Human Security and Constitutional Rights: Lessons from Substantive Due Process Cases

William D. Lay, J.D.
Chair, Department of Criminal Justice and Human Security
College of Public and International Affairs
University of Bridgeport
Bridgeport, CT 06604
United States

Abstract

To provide human security, governments should protect civil and political as well as social and economic rights. This article posits a tripartite distinction between first-order rights that are easily created and altered in the democratic process, second-order rights that arise from beyond that process and are given constitutional protection, and third-order values that transcend the legal process. The article discusses the natural law view of rights that underlies the Anglo-American legal system, and then discusses a line of U.S. Supreme Court cases that seek to identify which rights are so fundamental and important that they are woven into the very notion of due process of law. The article suggests steps to encourage greater participation by the People in political and social processes to achieve greater social and political stability and maturity.

Keywords: human security; natural law; substantive due process; fundamental rights; civil and political rights; socio-economic rights; United States Supreme Court

Introduction

To achieve human security, "the rule of law and emphasis on civil and political rights as well as socio-economic rights" should be fostered in every country (Ginwala, 2003, p. 3). This leads to the primary dilemma faced by all constitutional framers – government must be strong enough to govern effectively, but its powers must be limited to protect the people from the government. One approach is to identify the fundamental liberty rights that will be protected, and to determine the level of protection that such rights will receive. But it is also important to recognize that there are values – such as dignity, peace of mind, and happiness – that transcend the legal plane.
I distinguish here between first-order rights (that are easily created and altered in the democratic process), second-order rights (that arise from beyond that process and deserve special recognition and protection), and third-order values (the transcendent values that both underlie and transcend the legal framework, but do not take the form of legal rights). A sound legal structure will give support to third-order values, but it cannot guarantee their realization. Yet dignity, peace of mind, happiness and similar third-order values are the very essence of human security. Although they cannot be legally mandated, creating an environment where they can be attained requires an understanding of the limits of law, and the proper role of the law-generating elements of government and society.

This article first discusses the natural law view of rights that underlies the Anglo-American legal system, as well as the classical perspective of man as a political being in which that view developed. It then discusses a line of U.S. Supreme Court cases that seek to identify which rights are most deserving of protection, and incorporates these into the substance of "due process of law."

"Due process" is a particularly vital concept in constitutional law. While life and liberty may be inalienable rights endowed by the Creator, the Constitution indicates that government may deprive any person of "life, liberty, and property" through "due process of law." Thus, "due process" is the crucial limiter of otherwise limitless and absolute rights. "Process" suggests procedures, but due process is substantive as well. The government may not impose unjust or arbitrary laws where fundamental rights are impacted, even if those rights are not specifically enumerated in the Constitution. This is the doctrine of substantive due process.

Examining how the Court has historically determined what rights are indispensable for substantive due process sheds light on what is required for a right to properly enjoy constitutional protection. At present, U.S. Constitutional law recognizes only a group of privacy rights as meriting this special form of protection, but in the past, basic economic freedoms were also protected. In withdrawing that protection, the Constitutional practice moved from a libertarian view supportive of acquisitive individualism toward the natural law views of John Locke, which called for kindness and support for the less advantaged.

Finally, this article draws lessons concerning the proper role of law in the larger context of achieving human security, and suggests steps to encourage a "new birth of freedom" through greater participation by "the People" in political and social processes.

1. Human Security and Human Rights

1.1. The Desiderata – Roosevelt's "Second Bill of Rights"

Freedom was the theme of Franklin Roosevelt's State of the Union Address of January 6, 1941. This speech, and the Four Freedoms that would be the groundwork for a "more secure" future world, are generally regarded as the genesis of the human security paradigm. For Roosevelt, the four essential freedoms are freedom of speech, freedom of religion, freedom from want, and freedom from fear (Roosevelt, 1941).
Three years later, Roosevelt again addressed Congress with a more articulated statement of his commitment to worldwide human security. At that time, he introduced his proposed "Second Bill of Rights" (Roosevelt, 1944):

- The right to a useful and remunerative job in the industries or shops or farms or mines of the nation;
- The right to earn enough to provide adequate food and clothing and recreation;
- The right of every farmer to raise and sell his products at a return which will give him and his family a decent living;
- The right of every businessman, large and small, to trade in an atmosphere of freedom from unfair competition and domination by monopolies at home or abroad;
- The right of every family to a decent home;
- The right to adequate medical care and the opportunity to achieve and enjoy good health;
- The right to adequate protection from the economic fears of old age, sickness, accident, and unemployment;
- The right to a good education.

Roosevelt understood that what he was introducing was not a bill or rights in the traditional sense. Rather, he was proposing a slate of legislation. His list of desired first-order rights could only be achieved democratically, and only by means that did not infringe on second-order (constitutional) rights. That is why he asked *Congress* "to explore the means for implementing" these social and economic desiderata, "for it is definitely the responsibility of the Congress to do so" (Roosevelt, 1944).

Examining what qualifies a "right" as meriting constitutional protection makes clear why Roosevelt's Second Bill was properly addressed to the legislature, not the courts. And why efforts to move the adoption of such rights into a judicial agenda are misguided.

1.2. The Natural Basis of Rights

The natural law approach seeks to ground rights in reality, rather than derive them from obligations or posited rules, or the whims of rulers (Weinreb, 1992, p. 280). Both the American Declaration of Independence of 1776 and the French Declaration of the Rights of Man of 1789 expressly recognize that the most fundamental rights are, respectively, "endowed by the creator" and "sacred."

In reaching this formulation, the American founders relied on the theoretical works of, among others, Aristotle and Locke. For Aristotle, the pursuit of happiness involves all human beings in seeking and trying to obtain the same goal of being fully human, and this compels us to enter civil life together. In relationship as a "People" in a social and political tapestry, "others have a right to expect from us that we do nothing that might impede or obstruct their pursuit of happiness—nothing that might interfere with or prevent their obtaining or possessing the real goods they need to make good lives for themselves" (Adler, 1978, p. 115). It is their *need* for real goods that gives rise to natural rights—rights that we must respect to consider ourselves just.

Aristotle's impact on the American system does not stop there. Sandel (2009) points out that for Aristotle, man, the political and social being, can only be human in civil life in civil society (p. 195). As Sandel notes, a "just society" involves reasoning together "about the meaning of the good life" (p. 261).

Thus, the "right to be let alone," famously invoked by U.S. Supreme Court Justice Louis Brandeis (*Olmstead v. U.S.*, 1928, p. 478) must be counterpoised against an obligation to participate—to *not* be let alone, and to not *be* alone. As Article 29 of the Universal Declaration of Human Rights states, it is only in "community" that "the free and full development of [human] personality is possible."

John Locke's contribution to the American philosophy is today sometimes marginalized for its religious nature or misunderstood as justifying selfish materialism. Such dismissal of his thought is regrettable, for Locke's thinking encompassed a much more nuanced view of humanity. Locke taught that people join in society for the mutual preservation of "their lives, liberties and estates" (Locke, 1993, p. 178). But life, liberty, and estate (property) are not to be found in isolation. As McDonald (1985) observes:

The concepts of liberty and private property carried with them a large body of assumptions, customs, attitudes, regulations both tacit and explicit, and rules of behavior. Thus neither liberty nor property was a right, singular; each was a complex and subtle combination of many rights, powers, and duties, distributed among individuals, society, and the state. (p. 13)

Locke believed that the law of nature limited what may be accumulated, and decreed that no man can have such a "portion of things of this world" as to deprive "his needy brother a right to the surplusage of his goods" (Locke, p. 31). "As Justice gives every man a title to the product of his honest Industry . . . so charity gives every man a title to so much out of another's plenty, as will keep him from extreme want," for "God requires him to afford to the wants of his brother" (Locke, pp. 31-32). A sharing of the "plenty" is necessary to preserve human freedom, so every person has a basic right to freedom from want. Although a right to property inheres in human nature, that right is limited by the needs of others. The general limitation is to keep the other "from extreme want." In a democracy, it falls to the legislature to work out the exact contours of the right of the needful "brother" to the property of the more prosperous man.

Similarly, Weinreb (1992) reasons that in order for one to function as a "morally constituted individual," basic needs must be met (p. 291). Thus, "[a] persuasive case can be made that some level of physical, intellectual, and emotional well-being as well as some range of opportunity for significant responsible decisions are essential to one's being as a responsible creature" (p. 295). Approached this way, "rights are specifications of the conception of a morally constituted individual," and describe a concurrent duty owed by those with more to those with little (p. 291).

Consistent with this view, Supreme Court Justice John Paul Stevens recently described freedom as "a measure of dignity and self-rule [to] be afforded to all persons" (*McDonald v. Chicago*, 2012, p. 3092). The existence of this freedom may give rise to legally enforceable rights, but it also demands a human response from other members of "the People" that cannot be enforced by law.

1.3. Human Rights and Human Security

The human security approach stands to benefit from the proper balancing of claims for assistance of individuals in need, and liberty rights of all to pursue their interests without unnecessary restrictions. Tadjbakhsh and Chenoy (2007) note that the articulation of human rights may provide a "framework" that "formalizes the ethical and political importance of human security" (p. 123). In addition, by means of "their moral imperatives and their normative quality," human rights might serve to more clearly define the threats, the actors, and the duties that human security advocates should be addressing (p. 123). For Ramcharan (2002), the essence of human security is to respect the rights and fundamental freedoms that have been distilled and articulated by the international community (p. 5). Human security thinking is a broad framework implementing the fulfillment and happiness of ordinary people – the elimination of want and fear. It goes beyond compulsion and sanction, and "reinforces the notion of empowerment of the individual and community" (Tadjbakhsh and Chenoy, p. 134).

For Sen (2000), the "vital core of life" is a "set of elementary rights and freedoms that people enjoy". But the human security approach "incorporates human rights into everyday practice by focusing on the interdependence of rights, development, and security to ensure dignity of citizens" (Tadjbakhsh and Chenoy, 2007, p. 134).

And An-Na'im (2001) proposes a "reconceptualization of legal protection as part of wider strategies of implementation, rather than as the primary means of realising respect for human rights".

These advocates seek to use the law as an instrument to attain human security while recognizing the limitations of that instrument. Litigation may be an improvement to fighting in the streets, but a genuine end to "wanting" and "fearing" cannot be accomplished by court orders. Law can only take us so far; safety and happiness are ultimately only to be found in a society of mature and responsible persons.

1.4. The Split Between Political and Civil Rights and Economic and Social Rights

The American Bill of Rights drew from contemporary state bills of rights, but the latter tended to be broader, and encompassed hortatory clauses. The Virginia Declaration of Rights of 1776, for example, in addition to setting forth rights, makes demands on each citizen:

- "that no free government, or the blessings of liberty, can be preserved to any people but by a firm adherence to justice, moderation, temperance, frugality, and virtue and by frequent recurrence to fundamental principles;" and
- "that it is the mutual duty of all to practice . . . forbearance, love, and charity towards each other."

Such demands are suggestive of the Bill of Responsibilities that Justice Clarence Thomas has called for. These sentiments are also consistent with Locke's views, and with Madison's observation that the Constitution would only function properly for "a good and moral people." But such language does not generally support legally enforceable rights.

Similar hortatory language is found in the Universal Declaration of Human Rights, approved by the United Nations General Assembly on December 10, 1948. Unlike the U.S. Bill of Rights, the Universal Declaration of Human Rights is merely a non-binding declaration of "a common standard of achievement for all peoples and all nations."

Wary of resistance, proponents of codification of that standard divided the rights identified in the Universal Declaration into civil and political as well as social and economic, producing the International Covenant on Economic, Social and Cultural Rights and the International Covenant on Civil and Political Rights and its two Optional Protocols. The United States ratified the latter in 1992, but has not ratified the other, generally based on the view that economic and social "rights" are more aspirations and goals than rights.

Here is the classic dichotomy leading to liberal and conservative positions, with resulting gridlock and stagnation. The liberal view emphasizes social and economic rights; the conservative, civil and political. To move beyond the gridlock requires recognition that higher order rights deserve greater protection, but the people have legitimate authority to alter first order rights by means of the democratic and political process.

1.5. Constitutive Commitments, Constitutional Rights, and Transcendent Values

1.5.1. Constitutive Commitments

Social commitments that are widely accepted, deeply embedded, and stable over time have been referred to as "constitutive commitments" (Sunstein, 2004, p. 62). Such commitments have a long history in the United States. As the Supreme Court has noted, "[f]rom its founding, the Nation's basic commitment has been to foster the dignity and well-being of persons within its borders" (*Goldberg v. Kelly*, 1970, pp. 264-65).

This basic commitment is fulfilled through the political process, that is, the democratic legislative process, and to a lesser extent, judicial and executive actions flowing therefrom. Any rights that are created are fully subject to the decisions and will of those who created them and can be limited, and even rescinded, subject to limitations of their being fully vested and mature.

This process is among the vital activities of the polis, allowing and supporting individual maturity and the ripening and maturing of societies and nations. Courts of law have an undemocratic aspect, inherent in their judicial function. Being undemocratic, courts should be reluctant to recognize a new liberty right, for "[i]t takes that right, to a considerable extent, outside the arena of public debate and legislative action" (McDonald v. Chicago, 2010, p.310). Justice Hugo Black, one of the Supreme Court's greatest defenders of civil rights, commented in his dissent in *Goldberg v. Kelly* (1970) that the move toward a welfare state "must inevitably be met within the framework of our democratic constitutional government, if our system is to survive as such" (p. 272).

And he continued, "new experiments in carrying out a welfare program should not be frozen into our constitutional structure. They should be left, as are other legislative determinations, to the Congress and the legislatures that people elect to make our laws." (p. 279).

It is essential to the health of the democratic process that the courts not undermine it. As noted by Bickel (1962), "judicial review can have a tendency over time seriously to weaken the democratic process" (p. 21). And the "tendency of a common and easy resort to [striking down legislation], now lamentably too common, is to dwarf the political capacity of the people, and to deaden its sense of moral responsibility" (p. 22).

As Aristotle noted, it is only in the push and pull of the political process that the people can fully develop their humanity. In exercising its will through the democratic process, the people fulfill the purpose of the polis to achieve their full development. If that function over-accumulates in the judiciary, whether by sedimentary or seismic action, (i.e., whether by individual apathy or by judicial usurpation), the result will be to sap the polis of the vitality of political life.

Sandel (2009) writes of "Americans' hunger for a public life of larger purpose and . . . a politics of moral and spiritual aspiration" (p. 263). In Sandel's view, Barack Obama addressed that hunger and aspiration in the 2008 campaign. For many, Obama has failed to deliver on his hopeful promise. This may be the nature of political campaigns, but in the tradition of Aristotle, "the People" may still develop through political process regardless of any president's success or failure to deliver a package of promised goods.

1.5.2. Constitutionally Protected Rights

The second order of values is that of individual rights that are specifically protected at the constitutional level, the highest level of protection generally afforded in the legal system. Although such rights are not inviolate, they are highly protected. Among these protected rights are free speech and freedom of religion (First Amendment), the rights of the accused (Fifth and Sixth Amendments), and just compensation for a government taking (Fifth Amendment). Major additional constitutional rights have been protected by Amendments enacted after the Bill of Rights, such as the Thirteenth, Fourteenth, and Fifteenth Amendments, and by Court decisions that expressly expand earlier protections, such as the right of privacy, or the right to be protected from punishments that were previously deemed acceptable. The Ninth Amendment allows for unstated rights, noting that the "enumeration in the Constitution of certain rights shall not be construed to deny or disparage others retained by the people."

1.5.3. The Highest Transcendent Values

The highest values are beyond the reach of law, and therefore can be only awkwardly articulated in the language of "rights." Foundational documents, such as the American Declaration of Independence, point to these values, as do the philosophical and religious works that form the ideological basis of the U.S. Constitution. Cardozo (1921) referred to the legal relevance of "habits of life" (p. 19). Washington State Supreme Court Justice William Goodloe called fundamental truths "maxims" that underlie both principles and rules of law. Roosevelt (1935) referred to "principles" and noted that, unlike "rules," they are necessarily "sacred". By whatever name, these basic human values – such as dignity, peace of mind, and happiness – are transcendent of the state's ability to infringe or guarantee.

This classification suggests an underlying hierarchy or structure—that those values that rise only to the level of social commitments are first-order and are properly consigned to the democratic and political process, where the maturing society may work through possible solutions and improvements in the human condition reflecting the will of the majority; that constitutional rights are second-order and are entitled to protection from the will of the majority; and that the third-order values inherent to the human spirit (and possibly related moral obligations), while they merit the greatest respect, in some sense are not the subject matter of law and government at all.

2. The U.S. Supreme Court Identifies Fundamental Rights

The role of rights in human security may be informed by a consideration of the efforts over time of the United States Supreme Court to identify fundamental rights for constitutional protection. The Court sits as a common law court, overseeing the U.S. legal system while interpreting the text of a written constitution. It grapples with the contours of constitutional rights within a jurisprudential environment shaped by natural law concepts. This complex function demands both an understanding of the Anglo-American natural law tradition and of the role and limits of law itself.

The Court has generally been composed of men and women with differing beliefs and ideas, but perhaps a shared sense that law is but one element in the complex web of human relations. The Court is also heir to the tradition of American thought that sees political participation as an important engine of human progress.

In the Anglo-American legal tradition, no legal right is absolute. Rather, all are subject to limitation through "due process." As Justice Frankfurter observed, due process expresses "in its ultimate analysis respect enforced by law for that feeling of just treatment which has been evolved through centuries of Anglo-American constitutional history and civilization" and "is compounded of history, reason, the past course of decisions, and stout confidence in the strength of the democratic faith which we profess" (*Anti-Fascist Committee v. McGrath*, 1951, pp. 162-63).

Given the profound centrality of "due process" in the constitutional scheme, the Court's considerations of "due process" offer focused illumination of the nature of human rights in American law. And one context in which the Court has grappled with the notion of "fundamental" rights has been in restricting the conduct of the states pursuant to the "due process" clause of the Fourteenth Amendment. This process has inevitably drawn the Court into a consideration of what sort of rights are "natural," "inherent," or otherwise "fundamental."

2.1. Federal Restrictions of State Powers

The Constitution as originally ratified contained few provisions restricting the states in exercising their "police powers," and therefore left open the possibility of infringement by the states of basic individual rights. This was somewhat checked by Article I, Section 10, which contains a list of powers expressly denied to the states. These include some restrictions that one might expect to find in a Bill of Rights, i.e., a prohibition on "any Bill of Attainder, ex post facto Law, or Law impairing the Obligation of Contracts."

To fortify that Section, in 1789, when the first Congress convened under the new Constitution, James Madison suggested adding "some other provisions of equal, if not greater importance than those already made" (Madison, 1789). But Congress did not adopt this suggestion, even though Madison regarded certain of his proposed rights against the states as more important than the restrictions against federal power that became the Bill of Rights (Epstein and Walker, 2009, p. 17). Absent express provisions to the contrary, the Supreme Court held that the Bill of Rights applied only to the federal government, and not against the states. It was up to the states, then, to identify such personal rights as they deemed important and to write safeguards of those rights into their respective state constitutions. They did so, but certain states also treated persons in their jurisdictions harshly and in some cases completely denied them basic human rights, as in the case of slavery in the southern states. This situation was eventually changed by means of the post-Civil War Thirteenth, Fourteenth, and Fifteenth Amendments.

In particular, the equal treatment of freed slaves in the southern states was uppermost in the minds of those who shaped the Fourteenth Amendment. Thus, it first defines United States citizenship to include "[a]ll persons born or naturalized in the United States" (overturning by amendment the Court's decision in the *Dred Scott* case) and then bars any state from making or enforcing any law "which shall abridge the privileges or immunities of citizens of the United States." It goes on to bar the states from depriving any person of life, liberty, or property without due process of law, or denying any person within their jurisdiction the equal protection of the laws.

2.2. Interpreting the Fourteenth Amendment

The *Slaughterhouse Cases* (1873) provided the Court with its first opportunity to interpret the Fourteenth Amendment. The Cases involved efforts of the State of Louisiana to protect the drinking water of New Orleans from the offal of upstream slaughterhouses. To stop the contamination, the state formed a chartered Slaughterhouse Corporation and compelled all butchers of New Orleans to join it. A group of butchers sought to overturn the scheme as an infringement of their economic rights.

John Campbell, attorney for the butchers, argued that the Amendment's protection of the "privileges and immunities of citizens of the United States" meant that the butchers could not be obliged to join the charter corporation in order to pursue their trade. The Court disagreed and in the process, eviscerated the Fourteenth Amendment's privileges and immunities clause, reducing it, in the words of a dissenter, to "a vain and idle enactment, which accomplished nothing" (*Slaughterhouse Cases*, 1872, p. 96). Only later did the Court–without overruling the *Slaughterhouse Cases*–give greater effect to the intent of the Fourteenth Amendment, not by reviving the privileges and immunities clause, but by incorporating fundamental rights into the *due process* clause of the same paragraph.

This gave rise to a new line of cases to determine what specific protections are incorporated. Thus, the question was repeatedly presented, case-by-case: what rights are so fundamental that they should be incorporated into the Fourteenth Amendment due process clause so as to be applicable against the states?

For Justice Hugo Black, the framers had already answered the question, and the Bill of Rights was that answer. Black called for "total incorporation" of those rights into the Fourteenth Amendment. The Court, however, never adopted Black's "total incorporation" approach. Instead, the Court embarked upon case-by-case considerations as to whether each claimed right was so *fundamental* that there could be no "due process" without it.

Justice Alito's plurality opinion in *McDonald v. Chicago*, the most recent incorporation case, identifies "eras" in which, to identify such rights, the Court has used different formulations. In an early era, in *Twining v. New Jersey* (1908), the Court found that the Fifth Amendment privilege against self-incrimination was not of such a nature as to be incorporated into due process. (This was later overturned.) The standard the Court applied in *Twining* was whether the affected right was one of the "immutable principles of justice which inhere in the very idea of free government which no member of the Union may disregard." In *Snyder v. Massachusetts* (1934), in denying the appeal of a defendant who was not permitted to accompany the jury to "view" the alleged crime scene, the Court looked for rights that are "so rooted in the traditions and conscience of our people as to be ranked as fundamental." And in *Palko v. Connecticut* (1937), in finding that the bar of double jeopardy was not incorporated (also later overturned), Justice Cardozo famously wrote that due process protects only those rights that are "the very essence of a scheme of ordered liberty" and essential to "a fair and enlightened system of justice" (p. 325).

In grappling further with this standard, at one point, as related in *Duncan v. Louisiana* (1968), the Court asked whether "a civilized system could be imagined that would not accord the particular protection" (p. 149 at n. 14). Presumably, if such could be *imagined*, the right was not sufficiently fundamental to be incorporated into the very notion of due process of law. "Thus, in holding that due process prohibits a State from taking private property without just compensation, the Court described the right as 'a principle of natural equity, recognized by all temperate and civilized governments, from a deep and universal sense of its justice'" (*McDonald v. Chicago*, p. 3092).

In a more recent era, the Court has incorporated almost all of the provisions of the Bill of Rights. In doing so, the Court made it clear that the governing standard is not whether *any* "civilized system [can] be imagined that would not accord the particular protection" (*Duncan v. Louisiana*, 1968, p. 149 at n. 14). Rather, the question is whether a particular guarantee is one of those "fundamental principles of liberty and justice which lie at the base of all our civil and political institutions" (p. 148). Thus, the more modern approach is to conduct a historical analysis of the importance of the claimed right, rather than to consider *ab initio* whether the right is essential and fundamental to being human in society.

Using these methods, or variations thereof, the Court has incorporated into the Fourteenth Amendment rights found in Amendments One (speech, press, assembly, petition, free exercise of religion, no establishment of religion), Two (the right to bear arms), Four (search and seizure, exclusionary rule), Five (compensation for takings, self-incrimination, double jeopardy), Six (various criminal trial protections), Eight (cruel and unusual punishment), and Nine (privacy).

2.3. Substantive Due Process

Substantive due process traces its origins to the view expressed by Justice Bradley in *Davidson v. New Orleans* (1878), when he wrote that "due process" could be understood in more than a procedural sense (p. 107). Rather, a court should "review not only how, procedurally, the government acts (procedural due process), but also what, substantially, the government does (substantive due process)" (Rossum and Tarr, 2010, p. 124). Under this view, if a court "discerns that a law is unreasonable—that is, 'arbitrary, oppressive, and unjust'—then it is justified in declaring the law to be a denial of due process and, hence, constitutionally infirm" (p. 124).

Initially, this principle was used to protect economic rights, sometimes referred to as "freedom of contract," which were not expressly protected by the Constitution. In *Mugler v. Kansas* (1887), the Court said that if "a statute purporting to have been enacted to protect the public health, public morals, or the public safety . . . is a palpable invasion of rights secured by the fundamental law," then the Court would overturn it (p. 661). In *Allgeyer v. Louisiana* (1897), the Court found that a right to contract was protected by the federal Constitution.

Economic substantive due process reached its highest point in *Lochner v. New York* (1905), and its progeny, where the Court held that the "general right to make a contract in relation to his business is part of the liberty of the individual protected by the 14th Amendment" (p. 53). In *Lochner*, the Court recognized that the state has certain police powers, and might limit certain contract rights in the legitimate use of those powers. But only if the limitation arises from the "fair, reasonable and appropriate exercise of the police power of the state" (p. 56). And in the *Lochner* Court's opinion, "[t]here is no reasonable ground for interfering with the liberty of person or the right of free contract, by determining the hours of labor, in the occupation of a baker;" as did the law that Lochner challenged (p. 59). Subsequent cases enlarged and upheld the "liberty of contract" against state regulation.

Lochner and its liberty of contract fell into disrepute, and the economic substantive due process that it represented was drastically curtailed by the New Deal case of *West Coast Hotel v. Parrish* (1937). The doctrine of substantive due process lives on, but exclusively for non-economic purposes, giving a "new cast" to U.S. law (Arkes, 2010). The new cast means that the Court now believes that the Constitution places a higher value on certain personal privacy interests than on economic rights.

The current jurisprudence of substantive due process owes much to the right to privacy championed by Justice Louis Brandeis. In his 1928 dissent in *Olmstead*, as mentioned above, Brandeis opined that the Constitution conferred on Americans "the right to be let alone—the most comprehensive of rights and the right most valued by civilized men" (*Olmstead v. U.S.*, 1928, p. 478). Also, in *Meyer v. Nebraska* (1923), the Court reasoned that the word "liberty" includes "the right of the individual . . . to engage in any of the common occupations of life, to acquire useful knowledge, to marry, establish a home and bring up children, to worship God according to the dictates of his own conscience, and generally to enjoy those privileges long recognized at common law as essential to the orderly pursuit of happiness by free men" (p. 399).

In his dissent in *Poe v. Ullman* (1961), Justice Harlan vehemently argued that substantive due process should be resurrected to protect not economic rights, but rather fundamental non-economic rights which are essential to the concept of ordered liberty. Four years later, in *Griswold v. Connecticut*, the Court gave constitutional protection to "a right of privacy older than the Bill of Rights," and presumably rooted in human nature as endowed by nature's God (p. 486).

The privacy right recognized by *Griswold* has served as the basis of the protection of abortion rights, the right to consensual homosexual sexual activity, and the right of a competent individual to terminate life-sustaining medical treatment. However, the Court stopped short of finding a right to obtain the assistance of a physician in committing suicide (*Washington v. Glucksberg*, 1997). In his opinion in *Washington v. Glucksberg*, Chief Justice Rehnquist stressed that "Americans are engaged in an earnest and profound debate about the morality, legality, and practicality of physician-assisted suicide" (p. 735). He further noted that the Court's decision "permits this debate to continue, as it should in a democratic society" (p. 735).

Some might still defend the *Lochner* position and maintain that allowing such extensive government intrusion into the marketplace as we have today has weakened the ability of capitalism and free enterprise as practiced in the United States to meet human needs and generate prosperity. However, the abandonment of the *Lochner* approach moves American jurisprudence back in the direction of Locke's humanitarian views, and allows greater democratic experimentation, as championed by Justice Rehnquist.

2.4. The Court's Current Approach to Incorporation

Following the historical approach, in the most recent selective incorporation case, the Court in *McDonald v. Chicago* found that the Second Amendment right to keep and bear arms is fundamental to our scheme of ordered liberty because it is "deeply rooted in this Nation's history and tradition," and is also incorporated (*McDonald v. Chicago*, p. 3036).

The Court examined the history of the right to keep arms for self-defense, noting that per Blackstone, it was "one of the fundamental rights of Englishmen," and regarded by the founders as fundamental to the newly-formed American system of government. The Court also noted that in framing the 14th Amendment, Congress specifically considered and underscored the right to bear arms. In addition, the right was widely protected by state constitutions at the time.

"In sum," the Court concluded, "it is clear that the Framers and ratifiers of the Fourteenth Amendment counted the right to keep and bear arms among those fundamental rights necessary to our system of ordered liberty" (*McDonald v. Chicago*, p. 3042).

Thus, the Second Amendment right to "keep and bear arms" was determined to be fundamental, and was incorporated into the 14th Amendment and made applicable against the states.

In dissent, Justice Stevens would not regard the right to bear arms as sufficiently fundamental to be incorporated into the protection of due process itself, but would limit such rights to those "relating to marriage, procreation, contraception, family relationships, and child rearing and education," and also rights against "[g]overnment action that shocks the conscience, pointlessly infringes settled expectations, trespasses into sensitive private realms or life choices without adequate justification, [or] perpetrates gross injustice" (*McDonald v. Chicago*, p. 3101). Justice Stevens would not protect the right to bear arms in this way in part because owning a handgun is not "critical to leading a life of autonomy, dignity, or political equality" (*McDonald v. Chicago*, p. 3109).

This view places particular emphasis on what Justice Stevens called the "liberty clause of the Fourteenth amendment," writing that it "is the liberty clause that enacts the Constitution's 'promise' that a measure of dignity and self-rule will be afforded to all persons," and it "is the liberty clause that reflects and renews 'the origins of the American heritage of freedom [and] the abiding interest in individual liberty that makes certain state intrusions on the citizen's right to decide how he will live his own life intolerable'" (*McDonald v. Chicago*, p. 3092).

Justice Stevens then cautioned as to the gravity of recognizing a new liberty right, but acknowledged:

Sometimes that momentous step must be taken; some fundamental aspects of personhood, dignity, and the like do not vary from State to State, and demand a baseline level of protection. But sensitivity to the interaction between the intrinsic aspects of liberty and the practical realities of contemporary society provides an important tool for guiding judicial discretion. (*McDonald v. Chicago*, p. 3092)

In summary, the Court has been vigilant in identifying for constitutional protection only those rights that either have a distinguished pedigree in Anglo-American jurisprudence or are so closely associated with the "sacred" precincts of human personhood that they may be deemed to be "a settled principle of universal law, reaching back of all constitutional provisions" based on "a deep and universal sense of its justice" (Chicago, Burlington & Quincy Railroad v. Chicago, 1897, p. 237-38).

3. Commitments, Rights, and Conscience

I have argued that the claims of individuals for the goods that constitute human security may be located within a three-tiered hierarchy of values: a first level where social commitments are enacted into law, a second level of fundamental constitutional rights afforded special protection, and a highest, over-arching level of pure moral obligations that are transcendent of law. The most dynamic level is the first, for this is where political, social, and legal processes are continuously at work creating rights to property and process. On this level, social commitments develop and are given form through the push and pull of the democratic and social process.

As the American founders distinctly appreciated, people seek to enhance and consolidate their powers and entitlements. So too, there are those who would elevate the social commitments of the first level to something more, something like constitutional rights.

But for his part, with respect to his proposed Second Bill of Rights, Franklin Roosevelt called on *Congress* "to explore the means for implementing this economic bill of rights," for in his view, it was "definitely the responsibility of the Congress to do so." That is, although he referred to the listed values as "rights," in fact he did not regard entitlement to them as a matter of constitutional law. Rather, he believed that it was up to the legislative branch to consider how best to achieve them as goals. The conduct of the legislative branch is within the first level of political and social activity. It is here that the creativity, dynamism, and flexibility necessary to accomplish these commitments will be found. These "rights" are not fundamental constitutional rights, and they should not be treated that way. This principle recognizes the limits of constitutional protection within the healthy legal system.

Ultimately, to achieve vibrancy, human security should be infused with elements that are transcendent of the material and economic. We are led to discover these elements through individuals and leaders such as Martin Luther King, Jr., Nelson Mandela, and Mohandas Gandhi, who have themselves transcended the limitations of deprivation, confinement, and mistreatment while vindicating human dignity. Their conduct inspires us because it connects directly with the realm of pure moral obligations – the inner realm of human life and the ultimate source of human security that transcends government.

Law is vital for human advancement. But law does not cause human advancement. Constitutional protection of fundamental rights, drawing from the transcendent moral principles that illuminate those rights, allows for the human processes that bring about the elevation of all persons and the achievement of human security.

References

Adler, M. J. (1978). *Aristotle for Everybody*, New York: Touchstone.

Allgeyer v. Louisiana, 165 U.S. 578 (1897).

An-Na'im, A. A. (2001). The Legal Protection of Human Rights in Africa: How to Do More With Less", in A. Sarat and T. R. Kearns (eds.), *Human Rights Concepts, Contests, Contingencies*, Ann Arbor, MI: University of Michigan Press.

Arkes, H. (2010). Lochner and the Cast of Our Law, in *Constitutional Illusions and Anchoring Truths, The Touchstone of the Natural Law*, Cambridge University Press.

Bickel, A. (1962). *The Least Dangerous Branch, The Supreme Court at the Bar of Politics*, New Haven: Yale University Press.

Cardozo, B. (1921). *The Nature of the Judicial Process*, New Haven: Yale University Press.

Chicago, Burlington & Quincy Railroad v. Chicago, 166 U.S. 226 (1897).

Davidson v. New Orleans, 96 U.S. 97 (1878).

Duncan v. Louisiana, 391 U.S. 145 (1968).

Epstein, L. and Walker, T. G. (2009). *Constitutional Law for a Changing America*, 4th ed., Washington, D.C.: CQ Press.

Ginwala, F. (2003). In *Human Security Now*, Commission on Human Security, New York: United Nations.

Goldberg v. Kelly, 397 U.S. 254, 264-65 (1970).

Griswold v. Connecticut, 381 U.S. 479 (1965).

Joint Anti-Fascist Refugee Committee v. McGrath, 341 U.S. 123 (1951).

Lochner v. New York, 198 U.S. 45 (1905).

Locke, J. (1993). *Two Treatises of Government*, London: Everyman.

Madison, J. (1789). *Speech before the House of Representatives*. Retrieved from http://press-pubs.uchicago.edu/founders/documents/bill_of_rightss11.html

McDonald, F. (1985). *Novus Ordo Seclorum, The Intellectual Origins of the Constitution*, University Press of Kansas.

McDonald v. Chicago, 130 S. Ct. 3020 (2010).

Meyer v. Nebraska, 262 U.S. 390 (1923).

Mugler v. Kansas, 123 U.S. 623 (1887).

Olmstead v. United States, 277 U.S. 438 (1928).

Palko v. Connecticut, 302 U.S. 319 (1937).

Poe v. Ullman, 367 U.S. 497 (1961).

Ramcharan, B. (2002). *Human Rights and Human Security*, The Hague: Nijhoff Publishers.

Roosevelt, F. D. (1935). Radio Address to the Young Democratic Clubs of America. Retrieved from http://www.presidency.ucsb.edu/ws/?pid=14925.

Roosevelt, F. D. (1941). Annual Message to Congress on the State of the Union. Retrieved from http://www.presidency.ucsb.edu/ws/?pid=16092.

Roosevelt, F.D. (1944). Annual Message to Congress on the State of the Union. Retrieved from http://www.presidency.ucsb.edu/ws/?pid=16518.

Rossum, R. A. and Tarr, G. A. (2010). *American Constitutional Law, Volume II, The Bill of Rights and Subsequent Amendments*, 8th Ed., Philadelphia: Westview Press.

Sandel, M. J. (2009). *Justice, What's The Right Thing To Do?* New York: Farrar, Straus and Giroux.

Sen, A. (2000). *Development as Freedom*, New York: Knopf.

Slaughter-House Cases, 83 U.S. 36 (1872).

Snyder v. Massachusetts, 291 U.S. 97 (1934).

Sunstein, C. (2004). *The Second Bill of Rights, FDR's Unfinished Revolution and Why We Need It More Than Ever*, New York: Basic Books.

Tadjbakhsh, S. and Chenoy, A. M. (2007). *Human Security, Concepts and Implications*, London and New York: Routledge.

Twining v. New Jersey, 211 U.S. 78 (1908).

Washington v. Glucksberg, 521 U.S. 702 (1997).

Weinreb, L. L. (1992). Natural Law and Rights, in *Natural Law Theory, Contemporary Essays*, Oxford: Oxford University Press, pp. 278-305.

West Coast Hotel v. Parrish, 300 U.S. 379 (1937).