a major source for Woodward's, *The Brethren*, his 1979 book on the first seven years of the Burger Court. More on that later. His father, James Garfield Stewart, was patriarch of an upper-middle class family in Cincinnati. The elder Stewart served for seven years as mayor of Cincinnati, then seven years on the Ohio Supreme Court after failing to secure the Republican nomination for governor in 1944. James' father had been a lawyer, as well, though never a judge. Like many other Cincinnatians of his pedigree, Potter went to Hotchkiss, an east coast prep school, graduating in 1933. After graduation he went to Yale, and then Yale Law School,

serving as Chairman of the *Yale Daily News*, and *Comment Editor* of the *Yale Law Journal*. At the end of his studies, he graduated first in his law school class.

World War II saw him serve in the Navy. At the end of the war, he briefly worked in a Wall Street law firm, but soon decided to return to Cincinnati. Perhaps surprisingly, he was a fan of FDR. Despite that, he won a term on City Council, then served as vice-mayor as a Republican. There is not a lot known about his personal views, but perhaps a key is that he considered himself to be a Libertarian. I will come back to *this* point later in the paper. He voted in 1964 for Senator Barry Goldwater, then for George McGovern in 1972 because he was fed up with Nixon, and opposed the Vietnam war.

In 1954 Senator Robert Taft offered Potter, then thirty-nine, a chance to become a Sixth Circuit Court of Appeals judge. He accepted the nomination after taking the weekend to think over the offer, exhibiting a characteristic thoughtfulness when it came to accepting a post that would take him away from doing what he loved most, pure lawyering. He was Taft's third choice. After serving four years on the Sixth he showed an analytical mind, and an even judicial temperament—his law clerks remarked on his civility, a Cincinnati trait.

He respected legal tradition, shown by his respect for *stare decisis*, a foundation of the common law, and a sensitivity to the rights of the underprivileged. While on the Sixth he had written a concurrence that carried *Brown v. Topeka, Ks.* (1954-55) beyond what southern Democratic senators could accept. This was the Supreme Court ruling that finally overturned *Plessy v. Ferguson* (1896). They were also critical of his dissent from the denial of a writ of *habeas corpus* requested by a black prison inmate sentenced for raping a white woman. Stewart dissented because of the hasty nighttime trial held within hours after the defendant had voluntarily surrendered to the police, and before he had the chance to obtain counsel. Stewart

wrote, “Swift Justice requires more than just swiftness.” It is difficult to say why local justice moved so fast. Putting the best face on it, it may have been to protect the man from a possible lynch mob. Get him convicted and get him out of town fast, might have been the reason. Readers and viewers of, *To Kill a Mockingbird*, will see what I mean here. In any case, Potter argued that they had violated the man’s constitutional rights no matter their reasoning.

President Eisenhower nominated him to the Supreme Court in 1958, but because of his modest civil rights stand, seventeen southern Senators, led by Richard Russell of Georgia, filibustered his nomination for seven months, October 1958 to May 1959. Closure was secured after Strom Thurman, racist Senator from South Carolina, finally gave up speaking after almost twenty-four hours of talk on the Senate floor. In October 1959 Stewart was confirmed seventy to seventeen. Stewart said that this had been a difficult time for him and his family. We can only imagine the abuse and threats that they must have endured over that seven months. He joined the Warren Court undoubtedly because Eisenhower, no great friend of civil rights, wanted to slow down the speed and direction of change in which Earl Warren was leading the Supreme Court, and he thought that Stewart was the jurist to help that project. After World War II, Eisenhower did support Truman’s order desegregating the military, and he did finally order the Arkansas National Guard to Little Rock to enforce *Brown* when Orval Faubus, Governor of Arkansas, refused to obey the unanimous decision of the Supreme Court regarding school desegregation. But Ike was not enthusiastic about that decision. The President said: “These people (meaning southern whites) aren’t bad people, they just don’t want their sweet little daughters sitting next to some big black buck.” Wonderfully put, Mr. President!

The term Warren Court refers to the U.S. Supreme Court as led by Chief Justice Earl Warren from October 5, 1953, to June 23, 1969.

Today, the Warren Court is considered one of the two most important periods in the history of American constitutional law. As Chief Justice, Warren applied his political abilities to guide the court to reaching often controversial decisions that dramatically expanded civil rights and liberties, as well as judicial power. The Warren Court effectively ended racial segregation in U.S. public schools, expanded the constitutional rights of defendants, ensured equal representation in state legislatures, outlawed state-sponsored prayer in public schools, and paved the way for the legalization of abortion. Opposition to the Warren Court's decisions spurred a storm of long-lasting vitriol among southerners, as well as political and judicial Conservatives.

To win the presidency, Nixon had adopted what was referred to as his "Southern Strategy." Republicans were and remain the minority party in terms of voter registration. Consequently, Democrats controlled the Congress, and Republicans had won the presidency only once, with Eisenhower, between FDR, Truman, Kennedy, and LBJ; then HW Bush's one term, followed by Clinton's two. Nixon believed that he could win if his party could manage to lure southerners away from the Democratic party to the Republican party.

To accomplish that he was willing to strike a deal with the devil, much like the Republican, and former Lit Club member, Rutherford B. Hayes in 1876, when in return for southern support in gaining the Oval Office, he agreed to end Reconstruction and withdraw Federal troops from the South, leaving newly freed African Americans to the tender mercies of groups like the KKK. To grasp power, Hayes turned his back on his own anti-slavery convictions; Mark Twain had campaigned for him. Thousands of black people were murdered by, among others, defeated and vengeful ex-Confederate soldiers, for the crime of attempting to

register to vote. This was despite the passage of the 13th, 14th, and 15th Amendments by 1870. In the meantime, Congress had also passed the Civil Rights Act of 1866.

Nixon and the Republicans essentially decided to disassociate themselves from the legacy of Abraham Lincoln and US Grant, taking on instead the defense of southern "culture" based on defending segregation and raising up Evangelical Christianity. There are three pillars Republicans collected over time--race, school prayer, and abortion. Lately, unrestricted access to guns has been added with the transformation of the NRA from a safe use gun club into a potent and extreme political power in defense of the 2nd Amendment. The party has been rewarded with a mass migration of southern whites from the Democrat to the Republican party. The South had always controlled the Congress, but now it is Republicans in the driver's seat.

Nixon was anxious to make good on his promises upon winning election in 1968, helped by his southern strategy, and with the false promise that he had a secret plan for ending the Vietnam War. He began with trying to alter the direction taken by the Warren Court. When Earl Warren retired in 1969, Nixon went after Abe Fortas, whom Johnson had wanted to succeed Warren. But he had been too close to LBJ for most senators to accept. Nixon would get to make the nomination of a Chief Justice, but first, he wanted to get rid of Abe Fortas altogether. So, he put J. Edgar Hoover and the FBI on the case, with the charge to find some sort of malfeasance that would force Fortas to resign. Hoover succeeded: Fortas had a financial conflict of interest problem. Nixon had John Mitchell communicate to him that he should resign or face public embarrassment if Hoover's report was released. Fortas obliged. Nixon succeeded in giving himself two Supreme Court appointments to make; Warren Burger as Chief Justice, and Harry Blackmun to replace Fortas. Nixon believed that he had his "strict constructionist" Justices.

Before settling on Warren Burger, Nixon interviewed Potter Stewart for the position. Potter had dissented from many of the most important decisions of the Warren Court. Often, his was the lone dissent. Nixon thought here might be his man to lead the Court away from Earl Warren. Potter went to meet Nixon in his office and the two had a long discussion. Stewart went to ask that his name be withdrawn from consideration. According to what Stewart related to Bob Woodward, he regretted not telling Nixon the truth about why he didn't want the job. He told Nixon that he did not want to put his family through another long confirmation battle. But there is seldom only one reason for doing or not doing something.

While concern for his family must have played a role in his decision, there were a couple of other significant reasons for declining to be considered. First, he did not want to deal with the administrative responsibilities that came with the Chief Justiceship. Stewart also did not want to see the Supreme Court become a tool of the Republican party, and he correctly believed that that was what Nixon was after. Stewart also did not want to be associated with any faction, either as leader or follower. He just wanted to work like a lawyer. Stewart also, wisely, did not trust Nixon because of the Vietnam War. Remember, he voted for McGovern in 1972. So, he was ambitious but not ravenously hungry for power. As a member of the Sixth, he worked to give clarity to judges below him; he didn't simply issue directives but wanted to help them understand how to apply the law correctly. Potter exercised the same strategy as an Associate Justice of the Supreme Court. Stewart knew what he wanted to do, and what he did not want to do.

That issue settled; Nixon turned to Warren Burger as his choice. Stewart was not an admirer of Burger, in fact not many people were. Potter thought that Burger would be the Chief that Nixon wanted, the guy who would lead the Court to rubber stamp policies of the Republican party. That would impugn the integrity of the Court and

limit its independence. He became convinced of this when he read and then opposed Burger's draft opinion on so-called *Brown II.*

This was a second ruling on the 1955 school desegregation issue which, when it came to how quickly schools ought to be desegregated, had given no timetable. Fourteen years later, by 1969, southern school districts, state attorney generals, legislators and governors had succeeded in finding one excuse after another to delay implementation of the Court's order. Picture then Governor of Alabama, George Wallace, in 1963, standing in the doorway of the University of Alabama to block two black students from entering. The Supreme Court was forced to find a way of halting that defiance. Four of the Justices wanted to order immediate desegregation. Stewart was one of the opposing four who wanted school desegregation to proceed, but he also wanted to respect southern concerns. The idea that southerners would come around to doing the right thing given enough time was common but proved to be completely mistaken. Burger wanted a unanimous ruling, but Stewart was appalled: The Chief's draft read like a White House press release; it summarized all the counter arguments to desegregating the schools. He was now more than ever convinced that Burger was Nixon's man. If Burger's view prevailed, the Court would finish by making law of the administrative difficulties encountered by the government in enforcing desegregation. Such a decision would have had no relationship with the common law foundations of the American judicial system. It would have been pure politics.

Brown II included the compromise phrase, "...with all deliberate speed." The desegregation issue now turned to how to achieve integration as quickly as possible. The Burger Court ordered busing as a means, and it became an intensely divisive issue north and south. Of course, not all students in the South were bussed to school; many walked to their segregated schools. In other cases, to maintain segregation,

white parents were more than happy to see their children bused past black schools to white ones, and black children bused past white schools to black ones, they became furious at the idea of using the same means to end school desegregation. They did not want black children bused to white schools, or white students bused to black ones. This was as true in Boston as it was in Biloxi. Stewart's opinion was nuanced: he thought it fine to bus older students, but not younger ones. Burger eventually caved to the pro-busing side.

As Woodward's book reveals, Supreme Court decisions were often the result of extended negotiation and compromise among the Justices. Unanimity was preferred, but consensus was the next best thing. In *Jacobellis*, for example, there were four separate arguments for reversing the lower court decision, with two sets of concurrences. The Justices agreed that the film in question, *The Lovers*, was not obscene, but they could not agree on why.

Nixon had suggested that officials comply with the Supreme Court's orders as slowly as possible. Woodward writes that Stewart's reservations about Burger soon turned to "acute distress." Ironically, he saw Burger as being like Warren: shoot from the hip, view cases in purely political terms. At the same time, Burger was worse. He would change his positions three or four times. Legal arguments could not reach him.

Before proceeding with more on Potter Stewart, I want to pause to consider the significance of the Supreme Court's situation as Stewart joined it in 1959. There had been two key inflection points. The first occurred in 1936 to 1939 when FDR, through his proposed "Judicial Procedures Reform Bill" of 1937, sought to expand the number of Supreme Court Justices by appointing a new member for every Justice over the age of 70 years and six months. It never became law. The proposal was in reaction to the Court striking down every piece of his New Deal legislation. The

second was the Warren Court, 1953 to 1969, which still today has so stirred Conservative vitriol that it has led them to undertake a complete takeover of the Federal Judiciary.

The Constitution does not specify how many Supreme Court Justices there should be, nor does it say exactly what the Court's jurisdiction is, or what its role in governing the country should be. There were initially six Justices, but President Lincoln dealt with ten jurists in his time. In 1869 Congress decreed that there should be eight Justices led by one Chief Justice, and things have remained that way ever since. Then there is the contested issue of jurisdiction.

Chief Justice Charles Evans Hughes of New York led the Supreme Court from 1931 to 1948. He was a remarkably accomplished individual, and a constant voice against racial inequality. The Hughes Court was divided into "liberal" and "conservative" blocks, as had been the previous Supreme Courts. The media finds such labels to be convenient, if less than accurate, so they stuck. There were four Justices in the conservative block, with three in the liberal group, and two swing votes.

Their differences were more ideological than legislative, meaning that they were united in the belief that their attention should focus on matters affecting the judiciary not society: It was "legal formalism" versus "legal realism." Formalists saw the law as being like science. Judges adduced the relevant legal principles and applied them axiomatically to specific cases. Realists, on the other hand, argued for flexibility. Oliver Wendell Holmes, Associate Justice of the Supreme Court from 1902 until 1932, was the first to develop this position. He argued that the basis of law was not logic but experience. If I may, to me this seems to argue that the law is really politics by another means. Realists argued that the Constitution should not be used to impede legislative experimentation. They saw the founding document as a "Living Constitution."

Between 1900 and 1920 their debates focused on "common law," then began spilling over into constitutional law. The American justice system, and elite views on the purpose of the state, are largely derived from seventeenth and eighteenth-century English philosophers, jurists, and legislators. The common law was a coexistent system of law, different from the King's Law, that was based on court decisions and opinions rather than statutes. It was the legal system of the merchant class which was in the process of superseding the medieval system.

Formalism made its way into American jurisprudence through Sir Edward Coke, Chief Justice of the English Court of Common Pleas, and Solicitor General, until his support for the common law over the King's Law became too much for James I to support, so Coke was sidelined. John Rutledge, the second Chief Justice of the US Supreme Court, called Coke "the very foundation of our laws." Also important were the *Commentaries on the English Common Law* written by the eighteenth-century jurist and teacher, William Blackstone. The *Commentaries* became the basis for legal education in America.

Like John Locke, he was a "liberal" in the seventeenth and eighteenth century meaning of the word. Both Coke and Locke supported republicanism at the expense of the monarchy. They represented the interests of the propertied class, mostly wealthy merchant families who had bought titles after the aristocracy had all but wiped itself out in the 15th century War of the Roses. In England property meant everything, and the protection of property often came with a plethora of crimes carrying the death penalty. For example, the historian Douglas Hay, in his essay, "Property, Authority, and the Criminal Law," in *Albion's Fatal Tree: Crime and Society in Eighteenth Century England,* (1975), wrote: "The rulers of eighteenth-century England cherished the death sentence…Once property had been officially deified, it became the measure of all things." The British Labour historian, EP

Thompson, in his 1975 book, *Whigs and Hunters: The Origins of the Black* Act, wrote: "The British state, all eighteenth-century legislators agreed, existed to preserve property and incidentally, the lives and liberties of the propertied."

The philosopher John Locke, to whom the US Constitution owes a great deal, was the spokesman of the 1688 Glorious Revolution, which Hay writes:

"…established the freedom not of men, but men of property… Locke had distorted the old natural law arguments to justify the liberation of wealth from all political or moral controls…Government, declared Locke, has no other end but the preservation of property."

This is the orientation that English liberalism passed across the Atlantic to the US.

Usually foundational class interests in pre-modern, non-capitalist societies are camouflaged by religion, so inquiry doesn't dare penetrate that veil. But in modern capitalist societies, those interests are obscured by a blizzard of high-sounding rhetoric, much of it about the sacrality of the State. But it can be penetrated. Friedrich Nietzsche's, *The Genealogy of Morals*, is instructive here. Briefly, his argument is, to wit: The elites codify their values, then impose them on everyone else.

Up to 1939 Lockean property rights prevailed above all others until the social and economic crises provoked by the Great Depression and the lynching of black Americans finally spurred the Federal government and the Supreme Court to respond. The Supreme Court, it has been written, had until then, effectively blocked every effort by the Federal government to be more involved in the economy to end the economic and racial calamities besetting the country. It closed off every avenue whereby Federal legislative initiative could become involved to get us out of that situation. This is the context that led to FDR's efforts to redesign the Supreme Court.

While FDR did not get his reformed Supreme Court, he apparently impressed upon the Justices the necessity that he be allowed to try to deal attempt to deal with these crises. After the failure of the Judicial Reform Act, in a remarkable turnaround, the Court switched to upholding his New Deal legislation.

There had also been present a generational issue. The conservative faction was composed of older Justices, several well past sixty-five years of age. Their age and experience meant that they perpetuated the traditional conservative attitudes about what the Court should get involved in and what it should not. For example, decisions like *Plessy v. Ferguson* (1896) still stood. The "living Constitution" viewpoint was increasingly becoming the position of a younger generation of jurists. Thus, FDR's intent was more than simply to expand the number of judges that he could appoint; with his reform proposal Roosevelt hoped to hasten a generational shift in Supreme Court jurisprudence.

Formalism no longer sat comfortably at center stage. With the Supreme Court reversing its previous stance against the New Deal, a shift occurred leading to the so called "activist" role pursued by the Warren Court. The Court had tried to deal only with issues affecting the judiciary, leaving social and economic issues to the legislative bodies. This makes sense to me up to a point, but what do we do when legislative bodies either refuse to act to defend the constitutional rights of all citizens, or they actively engage in disenfranchising some class of citizens? Or when legislative efforts to effect remedies are blocked by the Supreme Court? On the economic front, during the Great Depression, unemployment reached 25%, far worse than anything we had experienced before or after. Droves of Americans were homeless and experiencing food insecurity. What would this country have become if these situations had been left with no Federal intervention? Then what?

The earlier judicial attitude was expressed in three areas: The question of federalism, fear of centralized power that necessitated an unequivocal distinction between national powers and those reserved to the states; second was the distinction between public and private spheres of commercial activity susceptible to legislative regulation; third was the separation of public and private contractual interaction based upon "free labor" ideology and Lockean property rights. The administration of LBJ challenged the first with the Voting Rights Act; the Warren Court challenged the second with its order that segregation in interstate commerce was unconstitutional; and the third was challenged by unions allied with the Democratic party.

A couple of examples will illustrate the practical application of this philosophy. Elections are largely a state matter. What can or should courts or the Federal government do when the states refuse to provide protection for some of its citizens based on skin color, who are being targeted with violence aimed at preventing them either registering to vote or voting in sanctioned elections? What is the recourse that such persons have when the various states devise tests that are administered only to people like them, and not to white people, solely for the purpose of preventing them from qualifying to register to vote? When miners struck in coal mines in Utah, Kentucky, or West Virginia to protest wage cuts that were unilaterally implemented in violation of the contracts they had signed with employers, what then? What happens to their rights when the state, at the behest of employers, calls in the local National Guard or the Pinkertons to effectively go to war with the strikers? Think about what is called the "Matewan Massacre" that happened in 1920 in West Virginia; and the "Harlan County Mine War" of the 1930s around Hazard, Kentucky. I hate to quote Lenin, but it seems appropriate to ask, "What Is To Be Done?"

Over the long, but not yet long enough, course of my life, I have asked Conservatives what they would have liked to see done to end, for example, the unprovoked and unpunished, nationwide, lynching of black men. What is the Conservative solution to blacks being deprived by state legislatures, boards of elections, and governors, of the right to vote? What about strikers being fired on by National Guard units protecting the property rights of mine owners? The formalists on the Supreme Court stayed out of it.

The race question is met either by a resounding silence, or an argument to blame the victims. William F. Buckley, Jr. a founder of the Conservative movement, was for years adamantly opposed to LBJ's civil rights legislation—the Voting Rights Act, the Civil Rights Act, and the Fair Housing Act. He believed that the Warren Court and the President had gone way past what the Constitution permitted; southerners would grow out of their racism he argued. Decades later he reluctantly admitted that he had been wrong about that. Consequently, he said that what had been done in the 1960s had been the necessary thing after all. Buckley was a genuine Conservative, not a white supremacist masquerading as a Conservative.

The workers' question is met by recourse to the argument that it is the job of government to protect property rights over all other rights. The Lockean property rights argument. Unionization helped resolve many problems for white and eventually black workers. For black folks, deprived of the right to vote, we could not seek legislative remedies. The only recourse was to turn to the court system and the Executive. Even this was met with resistance. In 1958, the Conference of State Chief Justices adopted a resolution calling upon the Supreme Court "… to recognize and give effect to the difference between that which, on the one hand, the Constitution may prescribe or permit, and that which, on the other, a majority of the Supreme Court, as from time to time constituted, may deem desirable or

undesirable." Also, the Senate Judiciary Committee reported out a bill that would have stripped the Court of jurisdiction in state bar admission cases, as it also proposed to reverse four of the Court's recent decisions. The bill failed, but it was not the only effort of Conservatives to narrow the Supreme Court's jurisdiction in response to the rise of what they called "judicial activism."

Serving on both the Warren Court and the Burger Court, Potter Stewart became a Justice at a pivotal moment in the history of the Supreme Court and the country. Today the battle continues, with Conservatives resorting to packing the Supreme Court, as well as the lower Federal judiciary, with ideological jurists selected and approved by the Federalist Society, marginalizing the traditional role of the American Bar Association. Their aim is to revive formalism in a different way. The Senate hearings for the nomination of Robert Bork in 1987 to be an Associate Supreme Court Justice are exemplary. Reagan had been warned not to nominate a judicial extremist to the Court, but he did anyway. Bork was more than happy to flaunt his lack of respect for the principles of privacy and free speech in his hearing with senators, a majority of whom were so appalled by the results that his nomination was rejected on a bipartisan basis.

Bork evidenced a judicial philosophy that he called "textualism." This meant that the only relevant consideration for justices was what the words on the page meant, divorced from any context, historical or otherwise. To an historian this approach seems laughably naïve. Google the French philosopher Jacques Derrida, to see why. Texts become separated from the author's intention as soon as the words hit the page; there are often unintended meanings; there are often unrecognized contradictions, some present in the Constitution, for example. Fourthly, readers are then free to make their own interpretations since original intent often cannot be determined.

On the other hand, we have Antonin Scalia's doctrine of "originalism," which he developed to distinguish himself from the defeated Bork, while putting himself forward as a possible future Court nominee, in the same vein but different. Scalia's position has been caricatured as saying that all that is needed to understand the meaning of the Founders is a good etymological dictionary. I don't think that is much of a caricature, though. There was little if any ideological difference between Bork and Scalia.

Republicans vowed never to see another of their candidates be "Borked" again, and the Democrats followed suit. The most recent Senate Judiciary Committee confirmation hearings of Amy Coney-Barrett, a follower of Antonin Scalia's doctrine of *originalism*, was a travesty. Senator Lindsey Graham declared at the outset that the process would be decided on a purely partisan basis. Coney-Barrett met with only a handful of Republican senators. In the few Committee sessions that I forced myself to watch to, I had to admire the efficacy of the coaching that she had received on how to avoid answering senators' questions. The result was we learned absolutely nothing about her judicial philosophy or, more importantly, how she might apply her philosophical views to cases. Like others, she refused to respond to "hypotheticals," as she said. By the way, neither could she comment on any case currently before the Court. We have arrived at a sad state of affairs. Citizens are left with nothing other than partisanship upon which to make the decision to support, or not, a Supreme Court nominee.

This is the right moment to review a summary of Potter Stewart's opinions, and his jurisprudence. Since this section far exceeds my ability to synthesize, let alone analyze—I don't have the training to collect and analyze Stewart's opinions—I will rely on an article in the New York University Law Journal that does the job. It is co-authored by Helaine Meresman Barnett and Kenneth Levine. They identify five

areas that emerge as being of particular concern to Stewart: First Amendment freedoms; freedom of association; censorship; criminal procedure; and federalism.

Under the First Amendment category Stewart dealt with school prayer, the investigation of subversives, and obscenity. The fact that the Constitution is sometimes vague and even contradictory meant that these issues, which impacted society at least as greatly as the legal discipline, forced the Court to draw on history, and to formulate new constitutional standards. For example, what is meant by "…an establishment of religion…" or "…prohibiting the free exercise thereof…"? These two clauses came into play in *Engel v. Vitale*. A state required recitation of a state-composed non-denominational prayer in class. This was a Warren Court case, which, with Stewart's lone dissent, decided that this action was unconstitutional. His colleagues raised the issue of coercion: a student who did not wish to repeat the prayer might be forced to do so by peer pressure. Stewart rejected that idea, writing that coercion might not be present, depending on, for example, if the prayer were to be repeated at the beginning or end of class. If the latter, students would disperse immediately after the prayer, so peer pressure would not have the opportunity to kick-in. Stewart thought that the "free exercise" clause was the more important of the two mentioned above.

The investigation of subversives came under the heading of freedom of association. The issue was the right of Americans to associate with those whom they chose when it came into apparent conflict with the responsibility of government to protect itself. In *Bates v. The City of Little Rock*, local officials of the NAACP had been convicted for failing to disclose the association's membership lists. The Supreme Court reversed the convictions as violations of the First and Fourteenth amendments. Stewart wrote the majority opinion, basing it on the inviolability of the associational right of privacy. An absolute right of privacy is one way of protecting freedom of

association. In some cases, though, if the state could show a compelling interest in forcing such information, for example, to determine the fitness of teachers to a limited extent, that was allowable. Self-preservation of the government was another.

Censorship is the area where Stewart's opinion in *Jacobellis v. Ohio* (1964) became that professional epitaph that he did not want. The case involved the Court reversing the decision of a lower court which found the Louis Malle film, *The Lovers*, to be obscene. Woodward recounts that in such cases, the Justices had to gather to view such material to reach a decision. Potter famously wrote that, "I may not be able to define obscenity, but I know it when I see it, and this ain't it." In other words, obscenity is subjective, unless it is hard-core. Was he being a Libertarian here?

Criminal procedure was another area of the law that was important to Stewart. He was particularly concerned with protecting the rights of the poor and disadvantaged. Here Stewart wanted to ensure that procedures afforded citizens for determining their rights and liabilities were in accord with specific constitutional commands, or notions of fundamental fairness. He did preserve a degree of flexibility in balancing the rights of the defendant against the public necessity, i.e., the ability of police to do their job. He supported a defendant's right to counsel, from the very beginning of the trial process. This stance is what had gotten him into trouble with southern senators over such a right refused to a black defendant, resulting in a seven-month filibuster of his nomination to the Court, *Gideon v. Wainwright* (1963).

Fourth was the thorny issue of federalism, balancing the needs of the state when considering due process. The issue that came up was whether apportionment of a state legislature could be challenged in federal court. He supported such challenges to the Supreme Court based on the principle of "one person, one vote." He held for apportionment on a population basis. This position if of special interest today given the Trump administrations efforts to, in effect, change the Constitutional language

from "population" to "citizens." Recently, the Court side-stepped this issue. Another concern was whether there could exist federal exclusion of state actions in certain areas of the laws. Balancing state laws and federal intent, there must be evidence of federal intent to preempt. Stewart found that there could be instances of concurrent jurisdiction. We have an example of such conflict today with the movement to legalize marijuana. Okay in some states for medical reasons, or for recreational purposes—or both-- but possession of pot remains illegal at the federal level.

After this brief and no doubt unsatisfactory summary of Potter Stewart's opinions, what can we conclude about his judicial philosophy? We know that he desired to avoid the labels of "conservative" and "liberal." His jurisprudence exhibits an element from the formalist camp in his strong support for *stare decisis*, as well as support for the living constitution perspective in recognizing that vagueness in the Constitution sometimes required flexibility to come to reasonable and fair outcomes. An example of the last would be his support for abortion based on the Fourteenth Amendment judged to contain a right to privacy, important for a Libertarian like Stewart. His Libertarianism also comes across in his jurisprudence clearly in the issues of obscenity, which he regarded as subjective, and freedom of association, a position that also demonstrated the importance of privacy to him.

Stewart was disapproving of what he described as the "political" approaches of both Burger and Warren. He believed that both shot from the hip and were making judicial decisions not based on law but on political viewpoint; they were shooting at the Constitution from opposite ends of the political spectrum. Stewart approached each case on its own merits, avoiding the application of any predetermined all-inclusive philosophy.

Potter Stewart was true to himself. He tried and I think succeeded in avoiding political labels. Given the partisanship that we suffer under today, and one or the

other set of politico-judicial philosophies posing as pure law, wouldn't it be refreshing to have more like him?