

Judeo-Christian Ethics
Spring 1996

In his article, "Do We Have an Unwritten Constitution," Stanford Law Professor, Thomas C. Grey expresses the following conclusion at page 709:

"Much of our substantive constitutional doctrine is of this kind. Where it arises "under" some piece of constitutional text, the text is not invoked as the source of the values or principles that rule the cases. Rather the broad textual provisions are seen as sources of legitimacy for judicial development and explication of basic shared national values. These values may be seen as permanent and universal features of human social arrangements -- natural law principles-- as they typically were in the 18th and 19th centuries. Or they may be seen as relative to our particular civilization, and subject to growth and change, as they typically are today. Our characteristic contemporary metaphor is "the living Constitution" -- a constitution with provisions suggesting restraints on government in the name of basic rights, yet sufficiently unspecific to permit the judiciary to elucidate the development and change in the content of those rights over time."

The substantive debate between Mr. Justice Powell and Mr. Justice White in the 1977 decision of *Moore v. City of East Cleveland* appears to embrace the above conclusion by Grey regarding the existence of unwritten substantive constitutional doctrine. Thus, citing authorities and, speaking for the Court, Powell states (97 SC at 1937) that:

"...[T]he full scope of the liberty guaranteed by the Due Process Clause cannot be found in or limited by the precise terms of the specific guarantees elsewhere provided in the Constitution.
...*Poe v. Ullman*, supra 367 U.S. at 542-543, 81 S.Ct., at 1776-1777 (dissenting opinion).

Appropriate limits on substantive due process come not from drawing arbitrary lines but rather from careful "respect for the teachings of history (and), solid recognition of the basic values that underlie our society." *Griswold v. Connecticut*, 381 U.S. at 501, 85 S.Ct. at 169 (Harlan J. concurring. "

and White, in dissent, (97 et al. at 1958) states that:

Although the Court regularly proceeds on the assumption that the Due Process Clause has more than a procedural dimension, we must always bear in mind that the substantive content of the Clause is suggested neither by its language nor by preconstitutional history; that content is nothing more than the accumulated product of judicial interpretation of the Fifth and Fourteenth Amendments.

USING ONLY MATERIALS ASSIGNED AND/OR DISCUSSED IN CLASS.

discuss which of the two approaches -- Powell or White -- you feel is the proper one that the Court should embrace in the future.

NOTE: YOU CANNOT REJECT BOTH APPROACHES, EVEN THOUGH YOU BELIEVE THAT GREY, POWELL AND/OR WHITE ARE WRONG.

RATHER, ANSWER THE QUESTION.