RAISING CONSTITUTIONAL EYEBROWS[1] ON PRIVATE TAKINGS AND DUE COURSE OF LAW: WHERE DO WE GO FROM HERE?[2]

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INTRODUCTION

Both Texas and federal courts have held, as a general rule, that the Due Process Clause of the Fifth Amendment to the United States Constitution[3] and the Due Course of Law Clause in the Texas Constitution[4] are essentially the same.[5] Both federal and state courts afford greater protection to "life" and "liberty" interests than "property" interests through application of a heightened level of scrutiny.[6] While Texas historically tends to align with the federal government in applying a rational basis standard to property rights, it recently took the road less traveled—by the federal courts—and applied an "unreasonably burdensome" standard in its decision in *Patel v. Texas Department of Licensing & Regulation*.[7]

In *Patel*, the Texas Supreme Court increased the burden on the government to prove that a statute regulating citizens' economic liberties is

[1] Patel v. Tex. Dep't of Licensing & Regulation, 469 S.W.3d 69, 93 (Tex. 2015).

[2] Paul J. Larkin, Jr., *A Tale of Two Cases*, 73 WASH. & LEE L. REV. 467, 469 (2016).

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[3] U.S. CONST. amend. XIV.

[4] TEX. CONST. art. I, § 17.

[5] *See* Hackbelt 27 Partners, L.P. v. City of Coppell, 661 F. App'x 843, 846 n.1 (5th Cir. 2016); *Patel*, 469 S.W.3d at 84; Mayhew v. Town of Sunnyvale, 964 S.W.2d 922, 933 (Tex. 1998).

[6] Hettinga v. United States, 677 F.3d 471, 480–81 (2012).

[7] 469 S.W.3d at 87.

not so "unreasonably burdensome that it becomes oppressive in relation to the underlying governmental interest."[8] The court justified its holding by stating that Section 19 of the Texas Constitution affords Texas citizens additional protections unavailable under the federal Constitution.[9] In his concurrence, Justice Willett, while wholeheartedly agreeing with the majority, warned of potential problem areas for the Texas courts due to the change in the level of scrutiny afforded to economic liberty claims.[10] Justice Willett pointed to the U.S. Supreme Court's decision in *Kelo v. City of New London*[11] as reaffirming the Court's long history of "deference to legislative judgments and its unwillingness to second-guess the city's determination as to what public needs . . . justify the use of the takings power."[12] The *Kelo* decision prompted scathing dissents from both Justice Thomas and Justice O'Connor.[13] Both Justices found that the majority abdicated its constitutional duty[14] by leaving the government's power of eminent domain unchecked and essentially protecting citizens in their home while failing to protect the home itself.[15] To this point, Justice Willett noted that these "economic and noneconomic rights indisputably overlap."[16]

Both Constitutions allow for the taking of a private citizen's land for *public use* so long as the citizen receives "just compensation."[17] The federal courts apply "rational basis" scrutiny when deciding the purpose of public use property takings claims.[18] The Texas state courts have mirrored the federal courts' application of "rational basis" scrutiny to public use property takings cases as well.[19] While this standard is settled law in both the state and federal court system, when the issue is an unconstitutional taking of a private citizen's land for purely *private use*, the application of mere "rational basis" scrutiny presents problems.

[8] *Id.*

[9] *Id.*

[10] *Id.* at 95.

[11] Kelo v. City of New London, 545 U.S. 469, 483, 488 (2005).

[12] *Patel*, 469 S.W.3d at 115 (Willett, J., concurring).

[13] *Kelo*, 545 U.S. at 494 (O'Connor, J., dissenting); *id.* at 505 (Thomas, J., dissenting).

[14] *Id.* at 494 (O'Connor, J., dissenting).

[15] *Id.* at 518 (Thomas, J., dissenting).

[16] *Patel*, 469 S.W.3d at 115.

[17] U.S. CONST. amend. V; TEX. CONST. art. 1, § 17.

[18] Haw. Hous. Auth. v. Midkiff, 467 U.S. 229, 230 (1984).

[19] Sheffield Dev. Co. v. City of Glenn Heights, 140 S.W.3d 660, 675 (Tex. 2004).

While the U.S. Supreme Court has ruled that all takings claims are to be held to the same "rational basis" review,[20] the Texas Supreme Court only hinted at a possible answer to the questions that have yet to be asked, but will surely arise: should Texas courts continue to apply the "rational basis" standard when scrutinizing a governmental entity's taking of a private citizen's property which it then transfers to another private citizen? Should Texas follow in lockstep with the federal courts under *Kelo*, or are Texas courts free to apply the new *Patel* standard ("unreasonably burdensome") to such property takings? Should the courts characterize such a taking as an interference with a citizen's liberty and apply the stricter *Patel* standard? Or, should the courts bow to the legislative process in a governmental taking and apply the lower "rational basis" standard?

Part II of this article will briefly review, as other commentators repeatedly have, the federal commingling of two separate doctrines: Fifth Amendment due process claims—for the mechanics of governmental regulation affecting property rights—and takings claims—for the purpose behind the governmental action. Part III of this article will discuss how Texas is teetering on the edge of conflating due course of law for governmental regulation of private property rights with takings claims. Finally, the Conclusion will set forth an explanation and separation of these doctrines under a two-step process, similar to Justice O'Connor's approach in *Lingle v. Chevron U.S.A., Inc*.[21]

I. NO LESSONS LEARNED FROM THE FEDERAL MASH-UP OF *KELO*

Similar to the Texas Supreme Court in *Patel*, the federal court system has commingled due process and the Fifth Amendment Takings Clause (Takings) analysis.[22] As early as the late 1920s, the federal court system "fused the constitutional protections of property against being taken without due process and against being taken for public purpose without just compensation."[23] In February 2005, the Supreme Court heard arguments in two cases: *Lingle v. Chevron U.S.A., Inc.*[24] and *Kelo v. City of New*

[20] *Haw. Hous. Auth.*, 467 U.S. at 230.

[21] *See* 544 U.S. 528, 548 (2005).

[22] Robert G. Dreher, Lingle*'s Legacy: Untangling Substantive Due Process from Takings Doctrine*, 30 HARV. ENVTL. L. REV. 371, 372 (2006).

[23] *Id*. at 389.

[24] *Lingle*, 544 U.S. at 528.

London.[25] These two cases dealt with claims brought under the Fifth Amendment Takings Clause.[26] In *Lingle*, decided in May 2005, Justice O'Connor, writing for a unanimous Court, sought to clarify the confusion surrounding which test to apply: the due process test or the takings test. However, a month later, a split Court delivered the still hotly disputed decision in *Kelo* and thereby re-muddied the waters.[27]

A. Lingle*'s Attempt to De-Fuse the Two Doctrines*

The Court in *Lingle v. Chevron U.S.A., Inc.* was confronted with the question of "whether the 'substantially advances' formula . . . is an appropriate test for determining whether a regulation effects a Fifth Amendment taking."[28] This case arose from a Hawaiian statute that sought to safeguard independent gasoline dealers by restricting big oil companies in owning and leasing gas stations.[29] Chevron brought suit claiming that the statute, on its face, interfered with Chevron's property rights in such a way that it effectuated a taking in violation of the Fifth and Fourteenth Amendments.[30] Chevron convinced the district court to grant summary judgment because the statute did not "substantially advance any legitimate government interest."[31] Although the Ninth Circuit reversed, it held that the district court applied the proper test in determining Chevron's summary judgment on its takings claim.[32] The Supreme Court granted certiorari.[33]

In a unanimous decision, Justice O'Connor noted the complicated and confusing history surrounding due process and takings claims.[34] It began with the 1980 case of *Agins v. City of Tiburon*[35] which set forth a "substantially advances" test in order to determine if a governmental

[25] Kelo v. City of New London, 545 U.S. 469, 469 (2005).

[26] U.S. CONST. amend. V.

[27] *Kelo*, 545 U.S. at 486 n.16. The *Kelo* Court rebuffed Justice O'Connor for confusing the purpose of a taking with the mechanics of a taking to support the use of private developers to carry out the redevelopment plan. *Id.*

[28] *Lingle*, 544 U.S. at 532.

[29] *Id.* at 533.

[30] *Id.*

[31] *Id.* at 534.

[32] *Id.* at 535.

[33] *Id.* at 536.

[34] *See id.* at 541.

[35] 447 U.S. 255, 261 (1980).

regulation has effected an actual taking of property from a private citizen.[36] In particular, the test states that "the application of a general zoning law to particular property effects a taking if the ordinance does not substantially advance legitimate state interests."[37] The *Agins* Court set forth this standard to determine if there had been a taking; however, the language used suggests the courts should apply a "scrutiny-like" standard when determining if a particular regulation constitutes a taking. Justice O'Connor, in an attempt to untangle this jurisprudential Gordian Knot, pointed out that the *Agins* "substantially advances" test is "an inquiry in the nature of a due process, not a takings, test."[38] A proper takings test looks at the effect the regulation has on a citizen's private property.[39] The "substantially advances" test is proposed as a means of determining if there has been a taking of private property. However, it is actually an inquiry into the underlying validity of the regulation and not an inquiry into the effect the regulation has on the citizen's property rights.[40] Further, as Justice O'Connor pointed out, the Takings Clause of the Fifth Amendment presumes the government has validly acted in accordance with a public purpose.[41] And so, a test meant to determine if the regulation has effected a taking of private property that substantially advances some public purpose is superfluous and runs counter to federal takings jurisprudence.[42]

Unfortunately, *Lingle*'s de-fusion of the due process and takings standards failed to clarify the confusion. Justice O'Connor attempted to clear this path by presenting a two-step inquiry: (1) was there a taking under the Takings Clause; and (2) does the underlying regulation as applied violate a citizen's property rights under the Due Process Clause?[43] It is under the second prong of this two-step test that the federal courts have applied a more deferential scrutiny standard.[44] However, in accordance with

[36] *Lingle*, 544 U.S. at 540.

[37] *Id.*

[38] *Id.*

[39] *Id.* at 543.

[40] *Id.*

[41] *Id.*

[42] *Id.* at 540.

[43] *See id.* at 538–40.

[44] Separating the conceptual quagmire created by the confluence of the Due Process Clause and the Takings Clause is no easy feat, but their difference is critical in unraveling Justice O'Connor's two-step inquiry. In the first step, the court initially determines if there has been a taking. If there has been a taking, then the court will apply a standard of review to the regulation

Justice O'Connor, the Court required deference to governmental regulation in the first step of the test of determining application under the Takings Clause.[45] This newly found bright line test was short-lived when, exactly one month later, the Supreme Court decided *Kelo v. City of New London* by a 5-4 decision with Justice O'Connor vehemently dissenting.[46]

B. Further Confusion of the Doctrines After Kelo

In *Kelo*, the Court examined the constitutionality of a city's development plan that "was projected to create in excess of 1,000 jobs, to increase tax and other revenues."[47] However, this plan called for the condemnation of several privately owned homes in the area to be rebuilt by other private investors.[48] The homeowners in the area to be condemned sued, claiming a violation of the Public Use Clause in the Fifth Amendment.[49] The trial court "granted a permanent restraining order" prohibiting the city from taking the homeowners' properties.[50] Upon appeal, the Supreme Court of Connecticut reversed, holding that all the takings were valid under the Fifth Amendment and Connecticut's state constitution.[51] The Supreme Court of the United States granted certiorari "to determine whether a city's decision to take property for the purpose of economic development satisfies the 'public use' requirement of the Fifth Amendment."[52] In reaching its conclusion, the Court discussed three relevant cases[53]—*Berman v. Parker*,[54] *Hawaii Housing Authority v. Midkiff*,[55] and *Ruckelshaus v. Monsanto Co*.[56]

that vests the governmental entity with the power to act under the Takings Clause to determine if the regulation "substantially advances" (*Agins*) or is "unreasonably burdensome" (*Patel*). Agins v. Tiburon, 447 U.S. 255, 261 (1980); Patel v. Tex. Dep't of Licensing & Regulation, 469 S.W.3d 69, 87 (Tex. 2015). Under the second prong, the court then asks if this regulation as applied violates the Due Process Clause using the appropriate judicial review standard (i.e., strict scrutiny, intermediate scrutiny, or rational basis).

[45] *See Lingle*, 544 U.S. at 545.

[46] Kelo v. City of New London, 545 U.S. 469, 469 (2005).

[47] *Id.* at 472.

[48] *Id.* at 475 n.4.

[49] *Id.*

[50] *Id.* at 475–76.

[51] *Id.* at 476.

[52] *Id.* at 477.

[53] *Id.* at 480–83.

Throughout its discussion of these three precedents, the *Kelo* Court concluded that because economic development is rationally related to the public good, benefit, and welfare, a taking will be constitutional even if the property acquired by the taking is sold to a private individual or entity.[57] Due to the private company's broad economic impact, the Court found this impact to be sufficient evidence of "public use" to avoid violation of the Fifth Amendment through the taking.[58] The Court stated that "the government's pursuit of a public purpose will often benefit individual private parties"[59] and that this is justified so long as the taking is reasonably certain to benefit the public in some manner.[60] However, while the Court stayed consistent with its prior holdings, it is hard to comprehend how the Court would allow one private citizen's interest to trump another private citizen's interest based on the mere fact that one has more economic clout and political influence. As a practical matter, *Kelo* simply circumvented the Public Use Clause.

Justice O'Connor argued that the majority's holding now made private property "vulnerable to being taken and transferred to another private owner, so long as it might be upgraded."[61] In her dissent, Justice O'Connor noted that the Supreme Court has traditionally allowed the transfer of private property from private to public ownership for construction of public roads, "a hospital, or a military base."[62] The Court has also allowed the

[54] In *Berman*, the Court set forth precedent that private land can be taken by the government for private use if there is a rational reason that is reasonably connected with the government objectives set forth in the regulation. *See* Berman v. Parker, 348 U.S. 26, 28–31, 33–34 (1954).

[55] In *Hawaii Housing Authority v. Midkiff*, the Supreme Court found that, even though a private citizen's land had been taken and transferred "in the first instance" to another private owner, it did not necessarily definitively establish that taking as solely for private use. 467 U.S. 229, 243–44 (1984). While a taking may seemingly start out as a private taking, the government can later establish it to be a public taking if it can show that the public derived some sort of benefit throughout the course of the taking. *See id.* at 233, 235, 241, 243–244; *see also Kelo*, 545 U.S. at 481.

[56] In *Ruckelshaus v. Monsanto Co.*, the Court reaffirmed its adherence to the *Berman* holding and rational basis test by stating that the governmental taking will be considered constitutional "so long as [it] has a conceivable public character." 467 U.S. 986, 990, 994–1000, 1014–15 (1984).

[57] *Kelo*, 545 U.S. at 477–78.

[58] *Id.* at 484.

[59] *Id.* at 485.

[60] *Id.* at 487.

[61] *Id.* at 494 (O'Connor, J., dissenting).

[62] *Id.* at 497.

transfer of private property to a private entity "who make[s] the property available for the public's use."[63] However, Justice O'Connor argued, the majority's holding allows for takings for economic development that benefit a private party.[64] Moreover, these takings cater to the "citizens with disproportionate influence and power in the political process."[65]

Justice Thomas argued strict compliance with the language of the Fifth Amendment, arguing that "the most natural reading . . . is that it allows the government to take property only if the government owns, or the public has a legal right to use, the property, as opposed to taking it for any public purpose or necessity whatsoever."[66] Justice Thomas defined "public use" to mean that the public has a right to use the property that was taken and not, like the majority stated, that the public will receive some sort of derivative benefit from the property's transfer to a private citizen.[67] Further, Justice Thomas stated that the Public Use Clause in the Fifth Amendment should be construed "to concern whether the property is used by the public or the government, not whether the purpose of the taking is legitimately public."[68]

Justice Thomas also contended that the Framers of the Constitution saw property as "a natural, fundamental right."[69] Traditionally, the Supreme Court has held that fundamental rights are deserving of strict scrutiny treatment.[70] By arguing that property is a fundamental right, Justice Thomas implicitly cast his vote to raise the level of scrutiny in reviewing governmental actions infringing on the rights of citizens concerning their property. Moreover, Justice Thomas demonstrated how implausible it is that the Framers would defer to the judgment of the legislature on one provision of the Bill of Rights and not for any of the other provisions therein.[71] In Justice Thomas's estimation, the majority's holding in *Kelo* created a precedent that while citizens are protected from the government in their homes, "the homes themselves are not."[72]

[63] *Id.*

[64] *Id.* at 505.

[65] *Id.*

[66] *Id.* at 508 (Thomas, J., dissenting).

[67] *Id.*

[68] *Id.* at 511.

[69] *Id.* at 510.

[70] *See* Poe v. Ullman, 367 U.S. 497, 548 (1961).

[71] *See Kelo*, 545 U.S. at 517–18 (Thomas, J., dissenting).

[72] *Id.* at 518.

While the majority held that the rational basis test is still a valid standard to apply when reviewing government regulation, the dissenting justices pointed out that property rights are deserving of a heightened level of scrutiny.[73] The reasoning in the *Kelo* case deserves reconsideration of the meaning and scope of the Fifth Amendment's Takings Clause to adhere more closely with the intentions of the Framers and to be less dependent on the whims of bureaucracy. As Justice Thomas persuasively stated, "when faced with a clash of constitutional principle and a line of unreasoned cases wholly divorced from the text, history, and structure of our founding document, we should not hesitate to resolve the tension in favor of the Constitution's original meaning."[74] The *Kelo* decision continues the progressive view that sacrifices individual property rights to the public's right to control urbanization and commercialization.

C. Standards Applied to Fifth Amendment Claims of Due Process Violations to Property Rights

Against the backdrop of *Kelo* and *Patel*, a review of the appropriate level of scrutiny in the context of fundamental rights is called for. The Fifth Amendment to the United States Constitution states in part that "no person shall . . . be deprived of life, liberty, or property, without due process of law."[75] The Fifth Amendment enumerates three things of which citizens of the United States cannot be deprived: life, liberty, or property.[76] However, the level of scrutiny applied in claims for deprivation, infringement, or regulation of life, liberty, or property vary greatly. The level of scrutiny applied to each will be strict scrutiny, intermediate scrutiny, or rational basis scrutiny.[77]

1. Strict Scrutiny

Courts reserve strict scrutiny review for the most fundamental of rights.[78] Strict scrutiny rigorously protects rights by assuming the government regulation is unconstitutional unless the government can prove

[73] *See id.* at 510.

[74] *Id.* at 523.

[75] U.S. CONST. amend. V.

[76] *Id.*

[77] United States v. Carolene Products Co., 304 U.S. 144, 152 n.4 (1938).

[78] *See, e.g.*, Adarand Constructors, Inc. v. Pena, 515 U.S. 200, 227 (1995) (holding that all racial classifications must be analyzed by a reviewing court under strict scrutiny).

otherwise.[79] Under this level of judicial review, the burden of proof is on the State or government to prove constitutionality[80]—as opposed to rational basis scrutiny under which the government's action has a presumption of constitutionality, and the burden is on the challenger to prove unconstitutionality.[81] Moreover, if the reviewing court finds any ambiguities in the statute, those ambiguities must not be resolved in favor of the State.[82] As will be described later, the opposite is true for a rational basis review of governmental regulation.[83]

Justice Stone both established rational basis scrutiny and discussed—in the infamous *Carolene Products* footnote four—circumstances that would justify a review of governmental action under strict scrutiny.[84] In his footnote, Justice Stone stated that legislation that is, on its face, prohibited under the Constitution; legislation that restricts the political process; and/or legislation that restricts practices of religious, national, or racial minority groups are deserving of a heightened level of judicial review—strict scrutiny.[85] Strict scrutiny will hold governmental actions that hinder fundamental rights "constitutional only if they are narrowly tailored to further compelling governmental interests."[86] When determining if the statute is narrowly tailored in order to achieve a specific government purpose, the reviewing court must take into consideration "the place to which the regulations apply . . . ."[87]

2. Intermediate Scrutiny

The next level of scrutiny applied to certain governmental regulations is intermediate scrutiny:

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[79] To meet this burden, the government must show that the regulation is narrowly tailored and serves to further a compelling governmental interest. *See id.*

[80] Parents Involved in Cmty. Sch. v. Seattle Sch. Dist., 551 U.S. 701, 784 (2007) (Kennedy, J., concurring).

[81] *See Carolene Products Co.*, 304 U.S. at 148; Johanna Talcott, *Aging Disgracefully: Do Economic Laws Remain Rational in Spite of Changed Circumstances?*, 11 FIU L. REV. 495, 502–03 (2016).

[82] *Parents Involved in Cmty. Sch.*, 551 U.S. at 786 (Kennedy, J., concurring).

[83] Talcott, *supra* note 81, at 503.

[84] *Carolene Products Co.*, 304 U.S. at 152 & n.4.

[85] *Id.* at 152 n.4.

[86] Grutter v. Bollinger, 539 U.S. 306, 326 (2003).

[87] Hill v. Colorado, 530 U.S. 703, 728 (2000).

> [A] government regulation is sufficiently justified if it is within the constitutional power of the Government; if it furthers an important or substantial governmental interest; if the governmental interest is unrelated to the suppression of free expression; and if the incidental restriction on alleged First Amendment freedom is no greater than is essential to the furtherance of that interest.[88]

The intermediate scrutiny test contains the same "narrowly tailored" element as the strict scrutiny test. However, courts have held that the "narrowly tailored" element was met "so long as the neutral regulation promotes a substantial government interest that would be achieved less effectively absent the regulation."[89] Whereas strict scrutiny must be narrowly tailored to further *compelling* government interests,[90] intermediate scrutiny need only be narrowly tailored to further *substantial* government interests.[91]

3. Rational Basis

The third level of scrutiny a court may apply when reviewing governmental regulations is "rational basis" scrutiny under the 1938 Supreme Court case *United States v. Carolene Products Co.*[92] Specifically, the Supreme Court held that the Filled Milk Act would not violate the Fifth Amendment and deprive an entity of its Constitutional rights if the "facts . . . would show or tend to show that a statute depriving the suitor of life, liberty or property had a rational basis."[93] In defining "rational basis" review, the *Carolene* Court stated that:

> [T]he existence of facts supporting the legislative judgment is to be presumed for regulatory legislation affecting

[88] United States v. O'Brien, 391 U.S. 367, 377 (1968).

[89] United States v. Albertini, 472 U.S. 675, 689 (1985); *see* Ward v. Rock Against Racism, 491 U.S. 781, 789, 791, 796, 798 (1989).

[90] *Bollinger*, 539 U.S. at 326 ("[Regulations] are constitutional only if they are narrowly tailored to further compelling governmental interests.").

[91] Turner Broad. Sys. v. FCC, 520 U.S. 180, 186, 213–14 (1997) (allowing regulations that were "shown to further an important or substantial governmental interest unrelated to the suppression of free speech, provided the incidental restrictions did not 'burden substantially more speech than is necessary to further' those interests" (quoting *Ward*, 491 U.S. at 799)).

[92] 304 U.S. 144, 152 (1938).

[93] *Id.*

> ordinary commercial transactions is not to be pronounced unconstitutional unless in the light of the facts made known or generally assumed it is of such a character as to preclude the assumption that it rests upon some rational basis within the knowledge and experience of the legislators.[94]

And thus, rational basis was born. Courts have held that when "rational basis" review applies, they will uphold the governmental action so long as it is "rationally related to a legitimate government interest."[95] Stated another way, the inquiry when reviewing a government policy under "rational basis" scrutiny is "whether a rational relationship exists between the [policy] and a conceivable legitimate objective."[96] Moreover, the federal courts have held that so long as the government's objective is debatable there is likely a rational basis and no due process violation.[97]

D. Discrepancy Between Life/Liberty and Property Rights: The Rational Basis Bar is Set Too Low

The federal court system traditionally holds that only fundamental right deprivation claims are deserving of strict scrutiny review.[98] The courts have never considered deprivation of property rights deserving of this elevated "strict scrutiny" level of review.[99] Many commentators discussing "rational basis" review have criticized this standard as lacking teeth.[100] Rational basis scrutiny is the "least demanding test used by the courts to uphold [governmental] action[.]"[101] Additionally, the federal courts have found that many economic liberty deprivation claims are deserving of only "rational basis" review.[102] Moreover, from 1973 to 1996, the U.S. Supreme Court has

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[94] *Id.*

[95] Simi Inv. Co. v. Harris Cnty., 236 F.3d 240, 251 (5th Cir. 2000).

[96] *Id.* (alteration in original).

[97] *Id.*

[98] Shah v. Univ. of Tex. Sw. Med. Sch., 129 F. Supp. 2d 480, 502 (N.D. Tex. 2015), *aff'd*, 668 F. App'x 88 (5th Cir. 2016).

[99] *See* Weems v. Little Rock Police Dep't, 453 F.3d 1010, 1015–16 (8th Cir. 2006); Hager v. City of West Peoria, 84 F.3d 865, 872 (7th Cir. 1996).

[100] Alamea Deedee Bitran, Comment, *The UBER Innovations that Lyfted Our Standards Out of Thin Air (BNB), Because Now, "There's an App for That"*, 8 ELON L. REV. 503, 524 (2016).

[101] *Simi Inv. Co.*, 236 F.3d at 253 (alteration in original).

[102] United States v. Carolene Products Co., 304 U.S. 144, 152 (1938); *see* Ferguson v. Skrupa, 372 U.S. 726, 731 (1963).

found a regulation unconstitutional just ten out of one hundred times under a "rational basis" review.[103]

Commentators on the "rational basis" test have noted that property rights and liberty interests have historically been considered an inseparable concept.[104] With this underpinning, it is difficult to conceive why the courts have taken such strides to distinguish the two concepts and apply differing levels of scrutiny. Logic dictates that courts should review taking regulations and liberty interests under the same level of scrutiny. However, this is not the case.

Federal courts have long held that government actions regulating property rights and some economic liberties are constitutional so long as there is some "conceivable rationale" for such action.[105] Even with this extreme deference to the legislative branch, the Supreme Court still has never rejected the idea that a citizen potentially could show that the ends do not justify the means and the regulation does not efficiently accomplish the government's objective.[106]

However, even with lower federal courts and state courts demonstrating a less deferential attitude towards government regulations of property rights and economic liberties, the Supreme Court has yet to apply this less deferential attitude. In *Kelo v. City of New London*, the Supreme Court found that economic development satisfies the "public use" test, and therefore the eminent domain actions of a governmental entity were held constitutional.[107] In so holding, the Supreme Court reinforced the idea that property rights are less deserving of other constitutionally protected rights and liberties and that a taking is constitutional if the government's activity and regulation is rationally related to the public's interest.

[103] Talcott, *supra* note 81, at 496.

[104] Larkin, *supra* note 2, at 473 (citing Laura S. Underkuffler, *On Property: An Essay*, 100 YALE L.J. 127, 129 (1990)).

[105] Talcott, *supra* note 81, at 504.

[106] *Id.* at 505 (citing to cases in which the federal courts have "indicated an increased willingness to actually review the rationality of the factual justifications for economic regulations").

[107] 545 U.S. 469, 489–90 (2005).

II. TEXAS CONSTITUTION ARTICLE I, SECTIONS 17 AND 19

A. Discussion of the Texas Constitution

The Texas Due Process Clause is known as the Due Course of Law Clause and is contained in Article I § 19 of the Texas Constitution. This section states, "[n]o citizen of this state shall be deprived of life, liberty, property, privileges or immunities, or in any manner disfranchised, except by the due course of the law of the land."[108] Unlike the Fifth Amendment of the United States Constitution, Texas's Takings Clause is in a wholly separate provision, Article I § 17. The Texas Takings Clause contains both the Public Use Clause and the Just Compensation Clause.[109] However, unlike the Fifth Amendment and contrary to the holding in the *Kelo* case, Section 17(b) states "economic development or enhancement of tax revenues" does not qualify as a public use and therefore cannot be a justification for a governmental taking.[110]

Texas courts have long held that the Texas Due Course of Law Clause and the Due Process Clause of the Fifth Amendment generally afford the same protections.[111] Moreover, Texas has long followed the same judicial precedents set by the United States Supreme Court concerning takings.[112]

Texas, like the federal courts, recognizes three categories of scrutiny in reviewing government activity: strict scrutiny, intermediate scrutiny, and rational basis scrutiny. In addition, Texas, like the federal courts, has traditionally found that actions tending to regulate Texas citizens' economic liberties and property rights are only deserving of rational basis review. Both Texas and the federal courts have taken measures to set in stone the phrase "life, liberty, and property"[113] as a unified term of art without differentiating among the three.

B. Discrepancy Between Life/Liberty and Property Rights

Texas has recently fallen out of lockstep with the federal government when reviewing economic liberty claims. The Texas Supreme Court held

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[108] TEX. CONST. art. I, § 19.

[109] TEX. CONST. art. I, § 17.

[110] *Id.* § 17(b).

[111] Hackbelt 27 Partners, L.P. v. City of Coppell, 661 F. App'x 843, 846 n.1 (5th Cir. 2016); Patel v. Tex. Dep't of Licensing & Regulation, 469 S.W.3d 69, 84, 86, 98 (Tex. 2015).

[112] Mayhew v. Town of Sunnyvale, 964 S.W.2d 922, 932 (Tex. 1998).

[113] U.S. CONST. amends. V, XIV; TEX. CONST. art. I, § 19.

that regulations affecting citizens' economic liberties, while still not deserving strict scrutiny review, are deserving of a higher standard than rational basis.[114] The Texas Supreme Court has called this heightened rational basis standard the "rational basis including consideration of the evidence standard" and has found that it is synonymous with the intermediate scrutiny test of the federal courts.[115] The federal courts continue to hold that government actions regulating economic liberties will be reviewed under the rational basis test.

Pre-*Patel*, the Texas courts fell in line with the federal courts regarding which level of scrutiny to apply to which rights and liberties. Historically, Texas jurisprudence concerning the Texas Due Course of Law Clause aligned with federal jurisprudence concerning the federal Due Process Clause.[116]

In *Patel*, a group of eyebrow threaders sought a declaratory judgment that the Texas licensing statutes and regulations requiring 750 hours of training and a passing score on a state-mandated test violated the Due Course of Law Clause found in the Texas Constitution.[117] The Texas Commission of Licensing and Regulation is the governmental entity that oversees cosmetology businesses in the state to ensure that each business is in compliance with state regulations and requirements.[118] In 2008 and 2009, the Commission investigated several eyebrow-threading businesses and found that several of the individuals performing the service were unlicensed individuals in violation of several Texas statutes.[119] After investigation, the Commission issued fines and began administrative hearings against several of the businesses.[120] The threaders brought suit against the Commission in late 2009.[121] The threaders also "sought a permanent injunction barring the state from enforcing the cosmetology scheme relating to the commercial practice of eyebrow threading against them."[122] The district court denied the threaders' motion for summary judgment and granted the State's summary

[114] *Patel*, 469 S.W.3d at 87.

[115] *Id.* at 82, 87.

[116] *Id.* at 86.

[117] *Id.* at 73.

[118] *Id.* at 74.

[119] *Id.*

[120] *Id.*

[121] *Id.*

[122] *Id.*

judgment.[123] The court of appeals affirmed.[124] The Supreme Court of Texas discussed the possible alternatives to rational basis scrutiny; specifically, the court discussed the three alternatives that the threaders argued: the real and substantial test; the rational basis including consideration of evidence test; and the no evidence rational basis test.[125]

The court discussed all three tests and eventually determined that the rational basis including consideration of evidence test is the most appropriate for economic liberty claims.[126] The court conceded that historically, "Texas courts have not been entirely consistent in the standard of review applied when economic legislation is challenged under Section 19's substantive due course of law protections."[127] The threaders first argued for application of the "real and substantial" test, which requires the courts to consider whether the legislative intent is a proper one, whether there is a real and substantial connection to the legislature's purpose, and whether the statute places an undue burden on the citizens challenging the statute.[128] This test offers less deference to the government than does the federal rational basis test.[129]

The second test the threaders argued is the rational basis including consideration of evidence test.[130] In effect, this test uses the federal rational basis test while also considering relevant evidence to determine what the purpose of the law was at the time of enactment and whether the purpose of the law is reasonable.[131] The threaders contended that this test is more favorable to the government "because it asks only whether a statute or regulation arguably could bear some rational relationship to a legitimate governmental objective."[132]

Last, the threaders argued for application of a no evidence rational basis test.[133] Under this test, a regulation is constitutional so long as it has a "conceivable justification in a legitimate state interest, regardless of

[123] *Id.* at 75.

[124] *Id.*

[125] *Id.* at 80–82.

[126] *Id.* at 137.

[127] *Id.* at 80.

[128] *Id.*

[129] *Id.*

[130] *Id.* at 81.

[131] *Id.* at 82.

[132] *Id.*

[133] *Id.*

whether the justification is advanced by the government or 'invented' by the reviewing court."[134]

In determining that Texas courts should apply the rational basis including consideration of evidence to economic liberty claims, the court found that "occasionally Texas courts mentioned that the proper review involved examining the enactment for a 'real or substantial' relationship to the government's police power interest in public health, morals, or safety."[135] The court, after an in-depth discussion of the history of both the federal Due Process Clause and the Texas Due Course of Law Clause, held that, while statutes are presumed to be constitutional, a challenge to a citizen's economic liberty under Section 19 requires the challenger to show one of the following:

> either (1) the statute's purpose could not arguably be rationally related to a legitimate governmental interest; or (2) when considered as a whole, the statute's actual, real world effect as applied to the challenging party could not arguably be rationally related to, or is so burdensome as to be oppressive in light of, the governmental interest.[136]

In so holding, the Texas Supreme Court veered off the federal jurisprudence path to provide its citizens more protection than that afforded by the federal constitution.

Justice Willett, in his concurrence, while applauding the holding of the majority, discussed several areas of the law that will need revisiting and, quite possibly, understanding the challenges to other constitutionally protected rights that will need to be held to this higher elevated rational basis standard upon review.[137] Justice Willett described this new rational basis involving consideration of evidence test as "rational basis with bite."[138] Further, Justice Willett described the federal rational basis test as "no test at all; at most it is pass/fail, and the government never fails."[139] In discussing other potential implications of the majority's holding in *Patel*, Justice Willett argued that challenges to property rights, specifically property takings, may be deserving of this new level of scrutiny because

[134] *Id.*

[135] *Id.* at 84–85.

[136] *Id.* at 87.

[137] *Id.* at 96.

[138] *Id.* at 98 (Willett, J., concurring).

[139] *Id.* at 99.

economic liberties have long been intertwined with noneconomic liberties and property rights. Justice Willett discussed the *Kelo* case and contended that the "U.S. Supreme Court has supplanted the *Carolene Products* bifurcation with rational basis deference in takings cases."[140] Moreover, while the U.S. Constitution explicitly protects property in the Fifth Amendment, the Supreme Court has continued to uphold "its longstanding policy of deference to legislative judgments and its unwillingness to second-guess the city's determination as to what public needs justify the use of the takings power."[141] Justice Willett argued that he "would not have Texas judges condone government's dreamed-up justifications . . . for interfering with citizens' constitutional guarantees."[142]

The Texas Supreme Court, through its decision in *Patel*, has fallen out of line with the federal jurisprudence that applies the toothless rational basis test to claims challenging governmental regulation of economic liberties.[143] In his concurrence, Justice Willett demonstrated how economic liberties are not the only constitutionally protected rights that have gone virtually unprotected from governmental interference and sounded the call for application of a heightened level of scrutiny to all constitutionally guaranteed freedoms.

C. Property Takings

Article I § 17 of the Texas Constitution sets out the Takings Clause. This section provides, in part: "No person's property shall be taken, damaged, or destroyed for or applied to public use without adequate compensation being made, unless by the consent of such person."[144] In his concurrence, Justice Willett discussed a possible repercussion from the *Patel* holding on constitutionally protected property rights. Justice Willett argued that "Texas judges . . . should scrutinize government's actual justifications for a law" and that judges should "not bend-over-backwards" for the government in reviewing government regulations affecting property rights.[145] Justice Willett signaled the courts to take a second look before

[140] *Id.* at 112, 115.

[141] *Id.* (internal quotations omitted).

[142] *Id.* at 116.

[143] *Id.* at 86 (majority opinion); *see* Bitran, *supra* note 100, at 524.

[144] TEX. CONST. art. I, § 17.

[145] *Patel*, 469 S.W.3d at 116 (Willett, J., concurring).

reviewing governmental takings of private property for "public use" under the rational basis test.

Traditionally, the Texas courts have applied rational basis review of a governmental regulation that results in a taking.[146] These regulatory takings can happen in a variety of different ways: eminent domain, condemnation, inverse condemnation, and zoning ordinances.[147] In *Mayhew v. Town of Sunnyvale*, the Supreme Court of Texas analyzed the constitutionality of a zoning ordinance.[148] The Mayhews owned roughly 1200 acres in Sunnyvale and acquired an additional 1200 acres between 1941 and 1986.[149] Starting in 1985, the Mayhews sought permission to proceed with a proposed town development plan on their land.[150] The Mayhews' plan requested approval to build 3,650 to 5,025 units on their land, or more than three units per acre.[151] The Town found that a "less dense use of the property was preferable," and the Mayhews agreed to build only 3,600 units on their land.[152] The Town council met and subsequently denied the Mayhews' proposed development plan.[153] The Mayhews brought suit alleging that by denying their proposal, the Town had performed a "taking of their property without payment of just or adequate compensation."[154] The district court granted summary judgment in favor of the Town.[155] The court of appeals affirmed the summary judgment in favor of the Town council but also affirmed summary judgment in favor of the Mayhews on their constitutional claims.[156] In determining that the Town did not violate the Takings Clause, the Texas Supreme Court considered whether or not this decision "substantially advance[d] legitimate state interests or it denie[d] an owner all economically viable use of his land."[157] If a zoning ordinance "does not substantially advance a legitimate state interest [it] constitutes a

[146] *Id.* at 134.

[147] *See, e.g.*, Lucas v. S.C. Coastal Council, 505 U.S. 1003, 1004 (1992); State v. Fiesta Mart, Inc., 233 S.W.3d 50, 53 (Tex. App.—Houston [14th Dist.] 2007, pet. denied).

[148] 964 S.W.2d 922, 925 (Tex. 1998).

[149] *Id.*

[150] *Id.*

[151] *Id.* at 926.

[152] *Id.*

[153] *Id.*

[154] *Id.*

[155] *Id.*

[156] *Id.*

[157] *Id.* at 933 (internal quotations omitted).

taking" and the citizen will be owed just compensation.[158] The court differentiated this "substantial advancement test" from the federal courts' rational basis test stating that this test "requires that the ordinance substantially advance the legitimate state interest sought to be achieved rather than merely analyzing whether the government could rationally have decided that the measure achieved a legitimate objective."[159] While courts have held zoning ordinances to a level of scrutiny higher than just rational basis, property rights as a whole have not been treated similarly.

Recently, in *Hackbelt 27 Partners, L.P. v. City of Coppell*, the Fifth Circuit Court of Appeals discussed the idea of zoning ordinances and the level of scrutiny they deserve.[160] The Fifth Circuit reviewed the district court's order granting summary judgment in favor of the City of Coppell and denying Hackbelt its requested zoning change.[161] The Fifth Circuit, prior to oral arguments, asked the parties to address the potential implications the Texas Supreme Court's holding in *Patel* might have on due process claims under Section 19 of the Texas Constitution.[162] Specifically, the court asked the parties to be prepared to discuss if the recent holding governed due process claims in Texas and therefore changed the level of scrutiny applied to takings claims.[163] However, because the parties failed to do so in their briefs, the Fifth Circuit applied "only the federal framework" and did "not decide whether the state constitution provides for a different test."[164] Therefore, the court stated that it would only hold the government's action "unconstitutional if it [was] clearly arbitrary and unreasonable, having no substantial relation to the public health, safety, morals, or general welfare."[165] In other words, the Fifth Circuit continued to apply the federal rational basis test even to zoning ordinance cases, which the Texas Supreme Court had already held deserved an elevated "substantial advancement" test.

The courts have also struggled with what type of compensation to grant upon finding a property taking due to governmental action. The *Patel* standard additionally implicates this element of takings claims. Under both the United States and the Texas Constitutions, an injured citizen is entitled

[158] *Id.* at 934.

[159] *Id.* This is similar to Justice O'Connor's rationale in *Lingle*.

[160] 661 F. App'x 843, 849 n.5 (5th Cir. 2016).

[161] *Id.* at 845.

[162] *Id.* at 846 n.1.

[163] *Id.*

[164] *Id.*

[165] *Id.* at 847.

to just compensation under the law for the government's taking of his land.[166] However, courts have wrestled with what "kinds of damages incident to governmental activity . . . qualify as compensable under the state constitution."[167]

In *Palacios Seafood*, the Fifth Circuit was asked to decide if the Texas Constitution required compensation for damage to a privately owned business incident to a waterfront restoration project.[168] Palacios Seafood argued that the damage caused to its business by the repair of a deteriorating bulkhead constituted a taking under Section 17 and required the city to pay Palacios just compensation.[169] The Fifth Circuit found that "Section 17 specifies that compensation is limited to damages for a 'public use.'"[170] Moreover, the court found that the Takings Clause only applies to intentional government action and not negligent governmental action.[171] The Fifth Circuit found, however, that Palacios did not have a claim for compensation under Section 17 due to the nature of the relationship between the business and the city.[172] Palacios leased its building from the city; therefore, the court found that the remedies available to Palacios did not sound in constitutional claims, but rather in contract.[173] Further, the court held that "[S]ection 17 becomes operative on the basis of affirmative governmental activity that proximately damages or destroys private property."[174] But the question remains: what level of scrutiny should a court apply to these claims for damages when it finds that a governmental taking of private property has occurred?

Justice Lehrmann, in her concurrence in *Harris County Flood Control District v. Kerr*, discussed the question the Texas Supreme Court has yet to address: what level of scrutiny should apply to takings claims that give rise to damages?[175] In *Harris*, the Texas Supreme Court was asked to determine "whether governmental entities that engage in flood-control efforts are

[166] U.S. CONST. amend. V; TEX. CONST. art. 1, § 17.

[167] Palacios Seafood, Inc. v. Piling, Inc., 888 F.2d 1509, 1510 (5th Cir. 1989) (emphasis omitted).

[168] *Id.*

[169] *Id.* at 1510–12.

[170] *Id.* at 1513.

[171] *Id.* at 1514.

[172] *Id.*

[173] *Id.* at 1511.

[174] *Id.* at 1514.

[175] 499 S.W.3d 793, 812 (Tex. 2016) (Lehrmann, J., concurring).

liable to homeowners who suffer flood damage, on the theory that the governments effected a taking of the homeowners' property by approving a private development without fully implementing a previously approved flood-control plan."[176] The court stated that the general threshold to invoke Section 17 was a showing that the "government intentionally took or damaged their property for public use, or was substantially certain that would be the result."[177] The court also gave its approval of Justice Lehrmann's contention that, if a taking for public use is compensable, then a taking for a private use is also compensable.[178]

The court found, however, that a taking had not occurred in this case due to the absence of the intent element, and therefore dismissed the case.[179] Justice Lehrmann discussed that when the government takes land for public use without payment, the landowner is entitled to inverse condemnation damages.[180] Justice Lehrmann also argued that the same should bear true for government takings for private use, and that the injured citizen should be able to bring a claim for damages due to inverse condemnation.[181] Moreover, Justice Lehrmann pointed out that there is no guidance as to how Texas courts should handle the situation "when a taking for private use damages property and reduces its value."[182] It seems that a rational basis review of these claims would not adequately compensate the injured party. It also "makes no sense to say that a property owner is entitled to compensation if the government does the right thing but not if it does the wrong thing"[183] because "sovereign immunity would bar alternative tort claims against the government."[184]

III. CONCLUSION

While not explicitly agreeing with Justice O'Connor's opinion in *Lingle*, the Texas Supreme Court seems to fall in line with her two-step process. The *Patel* court suggested that the extreme deference should not be

[176] *Id.* at 795 (majority opinion).

[177] *Id.* at 799.

[178] *Id.* at 803 n.41.

[179] *Id.* at 806.

[180] *Id.* at 811 (Lehrmann, J., concurring).

[181] *Id.* 811–812.

[182] *Id.* at 812.

[183] *Id.* at 813.

[184] *Id.* at 813 n.3.

afforded to the government when considering a due course of law claim that a regulation as-applied has violated a citizen's property rights protected under Article I § 17 of the Texas Constitution. This is consistent with the *Lingle* Court's holding that the Takings Clause of the Fifth Amendment presumes the government has validly acted in accordance with a public purpose.[185] Procedurally, the Texas courts must first determine if the challenged regulation has effected a taking under the Takings Clause. This first step brings into play the deference to the government action and, like the federal courts, the Texas courts should presume that the government has acted with a valid public purpose. If the court determines there has been no taking, the inquiry stops. If, however, the court determines there has been a taking, the next inquiry becomes: does this regulation as-applied interfere with a citizen's due course of law protections? It is this second step where the Texas and federal jurisprudence sharply disagree on the level of scrutiny standard to apply.

Life, liberty, and property are deserving of constitutional protection against government interference through application of the strict scrutiny test. When both the government and the people have a legitimate interest, both the public and private benefits should be weighed and balanced. Here, Texas charts a new course and applies an elevated rational basis test—also known as intermediate scrutiny or the "rational basis including consideration of evidence" test. The federal judiciary applies a mere rational basis test to claims for interference with economic liberties or property rights. Applying a rational basis test allows the government to take citizens' land and transfer it to private individuals or entities for a seemingly public use, thereby eliminating the vital check and balance on the government's taking. The courts should instead apply a more stringent standard than rational basis, but less than strict scrutiny—intermediate scrutiny.

It is evident that Texas is slowly changing its approach to review of governmental action that encroaches upon its citizens' constitutionally protected freedoms and rights. This author proposes that Texas raise the level of scrutiny for reviewing all challenges to property and takings claims.

[185] Lingle v. Chevron U.S.A., Inc., 544 U.S. 528, 543 (2005).