

Sultan - Judeo-Christian - Model Answer to Exam '96  
Spring 1996 *Spring*

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In analyzing the pros and cons of either Powell's or White's

view on proper interpretation of the Due Process Clause, certain similar pros

and cons arise by virtue of their adoption of natural law ~~as a~~ <sup>as a Constitutional</sup>

interpretation tool. But also, certain different pros and cons arise

by differences in interpretation of the natural law. I will analyze

the similar first then discuss the differences in interpretation.

In the end, I believe Powell's view is the more proper view, because

it does a better job keeping true to the natural law, for the following reasons.

First, similar pros and cons arise, just from using the natural

*similar pros* law as an interpretation tool. The first reason in favor of either view is that ~~either~~ either view recognizes natural law as a part of

the Constitution. Recognizing a historical philosophical tradition prevalent

in the education of all the founding fathers is important as an insight

to their thoughts in writing what they did. Also, in the tradition of

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the Stoics, Cicero, and ~~Aquinas~~<sup>Aquinas</sup>, the appropriate tool to ~~establish~~<sup>establish</sup> law (2)

Goal in the "ideal state" or government is the use of a deontological analysis, not only recognizing what the law currently is, but also what the law ~~ought~~ ought to be to better society as a whole. By moving the law forward to what it ought to be, social norms are furthered.

The second notion in favor of either view is the recognition of natural law as a limitation on rulers as well as the ruled. As

Reid stated, it is not kings that grant rights, but rather rights are inherent in the people, and need to be asserted against the rulers to insure they remain rights. This also follows the reasoning of Lord

Coke in Bohans Case, that the natural law, ~~is~~ derived through the common law, should restrict the actions of rulers, so that all actions are done for the betterment of society, not the betterment of the rulers. (2)

of good ( The third item in favor of these views is that they allow the judiciary, and the people (in the case), to work within the system to create change, similar to Thoreau, Lincoln, and King. By taking the higher, moral road, the better result will be achieved. By following what the natural law dictates, government will better serve the people, without the need for civil disobedience. Government can run more efficiently without <sup>a mass of</sup> counterweights going against it, but rather a few people making reasoned arguments. ~~Just like~~ Just like the Twelve Tables of Rome, or the Magna Carta, if you don't give the people the ability to voice their displeasure, they'll rebel to get their rights.

(Some of the cons)

The first notion <sup>either view</sup> against using ~~the~~ is that they set up an elitist Plutonic authority system. This ignores a long line of thinking from Aristotle, Cicero, Maimonides to their followers. It takes the ability of self-government away from the people. This runs contrary to ③

✓ Social contract theory, where the governed give their consent to their representatives to govern them. It also takes away the need for an educated body politic if the judges make all the decisions, essentially babysitting the citizens. If carried too far, certain bad effects could begin, like the ~~beginnings~~ <sup>beginnings</sup> of the corruption of Rome.

The second notion against these views is that they will bring "unenumerated rights" into the written Constitution, similar to the Ninth Amendment. This shows disrespect for the whole concept of the written organic law, which was considered important by many, including Aristotle, the Jews, Levellers, Locke, et al. The whole purpose of the written organic law is to prevent misinterpretation by future generations. Providing these rights through the judiciary short circuits this process while the right created is written along with its logic in the opinion, it could easily be lost in the vast (4)

volumes of jurisprudence. Rather, it should be reduced to a single

concept, and placed in the original document by the political

branches, if the right is indeed that important. Also, allowing

judges to decide which rights are proper and which exist in the

natural law creates the opportunity for them to "barge in on God's

Act" according to ~~the~~ Judge Bork.

Each view's interpretive approach provides different reasons

why they are good or bad ideas. White's view takes a more

relativistic approach, by basing all decisions not on what has been

decided by past generations, but rather building a completely new

set of jurisprudence integrating one piece of text. Powell's view on

the other hand, remains true to the natural law concept of

merging faith and reason, by using the intellectual building blocks

of all the previous thinkers.

The first pro of White's view is the cautious development of  
the concept within the jurisprudence of the Due Process Clause. Like  
goal 7 the development of the Common Law, each concept should be seriously  
considered, before adopting it, and moving on to a new natural law

goal 7 concept. This seems to follow a view similar to what Black  
expressed in his article on interpreting "unenumerated" rights under  
the Ninth Amendment. Each building block should be clearly established,  
each step checked, to prevent a "wrong turn".

goal 7 The other pro of White's view is that it seems to follow Aquinas's  
view of cautiously discerning truth through intellect, so that the  
will ~~can~~ <sup>can</sup> do good easier, and justice may be achieved. If applied  
properly with some moral basis, this could work out for a better  
society

The main problem with White's view is that it

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book #2  
(cont).

ignores the complete history of natural law and attempts

? to set up a completely new jurisprudence to determine it. This

is essentially "re-inventing the wheel" and allows the judge to

pick and choose, or ignore completely, the basis of natural law

This could also lead to the non-adoption of monotheistic values/norms

as a guidance, creating a completely relativistic body of law.

This relativistic body of rights could be used to establish absolute

liberty, which is clearly like absolute power in its effect. The

end result is anything but the betterment of society. This

view seems to present the greatest possibility for abuse because it

is unanchored in the traditional norms/values of our religions

and ethical heritage.

I find Powell's view to be more attractive, for the main

reason that it sticks to the values & norms already established

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in our monothetic society. Powell's goal is not to reinvent

the wheel, but rather to stick to traditional thinking. By keeping

the Due Process clause based on a foundation of historical norms/values

from society, less chance of abuse is present. Powell recognizes

the importance of the sources of our system of government: the

Natural Law, as well as the British Constitution, Colonial Charters,

Common Law reasoning, and the scriptures, indirectly if not directly

By keeping morality and faith as the basis, it is easier to determine

what ought to be properly, instead of wandering about without an

anchor, as Lewis & Murray were concerned about. Also

this view recognizes the merging of faith & reason as stated by

Maimonides, Cicero, & Aquinas, among others, as being crucial

to a better society to achieve justice. I believe Powell's view

is the better choice.

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