
Freedom to Conduct a Business, a Comparative Law Perspective

United States of America



STUDY

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FREEDOM TO CONDUCT A BUSINESS, A COMPARATIVE-LAW PERSPECTIVE

United States of America

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Abstract

This document is part of a series of Comparative Law studies that analyze the freedom to conduct a business in different legal orders around the world. After a brief historic introduction and a presentation of applicable legislation and case law, the content, limits and possible evolution of this freedom are examined.

The subject of this study is the United States' federal legal system.

The United States' Constitution does not grant an express right to freely conduct or operate a business. To the contrary, the Constitution expressly grants the federal Congress power to regulate interstate commerce. In addition, per the Tenth Amendment to the Constitution, the states can regulate businesses under their inherent police power to protect the health, safety, and general welfare of their inhabitants. Although early Supreme Court precedent recognized an "economic property right" that merited constitutional protection from government interference, the Supreme Court's position significantly changed in the 1930s during the New Deal expansion of federal regulation and intervention in the national economy. In the modern era, the Supreme Court has consistently ruled that the federal and state governments have a broad power to regulate businesses to serve any legitimate purpose so long as the legislation or regulations have a rational basis connected to that purpose.

AUTHOR

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List of Abbreviations*

| | |
|--------------------------|-----------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------|
| § | section (“§§” is an abbreviation for “sections”) |
| 2d | second |
| 3d | third |
| amend. | amendment |
| Ann. | Annotated |
| art. | article |
| ch. | chapter (<i>an early designation for public laws published in United States Statutes at Large</i>) |
| cl. | clause |
| Cir. | Circuit |
| Cong. Rsch. Serv. | Congressional Research Service |
| Const. | Constitution |
| Corp. | Corporation |
| Dep’t | Department |
| e.g. | <i>exempli gratia</i> (in citations, used to indicate that the authority states the proposition; other authorities also state the proposition, but citation to them is not useful or is repetitive) |
| ed. | Edition |
| EdN. | Editor’s note |
| et seq. | <i>et sequitur</i> (used to indicate that the cited reference includes additional sections that follow the initial section cited) |
| ex rel. | <i>ex relatione</i> (in case names, used as an abbreviation for expressions like “on behalf of”) |
| F. | <i>Federal Reporter</i> , the reporter of cases from the United States Courts of Appeals. Cases may be reported in subsequent series, e.g., F.2d, F.3d. |
| Fed. | Federal |
| Gov’t | Government |
| i.e. | <i>id est</i> (in text used as an abbreviation for “in other words”) |
| Id. | <i>idem</i> (in citations, used to refer to the immediately preceding authority cited) |
| Inc. | Incorporated |
| Int’l | International |
| J. | Journal (or Justice, when used with the name of a Supreme Court Justice in a case quotation) |

* Abbreviations are taken from *The Bluebook: A Uniform System of Citation* (21st ed. 2020). *The Bluebook* is an authoritative citation manual used in legal writing in the United States.

| | |
|--------------------|---------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------|
| L. | Law |
| La. | Louisiana |
| Legis. | Legislation |
| Md. | Maryland |
| Nat'l | National |
| N.Y. | New York |
| No. | Number |
| Okla. | Oklahoma |
| p. / pp. | Page / pages |
| Pol'y | Policy |
| Pub. | Public |
| Rsch. | Research |
| Rev. | revised |
| S. Ct. | Supreme Court Reporter (<i>case law reporter that includes opinions of the United States Supreme Court</i>) |
| sec. | section |
| Serv. | Service |
| Stat. | United States Statutes at Large (<i>official publication of statutes passed in the United States, in chronological order</i>) |
| Supra | Above (<i>used to indicate that the material referenced was referenced in full in a prior footnote, but not in the immediately prior footnote</i>) |
| Tenn. | Tennessee |
| tit. | title |
| U. | University |
| U.S. | United States of America or United States Reporter (<i>in text, used as an adjective, as in, "U.S. history;" in citations, used to abbreviate "United States Reporter," the official case law reporter for opinions of the United States Supreme Court</i>) |
| U.S. Const. | United States Constitution |
| U.S.C. | United States Code (<i>official code containing the general and permanent laws of the United States</i>) |
| v. | versus (<i>in case names, used to delineate opposing parties</i>) |
| Va. | Virginia |
| Vol. | Volume |
| Wall. | John William Wallace (<i>found in citations to early U.S. Reports during the time period when Wallace was that publication's editor</i>) |

Executive Summary

The United States does not recognize a fundamental freedom to conduct a business*. The Constitution prohibits the federal and state governments from interfering with property rights without “due process of law” under the Fifth and Fourteenth amendments, but expressly gives the Congress authority to regulate interstate commerce and implicitly grants the states the power to regulate intra-state commerce via their police power, i.e., their sovereign authority to regulate private persons to protect the public’s health, safety, and general welfare.

Early twentieth-century Supreme Court jurisprudence recognized some fundamental property rights to contract for employment, practice occupations, and operate businesses without government interference, but the Court’s position changed in the 1930s during the New Deal expansion of government and regulation of the economy. Modern Supreme Court jurisprudence evaluates government regulation of business activities under a “rational basis review” standard. “Rational basis review” is the lowest level of scrutiny applied by the Supreme Court in evaluating the constitutionality of federal and state laws and regulations. Under this standard, the government can regulate to serve any legitimate purpose, and the courts will defer to the legislature so long as the legislation or regulations have a rational basis connected to that purpose.

Today, businesses in the United States must comply with numerous federal and state laws and regulations that protect employees, the environment, consumers, and investors; prohibit monopolies and anticompetitive conduct; and require licensing for professions and occupations.

* EdN.: to compare with other legal systems, see other studies in the “**Freedom to conduct a business**” series:

- **European Union**: ZILLER, J.: [La liberté d’entreprise, une perspective de droit comparé : Union européenne](#), Unité Bibliothèque de droit comparé, Service de recherche du Parlement européen (EPRS), janvier 2024, XII et 135 pp., référence PE 757.620;
- **France**: PONTTHOREAU, M.-C.: [La liberté d’entreprise, une perspective de droit comparé : France](#), Unité Bibliothèque de droit comparé, Service de recherche du Parlement européen (EPRS), avril 2024, XII et 124 pp., référence PE 762.291;
- **Germany**: REIMER, F.: [Die unternehmerische Freiheit, eine rechtsvergleichende Perspektive: Deutschland](#), Bibliothek für Vergleichendes Recht, Wissenschaftlicher Dienst des Europäischen Parlaments (EPRS), April 2024, XV und 140 S., Referenz PE 760.415;
- **Mexico**: FERRER MAC-GREGOR POISOT, E.: [La libertad de empresa, una perspectiva de Derecho Comparado: México](#), Unidad Biblioteca de Derecho Comparado, Servicio de Estudios del Parlamento Europeo (EPRS), mayo 2024, XIV y 194 pp., referencia PE 762.318;
- **Spain**: GONZÁLEZ-TREVIJANO SÁNCHEZ, P.: [La libertad de empresa, una perspectiva de Derecho Comparado - España](#), Unidad Biblioteca de Derecho Comparado, Servicio de Estudios del Parlamento Europeo (EPRS), marzo 2024, XVI y 160 pp., referencia PE 760.373.

I. A Brief History of the Recognition of the Freedom to Conduct a Business in the Legal System of the United States

I.1. Its Appearance at Constitutional Level

The organic documents of the United States acknowledge certain fundamental property rights and express a governmental role in protecting economic liberties and property rights.

“Economic liberties” refers to constitutional rights concerning the ability

- (1) to enter into and enforce contracts;
- (2) to pursue a trade or profession; and
- (3) to acquire, possess, and convey property.¹

The [Declaration of Independence](#) recognizes that people have “*certain unalienable rights, that among these are life, liberty, and the pursuit of happiness.*”

FRAME 1

Declaration of Independence, 1776

We hold these truths to be self-evident, that all men are created equal, that they are endowed by their Creator with certain unalienable Rights, that among these are Life, Liberty and the pursuit of Happiness.

Some commentators assert that the Constitution has a fundamental purpose of protecting property rights.²

The first organizing document of the newly-independent United States was the [Articles of Confederation](#) (1777). It came into force on March 1, 1781, after being ratified by all thirteen states. The Articles established a weak central government, affording it only those powers the former colonies had recognized as belonging to king and parliament. The guiding principle of the Articles was the establishment and preservation of the independence and sovereignty of the states.

Because each state had a significant amount of power over its own economy and could engage in trade competition with its neighboring states, the Articles expressly prohibited a state from discriminating against the citizens of other states conducting business within its borders. Article IV states:

FRAME 2

Articles of Confederation, [art. IV](#)

The better to secure and perpetuate mutual friendship and intercourse among the people of the different states in this union, the free inhabitants of each of these states [...] shall be entitled to all privileges and immunities of free citizens in the several states; and the people of each state shall have free ingress and regress to and from any other state, and shall enjoy therein all the privileges of trade and commerce [...]

¹ CHEMERINSKY, E.: *Constitutional Law: Principles and Policies*, Aspen Publishing, 7th ed., 2023 (p. 673).

² WILLIS, H. E.: "Capitalism, the United States Constitution and the Supreme Court", *Kentucky Law Journal*, Vol. XXII, March 1934 (p. 343).

The weak national government of the early United States proved to be ineffective, and within the country's first decade of independence a new constitution was drafted and was ratified in 1789. The [1789 Constitution](#) is the constitution currently in effect.

The 1789 Constitution has several articles that govern commerce and economic liberties. First, the Congress is expressly given several powers within its exclusive jurisdiction, including:

FRAME 3

Constitution of the United States, [art. I, section 8](#)

The Congress shall have Power [...]

To regulate Commerce with foreign Nations, and among the Several states, and with the Indian Tribes;³
[...]

To make all Laws which shall be necessary and proper for carrying into Execution the foregoing Powers, and all other Powers vested by the Constitution in the Government of the United States, or in any Department or Officer thereof.⁴

The Constitution also echoes the “privileges and immunities” language used in the Articles of Confederation:

FRAME 4

Constitution of the United States, [art. IV, section 2](#)

The Citizens of each State shall be entitled to all Privileges and Immunities of Citizens in the several States.⁵

The Fifth and Fourteenth Amendments to the Constitution limit the powers of the federal government and the states to interfere with persons’ property rights:

FRAME 5

Constitution of the United States, Amendments 5 and 14

[Amendment 5](#)

No person shall [...] be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

[Amendment 14, section 1](#)

No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

With respect specifically to a fundamental right to conduct a business, the constitutional provisions most applicable and germane are the Fifth Amendment (with regards to federal action) and the Fourteenth Amendment (with regards to state action). “Due Process” is what the Supreme Court has interpreted as detailed below in Part 1.2.

³ U.S. Const. art. I, sec. 8, cl. 3.

⁴ U.S. Const. art. I, sec. 8, cl. 18.

⁵ U.S. Const. art. IV sec. 2, cl. 1.

I.2. Subsequent Evolution of the Concept

The United States does not currently recognize a fundamental right to conduct a business, but this position has varied over time.

For approximately the first third of the twentieth century, the United States Supreme Court applied a doctrine known as “*economic substantive due process*.” This doctrine recognized “*liberty of contract*” as an interest protected by the Due Process clauses of the Fifth and Fourteenth Amendments.⁶ In implementing this doctrine, the Supreme Court struck down a variety of economic regulations as unconstitutional.⁷ This early twentieth-century period reflected the Court’s interpretation of the Constitution as embodying a *laissez-faire* view of economics.

The term *laissez-faire* denotes the view that prices, wages, and other marketplace outcomes should be shaped by the forces of supply and demand, rather than by government regulation.⁸ During this period of *laissez-faire* economics, also referred to as the “Lochner era” after *Lochner v. New York*, 198 U.S. 45 (1905), the Supreme Court, in several cases, rejected minimum wage laws as unlawfully interfering with the freedom of contract.⁹

The Supreme Court’s position changed fundamentally during the Great Depression as the federal government implemented an immense program of economic relief (the “New Deal” under President Franklin D. Roosevelt).¹⁰ The *laissez-faire* tenet of self-help was replaced by a belief that a legitimate government role is to regulate and intervene in the free market economy in order to help those who are unable to help themselves.¹¹

After 1934, the Supreme Court began to abandon the *laissez-faire* approach to economic regulation in favor of New Deal approaches. For example, in *Nebbia v. New York*,¹² a 1934 decision upholding New York’s price controls for milk, the Court held that in absence of other constitutional restrictions, a state may both adopt an economic policy that can reasonably be said to promote public welfare and enforce such policy by appropriate legislation.

⁶ Overview of Economic Substantive Due Process, Const. Annotated, https://constitution.congress.gov/browse/essay/amdt14-S1-6-2-1/ALDE_00013703/.

⁷ See *Allgeyer v. Louisiana*, 165 U.S. 578 (1897) (striking down Louisiana state law prohibiting out-of-state insurance corporations from conducting business in Louisiana without maintaining a place of business and authorized agent in the state); *Lochner v. New York*, 198 U.S. 45 (1905) (striking down New York state law restricting employment in bakeries to ten hours per day and sixty hours per week as unconstitutionally interfering with the right of adult laborers to contract for means of livelihood).

⁸ TANENHAUS, D. S. (ed.): *Encyclopedia of the Supreme Court of the United States*, Macmillan Reference USA, 2008 (p. 141).

⁹ See *Adkins v. Children’s Hospital*, 261 U.S. 525 (1923) (finding minimum wage law unconstitutional under the Fifth Amendment); *Morehead v. New York*, 298 U.S. 587 (1936) (New York state minimum wage law unconstitutional under the Fourteenth Amendment).

¹⁰ Some historians assert that the Supreme Court changed its view to avoid President Roosevelt’s “court-packing” plan to expand the membership of the Supreme Court so that he could nominate justices who would uphold the constitutionality of New Deal legislation (i.e., “the switch in time that saved nine”). See SOLOMON, R.: “Court Packing Plan”, in *The Oxford Companion to the Supreme Court of the United States*, Kermit L. Hall et al. eds., 2d ed., 2005.

¹¹ *Liberty of Contract and Lochner v. New York*, Const. Annotated, https://constitution.congress.gov/browse/essay/amdt14-S1-6-2-2/ALDE_00013704/.

¹² [291 U.S. 502](#) (1934).

FRAME 6

***Nebbia v. New York*, [291 U.S. 502 \(1934\)](#)**

So far as the requirement of due process is concerned, and in the absence of other constitutional restriction, a State is free to adopt whatever economic policy may reasonably be deemed to promote public welfare, and to enforce that policy by legislation adapted to its purpose.

In the 1937 case [West Coast Hotel v. Parrish](#),¹³ the Supreme Court overturned its precedents to uphold a Washington State minimum wage law and allow states to set minimum wages for employees.

Since *West Coast Hotel*, the Supreme Court's approach to economic regulation has shifted to defer to state legislation. As the Court explained in [Day-Brite Lighting, Inc. v. Missouri](#),¹⁴ its decisions since *West Coast Hotel* "make plain that we do not sit as a super-legislature to weigh the wisdom of legislation nor to decide whether the policy which it expresses offends the public welfare." While the legislative power has limits, the Court emphasized that:

FRAME 7

***Day-Brite Lighting, Inc. v. Missouri*, [342 U.S. 421](#)**

[T]he state legislatures have constitutional authority to experiment with new techniques and may within extremely broad limits control practices in the business-labor field, so long as specific constitutional prohibitions are not violated and so long as conflicts with valid and controlling federal laws are avoided.

[...]

[I]f our recent cases mean anything, they leave debatable issues as respects business, economic, and social affairs to legislative decision.

Indeed, in the 1955 decision [Williamson v. Lee Optical Co.](#),¹⁵ which upheld a statutory scheme regulating sales of eyeglasses that favored medical practitioners in private practice over opticians, the Supreme Court stated:

FRAME 8

***Williamson v. Lee Optical Co.*, [348 U.S. 488](#)**

The day is gone when this Court uses the Due Process Clause of the Fourteenth Amendment to strike down state laws, regulatory of business and industrial conditions, because they may be unwise, improvident, or out of harmony with a particular school of thought."¹⁶

¹³ [300 U.S. 379](#) (1937).

¹⁴ [342 U.S. 421](#), 423 (1952).

¹⁵ [348 U.S. 483](#) (1955).

¹⁶ *Id.* at 488.

II. Constitutional and Sub-Constitutional Provisions

II.1. Constitutional Provisions

II.1.1. Federal Constitution

The Declaration of Independence identifies “*certain unalienable rights, that among these are life, liberty and the pursuit of happiness.*” While it is not law, this declaration has been interpreted as a founding statement of principles that include property rights and a right to individual economic freedom. For example, “*the pursuit of happiness*” can refer to the “*individual’s right to pursue a trade and thereby improve his position in life.*”¹⁷ As noted below in the discussion of state constitutions, numerous states have expanded on the Declaration’s text to make this statement clear.

The [Articles of Confederation](#) (1777) served as the United States’ first framework of government. The Articles expressly prohibited states in economic competition with each other from discriminating against the citizens of other states and interfering with the “*privileges of trade and commerce.*”

FRAME 9

Articles of Confederation, art. IV

The free inhabitants of each of these states ... shall be entitled to all privileges and immunities of free citizens in the several states; and the people of each state shall have free ingress and regress to and from any other state, and shall enjoy therein all the privileges of trade and commerce

The [United States Constitution](#) (1789) centralized the regulation of interstate and foreign trade and economic activity to the national government. In addition, it made an expansive grant of power to the federal legislative branch.

The “Commerce Clause”

In [article I, section 8 of the United States Constitution](#), the powers of the legislative branch of the federal government (i.e., the Congress) are set out. Two of these powers are relevant for this report’s analysis. The first power is the “Commerce Clause”:

FRAME 10

Constitution of the United States, art. I, sec. 8, cl. 3

The Congress shall have the power [...] [t]o regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes;

The Commerce Clause gives Congress broad power to regulate interstate commerce and restricts states from impairing interstate commerce. The Supreme Court’s early interpretations of the Commerce Clause focused on the meaning of “commerce” while paying less attention to the meaning of “regulate.” As detailed more in sections I.2 above and III.1.3 below, the Supreme Court increasingly heard cases during the 1930s on Congress’s power to regulate

¹⁷ SANDEFUR, T.: *The Right to Earn a Living: Economic Freedom and the Law 24*, Cato Institute, 2010.

commerce, with the result that its interstate Commerce Clause jurisprudence evolved markedly during the twentieth century.¹⁸

The “Necessary and Proper Clause”

The second relevant legislative power detailed in article I, section 8 of the Constitution is the “Necessary and Proper Clause.”

FRAME 11

Constitution of the United States, art. I, sec. 8, cl. 18

The Congress shall have the power ... [t]o make all Laws which shall be necessary and proper for carrying into Execution the foregoing Powers, and all other Powers vested by this Constitution in the Government of the United States, or in any Department or Officer thereof.

Under the Necessary and Proper Clause, congressional power encompasses all implied and incidental powers that are “conducive” to the “beneficial exercise” of an enumerated power. The Clause does not require that legislation be absolutely necessary to the exercise of federal power. Rather, so long as Congress’s end is within the scope of federal power under the Constitution, the Necessary and Proper Clause authorizes Congress to employ any means that are “appropriate and plainly adapted to the permitted end.”¹⁹

Prohibition of discrimination against citizens of other states

Like the Articles of Confederation, the Constitution prohibits states from discriminating against citizens of other states.

FRAME 12

Constitution of the United States, art. IV, sec. 2, cl. 1

The Citizens of each State shall be entitled to all Privileges and Immunities of Citizens in the several States.

Subsequent amendments to the Constitution

Subsequent amendments to the Constitution, including the Bill of Rights (consisting of the first ten amendments), limited Congress’s power in two ways.

First, the Tenth Amendment limits the federal government’s jurisdiction to act in a way that interferes with the states’ reserved powers.

FRAME 13

Constitution of the United States, amendment X

The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people.

The Tenth Amendment concerns the relationship between the federal government’s powers and those powers reserved to the states. In the early twentieth century, the Supreme Court

¹⁸ Overview of Commerce Clause, Const. Annotated, https://constitution.congress.gov/browse/essay/artI-S8-C3-1/ALDE_00013403/.

¹⁹ Overview of Necessary and Proper Clause, Const. Annotated, https://constitution.congress.gov/browse/essay/artI-S8-C18-1/ALDE_00001242/.

relied on the Tenth Amendment to strike down various economic regulations as invasive of the police power reserved to the states by the amendment.²⁰ Beginning in the late 1930s, many of these decisions were overruled or limited as the Court embraced a broader conception of Congress's Commerce Clause power, along with the view that the Tenth Amendment does not bar federal action that is necessary and proper to the exercise of federal power.²¹

Two civil rights amendments to the Constitution act as a counterbalance to limit the Government's power to deprive persons of their property or interfere with their fundamental "privileges or immunities" without "due process of law." These are the Fifth Amendment (part of the Bill of Rights) and the Fourteenth Amendment (enacted after the Civil War).

The Fifth Amendment limits the power of the Federal government, and the Fourteenth Amendment limits the power of state governments. Both amendments make their limits through similar language—prohibiting the taking of life, liberty, or property without "due process of law."

FRAME 14

Constitution of the United States, amendment V

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

FRAME 15

Constitution of the United States, amendment XIV, sec. 1

All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

"Due Process" derives from English common law, in particular the [Magna Carta](#) (1215), in which King John promised his barons that "[n]o free man" would be deprived of his life, liberty, or property "except by the lawful judgment of his peers or by the law of the land."²² A statutory rendition of the Magna Carta in the Fourteenth Century ([28 Edw. III, c. 3](#)) enacted this provision of the Magna Carta as "No man of what state or condition he be, shall be put out of his lands or tenements nor taken, nor disinherited, nor put to death, without he be brought to answer by due process of law." (emphasis added). This language influenced the writings of Enlightenment jurists, such as Sir Edward Coke. Coke's writings were instrumental in the Framers'

²⁰ See, e.g., [Hammer v. Dagenhart](#), 247 U.S. 251 (1918) (invalidating federal prohibition on interstate trafficking in goods produced by child labor as invading "the local power always existing and carefully reserved to the states in the Tenth Amendment to the Constitution."), overruled by [Darby v. United States](#), 312 U.S. 100, 117 (1941).

²¹ See [Darby](#), 312 U.S. at 124 ("From the beginning and for many years the [Tenth] amendment has been construed as not depriving the national government of authority to resort to all means for the exercise of a granted power which are appropriate and plainly adapted to the permitted end.")

²² [Historical Background on Due Process](#), Const. Annotated, https://constitution.congress.gov/browse/essay/amdt5-5-2/ALDE_00013722/.

understanding of due process and in the drafting of colonial charters and the federal and state constitutions.²³

“Due process” as used in the Fifth and Fourteenth Amendments refers to two separate concepts:

- “Procedural Due Process”
- “Substantive Due Process”

Procedural Due Process refers to a system of procedural protections, such as notice and an opportunity for a hearing, before a person may be deprived of a protected interest.²⁴

“Substantive due process” protects certain fundamental constitutional rights from government interference, regardless of the procedures the government follows when enforcing law. These protected rights, though not listed in the Constitution, are deemed so fundamental that courts must subject government actions infringing on them to closer scrutiny.²⁵

Constitutional questions thus analyzed by the Supreme Court during the early twentieth century included those relating to whether the right to operate a business is a “fundamental constitutional right” protected by substantive due process under the Fifth and Fourteenth Amendments.²⁶

II.1.2. State Constitutions

Twenty-five states have the possession of property or other business or economic interests enumerated as a fundamental right of individuals in their constitutions.²⁷ These constitutional provisions mirror the language of the Declaration of Independence’s enumeration of “*life, liberty, and the pursuit of happiness*” as inalienable rights. Some examples follow:

FRAME 16

[Arkansas Constitution](#) (1874, as amended), art. 2, sec. 2

All men are created equally free and independent, and have certain inherent and inalienable rights, amongst which are those of enjoying and defending life and liberty; of acquiring, possessing and protecting property and reputation, and of pursuing their own happiness.

FRAME 17

[Oklahoma Constitution](#) (1907, as amended), art. II, sec. 2

All persons have the inherent right to life, liberty, the pursuit of happiness, and the enjoyment of the gains of their own industry.

²³ Id.

²⁴ *Overview of Due Process Procedural Requirements*, Const. Annotated, https://constitution.congress.gov/browse/essay/amdt5-6-1/ALDE_00013723/
A detailed examination of procedural due process is beyond the scope of this report.

²⁵ *Overview of Substantive Due Process*, Const. Annotated, https://constitution.congress.gov/browse/essay/amdt14-S1-6-1/ALDE_00013814/

²⁶ *Liberty of Contract and Lochner v. New York*, Const. Annotated, https://constitution.congress.gov/browse/essay/amdt14-S1-6-2-2/ALDE_00013704/

²⁷ See MADDEX, R. L.: *State Constitutions of the United States*, 2d ed., 2006.

FRAME 18

West Virginia Constitution (1863, as amended), art. III, sec. 1

All men are, by nature, equally free and independent, and have certain inherent rights, of which, when they enter into a state of society, they cannot, by compact, deprive or divest their posterity, namely: The enjoyment of life and liberty, with the means of acquiring and possessing property, and of pursuing and obtaining happiness and safety.

The State of New York has enacted several amendments to its constitution that are unique among the states. As noted above in section II, the United States Supreme Court in [Lochner](#) invalidated a New York state law that set maximum working hours for bakers as an unconstitutional interference with economic substantive due process. In response to this decision, New York amended its constitution in 1938 to enshrine the state's legislative power to protect the health and safety of workers.²⁸

FRAME 19

New York Constitution (1895, as amended), Sec. 17 & 18

§ 17. Labor of human beings is not a commodity nor an article of commerce and shall never be so considered or construed.

§ 18. Nothing contained in this constitution shall be construed to limit the power of the legislature to enact laws for the protection of the lives, health, or safety of employees

II.2. Sub-Constitutional Provisions

Both the federal government and state governments have enacted numerous statutes and regulations that limit the freedom to conduct business.

II.2.1. Federal Laws

II.2.1.1. Labor and Employment Laws and Regulations

Federal laws set forth numerous provisions regulating labor and employment in the United States. A selection of these laws is delineated below.

The [Fair Labor Standards Act](#) of 1938²⁹ sets forth numerous requirements that businesses must follow regarding wages and hours.³⁰ For example, section 206 sets a minimum wage applicable to all employers;³¹ section 207 sets maximum weekly hours that can be worked before overtime wages must be paid;³² and section 212 restricts child labor.³³

²⁸ See *id.* at 282.

²⁹ 52 Stat. 1060, as amended, codified at [29 U.S.C. §201](#), *et seq.*

³⁰ See generally, Cong. Rsch. Serv., Report No. R42713, *The Fair Labor Standards Act (FLSA): An Overview* (March 8, 2023), <https://crsreports.congress.gov/product/pdf/R/R42713>.

³¹ See generally, Cong. Rsch. Serv., Report No. R43089, *The Federal Minimum Wage: In Brief* (Feb. 4, 2021), <https://crsreports.congress.gov/product/pdf/R/R43089>.

³² See also Cong. Rsch. Serv., Report No. R45007, *Overtime Exemptions in the Fair Labor Standards Act for Executive, Administrative, and Professional Employees*, (Oct. 31, 2017), <https://crsreports.congress.gov/product/pdf/R/R45007>.

³³ For more detail on the child labor provisions, see Cong. Rsch. Serv., Report, No. R44548, *The Fair Labor Standards Act (FLSA) Child Labor Provisions* (June 29, 2016), <https://crsreports.congress.gov/product/pdf/R/R44548>.

Title VII of the [Civil Rights Act of 1964](#)³⁴ prohibits discrimination* by covered employers³⁵ on the basis of race, color, religion, sex, or national origin.³⁶

³⁴ Pub. L. 88-352, 78 Stat. 241 (as amended and codified at [42 U.S.C. §2000e](#), et al.)

* EdN: For a comparison of the **principles of equality and non-discrimination** in other legal systems, see:

- **Austria:** VAŠEK, M.: [Die Grundsätze der Gleichheit und der Nichtdiskriminierung, eine rechtsvergleichende Perspektive – Österreich](#), Bibliothek für Vergleichendes Recht, Wissenschaftlicher Dienst des Europäischen Parlaments (EPRS), Oktober 2020, VIII und 44 S., Referenz PE 659.277 (original German version); [Les principes d'égalité et non-discrimination, une perspective de droit comparé - Autriche](#), Unité Bibliothèque de droit comparé, Service de recherche du Parlement européen (EPRS), octobre 2020, VIII et 49 pp., référence PE 659.277 (French version with added comments);
- **Belgium:** BEHRENDT, CH.: [Les principes d'égalité et non-discrimination, une perspective de droit comparé - Belgique](#), Unité Bibliothèque de droit comparé, Service de recherche du Parlement européen (EPRS), février 2021, VIII et 44 pp., référence PE 679.087 (original French version); [Los principios de igualdad y no discriminación, una perspectiva de Derecho Comparado - Bélgica](#), Unidad Biblioteca de Derecho Comparado, Servicio de Estudios del Parlamento Europeo (EPRS), julio 2022, X y 82 pp., referencia PE 733.602 (Spanish version with added comments and update); [Die Grundsätze der Gleichheit und der Nichtdiskriminierung, eine rechtsvergleichende Perspektive – Belgien](#), Bibliothek für Vergleichendes Recht, Wissenschaftlicher Dienst des Europäischen Parlaments (EPRS), Dezember 2022, VIII und 106 S., Referenz PE 739.262 (German version with added comments and update);
- **Canada:** SHEPPARD, C.: [The principles of equality and non-discrimination, a comparative law perspective - Canada](#), Comparative Law Library Unit, European Parliamentary Research Service (EPRS), November 2020, VIII and 64 pp., reference PE 659.362 (original English version); [Les principes d'égalité et de non-discrimination, une perspective de droit comparé - Canada](#), Unité Bibliothèque de droit comparé, Service de recherche du Parlement européen (EPRS), février 2022, X et 92 pp., référence PE 698.937 (French version with added comments and update);
- **Chile:** GARCÍA PINO, G.: [Los principios de igualdad y no discriminación, una perspectiva de Derecho Comparado - Chile](#), Unidad Biblioteca de Derecho Comparado, Servicio de Estudios del Parlamento Europeo (EPRS), marzo 2021, VIII y 120 pp., referencia PE 690.533 (original Spanish version); [Los principios de igualdad y no discriminación, una perspectiva de Derecho Comparado - Chile](#), Unidad Biblioteca de Derecho Comparado, Servicio de Estudios del Parlamento Europeo (EPRS), febrero 2023, X y 178 pp., referencia PE 739.352 (updated second edition with added comments); [Die Grundsätze der Gleichheit und der Nichtdiskriminierung, eine rechtsvergleichende Perspektive - Chile](#), Bibliothek für Vergleichendes Recht, Wissenschaftlicher Dienst des Europäischen Parlaments (EPRS), Februar 2023, XII und 210 S., Referenz PE 739.353 (German version with added comments and update) ;
- **Council of Europe:** ZILLER, J.: [Les principes d'égalité et de non-discrimination, une perspective de droit comparé - Conseil de l'Europe](#), Unité Bibliothèque de droit comparé, Service de recherche du Parlement européen (EPRS), octobre 2020, VIII et 72 pp., référence PE 659.276 (original French version); [Principios de igualdad y no discriminación, una perspectiva de Derecho Comparado – Consejo de Europa](#), Unidad Biblioteca de Derecho Comparado, Servicio de Estudios del Parlamento Europeo (EPRS), octubre 2022, X y 122 pp., referencia PE 738.179 (Spanish version with added comments and update); [Die Grundsätze der Gleichheit und der Nichtdiskriminierung, eine rechtsvergleichende Perspektive – Europarat](#), Bibliothek für Vergleichendes Recht, Wissenschaftlicher Dienst des Europäischen Parlaments (EPRS), November 2022, X und 136 S., Referenz PE 739.217 (German version with added comments and update) ;
- **European Union:** SALVATORE, V.: [I principi di uguaglianza e non discriminazione, una prospettiva di diritto comparato - Unione europea](#), Unità Biblioteca di diritto comparato, Servizio Ricerca del Parlamento europeo (EPRS), gennaio 2021, VIII e 61 pp., referencia PE 679.060 (original Italian version); [Die Grundsätze der Gleichheit und der Nichtdiskriminierung, eine rechtsvergleichende Perspektive – Europäische Union](#), Bibliothek für Vergleichendes Recht, Wissenschaftlicher Dienst des Europäischen Parlaments (EPRS), Mai 2023, X und 121 S., Referenz PE 747.894 (updated German version with comments).
- **France:** PONTHEAUX, M.-C.: [Les principes d'égalité et non-discrimination, une perspective de droit comparé - France](#), Unité Bibliothèque de droit comparé, Service de recherche du Parlement européen (EPRS), janvier 2021, VIII et 44 pp., référence PE 679.061 (original French version); [Los principios de igualdad y no discriminación, una perspectiva de Derecho Comparado - Francia](#), Unidad Biblioteca de Derecho Comparado, Servicio de Estudios del Parlamento Europeo (EPRS), abril 2022, XI y 82 pp., referencia PE 729.378 (Spanish version with added comments and update);
- **Germany:** REIMER, F.: [Die Grundsätze der Gleichheit und der Nichtdiskriminierung, eine rechtsvergleichende](#)

Subsequent federal acts have prohibited workplace discrimination on the basis of age,³⁷ pregnancy,³⁸ and disability.³⁹

The federal government also has implemented employment regulations in order to promote competition, increase innovation, and foster new business formation. For example, on May 7, 2024, the Federal Trade Commission (FTC) promulgated a regulation prohibiting many types of non-compete clauses in employment contracts.⁴⁰

Perspektive - Deutschland, Bibliothek für Vergleichendes Recht, Wissenschaftlicher Dienst des Europäischen Parlaments (EPRS), Oktober 2020, XIV und 77 S., Referenz PE 659.305 (original German version); *Les principes d'égalité et de non-discrimination, une perspective de droit comparé - Allemagne*, Unité Bibliothèque de droit comparé, Service de recherche du Parlement européen (EPRS), mars 2022, XIV et 111 pp., référence PE E 729.295 (French version with added comments and update);

- **Italy:** LUCIANI, M.: *I principi di eguaglianza e di non discriminazione, una prospettiva di diritto comparato - Italia*, Unità Biblioteca di diritto comparato, Servizio Ricerca del Parlamento europeo (EPRS), ottobre 2020, X e 71 pp., referenza PE 659.298; *Die Grundsätze der Gleichheit und der Nichtdiskriminierung, eine rechtsvergleichende Perspektive - Italien*, Bibliothek für Vergleichendes Recht, Wissenschaftlicher Dienst des Europäischen Parlaments (EPRS), September 2023, X und 137 S., Referenz PE 747.895 (updated German version with comments); DIEZ PARRA (Coord.): *I principi di eguaglianza e di non discriminazione, una prospettiva di diritto comparato - Italia*, Unità Biblioteca di diritto comparato, Servizio Ricerca del Parlamento europeo (EPRS), febbraio 2024, XVI e 172 pp., referenza PE 659.298 (updated second edition with comments);
- **Peru:** ESPINOSA-SALDAÑA BARRERA, E.: *Los principios de igualdad y no discriminación, una perspectiva de Derecho Comparado - Perú*, Unidad Biblioteca de Derecho Comparado, Servicio de Estudios del Parlamento Europeo (EPRS), diciembre 2020, VIII y 64 pp., referencia PE 659.380;
- **Spain:** GONZÁLEZ-TREVIJANO SÁNCHEZ, P.: *Los principios de igualdad y no discriminación, una perspectiva de Derecho Comparado - España*, Unidad Biblioteca de Derecho Comparado, Servicio de Estudios del Parlamento Europeo (EPRS), octubre 2020, VIII y 104 pp., referencia PE 659.297 (original Spanish version); *Les principes d'égalité et non-discrimination, une perspective de droit comparé - Espagne*, Unité Bibliothèque de droit comparé, Service de recherche du Parlement européen (EPRS), juin 2022, X et 167 pp., référence PE 733.554 (French version with added comments and update); *Die Grundsätze der Gleichheit und der Nichtdiskriminierung, eine rechtsvergleichende Perspektive - Spanien*, Bibliothek für Vergleichendes Recht, Wissenschaftlicher Dienst des Europäischen Parlaments (EPRS), Januar 2023, X und 194 S., Referenz PE 739.207 (German version with added comments and update);
- **Switzerland:** FREI, N.: *Die Grundsätze der Gleichheit und der Nichtdiskriminierung, eine rechtsvergleichende Perspektive - Schweiz*, Bibliothek für Vergleichendes Recht, Wissenschaftlicher Dienst des Europäischen Parlaments (EPRS), Oktober 2020, X und 70 S., Referenz PE 659.292 (original German version); *Les principes d'égalité et de non-discrimination, une perspective de droit comparé - Suisse*, Unité Bibliothèque de droit comparé, Service de recherche du Parlement européen (EPRS), mars 2022, X et 95 pp., référence PE 729.316 (French version with added comments);
- **United States:** OSBORNE, E.L.: *The principles of equality and non-discrimination, a comparative law perspective - United States of America*, Comparative Law Library Unit, European Parliamentary Research Service (EPRS), March 2021, XII and 83 pp., reference PE 689.375 (original English version); *Les principes d'égalité et de non-discrimination, une perspective de droit comparé - États-Unis d'Amérique*, Unité Bibliothèque de droit comparé, Service de recherche du Parlement européen (EPRS), février 2022, XIII et 111 pp., référence PE 698.938 (French version with added comments and update).

³⁵ Covered employers have fifteen or more employees for each working day in each of twenty or more calendar weeks in the current or preceding calendar year. [42 U.S.C. §2000e\(b\)](#).

³⁶ See generally, Cong. Rsch. Serv., Report No. R46534, *The Civil Rights Act of 1964: An Overview* 60—85 (Sept. 21, 2020), <https://crsreports.congress.gov/product/pdf/R/R46534>; Cong. Rsch. Serv., Report No. IF11705, *The Civil Rights Act of 1964: Eleven Titles at a Glance 2*, (Dec. 14, 2020), <https://crsreports.congress.gov/product/pdf/IF/IF11705>.

³⁷ [The Age Discrimination in Employment Act of 1967](#), Pub. L. 90-202, 81 Stat. 602.

³⁸ [Pregnancy Discrimination Act of 1978](#), Pub. L. 95-555, 92 Stat. 2077.

³⁹ [Americans with Disabilities Act of 1990](#), Pub. L. 101-336, 104 Stat. 327.

⁴⁰ [Non-Compete Clause Rule](#), 89 Fed. Reg. 38,342 (May 7, 2024).

II.2.1.2. Environmental Laws and Regulations

There are numerous federal statutes that regulate how businesses can operate insofar as they affect the environment. A selection of these laws is detailed below:

- The [Clean Air Act](#),⁴¹ which seeks to protect human health and the environment from emissions that pollute ambient, or outdoor, air.
- The [Clean Water Act](#),⁴² which aims to restore and maintain the chemical, physical, and biological integrity of the nation's waters. The Clean Water Act requires that all discharges into the nation's waters be specifically authorized by a permit. In addition, dischargers are also required to maintain records and to carry out effluent monitoring activities.⁴³
- The [Comprehensive Environmental Response, Compensation, and Liability Act of 1980](#) (CERCLA),⁴⁴ commonly referred to as "Superfund," authorizes the federal government to clean up contaminated sites in the United States and to make the "potentially responsible parties" connected to those sites financially liable for the cleanup costs.
- [The Marine Mammal Protection Act](#)⁴⁵ conserves marine mammal populations to protect them from extinction or depletion as a result of human activities. Section 118 of the act regulates commercial fishing operations. The act requires specialized gear and traps to minimize the injury of marine mammals, establishes licensing requirements, and authorizes federal agents to board and accompany any commercial fishing vessel to conduct research and observe operations that assist in the development of improved fishing methods and gear.

The Environmental Protection Agency (EPA) has been empowered by Congress to promulgate regulations implementing the above statutes.⁴⁶

⁴¹ Codified as [42 U.S.C. § 7401](#), *et seq.* The Clean Air Act is a "blanket term" referring to the [Air Pollution Control Act](#), Pub. L. 84-159, 69 Stat. 322 (1955) and subsequent amendments and similar acts. For a list of acts that comprise the Clean Air Act, see Cong. Rsch. Serv., Report No. RL30853, *Clean Air Act: A Summary of the Act and Its Major Requirements* (Sept. 13, 2022), <https://crsreports.congress.gov/product/pdf/RL/RL30853>.

⁴² Codified generally as [33 U.S.C. §§ 1251–1387](#). The "Clean Water Act" refers to the [Federal Water Pollution Control Act of 1948](#), ch. 758, 62 Stat. 1155; the [Federal Water Pollution Control Act Amendments of 1972](#), Pub. L. 92-500, 86 Stat. 816; the [Clean Water Act of 1977](#), Pub. L. 95-217, 91 Stat. 1566, and several related amendments and similar acts. For a list of acts that comprise the Clean Water Act, see Cong. Rsch. Serv., Report No. RL30030, *Clean Water Act: A Summary of the Law* (Oct. 18, 2016), <https://crsreports.congress.gov/product/pdf/RL/RL30030>.

⁴³ Report No. RL30853 at 5.

⁴⁴ Pub. L. 96-510, 94 Stat. 2767, as amended. For a list of subsequent amendments, see Cong. Rsch. Serv., Report No. R41039, *Comprehensive Environmental Response, Compensation, and Liability Act: A Summary of Superfund Cleanup Authorities and Related Provisions of the Act* (2012), <https://crsreports.congress.gov/product/pdf/R/R41039>.

⁴⁵ Pub. L. 92-522, 86 Stat. 1027 (1972), codified at [16 U.S.C. §§ 1361](#), *et seq.* For more information, see Cong. Rsch. Serv., Report No. R47892, *The Marine Mammal Protection Act (P.L. 92-522): Primer and Issues for Congress* (2024), <https://crsreports.congress.gov/product/pdf/R/R47892>.

⁴⁶ [Reorganization Plan No. 3 of 1970](#), 84 Stat. 2086. Most EPA regulations are codified in title 40 of the Code of Federal Regulations (C.F.R.).

II.2.1.3. Antitrust Law

Antitrust law is principally concerned with preventing anticompetitive conduct that enables firms to exercise market power. United States antitrust doctrine prioritizes consumer welfare and does not typically permit producer gains to offset downstream harms.⁴⁷ The key statutes comprising United States antitrust law are:

- Section 1 of the [Sherman Act](#),⁴⁸ which prohibits contracts “in restraint of trade.” These include “horizontal” (i.e., agreements between competitors) price fixing, horizontal market allocation, and horizontal boycotts.
- Section 2 of the Sherman Act, which prohibits monopolization—the unilateral anticompetitive conduct by dominant firms.
- Section 7 of the [Clayton Act](#),⁴⁹ which prohibits mergers and acquisitions that threaten substantially to lessen competition or tend to create a monopoly.

Enforcement of federal antitrust law and the promulgation of rules, regulations, and merger guidelines are conducted by the Department of Justice and the FTC.

II.2.1.4. Product Safety

The federal government has enacted several programs requiring businesses to ensure the quality, effectiveness, and safety of drugs, food, and consumer products:

- The Food and Drug Administration (FDA) is a federal agency that oversees the approval and regulation of drugs entering the U.S. market.⁵⁰ Two regulatory frameworks support the FDA’s review of prescription drugs. First the FDA reviews the safety and effectiveness of new drugs that manufacturers wish to market in the United States. Second, once a drug has passed that threshold and is FDA-approved, the FDA acts through its postmarket or postapproval regulatory procedures. The FDA’s drug regulatory authority derives from several statutes: [The Pure Food and Drug Act of 1906](#);⁵¹ the [Federal Food, Drug, and Cosmetic Act](#) (FFDCA);⁵² and the [Kefauver-Harris Drug Amendments to the FFDCA](#).⁵³
- Numerous federal, state, and local agencies share responsibilities for regulating the safety of the U.S. food supply. Federal responsibility for food safety rests primarily with the FDA and the U.S. Department of Agriculture (USDA), but as many as fifteen

⁴⁷ Cong. Rsch. Serv., Report No. IF11234, *Antitrust Law: An Introduction* (2022), <https://crsreports.congress.gov/product/pdf/IF/IF11234>.

⁴⁸ [Sherman Antitrust Act](#), ch. 647, 26 Stat. 209 (1890), codified at [15 U.S.C. §§ 1–7](#).

⁴⁹ [Clayton Antitrust Act](#), ch. 323, 38 Stat. 730 (1914), codified at [15 U.S.C. §§ 12–27](#).

⁵⁰ See generally, Cong. Rsch. Serv., Report No. R41983, *How FDA Approves Drugs and Regulates Their Safety and Effectiveness* (2018), <https://crsreports.congress.gov/product/pdf/R/R41983>.

⁵¹ Ch. 3915, 34 Stat. 768.

⁵² Ch. 675, 52 Stat. 1040 (1938).

⁵³ Pub. L. 87-781, 76 Stat. 780 (1962).

agencies have some responsibility in administering the approximately thirty laws relating to food safety.⁵⁴

- [The Consumer Product Safety Act](#)⁵⁵ established the Consumer Product Safety Commission (CPSC) “to protect the public against unreasonable risks of injury associated with consumer products.” Although the CPSC has authority to issue mandatory consumer product safety rules, in most instances, the CPSC defers to “voluntary consumer product safety standards” drafted and developed by private industry. The CPSC also has authority to order companies to engage in corrective actions and recall products.⁵⁶

II.2.1.5. Workplace Safety

The [Occupational Safety and Health Act](#) (OSHA)⁵⁷ established the Occupational Safety and Health Administration under the Department of Labor, which is authorized to promulgate, investigate, and enforce health and safety standards for workplaces.⁵⁸ The act covers most private-sector employers and their workers, in addition to some public-sector employers and workers in states, territories, and jurisdictions under federal authority.⁵⁹

II.2.1.6. Securities Laws

Numerous federal statutes regulate the securities industry, the way corporations issue securities, the secondary securities markets (e.g., stock exchanges), investment advisers and investment firms, securities litigation, and accounting standards and practices.⁶⁰ These statutes include

- [The Securities Act of 1933](#),⁶¹ which governs the process by which companies issue securities. The act prohibits any person from offering or selling a security to the public unless the offering has been registered with the Securities and Exchange Commission (SEC) or falls under an exemption.
- [The Securities Exchange Act of 1934](#),⁶² which regulates secondary securities markets. In particular, the act (1) requires companies with securities traded on national

⁵⁴ See generally, Cong. Rsch. Serv., Report No. RS22600, *The Federal Food Safety System: A Primer* (2016), <https://crsreports.congress.gov/product/pdf/RS/RS22600>. A list of the major federal food safety agencies and food safety laws is contained in Appendix A of the report.

⁵⁵ Pub. L. 92-573, 86 Stat. 1207 (1972), codified at [15 U.S.C. §§ 2051](#), *et seq.*

⁵⁶ See generally, Cong. Rsch. Serv., Report No. R45174, *The Consumer Product Safety Act: A Legal Analysis* (2018), <https://crsreports.congress.gov/product/pdf/R/R45174>.

⁵⁷ [The Occupational Safety and Health Act](#), Pub. L. 91-596, 84 Stat. 1590 (1970), as amended, is codified at [29 U.S.C. §§ 651–78](#).

⁵⁸ Safety rules promulgated by the Occupational Safety and Health Administration are codified in Chapter XVII of Title 29 of the Code of Federal Regulations ([29 C.F.R. §§ 1910.1–1910.1450](#)).

⁵⁹ See generally, Cong. Rsch. Serv., Report No. R47241, *Workforce and Labor Policy: Resources for Congressional Offices* (2023), <https://crsreports.congress.gov/product/pdf/R/R47241>.

⁶⁰ See generally, Cong. Rsch. Serv., Report No. IF11422, *Federal Securities Laws: An Overview* (2020), <https://crsreports.congress.gov/product/pdf/IF/IF11422>.

⁶¹ 48 Stat. 74, codified as amended at [15 U.S.C. §§ 77a](#), *et seq.*

⁶² 48 Stat. 881, codified as amended at [15 U.S.C. §§ 78a](#), *et seq.*

securities exchanges and companies with large numbers of shareholders to register their securities with the SEC and abide by a variety of reporting requirements; (2) regulates national securities exchanges, broker-dealers, and self-regulatory organizations; (3) imposes requirements on tender offers; and (4) governs proxy solicitation.

- [The Investment Company Act of 1940](#),⁶³ which regulates issuers that engage primarily in vesting, reinvesting, and trading in securities, in particular mutual funds and exchange-traded funds.
- [The Investment Advisers Act of 1940](#),⁶⁴ which imposes a range of requirements on persons or firms in the business of advising others about the value of securities or the advisability of investing in securities.
- [The Foreign Corrupt Practices Act of 1977](#),⁶⁵ which prohibits corrupt payments or bribes to foreign officials to obtain or retain business and sets accounting provisions to ensure that corporations do not mischaracterize bribes in their accounts or use corporate funds for improper purposes.
- [The Sarbanes-Oxley Act of 2002](#),⁶⁶ which (1) requires the management of public companies to assess and report on the company's internal controls to ensure accurate financial disclosures; (2) requires the CEOs and CFOs of public companies to certify their annual and quarterly reports for accuracy and truthfulness; (3) prohibits public companies from exercising improper influence over their auditors; (4) requires public companies to establish procedures for internal reporting of suspected abuses and complaints; and (5) protects whistleblowers. The act also established the Public Company Accounting Oversight Board to oversee the audits of public companies.

II.2.2. State Laws

Because the Commerce Clause of the United States Constitution vests the power of regulating interstate commerce exclusively in the federal government, states cannot regulate the operation of businesses in a way that would unduly burden interstate commerce.⁶⁷ One permitted sphere of state regulation is the licensing of professions, as these professions work locally, usually cannot operate out of state (due to other states' licensing requirements), and have minimal effect on interstate commerce. Moreover, licensing for the purposes of protecting health and safety falls within the police power reserved to the states by the Tenth Amendment.⁶⁸

⁶³ 54 Stat. 789, codified as amended at [15 U.S.C. §§ 80a-1, et seq.](#)

⁶⁴ 54 Stat. 847, codified as amended at [15 U.S.C. §§ 80b-1, et seq.](#)

⁶⁵ Pub. L. 95-213, 91 Stat. 1494, codified as amended at [15 U.S.C. § 78dd-1.](#)

⁶⁶ Pub. L. 107-204, 116 Stat. 745.

⁶⁷ See, e.g., [South Dakota v. Wayfair, Inc.](#), 138 S. Ct. 2080, 2090–91 (2018).

⁶⁸ Overview of Tenth Amendment, Rights Reserved to the States and People, *Constitution Annotated*, https://constitution.congress.gov/browse/essay/amdt10-1/ALDE_00013619/.

For example, the State of Virginia regulates and licenses numerous professions,⁶⁹ including

- Professions regulated by the Department of Professional and Occupational Regulation,⁷⁰ such as
 - Athlete agents⁷¹
 - Real estate appraisers⁷²
 - Soil scientists, wetland professionals, and geologists.⁷³
- Professions and occupations regulated by boards within the Department of Health Professions,⁷⁴ including
 - Dentistry⁷⁵
 - Medicine⁷⁶
 - Funeral services⁷⁷
 - Nursing⁷⁸
 - Pharmacy⁷⁹
 - Physical therapy⁸⁰
 - Social work⁸¹
 - Veterinary medicine.⁸²
- Attorneys, who are regulated by the Supreme Court of Virginia.⁸³

⁶⁹ See generally [Va. Ann. Code, tit. 54.1](#) (Professions and Occupations).

⁷⁰ <https://www.dpor.virginia.gov/>.

⁷¹ [Va. Ann. Code §§ 54.1-526 through 54.1-542](#).

⁷² [Va. Ann. Code §§ 54.1-2009 through 54.1-2019](#).

⁷³ [Va. Ann. Code §§ 54.1-2200 through 54.1-2208.4](#).

⁷⁴ <https://www.dhp.virginia.gov/>.

⁷⁵ [Va. Ann. Code §§ 54.1-2700 through 54.1-2729.01](#).

⁷⁶ [Va. Ann. Code §§ 54.1-2900 through 51.1-2998](#).

⁷⁷ [Va. Ann. Code §§ 54.1-2800 through 54.1-2825](#).

⁷⁸ [Va. Ann. Code §§ 54.1-3000 through 54.1-3043](#).

⁷⁹ [Va. Ann. Code §§ 54.1-3300 through 54.1-3322](#).

⁸⁰ [Va. Ann. Code §§ 54.1-3473 through 54.1-3496](#).

⁸¹ [Va. Ann. Code §§ 54.1-3700 through 54.1-3709.3](#).

⁸² [Va. Ann. Code §§ 54.1-3800 through 54.1-3813](#).

⁸³ <https://www.vacourts.gov/courts/scv/home.html>. See [Va. Ann. Code §§ 54.1-3900 through 54.1-3944](#), and the Rules of the Supreme Court, which are available via the Virginia State Bar: <https://www.vsb.org/Site/Site/about/rules-regulations/rules-landing.aspx>.

III. The Most Relevant Case Law in this Area

This section reviews selective decisions of courts that concern a fundamental right to operate a business, or as detailed in section I, “*economic substantive due process*.” The Supreme Court’s interpretation of this concept developed and changed from the nineteenth through the twentieth centuries. Cases recognizing a fundamental right were decided before 1937.⁸⁴

III.1. U.S. Supreme Court

III.1.1. Early Cases Leading to an Economic Substantive Due Process Doctrine

Early attempts to invoke an economic substantive due process doctrine at the Supreme Court were unsuccessful. A notable set of cases that considered and rejected a fundamental right to operate a business are known as the [Slaughter-House Cases](#).⁸⁵

The *Slaughter-House Cases* concerned a group of butchers who challenged a Louisiana statute conferring the exclusive privilege of butchering cattle in New Orleans to one corporation. In reviewing the state law establishing a monopoly, the Court recognized that although the Constitution prohibited the government from depriving people of property without due process, the exercise of trade was not “property” within the meaning of the Fifth and Fourteenth Amendments to the Constitution.

Justice Joseph Bradley wrote a dissenting opinion in the *Slaughter-House Cases* in which he espoused a theory that the fundamental natural rights of liberty and property included the freedom to pursue lawful employment and to make contracts. His dissent influenced the Court as it developed a theory of economic substantive due process in later cases.

FRAME 20

***The Slaughter-House Cases*, 83 U.S. (16 Wall.) 36 (1873)**

(Bradley, J., Dissenting)

[I]n my judgment, the right of any citizen to follow whatever lawful employment he chooses to adopt ... is one of his most valuable rights, and one which the legislature of a State cannot invade....

For the preservation, exercise, and enjoyment of these rights the individual citizen, as a necessity, must be left free to adopt such calling, profession, or trade as may seem to him most conducive to that end. Without this right he cannot be a freeman. This right to choose one’s calling is an essential part of that liberty which it is the object of government to protect; and a calling, when chosen, is a man’s property and right.

In my view, a law which prohibits a large class of citizens from adopting a lawful employment, or from following a lawful employment previously adopted, does deprive them of liberty as well as property, without due process of law. Their right of choice is a portion of their liberty; their occupation is their property.

⁸⁴ This analysis relies largely on CHEMERINSKY, *supra* note 1, ch. 8.

⁸⁵ [83 U.S. \(16 Wall.\) 36 \(1873\)](#).

III.1.2. Supreme Court Cases Recognizing a Fundamental Right to Operate a Business and Applying Economic Substantive Due Process to Overturn State Legislation or Regulation

In [Allgeyer v. Louisiana](#),⁸⁶ the Supreme Court declared unconstitutional a Louisiana state law that prohibited payments on marine insurance policies issued by out-of-state companies that were not licensed or approved to do business in the state. The Court found that the law interfered with freedom of contract and thus violated the due process clause of the Fourteenth Amendment.

FRAME 21

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

The liberty mentioned in that amendment [amend. 14] ... [is] deemed to embrace the right of citizen[s] to be free in the enjoyment of all his faculties, to be free to use them in all lawful ways; to live and work where he will; to earn his livelihood by any lawful calling; to pursue any livelihood or avocation, and for that purpose to enter into all contracts which may be proper, necessary, and essential to his carrying out to a successful completion the purposes above mentioned.

The seminal case of [Lochner v. New York](#)⁸⁷ defined what came to be known as the “Lochner” era, characterized by the Supreme Court’s recognition of a fundamental right to economic freedom. *Lochner* concerned a New York state law that set the maximum hours that bakers could work. The Supreme Court declared the law unconstitutional because it interfered with freedom of contract and because it did not serve a valid exercise of the state’s police power. The Court in *Lochner* reached three conclusions:

- (1) freedom of contract is a basic right protected as liberty and a property right under the due process clause of the Fourteenth Amendment;
- (2) the government could interfere with freedom of contract only to serve a valid police purpose, such as protecting public safety, public health, or public morals; and
- (3) the judiciary has the power to carefully scrutinize legislation interfering with the freedom of contract to make sure that it falls within the state’s police power.

Justice Oliver Wendell Holmes wrote a dissenting opinion that rejected the *Lochner* majority’s premise that the Constitution should be used to limit governmental regulation and protect a *laissez-faire* economy. Justice Holmes’ dissent strongly influenced cases in the post-*Lochner* era as the doctrine of substantive economic due process was rejected.

FRAME 22

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

(Holmes, J., dissenting)

The Fourteenth Amendment does not enact Mr. Herbert Spencer’s Social Statics [A] constitution is not intended to embody a particular economic theory, whether of paternalism and the organic relation of the citizen to the State or of laissez-faire.

⁸⁶ [165 U.S. 578](#) (1897).

⁸⁷ [198 U.S. 45](#) (1905).

In [New State Ice Co. v. Liebmann](#),⁸⁸ the Supreme Court declared unconstitutional a law that prohibited any person to manufacture ice unless they first obtained a permit from the government, which permit request would be denied if the government determined the existing level of service was adequate. In the opinion, the Supreme Court expressly stated that engaging in a lawful business was a fundamental right protected by the Constitution.

FRAME 23

[New State Ice Co. V. Liebmann](#), 285 U.S. 262 (1932)

A regulation which has the effect of denying or unreasonably curtailing the common right to engage in a lawful business ... cannot be upheld.

In [Adkins v. Children's Hospital](#),⁸⁹ and [Morehead v. New York ex rel. Tipaldo](#),⁹⁰ the Supreme Court declared unconstitutional state minimum wage laws for women on the grounds that the laws interfered with the freedom of contract and did not serve a valid state police purpose.

FRAME 24

[Morehead v. New York ex rel. Tipaldo](#), 298 U.S. 587 (1936)

[T]he State is without power by any form of legislation to prohibit, change, or nullify contracts between employers and adult women workers as to the amount of wages to be paid.

III.1.3. Modern Era: Supreme Court Abandons the Economic Substantive Due Process Doctrine and No Longer Recognizes Operating a Business as a Fundamental Right

The Great Depression and the economic reforms and programs of the New Deal put great political pressure on the Supreme Court to change its policy and uphold federal government programs regulating business and employment. Indeed, President Franklin Roosevelt threatened to “pack the Court” by expanding the size of the Supreme Court with additional justices that would support the New Deal. Although the court-packing threat never came to fruition, the Supreme Court abandoned its prior *laissez-faire* jurisprudence and the economic substantive due process doctrine in 1937.

In [West Coast Hotel v. Parrish](#),⁹¹ the Supreme Court upheld a state law that required a minimum wage for women employees and expressly overruled [Adkins](#) and [Morehead](#). Chief Justice Hughes, writing for the Court, made it clear that the Court was abandoning the principles of [Lochner](#) and that freedom of contract was no longer considered a fundamental right for the purposes of due process under the Fifth and Fourteenth Amendments.

FRAME 25

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

What is this freedom of contract? The Constitution does not speak of freedom of contract. It speaks of liberty and prohibits the deprivation of liberty without due process of law [R]egulation which is reasonable in relation to its subject and is adopted in the interest of the community is due process.

⁸⁸ [285 U.S. 262](#) (1932).

⁸⁹ [261 U.S. 525](#) (1923).

⁹⁰ [298 U.S. 587](#) (1936).

⁹¹ [300 U.S. 379](#) (1937).

In [United States v. Carolene Products Co.](#),⁹² the Court upheld the [Filled Milk Act of 1923](#),⁹³ which prohibited the sale of milk that had been adulterated with fats or oil other than milk fat. The Court held that economic regulations should be upheld so long as they are supported by a *conceivable* rational basis.

FRAME 26

United States v. Carolene Products Co., 304 U.S. 144 (1938)

Even in the absence of such aids [e.g., reports of legislative committees], the existence of facts supporting the legislative judgment is to be presumed, for regulatory legislation affecting 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.

[Williamson v. Lee Optical](#)⁹⁴ concerned an Oklahoma statute that regulated the retail sale of eyeglasses. The statute made it unlawful for any person not a licensed optometrist or ophthalmologist to fit lenses to a face or to duplicate or replace lenses into glass frames except upon written prescriptive authority of an Oklahoma licensed ophthalmologist or optometrist. An optician brought the suit arguing that the statute was unconstitutional under the Fourteenth Amendment because a law that prohibited opticians from taking old prescription lenses and putting them into a new frame was not within the state's police power. The district court agreed and held the statute unconstitutional. The Supreme Court reversed, ruling that balancing the advantages and disadvantages of a new regulatory requirement was within the purview of the legislature.⁹⁵

FRAME 27

Williamson v. Lee Optical, 348 U.S. 483 (1955)

[T]he 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. The day is gone when this Court uses the Due Process Clause of the Fourteenth Amendment to strike down state laws, regulatory of business and industrial conditions, because they may be unwise, improvident, or out of harmony with a particular school of thought.

"Rational basis review" became the Supreme Court's modern test for legislation and regulations that did not prejudice a "protected class" of persons (e.g., members of racial minority groups) or interfere with a fundamental right. The freedom to contract and other economic and business freedoms were no longer considered to be fundamental rights under the Constitution, and thus as to regulating economic matters, government could regulate to serve *any legitimate purpose*, and the courts would defer to the legislature so long as the legislation or regulations had a *rational basis* connected to that purpose. Rational basis review is the lowest level of scrutiny applied by the Supreme Court in evaluating the constitutionality of federal and state laws and regulations. Private parties challenging such laws bear the burden of proof to show that there is no legitimate purpose or rational connection between the interest and the means to achieve it.

⁹² [304 U.S. 144](#) (1938).

⁹³ Ch. 262, 42 Stat. 1486, codified at [21 U.S.C. §§ 61–63](#).

⁹⁴ [348 U.S. 483](#) (1955).

⁹⁵ *Id.* at 487.

Not one state or federal economic regulation has been found unconstitutional by the Supreme Court under the due process clauses of the Fifth and Fourteenth Amendments since 1937,⁹⁶ although, as described in the next section, some federal appellate court cases have found economic regulation that violates due process the rational basis test.

III.2. U.S. Courts of Appeal

An illustrative set of cases at the appellate level concerns the manufacture and sale of caskets, as the cases described below apply the rational basis test to evaluate the constitutionality of state laws and regulations that require casket manufacturers and retailers to be subject to the licensing requirements for funeral directors and funeral establishments. These cases present rare applications to strike down laws under rational basis review. Despite a split in authority between several circuit courts, the Supreme Court did not grant *certiorari* in any of these cases to resolve the split.⁹⁷

III.2.1. Case Upholding Regulation Under the Rational Basis Test

A Tenth Circuit case, *Powers v. Harris*,⁹⁸ concerned the Oklahoma Funeral Services Licensing Act (FSLA).⁹⁹ Under the FSLA, any person engaged in the sale of funeral service merchandise, including caskets, must be a licensed funeral director operating out of a funeral establishment. Plaintiffs operated a business to sell funeral merchandise over the Internet, offered no funeral-related services, played no role in the disposition of human remains, and was not licensed in Oklahoma as a funeral establishment. Plaintiffs wished solely to sell caskets in-state, at time-of-need to Oklahoma residents over the Internet. Plaintiffs argued that the funeral director and establishment licenses were irrelevant to the operation of a retail casket business, and thus that the licensing requirement violated the Fourteenth Amendment due process clause. Plaintiffs argued that as a matter of substantive due process, the FSLA violates “*the right of every citizen of the United States to follow any lawful calling, business, or profession he may choose.*”

The Tenth Circuit upheld the FSLA. First, the court dismissed the equal protection claim because the state economic regulation did not affect a fundamental right and did not target a protected class of persons but rather categorized people on the basis of a non-suspect classification (i.e., occupation).¹⁰⁰ Second, the court held that “*absent a violation of a specific constitutional provision or other federal law, intrastate economic protectionism [i.e., the protection of a particular group or industry from competition,] constitutes a legitimate state interest.*”¹⁰¹ Upon finding a rational relationship between the casket regulation and the funeral directors’ interest in protecting the intrastate funeral home industry, the court ended its inquiry.¹⁰² The court ultimately concluded that based on Supreme Court precedent, economic protectionism was a valid state purpose under rational basis analysis.

⁹⁶ CHEMERINSKY, *supra* note 1, at 693 citing STONE, G. *et al.*: *Constitutional Law* 832, 5th ed., 2005.

⁹⁷ KINGSMILL, A. B.: *Of Butchers, Bakers, and Casket Makers: St. Joseph Abbey v. Castille and the Fifth Circuit’s Rejection of Pure Economic Protectionism as a Legitimate State Interest*, 75, *La L Rev* 933, 2015.

⁹⁸ [379 F.3d 1208](#) (10th Cir. 2004).

⁹⁹ [Okla. Stat. §§ 395.1. et seq.](#)

¹⁰⁰ 379 F.3d at 1215.

¹⁰¹ *Id.* at 1221.

¹⁰² *Id.* at 1222.

III.2.2. Cases Vacating Regulation Under the Rational Basis Test

In contrast to the Tenth Circuit, two federal circuits have vacated casket regulations under the rational basis test.

A Sixth Circuit decision, [Craigmiles v. Giles](#),¹⁰³ concerned a provision in the Tennessee Funeral Directors and Embalmers Act (FDEA) that forbids anyone from selling caskets without being licensed by the state as a “funeral director.”¹⁰⁴ The court held that the Tennessee licensing requirement was nothing more than an attempt to prevent economic competition, and there was nothing in the statute or the licensing of funeral directors that advanced public health or safety with regards to the sale of caskets.¹⁰⁵ The court found that the evidence in the case directly contradicted the state’s reasoning of public health and safety and consumer protection, and accordingly held that there was no rational relation between the regulatory scheme and any legitimate state interest. The licensing requirement was vacated under the rational basis test.

On similar grounds, the Fifth Circuit in [St. Joseph Abbey v. Castille](#)¹⁰⁶ overturned a Louisiana statute requiring casket sellers to operate licensed funeral establishments, provide embalming services, and hire a licensed funeral director.¹⁰⁷ Much like the Sixth Circuit, the court in this case rejected the state’s argument that the casket sale requirements advanced public health or safety. Indeed, the court noted that caskets were not even required for a burial under Louisiana law, so casket safety could not be a state interest.¹⁰⁸ Accordingly, the Louisiana law failed rational basis review because the court could not find a rational relationship between the law and consumer protectionism or public health and safety, because the state’s plausible rationales were “betrayed by the undisputed facts.”¹⁰⁹

¹⁰³ [312 F.3d 220](#) (6th Cir. 2002).

¹⁰⁴ [Tenn. Code Ann. § 62-5-101\(a\)\(3\)\(A\)\(iii\)](#).

¹⁰⁵ 312 F.3d at 225.

¹⁰⁶ [712 F.3d 215](#) (5th Cir. 2013).

¹⁰⁷ [La. Rev. Stat. Ann. §§ 37:831–37:854](#).

¹⁰⁸ 712 F.3d at 223.

¹⁰⁹ *Id.*

IV. Freedom to Conduct a Business and Its Challenges

IV.1. The Concept of ‘Freedom to Conduct a Business’

As noted earlier in this report, the concept of “freedom to conduct a business” does not exist in the current law of the United States. However, materials outside the legal field provide definitions of this and related concepts.

For example, the Heritage Foundation, a politically conservative American think tank, produces an annual report, *The Index of Economic Freedom*, in which they quantitatively compare over 180 national economies as to their economic and business freedoms.¹¹⁰

The *Index* defines economic freedom as

FRAME 28

Heritage Foundation, *The Index of Economic Freedom* (2023)

The fundamental right of every human to control his or her own labor and property. In an economically free society, individuals are free to work, produce, consume, and invest in any way they please. In economically free societies, governments allow labor, capital, and goods to move freely, and refrain from coercion or constraint of liberty beyond the extent necessary to protect and maintain liberty itself.

To measure economic freedom, the *Index* assigns measurements to 12 qualitative and quantitative factors, consisting of

- Rule of Law: property rights, government integrity, judicial effectiveness;
- Government Size: government spending, tax burden, fiscal health;
- Regulatory Efficiency: business freedom, labor freedom, monetary freedom; and
- Open Markets: trade freedom, investment freedom, financial freedom.

The “business freedom” component of the *Index* “measures the extent to which a country’s regulatory and infrastructure environments constrain the efficient operation of businesses.” They note that “many regulations hinder business productivity and profitability, but those that most inhibit entrepreneurship are those that are associated with the licensing of new businesses.”¹¹¹ Once a business is open, “government regulation may interfere with the normal decision-making or price-setting process.”¹¹²

IV.1.1. Different Names for the Same Concept?

As detailed in prior sections of this report, the concept of “freedom to conduct a business” has been described in various ways in the United States legal tradition, including as “property rights,” “freedom of contract,” “economic substantive due process,” and “economic freedom.”

¹¹⁰ The 2023 edition is available at <https://www.heritage.org/index/pages/about>.

¹¹¹ <https://www.heritage.org/index/pages/report#indexTwelveFreedom>

¹¹² *Id.*

IV.1.2. Differences Between ‘Freedom to Conduct a Business’ and Other Freedoms

IV.1.2.1. Trade Freedom

The *Index* defines “trade freedom” as “the extent of tariff and nontariff barriers that affect import and exports of goods and services.”¹¹³

IV.1.2.2. Industrial Freedom

The term “industrial freedom” describes a relationship between entrepreneurs and labor. A firm definition as used in United States legal practice has been inconsistent. The Supreme Court in *Lochner* described industrial freedom as representing citizens’ right to contract their labor free of state regulation.¹¹⁴ In contrast, then-future Supreme Court Justice Louis Brandeis, often associated with the progressive movement, described “industrial freedom” as consistent with “the health of the body, the mind, and the soul of the worker ... with greater joy in work and generally in living.”¹¹⁵ Industrial freedom, in Brandeis’s view, was related to industrial democracy: the right of workers to influence the nature and direction of productive enterprise.¹¹⁶

IV.1.2.3. Freedom of Economic Initiative

The phrase “freedom of economic initiative” is not a generally recognized legal term in the United States, but is recognized in some European countries (e.g. Italy).¹¹⁷

IV.2. Is the Freedom to Conduct a Business a Fundamental Right in the United States?

As detailed the above sections of this report, the Constitution does not grant an express right to freely conduct or operate a business. To the contrary, the Constitution expressly grants the Congress power to regulate interstate commerce. The Supreme Court in the modern era has consistently ruled that the government has a broad power to regulate businesses to serve any legitimate purpose so long as the legislation or regulations have a rational basis connected to that purpose.

IV.3. Coexistence with the Right to Property

As detailed above, although early Supreme Court jurisprudence held that employment and business operations were fundamental property rights, in the modern era the Supreme Court has consistently held that they are not, and that they are subject to government regulation rationally related to a legitimate purpose.

¹¹³ <https://www.heritage.org/index/pages/about#indexMethodology>.

¹¹⁴ *Lochner*, 198 U.S. at 71–72.

¹¹⁵ BRANDEIS, L. D.: “Efficiency by Consent”, *Harper’s Weekly*, Dec. 11, 1915, at 568, quoted in KRAINES, O.: “Brandeis’ Philosophy of Scientific Management”, 13 *The Western Political Quarterly* 191, 196 (1960).

¹¹⁶ APAR, E. L.: *Capitalism and Unfreedom: Louis D. Brandeis and a Liberty of the Left* 62, The City University of New York, 2017.

¹¹⁷ FALERI, C.: “Information Technology and Workers’ Privacy: The Italian Law Part II: National Studies”, 23, *Comparative Labor Law & Policy Journal* J 399, 414, 2001–2002.

IV.4. Freedom to Conduct a Business and Rule of Law

Under modern Supreme Court jurisprudence, government legislation and regulations that do not prejudice a “protected class” of citizens (e.g., members of racial or religious minority groups) are evaluated under “rational basis review.” This test is highly deferential to the government and is the lowest level of scrutiny applied by the Supreme Court. Private parties challenging such legislation or regulations bear the burden of proof to show that the regulations serve no legitimate purpose or that there is no rational connection between the government’s interest and the means to achieve it.

IV.5. Freedom to Conduct a Business and the State’s Economic Model

Per the Heritage Foundation’s 2023 *Index of Economic Freedom*, the United States ranks 25th in the world for “economic freedom.”¹¹⁸ The United States’ economic model is a market economy with government intervention and regulation—an economy that is “mostly free,” bordering on “moderately free,” per the *Index*’s rubric of “economic freedom.” The *Index* gives the United States a high rank for recognizing and protecting property rights, but otherwise its other scores concerning “labor freedom,” “trade freedom,” “business freedom,” and “investment freedom” are generally ranked as “mostly” to “moderately” free.

IV.6. Freedom to Conduct a Business and “national practices”

Article 16 of the European Charter of Fundamental Rights recognizes “*the freedom to conduct a business in accordance with Union law and national laws and practices.*”

Inasmuch as article 16 applies to the European Union there is no directly analogous concept in the legal system of the United States.

However, a possible comparison would be to view the United States as a political and economic union of individual states, and consider the freedom of conducting a business or businesses operating in multiple states. Accordingly, the discussion and analysis of the “dormant commerce clause” in section IV.8.6 below might be illuminating regarding the relationship between the federal and state governments in regulating commerce.

IV.7. Freedom to Conduct a Business in a Non-Centralized State Structure

The United States has a federal system of government with both a national centralized government and individual state governments with authority over matters delegated to them. With regards to states’ power to regulate business and the economy versus the federal government’s power, see the discussion of the “dormant commerce clause” in section IV.8.6 below.

¹¹⁸ <https://www.heritage.org/index/pages/report>.

IV.8. Limits to the Freedom to Conduct a Business

IV.8.1. Restrictions Due to the Principle of Proportionality

The “Principle of Proportionality” is a principle of European Union law, and it derives from Continental civil law systems.¹¹⁹ The principle of proportionality requires that a measure must be appropriate and necessary to achieve its objectives.¹²⁰ This principle comprises two tests: suitability and necessity.

Suitability is a test of internal consistency requiring that the means employed by the measure must be reasonably likely to achieve its objectives. Necessity requires that the measure be the least restrictive way of producing the result, and that the measure does not have an excessive effect on the interests of the regulated parties.¹²¹

The principle of proportionality does not appear in the law of the United States, and indeed as a constitutional matter, American law takes an opposite approach.

As noted above, Congress has express authority to regulate interstate commerce under article I, section 8 of the Constitution. In addition, under common law, states have an inherent police power to protect the health, safety, and general welfare of their inhabitants, and this power is reserved to the states under the Tenth Amendment to the Constitution.

Modern Supreme Court jurisprudence grants both the federal government and the states broad powers to regulate businesses, employment, and economic activity. Laws regulating economic activity are considered under “rational basis review,” which does not require that a law or regulation be the “least restrictive” way of producing the desired result. Under rational basis review, legislation carries with it a presumption of rationality that can only be overcome by a clear showing of arbitrariness and irrationality. The law will be upheld unless the challenger can prove that the government has *no* legitimate purpose or that the means used are *not a reasonable* way to accomplish the goal.¹²² Moreover, unless the government’s action is “*clearly wrong, a display of arbitrary power, not an exercise of judgment,*” it will be upheld under rational basis review.¹²³ Indeed, as Justice Stevens noted in his analysis of rational basis review, “*The Constitution does not prohibit legislatures from enacting stupid laws.*”¹²⁴

IV.8.2. Sectors Reserved for the State

At the federal level, there are several sectors of the economy in which federally-chartered businesses operated. These businesses, while owned by the federal government, provide public services and are legally separate from the federal government to remain nonpartisan:

¹¹⁹ SCHÜTZE, R. and TRIDIMAS, T. (eds.): *Oxford Principles of European Union Law*. First edition, Oxford University Press, 2018.

¹²⁰ *Id.* at 246.

¹²¹ *Id.* at 247.

¹²² CHEMERINSKY, *supra* note 1, at 751.

¹²³ *Id.* at 758 (citing [Matthews v. De Castro](#), 429 U.S. 181, 185 [1976]).

¹²⁴ [New York State Bd. of Elections v. Lopez Torres](#), 552 U.S. 196, 209 (2008) (Stevens, J., concurring).

- The Federal Deposit Insurance Corporation (FDIC), which insures bank deposits and examines and supervises financial institutions for safety, soundness, and consumer protection.¹²⁵
- The United States Postal Service (USPS),¹²⁶ which exclusively provides first-class letter mail but otherwise competes with private shippers.¹²⁷
- The Tennessee Valley Authority (TVA), which is a federal government corporation created by the [Tennessee Valley Authority Act](#)¹²⁸ in 1933. The TVA's mission is to develop and operate the Tennessee River system to improve navigation, minimize flood damage, and to provide energy and related products and services safely, reliably, and at the lowest feasible cost to residents and businesses in the multi-state Tennessee Valley region.
- The Export-Import Bank of the United States is the official U.S. government export credit agency¹²⁹ and aims to support U.S. exports when the private sector is unwilling or unable to provide financing and/or when U.S. exports compete overseas against exports from other countries backed by foreign export credit agencies.¹³⁰

At the state level, there are businesses owned and operated by individual states, counties, or municipalities, including:

- Liquor stores¹³¹
- Toll bridges, tunnels, seaports, and airports¹³²
- Public transit systems¹³³
- Public hospitals¹³⁴
- Banks: The Bank of North Dakota is the only remaining state-owned bank in the United States¹³⁵

¹²⁵ <https://www.fdic.gov/about/what-we-do/>.

¹²⁶ Prior to the enactment of the [Postal Reorganization Act \(PRA\) of 1970](#), Pub. L. 91-375, 84 Stat. 719, mail delivery in the United States was the responsibility of the U.S. Post Office Department, a Cabinet-level department in the executive branch. The PRA established the USPS as an independent agency of the executive branch. See, Cong. Rsch. Serv., Report No. R44603, *Reforming the U.S. Postal Service: Background and Issues for Congress* (2022), <https://crsreports.congress.gov/product/pdf/R/R44603>.

¹²⁷ [39 C.F.R. pt. 310](#) (monopoly on letter mail).

¹²⁸ [16 U.S.C. § 831](#).

¹²⁹ Created under the [Export-Import Bank Act of 1945](#), ch. 341, 59 Stat. 526, as amended, [12 U.S.C. §§ 635, et seq.](#)

¹³⁰ See Cong. Rsch. Serv., Report No. IF10017, *Export-Import Bank of the United States (Ex-Im Bank)* (2024), <https://crsreports.congress.gov/product/pdf/IF/IF10017>.

¹³¹ E.g., [Va. Code § 4.1-119](#) (operation of government liquor stores in Virginia).

¹³² E.g., the Port Authority of New York and New Jersey.

¹³³ E.g., Bay Area Rapid Transit District, a special-purpose district body which operates the Bay Area Rapid Transit system in San Francisco and nearby counties.

¹³⁴ E.g., Hospitals/Bellevue, which is owned and operated by New York City (<https://www.nychealthandhospitals.org/bellevue/history/>).

¹³⁵ [North Dakota Code § 6-09-01](#) ("For the purpose of encouraging and promoting agriculture, commerce, and industry, the state of North Dakota shall engage in the business of banking, and for that purpose shall maintain a system of banking owned, controlled, and operated by it, under the name of the Bank of North Dakota.")

IV.8.3. Competition Law, in Particular State Aids

In the European Union, “State Aid” refers to transfers of public resources in favor of certain undertakings or the production of certain goods, which by providing a selective economic advantage, distorts or threatens to distort competition in the internal market.¹³⁶

FRAME 29

Treaty on Functioning of the European Union (TFUE), art. 107.1

Save as otherwise provided in the Treaties, any aid granted by a Member State or through State resources in any form whatsoever which distorts or threatens to distort competition by favouring certain undertakings or the production of certain goods shall, in so far as it affects trade between Member States, be incompatible with the internal market.

With respect to competition within the United States and whether state governments may permissibly favor their own businesses over out-of-state businesses, see the discussion regarding the “dormant commerce clause” in section IV.8.6 below.

Respecting international trade, from at least the 1990s until recently, the United States government largely emphasized a market-led approach to the industrial sector.¹³⁷ This focus changed in recent years, partly in response to the COVID-19 pandemic, which raised concern about production capacity in certain industries and the reliance on imports considered essential to public health and national security. New legislation was enacted during and immediately after the pandemic to provide a greater government role and more coordinated approach to industrial development. This legislation included:

- the [Creating Helpful Incentives to Produce Semiconductors \(CHIPS\) for America Act](#),¹³⁸ which established investment and incentive schemes to support U.S. semiconductor manufacturing, research and development (R&D), and supply chain security;
- the [Infrastructure Investment and Jobs Act](#),¹³⁹ which established requirements and incentives to support R&D and energy infrastructure and cybersecurity, and ensure a supply chain for critical minerals and battery materials;
- the [CHIPS and Science Act of 2022](#),¹⁴⁰ which provides funding to support U.S. semiconductor manufacturing, R&D, and supply chain security; and
- the [Inflation Reduction Act \(IRA\) of 2022](#),¹⁴¹ which supports investments in domestic energy production, incentivizes the procurement of domestically produced or assembled inputs and products, and boosts R&D of clean-energy technologies.

¹³⁶ Treaty on Functioning of the European Union, arts. 107 & 108, <https://www.affarieuropei.gov.it/en/activity/state-aid/articles-107-and-108/>

¹³⁷ See Cong. Rsch. Serv., Report No. IF12119, *Industrial Policy and International Trade* (2024), <https://crsreports.congress.gov/product/pdf/IF/IF12119>.

¹³⁸ Title XCIX of the [William M. \(Mac\) Thornberry National Defense Authorization Act for Fiscal Year 2021](#), Pub. L. 116-283, 134 Stat. 3388 (2021).

¹³⁹ Pub. L. 117-58, 135 Stat. 429 (2021).

¹⁴⁰ Pub. L. 117-167, 136 Stat. 1366.

¹⁴¹ Pub. L. 117-169, 136 Stat. 1818.

IV.8.4. Labor Law

The three major labor relations statutes in the United States are the [Railway Labor Act](#), the [National Labor Relations Act](#), and the [Federal Service Labor-Management Relations Statute](#). Each law governs a distinct population of the U.S. workforce.¹⁴²

The [Railway Labor Act](#) (RLA) was enacted in 1926.¹⁴³ Its coverage extends to railway and airline carriers, their employees, and unions. The RLA guarantees employees the right to organize and bargain collectively with their employers over conditions of work and protects them against unfair employer and union practices. It lays out specific procedures for selecting employee representatives and provides dispute resolution procedures that aim to resolve labor disputes between parties, with an emphasis on mediation and arbitration. The RLA provides multiple processes for dispute resolution, depending on whether the dispute is based on a collective bargaining issue or the application of an existing collective bargaining agreement.

The [National Labor Relations Act](#) (NLRA) was enacted in 1935.¹⁴⁴ The NLRA's coverage extends to most other private sector employers that are not covered by the RLA. Like the RLA, the NLRA guarantees employees the right to organize and bargain collectively over conditions of employment and protects them against unfair employer and union activities. However, its dispute resolution system differs from the RLA's in that it is arguably more adversarial in nature; many disputes are resolved through adjudication, rather than through mediation and arbitration.

The [Federal Service Labor-Management Relations Statute](#) (FSLMRS)¹⁴⁵ was enacted in 1978, and its coverage extends to most federal employees. The basic framework of the FSLMRS is similar to that of the NLRA; however, employee rights are more restricted under the FSLMRS, given the unique nature of their employer, the federal government. Federal employees have the right to organize and bargain collectively, but they cannot strike. Most federal employees cannot bargain over wages or benefits. Additionally, the President can exclude a federal agency or subdivision from coverage if the organization's primary work concerns national security.

IV.8.5. Criminal Law

Although the federal government handles many violations of federal rules and regulations by fines and other civil enforcement, criminal penalties are also available.¹⁴⁶ States also can enforce business regulations using criminal penalties.¹⁴⁷

¹⁴² See generally, Cong. Rsch. Serv., Report No. R42526, *Federal Labor Relations Statutes: An Overview* (2014), <https://crsreports.congress.gov/product/pdf/R/R42526>.

¹⁴³ [Railway Labor Act](#) (RLA), ch. 347, 44 Stat. 577 (1926).

¹⁴⁴ [National Labor Relations Act \(NLRA\)](#), ch. 372, 49 Stat. 449 (1935).

¹⁴⁵ Pub. L. 95-454, 92 Stat. 1192 (1978).

¹⁴⁶ See, e.g., [21 U.S.C. § 333](#) (criminal enforcement of the Food, Drug, and Cosmetic Act); [33 U.S.C. § 1319\(c\)](#) (criminal sanctions for violations of the Clean Water Act); [42 U.S.C. § 300h-2\(b\)](#) (criminal sanctions under the Safe Drinking Water Act); [18 U.S.C. § 1348](#) (criminal penalties under the Securities Exchange Act of 1934).

¹⁴⁷ See, e.g., [Va. Code § 54.1-3904](#) (criminal penalty for unlicensed practice of law in Virginia).

IV.8.6. Right of Establishment

In the European Union, the “Right of Establishment” is one of the “four freedoms” enshrined in the Rome Treaty of 1957.¹⁴⁸ The Right of Establishment concerns the freedom to provide services by self-employed persons, professionals, or legal persons, who are legally operating in one Member State, to set up and manage undertakings in another Member State under the same conditions as those laid down by that state for its own nationals. The exercise of this freedom involves the elimination of discrimination on the grounds of nationality.

Constitutional law in the United States has an analogue to eliminate states’ discrimination in commerce on the grounds of out-of-state citizenship or residency, but it is not created as a fundamental right of persons; rather it is a limitation of states’ power in the federal Constitution. The “Dormant Commerce Clause” stems from article I, section 8, clause 3 of the Constitution, which provides that “[t]he Congress shall have Power ... [t]o regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes.” Although the Commerce Clause is framed as a positive grant of power to Congress and not an explicit limit on states’ authority, the Supreme Court has interpreted this clause to prohibit state laws that unduly restrict interstate commerce even in the absence of congressional legislation—i.e., where Congress is “dormant.”¹⁴⁹ This negative or dormant interpretation of the Commerce Clause “prevents the states from adopting protectionist measures and thus preserves a national market for goods and services.”¹⁵⁰

IV.8.7. Circulation of Services

Under European Union law, the free movement of services is another of the Four Freedoms from the Rome Treaty of 1957.¹⁵¹ Similar to the discussion in section IV.8.6, the closest analogue in United States law would be the limitation of states’ power to interfere with interstate commerce under the Dormant Commerce Clause.

IV.8.8. Capital Movements

Another of the Four Freedoms from the Rome Treaty of 1957 is the free movement of capital.¹⁵² Again the discussion in section IV.8.6 on the limitation of states’ power to interfere with interstate commerce under the Dormant Commerce Clause is similarly relevant here.

IV.8.9. Advertising Products or Services

The First Amendment to the Constitution provides that “Congress shall make no law ... abridging the freedom of speech.” However, commercial speech—speech that merely proposes a commercial transaction or relates solely to the speaker’s and the audience’s economic interests—has historically received less First Amendment protection than other forms of

¹⁴⁸ *Oxford Principles of European Union Law*, *supra* note 121, at 6.

¹⁴⁹ See Cong. Rsch. Serv., Report No. LSB11031, *Supreme Court Narrows Dormant Commerce Clause and Upholds State Animal Welfare Law* (2023), <https://crsreports.congress.gov/product/pdf/LSB/LSB11031>.

¹⁵⁰ *Tenn. Wine & Spirits Retailers Ass’n v. Thomas*, 139 S. Ct. 2449, 2459 (2019) (holding that state law that required applicants to obtain a license to operate a liquor store to have been state residents for two years and that corporations seeking a license be owned by only state-resident stockholders was unconstitutional under the Commerce Clause).

¹⁵¹ *Oxford Principles of European Union Law*, *supra* note 121, at 6.

¹⁵² *Id.*

protected speech.¹⁵³ While restrictions on most forms of protected speech receive “strict” scrutiny by the courts, the Supreme Court has held that restrictions of non-misleading commercial speech concerning a lawful activity are subject only to “intermediate” scrutiny. Under this standard, such laws are constitutional only if they directly advance a substantial government interest and are not broader than necessary to serve that interest.¹⁵⁴

However, the government may prohibit “forms of communication more likely to deceive the public than to inform it” as well as “commercial speech related to illegal activity.”¹⁵⁵ Accordingly, the FTC and the Federal Communications Commission (FCC) can regulate deceptive commercial speech without violating the First Amendment.¹⁵⁶

IV.8.10. Consumer Rights

At the federal level, there are several agencies responsible for enforcing consumer rights and protection laws, including the FTC¹⁵⁷ and the Consumer Finance Protection Bureau.¹⁵⁸

In addition, the federal government and the states also have consumer protection laws and regulations concerning consumer product warranties. For example, the federal government¹⁵⁹ and all fifty states have enacted “lemon laws,” which protects consumers by providing a remedy for purchases that repeatedly fail to meet standards of quality and performance.¹⁶⁰

IV.8.11. Environmental Law

Please see the analysis and discussion in section II.2.1.2.

IV.8.12. Other Limits

Please see the analysis and discussion in sections II.2.1 and II.2.2 for more detail on federal and state legislation and regulations affecting business operations.

¹⁵³ Cong. Rsch. Serv., Report No. IF11072, *The First Amendment: Categories of Speech* (2024), <https://crsreports.congress.gov/product/pdf/IF/IF11072>.

¹⁵⁴ *Central Hudson Gas & Elec. Corp. v. Public Service Comm.*, 447 U.S. 557 (1980).

¹⁵⁵ *Id.* at 563–64.

¹⁵⁶ Cong. Rsch. Serv., Report No. IF12180, *False Speech and the First Amendment: Constitutional Limits on Regulating Misinformation* (2022), <https://crsreports.congress.gov/product/pdf/IF/IF12180>.

¹⁵⁷ See, e.g., Cong. Rsch. Serv., Report No. IF12244, *Unfair or Deceptive Acts or Practices (UDAP) Enforcement Authority Under the Federal Trade Commission Act* (2022), <https://crsreports.congress.gov/product/pdf/IF/IF12244>.

¹⁵⁸ See Cong. Rsch. Serv., Report No. IF10031, *Introduction to Financial Services: The Consumer Financial Protection Bureau (CFPB)* (2023), <https://crsreports.congress.gov/product/pdf/IF/IF10031>.

¹⁵⁹ [15 U.S.C. §§ 2301, et seq.](#)

¹⁶⁰ E.g., [Md. Com. Law Code Ann. §§ 14-1501, et seq.](#)

V. Conclusions

V.1. State of Play

The Constitutional view of business operations, ownership, and employment has evolved significantly over the course of the Republic's history. Whereas early twentieth-century Supreme Court decisions held that these were property rights that the government could only interfere with if it met a significant burden, modern jurisprudence holds that the federal and state governments have broad legislative and regulatory authority under both express constitutional provisions and implicit state police powers. Accordingly, there is no fundamental right to operate a business under United States law.

In the current landscape, legislation and regulations overseeing business and employment are less often a legal question than a political one. The major political parties in the United States (i.e., the Republicans and Democrats) have as one of their fundamental points of disagreement the extent and need for regulations at both the federal and state level. Arguments in the legislatures typically focus on the "regulatory burden," or the effect regulations may have on profitability, on state or local economies, or on the competitiveness of the national economy versus more *laissez-faire* countries.¹⁶¹ As a general theme in the United States, the political debate over regulations does not include an assertion of a "fundamental right" under the Constitution to operate a business.

V.2. Possible Future Developments

Following the European Union's adoption of the General Data Protection Regulation, national data protection and internet privacy laws are currently under development and consideration in the Congress, and various federal agencies are drafting proposed regulations for public discussion.¹⁶² States are also considering, or have recently enacted, data privacy legislation. For example, California has enacted pro-consumer data protection laws and regulations.¹⁶³ The debate over federal regulation of the internet and electronic data will likely continue well into the future.

¹⁶¹ See, e.g., Cong. Rsch. Serv., Report No. R44840, *Cost and Benefit Considerations in Clean Air Regulations* (2017), <https://crsreports.congress.gov/product/pdf/R/R44840>; Cong. Rsch. Serv., Report No. R43999, *An Analysis of the Regulatory Burden on Small Banks* (2015), <https://crsreports.congress.gov/product/pdf/R/R43999>.

¹⁶² See, e.g., the following Congressional Research Service reports: No. IF12347, *Digital Trade and Data Policy: Key Issues Facing Congress* (2024), <https://crsreports.congress.gov/product/pdf/IF/IF12347>; no. R47434, *Banking, Data Privacy, and Cybersecurity Regulation* (2023), <https://crsreports.congress.gov/product/pdf/R/R47434>; No. IN12291, *CFPB Proposes New Regulation on Consumer Data Rights* (2023), <https://crsreports.congress.gov/product/pdf/IN/IN12291>; no. LSB10839, *FTC Considers Adopting Commercial Surveillance and Data Security Rules* (2022), <https://crsreports.congress.gov/product/pdf/LSB/LSB10839>; No. R47325, *Computer Matching and Privacy Protection Act: Data Integration and Individual Rights* (2022), <https://crsreports.congress.gov/product/pdf/R/R47325>; No. LSB10441, *Watching the Watchers: A Comparison of Privacy Bills in the 116th Congress* (2020), <https://crsreports.congress.gov/product/pdf/LSB/LSB10441>.

¹⁶³ The [California Privacy Rights Act](#) (CPRA) of 2020, codified at [Cal. Civil Code §§ 1798.100–1798.199.100](#).

List of Legislative Acts and Regulations

FEDERAL LAW

United States Statutes at Large

[Age Discrimination in Employment Act of 1967, Pub. L. 90-202, 81 Stat. 602](#)

[Air Pollution Control Act, Pub. L. 84-159, 69 Stat. 322 \(1955\)](#)

[Americans with Disabilities Act of 1990, Pub. L. 101-336, 104 Stat. 327](#)

[CHIPS and Science Act of 2022, Pub. L. 117-167, 136 Stat. 1366](#)

[Civil Rights Act of 1964, Title VII, Pub. L. 88-352, 78 Stat. 241](#)

[Clayton Antitrust Act of 1914, 38 Stat. 730](#)

[Clean Water Act of 1977, Pub. L. 95-217, 91 Stat. 1566](#)

[Comprehensive Environmental Response, Compensation, and Liability Act of 1980 \(CERCLA\) \["Superfund"\], Pub. L. 96-510, 94 Stat. 2767](#)

[Consumer Product Safety Act, Pub. L. 92-573, 86 Stat. 1207 \(1972\)](#)

[Export-Import Bank Act of 1945, ch. 341, 59 Stat. 526](#)

[Fair Labor Standards Act of 1938, 52 Stat. 1060](#)

[Federal Food, Drug, and Cosmetic Act \(FFDCA\), ch. 675, 52 Stat. 1040 \(1938\)](#)

[Federal Service Labor-Management Relations Statute \(FSLMRS\), Pub. L. 95-454, 92 Stat. 1192 \(1978\)](#)

[Federal Water Pollution Control Act Amendments of 1972, Pub. L. 92-500, 86 Stat. 816](#)

[Federal Water Pollution Control Act of 1948, ch. 758, 62 Stat. 1155](#)

[Filled Milk Act of 1923, ch. 262, 42 Stat. 1486](#)

[Foreign Corrupt Practices Act of 1977, Pub. L. 95-213, 91 Stat. 1494](#)

[Inflation Reduction Act \(IRA\) of 2022, Pub. L. 117-169, 136 Stat. 1818](#)

[Infrastructure Investment and Jobs Act, Pub. L. 117-58, 135 Stat. 429 \(2021\)](#)

[Investment Advisers Act of 1940, 54 Stat. 847](#)

[Investment Company Act of 1940, 54 Stat. 789](#)

[Kefauver-Harris Drug Amendments to the FFDCA, Pub. L. 87-781, 76 Stat. 780 \(1962\)](#)

[Marine Mammal Protection Act, Pub. L. 92-522, 86 Stat. 1027 \(1972\)](#)

[National Labor Relations Act \(NLRA\), ch. 372, 49 Stat. 449 \(1935\)](#)

[Occupational Safety and Health Act, Pub. L. 91-596, 84 Stat. 1590 \(1970\)](#)

[Postal Reorganization Act \(PRA\) of 1970, Pub. L. 91-375, 84 Stat. 719](#)

[Pregnancy Discrimination Act of 1978, Pub. L. 95-555, 92 Stat. 2077](#)

[Pure Food and Drug Act of 1906, ch. 3915, 34 Stat. 768](#)

[Railway Labor Act \(RLA\), ch. 347, 44 Stat. 577 \(1926\)](#)

[Reorganization Plan No. 3 of 1970, 84 Stat. 2086](#)

[Sarbanes-Oxley Act of 2002, Pub. L. 107-204, 116 Stat. 745](#)

[Securities Act of 1933, 48 Stat. 74](#)

[Securities Exchange Act of 1934, 48 Stat. 881](#)

[Sherman Antitrust Act of 1890, 26 Stat. 209](#)

[William M. \(Mac\) Thornberry National Defense Authorization Act for Fiscal Year 2021, Pub. L. 116-283, 134 Stat. 3388 \(2021\)](#)

United States Code

[12 U.S.C. §§ 635, *et seq.*](#)

[15 U.S.C. §§ 1–7](#)

[15 U.S.C. §§ 12–27](#)

[15 U.S.C. §§ 77a, *et seq.*](#)

[15 U.S.C. §§ 78a, *et seq.*](#)

[15 U.S.C. § 78dd-1](#)

[15 U.S.C. §§ 80a-1, *et seq.*](#)

[15 U.S.C. §§ 80b-1, *et seq.*](#)

[15 U.S.C. §§ 2051, *et seq.*](#)

[15 U.S.C. §§ 2301, *et seq.*](#)

[16 U.S.C. § 831](#)

[16 U.S.C. §§ 1361, *et seq.*](#)

[18 U.S.C. § 1348](#)

[21 U.S.C. §§ 61–63](#)

[21 U.S.C. § 333](#)

[29 U.S.C. §§ 201, *et seq.*](#)

[29 U.S.C. §§ 651–78](#)

[33 U.S.C. §§ 1251–1387](#)

[33 U.S.C. § 1319\(c\)](#)

[42 U.S.C. § 300h-2\(b\)](#)

[42 U.S.C. §§ 2000e, *et seq.*](#)

[42 U.S.C. § 2000e\(b\)](#)

[42 U.S.C. §§ 7401, *et seq.*](#)

Federal Register

[Non-Compete Clause Rule, 89 Fed. Reg. 38,342 \(May 7, 2024\)](#)

Code of Federal Regulations

[29 C.F.R. §§ 1910.1–1910.1450](#)

[39 C.F.R. pt. 310](#)

STATE LAWS

California

[California Civil Code §§ 1798.100–1798.199.100](#)

Louisiana

[Louisiana Revised Statutes Annotated §§ 37:831–37:854](#)

Maryland

[Maryland Com. Law Code Annotated §§ 14-1501, *et seq.*](#)

North Dakota

[North Dakota Code § 6-09-01](#)

Oklahoma

[Oklahoma Statutes, title 59 \(Professions and Occupations\)](#)

Tennessee

[Tennessee Code Ann. § 62-5-101\(a\)\(3\)\(A\)\(iii\)](#)

Virginia

[Virginia Annotated Code § 4.1-119](#)

[Virginia Annotated Code, tit. 54.1 \(Professions and Occupations\)](#)

[Virginia Annotated Code §§ 54.1-526 through 54.1-542](#)

[Virginia Annotated Code §§ 54.1-2009 through 54.1-2019](#)

[Virginia Annotated Code §§ 54.1-2200 through 54.1-2208.4](#)

[Virginia Annotated Code §§ 54.1-2700 through 54.1-2729.01](#)

[Virginia Annotated Code §§ 54.1-2800 through 54.1-2825](#)

[Virginia Annotated Code §§ 54.1-2900 through 51.1-2998](#)

[Virginia Annotated Code §§ 54.1-3000 through 54.1-3043](#)

[Virginia Annotated Code §§ 54.1-3300 through 54.1-3322.](#)

[Virginia Annotated Code §§ 54.1-3473 through 54.1-3496](#)

[Virginia Annotated Code §§ 54.1-3700 through 54.1-3709.3](#)

[Virginia Annotated Code §§ 54.1-3800 through 54.1-3813](#)

[Virginia Annotated Code §§ 54.1-3900 through 54.1-3944](#)

List of Cases

U.S. SUPREME COURT

- [*Adkins v. Children’s Hospital*, 261 U.S. 525 \(1923\)](#)
- [*Allgeyer v. Louisiana*, 165 U.S. 578 \(1897\)](#)
- [*Central Hudson Gas & Elec. Corp. v. Public Service Comm.*, 447 U.S. 557 \(1980\)](#)
- [*Darby v. United States*, 312 U.S. 100 \(1941\)](#)
- [*Day-Brite Lighting, Inc. v. Missouri*, 342 U.S. 421 \(1952\)](#)
- [*Hammer v. Dagenhart*, 247 U.S. 251 \(1918\)](#)
- [*Lochner v. New York*, 198 U.S. 45 \(1905\)](#)
- [*Matthews v. De Castro*, 429 U.S. 181 \(1976\)](#)
- [*Morehead v. New York*, 298 U.S. 587 \(1936\)](#)
- [*Nebbia v. New York*, 291 U.S. 502 \(1934\)](#)
- [*New State Ice Co. v. Liebmann*, 285 U.S. 262 \(1932\)](#)
- [*New York State Bd. of Elections v. Lopez Torres*, 552 U.S. 196 \(2008\)](#)
- [*The Slaughter-House Cases*, 83 U.S. \(16 Wall.\) 36 \(1873\)](#)
- [*South Dakota v. Wayfair, Inc.*, 138 S. Ct. 2080 \(2018\)](#)
- [*Tenn. Wine & Spirits Retailers Association v. Thomas*, 139 S. Ct. 2449 \(2019\)](#)
- [*West Coast Hotel v. Parrish*, 300 U.S. 379 \(1937\)](#)
- [*Williamson v. Lee Optical Co.*, 348 U.S. 483 \(1955\)](#)
- [*United States v. Carolene Products Co.*, 304 U.S. 144 \(1938\)](#)
- [*United States v. Darby*, 312 U.S. 100 \(1941\)](#)

U.S. COURTS OF APPEAL

- [*Craigmiles v. Giles*, 312 F.3d 220 \(6th Cir. 2002\)](#)
- [*Powers v. Harris*, 379 F.3d 1208 \(10th Cir. 2004\)](#)
- [*St. Joseph Abbey v. Castille*, 712 F.3d 215 \(5th Cir. 2013\)](#)

Bibliography

APAR, E. L.: 'Capitalism and Unfreedom: Louis D. Brandeis and a Liberty of the Left'. Master's Thesis, The City University of New York, 2017.

https://academicworks.cuny.edu/cgi/viewcontent.cgi?article=2914&context=gc_etds.

CHEMERINSKY, E.: *Constitutional Law: Principles and Policies*. 7th ed. Aspen treatise series. Frederick, MD, Aspen Publishing, 2023.

FALERI, C.: 'Information Technology and Workers' Privacy: The Italian Law Part II: National Studies'. *Comparative Labor Law & Policy Journal* 23, no. 2, 2001–2002 (p. 399–430).

HALL, K. L., ELY, J. W. and GROSSMAN, J. B. (eds.): *The Oxford Companion to the Supreme Court of the United States*. 2nd ed. Oxford University Press, New York, 2005.

KINGSMILL, A. B.: 'Of Butchers, Bakers, and Casket Makers: St. Joseph Abbey v. Castille and the Fifth Circuit's Rejection of Pure Economic Protectionism as a Legitimate State Interest'. *Louisiana Law Review* 75, 2015 (p. 933).

KRAINES, O.: 'Brandeis' Philosophy of Scientific Management'. *The Western Political Quarterly* 13, no. 1, 1960 (p. 191).

MADDEX, R. L.: *State Constitutions of the United States*. 2nd ed. Washington, D.C., Congressional Quarterly Press, 2006.

SANDEFUR, T.: *The Right to Earn a Living: Economic Freedom and the Law*. Washington, D.C., Cato Institute, 2010.

SCHÜTZE, R. and TRIDIMAS, T. (eds.): *Oxford Principles of European Union Law*. First edition, Oxford, Oxford University Press, 2018.

TANENHAUS, D. S. (ed.): *Encyclopedia of the Supreme Court of the United States*. Detroit, Macmillan Reference USA, 2008.

WILLIS, H. E.: "Capitalism, the United States Constitution and the Supreme Court", *Kentucky Law Journal*, Vol. XXII, March 1934, Number 3.

Congressional Research Service Reports Cited

An Analysis of the Regulatory Burden on Small Banks. no. R43999, 2015.

<https://crsreports.congress.gov/product/pdf/R/R43999>.

Antitrust Law: An Introduction. no. IF11234, 2022.

<https://crsreports.congress.gov/product/pdf/IF/IF11234>.

Banking, Data Privacy, and Cybersecurity Regulation. no. R47434, 2023.

<https://crsreports.congress.gov/product/pdf/R/R47434>.

CFPB Proposes New Regulation on Consumer Data Rights. no. IN12291, 2023.

<https://crsreports.congress.gov/product/pdf/IN/IN12291>.

Clean Air Act: A Summary of the Act and Its Major Requirements. no. RL30853, 2022.

<https://crsreports.congress.gov/product/pdf/RL/RL30853>.

Clean Water Act: A Summary of the Law. no. RL30030, 2016.

<https://crsreports.congress.gov/product/pdf/RL/RL30030>.

- Comprehensive Environmental Response, Compensation, and Liability Act: A Summary of Superfund Cleanup Authorities and Related Provisions of the Act.* no. R41039, 2012. <https://crsreports.congress.gov/product/pdf/R/R41039>.
- Computer Matching and Privacy Protection Act: Data Integration and Individual Rights.* no. R47325, 2022. <https://crsreports.congress.gov/product/pdf/R/R47325>.
- Cost and Benefit Considerations in Clean Air Regulations.* no. R44840, 2017. <https://crsreports.congress.gov/product/pdf/R/R44840>.
- Digital Trade and Data Policy: Key Issues Facing Congress.* no. IF12347, 2024. <https://crsreports.congress.gov/product/pdf/IF/IF12347>.
- Export-Import Bank of the United States (Ex-Im Bank).* no. IF10017, 2024. <https://crsreports.congress.gov/product/pdf/IF/IF10017>.
- False Speech and the First Amendment: Constitutional Limits on Regulating Misinformation.* no. IF12180, 2022. <https://crsreports.congress.gov/product/pdf/IF/IF12180>.
- Federal Labor Relations Statutes: An Overview.* no. R42526, 2014. <https://crsreports.congress.gov/product/pdf/R/R42526>.
- Federal Securities Laws: An Overview.* no. IF11422, 2020. <https://crsreports.congress.gov/product/pdf/IF/IF11422>.
- FTC Considers Adopting Commercial Surveillance and Data Security Rules.* no. LSB10839, 2022. <https://crsreports.congress.gov/product/pdf/LSB/LSB10839>.
- How FDA Approves Drugs and Regulates Their Safety and Effectiveness.* no. R41983, 2018. <https://crsreports.congress.gov/product/pdf/R/R41983>.
- Industrial Policy and International Trade.* no. IF12119, 2024. <https://crsreports.congress.gov/product/pdf/IF/IF12119>.
- Introduction to Financial Services: The Consumer Financial Protection Bureau (CFPB).* no. IF10031, 2023. <https://crsreports.congress.gov/product/pdf/IF/IF10031>.
- Overtime Exemptions in the Fair Labor Standards Act for Executive, Administrative, and Professional Employees.* no. R45007, 2017. <https://crsreports.congress.gov/product/pdf/R/R45007>.
- Reforming the U.S. Postal Service: Background and Issues for Congress.* no. R44603, 2022. <https://crsreports.congress.gov/product/pdf/R/R44603>.
- Supreme Court Narrows Dormant Commerce Clause and Upholds State Animal Welfare Law.* no. LSB11031, 2023. <https://crsreports.congress.gov/product/pdf/LSB/LSB11031>.
- The Civil Rights Act of 1964: An Overview.* no. R46534, 2020. <https://crsreports.congress.gov/product/pdf/R/R46534>.
- The Civil Rights Act of 1964: Eleven Titles at a Glance.* no. IF11705, 2020. <https://crsreports.congress.gov/product/pdf/IF/IF11705>.
- The Consumer Product Safety Act: A Legal Analysis.* no. R45174, 2018. <https://crsreports.congress.gov/product/pdf/R/R45174>.
- The Fair Labor Standards Act (FLSA): An Overview.* no. R42713, 2023. <https://crsreports.congress.gov/product/pdf/R/R42713>.
- The Fair Labor Standards Act (FLSA) Child Labor Provisions.* no. R44548, 2016. <https://crsreports.congress.gov/product/pdf/R/R44548>.

The Federal Food Safety System: A Primer. no. RS22600, 2016.
<https://crsreports.congress.gov/product/pdf/RS/RS22600>.

The Federal Minimum Wage: In Brief. no. R43089, 2021.
<https://crsreports.congress.gov/product/pdf/R/R43089>.

The First Amendment: Categories of Speech. no. IF11072, 2024.
<https://crsreports.congress.gov/product/pdf/IF/IF11072>.

The Marine Mammal Protection Act (P.L. 92-522): Primer and Issues for Congress. no. R47892, 2024. <https://crsreports.congress.gov/product/pdf/R/R47892>.

Unfair or Deceptive Acts or Practices (UDAP) Enforcement Authority Under the Federal Trade Commission Act. no. IF12244, 2022. <https://crsreports.congress.gov/product/pdf/IF/IF12244>.

Watching the Watchers: A Comparison of Privacy Bills in the 116th Congress. no. LSB10441, 2022. <https://crsreports.congress.gov/product/pdf/LSB/LSB10441>.

Workforce and Labor Policy: Resources for Congressional Offices. no. R47241, 2023.
<https://crsreports.congress.gov/product/pdf/R/R47241>.

List of Websites Checked

Websites for Accessing Primary Sources

California Legislative Information:

<https://leginfo.legislature.ca.gov/faces/codes.xhtml>

Library of Congress, Constitution of the United States:

<https://constitution.congress.gov/constitution/>

Law Library of Congress, Statutes at Large:

<https://www.loc.gov/collections/united-states-statutes-at-large/about-this-collection/>

Law Library of Congress, United States Reports:

<https://www.loc.gov/collections/united-states-reports/about-this-collection/>

Louisiana State Legislature, Louisiana Laws:

<https://www.louisiana.gov/government/>

Maryland General Assembly, Statutes:

<https://mgaleg.maryland.gov/mgawebwebsite/laws/statutes/>

North Dakota Legislative Branch, Century Code:

<https://ndlegis.gov/general-information/north-dakota-century-code/index.html>

Office of the Law Revision Counsel, U.S. Code:

<https://uscode.house.gov/>

Oklahoma State Legislature, Oklahoma Statutes:

<http://www.oklegislature.gov/osStatuesTitle.aspx/>

Tennessee Code (Lexis):

<http://www.lexisnexis.com/hottopics/tncode/>

U.S. Government Publishing Office, GovInfo:

<https://www.govinfo.gov/>

U.S. National Archives and Records Administration:

<https://www.archives.gov/>

U.S. National Archives and Records Administration, Code of Federal Regulations:

<https://www.ecfr.gov/>

U.S. National Archives and Records Administration, Federal Register:

<https://www.federalregister.gov/>

U.S. Supreme Court:

<https://www.supremecourt.gov/>

Virginia's Legislative Information System, Code of Virginia:

<https://law.lis.virginia.gov/vacode/>

Individually Referenced Sites and Pages

NYC Health and Hospitals, *Bellevue History*:

<https://www.nychealthandhospitals.org/bellevue/history/>

Constitution Annotated:

- *Historical Background on Due Process*
https://constitution.congress.gov/browse/essay/amdt5-5-2/ALDE_00013722/
- *Liberty of Contract and Lockner v. New York:*
https://constitution.congress.gov/browse/essay/amdt14-S1-6-2-2/ALDE_00013704/
- *Overview of Commerce Clause:* https://constitution.congress.gov/browse/essay/artI-S8-C3-1/ALDE_00013403/
- *Overview of Due Process Procedural Requirements:*
https://constitution.congress.gov/browse/essay/amdt5-6-1/ALDE_00013723/
- *Overview of Economic Substantive Due Process:*
https://constitution.congress.gov/browse/essay/amdt14-S1-6-2-1/ALDE_00013703/
- *Overview of Substantive Due Process:*
https://constitution.congress.gov/browse/essay/amdt14-S1-6-1/ALDE_00013814/
- *Overview of Tenth Amendment, Rights Reserved to the States and the People:*
https://constitution.congress.gov/browse/essay/amdt10-1/ALDE_00013619/

Heritage Foundation, *Index of Economic Freedom*:
<https://www.heritage.org/index/>

Virginia State Bar, *Rules and Regulations Governing the Bar*:
<https://vsb.org/Site/Site/about/rules-regulations/rules-landing.aspx>

Virginia's Judicial System, *Supreme Court of Virginia*:
<https://www.vacourts.gov/courts/scv/home.html>

Department for European Affairs, Government of Italy, *Treaty on Functioning of the European Union, Articles 107 and 108*:
<https://www.affarieuropei.gov.it/en/activity/state-aid/articles-107-and-108/>.

Virginia Department of Health Professions:
<https://www.dhp.virginia.gov/>

Virginia Department of Professional and Occupational Regulation:
<https://www.dpor.virginia.gov/>

Federal Deposit Insurance Corporation (FDIC), *What We Do*:
<https://www.fdic.gov/about/what-we-do/>.

List of Publications of the European Parliament Comparative Law Library

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COMPARATIVE LAW LIBRARY OF THE EUROPEAN PARLIAMENT

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I. Constitutional courts

- **Belgium:** BEHRENDT, CH.:
[Le rôle des Cours constitutionnelles dans la gouvernance à plusieurs niveaux - Belgique : La Cour constitutionnelle](#), Unité Bibliothèque de droit comparé, Service de recherche du Parlement européen (EPRS), novembre 2016, VIII et 38 pp., référence PE 593.508 (original French version);
[Die Rolle der Verfassungsgerichte in der „Multi-Level-Governance“ - Belgien: Der Verfassungsgerichtshof](#), Bibliothek für Vergleichendes Recht, Wissenschaftlicher Dienst des Europäischen Parlaments (EPRS), November 2016, VIII und 41 S., Referenz PE 593.508 (German version);
[Il ruolo delle Corti costituzionali in un sistema di governo multilivello - Belgio: La Corte costituzionale, Unità](#) Biblioteca di diritto comparato, Servizio Ricerca del Parlamento europeo (EPRS), novembre 2016, VIII e 39 pp., referenza PE 593.508 (Italian version);
- **Canada:** POIRIER, J.: [The role of constitutional courts, a comparative law perspective - Canada: The Supreme Court](#), Comparative Law Library Unit, European Parliamentary Research Service (EPRS), July 2019, VI and 41 pp., reference PE 640.134;
- **European Union:** SALVATORE, V.:
[Il ruolo delle Corti Costituzionali in un sistema di governo multilivello - Unione Europea: La Corte di Giustizia dell'UE](#), Unità Biblioteca di diritto comparato, Servizio Ricerca del Parlamento europeo (EPRS), novembre 2016, VI e 30 pp., referenza PE 593.505 (original Italian version);
[Die Rolle der Verfassungsgerichte in der „Multi-Level-Governance“ - Europäische Union: Der Gerichtshof der Europäischen Union](#), Bibliothek für Vergleichendes Recht, Wissenschaftlicher Dienst des Europäischen Parlaments (EPRS), November 2016, VII und 32 S., Referenz PE 593.505 (German version);
[The role of constitutional courts in multi-level governance - European Union: The Court of Justice of the European Union](#), Comparative Law Library Unit, European Parliamentary Research Service (EPRS), November 2016, VI and 29 pp., reference PE 593.505 (English version);
- **Germany:** SCHÖNDORF-HAUBOLD, B.:
[Die Rolle der Verfassungsgerichte in der „Multi-Level-Governance“ - Deutschland: Das Bundesverfassungsgericht](#), Bibliothek für Vergleichendes Recht, Wissenschaftlicher Dienst des Europäischen Parlaments (EPRS), November 2016, VIII und 48 S., Referenz PE 593.504 (original German version);
[Le rôle des cours constitutionnelles dans la gouvernance à plusieurs niveaux - Allemagne : la Cour constitutionnelle fédérale](#), Unité Bibliothèque de droit comparé, Service de recherche du Parlement européen (EPRS), novembre 2016, VIII et 55 pp., référence PE 593.504 (French version with added comments);
[El papel de los Tribunales Constitucionales en la gobernanza multinivel - Alemania: El Tribunal Constitucional Federal](#), Unidad Biblioteca de Derecho Comparado, Servicio de Estudios del Parlamento Europeo (EPRS), noviembre 2016, VIII y 56 pp., referancia PE 593.504 (Spanish version with added comments);
- **Italy:** LUCIANI, M.:
[Il ruolo delle Corti costituzionali in un sistema di governo multilivello - Italia: La Corte costituzionale](#), Unità Biblioteca di diritto comparato, Servizio Ricerca del Parlamento europeo (EPRS), novembre 2016, VI e 30 pp., referenza PE 593.507 (original Italian version);
[Die Rolle der Verfassungsgerichte in der „Multi-Level-Governance“ - Italien: Der Verfassungsgerichtshof](#), Bibliothek für Vergleichendes Recht, Wissenschaftlicher Dienst des Europäischen Parlaments (EPRS), November 2016, V und 35 S., Referenz PE 593.507 (German version with added comments);
- **Spain:** PÉREZ DE LOS COBOS ORIHUEL, F.:
[El papel de los Tribunales Constitucionales en la gobernanza a diferentes niveles - España: El Tribunal Constitucional](#), Unidad Biblioteca de Derecho Comparado, Servicio de Estudios del Parlamento Europeo (EPRS), noviembre 2016, VI y 29 pp., referancia PE 593.506 (original Spanish version);
[Die Rolle der Verfassungsgerichte in der „Multi-Level-Governance“ - Spanien: Das Verfassungsgericht](#), Bibliothek für Vergleichendes Recht, Wissenschaftlicher Dienst des Europäischen Parlaments (EPRS), November 2016, V und 33 S., Referenz PE 593.506 (German version with added comments);

- **Switzerland:** DE ROSSA, F.:
[Le rôle des Cours Constitutionnelles dans la gouvernance à plusieurs niveaux - Suisse : Le Tribunal fédéral](#), Unité Bibliothèque de droit comparé, Service de recherche du Parlement européen (EPRS), novembre 2016, VI et 108 pp., référence PE 593.509 (original French version);
[Die Rolle der Verfassungsgerichte in der „Multi-Level-Governance“ - Schweiz: Das Bundesgericht](#), Bibliothek für Vergleichendes Recht, Wissenschaftlicher Dienst des Europäischen Parlaments (EPRS), November 2016, VII und 49 S., Referenz PE 593.509 (German version with added comments);
[Il ruolo delle Corti costituzionali nella governance multilivello - Svizzera: Il Tribunale federale](#), Unità Biblioteca di diritto comparato, Servizio Ricerca del Parlamento europeo (EPRS), novembre 2016, VI e 47 pp., referenza PE 593.509 (Italian version);
- **United States:** MARTIN, J.W.:
[The role of constitutional courts in multi-level governance - United States of America: The Supreme Court](#), Comparative Law Library Unit, European Parliamentary Research Service (EPRS), November 2016, VI and 34 pp., reference PE 593.503 (original English version);
[Le rôle des cours constitutionnelles dans la gouvernance à plusieurs niveaux - États-Unis d'Amérique: la Cour suprême](#), Unité Bibliothèque de droit comparé, Service de recherche du Parlement européen (EPRS), novembre 2016, VI et 46 pp., référence PE 593.503 (French version with added comments);
[Die Rolle der Verfassungsgerichte in der Multi-Level-„Governance“ - Vereinigte Staaten von Amerika: Der Oberste Gerichtshof](#), Bibliothek für Vergleichendes Recht, Wissenschaftlicher Dienst des Europäischen Parlaments (EPRS), November 2016, VII und 40 S., Referenz PE 593.503 (German version with added comments).

II. Judicial remedies for individuals before the highest jurisdictions

- **Belgium:** BEHRENDT, CH.: [Recours des particuliers devant les plus hautes juridictions, une perspective de droit comparé - Belgique](#), Unité Bibliothèque de droit comparé, Service de recherche du Parlement européen (EPRS), octobre 2017, V et 38 pp., référence PE 608.732;
- **Canada:** POIRIER, J.:
[Recours des particuliers devant les plus hautes juridictions, une perspective de droit comparé - Canada](#), Unité Bibliothèque de droit comparé, Service de recherche du Parlement européen (EPRS), octobre 2017, X et 83 pp., référence PE 608.733 (original French version);
[Legal Proceedings available to Individuals before the Highest Courts: A Comparative Law Perspective - Canada](#), Comparative Law Library Unit, European Parliamentary Research Service (EPRS), October 2017, X and 80 pp., reference PE 608.733 (English version);
- **Council of Europe:** PÉREZ DE LOS COBOS ORIHUEL, F.: [Los recursos de los particulares ante las más altas jurisdicciones, una perspectiva de Derecho Comparado - Consejo de Europa: Tribunal Europeo de Derechos Humanos](#), Unidad Biblioteca de Derecho Comparado, Servicio de Estudios del Parlamento Europeo (EPRS), octubre 2017, VI y 51 pp., referencia PE 608.734;
- **European Union:** SALVATORE, V.: [I ricorsi individuali dinanzi alle più alte giurisdizioni. una prospettiva di diritto comparato - UE: Corte di giustizia dell'Unione europea](#), Unità Biblioteca di diritto comparato, Servizio Ricerca del Parlamento europeo (EPRS), ottobre 2017, VI e 39 pp., referenza PE 608.742;
- **Germany:** SCHÖNDORF-HAUBOLD, B.: [Rechtsbehelfe des Einzelnen bei den höchsten gerichtlichen Instanzen: eine Perspektive der Rechtsvergleichung - Deutschland](#), Bibliothek für Vergleichendes Recht, Wissenschaftlicher Dienst des Europäischen Parlaments (EPRS), Oktober 2017, VIII und 65 S., Referenz PE 608.735;
- **Italy:** LUCIANI, M.: [I ricorsi individuali dinanzi alle più alte giurisdizioni. Una prospettiva di diritto comparato - Italia](#), Unità Biblioteca di diritto comparato, Servizio Ricerca del Parlamento europeo (EPRS), ottobre 2017, VIII e 31 pp., referenza PE 608.736;
- **Spain:** GONZÁLEZ-TREVIJANO SÁNCHEZ, P.: [Los recursos de los particulares ante las más altas jurisdicciones, una perspectiva de Derecho Comparado - España](#), Unidad Biblioteca de Derecho Comparado, Servicio de Estudios del Parlamento Europeo (EPRS), octubre 2017, VIII y 52 pp., referencia PE 608.737;
- **Switzerland:** DE ROSSA, F.: [Recours des particuliers devant les plus hautes juridictions, une perspective de droit comparé - Suisse](#), Unité Bibliothèque de droit comparé, Service de recherche du Parlement européen (EPRS), octobre 2017, VIII et 58 pp., référence PE 608.738;
- **United Kingdom:** CRAM, I.: [Judicial remedies for individuals before the highest jurisdictions, a comparative law perspective - The United Kingdom](#), Comparative Law Library Unit, European Parliamentary Research Service (EPRS), October 2017, VIII and 50 pp., reference PE 608.746;
- **United States:** ACOSTA, L.: [Judicial remedies for individuals before the highest jurisdictions, a comparative law perspective - United States of America](#), Comparative Law Library Unit, European Parliamentary Research Service (EPRS), October 2017, VIII and 33 pp., reference PE 608.743.

III. Right to respect for private life

- **Belgium:** BEHRENDT, CH.: [Le droit au respect de la vie privée : les défis digitaux, une perspective de droit comparé - Belgique](#), Unité Bibliothèque de droit comparé, Service de recherche du Parlement européen (EPRS), octobre 2018, VI et 32 pp., référence PE 628.304;
- **Canada:** MOYSE, P.-E.: [Le droit au respect de la vie privée : les défis digitaux, une perspective de droit comparé - Canada](#), Unité Bibliothèque de droit comparé, Service de recherche du Parlement européen (EPRS), octobre 2018, VIII et 67 pp., référence PE 628.292;
- **Council of Europe:** PÉREZ DE LOS COBOS ORIHUEL, F.: [El derecho al respeto de la vida privada: los retos digitales, una perspectiva de Derecho comparado - Consejo de Europa](#), Unidad Biblioteca de Derecho Comparado, Servicio de Estudios del Parlamento Europeo (EPRS), octubre 2018, VI y 53 pp., referencia PE 628.261;
- **European Union:** SALVATORE, V.: [Il diritto al rispetto della vita privata: le sfide digitali, una prospettiva di diritto comparato - Unione europea](#), Unità Biblioteca di diritto comparato, Servizio Ricerca del Parlamento europeo (EPRS), ottobre 2018, VI e 39 pp., referencia PE 628.243;
- **France:** PONTTHOREAU, M.-C.: [Le droit au respect de la vie privée : les défis digitaux, une perspective de droit comparé - France](#), Unité Bibliothèque de droit comparé, Service de recherche du Parlement européen (EPRS), octobre 2018, VIII et 34 pp., référence PE 628.241;
- **Germany:** SCHÖNDORF-HAUBOLD, B.: [Das Recht auf Achtung des Privatlebens – Problemstellungen im Digitalbereich, eine rechtsvergleichende Perspektive: Deutschland](#), Bibliothek für Vergleichendes Recht, Wissenschaftlicher Dienst des Europäischen Parlaments (EPRS), Oktober 2018, X und 94 S., Referenz PE 628.285;
- **Italy:** LUCIANI, M.: [Il diritto al rispetto della vita privata: le sfide digitali, una prospettiva di diritto comparato - Italia](#), Unità Biblioteca di diritto comparato, Servizio Ricerca del Parlamento europeo (EPRS), ottobre 2018, VIII e 46 pp., referencia PE 628.259;
- **Spain:** GONZÁLEZ-TREVIJANO SÁNCHEZ, P.: [El derecho al respeto de la vida privada: los retos digitales, una perspectiva de Derecho comparado - España](#), Unidad Biblioteca de Derecho Comparado, Servicio de Estudios del Parlamento Europeo (EPRS), octubre 2018, VIII y 58 pp., referencia PE 628.260;
- **Switzerland:** MÉTILLE, S.: [Le droit au respect de la vie privée : les défis digitaux, une perspective de droit comparé - Suisse](#), Unité Bibliothèque de droit comparé, Service de recherche du Parlement européen (EPRS), octobre 2018, VIII et 57 pp., référence PE 628.242;
- **United Kingdom:** CRAM, I.: [The right to respect for private life: digital challenges, a comparative-law perspective - The United Kingdom](#), Comparative Law Library Unit, European Parliamentary Research Service (EPRS), October 2018, X and 38 pp., reference PE 628.249;
- **United States:** ACOSTA, L.: [The right to respect for private life: digital challenges, a comparative-law perspective - The United States](#), Comparative Law Library Unit, European Parliamentary Research Service (EPRS), October 2018, VIII and 35 pp., reference PE 628.240.

IV. Freedom of expression

- **Belgium:** BEHRENDT, CH.: [Liberté d'expression, une perspective de droit comparé - Belgique](#), Unité Bibliothèque de droit comparé, Service de recherche du Parlement européen (EPRS), octobre 2019, VI et 42 pp., référence PE 642.243;
- **Canada:** MOYSE, P.-E.: [Liberté d'expression, une perspective de droit comparé - Canada](#), Unité Bibliothèque de droit comparé, Service de recherche du Parlement européen (EPRS), octobre 2019, VI et 71 pp., référence PE 642.244;
- **Council of Europe:** ZILLER, J.: [Liberté d'expression, une perspective de droit comparé - Conseil de l'Europe](#), Unité Bibliothèque de droit comparé, Service de recherche du Parlement européen (EPRS), octobre 2019, VI et 64 pp., référence PE 642.268;
- **European Union:** SALVATORE, V.: [La libertà di espressione, una prospettiva di diritto comparato - Unione europea](#), Unità Biblioteca di diritto comparato, Servizio Ricerca del Parlamento europeo (EPRS), novembre 2019, VI e 40 pp., referenza PE 644.172;
- **France:** PONTTHOREAU, M.-C.: [Liberté d'expression, une perspective de droit comparé - France](#), Unité Bibliothèque de droit comparé, Service de recherche du Parlement européen (EPRS), octobre 2019, VI et 43 pp., référence PE 642.245;
- **Germany:** REIMER, F.: [Freiheit der Meinungsäußerung, eine rechtsvergleichende Perspektive - Deutschland](#), Bibliothek für Vergleichendes Recht, Wissenschaftlicher Dienst des Europäischen Parlaments (EPRS), Oktober 2019, X und 107 S., Referenz PE 642.269;
- **Italy:** LUCIANI, M.: [La libertà di espressione, una prospettiva di diritto comparato - Italia](#), Unità Biblioteca di diritto comparato, Servizio Ricerca del Parlamento europeo (EPRS), ottobre 2019, VIII e 55 pp., referenza PE 642.242;
- **Peru:** ESPINOSA-SALDAÑA BARRERA, E.: [La libertad de expresión, una perspectiva de Derecho Comparado - Perú](#), Unidad Biblioteca de Derecho Comparado, Servicio de Estudios del Parlamento Europeo (EPRS), noviembre 2019, VI y 43 pp., referencia PE 644.176;
- **Spain:** GONZÁLEZ-TREVIJANO SÁNCHEZ, P.: [La libertad de expresión, una perspectiva de Derecho Comparado - España](#), Unidad Biblioteca de Derecho Comparado, Servicio de Estudios del Parlamento Europeo (EPRS), octubre 2019, VIII y 56 pp., referencia PE 642.241;
- **Switzerland:** COTTIER, B.: [Liberté d'expression, une perspective de droit comparé - Suisse](#), Unité Bibliothèque de droit comparé, Service de recherche du Parlement européen (EPRS), octobre 2019, VIII et 39 pp., référence PE 642.262;
- **United Kingdom:** CRAM, I.: [Freedom of expression, a comparative-law perspective - The United Kingdom](#), Comparative Law Library Unit, European Parliamentary Research Service (EPRS), October 2019, VI and 53 pp., reference PE 642.263;
- **United States:** VELENCHUK, T.: [Freedom of expression, a comparative law perspective - The United States](#), Comparative Law Library Unit, European Parliamentary Research Service (EPRS), October 2019, X and 48 pp., reference PE 642.246.

V. Principles of equality and non-discrimination

- **Austria:** VAŠEK, M.:
[Die Grundsätze der Gleichheit und der Nichtdiskriminierung, eine rechtsvergleichende Perspektive – Österreich](#), Bibliothek für Vergleichendes Recht, Wissenschaftlicher Dienst des Europäischen Parlaments (EPRS), Oktober 2020, VIII und 44 S., Referenz PE 659.277 (original German version);
[Les principes d'égalité et non-discrimination, une perspective de droit comparé - Autriche](#), Unité Bibliothèque de droit comparé, Service de recherche du Parlement européen (EPRS), octobre 2020, VIII et 49 pp., référence PE 659.277 (French version with added comments);
- **Belgium:** BEHRENDT, CH.:
[Les principes d'égalité et non-discrimination, une perspective de droit comparé - Belgique](#), Unité Bibliothèque de droit comparé, Service de recherche du Parlement européen (EPRS), février 2021, VIII et 44 pp., référence PE 679.087 (original French version);
[Los principios de igualdad y no discriminación, una perspectiva de Derecho Comparado - Bélgica](#), Unidad Biblioteca de Derecho Comparado, Servicio de Estudios del Parlamento Europeo (EPRS), julio 2022, X y 82 pp., referencia PE 733.602 (Spanish version with added comments and update);
[Die Grundsätze der Gleichheit und der Nichtdiskriminierung, eine rechtsvergleichende Perspektive – Belgien](#), Bibliothek für Vergleichendes Recht, Wissenschaftlicher Dienst des Europäischen Parlaments (EPRS), Dezember 2022, VIII und 106 S., Referenz PE 739.262 (German version with added comments and update);
- **Canada:** SHEPPARD, C.:
[The principles of equality and non-discrimination, a comparative law perspective - Canada](#), Comparative Law Library Unit, European Parliamentary Research Service (EPRS), November 2020, VIII and 64 pp., reference PE 659.362 (original English version);
[Les principes d'égalité et de non-discrimination, une perspective de droit comparé - Canada](#), Unité Bibliothèque de droit comparé, Service de recherche du Parlement européen (EPRS), février 2022, X et 92 pp., référence PE 698.937 (French version with added comments and update);
- **Chile:** GARCÍA PINO, G.:
[Los principios de igualdad y no discriminación, una perspectiva de Derecho Comparado - Chile](#), Unidad Biblioteca de Derecho Comparado, Servicio de Estudios del Parlamento Europeo (EPRS), marzo 2021, VIII y 120 pp., referencia PE 690.533 (original Spanish version);
[Los principios de igualdad y no discriminación, una perspectiva de Derecho Comparado - Chile](#), Unidad Biblioteca de Derecho Comparado, Servicio de Estudios del Parlamento Europeo (EPRS), febrero 2023, X y 178 pp., referencia PE 739.352 (updated second edition with added comments);
[Die Grundsätze der Gleichheit und der Nichtdiskriminierung, eine rechtsvergleichende Perspektive - Chile](#), Bibliothek für Vergleichendes Recht, Wissenschaftlicher Dienst des Europäischen Parlaments (EPRS), Februar 2023, XII und 210 S., Referenz PE 739.353 (German version with added comments and update);
- **Council of Europe:** ZILLER, J.:
[Les principes d'égalité et de non-discrimination, une perspective de droit comparé - Conseil de l'Europe](#), Unité Bibliothèque de droit comparé, Service de recherche du Parlement européen (EPRS), octobre 2020, VIII et 72 pp., référence PE 659.276 (original French version);
[Principios de igualdad y no discriminación, una perspectiva de Derecho Comparado – Consejo de Europa](#), Unidad Biblioteca de Derecho Comparado, Servicio de Estudios del Parlamento Europeo (EPRS), octubre 2022, X y 122 pp., referencia PE 738.179 (Spanish version with added comments and update);
[Die Grundsätze der Gleichheit und der Nichtdiskriminierung, eine rechtsvergleichende Perspektive – Europarat](#), Bibliothek für Vergleichendes Recht, Wissenschaftlicher Dienst des Europäischen Parlaments (EPRS), November 2022, X und 136 S., Referenz PE 739.217 (German version with added comments and update);
- **European Union:** SALVATORE, V.:
[I principi di uguaglianza e non discriminazione, una prospettiva di diritto comparato - Unione europea](#), Unità Biblioteca di diritto comparato, Servizio Ricerca del Parlamento europeo (EPRS), gennaio 2021, VIII e 61 pp., referencia PE 679.060 (original Italian version);
[Die Grundsätze der Gleichheit und der Nichtdiskriminierung, eine rechtsvergleichende Perspektive – Europäische Union](#), Bibliothek für Vergleichendes Recht, Wissenschaftlicher Dienst des Europäischen Parlaments (EPRS), Mai 2023, X und 121 S., Referenz PE 747.894 (updated German version with comments).

- **France:** PONTTHOREAU, M.-C.:
[Les principes d'égalité et non-discrimination, une perspective de droit comparé - France](#), Unité Bibliothèque de droit comparé, Service de recherche du Parlement européen (EPRS), janvier 2021, VIII et 44 pp., référence PE 679.061 (original French version);
[Los principios de igualdad y no discriminación, una perspectiva de Derecho Comparado - Francia](#), Unidad Biblioteca de Derecho Comparado, Servicio de Estudios del Parlamento Europeo (EPRS), abril 2022, XI y 82 pp., referencia PE 729.378 (Spanish version with added comments and update);
- **Germany:** REIMER, F.:
[Die Grundsätze der Gleichheit und der Nichtdiskriminierung, eine rechtsvergleichende Perspektive - Deutschland](#), Bibliothek für Vergleichendes Recht, Wissenschaftlicher Dienst des Europäischen Parlaments (EPRS), Oktober 2020, XIV und 77 S., Referenz PE 659.305 (original German version);
[Les principes d'égalité et de non-discrimination, une perspective de droit comparé - Allemagne](#), Unité Bibliothèque de droit comparé, Service de recherche du Parlement européen (EPRS), mars 2022, XIV et 111 pp., référence PE E 729.295 (French version with added comments and update);
- **Italy:**
 LUCIANI, M.:
[I principi di eguaglianza e di non discriminazione, una prospettiva di diritto comparato - Italia](#), Unità Biblioteca di diritto comparato, Servizio Ricerca del Parlamento europeo (EPRS), ottobre 2020, X e 71 pp., referencia PE 659.298;
[Die Grundsätze der Gleichheit und der Nichtdiskriminierung, eine rechtsvergleichende Perspektive - Italien](#), Bibliothek für Vergleichendes Recht, Wissenschaftlicher Dienst des Europäischen Parlaments (EPRS), September 2023, X und 137 S., Referenz PE 747.895 (updated German version with comments);
 DÍEZ PARRA (Coord.):
[I principi di eguaglianza e di non discriminazione, una prospettiva di diritto comparato - Italia](#), Unità Biblioteca di diritto comparato, Servizio Ricerca del Parlamento europeo (EPRS), febbraio 2024, XVI e 172 pp., referencia PE 659.298 (updated second edition with comments) ;
- **Peru:** ESPINOSA-SALDAÑA BARRERA, E.: [Los principios de igualdad y no discriminación, una perspectiva de Derecho Comparado - Perú](#), Unidad Biblioteca de Derecho Comparado, Servicio de Estudios del Parlamento Europeo (EPRS), diciembre 2020, VIII y 64 pp., referencia PE 659.380;
- **Spain:** GONZÁLEZ-TREVIJANO SÁNCHEZ, P.:
[Los principios de igualdad y no discriminación, una perspectiva de Derecho Comparado - España](#), Unidad Biblioteca de Derecho Comparado, Servicio de Estudios del Parlamento Europeo (EPRS), octubre 2020, VIII y 104 pp., referencia PE 659.297 (original Spanish version);
[Les principes d'égalité et non-discrimination, une perspective de droit comparé - Espagne](#), Unité Bibliothèque de droit comparé, Service de recherche du Parlement européen (EPRS), juin 2022, X et 167 pp., référence PE 733.554 (French version with added comments and update);
[Die Grundsätze der Gleichheit und der Nichtdiskriminierung, eine rechtsvergleichende Perspektive - Spanien](#), Bibliothek für Vergleichendes Recht, Wissenschaftlicher Dienst des Europäischen Parlaments (EPRS), Januar 2023, X und 194 S., Referenz PE 739.207 (German version with added comments and update);
- **Switzerland:** FREI, N.:
[Die Grundsätze der Gleichheit und der Nichtdiskriminierung, eine rechtsvergleichende Perspektive - Schweiz](#), Bibliothek für Vergleichendes Recht, Wissenschaftlicher Dienst des Europäischen Parlaments (EPRS), Oktober 2020, X und 70 S., Referenz PE 659.292 (original German version);
[Les principes d'égalité et de non-discrimination, une perspective de droit comparé - Suisse](#), Unité Bibliothèque de droit comparé, Service de recherche du Parlement européen (EPRS), mars 2022, X et 95 pp., référence PE 729.316 (French version with added comments);
- **United States:** OSBORNE, E.L.:
[The principles of equality and non-discrimination, a comparative law perspective - United States of America](#), Comparative Law Library Unit, European Parliamentary Research Service (EPRS), March 2021, XII and 83 pp., reference PE 689.375 (original English version);
[Les principes d'égalité et de non-discrimination, une perspective de droit comparé - États-Unis d'Amérique](#), Unité Bibliothèque de droit comparé, Service de recherche du Parlement européen (EPRS), février 2022, XIII et 111 pp., référence PE 698.938 (French version with added comments and update).

VI. Right to health

- **Argentina:** DÍAZ RICCI, S.: [El derecho a la salud, una perspectiva de Derecho Comparado - Argentina](#), Unidad Biblioteca de Derecho Comparado, Servicio de Estudios del Parlamento Europeo (EPRS), noviembre 2021, XVIII y 134 pp., referencia PE 698.814;
- **Austria:** WIMMER, A.: [Das Recht auf Gesundheit, eine rechtsvergleichende Perspektive - Österreich](#), Bibliothek für Vergleichendes Recht, Wissenschaftlicher Dienst des Europäischen Parlaments (EPRS), April 2022, XI und 70 S., Referenz PE 729.394;
- **Belgium:** BEHRENDT, C.: [Le droit à la santé une perspective de Droit comparé - Belgique](#), Unité Bibliothèque de droit comparé, Service de recherche du Parlement européen (EPRS), mars 2022, X et 74 pp., référence PE 729.344;
- **Canada :** JONES, D.J.: [Right to health, a comparative law perspective-Canada](#), Comparative Law Library Unit, European Parliamentary Research Service (EPRS), May 2022, X and 98 pp. , reference PE 729.444;
- **Council of Europe:** ZILLER, J.: [Le droit à la santé, une perspective de droit comparé - Conseil de l'Europe](#), Unité Bibliothèque de droit comparé, Service de recherche du Parlement européen (EPRS), septembre 2021, VIII et 67 pp., référence PE 698.030;
- **European Union:** SALVATORE, V.: [Il diritto alla salute, una prospettiva di diritto comparato - Unione europea](#), Unità Biblioteca di diritto comparato, Servizio Ricerca del Parlamento europeo (EPRS), dicembre 2021, X e 68 pp., referenza PE 698.827;
- **France:** PONTTHOREAU, M.-C.: [Le droit à la santé, une perspective de droit comparé - France](#), Unité Bibliothèque de droit comparé, Service de recherche du Parlement européen (EPRS), octobre 2021, X et 66 pp., référence PE 698.755;
- **Germany:** REIMER, F.: [Das Recht auf Gesundheit, eine rechtsvergleichende Perspektive - Deutschland](#), Bibliothek für Vergleichendes Recht, Wissenschaftlicher Dienst des Europäischen Parlaments (EPRS), Oktober 2021, XIV und 81 S., Referenz PE 698.770;
- **Italy:** LUCIANI, M.: [Il diritto alla salute, una prospettiva di diritto comparato - Italia](#), Unità Biblioteca di diritto comparato, Servizio Ricerca del Parlamento europeo (EPRS), gennaio 2022, XII e 85 pp., referenza PE 698.893;
- **Mexico:** FERRER MAC-GREGOR POISOT, E.: [El derecho a la salud, una perspectiva de Derecho Comparado - México](#), Unidad Biblioteca de Derecho Comparado, Servicio de Estudios del Parlamento Europeo (EPRS), enero 2022, X y 116 pp., referencia PE 698.899;
- **Spain:** GONZÁLEZ-TREVIJANO SÁNCHEZ, P.: [El derecho a la salud, una perspectiva de Derecho Comparado - España](#), Unidad Biblioteca de Derecho Comparado, Servicio de Estudios del Parlamento Europeo (EPRS), noviembre 2021, X y 89 pp., referencia PE 698.810;
- **Switzerland:** DUPONT, A.S., BURGAT, S., HOTZ, S. et LÉVY, M. : [Le droit à la santé, une perspective de droit comparé - Suisse](#), Unité Bibliothèque de droit comparé, Service de recherche du Parlement européen (EPRS), Mai 2022, XVI et 126 pp., référence PE 729.419;
- **United States:** MARTIN, J.W.: [Right to health, a comparative law perspective - United States of America](#), Comparative Law Library Unit, European Parliamentary Research Service (EPRS), May 2022, XII and 74 pp., reference PE 729.407.

VII. Rule of Law

- **Argentina** : DÍAZ RICCI, S. : [El Estado de Derecho, una perspectiva de Derecho Comparado: Argentina](#), Unidad Biblioteca de Derecho Comparado, Servicio de Estudios del Parlamento Europeo (EPRS), junio 2023, XVI y 199 pp., referencia PE 745.675;
- **Belgium**: BEHRENDT, C.: [L'État de droit, une perspective de droit comparé : Belgique](#), Unité Bibliothèque de droit comparé, Service de recherche du Parlement européen (EPRS), juin 2023, XII et 116 pp., référence PE 745.680 ;
- **Canada**: ZHOU, H.-R. : [L'État de droit, une perspective de droit comparé : Canada](#), Unité Bibliothèque de droit comparé, Service de recherche du Parlement européen (EPRS), mai 2023, X et 113 pp., référence PE 745.678;
- **Council of Europe**: ZILLER, J.: [L'État de droit, une perspective de droit comparé : Conseil de l'Europe](#), Unité Bibliothèque de droit comparé, Service de recherche du Parlement européen (EPRS), mars 2023, X et 138 pp., référence PE 745.673;
- **European Union**: SALVATORE, V. : [Lo Stato di diritto, una prospettiva di diritto comparato - Unione europea](#), Unità Biblioteca di diritto comparato, Servizio Ricerca del Parlamento europeo (EPRS), luglio 2023, X e 105 pp., referenza PE 745.685.
- **France**: PONTTHOREAU, M.-C.: [L'État de droit, une perspective de droit comparé : France](#), Unité Bibliothèque de droit comparé, Service de recherche du Parlement européen (EPRS), avril 2023, X et 119 pp., référence PE 745.676;
- **Germany** : REIMER, F.: [Der Rechtsstaat, eine rechtsvergleichende Perspektive: Deutschland](#), Bibliothek für Vergleichendes Recht, Wissenschaftlicher Dienst des Europäischen Parlaments (EPRS), März 2023, XVI und 149 S., Referenz PE 745.674;
- **Italy**: LUCIANI, M. : [Lo Stato di diritto, una prospettiva di diritto comparato - Italia](#), Unità Biblioteca di diritto comparato, Servizio Ricerca del Parlamento europeo (EPRS), luglio 2023, XVI e 127 pp., referenza PE 745.682;
- **Mexico** : FERRER MAC-GREGOR POISOT, E. : [El Estado de Derecho, una perspectiva de Derecho Comparado: México](#), Unidad Biblioteca de Derecho Comparado, Servicio de Estudios del Parlamento Europeo (EPRS), junio 2023, XIV y 161 pp., referencia PE 745.683;
- **Spain**: GONZÁLEZ-TREVIJANO SÁNCHEZ, P.: [El Estado de Derecho, una perspectiva de Derecho Comparado: España](#), Unidad Biblioteca de Derecho Comparado, Servicio de Estudios del Parlamento Europeo (EPRS), abril de 2023, XIV y 157 pp., referencia PE 745.677;
- **Switzerland**: HERTIG RANDALL, M. : [L'État de droit, une perspective de droit comparé : Suisse](#), Unité Bibliothèque de droit comparé, Service de recherche du Parlement européen (EPRS), mai 2023, XII et 183 pp., référence PE 745.684;
- **United States**: PRICE, A. L.: [The rule of law, a comparative law perspective - United States of America](#), Comparative Law Library Unit, European Parliamentary Research Service (EPRS), July 2023, X and 121 pp., reference PE 745.681.

VIII. Freedom to conduct a business

- **Canada:** LEE, I. B. : [Freedom to conduct a business, a comparative law perspective: Canada](#), Comparative Law Library Unit, European Parliamentary Research Service (EPRS), June 2024, XIV and 140 pp., reference PE 762.347;
- **European Union:** ZILLER, J.: [La liberté d'entreprise, une perspective de droit comparé : Union européenne](#), Unité Bibliothèque de droit comparé, Service de recherche du Parlement européen (EPRS), janvier 2024, XII et 135 pp., référence PE 757.620;
- **France:** PONTTHOREAU, M.-C.: [La liberté d'entreprise, une perspective de droit comparé : France](#), Unité Bibliothèque de droit comparé, Service de recherche du Parlement européen (EPRS), avril 2024, XII et 124 pp., référence PE 762.291;
- **Germany:** REIMER, F.: [Die unternehmerische Freiheit, eine rechtsvergleichende Perspektive: Deutschland](#), Bibliothek für Vergleichendes Recht, Wissenschaftlicher Dienst des Europäischen Parlaments (EPRS), April 2024, XV und 140 S., Referenz PE 760.415;
- **Mexico:** FERRER MAC-GREGOR POISOT, E.: [La libertad de empresa, una perspectiva de Derecho Comparado: México](#), Unidad Biblioteca de Derecho Comparado, Servicio de Estudios del Parlamento Europeo (EPRS), mayo 2024, XIV y 194 pp., referencia PE 762.318;
- **Spain:** GONZÁLEZ-TREVIJANO SÁNCHEZ, P.: [La libertad de empresa, una perspectiva de Derecho Comparado - España](#), Unidad Biblioteca de Derecho Comparado, Servicio de Estudios del Parlamento Europeo (EPRS), marzo 2024, XVI y 160 pp., referencia PE 760.373;
- **Switzerland:** MARTENET, V.: [La liberté d'entreprise, une perspective de droit comparé – Suisse](#), Unité Bibliothèque de droit comparé, Service de recherche du Parlement européen (EPRS), juin 2024, XII et 136 pp., référence PE 762.343.

This series will be completed in the course of 2024.

IX. Emergency law (legal bases for anti-COVID-19 measures)

- **Belgium:** BOUHON, F., JOUSTEN, A., MINY, X.: [Droit d'exception, une perspective de droit comparé - Belgique: Entre absence d'état d'exception, pouvoirs de police et pouvoirs spéciaux](#), Unité Bibliothèque de droit comparé, Service de recherche du Parlement européen (EPRS), avril 2021, X et 161 pp., référence PE 690.581;
- **France:** ZILLER, J.: [Droit d'exception, une perspective de droit comparé - France: lois d'urgence pour faire face à l'épidémie de Covid-19](#), Unité Bibliothèque de droit comparé, Service de recherche du Parlement européen (EPRS), mai 2021 (mise à jour du 1^{er} juin 2021), X et 105 pp., référence PE 690.624;
- **Germany:** SCHÄFER, B.:
[Das Recht des Ausnahmezustands im Rechtsvergleich - Deutschland: Ungenutztes Notstandsrecht und Integration des Ausnahmefalls in das einfache Recht](#), Bibliothek für Vergleichendes Recht, Wissenschaftlicher Dienst des Europäischen Parlaments (EPRS), mai 2020, IV und 35 S., Referenz PE 651.938 (original German version);
[Le droit d'exception, une perspective de droit comparé - Allemagne: non-utilisation du droit d'exception en faveur de l'application du droit ordinaire](#), Unité Bibliothèque de droit comparé, Service de recherche du Parlement européen (EPRS), mai 2020, IV et 38 pp., référence PE 651.938 (French version with added comments);
- **Italy:** ALIBRANDI, A.: [Il diritto di eccezione: una prospettiva di diritto comparato - Italia: stato di emergenza](#), Unità Biblioteca di diritto comparato, Servizio Ricerca del Parlamento europeo (EPRS), giugno 2020, VIII e 49 pp., referenza PE 651.983;
- **Spain:** LECUMBERRI BEASCOA, G.:
[El Derecho de excepción, una perspectiva de Derecho Comparado - España: estado de alarma](#), Unidad Biblioteca de Derecho Comparado, Servicio de Estudios del Parlamento Europeo (EPRS), abril 2020, II y 19 pp., referencia PE 649.366 (original Spanish version);
[Das Notstandsrecht, eine rechtsvergleichende Perspektive - Spanien: Alarmzustand](#), Bibliothek für Vergleichendes Recht, Wissenschaftlicher Dienst des Europäischen Parlaments (EPRS), April 2020, II und 20 S., Referenz PE 649.366 (German version with added comments);
[Le droit d'exception, une perspective de droit comparé - Espagne: état d'alerte](#), Unité Bibliothèque de droit comparé, Service de recherche du Parlement européen (EPRS), avril 2020, II et 19 pp., référence PE 649.366 (French version);
[Il diritto di eccezione, una prospettiva di diritto comparato - Spagna: stato di allarme](#), Unità Biblioteca di diritto comparato, Servizio Ricerca del Parlamento europeo (EPRS), aprile 2020, II e 20 pp., referenza PE 649.366 (Italian version with added comments);
[El Derecho de excepción, una perspectiva de Derecho Comparado - España: estado de alarma](#), Unidad Biblioteca de Derecho Comparado, Servicio de Estudios del Parlamento Europeo (EPRS), 2a edición (aumentada y puesta al día), julio 2020, VI y 69 pp., referencia PE 652.005 (updated second edition Spanish version).

X. Ratification of international treaties

- **Belgium:** BEHRENDT, CH.: [La ratification des traités internationaux, une perspective de droit comparé - Belgique](#), Unité Bibliothèque de droit comparé, Service de recherche du Parlement européen (EPRS), mars 2020, VI et 44 pp., référence PE 646.197;
- **Canada:** PROVOST, R.: [La ratification des traités internationaux, une perspective de droit comparé - Canada](#), Unité Bibliothèque de droit comparé, Service de recherche du Parlement européen (EPRS), février 2018, VI et 34 pp., référence PE 633.186;
- **France:** PONTTHOREAU, M.-C.: [La ratification des traités internationaux, une perspective de droit comparé - France](#), Unité Bibliothèque de droit comparé, Service de recherche du Parlement européen (EPRS), juin 2019, VI et 61 pp., référence PE 637.963;
- **Germany:** GRAF VON KIELMANSEGG, S.:
[Ratifikation völkerrechtlicher Verträge: eine rechtsvergleichende Perspektive - Deutschland](#), Bibliothek für Vergleichendes Recht, Wissenschaftlicher Dienst des Europäischen Parlaments (EPRS), April 2018, VIII und 47 S., Referenz PE 620.232 (original German version);
[Ratificación de los tratados internacionales: una perspectiva de Derecho Comparado - Alemania](#), Unidad Biblioteca de Derecho Comparado, Servicio de Estudios del Parlamento Europeo (EPRS), abril 2018, X y 55 pp., referencia PE 620.232 (Spanish version with added comments);
[La ratification des traités internationaux, une perspective de droit comparé - Allemagne](#), Unité Bibliothèque de droit comparé, Service de recherche du Parlement européen (EPRS), février 2021, XII et 68 pp., référence PE 689.340 (French version with added comments and update);
- **Italy:** CAFARO, S.: [La ratifica dei trattati internazionali, una prospettiva di diritto comparato - Italia](#), Unità Biblioteca di diritto comparato, Servizio Ricerca del Parlamento europeo (EPRS), luglio 2018, VIII e 42 pp., referenza PE 625.128;
- **Morocco:** BERRAMDANE, A.: [La ratification des traités internationaux, une perspective de droit comparé - Maroc](#), Unité Bibliothèque de droit comparé, Service de recherche du Parlement européen (EPRS), décembre 2018, VIII et 52 pp., référence PE 630.337;
- **Portugal:** SALVAÇÃO BARRETO, P.: [A ratificação de tratados internacionais, uma perspectiva de direito comparado - Portugal](#), Unidade Biblioteca de Direito Comparado, Serviços de Estudos do Parlamento Europeu (EPRS), novembro 2018, VIII e 33 pp., referência PE 630.294;
- **Spain:** FERNÁNDEZ DE CASADEVANTE ROMANI, C.: [La ratificación de los tratados internacionales, una perspectiva de Derecho Comparado - España](#), Unidad Biblioteca de Derecho Comparado, Servicio de Estudios del Parlamento Europeo (EPRS), septiembre 2021, VIII y 80 pp., referencia PE 698.044;
- **Switzerland:** DE ROSSA, F.: [La ratification des traités internationaux, une perspective de droit comparé - Suisse](#), Unité Bibliothèque de droit comparé, Service de recherche du Parlement européen (EPRS), mars 2018, VI et 35 pp., référence PE 614.719;
- **United States:** WINSTON, A.M.: [Ratification of international treaties, a comparative law perspective - United States of America](#), Comparative Law Library Unit, European Parliamentary Research Service (EPRS), July 2020, VIII and 44 pp., reference PE 652.013.

XI. Other topics

- **Copyright Law:** AA. VV.: [Copyright Law in the EU: Salient features of copyright law across the EU Member States](#), Comparative Law Library Unit, European Parliamentary Research Service (EPRS), June 2018, VIII and 409 pp., reference PE 625.126;
- **Supreme Court of the United States: appointment of judges:** Díez PARRA, I.: [La nomination des juges de la Cour Suprême des États-Unis](#), Unité Bibliothèque de droit comparé, Service de recherche du Parlement européen (EPRS), septembre 2020, 10 pp., référence PE 652.103.
- **Selected case law:**
COMPARATIVE LAW LIBRARY UNIT: [Better Law-Making – Selected case law](#), Comparative Law Library Unit, European Parliamentary Research Service (EPRS), January 2017, 5 pp;
COMPARATIVE LAW LIBRARY UNIT: [Rule of law– Selected case law](#), Comparative Law Library Unit, European Parliamentary Research Service (EPRS), March 2017, 15 pp, reference PE 599.338;
MICHAELSEN, F. and Díez PARRA, I. (coord.): [Accession of the EU to the ECHR – Selected publications & case law](#), Comparative Law Library Unit, European Parliamentary Research Service (EPRS), July 2017, 7 pp, reference PE 607.299.
- **Selected publications:**
COMPARATIVE LAW LIBRARY UNIT: [Better Law-Making – Selected publications](#), Comparative Law Library Unit, European Parliamentary Research Service (EPRS), January 2017, 9 pp;
COMPARATIVE LAW LIBRARY UNIT: [Rule of law– Selected publications](#), Comparative Law Library Unit, European Parliamentary Research Service (EPRS), March 2017, 13 pp, reference PE 599.339;
COMPARATIVE LAW LIBRARY UNIT: [Better Law-Making – Selected publications](#), Comparative Law Library Unit, European Parliamentary Research Service (EPRS), February 2018, 9 pp, reference PE 614.712;
DIMBOUR, C. and Díez PARRA, I. (dir.): [Sélection de publications en droit comparé: Juridictions constitutionnelles: fondamentaux](#), Unité Bibliothèque de droit comparé, Service de recherche du Parlement européen (EPRS), février 2020, 35 pp., référence PE 646.175.

This document is part of a series of Comparative Law studies that analyze the freedom to conduct a business in different legal orders around the world. After a brief historic introduction and a presentation of applicable legislation and case law, the content, limits and possible evolution of this freedom are examined.

The subject of this study is the United States' federal legal system.

The United States' Constitution does not grant an express right to freely conduct or operate a business. To the contrary, the Constitution expressly grants the federal Congress power to regulate interstate commerce. In addition, per the Tenth Amendment to the Constitution, the states can regulate businesses under their inherent police power to protect the health, safety, and general welfare of their inhabitants. Although early Supreme Court precedent recognized an "economic property right" that merited constitutional protection from government interference, the Supreme Court's position significantly changed in the 1930s during the New Deal expansion of federal regulation and intervention in the national economy. In the modern era, the Supreme Court has consistently ruled that the federal and state governments have a broad power to regulate businesses to serve any legitimate purpose so long as the legislation or regulations have a rational basis connected to that purpose.

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