RECHER

Procrustean[1] Jurisprudence: An Austrian School Economic Critique of the Separation and Regulation of Liberties in the Twentieth Century United States

INTRODUCTION

The beloved[2] Justice Oliver Wendell Holmes in his dissenting opinion in *Lochner v. New York*[3] denounced the majority for embracing an economic theory of laissez-faire which according to him "a large part of the country does not entertain."[4] Holmes went on to say that he did not perceive it as his duty to decide cases based upon economic theory because a "constitution is not intended to embody a particular economic theory."[5] Rather, it is made for "people of fundamentally differing views" which through a majority enact their views into law.[6] Holmes, in *Lochner*,[7] would have upheld a labor law enacted by the state of New York which prohibited a baker from entering into a voluntary exchange with his employer to work more than 60 hours per week.[8]

The issue in *Lochner* should not have been which economic theory to embrace. Rather, the issue should have been whether an individual has a fundamental right to engage in voluntary exchanges.

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1. Procrustes is a notorious giant robber from greek mythology who laid his victims on an iron bed stretching them out or cutting off their legs to make them fit. In so doing, Procrustes demonstrated an arbitrary and often ruthless disregard of individual differences or special circumstances. The Procrustean Bed is defined as "a scheme or pattern into which someone or something is arbitrarily forced." WEBSTER'S NEW COLLEGIATE DICTIONARY 918 (1976).

This article argues that the twentieth century "bench" has become the modern Procrustean "bed" as the inextricably intertwined so-called fundamental and economic liberties have been "forced" into an "arbitrary" separation scheme. This separation and disparate treatment by the U.S. Supreme Court has allowed various governmental units in the twentieth century to become modern Procrusteans, that is, this century's gigantic robbers.

2. The reader should not infer that because Holmes is beloved by many others, that he is greatly apppreciated by this author.

3. 198 U.S. 45 (1905).

4. *See* Lochner v. New York, 198 U.S. 45, 75 (1905) (Holmes, J., dissenting).

5. *Id.* at 75.

6. *Id.* at 76.

7. *Id.*

8. *See Lochner*, 198 U.S. at 45, 46 & 74 (Holmes, J., dissenting).

The science of economics so disparaged by Holmes remains a touchstone by which such jurisprudential quandaries as *Lochner*[9] may be analyzed and evaluated.

Unfortunately, Holmes' dissent in *Lochner*[10] was the beginning of the end of the freedom to contract that had until then been highly regarded and protected.[11] In *Nebbia v. New York*,[12] the United States Supreme Court, in an attempt to separate economic liberties from those that would later come to be known as fundamental liberties, started the nation down the procrustean path of jurisprudential disaster and economic self-destruction.[13]

Austrian School economist Ludwig Von Mises, in his epic treatise on economics, *Human Action*,[14] foresaw the resulting demise of liberty and in turn society which results when governments attempt to separate liberties into economic and personal or fundamental realms:

> The fallacy of this [in this case, Holmes'] argument stems from the spurious distinction between two realms of human life and action, entirely separated from one another, viz., the "economic" sphere and the "noneconomic" sphere. . . .
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> . . .
>
> . . . as soon as the economic freedom which the market economy grants to its members is removed, all political liberties and bills of rights become humbug.[15]

9. *Id.*

10. *Id.*

11. See *infra* part I for a detailed commentary on the devolution of economic liberties including freedom of contract.

12. 291 U.S. 502 (1934).

13. *See id.* at 537 ("So far as the requirement of due process is concerned . . . a state is free to adopt whatever economic policy may reasonably be deemed to promote public welfare" thus separating the economic realm from other areas of constitutional protection); see *infra* parts I-III, for further justification of this position.

14. LUDWIG VON MISES, HUMAN ACTION (3d rev. ed., 1966).

15. *Id.* at 285, 287. More completely, "The freedom to be abolished [by Holmes in *Lochner*] is merely the spurious "economic" freedom of the capitalists that harms the common man. Outside the "economic sphere" [it is said] freedom will not only be fully preserved, but considerably expanded. . . . The fallacy of this [in this case, Holmes'] argument stems from the spurious distinction between two realms of human life and action, entirely separated from one another, viz., the "economic" sphere and the "noneconomic" sphere . . . As soon as the economic freedom which the market economy grants to its members is removed, all political liberties and bills of rights become humbug. Freedom of the press is a mere blind if the authority controls all printing offices and paper plants. *And so are all the other rights of men.*" (emphasis added).

Holmes' first error in *Lochner*[16] was supposing that because people do not believe a particular economic principle or law, it does not exist. Economic laws based in sound theory, like laws of physics, exist whether particular members or even the majority of a population believe them or not. An early belief that the sun rotates around the earth held by most people[17] did and does not change the physical fact that the earth orbits the sun.[18]

Likewise, axioms and the economic laws and principles deduced from them such as the law of diminishing marginal utility exist with or without the individual's or majority's consent or belief.[19] According to the Austrian School of Economics, these axioms and logically derived principles scientifically demonstrate that societal utility can only be maximized by a non-interventionist (laissez-faire) system of laws and property rights.[20]

Ignoring the wisdom of Mises and other Austrian economists has resulted in nearly sixty-five years of irreconcilable and necessarily inept court decisions encouraging the need to create a *"right to privacy"* from the so-called *penumbras* of what were otherwise amendments protective of property rights; namely the first, third and fourth.[21]

Secondly, Holmes (while claiming to disavow any economic system) erred in failing to realize that by refusing to embrace what he called the "economic theory . . . of laissez-faire,"[22] he by default endorsed "bringing about socialism by successive measures."[23] By legally legitimizing state regulation of labor laws,[24] milk boards,[25] and other casts of central

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

17. DONALD KAGAN ET. AL., THE WESTERN HERITAGE SINCE 1648 500 (2d ed. 1983) "Nicholas Copernicus's view [was] of the universe with the sun in the center." The view that dominated astronomy through the sixteenth century was that of Ptolemy, who put the earth at the center of the universe. *Id.*

18. *Id.*

19. *See* MURRAY N. ROTHBARD, MAN, ECONOMY, AND STATE: A TREATISE ON ECONOMIC PRINCIPLES 20-21 (rev. ed. 1993) [hereinafter ROTHBARD-STATE]. The law of diminishing marginal utility simply stated is "[F]or all human actions, as the quantity of the supply (stock) of a good increases, the utility (or value) of each additional unit decreases." This is logically true because as the units are given up, the least urgent of the wants that could have been satisfied with those units are those first foregone. *Id.*; *see also infra* part II.G.

20. See *infra* parts II.E, G-H for full development of this conclusion.

21. Griswold v. Connecticut, 381 U.S. 479, 483-85 (1965).

22. Lochner v. New York, 198 U.S. 45, 75 (1905) (Holmes, J., dissenting).

23. VON MISES, *supra* note 14, at 259. "The 'socialization' of individual plants, shops, and farms—that is their transfer from private into public ownership—is a method of bringing about socialism by successive measures." *Id.*

24. *See* Muller v. Oregon, 208 U.S. 412 (1908); Bunting v. Oregon, 243 U.S. 426 (1917).

planners in the name of the collective good, the United States Supreme Court allowed the state to control capital and the uses to which it is put.

Socialism is often defined as an economic system wherein the state owns the means of production.[26] However, the destructive effects of socialism are at least as disastrous when the state, through regulation, controls the means of production.[27] It is, of course, without taking title, theoretically possible through regulation to control capital, be it human or otherwise, to the extent its use is totally controlled by the state. Here we have capitalism in name only because while titles to capital goods are held by private individuals, the state controls them as if they were the title holder.[28] This may actually be worse than socialism as it is usually thought of because any liability resulting from whatever state ordained uses the capital may be put to may still be assessed against the "title holder."[29]

Holmes states, dissenting in *Lochner*,[30] that he would require considerably more study if he were to make decisions with respect to economic theory.[31] On this point, Holmes was certainly correct.[32]

Holmes and his progeny's gravest errors, however, are the subject of this comment. First, that economic liberties are inherently different from fundamental liberties, and as such can somehow not only be separated, but should be afforded different levels of scrutiny and protection under the United States Constitution. And secondly, that the redistributive effects of the collective force of economic regulation allegedly enacted for the common good, actually benefits society as a whole and is rational, such that it can survive the minimal "rational basis test" of constitutional review.[33] To the separation and disparate treatment of liberties the Austrian School

25. *See* Nebbia v. New York, 291 U.S. 502 (1934); United States v. Carolene Prods., 304 U.S. 144 (1938).

26. ROGER LEROY MILLER, ECONOMICS TODAY 24 (7th ed. 1991).

27. HANS-HERMANN HOPPE, A THEORY OF SOCIALISM AND CAPITALISM 66 (1989) [hereinafter HOPPE-THEORY].

28. *Id.*

29. *Id.*

30. Lochner v. New York, 198 U.S. 45, 75 (1905) (Holmes, J., dissenting).

31. *Id.* at 65.

32. It is argued throughout this comment in parts I, II, and III, that any sound understanding of economic theory would have prevented Holmes from disassociating economics from constitutional rights-analysis as he did in his *Lochner* dissent.

33. *See* Williamson v. Lee Optical, 348 U.S. 483, 491 (1955). "But the law need not be in every respect logically consistent with its aims to be constitutional. It is enough that there is an evil at hand for correction, and that it might be thought that the particular legislative measure was a rational way to correct it." *Id.*

says "humbug."[34] To the redistributive effects of socio-economic regulatory action, the Austrian School demonstrates it is "inherently irrational."[35]

Over time, certain standards of review in the tradition of natural law have been used in an attempt to balance the importance of certain liberties with state responsibility for order and to distinguish the so-called economic liberties from the so-called fundamental liberties.[36] These include "implicit in the concept of ordered liberty,"[37] "lie[s] at the base of all our civil and political institutions,"[38] "so rooted in the traditions and conscience of our people as to be ranked as fundamental,"[39] and "that fundamental fairness essential to the very concept of justice."[40] (Strong originalist constitutional law arguments have also been proffered for preservation of these so-called economic liberties under the Ninth Amendment.)[41]

According to constitutional law scholar Bernard Siegan, "such a collection of catchwords and catch phrases would fill pages, but would not be very helpful in establishing guidelines."[42]

The Austrian School of Economics[43] provides the scientific touchstone for escaping the judicial trap of "catchwords and catch phrases"[44] identified by Siegan as those vague guidelines which justices throughout the history of this country have attempted to rely upon unsuccessfully.[45] Ironically, this touchstone lies within the very science Holmes attempted to disassociate from constitutional law in his *Lochner* dissent, that is, economics.[46]

As argued below, the Austrian School of economics not only demonstrates that there could be no rational basis for the redistributive transfers of wealth from consumers to producers in economic regulatory cases such as

34. *See* VON MISES, *supra* note 14, at 285, 287; *see also supra* note 15.

35. *See infra* parts II.E, H, K, and L.

36. BERNARD H. SIEGAN, ECONOMIC LIBERTIES AND THE CONSTITUTION 248 (1980).

37. Palko v. Connecticut, 302 U.S. 319, 325 (1937).

38. Hebert v. Louisiana, 272 U.S. 312, 316 (1926).

39. Snyder v. Massachusetts, 291 U.S. 97, 105 (1934).

40. Lisenba v. California, 314 U.S. 219, 236 (1941).

41. Randy E. Barnett, *A Ninth Amendment for Today's Constitution*, 26 VAL. U. L. REV. 419 (1991).

42. SIEGAN, *supra* note 36, at 208.

43. The Austrian School of Economics is best described as the science of praxeology or human action. The Austrian methodology remains distinct from other schools of economic thought in both its strict adherence to subjective value theory and its derivation of economic laws using deductive reasoning from *a priori* propositions. ROBERT FORMAINI, THE MYTH OF SCIENTIFIC PUBLIC POLICY 23-25 (1990).

44. SIEGAN, *supra* note 36, at 206.

45. *Id.*

46. *See* Lochner v. New York, 198 U.S. 45, 75 (1905) (Holmes, J., dissenting).

Nebbia,[47] *United States v. Carolene Products Co.*,[48] *Williamson v. Lee Optical*,[49] but demonstrates that separation of economic from fundamental liberties is simply impossible.[50]

Rather, the Austrian School definitively demonstrates that the libertarian[51] shibboleth for which Holmes held apparent contempt, that is, "the liberty of the [individual] citizen to do as he likes so long as he does not interfere with the liberty of others to do the same,"[52] would be the only rational jurisprudential philosophy to embrace given that maximum productivity and just distribution are indeed societal goals.

In chastising the dismal science and attempting to separate jurisprudence from it, Holmes and his judicial progeny have also increased the level of uncertainty and the economic stagnation which necessarily results from that uncertainty.[53] By legally allowing decisionmaking to be shifted from the consumers to central planners ("three men at headquarters")[54] who are without market signals, allocative efficiency is also necessarily reduced.[55]

By attempting to do the scientifically impossible, that is separate liberty from property and economic reality from jurisprudence, Holmes and the Supreme Court have constructed the modern Procrustean bed upon which individual liberty has become similarly mythical.

Part I of this article details the historical treatment of liberties and the often vague notions and phrases under which they were generally protected prior to the *Nebbia*[56] decision. The subsequent withering and ensuing procrusteanism and the right to privacy retrenchment is also discussed. Part II introduces the basic theoretical tenets of the Austrian School of Economics necessary to the understanding of Part III. Part III utilizes the precepts in Part II to identify more specifically why the separation of liberties is scientifically impossible (as well as nonsensical and inconsistent) and why the regulation of pareto superior[57] liberties cannot withstand even the

47. Nebbia v. New York, 291 U.S. 502 (1934).

48. 304 U.S. 144 (1938).

49. 348 U.S. 483 (1955).

50. *See* VON MISES, *supra* note 14, at 285, 287; *see also supra* note 15; *infra* part III.

51. MURRAY N. ROTHBARD, FOR A NEW LIBERTY 23 (rev. ed. 1978) [hereinafter ROTHBARD-LIBERTY] ("The libertarian creed rests upon one central axiom: that no man or group of men may aggress against the property of person of anyone else.").

52. Lochner v. New York, 198 U.S. 45, 75 (1905) (Holmes, J., dissenting).

53. *See infra* part I.C.1.

54. Nebbia v. New York, 291 U.S. 502, 558 (1934) (McReynolds J., dissenting).

55. See *infra* part II.I for a detailed explanation.

56. SIEGAN, *supra* note 36, at 139 ("The *[Nebbia]* decision was historically significant because it signalled the approaching end of economic due process.").

57. MURRAY N. ROTHBARD, THE ETHICS OF LIBERTY 203 (1982) [hereinafter ROTHBARD-ETHICS] (stating that pareto superior actions are those actions by which the utility of at least one person is increased while the utility of no one else is decreased).

minimal low-level judicial scrutiny of the rational basis test. Included are case examples in which the procrustean path taken by modern jurisprudence is demonstrated to be hopelessly flawed and applies the theoretical tenets of Part III to their proper resolution. The article concludes by recommending a total recall of the twentieth century's jurisprudential procrusteanism to include the economic history resulting from lying on its Procrustean bed.

I. BACKGROUND—THE DEVOLUTION AND SEPARATION OF LIBERTIES

The precepts of the Austrian School of economics, argued by this article to provide a scientific basis for this non-separability and protection of rights, could not have been relied upon by the constitutional framers for support because Austrian thought developed later in history than the formation of the U.S. Constitution.[58] Rather, what Siegan described as "catchwords and catch phrases"[59] often originating in natural law theory served as the unstable touchstone of the United States' Constitutional protection of liberties.

Beginning in the progressive era, much like sandstone, that touchstone crumbled under the pressure of economic self-interested corporate liberalism as, under the guise of serving the public interest,[60] regulation enacted to benefit one group at the expense of another[61] (made possible by judicial abdication of the economic rights of the individual), became not only the rule but, more sadly, the rule of law.[62]

In 1848, French political economist and journalist Frederic Bastiat wrote an essay entitled *The Law*[63] in which he argued that "life, liberty,

58. HENRY WILLIAM SPIEGEL, THE GROWTH OF ECONOMIC THOUGHT 530 (3d ed. 1991) Carl Menger, the co-discoverer of the marginal principle, of the subjective theory of value, and founder of the Austrian School of economics, lived from 1840-1921. *Id.*

59. *See* SIEGAN, *supra* note 36, at 208.

60. JAMES WEINSTEIN, THE CORPORATE IDEAL IN THE LIBERAL STATE: 1900-1918 (1968) (Mr. Weinstein discusses two essential aspects of the liberal state as it developed in the progressive era. The first was the need of many of the largest corporations to have the government (usually the federal government) intervene in economic matters to protect against "irresponsible business conduct" and to assure stability in marketing and financial affairs.). *See generally* ROBERT HIGGS, CRISIS AND LEVIATHAN: CRITICAL EPISODES IN THE GROWTH OF AMERICAN GOVERNMENT, Chapter 6 (1987).

61. Nebbia v. New York, 291 U.S. 502, 548 (1934) (McReynolds, J., dissenting) ("It [such economic regulation] imposes direct and arbitrary burdens on those already seriously impoverished with the alleged immediate design of affording special benefits to others.").

62. *See* Nebbia v. New York, 291 U.S. 502 (1934).

63. FREDERIC BASTIAT, THE LAW, (Dean Russell trans., Foundation for Economic

and property do not exist because men have made laws. Rather, it was the fact that life, liberty, and property existed that caused men to make laws in the first place."[64] Bastiat made this observation to demonstrate that the purpose of the law's creation was nothing more than an efficient step taken to jointly protect property from expropriation.

This understanding was reiterated by the Supreme Court as recently as 1993 by Clarence Thomas: "The great end for which men entered into society, was to secure their property."[65] Any attempt by a group to collectively deprive the individual of his property would have been antithetical to this basis for the individuals entering into such a property protecting "contract" in the first place.

Thus, the principle of collective right—its reason for existing, its lawfulness—is based on individual right because the common force that protects this collective right cannot be logically justified to have any other function than that for which it acts as a surrogate.[66]

A. EARLY RIGHTS RECOGNITION

An early recognition of (1) the non-separability of so-called economic and fundamental liberties, (2) broadly defined rights, (3) the importance of judicial protection of such rights against collective (legislative) debasement, and (4) what can and cannot qualify as a right, is obvious from the writings of Constitutional framers[67] and early U.S. Supreme Court Justices.[68]

James Madison stated "In a word, as a man is said to have a right to his property, he may be equally said to have a property in his rights."[69]

Education 1987) (1853) [hereinafter BASTIAT-LAW].

64. *Id.* at 6.

65. United States v. James Daniel Good Real Property, 114 S.Ct. 492, 515 (1993) (Thomas, J., concurring in part and dissenting in part) (quoting Entick v. Carrington, 19 How. St. Tr. 1029, 1066 (C.P. 1765)).

66. BASTIAT-LAW, *supra* note 63, at 7.

67. James A. Dorn, *Judicial Protection of Economic Liberties*, in ECONOMIC LIBERTIES AND THE JUDICIARY 4 (James A. Dorn & Henry G. Manne eds. 1987). That James Madison held freedom of contract and other economic liberties in high regard is discernable by the following passage from his essay entitled Property: "If the United States mean to obtain or deserve the full praise due to wise and just governments, they will equally respect *the rights of property, and the property in rights.*" *Id.* (emphasis added).

68. *See* Calder v. Bull, 3 U.S. 386, 387-88 (1798) ("A law that punished a citizen for an innocent action . . . [or] . . . impairs the lawful private contracts of citizens; . . . or a law that takes property from A gives it to B: it is against all reason and justice, for a people to intrust a legislature with such powers.").

69. Dorn, *supra* note 67, at 3.

John Locke, who greatly influenced Jefferson in his writings contained in the Declaration of Independence and the Constitution's Bill of Rights, argued that man had natural rights to life, liberty, and property and that the state itself does not furnish new or independent rights subject to its controls.[70]

The framers of the U.S. Constitution as well as Justices in formulating "natural law" and "ordered concept of liberty" arguments relied on Jeffersonian and Lockean natural law theory.[71] As such, framers attempted to protect economic liberties and property rights. James Madison, generally regarded property as "that dominion which one man claims and exercises over the external things of the world, in exclusion of every other individual."[72] More than that, Madison described that property, "*[i]n its larger and juster meaning, it embraces every thing to which a man may attach a value and have a right; and which leaves to everyone else the like advantage.*"[73] According to Madison, this property right included a person's property in his [their] opinions, and in the profession and practice dictated by them [religious opinions], a property very dear to him in the safety and liberty of his person, and an equal property in the free use of faculties, and a free choice of the objects on which to employ them.[74]

This, of course, constituted a much broader definition of rights and property than is currently recognized. An erosion of property rights this broadly defined was a concern foreseen by the Constitutional framers.[75] The judiciary was thus empowered to prevent the legislature from what is the legislative and interest group tendency to engage in redistribution from one group of the electorate to another.[76] The judiciary was regarded as "the government entity that was esteemed above all others as a counterweight to popular rule and some of the earliest statements favorable to judicial review were directed toward legislative attempts to interfere with property rights."[77]

Another important insight provided within Madison's writing which would appear to be a long lost consideration of modern jurisprudence is the ascertaining of what can and cannot be a right. Madison's phrase (italicized

70. RICHARD A. EPSTEIN, TAKINGS 12 (1985).

71. SIEGAN, *supra* note 36, at 35-36.

72. Kozinski *in* ECONOMIC LIBERTIES AND THE JUDICIARY 4, *supra* note 67, at 3.

73. *Id.* (emphasis added).

74. *Id.*

75. SIEGAN, *supra* note 36, at 88.

76. *Id.*

77. *Id.* (emphasis added).

above), "and which leaves to every one else the like advantage,"[78] is a vital notion which serves as a tool for discerning rights from preferences or pipe dreams. The notion is that of universality. An alleged right cannot be a right unless it can be "universalized" or enjoyed by all individuals simultaneously without being internally contradictory.[79]

Attempting to apply the notion of universality to modern "rights" makes them rather suspect. When attempting to grant rights status to more than one's own level of production, one must ask at whose expense this is to be provided. For if some individuals are entitled by right to the products of the works of others, it means that those others at the same time are deprived of rights and condemned to slave labor.[80]

Trying to universalize a right to income without work would necessitate that everyone could have income without work. Clearly this is internally inconsistent. For any person to have income would require that at least one person be engaged in production. It was this notion of universality that prompted Bastiat to write "the state is that great fictitious entity by which everyone seeks to live at the expense of everyone else."[81]

The pareto superior actions of voluntary exchange (contract), self ownership, production, and homesteading were generally more respected by the higher courts throughout much of the nineteenth century.[82]

In addition to constitutional framers embracing the broad, non-separable and universality notions of rights,[83] early Supreme Court decisions recognized the principles established by the framers and held them sacred.

In 1798, Justice Samuel Chase, signer of the Declaration of Independence, wrote in an opinion that:

> The purposes for which men enter into society will determine the nature and terms of the social compact; and as they are the foundation of the legislative power, they will decide what are the proper objects of it . . . An act of the legislature (for I cannot call it a law), contrary to the great first principles of the social compact, cannot be considered a righful [sic] exercise of legislative authority.

78. Dorn, *supra* note 67, at 3 (quoting Madison's *Property).*

79. *See* HANS-HERMANN HOPPE, THE ECONOMICS AND ETHICS OF PRIVATE PROPERTY 182 (1993) [hereinafter HOPPE-PROPERTY].

80. *Id.* at 292.

81. FREDERIC BASTIAT, SELECTED ESSAYS ON POLITICAL ECONOMY (1969).

82. *See, e.g.*, Fletcher v. Peck, 10 U.S. 87 (1810); Ogden v. Saunders, 25 U.S. 213 (1827); Terrett v. Taylor, 13 U.S. 43 (1815); Wilkinson v. Leland, 27 U.S. 627 (1829); Lochner v. New York, 198 U.S. 45 (1905).

83. *See supra* notes 67, 69-78.

> A law that punished a citizen for an innocent action . . . a law that impairs the lawful private contracts of citizens; . . . or a law that takes property from A and gives it to B: it is against all reason and justice, for a people to intrust a legislature with such powers; and therefore it cannot be presumed that they have done it. The genius, the nature and the spirit of our state governments, amount to a prohibition of such acts of legislation; and the general principles of law and reason forbid them.[84]

A series of cases in the early nineteenth century further solidified a Constitutional basis for liberties now regarded by the Court as "mere" economic liberties.[85] This is not to say that the Constitution is divine or perfect but rather to establish that the economic system of pareto superior actions and property rights to be identified in Austrian theory as maximizing of societal utility were originally recognized as of equal importance in the early judicial interpretations of the Constitution. In *Fletcher v. Peck*[86] and *Ogden v. Saunders*,[87] Chief Justice Marshall strongly asserted that this right to contract is brought into society and "originates from the right which every man retains, to acquire property, to dispose of that property according to his own judgment, and to pledge himself to a future act."[88]

Justice Story in *Terrett v. Taylor*[89] and *Wilkinson v. Leland*,[90] reaffirmed Marshall's earlier dissenting opinion arguing that the "fundamental maxims of a free government seem to require, that the rights of personal liberty and private property should be held sacred."[91] Further, Story added that:

> no court of justice in this country would be warranted in assuming, that the power to violate and disregard them—a power so repugnant to the common principles of justice and civil liberty—lurked under any general grant of legislative authority, or ought to be implied from any general expressions of the will of the people. The people

84. Calder v. Bull, 3 U.S. 386, 387-88 (1798).

85. *See* cases cited *supra* note 82.

86. 10 U.S. 87 (1810).

87. 25 U.S. 213 (1827).

88. Ogden v. Saunders, 24 U.S. 213, 246-47 (1827).

89. 13 U.S. 43 (1815).

90. 27 U.S. 627 (1829).

91. *Id.* at 657.

> ought not to be presumed to part with rights so vital to their security and well-being . . ."[92]

B. EROSION OF THE PROPERTY IN RIGHTS

The so-called economic rights and rights to property, which "eighteenth century political leaders looked to the judiciary for the safeguarding of,"[93] began an unfortunate and quick erosion in the early twentieth century as courts allowed governments to interfere with freedom of contracts "affected with a public interest."[94]

Disregarding the rights of the individual in a quest to serve the so-called public interest allowed for an opening of the proverbial flood gates as special interests began to act through legislative bodies to dictate what "affects" the public interest.[95]

In *Wolff Packing Co. v. Court of Industrial Regulations*,[96] Chief Justice Taft wrote that while the food business in question did not sufficiently affect the public interest so as to be denied freedom of contract,[97] four categories of business did justify public regulation: (1) Those carried on under authority of a public franchise, (2) certain occupations regarded as exceptional . . . e.g. inns, cabs, and grist mills, (3) businesses in which an economic monopoly exists[98] or is likely to occur, and (4) businesses that are so important in the nation's economy that destruction or stoppage would endanger the public welfare.[99]

The collective or public interest is a dangerous end when justified by a Constitution formed to protect the rights of the individual because it necessitates group classification and individuals belong to more than one group.[100] Taft's rationale soon became a dangerous interventionary wedge

92. *Id.*

93. SIEGAN, *supra* note 36, at 88.

94. WILLIAM COHEN & JONATHAN D. VARAT, CONSTITUTIONAL LAW: CASES AND MATERIALS 524 (9th ed. 1993). Under the guise of protecting the public from itself, the socio-economic regulatory cases were upheld. "A long line of cases developed marking out the distinction between ordinary businesses and those affected with a public interest and so subject to price regulations." *Id.*

95. *See generally* WEINSTEIN, *supra* note 60.

96. 262 U.S. 522 (1923).

97. *Id.* at 538.

98. Austrian School economists argue that the Sherman Antitrust Act was the product of special interest rent-seeking. *See* Thomas J. DiLorenzo, *The Origins of Antitrust: An Interest Group Perspective*, 5 INTL. REV. L. & ECON. 73 (1985).

99. *Wolff Packing Co.*, 262 U.S. at 535, 538 (1923).

100. *See infra* part III.A.

of government into the operations of the market, freedom of contract, and property rights.

In 1934, not long after Taft's *Wolff* decision sustained the existing freedom of contract for the food industry, the U.S. Supreme Court, in a 5-4 decision, upheld the right of the New York legislature to enact a law to establish a minimum retail price for milk.[101] This law was enacted after dairy prices were "brilliantly discovered" by a New York legislative committee (likely after substantial hints from the organized dairy producers) to have fallen below the costs of production. Mr. Nebbia operated a small store in Rochester where he sold two bottles of milk and a loaf of bread for eighteen cents and was charged with a misdemeanor as the minimum selling price by legislative edict was nine cents per bottle of milk.

In criticizing the majority opinion in *Nebbia v. New York*,[102] Justice McReynolds, in his dissent, asked the rhetorical question: "Are federal rights subject to extinction by reports of committees?!"[103] He answered his own question by saying "Heretofore, they have not been."[104] McReynolds went on to expose the regulatory action for what it was: a violation of the rights of the storekeeper, of the liberty of twelve million consumers, and a transfer of wealth from those seriously impoverished to milk producers.[105]

Justice McReynolds concluded the dissenting opinion in *Nebbia*[106] with the economic insight that continues to be grossly lacking in decisions that have allowed preferred production of some goods over others, wealth redistribution, government imposed price and wage legislation, and many

101. Nebbia v. New York, 291 U.S. 502 (1934).

102. *Id.*

103. Nebbia v. New York, 291 U.S. 502, 548-49 (1934) (McReynolds, J., dissenting).

104. *Id.*

105. *Id.* at 551, 557-58 (McReynolds, J., dissenting), ("The exigency is of the kind which inevitably arises when one set of men continue to produce more than all others can buy. The distressing result to the producer followed his ill-advised but voluntary efforts. Similar situations occur in almost every business. If here we have an emergency sufficient to empower the Legislature to fix sales prices, then whenever there is too much or too little of an essential thing . . . constitutional provisions may be declared inoperative. Not only does the statute interfere arbitrarily with the rights of the little grocer to conduct his business according to the standards long accepted . . . but it takes away the liberty of twelve million consumers to buy a necessity of life in an open market. It imposes direct and arbitrary burdens upon those already seriously impoverished with the alleged immediate design of affording special benefits to others. To him with less than nine cents it says—You cannot procure a quart of milk from the grocer although he is anxious to accept what you can pay and the demands of your household are urgent! A superabundance; but no child can purchase from a willing storekeeper below the figure appointed by three men at headquarters!").

106. Nebbia v. New York, 291 U.S. 502, 557-58 (1934) (McReynolds, J., dissenting).

other interferences with actions demonstrated to be pareto superior and the notion of universality by arguing that:

> The Legislature cannot lawfully destroy guaranteed rights of one man with the prime purpose of enriching another, even if for the moment, this may seem advantageous to the public. . . . Grave concern for embarrassed farmers is everywhere; but this should neither obscure the rights of others nor obstruct judicial appraisement of measures proposed for relief. The ultimate welfare of the producer, like that of every other class, requires dominance of the Constitution. And zealously to uphold this in all its parts is the highest duty intrusted to the courts.[107]

Justice McReynolds' reputation of being opposed to "democratic progress" because of his outspoken judicial attacks on Roosevelt's New Deal Policies has lasted through the present day.[108] These attacks were launched in an attempt to preserve economic liberties described above as in the tradition of Locke, Jefferson,[109] and Bastiat.[110] McReynolds did not see himself as endorsing a laissez-faire economic system over any other economic system.[111] Rather he endeavored only to "protect the inalienable rights of the individual."[112] These same rights were to be denied by Justice Holmes in his goal to disenfranchise Constitutional law from economic reasoning.[113]

The erosion of rights has become so complete that if one looks at the outcome of cases challenging socio-economic regulatory legislation under due process, it would appear that no effective review is undertaken by the Court.[114] Since the 1937 demise of substantive due process, no socio-economic regulatory statute has been held invalid on the ground that it violated due process.[115]

107. *Id.*

108. JAMES E. BOND, I DISSENT: THE LEGACY OF CHIEF JUSTICE JAMES CLARK MCREYNOLDS 136-37 (1992).

109. *Id.*

110. *See* BASTIAT-LAW, *supra* note 63, at 6.

111. BOND, *supra* note 108, at 136-37.

112. *Id.* at 136-37 ("McReynolds' constitutional views were those of Jefferson, as they had been transmitted to him by a father born in the heyday of Jacksonian democracy. The Jeffersonian view to which McReynolds adhered rested on a sound exposition of legal principles rooted in the precedents reaching back to the beginning of the American Republic. The Justice's voice thus echoed from the distant past, and it seemed outdated to twentieth century Americans. Yet he did see himself as the midwife, delivering the future still-born. He did not consciously seek to make the world safe for capitalism or the capitalist. He sought only to make it safe for the individual citizen to exercise his inalienable rights.").

113. Lochner v. New York, 198 U.S. 45, 75 (1905).

114. SIEGAN, *supra* note 36, at 17.

C. RETRENCHMENT AND INVENTION OF A RIGHT TO PRIVACY

After nearly thirty years of no economic regulatory statute being held invalid[116] under the "rational basis test"[117] for economic regulation, the U.S. Supreme Court in 1965 retrenched[118] and completed construction of the Procrustean bed[119] for which this article is titled.

The Court in *Griswold v. Connecticut*[120] confronted the problem of how to deal with state legislative restraints on liberties that many people regarded as extremely important but that are not even remotely referred to in any constitutional provision and that the Framers of the original Constitution or the Fourteenth Amendment never imagined.[121]

Justice Douglas said that the Connecticut statute in *Griswold,*[122] making criminal the use of any drug, article, or instrument intended to prevent human conception, raised an entirely different issue because it affected an intimate relationship between husband and wife.[123] He stated, "We do not sit as a super-legislature to determine the wisdom, need, and propriety of laws that touch economic problems, business affairs, or social conditions. This law, however, operates directly on an intimate relation to husband and wife and their physician's role in one aspect of that relation."[124]

In contrast, delivering the majority opinion in *Williamson v. Lee Optical,*[125] Justice Douglas upheld a law which he stated may exact a needless, wasteful requirement disallowing opticians from dispensing and duplicating eyeglasses. In *Williamson,*[126] something less than the rational basis was used to uphold the economic regulation. Douglas stated "[i]t is enough that there is an evil at hand for correction, and that it might be thought that the particular legislative measure was a rational way to correct

115. *Id.*

116. *Id.*

117. Williamson v. Lee Optical, 348 U.S. 483, 491 (1955); *see supra* note 33.

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

119. See *supra* note 1 for a detailed description of this phrase.

120. 381 U.S. 479 (1965).

121. SIEGAN, *supra* note 36, at 16.

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

123. *Id.* at 482.

124. *Id.*

125. 348 U.S. 483 (1955).

126. *Id.* at 483.

it."[127] (Not that there actually must be a rational basis for the legislature's actions, but only that there *might be*!)

According to Siegan, "applying a pre-1937 substantive due process analysis, the Court might have disposed of the case in the following manner: By selling a professional service to married couples, the defendants were exercising liberty of contract. Connecticut's ban would have been an arbitrary and unjustifiable infringement of this liberty."[128] As a post-1937 and especially as a post-*Williamson*[129] decision, however, Justice Douglas to be consistent should have ruled that if there was an evil at hand for correction, (here Connecticut even identified the evil as "promiscuous or illicit sexual relationships" as opposed to the Court speculating as to reasons in *Williamson*)[130] and the particular legislative measure *might be* thought a rational way to correct it, the prohibition against contraceptive devices should have been upheld as just another garden variety socio-economic regulation.[131] Rather, Douglas ruled the legislative enactment violated the newly fabricated right to privacy, which he discovered within the penumbras of specific guarantees in the Bill of Rights "formed by emanations from those guarantees that help give them life and substance."[132]

Justice Douglas in his decision mentions the First, Third, Fourth and Ninth Amendments as origins for this right to privacy.[133] The First Amendment's freedom of association must assume self ownership and could not propose that one has the right to associate with another against their will on their property.[134] The Third Amendment's "prohibition of the quartering of soldiers in any house in time of peace without the consent of the owners" could certainly be regarded as a property rights amendment.[135] The Fourth Amendment guaranteeing the "right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures" could also be easily reconciled as nothing more than a right from property interference by the state.[136] The Ninth Amendment provides that the enumeration of certain rights in the Constitution shall not be construed to disparage others retained by the people.[137] Might this Amendment then not protect the right to dispense replacement spectacles?[138]

127. *Id.* at 488.
128. SIEGAN, *supra* note 36, at 17.
129. Williamson v. Lee Optical, 348 U.S. 483 (1955).
130. *Id.* at 488.
131. This is only to say that the liberty (action) in question could be just as easily analyzed as a freedom of contract issue as that of a "right to privacy."
132. *Griswold*, 381 U.S. at 484.
133. *Id.*
134. *See infra* notes 134-36, 392-94 and part III.B (stating that notions of property become totally meaningless in the absence of fundamental liberties being limited by legal property principles of trespass, etc.).
135. *Id.*
136. *Id.*

Additionally, Justice Douglas attempted to use seniority as a justification for his right to privacy in stating, "We deal with a right of privacy older than the Bill of Rights—older than our political parties, older than our school system.[139] Marriage is a coming together for better or for worse, hopefully enduring, and intimate to the degree of being sacred."[140] But according to Justice Brown, laws forbidding marriage are technically an interference in the freedom of contract[141] meaning that freedom of contract must be at least as old as the variety of contract known as marriage. Therefore, if seniority is the criteria, to be consistent, freedom of contract must be afforded the same level of protection from state interference. Property, by the same token, as indicated in the ideas of Bastiat,[142] Locke and Jefferson,[143] must be even older, for without property what would there have been to contract with or enter into society for!?

So-called fundamental liberties were redefined in "right to privacy" cases heard subsequent to *Griswold*.[144] Under *Roe v. Wade*,[145] strict scrutiny was applied to an infringement of a woman's right to privacy in making a decision to terminate her pregnancy.[146] In *Bowers v. Hardwick*,[147] the right of privacy was determined not to go so far as to protect every kind of sexual conduct between consenting adults and more specifically did not include homosexual acts even if conducted in the privacy of one's own home.[148]

137. U.S. CONST. amend. IX.
138. *Id.* (Nowhere in the enumerated powers of the U.S. Constitution is the right to dispense or regulate dispensation of eyewear delegated to state or national governments.).
139. Griswold v. Connecticut, 381 U.S. 479, 486 (1965).
140. *Id.* at 486.
141. Plessy v. Ferguson, 163 U.S. 537, 545 (1896).
142. *See* BASTIAT-LAW, *supra* note 63 and accompanying text.
143. *See* EPSTEIN, *supra* note 70.
144. Griswold v. Connecticut, 381 U.S. 479 (1965).
145. Roe v. Wade, 410 U.S. 113 (1973).
146. *Id.* at 155. While the words strict scrutiny do not exist in the text of the opinion, the opinion states that abortion fits within private rights subject only to certain state interests. *Id.*
147. 478 U.S. 186 (1986).
148. *Bowers*, 478 U.S. at 190-91.

In *Planned Parenthood v. Casey*,[149] Justice O'Connor describes within the ambit of the right to privacy "personal decisions relating to marriage, procreation, contraception, family relationships, child rearing, and education as involving the most intimate and personal choices a person may make in a lifetime, choices central to personal dignity and autonomy as central to the liberty protected by the Fourteenth Amendment."[150] At the heart of liberty, she states, is the right to "define one's own concept of existence, of meaning, of the universe, and of the mystery of human life."[151] According to O'Connor, beliefs about these matters "could not define the attributes of personhood were they formed under compulsion of the State."[152]

D. OTHER SO-CALLED FUNDAMENTAL LIBERTIES

Thus, after *Griswold v. Connecticut*,[153] there exists the minimal rational basis test[154] for reviewing the constitutionality of economic regulation while so-called fundamental liberties, in order to pass constitutional muster, must be "*narrowly tailored to address compelling state interests*."[155]

Beside those fundamental liberties of marriage and family identified in *Griswold*[156] within the rubric of the "right to privacy,"[157] other fundamental liberties are recognized by the Court as so fundamental as to require stricter scrutiny in their protection. "The Court has held that the rights to certain personal privacies, to travel, to equal access to the criminal appellate process, and to vote, are fundamental and therefore, it subjects governmental restraints upon them to strict scrutiny."[158]

The seemingly ironic twist in the aforementioned jurisprudence is that the Court is more protective of rights not even mentioned in the Constitution yet provides little or no protection for those rights specifically delineated.[159]

149. 112 S. Ct. 2791 (1992).
150. *Planned Parenthood,* 112 S. Ct. at 2807.
151. *Id.*
152. *Id.*
153. 381 U.S. 479 (1965).
154. *See* Williamson v. Lee Optical, 348 U.S. 483, 487-88 (1955).
155. Roe v. Wade, 410 U.S. 113, 155 (1973).
156. Griswold v. Connecticut, 381 U.S. 479 (1965).
157. *Id.* at 485; *see also* Moore v. City of East Cleveland, Ohio, 431 U.S. 494, 549 (1977).
158. SIEGAN, *supra* note 36, at 207.
159. *Id.* As seen in *Griswold*, a right need not be mentioned specifically in the Constitution in order to be designated as fundamental. The Court has held that the rights to certain personal privacies, to travel, to equal access to the criminal appellate process, and to voting are fundamental and therefore it subjects restraints upon them to strict scrutiny. Thus, the anomalous situation exists which accords higher priority to rights nowhere mentioned in the Constitution than is allocated to the right of property which is specifically recognized in the Fifth Amendment. *Id.*

In *Moore v. City of East Cleveland, Ohio*,[160] fundamental rights described as "almost impregnable to invasion"[161] included freedoms of speech, press, and religion, freedom from cruel and unusual punishment, the right of association, and the right to vote. These rights were used as a justification to strike as unconstitutional a housing ordinance which prohibited grandchildren of different parents from residing simultaneously in their grandmother's home.[162]

E. THE PROCRUSTEAN "FALSE DICHOTOMY"

Justice Stevens, concurring in *Moore*,[163] argued that the "critical question is whether East Cleveland's housing ordinance is a permissible restriction on the grandmother's right to use her own property as she sees fit."[164] Had the case been tried on those property rights grounds rather than a privacy right, like all other economic regulatory actions since 1937, the fate of at least one of Ms. Moore's grandchildren would have been rather suspect.[165] As Justice Stevens points out, this artificial separation results in what Justice Stewart in 1972 had described as a false dichotomy between property rights and personal liberties.[166]

The Constitution does not explicitly mention any right of privacy.[167] However, when freedom to contract for a marital partner[168] or for the services of an abortionist became issues for the twentieth century's "Court of fundamental liberties," a sudden retrenchment in the way of the higher level of judicial scrutiny requiring "narrowly tailored means to address a compelling state interest"[169] to uphold so-called fundamental liberty regulation became the test.

Of course, all these issues could have been and had been reconcilable within the system of rights to property and the property in rights embraced

160. 431 U.S. 494 (1977).
161. *Id.* at 548-49.
162. *Id.*
163. *Id.*
164. *Id.* at 513 (Stevens, J., concurring).
165. *See* SIEGAN, *supra* note 36, at 17.
166. Lynch v. Household Fin. Corp., 405 U.S. 538, 552 (1972).
167. *See* SIEGAN, *supra* note 36, at 207.
168. *See, e.g.*, Zablocki v. Redhail, 434 U.S. 374 (1978).
169. Roe v. Wade, 410 U.S. 113, 155 (1973).

by the eighteenth and nineteenth century Supreme Courts.[170] Having abdicated those rights using many of the same catchwords as catch phrases argued to be too vague to protect the so-called economic liberties,[171] the Court used similar catchwords and phrases in cases like *Griswold*[172] and *Moore*[173] to invent a "right to privacy" to preserve the so-called fundamental liberties.[174]

These highly subjective notions of what rights should be Constitutionally protected with different levels of scrutiny have led us to the false dichotomy[175] induced Procrustean state of chaos which is the subject matter of this comment.

II. THE AUSTRIAN SCHOOL OF ECONOMICS

The eroding natural law touchstone for protection of individual liberties should be replaced by the sound propositions of Austrian School's scientific tenets. To Holmes notion that "general propositions do not decide concrete cases, rather that decisions should depend on judgment or intuition more subtle than any articulate major premise,"[176] this author contends that Procrusteanism thrives in a jurisprudence without principle.

Rather, good propositions and the principles derived from them, make for sound case disposition. As the past sixty years of history suggests, Procrustean propositions make for schizophrenic law.[177]

Part II provides the necessary theoretical understanding to slay the modern Procrustean jurisprudential robber and demonstrates the necessity of adherence to the legal principle of protecting pareto superior actions[178] as defined in Part I and detailed in Section A below. The tool of analysis used in this article for determining that personal and so-called economic liberties are inextricably intertwined is the economic theory of the Austrian School.

170. *See infra* part I.A.
171. *See* SIEGAN, *supra* note 36, at 208.
172. Griswold v. Connecticut, 381 U.S. 479 (1965).
173. Moore v. City of East Cleveland, Ohio, 431 U.S. 494 (1977).
174. *See infra* part I.C.
175. *See generally* David M. Burke, *The Presumption of Constitutionality Doctrine and the Rehnquist Court: A Lethal Combination for Individual Liberty*, 18 HARV. J.L. & PUB. POL'Y 73, 163-73 (1994).
176. Lochner v. New York, 198 U.S. 45, 76 (1905) (Holmes, J., dissenting).
177. *See generally infra* part III.
178. *See* ROTHBARD-ETHICS, *supra* note 57; *see also infra* part II.H.

A. BACKGROUND

The Austrian School of Economics is best described as the science of praxeology, that is, human action.[179] All human actions (purposeful behavior thus excepting reflexes) involve the use of scarce means in an attempt to maximize the acting individual's utility.[180] All of these actions involve the use of at least some economic goods, that is, those perceived as scarce.[181] Examples here include one's own body, time, and the ground required for the physical space one's body occupies in that none of us are free floating spirits.[182]

The Austrian methodology[183] remains uniquely distinct from other schools of economic thought in its strict adherence to subjective value theory and its derivation of economic laws using deductive reasoning from *a priori* propositions.[184] As well as being unique in its methodology, application of this Austrian theory often results in conclusions strikingly different from those of other economic schools of thought.[185] These conclusions most generally favor free markets unfettered by government intervention as a means of maximizing society's utility.[186]

B. HUMAN ACTION

Humans act in an attempt to improve their condition by using means or scarce resources to achieve ends or goals that provide higher levels of satisfaction.[187] That humans act is *a priori* true. Any attempt to disprove this notion would be internally inconsistent because the very "attempt to

179. VON MISES, *supra* note 14, at 12-13.
180. *Id.* at 13-14.
181. ROTHBARD-STATE, *supra* note 19, at 3-4.
182. *Id.* at 3-6.
183. FORMAINI, *supra* note 43, at 23-25. The modern Austrian approach to the study of economics developed along lines very different from those prevailing in the British Classical tradition. The major relevant difference is the Austrian's adherence to an explicitly subjectivist utility theory which is a logically-deduced concept from demonstrated preference.

Objectivists believe that reality is totally outside of human consciousness, although human reason can be a very accurate guide to that reality. Subjectivists argue that reality is not simply a collection of objects, standing apart from human consciousness, but a mixture of those objects and subjective perceptions of them. The Austrians were champions of free markets, arriving at that position from an entirely different methodological framework than their British colleagues. *Id.*
184. *Id.*
185. *Id.*
186. *Id.*
187. *See* VON MISES, *supra* note 14, at 13-14.

disprove" by arguing against the notion, is in itself, an action.[188] Every human action must be recognized as nothing more than an attempted at raising one's own utility level.[189]

The cost of any action is the highest valued opportunity foregone to act in such a manner.[190] The additional satisfaction gained by choosing the highest ranking goal over that expected by the second most highly ranking goal is the psychic profit.[191] Each individual actor hopes to gain this profit by choosing action he believes will accomplish his most important end.[192]

C. INEVITABILITY AND PRIVATE PROPERTY

The Austrian School more soundly establishes the necessity of private property rights than the argumentatively weaker intuitive or natural law notions of private property rights as described in Part II and embraced by the Constitutional framers[193] and the early U.S. Supreme Court Justices.[194]

This stronger philosophical case for the inevitability of private property is made by Austrian Economist Hans-Hermann Hoppe, Ph.D., author of what has been argued to be the most important book of the decade, for his argumentation ethic:[195]

> [I]t is obvious . . . that . . . a property right in one's own body must be said to be justified *a priori*. Anyone who would try to justify any norm of whatsoever content must already presuppose an exclusive right of control over his own body simply in order to say "I propose such and such." And any one disputing such a right, then, would be caught up in a practical contradiction since in arguing so, one would already implicitly have accepted the very norm that one was disputing.[196]

188. ROTHBARD-STATE, *supra* note 19, at 1-2.
189. *See* VON MISES, *supra* note 14, at 13-14.
190. ROTHBARD-STATE, *supra* note 19, at 237-38.
191. *Id.*
192. *Id.*
193. *See* Dorn, *supra* note 67.
194. *See* Calder v. Bull, 3 U.S. 386, 387-88 (1798).
195. N. Stephan Kinsella, *The Undeniable Morality of Capitalism*, 25 ST. MARY'S L.J. 1419, 1420 (1994) (book review).
196. Hans-Hermann Hoppe, *The Ultimate Justification of the Private Property Ethic*, LIBERTY, Sept. 1988, at 21 [hereinafter Hoppe-*Ultimate*].

By establishing the inevitability of a private property in one's self, Hoppe continues to do the same for those things necessary to support one's life.

> [I]f a person did not acquire the right of exclusive control over such goods by homesteading, by establishing some objective link between a particular person and a particular scarce resource before anyone else had done so, but instead late-comers were assumed to have ownership claims to things, then literally *no one would be allowed to do anything with anything* unless he had the prior consent of all late-comers.[197]

Hoppe concludes that by being alive and formulating any proposition, one must accept the inevitability of private property.[198]

D. ACTION AND PROPERTY

Action and property, while individually inevitable, are also inseparably linked. That action must involve property logically follows because man must, if nothing else, have a physical place to act even if that action is only one of standing.[199] All action will involve the use of at least a minimal amount of property in addition to one's physical being.

Because "actors" use property or scarce resources in ways that can increase or decrease aggregate utility, it is important to be able to distinguish between actions that benefit society by increasing utility and those actions that do not.[200]

E. UTILITY

Utility is the economic name given to the satisfaction an individual actor derives from achieving an end.[201] A common sense or intuitive approach toward maximizing composite utility in society would involve the

197. *Id.*
198. *Id.* at 22 ("If this were not so and the latecomers supposedly had legitimate claims to things . . . no one could possibly survive as a physically independent decision-making unit at any given point in time, and hence no one could ever raise any validity claiming proposition whatever.").
199. *Id.* at 21.
200. Logic dictates than in order to increase societal utility, actions, which necessarily require property, which decrease individual utility, *ceteris paribus*, would necessarily decrease aggregate utility and those which increase individual utility, *ceteris paribus*, would necessarily increase aggregate utility; *see supra* notes 191-94
201. MILLER, *supra* note 26, at 507.

measuring and summation of all individual utility levels and then enacting laws that would assure increasing this sum.

However, currently only Austrian School economists seem to realize that what makes this "measurement" of utility problematic is its purely subjective nature.[202] The subjectivity of utility makes it impossible to measure in a cardinal way. With no way to assign cardinal numbers to levels of utility, any actual summation is simply impossible.[203]

This non-cardinal measurability of utility also prohibits interpersonal comparisons of utility.[204] One can make only ordinal judgments of utility and then only by observing demonstrated preferences by individual actors.[205] Further, these preferences do nothing to indicate the motive for any action, only that the action demonstrated is preferable to all others perceived by the actor as possible at that instant.[206]

F. TIME PREFERENCE AND UTILITY

Although the subjectivity of utility limits utility analysis greatly, an additional point with respect to utility can be made. Utility derived from a present good is necessarily greater than the present expectation of that same good being realized in the future.[207] Additionally, the utility to which each individual attributes present goods versus future goods also is subjective and cannot be compared interpersonally.

G. DIMINISHING MARGINAL UTILITY

Another law of utility that is logically true is that of its diminishing marginal nature. This law simply stated is that each additional unit of a good subjectively perceived as homogeneous and within the control of the same individual must necessarily have less utility to him than the previous unit.[208] This is logically and necessarily true because the first unit of a homogenous good will always be used to satisfy the most urgent need that can be satisfied with such a good.[209]

202. *See* FORMAINI, *supra* note 43, at 23-25; *see also supra* note 183.

203. VON MISES, *supra* note 14, at 97 ("It is vain to speak of any calculation of [utility] values ... It can be sensed only by the individual. It cannot be communicated or imparted to any fellow man. It is an intensive magnitude.").

204. ROTHBARD-STATE, *supra* note 19, at 260.

205. VON MISES, *supra* note 14, at 96.

206. *Id.*

207. *Id.* at 483 ("Satisfaction of a want in the nearer future is, other things being equal, preferred to that in the farther distant future.").

208. *See* ROTHBARD-STATE, *supra* note 19, at 20-21.

209. *Id.*

So, while we know that each additional unit is worth less than the previous unit, due to utility's non-quantifiable nature,[210] we once again cannot measure by how much less. Because of this inability to measure utility in cardinal terms, it necessarily follows that there can be no interpersonal comparisons of utility. From this, it also necessarily follows that the *nth* unit of a good (to include money) taken from one individual and transferred to another currently possessing some number of units *less than n* is not necessarily composite utility improving.[211] It is this impossibility of interpersonal comparability of utility that limits the number of utility increasing actions (necessarily involving property) to only four.

H. PARETO SUPERIOR ACTIONS

Pareto superior actions are defined as those actions by which "one or more people are better off (in terms of satisfying utility) . . . while no one is worse off."[212] These actions move society toward a pareto optimal state of efficient allocation where no further actions with property can be taken without making someone else worse off.[213] Composite utility increasing property actions consist only of homesteading, self ownership, production without externalities (externalities are examined extensively in the portion of this thesis devoted to force and fraud), and voluntary exchange.[214] It can be logically determined that these actions are pareto superior by considering the consequences of each.

Homesteading employs a resource that no prior actor has recognized as scarce or valued highly enough to put to use. The additional production and utility that results from employment of the new resource increases the utility of the homesteader without making any other individual worse off.[215]

210. *See* FORMAINI, *supra* note 43, at 23-25.

211. Logic dictates that the inability to measure utility in any cardinal way makes impossible the premise upon which welfare economics is grounded. That is, because utility is an intensive magnitude, as opposed to an extensive one, no taking of 100 feet of pipe (for example) from A (who has 500 feet of pipe) to be given to B (who has only 100 feet of pipe) can be said to increase societal welfare. We can say, (because pipe is an extensive magnitude), that B now has 200 feet of pipe but we can never say (because utility is an intensive magnitude) that the utility B gets from having the additional 100 feet of pipe is greater than the disutility A suffers from having 100 feet less. The same is true for all goods including money.

212. *See* ROTHBARD-ETHICS, *supra* note 57, at 203.

213. ROBERT S. PINDYCK & DANIEL L. RUBINFELD, MICROECONOMICS, 581 (2d ed., McMillan Publishing Co. 1992) (1989).

214. ROTHBARD-STATE, *supra* note 19, at 78-79.

215. *Id.* at 78-80.

Self-ownership can, in a sense, be justified under the homesteading principle. It can be thought of as the process by which a specifically human "spirit" homesteads a previously unused resource, namely the physical body.[216]

Production of new goods using one's previously homesteaded or existing property results in combining less valued goods with the resource of time and labor to produce goods valued more highly than the inputs.[217] If the producer (engaging in purposeful action) did not value the newly produced goods (ends) more than the resources employed to produce them, they would not have been produced. Once again, more highly valued goods are introduced into the economy making the producer necessarily better off and no one else worse off.[218]

An exception to the premise that production is necessarily pareto superior is the externality.[219] An externality exists when a cost is imposed upon an individual other than the producer imposing the cost.[220] (Such actions were legally legitimized by nineteenth and twentieth century courts in the name of economic progress.)[221] Although legally legitimized, this is a legitimate exception that does indeed prevent production from being necessarily pareto superior. For this reason, production is classified as pareto superior only in the absence of externality.

Voluntary exchange also necessarily increases the utility of not only one but at least two individuals without making anyone else worse off.[222] Because in order for two actors to exchange properties, both must value more highly what they are receiving over what they are giving in exchange. In this action, no one else can be made worse off as all other existing property is unaffected.

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216. *Id.*

217. *Id.*

218. *Id.*

219. The externality in the context of this analysis is examined more extensively in part II.K.

220. MILLER, *supra* note 26, at 118.

221. ROTHBARD-LIBERTY, *supra* note 51, at 257 ("Before the mid and late nineteenth century, any injurious air pollution was considered a tort, a nuisance against which the victim could sue for damages and against which he could take out an injunction to cease and desist from any further invasion of his property rights. But during the nineteenth century, the courts systematically altered the law of negligence and the law of nuisance to *permit* any air pollution which was not unusually greater than any similar manufacturing firm, one that was not more than the customary practice of fellow polluters . . . These in effect said, 'Sorry, we know that industrial smoke . . . invades and interferes with your property rights. But there is something *more important* than *mere property rights*: and that is public policy, *the common good*.'") (emphasis added).

222. ROTHBARD-STATE, *supra* note 19, at 78-80.

I. MONEY, PRICE, AND THE MARKET PROCESS

Money's emergence results from a series of voluntary exchanges directed toward obtaining more marketable goods and escaping the double coincidence of wants problem.[223] Because possession of more marketable goods (eventually money) facilitates further voluntary exchange, both its emergence and use are necessarily pareto efficient.[224]

Money serves the vital process in an economy of allowing for more efficient resource allocation. With money it becomes possible to express any good in terms of any other good. This allows for cost accounting or an adding together of inputs to compare with the various outputs that could be produced with the same inputs. This serves as a tool to evaluate and increase productivity as inputs are directed to their most highly valued uses.[225]

These actions of production and voluntary exchange can both be considered utility-increasing.[226] Information inherently produced by the use of money and the resulting markets can further enhance the number of utility-increasing actions.[227] This must be true because this market generated information better indicates what types of production and exchanges will be most likely to generate profits by reducing scarcity.[228]

Money prices are the basis for this price mechanism; they are an indication by which resources may be directed to the use that is likely to generate the most utility.[229] As the supply of a highly demanded good becomes scarcer, its price in terms of other goods rises. Identification of this price change provides the insight to producers to divert resources away

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223. This problem exists in barter where the owner of product A needs to find a fellow-barterer who not only wants his product A, but also who has the particular product B he wants in exchange. Here, the owner of product A can still be made better off in an exchange if he trades for a product C, which is more marketable than his Product A. This is true because product C provides him more opportunities to trade for the Product B he ultimately desires than did his product A.

224. *See* ROTHBARD-STATE, *supra* note 19, at 78-79. *See generally infra* part II.H.

225. JOSEPH T. SALERNO, WHY A SOCIALIST ECONOMY IS IMPOSSIBLE 52 (1990) ("Mises's pathbreaking and central insight is that monetary calculation is the indispensable mental tool for choosing the optimum among the vast array of intricately related production plans that are available for employing the factors of production within the framework of the social division of labor. Without recourse to calculating and comparing the benefits of costs of production using the structure of monetary prices determined at each moment on the market, the human mind is only capable of surveying, evaluating, and directing production processes whose scope is drastically restricted to the compass of the primitive household economy.").

226. *See* ROTHBARD-STATE, *supra* note 19, at 78-79.

227. *See* SALERNO, *supra* note 225.

228. *Id.*

229. *Id.*

from the goods whose prices reflect a lesser demand or a more than adequate supply.[230]

It is important to distinguish between price and value as these terms are by no means interchangeable. The price sends market signals as mentioned above. As is the case with any exchange, the actors necessarily value what they receive in exchange more than the price in money they relinquish. Logically, if this were not true, no exchange would occur.

I. EFFECTS OF UNCERTAINTY ON SAVINGS AND GROWTH

Growth and long run prosperity can only increase, *ceteris paribus*,[231] as savings or investment increase.[232] A society which must devote all of its present resources to producing the consumer goods necessary to sustain life from day to day is necessarily stagnant and will enjoy no increase in prosperity. Only by producing more than it consumes, can it sustain itself during periods of production of higher order capital goods which once produced, can be used to produce consumer goods more efficiently.[233] Time preference utility theory[234] is the limiting disincentive to savings and its resulting economic growth.[235]

230. *Id.*

231. MILLER, *supra* note 26, at 50. The assumption that all other things are held equal or constant, except those under study. *Id.*

232. VON MISES, *supra* note 14, at 490 ("[P]ostponement of consumption makes it possible to direct action toward temporally remoter ends. It is now feasible to aim at goals which could not be thought of before on account of the length of the period of production required. . . . Saving is the first step on the way toward improvement of material well being and toward every further progress on this way). This process is easily demonstrable by using the following thought experiment using a one-person, Robinson Crusoe style economy. Suppose Robinson Crusoe spends all of his waking hours catching just enough fish to stay alive. He may have the knowledge (technology or education) necessary to build a casting net from the vines that surround him with which he could "net" (pardon the pun) twice as many fish per hour. However, until he can save enough fish to sustain his life during the time required to produce the net, he cannot improve his productivity and must spend all of his waking hours catching fish by hand just to prevent his own starvation. If he saves enough fish to sustain his life during the production time of the net and in that way converts the savings to the net, then and only then can he can produce more fish. He then can save this new surplus for yet another period during which the production of an even more efficient means of production can be produced.

233. *Id.*

234. *See* VON MISES, *supra* note 14, at 483.

235. Logically, because present consumption of goods always results in more utility than the expectation of consuming that same good in the future, only a return in excess of "that same good in the future" justifies a temporary refraining from present consumption.

Uncertainty plays a major role in the utility increasing aspects of savings and investment.[236] To the extent that savings are not possible to safeguard or property rights become suspect, a shift from savings to consumption invariably results and once again economic growth is curtailed.[237] For this reason, to maximize societal wealth and economic growth, a legal system must avoid allowing economic liberties to become subject to force and the uncertainty of procrustean jurisprudential means of abdication.

K. FORCE, FRAUD, AND EXTERNALITIES

The use of force or fraud to affect any actions mentioned above as pareto superior make them necessarily non-pareto superior.[238] Furthermore, tolerance or initiation of such force by society or the legal system raises the level of uncertainty, results in relatively higher time preference levels, and increases present consumption which reduces investment and future production.[239]

236. ROTHBARD-STATE, *supra* note 19, at 52.

237. *See* VON MISES, *supra* note 14, at 490; see also *supra* note 232 for further analysis. (This is easily demonstrable by returning to the thought experiment of the one person-economy. Suppose now that the island has become a one-person, one-bear economy and regardless of where or how Crusoe attempts to secure his surplus fish at the end of the day, the bear eats the stored fish while Robinson sleeps. Again, the result is a stagnant economy in which no increase in the standard of living is possible. However, another significant effect results from Crusoe's realization of this. To the extent the bear is certain to eat the fish, Crusoe will either consume more fish immediately or fish less, but he will certainly not *save* fish. In either case, this shift from a saving and investment economy to one of pure consumption will prevent any growth in his level of output.

Money (fish) that might have been saved could have been quickly converted to consumption spending. Fortunately for humankind, humankind's ability to reason has over time allowed the triumph of reason and technology over nature such that animals like Crusoe's bear do not destroy "savings." As a result, humankind has moved from less efficient means of production to more efficient means of production and increased societal output (wealth). This superior reasoning ability does not, however, eliminate the ugly menace of expropriation of savings and investment goods by other reasoning animals (namely other humans) who engage in similarly forceful but far less excusable actions.).

238. MURRAY N. ROTHBARD, POWER AND MARKET, 13-14 (2d ed., 1977) (1970) [hereinafter ROTHBARD-POWER] ("Coercive intervention . . . signifies per se that the individual or individuals coerced would not have done what they are doing without the intervention . . . the coerced individual loses in utility as a result of the intervention . . . All instances of intervention, then, are cases where one set of men gain at the expense of other men.").

239. *See* VON MISES, *supra* note 14. See also *supra* notes 232 and 237 for further analysis.

The forced exchange results in one trader being made worse off at the expense of the other.[240] As it is with all forceful interferences, it is logically irrefutable that the actor employing the force (aggressor) is increasing his own utility or he would not have engaged in the forceful action. It is equally true that the recipient of the force (aggressee) is made worse off. Otherwise, no force would have been necessary to prompt the exchange.[241]

Another form of force that is doubly devastating is that of force initiated to prevent an exchange.[242] In this case, once again the aggressor benefits but two other actors are made worse off because they are prevented from entering into an exchange in which both would necessarily have benefitted, albeit subjectively.

Forced homesteading would result in employment of a resource whose value is either regarded as higher when left in a state of nature and unused or the cost of employment of that resource is more costly than the benefits to be derived from its use.[243] Logically, if this were not the case, no force would have been required to bring the resource into production. Threat of force to restrict homesteading of a resource has an equally devastating utility reducing effect.[244]

Force or forceful restriction in the area of self-ownership results in something between partial conscription and total slavery.[245] The value of the individual is necessarily reduced if the voluntary physical uses one can make with one's own body are reduced in any way.[246]

Forced or forcefully restricted production takes resources away from production of a more highly valued product and redirects them to a less desirable use or possibly a use not valued at all.[247] Otherwise, once again no force would be necessary to initiate the change of usage.

Another aspect of the use of force needs to be considered when examining the action of production. This is not force employed against the

240. *See* ROTHBARD-POWER, *supra* note 238.

241. *Id.*

242. *Id.*

243. *Id.*

244. *Id.*

245. *See* ROTHBARD-POWER, *supra* note 238.

246. HOPPE-THEORY, *supra* note 27, at 15 ("[When an owner] . . . can no longer decide on his own, undisturbed by others, to what uses to put his body, the value attached to it by him is now lower; the want satisfaction, the psychic income, that is to say, which he can derive from his body by putting it to certain uses is reduced because the range of options available to him has been limited.").

247. *See* ROTHBARD-STATE, *supra* note 19, at 78-79.

producer but rather force employed by the producer in the act of production otherwise known as "the externality."[248]

The externality must be limited to force initiated against or affecting the physical integrity of another individual's property.[249] This force can be an actual physical invasion but must also include a threat of force that in any way limits the physical uses that an owner might make of his property.[250] This "physical integrity" limitation was apparently recognized by Justice Blackmun in the so-called fundamental liberty case, *Bowers v. Hardwick*,[251] in which Blackmun regarded a homosexual act as involving "no real interference with the rights of others, for the mere knowledge that other individuals do not adhere to one's value system cannot be a legally cognizable interest . . . let alone an interest that can justify invading the houses, hearts, and minds of citizens who choose to live their lives differently."[252]

Fraudulent behavior destroys the utility maximizing characteristics of pareto superior exchanges.[253] Exchanges entered into while relying on false information knowingly provided by one of the exchangers results in the fraudulent actor gaining at the expense of the defrauded individual.[254] This defrauded individual will have given up more than would have been necessary to acquire what he received in the exchange.

248. *Id.*

249. Logically, the externality to be internally consistent in its application, must not include the subjective devaluation of a property that has suffered no interference in its physical integrity. This type of devaluation can occur any time the supply of a similar property changes or the demand (another individual's subjective interest) in that type of property changes. Allowing such devaluation resulting from non-physical invasion to be considered an externality would either require limiting other's physical use of their property while maintaining the right to use one's own or assume a right to control another's subjective valuation while assuming a right to one's own subjective valuation in making that judgment. (Either of which is an internally inconsistent or non-universalizable proposition.).

250. *Id.*; *see, e.g.*, Lucas v. South Carolina Coastal Council, 112 S. Ct. 2886 (1992). In *Lucas*, the coastal property in question was nearly totally devalued ("regulatory taking") not by others use of their property or subjective valuations of the coastal property. Rather, the devaluation resulted from threat of force limiting the physical uses to which the property owner could put his own land. Here, there is no physical invasion by the aggressor (namely, the Coastal Commission) only a threat of force affecting the physical uses to which the property could be put by its owner. *Id.*

251. 478 U.S. 186 (1986).

252. *Bowers*, 478 U.S. at 213 (Blackmun, J., dissenting). Blackmun was the quintessential Procrustean here as his dissent in *Lucas*, an economic liberty case, recognized no due process violation. *Id.*

253. ROTHBARD-POWER, *supra* note 238, at 245-46.

254. *Id.*

If the exchange would have taken place even without the misrepresentation, no fraud (force) would have been employed. All fraud is employed at a cost to the fraudfeasor because the fraudfeasor will then face an increased level of skepticism which will have the effect of decreasing the number of (utility increasing) exchanges he can enter in the future.

In addition to initiation of force rendering otherwise pareto superior actions non-pareto superior, force, fraud, and externalities have an additional indirectly devastating effect on the utility increasing ability of individuals. This devastating effect results because force inhibits the utility enhancing market process and its resulting price mechanism.[255] Force, as defined above, redirects resources to less valued uses and the entire value reflecting ability of the market process becomes distorted.[256]

L. COLLECTIVE FORCE

Force (and fraud) engaged in by individuals is regarded as criminal activity.[257] Theft, murder, and kidnapping, while generally considered criminal in the common law, also can be considered "economically criminal" or non-pareto superior.[258] While the illegality of such criminal actions as these are generally justified on moral and ethical grounds, pareto optimal utility analysis provides justification for their prohibition as well.

It would be a fallacy of composition to assume that utility, which cannot be increased other than by the pareto superior activity of individuals, can somehow be increased by non-pareto superior or forceful actions when initiated by groups of individuals.[259] Only an individual can know the utility derived from one's own actions and resource use.[260] The impossibility of interpersonal comparisons of utility prevent individuals from knowing the utility of another.[261]

But this fallacy of composition is overlooked in maintaining that utility destroying initiations of force by individuals identified above as criminal somehow become good for society when they are jointly initiated by a democratic majority. Utility losses and destructive market-process effects

255. *See* SALERNO, *supra* note 225.

256. VON MISES, *supra* note 14, at 258 ("The [unfettered] market process is the adjustment of the individual actions of the various members of the market society . . . The market prices tell the producers what to produce, how to produce, and in what quantity . . . it is the center from which the activities of the individuals radiate.").

257. ROTHBARD-LIBERTY, *supra* note 51, at 23-24.

258. *See* ROTHBARD-POWER, *supra* note 238.

259. *See* ROTHBARD-LIBERTY, *supra* note 51, at 23-24.

260. *See* FORMAINI, *supra* note 43 at 23-25; see also *supra* note 183 for further analysis.

261. *See* ROTHBARD-STATE, *supra* note 19, at 260.

are identical whether initiation of force is undertaken by individuals or collectives (groups of individuals).[262]

It is this above mentioned fallacy of composition, however, that underlies the utility destroying initiation of collective force employed by the democratic state in its pursuit of advancement of the "public good or public interest."[263]

M. THEORETICAL CONCLUSION

A legal system that has as its purpose the maximization of societal utility would be one whose guiding principle would be the encouragement of pareto superior actions[264] and discouragement of individual and collective force.[265]

The Austrian School Paradigm provides the framework and tools which can be used to analyze judicial decision's effects on opportunities for Pareto superior behavior and the resulting overall utility gains by society in its attempt to move toward the desirable Pareto optimal state. Such a paradigm must be the basis for a constitutional scrutiny of individual rights in the legal system. This paradigm, ironically, is exactly the "shibboleth" of libertarianism[266] for which Justice Holmes held such bitter contempt.[267]

III. AUSTRIAN SCHOOL THEORY AND THE NON-SEPARABILITY OF LIBERTIES

A. INDIVIDUAL AS THE UNIT OF ANALYSIS

Citing *Arizona Governing Committee v. Norris*,[268] Justice O'Connor writes in *Metro Broadcasting, Inc. v. Federal Communication Commission*,[269] "Government must treat citizens as *individuals*, not as simply components of a racial, religious, sexual or national class."[270] "Social scientists may debate how peoples' thoughts and behavior reflect their background, but the Constitution provides that the Government may not allocate benefits and burdens among *individuals* based on the assumption

262. ROTHBARD-POWER, *supra* note 238, at 15.

263. *See* Wolff Packing Co. v. Court of Indus. Relations, 262 U.S. 522 (1923).

264. *See* ROTHBARD-STATE, *supra* note 19, at 78-79.

265. *See* ROTHBARD-POWER, *supra* note 238.

266. *See* ROTHBARD-LIBERTY, *supra* note 51.

267. Lochner v. New York, 198 U.S. 45, 63 (1905).

268. 463 U.S. 1073 (1983).

269. 497 U.S. 547 (1990).

270. *Metro Broadcasting*, 497 U.S. at 602 (O'Connor, J., dissenting) (emphasis added).

that race or ethnicity determines how they act or think."[271] The Court was "the government entity esteemed above all others to protect the rights of the *individual* as a counterweight to popular rule."[272]

The Austrian School theorists are in total agreement with Justice O'Connor's notion that the unit of analysis can only be the individual actor.[273] Only individuals act, only individuals exercise liberty.[274] Any legal rights analysis not cognizant of the individual as the unit of analysis is plagued with the insurmountable obstacle of the fact that an individual can at the same time belong to more than one group.[275]

B. THEORETICAL BASES FOR NON-SEPARABILITY

Given that the individual must be the unit of analysis, six derivative arguments from the Austrian School theory can be used to demonstrate the non-separability of so-called fundamental and economic liberties.

1. *All Action is Economic*

First and most basic, all human actions or exercised liberties are necessarily economic.[276] These actions are very simply the pursuit of ends by the use of scarce resources known as means.[277] Every single action by any individual is an attempt to increase their utility level or reduce disutility.[278] Even acts of so-called charity are intended to provide a warm

271. *Id.* (emphasis added).

272. *See* SIEGAN, *supra* note 36, at 88.

273. VON MISES, *supra* note 14, at 42-43 ("All actions are performed by individuals. A collective operates always through the intermediary of one or several individuals whose actions are related to the collective as the secondary source. It is the meaning which the acting individuals and all those who are touched by their action attribute to an action, that determines its character. The hangman, not the state, executes a criminal . . . For a social collective has no existence and reality outside of the individual member's actions. The life of a collective is [only] lived in the actions of the individuals constituting its body. Those who want to start the study of human action from the collective unity encounter an insurmountable obstacle in the fact that an individual at the same time can belong and—with the exception of the most primitive tribesman—really belongs to various collective entities.").

274. *Id.*

275. *Id.*

276. *See* VON MISES, *supra* note 14, at 13-14.

277. *Id.*

278. VON MISES, *supra* note 14, at 92-93 ("Thinking man sees the serviceableness of things, i.e. their ability to administer to his ends, and acting man makes them means. It is of primary importance to realize that parts of the external world become means only through the operation of the human mind and its offshoot, human action. Economics is not about things and tangible material objects; it is about men, their meanings and actions. Goods, commodities, and wealth and all the other notions of conduct are not elements of nature; they are elements of human meaning and conduct. He who wants to deal with them must not look at the external world; he must search for them in the meaning of acting men. . . . An end is everything which men aim at. A means is everything which acting men consider as such. . . . Means are necessarily always limited, i.e. scarce with regard to the services for which man wants to use them. If this were not the case, there would not be any action with regard to them. Where man is not restrained by the insufficient quantity of things available, there is no need for any action.").

feeling in one's belly or at least relieve guilt felt for the suffering of another.[279] To suggest that one action is a fundamental liberty while another is an economic liberty is to deny the very simple action axiom that all actions (excepting reflexes) are purely economic.[280]

In *Meyer v. Nebraska,*[281] the rights of parents to educate their children as they saw fit were initially upheld as a right of the individual to contract to engage in any of the common occupations of life and to acquire useful knowledge[282] but was later cited in *Griswold v. Connecticut*[283] to justify the "right to privacy" and the new "fundamental liberty" because under the First and Fourteenth Amendments, "the right of freedom of speech includes not only the right to utter or to print but the right to distribute, the right to receive, the right to read.[284]

So which is it, the right to contract for acquiring useful knowledge or a fundamental right to receive and read under the First Amendment? The answer, of course, is WHO KNOWS? Whether education is human capital accumulation engaged in solely for the purpose of future capital accumula-

279. *Id.* at 241.

280. *Id.* at 233-34 ("Strictly speaking, people do not long for tangible goods as such, but for the services which these goods are fitted to render them. They want to attain the increment in well-being which these services are able to convey. But if this is so, it is not permissible to excerpt from the orbit of 'economic' action those actions which remove uneasiness directly without the interposition of any tangible and visible things. . . . Acting man is always concerned both with 'material' and 'ideal' things. He chooses between various alternatives, no matter whether they are to be classified as material or ideal. In the actual scales of value, material and ideal things are jumbled together. *Even if it were feasible to draw a sharp line between material and ideal concerns, one must realize that every concrete action either aims at the realization both of material and ideal ends or is the outcome of choice between something material and something ideal* . . . we must not overlook the fact that in reality no food is valued solely for its nutritive power and no garment or house solely for the protection it affords against cold weather and rain. It cannot be denied that the demand for goods is widely influenced by metaphysical, religious, and ethical considerations, by aesthetic value judgments, by customs, habits, prejudices, tradition, changing fashions, and many other things.") (emphasis added).

281. 262 U.S. 390 (1923).

282. *Meyer*, 262 U.S. at 399.

283. 381 U.S. 479 (1965).

284. *Griswold,* 381 U.S. at 482.

tion and so-called economic gain or for utility that comes from Von Mises' "metaphysical, religious, and ethical considerations, by aesthetic value judgments"[285] can only be known in the mind of the actor. More troublesome is that it is almost certainly a combination of both motives.

2. *All Actions or Liberty Require Property*

All action necessarily requires the use of property.[286] Even choosing physical inactivity, which is itself an action, requires if nothing else a "place to be."[287] It is thus impossible to regulate the use of property without by definition affecting the actions to which an individual actor may have put that property.[288] To suppose that regulation which limits the uses one makes of one's own body deserves a higher level of judicial protection from collective force than regulation that limits the property necessary to use one's body is grossly inconsistent. The point here is that as all action requires property, regulating property necessarily limits that action.[289]

Because "goods, commodities, and wealth" are not elements of nature, but rather "elements of human meaning and conduct,"[290] regulation of them can never be accomplished with certainty of not regulating away an individual's means or ends.[291] In fact, what may be purely ends for one individual may be another individual's means.[292]

As soon as the commodities and wealth which the market economy provides to individuals is limited, all fundamental liberties and bills of rights become meaningless.[293] Freedom of the press is a mere shuck if the

285. *See* VON MISES, *supra* note 14, at 233-34; *see also supra* note 280 and accompanying text.

286. *See* HOPPE-*Ultimate*, *supra* note 196, at 21.

287. *Id.*

288. HOPPE-THEORY, *supra* note 27, at 15 ("Whatever the degree, regulation of property always, and necessarily so, produces two types of effects. The first effect, 'economic' in the narrower sense of the term, is a reduction in the amount of investment in human capital. . . . Since he [the individual] can no longer decide on his own, undisturbed by others, to what uses to put his body, the satisfaction, the psychic income, that is to say, which he can derive from his body by putting it to certain uses is reduced because the range of options available to him has been limited.").

289. *Id.*

290. *See* VON MISES, *supra* note 14, at 92-93; *see also supra* note 278.

291. *See* VON MISES, *supra* note 14, at 96; *see also infra* note 401.

292. *Id.*

293. *See* VON MISES, *supra* note 14, at 287; *see also supra* note 15.

authority controls all printing offices and paper plants.[294] "And so are all the other rights of men."[295]

In fact, absent property rights and market actions, ability to exercise the so-called fundamental liberties are lessened due to an increase in the scarcity of the tools which serve as means.[296]

3. *Personal Devaluation*

It is necessarily true that regulation of the uses of property necessarily limits the uses with which one can put the scarce resource of their own body to.[297] This necessarily devalues the individual as fewer options for the individual, *ceteris paribus*, reduces the value of the individual.

If self worth or dignity is to be protected as a fundamental liberty,[298] a legislature can hardly regulate away options the physical body can be put to without devaluing that individual's self worth.[299] In *Bowers v. Hardwick*,[300] rights of privacy were argued by the dissent to be protected because "a person belongs to himself and not others nor society as a whole."[301] As Hoppe demonstrates, regulation which limits the options a person can put his bodily property to, necessarily devalues that bodily property.[302] Yet this fundamental liberty is expunged by way of economic regulation of other property which requires only a "rational basis" justification to be deemed constitutional.

In the case of *Lochner v. New York*,[303] which sparked Holmes dissent chastising economic theory based constitutional principles,[304] the right of a baker to engage in what he regarded as a pareto superior exchange or more work for additional pay. This "economic" regulation effected nothing more than the physical use to which the laborer could put his body.[305] On one hand, bodily integrity is deemed to be a fundamental liberty,[306] yet,

294. ROTHBARD-LIBERTY, *supra* note 51, at 43.

295. *See* VON MISES, *supra* note 14, at 287; *see also supra* note 15.

296. *See supra* part II.C.2.

297. *See* HOPPE-THEORY, *supra* note 27, at 15; *see also supra* note 288.

298. Planned Parenthood v. Casey, 112 S. Ct. 2791, 2807 (1992).

299. *See* HOPPE-THEORY, *supra* note 27, at 15; *see also supra* note 288.

300. 478 U.S. 186 (1986).

301. *Bowers*, 478 U.S. at 204 (citing Thornburgh v. American College of Obstetricians & Gynecologists, 476 U.S. 747, 777 n.5 (1986)).

302. *See* HOPPE-THEORY, *supra* note 27, at 15; *see also supra* note 288.

303. 198 U.S. 45 (1905).

304. *Lochner*, 198 U.S. at 75.

305. The property (ovens, etc.) owned by the baker would have been used to the same physical degree. Only the particular individual operating them would have been differed.

306. *See, e.g.*, Roe v. Wade, 410 U.S. 113 (1973); Planned Parenthood v. Casey, 112

the baker's own decision to put his body to that particular use would have been denied by Holmes.[307]

In the Austrian paradigm, it is plainly recognized that the use to which the baker intended to put his own body, necessarily involved property.[308] However, in limiting the physical uses to which the laborer could put his body, his self worth necessarily was diminished, or his human capital if you will.[309] If self worth and dignity are to be protected as fundamental liberties,[310] a legislature can hardly regulate away options that the physical body can be put to without devaluing that individual's self worth.

4. *Motive Discernment and Ends/Means Separation Problems*

Impossibility of motive discernment makes the procrustean division of personal and economic liberties even more untenable. Because demonstrated preferences never reveal motive,[311] only preference,[312] no action could externally be identified as one taken as a means to an end, or an end in itself.[313]

This is problematic when the courts give one level of scrutiny to a so-called "fundamental liberty means" exercised for no other purpose than a so-called "economic liberty end" which can be regulated away with mere rational basis scrutiny. How, without knowing actual motive, is one to know that what appears to be the exercise of a fundamental liberty end is no more than the means for an economic end. And conversely, an economic liberty which may appear to be an economic end in itself, may be nothing more than economic fodder necessary to exercise the fundamental right of expression on a grander scale.[314] (Free speech is after all not "free" in the economic sense). For this reason, different levels of judicial scrutiny become totally meaningless.

S. Ct. 2791 (1992).

307. *Lochner*, 198 U.S. at 75.

308. *See* HOPPE-*Ultimate*, *supra* note 196, at 21 (All actions do, of course!).

309. *Id.*

310. *See Planned Parenthood*, 112 S. Ct at 2807.

311. *See* VON MISES, *supra* note 14, at 96 (stating that these preferences do nothing to indicate the motive for any action, only that the action demonstrated is preferable to all other perceived by the actor as possible at that instant).

312. *Id.*

313. *See* VON MISES, *supra* note 14, at 92-93; *see also supra* note 280.

314. Capital accumulation may be accomplished for the purpose of exercising a so-called economic liberty (i.e., opening a furniture store) or a so-called personal liberty (i.e., seeing a fertility doctor). Should the means of capital accumulation be given different levels of scrutiny depending upon its intended purposeful end?!

Realistically, since the time required to exercise a personal liberty such as free speech is scarce (not free), it is quite reasonable to expect that a personal liberty such as free speech is seldom, if ever, exercised as a means for anything other than what would, under the procrustean scheme, be regarded as an economic end.

Only because free speech serves as a tool or means of achieving political ends that, in turn, often serve to attain purely economic benefit, (which all actions do),[315] does it have any inherent value worth constitutionally protecting. Only by knowing the motive of the individual actor and whether an action is an end or a mean, could we sort out a so-called economic liberty from a so-called personal liberty.[316] But we can never know the motive of another actor.[317] Motive is after all, solely in the mind of the individual.[318] Even the action of declaring the action of a certain motive would prove useless other than to suppose the declarer prefers the listener to associate that motive with the action.

This impossibility of sorting this out is clearly demonstrated in the case of *Eastern R.R. Presidents Conference v. Noerr Motor Freight*.[319] In *Noerr*, the high Court unanimously held that understandings and agreements among competitors that could traditionally be regarded as an illegal conspiracy in violation of the Sherman Antitrust Act were beyond the reach of the statute if they constituted attempts to influence government decisions.[320] Here, the fundamental freedom of expression was engaged in solely for the purpose of eliminating competition and economic benefit which, once achieved, would have been subject to a significantly lower level of scrutiny. The "sham" exception[321] was apparently included in an attempt to deal with the procrustean impossibility and absurdity.

5. *Fundamental and Economic Reverse Utility Preferences*

Demonstrated preference and voluntary exchange suggest that so-called economic and personal liberty cannot be treated with different levels of scrutiny as neither are inherently more or less valuable. The pareto superior societal utility increase of voluntary exchanges[322] exists only because both actors value that which they receive in the exchange more than that which

315. *See* VON MISES, *supra* note 14, at 13-14 (*All* actions are economic).

316. *See supra* note 314.

317. *See* VON MISES, *supra* note 14, at 96.

318. *Id.*

319. 365 U.S. 127 (1961).

320. *Noerr Motor Freight*, 365 U.S. at 136.

321. *Id.* at 144.

322. *See* ROTHBARD-STATE, *supra* note 19, at 78-79.

is foregone. This reverse utility preference is what prompts an exchange in the first place. But this necessarily means that the parties to the exchange have reverse value preferences.

To suppose that so-called personal liberties warrant a higher level of judicial protection from the tyranny of the majority exercised by the democratic legislative process is to suppose that they are of more value to society than so-called economic liberties. The unit of analysis, of course, must remain the individual.[323] The fact that every exchange involving the trading of one type of liberty for the other demonstrates that at least one trading partner values the so-called economic good more than the so-called fundamental liberty and the other values the fundamental liberty more than the economic good. That such an exchange ever takes place demonstrates that either liberty's preferred valuation is necessarily non-existent.

Everyday exchanges such as employment contracts demonstrate that employees forego (at least temporarily) certain fundamental liberties in exchange for what are regarded as purely economic benefits, namely money.[324] As an example, free speech and freedom from search and seizure in voluntary drug testing agreements are often foregone by the employee as part of the exchange.[325]

For years, so-called fundamental liberties have been exchanged for mere economic benefit. In famous contract law cases, a nephew entered into a voluntary exchange to refrain from engaging in such fundamental liberties as swearing (freedom of expression) *Hamer v. Sidway*,[326] and consumption of liquor[327] or as in *Earle v. Angell*[328] where, again a nephew, agreed to accept $500 to forego a future "right to travel" elsewhere by attending a funeral service.[329] It is clear that fundamental liberties are often foregone in exchange for "mere economic benefit." But the opposite must be true of parties who refuse to enter such exchanges. It is only because they value the fundamental liberty to be foregone more than the economic benefit to be offered that they refuse to enter such exchanges. No basis for preferred protection of so-called fundamental liberties could

323. *See* VON MISES, *supra* note 14, at 42-43; *see also supra* note 273.

324. Travel, free speech, drug testing, and to some extent even reproductive rights may be temporarily or not so temporarily foregone in the process of engaging in voluntary employment contracts.

325. *See supra* note 324.

326. 27 N.E. 256 (N.Y. 1891).

327. *Hamer*, 27 N.E. at 256.

328. 32 N.E. 164 (Mass. 1892).

329. *Earle*, 32 N.E. at 164.

possibly be justified on value to society grounds in light of the reverse utility preferences prompting these exchanges.

6. *Universality Principle Problem*

Unless so-called fundamental liberties are reconciled within the framework of property rights, the resources required to engage in these liberties (demand) will always exceed the supply of such resources. Alleged rights, be they economic or otherwise, cannot be recognized as rights unless they can be "universalized" or enjoyed by all individuals simultaneously without being internally contradictory.[330]

Absent property rights and the market mechanism, demand for the tools of free speech, paper and ink, for example, will always exceed supply with no universalizable means of rationing.[331] It would be possible to universalize a right to all the air time or newspaper coverage one can obtain by voluntary exchange on a free market. However, absent that right being subject to consent of a property owner, a right to speak from a certain physical location is by definition non-universal simply because two physical bodies cannot occupy the same place at the same time and all liberties require at least some minimal amount of property in which to be engaged.[332] As such, no right status can be granted.

Any according of rights status to a right of expression aside from the recognition of the necessarily accompanying property right, leads to the rationing problem.[333] A scarce resource, if not allocated by price, must be allocated by some other means by its owner. But to the extent this resource allocation is negated and made free to any potential user, the demand for obtaining this time or space is bound greatly to exceed the supply, and hence a perceived "shortage" of the resource is bound to develop.[334]

Although generally this resource allocation problem tends to be one of allocation of government property remedied by time, place, and manner restrictions, in the truest sense, his is simply unsatisfactory. Time preference[335] and subjective utility theory[336] dictate that even the same physical location at different times is necessarily a different good. Thus, the right to speak from a public podium restricted by different time restraints is not a resolution of the universality problem at all.

330. *See* HOPPE-PROPERTY, *supra* note 79.

331. ROTHBARD-ETHICS, *supra* note 57, at 115-16.

332. *See* HOPPE-*Ultimate*, *supra* note 196, at 21.

333. *See* ROTHBARD-ETHICS, *supra* note 57, at 115-16.

334. *Id.*

335. *See* VON MISES, *supra* note 14, at 483.

336. *See* FORMAINI, *supra* note 14, at 23-25; *see also supra* note 183.

Courts, in the Procrustean tradition of protecting fundamental liberties to a greater degree than economic liberties, have reached absurd results. In *Pruneyard Shopping Center v. Robins*,[337] government courts misallocated a mall owner's property to paid petitioners under the guise of fundamental freedom of speech![338]

C. SECONDARY EFFECTS OF THE PROCRUSTEAN SEPARATION SCHEME

1. *Uncertainty and Economic Stagnation*

The arbitrary judicial decisions bleeding from embracement of the impossible Procrustean separation scheme result in more uncertainty in judicial outcomes. While "[l]iberty is argued to find no refuge in a jurisprudence of doubt,"[339] it is axiomatic that economic growth finds no refuge when property rights are suspect.[340] To the extent an impossibly arbitrary separation scheme is embraced by the courts, certainty of property rights are suspect at best. As property rights become suspect, a shifting from investment to consumption spending is certain.[341] Equally certain is that this shift away from investment necessarily results in lower levels of economic growth than would have been possible absent the shift.[342]

One schizophrenic effect exists with the Court's treatment of certain educational rights as fundamental liberties,[343] while at the same time, making property rights suspect. Education requires savings.[344] Yet, increased savings necessary for education require certainty in property rights.[345] To afford the necessary condition of savings (the means), less judicial protection than education (the end), is totally inconsistent and, well, Procrustean. Education (human capital accumulation), like other forms of capital accumulation, requires savings to rely upon for minimal consumption during the period of accumulation until the increased consumption production is realized from the new capital accumulation.[346]

337. 447 U.S. 74 (1980).
338. *Pruneyard Shopping Center*, 447 U.S. at 91.
339. Planned Parenthood v. Casey, 112 S. Ct. 2791, 2803 (1992).
340. *See* ROTHBARD-STATE, *supra* note 19, at 52.
341. *See* VON MISES, *supra* note 14, at 490; *see also supra* note 232.
342. *Id.*; *see also* ROTHBARD-STATE, *supra* note 19, at 52.
343. *See, e.g.*, Meyer v. Nebraska, 262 U.S. 390 (1923); Pierce v. Society of Sisters, 268 U.S. 510 (1925).
344. *See supra* note 232. Education (production of human capital) requires savings so consumption can be foregone during this period of (human) capital accumulation. *Id.*
345. *See* ROTHBARD-STATE, *supra* note 19, at 52.
346. *See* VON MISES, *supra* note 14, at 490; *see also supra* note 232.

2. *Fundamental Liberties Necessarily Reduced*

All liberties of action require property.[347] Freedom of the press is meaningless without ink, paper and press.[348] Common sense dictates that unrestricted abortion is meaningless without a physician to perform the procedure and the right to travel is diminished without efficient means of transportation.

Absent the increased production from savings and investment resulting from certainty of property rights, supplies of such means of exercising so-called fundamental liberties will likewise fall[349] against a steady demand curve, *ceteris paribus*.

The law of marginal utility defines that the demand curve is downward sloping[350] and a diminished supply against this demand curve invariable results in higher prices for such goods.[351] At higher prices, less tools necessary to exercise fundamental liberties will be available or consumed[352] and as such, *ceteris paribus*, the reduction in economic liberties and property rights necessarily brings with it diminished exercising of so-called fundamental liberties. This is certainly not to say the exercising of fundamental liberties are reduced for everyone at the same relative rate.

Rather, as fewer means become available as property rights become suspect and, in turn, available only at relatively higher prices,[353] fundamental liberties become relatively more accessible to the wealthy and relatively less available to the economically disadvantaged. So in addition to overall liberties being decreased, so also is there a shift in the de facto ability to exercise these "rights."

In the case of *Griswold v Connecticut*,[354] in which the "fundamental" right to privacy was concocted, a dichotomy between regulating the manufacture and sale of contraceptive devices rather than simply their use[355] was curiously mentioned. But absent the right to engage in the pareto superior action of contraceptive device production, which obviously

347. *See* HOPPE-*Ultimate*, *supra* note 196, at 21.
348. *See* VON MISES, *supra* note 14, at 287; *see also supra* note 15.
349. *See* VON MISES, *supra* note 14, at 490; *see also supra* note 237.
350. *See* ROTHBARD-STATE, *supra* note 19. The demand curve is logically derived as downward sloping as it describes graphically cost on the vertical axis and quantity consumed on the horizontal axis. The downward slope describes the inverse relationship between cost and quantity consumed derived from this law of diminishing marginal utility. *Id.*
351. *Id.*
352. *Id.*
353. *Id.*
354. 381 U.S. 479 (1965).
355. *Griswold*, 381 U.S. at 485.

brings such devices into the marketplace, to what extent is the privacy right of using these contraceptive devices meaningful in any way?

3. *Efficient Resource Allocation Problem*

Because economic regulation often, as in *Nebbia*,[356] results in the creation of a board of "central planners," staffed by self-interested representatives of the industry behind the regulation,[357] overall societal efficiency declines.[358] Abandonment of market prices which are necessarily eliminated by these central planners in their initiation of collective force[359] through the state, destroys the market signal[360] by which resources may be directed to the use that is likely to generate the most utility.[361] As in *Nebbia*,[362] instead of resources being diverted away from milk production as profits were likely falling due to an abundance of supply and to areas of production where relative scarcity was experienced,[363] the effect of the "three men at headquarters"[364] was to shift resources where too many were already misallocated and, as importantly, away from an area of industry lacking such resources.[365]

D. EVEN RATIONAL BASIS SCRUTINY BARS SOCIO-ECONOMIC REGULATION

Upon recognition that so-called fundamental and economic liberties are inextricably intertwined, the question remains as to which level of judicial scrutiny is appropriate for legislative limits on liberties. The current judicially-recognized choices are the rational relation test,[366] a stricter scrutiny requiring narrowly tailored means to achieve a compelling state interest[367] (as used for the so-called fundamental liberties), and an intermediate[368] or alternative level of scrutiny.

356. Nebbia v. New York, 291 U.S. 502 (1934).
357. *See generally* WEINSTEIN, *supra* note 60.
358. *See* SALERNO, *supra* note 225.
359. *Id.*
360. *Id.*
361. *Id.*
362. Nebbia v. New York, 291 U.S. 502 (1934).
363. *Nebbia,* 291 U.S. at 558 (McReynolds, J., dissenting).
364. *Id.*
365. *See* VON MISES, *supra* note 14, at 258; *see also supra* note 256.
366. *See* Williamson v. Lee Optical, 348 U.S. 483, 487-88.
367. *See* Roe v. Wade, 410 U.S. 113 (1973).
368. *See* Craig v. Boren, 429 U.S. 190 (1976); Frontiero v. Richardson, 411 U.S. 677 (1973).

The Austrian School's strict adherence to the subjective utility analysis[369] dictates that regardless of which of the currently-recognized levels of scrutiny are chosen, the outcome always remains protective of liberty even in the Madisonian sense of the property in rights.[370]

Even the rational relation test would require that a rational basis exist for the deprivation of liberty within the context of the state's preservation of morals, welfare, etc. If truly underlying these socio-economic regulations is an overall benefit to society, no rational basis for limiting liberties identified as pareto-efficient[371] could ever exist.

Legislation of this type is by definition collective force.[372] Because cardinal quantification of utility is impossible,[373] and in turn, so are interpersonal comparisons of utility,[374] no rational basis could ever exist for enacting what is by definition redistributionist ("a law takes property from A and gives it to B")[375] legislation.

Absent knowing that the increase in marginal utility to those benefitted more than offsets the marginal utility decrease to the burdened, one could never know that the winners gained more utility than the losers lost as a result of the initiation of this collective force.[376] As in *Nebbia,*[377] no rational basis exists for knowing that consumers and retailers (each engaging in voluntary exchange and each necessarily benefitting) ultimately jointly lose less from the prohibition of free exchange than the dairy producers gain by their using the collective force of government to establish an artificial minimum selling price for what many would regard as a "necessity of life," namely milk.[378] Common law notions of contract and tort would still afford protection and damage awards for initiation of individual force, fraud, and externalities. Within the Austrian Paradigm, legislation regarding the penalties to be imposed for initiation of individual force and fraud (as regarded by Bastiat[379] as the proper role of government legislation) might still be "rational" for the state to regulate.

Any regulation not designed to implement these either retributionist or restitutionist "punishments" for initiations of force are thus inherently

369. *See* FORMAINI, *supra* note 43, at 23-25; *see also supra* note 183.
370. Dorn, *supra* note 67, at 3.
371. *See* ROTHBARD-ETHICS, *supra* note 57.
372. *See* ROTHBARD-POWER, *supra* note 238, at 15.
373. *See* FORMAINI, *supra* note 43 at 23-25; *see also supra* note 183.
374. *See* ROTHBARD-STATE, *supra* note 19, at 260.
375. Calder v. Bull, 3 U.S. 386, 387-88 (1798).
376. *See* ROTHBARD-POWER, *supra* note 238, at 15.
377. Nebbia v. New York, 291 U.S. 502 (1934).
378. *Id.* at 542.
379. *See* BASTIAT-LAW, *supra* note 63, at 6.

irrational within the principles of the subjective utility theory and free-market-, non-interventionary- favoring Austrian School.[380] Prohibition of all other legislative redistributional schemes are deemed by the Austrian Paradigm to be inherently irrational, unless of course, minimizing societal wealth is the judicially desired "rational" end.

CONCLUSION

The Court's role in the check and balance system of federalism is intended to serve as a check on the majoritarian abuses of power exercised through the legislative, executive, and now administrative branch violations of individual rights.[381] Without a sound scientific framework by which these various actions by the legislative, executive and administrative branches of the state can be analyzed by the Court for their right protecting savvy, no right is sacred, safe, or as the short history of this country has demonstrated, salvaged.[382]

Justice Holmes, in his dissenting opinion in *Lochner*,[383] suggested disassociating economic science from constitutionality considerations. Yet, it is the praxeology-based Austrian School of Economics with its strict adherence to subjective utility theory that provides the ideal scientific framework[384] to avoid the pitfalls of what constitutional scholar Siegan describes as a "collection of catchwords and catch phrases which would fill pages but would not be helpful in establishing guidelines."[385]

The logically irrefutable axioms of the Austrian School of Economics demonstrate that the Procrustean separation of so-called fundamental and economic liberties is impossible,[386] ludicrous, destructive of all liberties,[387] and results in a lower standard of living for all.[388]

380. *See* FORMAINI, *supra* note 43, at 23-25; *see also supra* note 183.
381. *See* SIEGAN, *supra* note 36, at 88.
382. *See supra* part I.B.
383. Lochner v. New York, 198 U.S. 45, 75 (1905).
384. *See supra* part II.A-M.
385. *See* SIEGAN, *supra* note 36, at 208.
386. *See supra* part III.B.
387. *See supra* part III.C.2.
388. *See* VON MISES, *supra* note 14, at 839 "We may fully endorse the religious and ethical precepts that declare it to be man's duty to assist his unlucky brethren whom nature has doomed. But the recognition of this duty does not answer the question concerning what methods should be resorted to for its performance. It does not enjoin the choice of methods which would endanger society and curtail the productivity of the human effort. *Neither the able-bodied nor the incapacitated would derive any benefit from a drop in the quantity of goods available.*" (emphasis added); *see also* part III.C.1.3.

The Austrian School demonstrates this impossibility of Procrustean separation of liberties because 1) All actions are necessarily economic;[389] 2) exercising any liberty requires an accompanying property right (a so-called economic liberty);[390] 3) the so-called fundamental liberty of self worth is necessarily devalued whenever so-called economic liberties are restricted;[391] 4) impossibility of ends/means identification makes any so-called economic regulation violative of fundamental liberties;[392] 5) commonplace exchanges demonstrate that neither fundamental or economic liberties are more highly valued;[393] and 6) the universality principle of rights identification makes a right to so-called fundamental liberties logically impossible without an accompanying property rights condition.[394]

Additionally, even if this Procrustean separation scheme were somehow possible, economic regulation, under Austrian subjective utility pareto-optimality analysis, is nothing other than collective force which will not withstand even the minimal scrutiny level of the "rational basis test."[395] This framework of analysis clearly demonstrates that because interpersonal comparisons of utility cannot be executed,[396] wealth redistribution in the name of the common good or public interest is arbitrary at best and has no scientific justification, and is an inherently irrational means to any genuine "public interest" end.[397]

But are economic tenets of the Austrian School reconcilable with notions of justice enunciated by United States Supreme Court Justices? Consider the similarity of the following quotations:

> Property does not have rights. People have rights. The right to enjoy property without unlawful deprivation, no less than the right to speak or the right to travel, is in truth, a "personal" right. . . . In fact, a fundamental interdependence exists between the personal right to liberty and the personal right in property. Neither could have meaning without the other.[398]
>
> —Justice Stewart, U.S. Supreme Court, 1972, and

389. *See supra* part III.B.
390. *Id.*
391. *Id.*
392. *Id.*
393. *Id.*
394. *See supra* part III.B.
395. *See* Williamson v. Lee Optical, 348 U.S. 483, 487-88.
396. *See* ROTHBARD-STATE, *supra* note 19, at 260.
397. *See* ROTHBARD-POWER, *supra* note 238, at 13-14.
398. Lynch v. Household Fin. Corp., 405 U.S. 538, 552 (1972).

> In the first place, there are two senses in which property rights are identical with human rights: one, that property can *only* accrue to humans, so that their rights to property are rights that belong to human beings; and two that a persons right to his own body, his personal liberty, is a property right in his own person as well as a "human right."[399]
>
> —Dr. Murray N. Rothbard, Austrian Economist, 1982.

"[H]uman rights, when not put in terms of property rights, turn out to be vague and contradictory, causing liberals to weaken those rights on behalf of 'public policy' or the 'public good.'"[400] This quotation aptly describes in one sentence Procrustean Jurisprudence in these twentieth century United States as well as the justification for its immediate and total obliteration. Only by repealing this century's Procrustean jurisprudence of doubt, may individual rights to life, liberty, and property be restored and the accompanying pursuit of utility reinstated.

For a new liberty,[401]

JOSEPH BECKER

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399. ROTHBARD-ETHICS, *supra* note 57, at 113.

400. *Id.*

401. On the evening of January 7, 1995, as I was feverishly perusing Rothbard's "Man, Economy, and State," *supra* note 19, for discussion of the idea supported by footnote 285, my telephone rang. Most regrettably, it was Professor Hoppe, author *supra* notes 27, 79, and 196, who had telephoned to inform me that my mentor and Thesis Chair, Dr. Rothbard, S.J. Hall Distinguished Professor of Economics, University of Nevada, Las Vegas, and author *supra* notes 19, 51, 57, and 238, had died of a sudden heart attack in New York City, earlier that day. Dr. Rothbard was a champion of liberty in the truest sense. Hopefully, humanity will never lose the insight into liberty that was uniquely his; I will certainly miss his friendship, his intellectual leadership, and his seemingly unending inspiration in the battle against statism of every "type."

This comment is dedicated to that giant of liberty to whom I owe a huge intellectual debt, Murray N. Rothbard, Ph.D.