

WEST'S  
ENCYCLOPEDIA  
*of*  
AMERICAN  
LAW

2ND EDITION

VOLUME 3



COM TO DOR

**WEST'S**  
**ENCYCLOPEDIA**  
*of*  
**AMERICAN**  
**LAW**

**2ND EDITION**

**VOLUME 3**



**COM TO DOR**

**THOMSON**  
—★—  
**GALE**



## West's Encyclopedia of American Law, 2nd Edition

### Project Editors

Jeffrey Lehman  
Shirelle Phelps

### Editorial

Andrew C. Claps, Pamela A. Dear, Jason M. Everett, Lynn U. Koch, John F. McCoy, Jeffrey Wilson, Jennifer M. York, Ralph Zerbernia

### Research

Barbara McNeil

### Editorial Support Services

Ryan Cartmill, Mark Hefner, Sue Petrus

### Data Capture

Katrina Coach, Nikita Greene, Beverly Jendrowski, Elizabeth Pilette, Beth Richardson

### Indexing Services

Lynne Maday

### Permissions

Margaret A. Chamberlain

### Imaging and Multimedia

Dean Dauphinais, Leitha Etheridge-Sims, Mary Grimes, Lezlie Light, Dan Newell, David G. Oblender, Chris O'Bryan

### Product Design

Cynthia Baldwin, Kate Scheible

### Composition and Electronic Capture

Evi Seoud, Mary Beth Trimper

### Manufacturing

Rhonda Williams

© 2005 Thomson Gale, a part of  
The Thomson Corporation.

Thomson and Star Logo are trademarks  
and Gale is a registered trademark used  
herein under license.

### For more information, contact

The Gale Group, Inc.  
27500 Drake Rd.  
Farmington Hills, MI 48331-3535  
Or you can visit our Internet site at  
<http://www.gale.com>

### ALL RIGHTS RESERVED

No part of this work covered by the copy-  
right hereon may be reproduced or used in  
any form or by any means—graphic, elec-  
tronic, or mechanical, including photocopy-  
ing, recording, taping, Web distribution, or  
information storage retrieval systems—  
without the written permission of the pub-  
lisher.

This publication is a creative work fully  
protected by all applicable copyright laws,  
as well as by misappropriation, trade  
secret, unfair condition, and other applica-  
ble laws. The authors and editors of this  
work have added value to the underlying  
factual material herein through one or  
more of the following: coordination,  
expression, arrangement, and classification  
of the information.

For permission to use material from this  
product, submit your request via Web at  
<http://www.gale-edit.com/permission>  
or you may download our Permissions  
Request form and submit your request by  
fax of mail to:

### Permissions Department

The Gale Group, Inc.  
27500 Drake Rd.  
Farmington Hills, MI 48331-3535  
Permissions Hotline:  
248-699-8006 or 800-877-4253, ext. 8006  
Fax: 248-699-8074 or 800-762-4058

Inside cover photograph reproduced by  
permission of the Library of Congress  
(Thurgood Marshall).

Since this page cannot legibly accommo-  
date all copyright notices, the acknowledg-  
ments constitute an extension of the  
copyright notice.

While every effort has been made to  
ensure the reliability of the information  
presented in this publication, The Gale  
Group, Inc. does not guarantee the accu-  
racy of the data contained herein. The  
Gale Group, Inc. accepts no payment for  
listing; and inclusion in the publication of  
any organization, agency, institution, pub-  
lication service, or individual does not  
imply endorsement of the editors or pub-  
lisher. Errors brought to the attention of  
the publisher and verified to the satisfac-  
tion of the publisher will be corrected in  
future editions.

### Library of Congress Cataloging-in-Publication Data

West's encyclopedia of American law / Jeffrey Lehman, editor, Shirelle  
Phelps, editor.—2nd ed.

p. cm.

Includes bibliographical references and index.

ISBN 0-7876-6367-0 (hardcover set : alk. paper)

1. Law—United States—Encyclopedias. 2. Law—United States—Popular  
works. I. Lehman, Jeffrey. II. Phelps, Shirelle.

KF154.W47 2004

349.73'03—dc22

2004004918

ISBN 0-7876-6367-0 (set), ISBN 0-7876-6368-9 (vol. 1), ISBN 0-7876-6369-7 (vol. 2), ISBN 0-7876-6370-0 (vol. 3), ISBN 0-7876-6371-9 (vol. 4), ISBN 0-7876-6372-7 (vol. 5), ISBN 0-7876-6373-5 (vol. 6), ISBN 0-7876-6374-3 (vol. 7), ISBN 0-7876-6375-1 (vol. 8), ISBN 0-7876-6376-X (vol. 9), ISBN 0-7876-6377-8 (vol. 10), ISBN 0-7876-6378-6 (vol. 11), ISBN 0-7876-6379-4 (vol. 12), ISBN 0-7876-9420-7 (vol. 13)

This title is also available as an e-book. ISBN 0-7876-9373-1 (set)  
Contact your Gale sales representative for ordering information.

Printed in the United States of America  
10 9 8 7 6 5 4 3 2

WEST'S  
ENCYCLOPEDIA  
*of*  
AMERICAN  
LAW

2ND EDITION

## DEDICATION

*West's Encyclopedia of American Law*  
(*WEAL*) is dedicated to librarians  
and library patrons throughout the  
United States and beyond. Your  
interest in the American legal system  
helps to expand and fuel the frame-  
work of our Republic.



**T**he U.S. legal system is admired around the world for the freedoms it allows the individual and the fairness with which it attempts to treat all persons. On the surface, it may seem simple, yet those who have delved into it know that this system of federal and state constitutions, statutes, regulations, and common-law decisions is elaborate and complex. It derives from the English common law, but includes principles older than England, along with some principles from other lands. The U.S. legal system, like many others, has a language all its own, but too often it is an unfamiliar language: many concepts are still phrased in Latin. The second edition of *West's Encyclopedia of American Law (WEAL)* explains legal terms and concepts in everyday language, however. It covers a wide variety of persons, entities, and events that have shaped the U.S. legal system and influenced public perceptions of it.

## MAIN FEATURES OF THIS SET

### Entries

This encyclopedia contains nearly 5,000 entries devoted to terms, concepts, events, movements, cases, and persons significant to U.S. law. Entries on legal terms contain a definition of the term, followed by explanatory text if necessary. Entries are arranged alphabetically in standard encyclopedia format for ease of use. A wide variety of additional features, listed later in this preface, provide interesting background and supplemental information.

**Definitions** Every entry on a legal term is followed by a definition, which appears at the beginning of the entry and is italicized. The Dictionary and Indexes volume includes a glossary containing all the definitions from *WEAL*.

**Further Readings** To facilitate further research, a list of Further Readings is included at the end of a majority of the main entries.

**Cross-References** *WEAL* provides two types of cross-references, within and following entries. Within the entries, terms are set in small capital letters—for example, *LIEN*—to indicate that they have their own entry in the encyclopedia. At the end of the entries, related entries the reader may wish to explore are listed alphabetically by title.

Blind cross-reference entries are also included to direct the user to other entries throughout the set.

### In Focus Essays

In Focus essays accompany related entries and provide additional facts, details, and arguments on particularly interesting, important, or controversial issues raised by those entries. The subjects covered include hotly contested issues, such as abortion, capital punishment, and gay rights; detailed processes, such as the Food and Drug Administration's approval process for new drugs; and important historical or social issues, such as debates over the formation of the U.S. Constitution.

### Sidebars

Sidebars provide brief highlights of some interesting facet of accompanying entries. They

complement regular entries and In Focus essays by adding informative details. Sidebar topics include the Million Man March and the branches of the U.S. armed services. Sidebars appear at the top of a text page and are set in a box.

**Biographies**

WEAL profiles a wide variety of interesting and influential people—including lawyers, judges, government and civic leaders, and historical and modern figures—who have played a part in creating or shaping U.S. law. Each biography includes a timeline, which shows important moments in the subject’s life as well as important historical events of the period. Biographies appear alphabetically by the subject’s last name.

**ADDITIONAL FEATURES OF THIS SET**

**Enhancements** Throughout WEAL, readers will find a broad array of photographs, charts, graphs, manuscripts, legal forms, and other visual aids enhancing the ideas presented in the text.

**Indexes** WEAL features a cases index and a cumulative index in a separate volume.

**Appendixes**

Three appendix volumes are included with WEAL, containing hundreds of pages of docu-

ments, laws, manuscripts, and forms fundamental to and characteristic of U.S. law.

**Milestone Cases in the Law**

A special Appendix volume entitled Milestones in the Law, allows readers to take a close look at landmark cases in U.S. law. Readers can explore the reasoning of the judges and the arguments of the attorneys that produced major decisions on important legal and social issues. Included in each Milestone are the opinions of the lower courts; the briefs presented by the parties to the U.S. Supreme Court; and the decision of the Supreme Court, including the majority opinion and all concurring and dissenting opinions for each case.

**Primary Documents**

There is also an Appendix volume containing more than 60 primary documents, such as the English Bill of Rights, Martin Luther King Jr.’s Letter from Birmingham Jail, and several presidential speeches.

**Citations**

Wherever possible, WEAL entries include citations for cases and statutes mentioned in the text. These allow readers wishing to do additional research to find the opinions and statutes cited. Two sample citations, with explanations of common citation terms, can be seen below and opposite.

*Miranda v. Arizona*, 384 U.S. 436, 86 S.Ct. 1602, 16 L.Ed. 2d 694 (1966)

1
2
3
4
5
6
7

1. *Case title.* The title of the case is set in i and indicates the names of the parties. The suit in this sample citation was between Ernesto A. Miranda and the state of Arizona.
2. *Reporter volume number.* The number preceding the reporter name indicates the reporter volume containing the case. (The volume number appears on the spine of the reporter, along with the reporter name).
3. *Reporter name.* The reporter name is abbreviated. The suit in the sample citation is from the reporter, or series of books, called *U.S. Reports*, which contains cases from the U.S. Supreme Court. (Numerous reporters publish cases from the federal and state courts.)
4. *Reporter page.* The number following the reporter name indicates the reporter page on which the case begins.
5. *Additional reporter page.* Many cases may be found in more than one reporter. The suit in the sample citation also appears in volume 86 of the *Supreme Court Reporter*, beginning on page 1602.
6. *Additional reporter citation.* The suit in the sample citation is also reported in volume 16 of the *Lawyer’s Edition*, second series, beginning on page 694.
7. *Year of decision.* The year the court issued its decision in the case appears in parentheses at the end of the cite.

<i>Brady Handgun Violence Prevention Act,</i>	Pub. L. No.	103-159,	107	Stat. 1536	(18	U.S.C.A.	§§ 921-925A)
1	2	3	4	5	6	7	8

1. *Statute title.*
2. *Public law number.* In the sample citation, the number 103 indicates this law was passed by the 103d Congress, and the number 159 indicates it was the 159th law passed by that Congress.
3. *Reporter volume number.* The number preceding the reporter abbreviation indicates the reporter volume containing the statute.
4. *Reporter name.* The reporter name is abbreviated. The statute in the sample citation is from *Statutes at Large*.
5. *Reporter page.* The number following the reporter abbreviation indicates the reporter page on which the statute begins.
6. *Title number.* Federal laws are divided into major sections with specific titles. The number preceding a reference to the U.S. Code stands for the section called Crimes and Criminal Procedure.
7. *Additional reporter.* The statute in the sample citation may also be found in the *U.S. Code Annotated*.
8. *Section numbers.* The section numbers following a reference to the *U.S. Code Annotated* indicate where the statute appears in that reporter.



---

---

# CONTRIBUTORS

## **Editorial Reviewers**

Matthew C. Cordon  
Frederick K. Grittner  
Stephanie Schmitt  
Linda Tashbook  
M. Uri Toch

## **Contributing Authors**

James Cahoy  
Matthew C. Cordon  
Richard J. Cretan  
Mark Engsberg  
Frederick K. Grittner  
Lauri R. Harding  
David R. Johnstone  
Theresa J. Lippert  
Frances T. Lynch  
George A. Milite  
Melodie Monahan  
Kelle Sisung  
Scott D. Slick

## **Contributors to Previous Edition**

Richard Abowitz  
Paul Bard  
Joanne Bergum  
Michael Bernard  
Gregory A. Borchard  
Susan Buie

Terry Carter  
Sally Chatelaine  
Joanne Smestad Claussen  
Richard Cretan  
Lynne Crist  
Paul D. Daggett  
Susan L. Dalhed  
Lisa M. DelFiacco  
Suzanne Paul Dell'Oro  
Dan DeVoe  
Joanne Engelking  
Sharon Fischlowitz  
Jonathan Flanders  
Lisa Florey  
Robert A. Frame  
John E. Gisselquist  
Russell L. Gray III  
Frederick K. Grittner  
Victoria L. Handler  
Heidi L. Headlee  
James Heidberg  
Clifford P. Hooker  
Marianne Ashley Jerpbak  
Andrew Kass  
Margaret Anderson Kelliher  
Christopher J. Kennedy  
Anne E. Kevlin  
Ann T. Laughlin  
Laura Ledsworth-Wang  
Linda Lincoln

Gregory Luce  
David Luiken  
Jennifer Marsh  
Sandra M. Olson  
Anne Larsen Olstad  
William Ostrem  
Lauren Pacelli  
Randolph C. Park  
Gary Peter  
Michele A. Potts  
Reinhard Priester  
Christy Rain  
Brian Roberts  
Debra J. Rosenthal  
Mary Lahr Schier  
Mary Scarbrough  
Theresa L. Schulz  
John Scobey  
James Slavicek  
Scott D. Slick  
David Strom  
Wendy Tien  
Douglas Tueting  
Richard F. Tyson  
Christine Ver Ploeg  
George E. Warner  
Anne Welsbacher  
Eric P. Wind  
Lindy T. Yokanovich

---

# CONTENTS

## VOLUME 1

<i>Preface</i> .....	.ix
<i>Contributors</i> .....	.xiii
<b>A–Ba</b> .....	.1
<i>Abbreviations</i> .....	.507

## VOLUME 2

<i>Preface</i> .....	.ix
<i>Contributors</i> .....	.xiii
<b>Be–Col</b> .....	.1
<i>Abbreviations</i> .....	.511

## VOLUME 3

<i>Preface</i> .....	.ix
<i>Contributors</i> .....	.xiii
<b>Com–Dor</b> .....	.1
<i>Abbreviations</i> .....	.509

## VOLUME 4

<i>Preface</i> .....	.ix
<i>Contributors</i> .....	.xiii
<b>Dou–Fre</b> .....	.1
<i>Abbreviations</i> .....	.509

## VOLUME 5

<i>Preface</i> .....	.ix
<i>Contributors</i> .....	.xiii
<b>Fri–Jam</b> .....	.1
<i>Abbreviations</i> .....	.501

## VOLUME 6

<i>Preface</i> .....	.ix
<i>Contributors</i> .....	.xiii
<b>Jap–Ma</b> .....	.1
<i>Abbreviations</i> .....	.469

## VOLUME 7

<i>Preface</i> .....	.ix
<i>Contributors</i> .....	.xiii
<b>Mc–Pl</b> .....	.1
<i>Abbreviations</i> .....	.467

## VOLUME 8

<i>Preface</i> .....	.ix
<i>Contributors</i> .....	.xiii
<b>Po–San</b> .....	.1
<i>Abbreviations</i> .....	.461

## VOLUME 9

<i>Preface</i> .....	.ix
<i>Contributors</i> .....	.xiii
<b>Sar–Ten</b> .....	.1
<i>Abbreviations</i> .....	.465

## VOLUME 10

<i>Preface</i> .....	.ix
<i>Contributors</i> .....	.xiii
<b>Ter–Z</b> .....	.1
<i>Abbreviations</i> .....	.459

## VOLUME 11

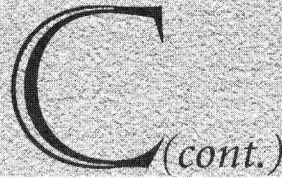
Milestones in the Law

## VOLUME 12

Primary Documents

## VOLUME 13

Dictionary of Legal Terms  
Cases Index  
General Index



### **CO-MAKER**

*One who becomes obligated, an obligor, under a negotiable instrument—such as a check or promissory note—by signing his or her name along with the name of the original obligor, thereby promising to pay on it in full.*

*A co-maker is a type of accommodation party, who is someone who has signed a COMMERCIAL PAPER to aid someone wishing to raise money on it. An accommodation party lends his or her name to another person and makes a promise to pay the bill or note when it is due if the other person defaults.*

### **COMBINATION**

*In CRIMINAL LAW, an agreement between two or more people to act jointly for an unlawful purpose; a conspiracy. In patent law, the joining together of several separate inventions to produce a new invention.*

An illegal combination in restraint of trade, defined under the SHERMAN ANTI-TRUST ACT, is one in which the conspirators agree expressly or impliedly to use devices such as price-fixing agreements to eliminate competition in a certain locality, e.g., when a group of furniture manufacturers refuse to deliver goods to stores that sell their goods for under a certain price.

In patent law a combination is distinguishable from an aggregation in that it is a joint operation of elements that produces a new result

as opposed to a mere grouping together of old elements. This is important in determining whether or not something is patentable, since no valid patent can extend to an aggregation.

### **COMBINATION IN RESTRAINT OF TRADE**

*An illegal compact between two or more persons to unjustly restrict competition and monopolize commerce in goods or services by controlling their production, distribution, and price or through other unlawful means.*

Such combinations—whether in the form of a contract, holding company, or other association—are prohibited by the provisions of the SHERMAN ANTI-TRUST ACT and other antitrust acts.

### **CROSS-REFERENCES**

Monopoly.

### **COMITY**

*Courtesy; respect; a disposition to perform some official act out of goodwill and tradition rather than obligation or law. The acceptance or ADOPTION of decisions or laws by a court of another jurisdiction, either foreign or domestic, based on public policy rather than legal mandate.*

In comity, an act is performed to promote uniformity, limit litigation, and, most important, to show courtesy and respect for other court decisions. It is not to be confused with FULL FAITH AND CREDIT, the constitutional pro-



Cargo ships docked in Newark, New Jersey. Commerce includes the transport of goods by sea.

AP/WIDE WORLD  
PHOTOS

vision that various states within the United States must recognize the laws, acts, and decisions of sister states.

*Comity of nations* is a recognition of fundamental legal concepts that nations share. It stems from mutual convenience as well as respect and is essential to the success of international relations. This body of rules does not form part of INTERNATIONAL LAW; however, it is important for public policy reasons.

*Judicial comity* is the granting of reciprocity to decisions or laws by one state or jurisdiction to another. Since it is based upon respect and deference rather than strict legal principles, it does not require that any state or jurisdiction adopt a law or decision by another state or jurisdiction that is in contradiction, or repugnant, to its own law.

*Comity of states* is the voluntary acceptance by courts of one state of the decision of a sister state on a similar issue or question.

## COMMERCE

*The exchange of goods, products, or any type of PERSONAL PROPERTY. Trade and traffic carried on between different peoples or states and its inhabitants, including not only the purchase, sale, and exchange of commodities but also the instrumentalities, agencies, and means by which business is accomplished. The transportation of persons and goods, by air, land, and sea. The exchange of merchandise on a large scale between different places or communities.*

Although the terms *commerce* and *trade* are often used interchangeably, *commerce* refers to large-scale business activity, while *trade*

describes commercial traffic within a state or a community.

## COMMERCE CLAUSE

*The provision of the U.S. Constitution that gives Congress exclusive power over trade activities among the states and with foreign countries and Indian tribes.*

Article 1, Section 8, Clause 3, of the Constitution empowers Congress "to regulate Commerce with foreign Nations, and among several States, and with the Indian Tribes." The term *commerce* as used in the Constitution means business or commercial exchanges in any and all of its forms between citizens of different states, including purely social communications between citizens of different states by telegraph, telephone, or radio, and the mere passage of persons from one state to another for either business or pleasure.

Intrastate, or domestic, commerce is trade that occurs solely within the geographic borders of one state. As it does not move across state lines, intrastate commerce is subject to the exclusive control of the state.

Interstate commerce, or commerce among the several states, is the free exchange of commodities between citizens of different states across state lines. Commerce with foreign nations occurs between citizens of the United States and citizens or subjects of foreign governments and, either immediately or at some stage of its progress, is extraterritorial. Commerce with Indian tribes refers to traffic or commercial exchanges involving both the United States and American Indians.

The Commerce Clause was designed to eliminate an intense rivalry between the groups of those states that had tremendous commercial advantage as a result of their proximity to a major harbor, and those states that were not near a harbor. That disparity was the source of constant economic battles among the states. The exercise by Congress of its regulatory power has increased steadily with the growth and expansion of industry and means of transportation.

## Power to Regulate

The Commerce Clause authorizes Congress to regulate commerce in order to ensure that the flow of interstate commerce is free from local restraints imposed by various states. When Congress deems an aspect of interstate commerce to be in need of supervision, it will enact legislation

that must have some real and rational relation to the subject of regulation. Congress may constitutionally provide for the point at which subjects of interstate commerce become subjects of state law and, therefore, state regulation.

Although the U.S. Constitution places some limits on state power, the states enjoy guaranteed rights by virtue of their reserved powers pursuant to the TENTH AMENDMENT. A state has the inherent and reserved right to regulate its domestic commerce. However, that right must be exercised in a manner that does not interfere with, or place a burden on, interstate commerce, or else Congress may regulate that area of domestic commerce in order to protect interstate commerce from the unreasonable burden. Although a state may not directly regulate, prohibit, or burden interstate or foreign commerce, it may incidentally and indirectly affect it by a bona fide, legitimate, and reasonable exercise of its POLICE POWERS. States are powerless to regulate commerce with Indian tribes.

Although Congress has the exclusive power to regulate foreign and interstate commerce, the presence or absence of congressional action determines whether a state may act in a particular field. The nature of the subject of commerce must be examined in order to decide whether Congress has exclusive control over it. If the subject is national in character and importance, thereby requiring uniform regulation, the power of Congress to regulate it is plenary, or exclusive.

It is for the courts to decide the national or local character of the subject of regulation, by BALANCING the national interest against the STATE INTEREST in the subject. If the state interest is slight compared with the national interest, the courts will declare the state statute unconstitutional as an unreasonable burden on interstate commerce.

The U.S. Supreme Court, in the case of *Southern Pacific Co. v. Arizona*, 325 U.S. 761, 65 S. Ct. 1515, 89 L. Ed. 1915 (1945), held that an Arizona statute that prohibited railroads within the state from having more than 70 cars in a freight train, or 14 cars in a passenger train, was unconstitutional. The purpose of the legislation, deemed a safety measure, was to minimize accidents by reducing the lengths of trains passing through the state. Practically speaking, however, the statute created an unreasonable burden on interstate commerce, as trains entering and leaving the state had to stop at the borders to break

up a 100-car freight train into two trains and to put on additional crews, thus increasing their operating costs. The Court held that the means used to achieve safety was unrealistic and that the increase in the number of trains and train operators actually enhanced the likelihood of accidents. It balanced the national interest in the free flow of interstate commerce by a national railway system, against the state interest of a dubious safety measure. It decided that the value of the operation of a uniform, efficient railway system significantly outweighed that of a state law that has minimal effect.

However, where there is an obvious compelling state interest to protect, state regulations are constitutional. Restrictions on the width and weight of trucks passing through a state on its highways are valid, because the state, pursuant to its police power, has a legitimate interest in protecting its roads.

Where the subject is one in which Congress or the state may act, a state may legislate unless Congress does so. Thereafter, a valid federal regulation of the subject supersedes conflicting state legislative enactments and decisions and actions of state judicial or administrative bodies.

If Congress has clearly demonstrated its intent to regulate the entire field, then the state is powerless to enact subsequent legislation even if no conflict exists between state and federal law. This type of congressional action is known as federal PREEMPTION of the field. Extensive federal regulation in a particular area does not necessarily result in federal preemption of the field. In determining whether a state may regulate a given field, a court evaluates the purpose of the federal regulations and the obligations imposed, the history of state regulation in the field, and the LEGISLATIVE HISTORY of the state statute. If Congress has not preempted the field, then state law is valid, provided that it is consistent with, or supplements, the federal law.

State health, sanitary, and quarantine laws that interfere with foreign and interstate commerce no more than is necessary in the proper exercise of the state's police power are also valid as long as they do not conflict with federal regulations on the subject. Such laws must have some real relation to the objects named in them, in order to be upheld as valid exercises of the police power of the state. A state may not go beyond what is essential for self-protection by interfering with interstate transportation into or through its territory.

A state may not burden interstate commerce by discriminating against it or persons engaged in it or the citizens or property originating in another state. However, the regulation of interstate commerce need not be uniform throughout the United States. Congress may devise a national policy with due regard for varying and fluctuating interests of different regions.

### Acts Constituting Commerce

Whether any transaction constitutes interstate or intrastate commerce depends on the essential character of what is done and the surrounding circumstances. The courts take a commonsense approach in examining the established course of business in order to distinguish where interstate commerce ends and local commerce begins. If activities that are intrastate in character have such a substantial effect on interstate commerce that their control is essential to protect commerce from being burdened, Congress may not be denied the power to exercise that control.

In 1995, for the first time in nearly 60 years, the U.S. Supreme Court held that Congress had exceeded its power to regulate interstate commerce. In *United States v. Lopez*, 514 U.S. 549, 115 S. Ct. 1624, 131 L. Ed. 2d 626 (1995), the Court ruled 5–4 that Congress had exceeded its Commerce Clause power in enacting the Gun-Free School Zones Act of 1990 (18 U.S.C.A. § 921), which prohibited the possession of firearms within 1,000 feet of a school.

In reaching its decision, the Court took the various tests used throughout the history of the Commerce Clause to determine whether a federal statute is constitutional, and incorporated them into a new standard that specifies three categories of activity that Congress may regulate under the clause: (1) the channels of interstate commerce, (2) persons or things in interstate commerce or instrumentalities of interstate commerce, and (3) activities that have “a substantial relation to interstate commerce . . . i.e., those activities that substantially affect interstate commerce.” The Court then applied this new standard to the 1990 Gun-Free School Zones Act and found that the statute could be evaluated under the third category of legislation allowed by the Commerce Clause. But the Court noted that the act was a criminal statute that had nothing to do with commerce and that it did not establish any jurisdictional authority to distinguish it from similar state regulations. Because the statute did not “substantially affect interstate

commerce,” according to the Court, it went beyond the scope of the Commerce Clause and was an unconstitutional exercise of Congress’s legislative power.

The Court stressed that federal authority to regulate interstate commerce cannot be extended to the point that it obliterates the distinction between what is national and what is local and creates a completely centralized government. Although recognizing the great breadth of congressional regulatory authority, the Court in *Lopez* attempted to create a special protection for the states by providing for heightened scrutiny of federal legislation that regulates areas of traditional concern to the states.

In a novel application of the Commerce Clause, a federal court decided in *United States v. Bishop Processing Co.*, 287 F. Supp. 624 (D.C. Md. 1968), that the movement of AIR POLLUTION across state lines from Maryland to Delaware constituted interstate commerce that is subject to congressional regulation. The plaintiff, the United States, sought an INJUNCTION under the federal Clean Air Act (42 U.S.C.A. §§ 7401 et seq. [1955]) to prevent the operation of the Maryland Bishop Processing Company, a fat-rendering plant, until it installed devices to eliminate its emission of noxious odors. The defendant plant owners argued, among other contentions, that Congress was powerless to regulate their business because it was clearly an intrastate activity. The court disagreed. Foul-smelling air POLLUTION adversely affects business conditions, depresses property values, and impedes industrial development. These factors interfere with interstate commerce, thereby bringing the plant within the scope of the provisions of the federal air-pollution law.

The power of Congress to regulate commerce also extends to contracts that substantially relate to interstate commerce. For example, Congress may regulate the rights and liabilities of employers and employees, as labor disputes adversely affect the free flow of commerce. Otherwise, contracts that do not involve any property or activities that move in interstate commerce are not ordinarily part of interstate commerce.

Congress acts within its power when it regulates transportation across state lines. The essential nature of the transportation determines its character. Transportation that begins and ends within a single state is intrastate commerce and is generally not within the scope of the Com-

merce Clause. If part of the journey passes through an adjoining state, then the transportation is interstate commerce, as long as the travel across state lines is not done solely to avoid state regulation. Commerce begins with the physical transport of the product or person and ends when either reaches the destination. Every aspect of a continuous passage from a point in one state to a point in another state is a transaction of interstate commerce. A temporary pause in transportation does not automatically deprive a shipment of its interstate character. For a sale of goods to constitute interstate commerce, interstate transportation must be involved. Once goods have arrived in one state from another state, their local sale is not interstate commerce.

Interstate commerce also includes the transmission of intelligence and information—whether by telephone, telegraph, radio, television, or mail—across state lines. The transmission of a message between points within the same state is subject to state regulation.

#### **Agencies and Instrumentalities of Commerce**

Congress, acting pursuant to the Commerce Clause, has the exclusive power to regulate the agencies and instrumentalities of interstate and foreign commerce, such as private and common carriers. A bridge is an instrumentality of interstate commerce when it spans NAVIGABLE WATERS or is used by travelers and merchandise passing across state lines. Navigable waters are instrumentalities of commerce that are subject to the control of federal and state legislation. A bridge over a navigable stream located in a single state is also subject to concurrent control by the state.

An office used in an interstate business is an instrumentality of interstate commerce. Railroads and tracks, terminals, switches, cars, engines, appliances, equipment used as components of a system engaged in interstate traffic, and vessels (including ferries and tugs) are also subject to federal regulation. Warehouses, grain elevators, and other storage facilities also might be considered instrumentalities of interstate commerce. Although local in nature, wharves are related to commerce and are subject to control by Congress, or by the state if Congress has not acted.

The INTERSTATE COMMERCE ACT of 1887, which Congress enacted to promote and facilitate commerce by ensuring equitable interaction

between carriers and the public, provided for the creation of the INTERSTATE COMMERCE COMMISSION. As designated by statute, the commission had jurisdiction and supervision of such carriers and modes of transportation as railroads, express-delivery companies, and sleeping-car companies. Concerning the transportation of persons and property, the commission had the power to enforce the statutory requirement that a certificate of public convenience and necessity be obtained before commencing or terminating a particular transportation service. The commission adopted reasonable and lawful rules and regulations to implement the policies of the law that it administered. The ICC was abolished by Congress in 1995 after Congress deregulated the trucking industry.

#### **Business Affecting Commerce**

Not every private enterprise that is carried on chiefly or in part by means of interstate shipments is necessarily so related to the interstate commerce as to come within the regulating power of Congress. The original construction of a factory building does not constitute interstate commerce, even though the factory is used after its construction for the manufacture of goods that are to be shipped in interstate commerce and even though a substantial part of the material used in the building was purchased in different states and transported in interstate commerce to the location of the plant.

Under some circumstances, however, businesses—such as advertising firms, hotels, restaurants, companies that engage in the leasing of PERSONAL PROPERTY, and companies in the entertainment and sports industries—may be regulated by the federal government. A business that operates primarily intrastate activities, such as local sporting or theatrical exhibits, but makes a substantial use of the channels of interstate trade, develops an interstate character, thereby bringing itself within the ambit of the Commerce Clause.

#### **Discrimination as a Burden on Commerce**

A state has the power to regulate intrastate commerce in a field where Congress has not chosen to legislate, as long as there is no injustice or unreasonable discrimination in favor of intrastate commerce as against interstate commerce. In a Colorado case, out-of-state students at the University of Colorado sued the state BOARD OF REGENTS to recover the higher costs

of the tuition paid by them as compared to tuition paid by in-state residents. They contended that their classification as out-of-state students—which violated, among other things, the Commerce Clause—constituted unreasonable discrimination in favor of in-state students. The court held that the statutes that classified students who apply for admission to the state university into in-state and out-of-state students did not violate the Commerce Clause because the classification was reasonable. A state statute affecting interstate commerce is not upheld merely because it applies equally to, and does not discriminate between, residents and nonresidents of the state, as it can otherwise unduly burden interstate commerce.

Discrimination must be more than merely burdensome; it must be unduly or unreasonably burdensome. One state required a licensed foreign corporation with retail stores in the state to collect a state sales tax on the sales it made from its mail-order houses located outside the state to customers within the state. The corporation contended that this statute discriminated against its operations in interstate commerce. Other out-of-state mail-order houses that were not licensed as foreign corporations in the state did not have to collect tax on their sales within the state. The court decided that the state could impose this burden of tax collection on the corporation because the corporation was licensed to do business in the state and it enjoyed the benefits flowing from its state business. Such a measure was not an unreasonable burden on interstate commerce.

A state may not prohibit the entry of a foreign corporation into its territory for the purpose of engaging in foreign or interstate commerce, nor can it impose conditions or restrictions on the conduct of foreign or interstate business by such corporations. When intrastate business is involved, it may do so.

Similarly, a private person who conducts a business that has a significant effect on interstate commerce in a discriminatory manner is not beyond the reach of lawful congressional regulation.

**RACIAL DISCRIMINATION** in the operation of public accommodations, such as restaurants and lodgings, affects interstate commerce by impeding interstate travel and is prohibited by the **CIVIL RIGHTS ACT OF 1964** (codified in scattered sections of 42 U.S.C.A.). In *Heart of Atlanta Motel v. United States*, 379 U.S. 241, 85 S. Ct. 348,

13 L. Ed. 2d 258 (1964), a local motel owner had refused to accept black guests. He argued that since his motel was a purely local operation, Congress exceeded its authority in legislating as to whom he should accept as guests. The U.S. Supreme Court held that the authority of Congress to promote interstate commerce encompasses the power to regulate local activities of interstate commerce, in both the state of origin and the state of destination, when those activities would otherwise have a substantial and harmful effect upon the interstate commerce. The Court concluded that in this case, the federal prohibition of racial discrimination by motels serving travelers was valid, as interstate travel by blacks was unduly burdened by the established discriminatory conduct.

### **State Taxation of Nondomiciliary Corporations**

In February 2000, the U.S. Supreme Court added another layer to its sometimes complicated Commerce Clause **JURISPRUDENCE** when it held that the Commerce Clause forbids states from taxing income received by nondomiciliary corporations for unrelated business activities that constitute a discrete business enterprise. *Hunt-Wesson, Inc. v. Franchise Tax Bd. of Cal.*, 528 U.S. 458, 120 S.Ct. 1022, 145 L. Ed. 2d 974 (2000)

Hunt-Wesson Inc., a California-based corporation, was the successor in interest to the Beatrice Companies Inc., the original taxpayer in the case. During the years in question, Beatrice was domiciled in Illinois but was engaged in the food business in California and throughout the world. For the purposes of this lawsuit, Beatrice's *unitary* operations consisted only of those corporate family business units engaged in its global food business. From 1980 to 1982, Beatrice also owned foreign subsidiaries that were not part of its food operations, but that formed a discrete business enterprise. For the purposes of this lawsuit, the parties stipulated that these foreign subsidiaries were part of the company's *non-unitary* business operations.

These non-unitary foreign subsidiaries paid dividends to Beatrice of \$27 million for 1980, \$29 million for 1981, and \$19 million for 1982, income that both parties agree was not subject to California tax under the Commerce Clause. In the operation of its unitary business, Beatrice took out loans and incurred interest expenses of \$80 million for 1980, \$55 million for 1981, and \$137 million for 1982. None of those loans was



related to borrowings of Beatrice's non-unitary subsidiaries that made the dividend payments to Beatrice.

On its franchise tax returns, Beatrice claimed deductions for its non-unitary interest expenses in calculating its net income apportioned to California. Following an audit, the California Franchise Tax Board applied the "interest offset" provision in California Revenue and Taxation Code Section 24344. Under that section, multistate corporations may take a deduction for interest expenses, but only to the extent that the expenses exceed their out-of-state income arising from the unrelated business activity of a discrete business enterprise; that is, the *non-unitary* income that the parties agree that California could not otherwise tax. The Section 24344 interest offset resulted in the tax board reducing Beatrice's interest-expenses deduction on a dollar-for-dollar basis by the amount of the constitutionally exempt dividend income that Beatrice received from its non-unitary subsidiaries.

Beatrice responded by filing suit in California state court to challenge the constitutionality of the law. The trial court struck down Section 24344 on the ground that it allowed the state to indirectly tax non-unitary business income that the Commerce Clause prohibits from being taxed directly. The California Court of Appeals reversed, and Hunt-Wesson, having intervened in the lawsuit as Beatrice's successor-in-interest, appealed.

In a unanimous opinion written by Justice STEPHEN BREYER, the U.S. Supreme Court struck down California Revenue and Taxation Code Section 24344. In reducing an out-of-state company's tax deduction for interest expenses by an amount that is equal to the interest and dividends that the company receives from the unrelated business activities of its foreign subsidiaries, Breyer wrote, Section 24344 enables California to circumvent the federal Constitution.

States may tax a proportionate share of the income of a nondomiciliary corporation that carries out a particular business both inside and outside the state, Breyer observed. But states may not, without violating the Commerce Clause, tax nondomiciliary corporations for income earned from unrelated business activities that constitute a discrete business enterprise. Thus, what California called a *deduction limitation* would amount to an impermissible tax under the Commerce Clause.

### License and Privilege Tax

A state may not impose a tax for the privilege of engaging in, and carrying on, interstate commerce, but it might be permitted to require a license if doing so does not impose a burden on interstate commerce. A state tax on the use of an instrumentality of commerce is invalid, but a tax may be imposed on the use of goods that have traveled in interstate commerce, such as cigarettes. A state may not levy a direct tax on the gross receipts and earnings derived from interstate or foreign commerce, but it may tax receipts from intrastate business or use the gross receipts as the measurement of a legitimate tax that is within the state's authority to levy.

A state may tax the sale of gasoline or other motor fuels that were originally shipped from another state, after the interstate transaction has ceased. As long as the sale is made within the state, it is immaterial that the gasoline to fulfill the contract is subsequently acquired by the seller outside the state and shipped to the buyer. The state may tax the sale of this fuel to one who uses it in interstate commerce, as well as the storage or withdrawal from storage of imported motor fuel, even though it is to be used in interstate commerce.

Although radio and television broadcasting may not be burdened by state-privilege taxes as far as they involve interstate commerce, broadcasting involving intrastate activity may be subject to local taxation.

A state may impose a nondiscriminatory tax for the use of its highways by motor vehicles in interstate commerce if the charge bears a fair relation to the cost of the construction, maintenance, and regulation of its highways.

The Commerce Clause does not prohibit a state from imposing a tax on a natural resource that is produced within its borders and that is sold primarily to residents of other states. In *Commonwealth Edison Co. v. Montana*, 453 U.S. 609, 101 S. Ct. 2946, 69 L. Ed. 2d 884 (1981), the U.S. Supreme Court upheld a 30 percent severance tax levied by Montana on the production of coal, the bulk of which was exported for sale to other states. The amount of the tax was challenged as an unconstitutional burden on interstate commerce. The Court reasoned that the Commerce Clause does not give the residents of one state the right to obtain resources from another state at what they consider a reasonable price, for that right would enable one state to control the development and depletion of natu-