



A SPECIAL MEETING

THE MONT PELERIN SOCIETY

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FROM THE PAST TO THE FUTURE: IDEAS AND ACTIONS FOR A FREE SOCIETY

CHAPTER SIXTEEN

THE COMMERCE CLAUSE, THE TAKINGS CLAUSE, AND DUE PROCESS

DOUGLAS GINSBURG





A More or Less Perfect Union

A Personal Exploration by Judge Douglas Ginsburg

Article I.

Section 1. All legislative Powers herein granted shall be vested in a Congress of the United States, which shall consist of a Senate and House of Representatives.

Section 2. The House of Representatives shall be composed of Members chosen every second Year by the People of the several States, and the Electors in each State shall have the Qualifications requisite for Electors of the most numerous Branch of the State Legislature.

No Person shall be a Representative who shall not have attained to the Age of twenty five Years, and seven Years a Citizen of the United States, and when elected shall not be an Inhabitant of that State in which he shall be chosen.

Section 3. The Senate of the United States shall be composed of two Senators from each State, chosen by the Electors in each State for six Years, and each Senator shall have the Qualifications requisite for Electors of the most numerous Branch of the State Legislature.

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**“The Congress shall have Power
...
To regulate Commerce ...
among the several States”**

Art. 1 § 8, cl. 3

“[E]ven if appellee's activity be **local and** though it may **not** be regarded as **commerce**, it may still, whatever its nature, be reached by Congress if it exerts a **substantial economic effect on interstate commerce** and this irrespective of whether such effect is what might at some earlier time have been defined as **‘direct’ or ‘indirect.’**”

Wickard v. Filburn, 317 U.S. 111, 125 (1942)

The Congress shall have Power

. . .

**To regulate matters substantially affecting
Commerce**

. . .

among the several states

**“nor shall private property be taken
for public use,
without just compensation.”**

“Accordingly, when this Court began applying the Fifth Amendment to the States at the close of the 19th century, it embraced the broader and more natural interpretation of public use as ‘**public purpose**.’”

Kelo v. City of New London, Conn., 545 U.S. 469, 479–80 (2005).

“Because [the City’s economic development] plan unquestionably serves a **public purpose**, the takings challenged here satisfy the **public use** requirement of the Fifth Amendment.”

Kelo v. City of New London, Conn., 545 U.S. 469, 484 (2005).

**nor shall private property be taken for
~~public use~~ a public purpose,
including economic development,
without just compensation.**

5th Amendment (1791): “No person shall . . . be deprived of life, liberty, or property [by the federal government], without due process of law.”

14th Amendment (1868): “. . . nor shall any State deprive any person of life, liberty, or property, without due process of law.”

“... nor shall any State deprive any person of life, liberty, or property, without **substantive or procedural** due process of law.”

Procedural due process: redundant; process *is* procedural.

Substantive due process: without a textual foundation? “Lex terrae” in Magna Carta?

Lochner era, 1897–1937: substantive due process used to hold unconstitutional state and federal laws restricting economic liberty or private contract rights.

Examples: federal regulation of child labor; state pension law.

Revival, 1965–present: substantive due process used to hold unconstitutional laws that restrict privacy.

Examples: married couples' access to birth control products; access to abortion; private homosexual acts.

“The enumeration in the Constitution, of certain rights, shall not be construed to deny or disparage others retained by the people.”

Where are those other rights to be found?

- **Natural Law, for the “unalienable rights” with which all men “are endowed by their Creator” . . . per the Declaration of Independence?**
- **Common law, for the rights of Englishmen as of 1789?**
- **A continuing common law of the Constitution?**



A More or Less Perfect Union

A Personal Exploration by Judge Douglas Ginsburg

Learn more at

www.freetochoosenetwork.org/Constitution



DOUGLAS GINSBURG

US COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

Douglas H. Ginsburg is a judge of the US Court of Appeals for the District of Columbia Circuit, to which he was appointed by President Reagan in 1986. He is also a professor at the Antonin Scalia Law School, George Mason University, where he teaches courses in antitrust and jurisprudence, and a visiting professor at University College London, Faculty of Laws. Before joining the bench, he was a professor at Harvard Law School and then assistant attorney general of the United States for antitrust. Judge Ginsburg is a graduate of Cornell University (1970) and of the University of Chicago Law School (1973).

Ginsburg serves on the advisory boards of many journals and academic centers, including the *Supreme Court Economic Review*, the *Harvard Journal of Law and Public Policy*, the *University of Chicago Law Review*, and, at University College London, both the Centre for Law, Economics and Society and the Jevons Institute for Competition Law and Economics.

Ginsburg is the author or coauthor of many books and articles, including “Originalism and Economic Analysis: Two Case Studies of Consistency and Coherence in Supreme Court Decision Making,” (*Harvard Journal of Law and Public Policy*, 2010); and “On Constitutionalism,” (2003 Simon Lecture, *CATO Supreme Court Review*, 2002–03). Judge Ginsburg recently completed a three-part series on the Constitution, *A More or Less Perfect Union*, to be broadcast on PBS stations early in 2020.

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