affirmative vote but it was another sanguine lesson of the realities of our world.

Mr. Peters: I'd better make this the last question. Yes, sir.

Participant: On behalf of the municipal local officials in the audience, I want to thank Village President Schultz for representing us. In the northwest suburbs, we consider Mayor Schultz the dean of the northwest suburbs. Thank you. (applause)

Mr. Peters: Well, I will now bring this panel to a close. Thank you for attendance and participation.

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Procrustean

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

INTRODUCTION

The beloved Justice Oliver Wendell Holmes in his dissenting opinion in *Lochner v. New York* denounced the majority for embracing an economic theory of laissez-faire which according to him "a large part of the country does not entertain." 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." Rather, it is made for "people of fundamentally differing views" which through a majority enact their views into law. Holmes, in *Lochner*, 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.

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." WEBSTERS 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 Procrustes, 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 appreciated by this author.

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


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* may be analyzed and evaluated.

Unfortunately, Holmes' dissent in *Lochner* was the beginning of the end of the freedom to contract that had until then been highly regarded and protected. In *Nebbia v. New York*, 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.

Austrian School economist Ludwig Von Mises, in his classic treatise on economics, *Human Action,* 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. . . .

. . . 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.  

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9. Id.
10. Id.
11. See infra part I for a detailed commentary on the devolution of economic liberties including freedom of contract.
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.
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).

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17. DONALD KAGAN ET AL., THE WESTERN HERITAGE SINCE 1648 500 (2d ed. 1983) "Nicholas Copernicus' 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.
23. VON MISSES, 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.*
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. However, the destructive effects of socialism are at least as disastrous when the state, through regulation, controls the means of production. 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. 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." Holmes states, dissenting in *Lochner*, that he would require considerably more study if he were to make decisions with respect to economic theory. On this point, Holmes was certainly correct.

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. To the separation and disparate treatment of liberties the Austrian School says "humbug." To the redistributive effects of socio-economic regulatory action, the Austrian School demonstrates it is "inherently irrational."

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. These include "implicit in the concept of ordered liberty," "lie[s] at the base of all our civil and political institutions," "so rooted in the traditions and conscience of our people as to be ranked as fundamental," and "that fundamental fairness essential to the very concept of justice." (Strong originalist constitutional law arguments have also been proffered for preservation of these so-called economic liberties under the Ninth Amendment). 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."

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

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

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28. Id.
29. Id.
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 dissociating 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.
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.
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.
But demonstrates that separation of economic from fundamental liberties is simply impossible.50

Rather, the Austrian School definitively demonstrates that the libertarian51 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 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 liberties cannot withstand even the 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.56 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 (made possible by judicial abdication of the economic rights of the individual), became not only the rule but, more sadly, the rule of law.61

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

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 and early U.S. Supreme Court Justices. 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."

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.

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. 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." More than that, Madison described that property, "[i]n its larger and jurer 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." 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.

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. 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. 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."79

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, supra note 36, at 3.
73. Id. (emphasis added).
74. Id.
75. Id.
76. Id. (emphasis added).
77. Id. (emphasis added).
above), "and which leaves to every one else the like advantage," 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, 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 rightful [sic] exercise of legislative authority.

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. See cases cited supra note 82.
85. See supra note 82.
86. Id. at 292.
87. Id. at 292.
88. Id. at 292.
89. Id. at 292.
90. Id. at 292.
91. Id. at 292.
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," 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." 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.

In Wolff Packing Co. v. Court of Industrial Regulations, 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, 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 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.

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. Taft's rationale soon became a dangerous interventionary wedge

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

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 subject to price regulations." Id.

95. See generally Weinstein, supra note 60.

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

97. Id. at 538.


100. See infra part III.A.
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-

107. Id.
108. JAMES E. BOND, I DISSENT: THE LEGACY OF CHIEF JUSTICE JAMES CLARK 
109. Id.
110. See BASTIAT-LAW, supra note 63, at 6.
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 capitaliste. He 
sought only to make it safe for the individual citizen to exercise his inalienable rights.”).
114. SIEGAN, supra note 36, at 17.

economic regulatory statute has been held invalid on the ground that it 
violated due process.115

C. RETRENCHMENT AND INVENTION OF A RIGHT TO PRIVACY

After nearly thirty years of no economic regulatory statute being held 
invalid under the ”rational basis test”116 for economic regulation, the 
U.S. Supreme Court in 1965 retrenched117 and completed construction of 
the Procrustean bed118 for which this article is titled.

The Court in Griswold v. Connecticut120 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 rela-
tion.”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 
big 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."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-Williamson129 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 pro-

vides that the enumeration of certain rights in the Constitution shall not be construed to disapprove others retained by the people.137 Might this Amendment then not protect the right to dispense replacement spectacles?138

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 contract141 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

127. Id. at 488.
128. SIEGAN, supra note 36, at 17.
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.
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.).
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.
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.
In Planned Parenthood v. Casey, 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. 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." According to O'Connor, beliefs about these matters "could not define the attributes of personhood were they formed under compulsion of the State."

D. OTHER SO-CALLED FUNDAMENTAL LIBERTIES

Thus, after Griswold v. Connecticut, there exists the minimal rational basis test 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."

Beside those fundamental liberties of marriage and family identified in Griswold within the rubric of the "right to privacy," 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."

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.

150. Planned Parenthood, 112 S. Ct. at 2807.
151. Id.
152. Id.
153. 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

In Moore v. City of East Cleveland, Ohio, fundamental rights described as "almost impregnable to invasion" 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.

E. THE PROCRUSTEAN "FALSE DICHOTOMY"

Justice Stevens, concurring in Moore, 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." 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. 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.

The Constitution does not explicitly mention any right of privacy. However, when freedom to contract for a marital partner 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" 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 certain personal privacies, to travel, to equal access to the criminal appellate process, and to voting are fundamental and therefore 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.

161. Id. at 546-49.
162. Id.
163. Id.
164. Id. at 513 (Stevens, J., concurring).
165. See SIEGAN, supra note 36, at 17.
167. See SIEGAN, supra note 36, at 207.
by the eighteenth and nineteenth century Supreme Courts.\textsuperscript{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,\textsuperscript{171} the Court used similar catchwords and phrases in cases like \textit{Griswold}\textsuperscript{172} and \textit{Moore}\textsuperscript{173} to invent a "right to privacy" to preserve the so-called fundamental liberties.\textsuperscript{174}

These highly subjective notions of what rights should be Constitutionally protected with different levels of scrutiny have led us to the false dichotomy\textsuperscript{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,"\textsuperscript{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.\textsuperscript{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\textsuperscript{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.

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\textsuperscript{170} See infra part I.A.
\textsuperscript{171} See SEIGAN, supra note 36, at 208.
\textsuperscript{172} Griswold v. Connecticut, 381 U.S. 479 (1965).
\textsuperscript{173} Moore v. City of East Cleveland, Ohio, 431 U.S. 494 (1977).
\textsuperscript{174} See infra part I.C.
\textsuperscript{176} Lochner v. New York, 198 U.S. 45, 76 (1905) (Holmes, J., dissenting).
\textsuperscript{177} See generally infra part III.
\textsuperscript{178} See ROTHBARD-ETHICS, supra note 57; see also infra part II.H.

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A. BACKGROUND

The Austrian School of Economics is best described as the science of praxeology, that is, human action.\textsuperscript{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.\textsuperscript{180} All of these actions involve the use of at least some economic goods, that is, those perceived as scarce.\textsuperscript{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.\textsuperscript{182}

The Austrian methodology\textsuperscript{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.\textsuperscript{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.\textsuperscript{185} These conclusions most generally favor free markets unfettered by government intervention as a means of maximizing society's utility.\textsuperscript{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.\textsuperscript{187} That humans act is a priori true. Any attempt to disprove this notion would be internally inconsistent because the very "attempt to

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\textsuperscript{179} VON MISES, supra note 14, at 12-13.
\textsuperscript{180} Id. at 13-14.
\textsuperscript{181} ROTHBARD-STATE, supra note 19, at 3-4.
\textsuperscript{182} Id. at 3-6.
\textsuperscript{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. Objectivist 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.
\textsuperscript{184} Id.
\textsuperscript{185} Id.
\textsuperscript{186} Id.
\textsuperscript{187} See VON MISES, supra note 14, at 13-14.
disprove" by arguing against the notion, is in itself, an action. Every human action must be recognized as nothing more than an attempted at raising one's own utility level.

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

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 and the early U.S. Supreme Court Justices.

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.

It 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.

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. 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.

E. UTILITY

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

This non-cardinal measurability of utility also prohibits interpersonal comparisons of utility. One can make only ordinal judgments of utility and then only by observing demonstrated preferences by individual actors. 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.

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. 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. 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.

So, while we know that each additional unit is worth less than the previous unit, due to utility's non-quantifiable nature, 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. 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." 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. 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. It can be logically determined that these actions are pareto superior by considering the consequences of each.

Homesteading employs a resource that no prior act 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.

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.
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.

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

\(^{216}\) 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 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.
from the goods whose prices reflect a lesser demand or a more than adequate supply. 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.

J. EFFECTS OF UNCERTAINTY ON SAVINGS AND GROWTH

Growth and long run prosperity can only increase, _ceteris paribus_, as savings or investment increase. 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. Time preference utility theory is the limiting disincentive to savings and its resulting economic growth.

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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 MISSES, supra note 14, at 490_ ("Postponement 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 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 MISSES, 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.

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236. ROTHBARD-STATE, _supra note 19_, at 52.
237. See _VON MISSES, 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.
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 MISSES, 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. 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.

Another form of force that is doubly devastating is that of force initiated to prevent an exchange. 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. 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.

Force or forceful restriction in the area of self-ownership results in something between partial conscription and total slavery. 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.

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. 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 producer but rather force employed by the producer in the act of production otherwise known as "the externality." The externality must be limited to force initiated against or affecting the physical integrity of another individual's property. 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. This "physical integrity" limitation was apparently recognized by Justice Blackmun in the so-called fundamental liberty case, Bowers v. Hardwick, 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.

Fraudulent behavior destroys the utility maximizing characteristics of pareto superior exchanges. 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. This defrauded individual will have given up more than would have been necessary to acquire what he received in the exchange.

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.
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.
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. Force, as defined above, redirects resources to less valued uses and the entire value reflecting ability of the market process becomes distorted.

L. COLLECTIVE FORCE

Force (and fraud) engaged in by individuals is regarded as criminal activity. Theft, murder, and kidnapping, while generally considered criminal in the common law, also can be considered "economically criminal" or non-pareto superior. 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. Only an individual can know the utility derived from one's own actions and resource use. The impossibility of interpersonal comparisons of utility prevent individuals from knowing the utility of another.

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

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."

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 and discouragement of individual and collective force.

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 for which Justice Holmes held such bitter contempt.

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

A. INDIVIDUAL AS THE UNIT OF ANALYSIS

Citing Arizona Governing Committee v. Norris, Justice O'Connor writes in Metro Broadcasting, Inc. v. Federal Communication Commission, "Government must treat citizens as individuals, not as simply components of a racial, religious, sexual or national class. 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

255. See SALERNO, supra note 225.
256. See MISSES, 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. See ROTHBARD-LIBERTY, supra note 51, at 23-24.
258. See ROTHBARD-Power, supra note 238.
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.
262. ROTHBARD-POWER, supra note 238, at 15.
264. See ROTHBARD-STATE, supra note 19, at 78-79.
265. See ROTHBARD-Power, supra note 238.
266. See ROTHBARD-LIBERTY, supra note 51.
that race or ethnicity determines how they act or think.\textsuperscript{271} The Court was 'the government entity esteemed above all others to protect the rights of the individual as a counterweight to popular rule.'\textsuperscript{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.\textsuperscript{273} Only individuals act, only individuals exercise liberty.\textsuperscript{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.\textsuperscript{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.\textsuperscript{276} These actions are very simply the pursuit of ends by the use of scarce resources known as means.\textsuperscript{277} Every single action by any individual is an attempt to increase their utility level or reduce disutility.\textsuperscript{278} Even acts of so-called charity are intended to provide a warm feeling in one's belly or at least relieve guilt felt for the suffering of another.\textsuperscript{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.\textsuperscript{280}

   In *Meyer v. Nebraska*,\textsuperscript{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\textsuperscript{282} but was later cited in *Griswold v. Connecticut*\textsuperscript{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."\textsuperscript{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 accumulation 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.").

\textsuperscript{271} See Id. (emphasis added).
\textsuperscript{272} See *Siegan*, supra note 36, at 88.
\textsuperscript{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.").
\textsuperscript{274} Id.
\textsuperscript{275} Id.
\textsuperscript{276} See Von Mises, supra note 14, at 13-14.
\textsuperscript{277} Id.
\textsuperscript{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 offspring, 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

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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 exempt 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.").
281. 262 U.S. 390 (1923).
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" 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. Even choosing physical inactivity, which is itself an action, requires if nothing else a "place to be." It is thus impossible to regulate the use of property without definition affecting the actions to which an individual actor may have put that property. 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.

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

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. Freedom of the press is a mere shuck if the authority controls all printing offices and paper plants. "And so are all the other rights of men."

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.

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. 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, a legislature can hardly regulate away options the physical body can be put to without devaluing that individual's self worth. In Bowers v. Hardwick, 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." As Hoppe demonstrates, regulation which limits the options a person can put his bodily property to, necessarily devalues that bodily property. 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, which sparked Holmes dissent chastising economic theory based constitutional principles, 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. On one hand, bodily integrity is deemed to be a fundamental liberty, yet,
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.


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),313 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.314 But we can never know the motive of another actor.315 Motive is after all, solely in the mind of the individual.316 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" exception321 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 exchanges322 exists only because both actors value that which they receive in the exchange more than that which
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. 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. 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.

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, and consumption of liquor or as in Earle v. Angel where, again a nephew, agreed to accept $500 to forego a future "right to travel" elsewhere by attending a funeral service. 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 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.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. 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. 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. 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 to exceed the supply, and hence a perceived "shortage" of the resource is bound to develop.

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 and subjective utility theory 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.

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.
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, government courts misallocated a mall owner's property to paid petitioners under the guise of fundamental freedom of speech.

C. SECONDARY EFFECTS OF THE PROCRUSTEAN SEPARATION SCHEME

1. Uncertainty and Economic Stagnation

The arbitrary judicial decisions bleeding from embrace 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," it is axiomatic that economic growth finds no refuge when property rights are suspect. 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. 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.

One schizophrenic effect exists with the Court's treatment of certain educational rights as fundamental liberties, while at the same time, making property rights suspect. Education requires savings. Yet, increased savings necessary for education require certainty in property rights. 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.

2. Fundamental Liberties Necessarily Reduced

All liberties of action require property. Freedom of the press is meaningless without ink, paper and press. 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 against a steady demand curve, ceteris paribus.

The law of marginal utility defines that the demand curve is downward sloping and a diminished supply against this demand curve invariable results in higher prices for such goods. At higher prices, less tools necessary to exercise fundamental liberties will be available or consumed 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, 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, 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 was curiously mentioned. But absent the right to engage in the pareto superior action of contraceptive device production, which obviously

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337. 447 U.S. 74 (1980).
338. Pruneyard Shopping Center, 447 U.S. at 91.
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.
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.
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, results in the creation of a board of "central planners," staffed by self-interested representatives of the industry behind the regulation, overall societal efficiency declines. Abandonment of market prices which are necessarily eliminated by these central planners in their initiation of collective force through the state, destroys the market signal by which resources may be directed 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 misallocated and, as importantly, away from an area of industry lacking such resources.

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, a stricter scrutiny requiring narrowly tailored means to achieve a compelling state interest (as used for the so-called fundamental liberties), and an intermediate or alternative level of scrutiny.

357. See generally WEINSTEIN, supra note 60.
358. See SALERNO, supra note 225.
359. Id.
360. Id.
361. Id.
364. Id.
365. See VON MISES, supra note 14, at 258; see also supra note 256.

The Austrian School's strict adherence to the subjective utility analysis 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.

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 could ever exist.

Legislation of this type is by definition collective force. Because cardinal quantification of utility is impossible, and in turn, so are interpersonal comparisons of utility, no rational basis could ever exist for enacting what is by definition redistributionist ('a law takes property from A and gives it to B') 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. 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. 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 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
irrational within the principles of the subjective utility theory and free-market, non-interventionary-favoring Austrian School.380 Prohibition of all other legislative redistributitional 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 framework384 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."

The logically irrefutable axioms of the Austrian School of Economics demonstrate that the Procrustean separation of so-called fundamental and economic liberties is impossible,385 ludicrous, destructive of all liberties,386,387 and results in a lower standard of living for all.388

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 means/ends identification makes any so-called economic regulation violative of fundamental liberties;392 5) commonplace exchanges demonstrate that both 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

380. See Formani, 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.
384. See supra part II.A.M.
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 impair 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 asked); see also part III.C.1.3.
389. See supra part III.B.
390. Id.
391. Id.
392. Id.
393. Id.
394. See supra part III.B.
396. See Rothbard-State, supra note 19, at 260.
397. See Rothbard-Power, supra note 238, at 13-14.
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]


"[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 regretfully, 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.

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Illinois’ Confrontation With the Use of Closed Circuit Testimony in Child Sexual Abuse Cases: A Legislative Approach to the Supreme Court Decision of People v. Fitzpatrick

INTRODUCTION

Reports of child sexual abuse have greatly increased in recent years. Currently, the number of annually reported cases, throughout the country, exceeds 140,000.[1] Despite the horrible suffering children undergo from sexual abuse, they are likely to suffer additional emotional distress as a result of testifying at trial, in the presence of their attacker.[2] The emotional trauma associated with facing their abuser often renders children unable to provide coherent testimony at trial.[3] Because the child victims are usually the only witnesses, without their testimony, prosecution of this reprehensible

1. See Brief for Amicus Curiae American Psychological Ass'n in Support of Neither Party at 8 n.2, Maryland v. Craig, 497 U.S. 836 (1990) (No. 89-478). In 1976, child protection agencies nationwide reported 1,975 cases of child sexual abuse. Id. Reports increased to 127,000 cases by 1985, and 132,000 cases in 1986. Id.
3. See Brief for Amicus Curiae American Psychological Ass’n in Support of Neither Party, supra note 1, at 10. The symptoms of their victimization include sleep and eating disorders, fears and phobias, depression, guilt and deficiencies in school. Id. “Authorities have long believed that a significant amount of trauma...experienced by the child witness is due to the presence and proximity of the accused.” Id. at 13. However, not all children are adversely affected from testifying in the presence of their abusers and psychologists believe that some children may benefit from the experience. Id. For an additional discussion of the trauma experienced by child victims as witnesses, see Claudia L. Marchese, Child Victims of Sexual Abuse: Balancing a Child’s Trauma Against a Defendant’s Confrontation Rights-Coy v. Iowa, 6 J. CONTEMP. HEALTH L. & POL’Y 411 (1990).