

# Do the Due: What To Do With Due Process

October 24, 2023

# Due Process Clause

Not one, but two, Due Process Clauses in the US Constitution

“ [N]or shall any State deprive any person of life, liberty,  
or property, without due process of law . . . . ”

US Const. amend. XIV, Section 1

“ [N]or shall any person . . . be deprived of life, liberty or  
property, without due process of law . . . . ”

US Const. amend. V.

# Due Process Clause

- Why two Due process Clauses?
- What is the difference?
  - The Fifth Amendment was a restriction on the Federal Government
  - The 14th Amendment SPECIFICALLY applies to the states
    - The result from the “dreaded” *Dred Scott* case

# Key Constitutional Principles

## Due Process Clause

- “[N]or shall any State deprive any person of life, liberty or property without due process of law . . .”
- Requires “definite link,” “minimum connection” between a state and the person, property or transaction it taxes
- Income taxed “must be rationally related to values connected with the taxing State”
  - Tax due process tied to personal jurisdiction
- Due Process Clause analysis
  - Fundamental fairness;
  - Notice/fair warning;
  - Purposeful availment;
  - Substantial justice;
  - Allows taxpayer to know the potential results of their actions

# Judicial Standard – State Taxes

- Standard is whether the taxpayer purposefully directs its activities into a jurisdiction — *Burger King Corp. v. Rudzewicz*, 471 U.S. 462 (1985)
- Two requirements:
  - A minimal connection [nexus] between the interstate activities and the taxing State – *International Shoe Co. v. Washington*, 326 U.S. 310 (1945)
  - A rational relationship between [fair apportionment of] the activities attributed to the State and the intrastate values of the enterprise – *Moorman Mfg. Co. v. Bair*, 437 U.S. 267 (1978)
- Nexus requirement embodies two separate aspects:
  - Jurisdiction over the person (In personam); and
  - Jurisdiction over the taxpayer’s activities or transactions (In rem)
- Due Process Clause applies to both substantive and procedural issues

# Key Constitutional Principles

## Commerce Clause

- “The Congress shall have the power to . . . regulate commerce . . . among the several States . . . .”
  - Only states that Congress has **active power** to regulate commerce
  - Framers intended the provision to allow Congress to remedy situations where states discriminate in favor of in-state economic actors
  - Limited use in state tax context until the 20<sup>th</sup> Century, but now of significant consequence
- If Congress fails to **affirmatively** regulate taxation of interstate commerce, the Supreme Court has articulated “Dormant” or “Negative” Commerce Clause restrictions on state taxation even in the absence of congressional action
  - History of cases with analytic framework that has shifted over time

# Key Constitutional Principles

## Relationship Between Due Process and Commerce Clause Judicial Limits

- Discrimination is remedied under Commerce Clause
- Provisions applied interchangeably in many pre-*Quill* Supreme Court cases
- *Complete Auto's* 3 factors—other than discrimination—speak to Due Process considerations (e.g., *fair* apportionment, *fair* relation)
- *Quill* terms the two standards “closely related;” specifically differentiates between them in cases pertaining to remote sales
  - *MeadWestvaco* (2008): “distinct but parallel limitations” on state taxing power
- But *Quill* also invoked older Commerce Clause doctrine in support of its holding
- Also, *Quill* referenced the notion of “undue burden” standard applied in non-tax Commerce Clause cases to test the constitutionality of state regulations

# Background U.S. Supreme Court Cases

## General v. Specific Due Process Jurisdiction

- General jurisdiction: where a corporation's affiliations with the state are so continuous and systematic that the state has jurisdiction over such enterprise irrespective as to the nature of the claim
  - Actions that render the enterprise "essentially at home in the forum State"
  - If applies, courts may hear any and all claims against the entity.
- Specific jurisdiction: where a state has jurisdiction over a corporation with respect to a particular claim because the corporation's activities in the state gave rise to that claim
  - Supreme Court: "specific jurisdiction has become the centerpiece of modern jurisdiction theory[.]" *Goodyear Dunlop Tire Operations, S.A. v. Brown*, 564 U.S. 915, 925 (2011).
  - Typically more characteristic of a state tax claim.
  - If applies, courts may hear only those claims with a connection to the forum state.



## Due Process Nexus - Background

- *International Shoe Co. v. Washington*, 326 U.S. 310 (1945)
- *World-Wide Volkswagen Corp. v. Woodson*, 444 U.S. 286 (1980)
- *Burger King Corp. v. Rudzewicz*, 471 U.S. 462 (1985)
- *Asahi Metal Industry Co. v. Superior Court of Cal., Solano Cty.*, 480 U.S. 102 (1987)
- *Quill Corp. v. North Dakota*, 504 U.S. 298 (1992)

# Background U.S. Supreme Court Cases: General Jurisdiction

*Perkins v. Benguet Consolidated Mining Co.*, 342 U.S. 437 (1952)

- Ohio state court could exercise *general jurisdiction* over a foreign corporation on the basis of that company's “continuous and systematic” contacts with the state of Ohio
- Corporation is a Phillipine mining corporation basically being run out of Ohio during WWII

*Helicoptres Nacionales de Colombia v. Hall*, 466 U.S. 408 (1984)

- No general jurisdiction in Texas as to foreign corporation with respect to helicopter crash that takes place in Peru where corporation’s TX activities are limited to purchasing helicopters/parts, technical consulting, maintenance of bank account, etc.

# *International Shoe Co. v. Washington,* **326 U.S. 310 (1945)**

- Could the State of Washington require a Delaware corporation with its principal office in St. Louis, MO to remit an unemployment compensation tax?
- 13 salespersons resided in the state, commissions of more \$31,000 were paid each year (1937-1940)
- The U.S. Supreme Court affirmed the Supreme Court of Washington and found the “regular and systematic solicitation of orders in the state by appellant's salesmen” was sufficient to subject the corporation to be subject to the state’s court.
- The U.S. Supreme Court has employed a case-by-case approach & at the core of the approach is an examination of the nature and quality of a foreign person’s contacts with the state to determine whether the person *purposefully availed* itself of the marketplace.

# Background U.S. Supreme Court Cases: Specific Jurisdiction

## *World-Wide Volkswagen Corp. v. Woodson*, 444 U.S. 286 (1980)

- No personal jurisdiction in Oklahoma vs. car distributor or retailer where neither did any business in Oklahoma, shipped or sold any product there, or advertised there
- Accident based on alleged faulty gas tank took place in Oklahoma, but car was purchased in New York
- No showing that any other car of the car distributor or retailer had ever entered Oklahoma

## *Burger King Corp. v. Rudzewicz*, 471 U.S. 462 (1985)

- Personal jurisdiction in Florida contract, trademark infringement action upheld as to defendant Michigan restaurant licensee based on “substantial and continuing” contractual relationship.

# *World-Wide Volkswagen Corp. v.* **444 U.S. 286 (1980)**

- New York residents purchased an Audi in NY; had an accident in OK
- They sued Audi (the manufacturer), Volkswagen of America (the importer), World-Wide Volkswagen (the distributor), and Seaway Volkswagen (the dealership), alleging defective design and placement of the fuel tank
- The Supreme Court dismissed the distributor and the dealership
- Foreseeability, that an automobile sold in NY might find its way to other states, is not enough
- There was a complete absence of marketing, sales, service, or any other contacts with OK
- Key fact is that the manufacturer and the importer, both of whom did exploit and serve the national market, did not even contest jurisdiction and continued to be parties in the District Court.

# *Burger King Corp. v. Rudzewicz*, 471 U.S. 462 (1985)

- 40 years after *International Shoe*, U.S. Supreme Court reviews Florida long-arm statute that extends jurisdiction to the state based on any person breaching a contract in the state
- Rudzewicz, a MI resident and Burger King franchisee, was sued in a FL district court based on him and a partner defaulting on several monthly payments owed to Burger King pursuant to a contract
- The district court upheld jurisdiction; the 11<sup>th</sup> Circuit reversed finding the long-arm statute unconstitutional – “offend[ing] . . . fundamental fairness”
- U.S. Supreme Court reversed the 11<sup>th</sup> Circuit based on Rudzewicz knowing that he was contracting with a corporation based in Miami, FL – his relationship with the company cannot “be viewed as random, fortuitous, or attenuated.” (Internal quotes omitted.)

# Background U.S. Supreme Court Cases: Specific Jurisdiction

*Asahi Metal Indus. Co. v. Superior Ct*, 489 U.S. 102 (1987)

- The Supreme Court concluded that California had no jurisdiction over cross-claim brought by foreign tire manufacturer vs. foreign tire parts manufacturer, Asahi, as result of accident occurring in California.
- Asahi had no property, offices or agents in California and did not advertise or solicit business there . . . but it knew some of its parts would be sold in California through the “stream of commerce.”
- Unanimous conclusion on the facts; disagreement over proper analysis:

# *Asahi Metal Industry Co., Ltd.* **480 U.S. 102 (1987)**

- Asahi manufactured tire valves in Japan which were sold to a Taiwanese manufacturer of tubes – there was a products liability suit in California from a sudden loss of air in a tube used in a motorcycle.
- Only question remaining was whether Asahi was subject to California long-arm statute (to extent conforms with the state’s and U.S. Constitutions) to indemnify the manufacturer of the tubes
- California Supreme Court noted that Asahi had no property, offices or agents in the state; however, the court concluded that Asahi knew some of the tire valves used in the tubes sold by the Taiwanese tube manufacturer would be sold in California – “***stream of commerce***” theory
- U.S. Supreme Court reversed, all the Justices agreed that California asserting jurisdiction over Asahi was unreasonable and unfair; the Court was split on whether there had to be “purposeful directed activity” or if the “stream of commerce” (foreseeability) could otherwise be sufficient for a person to be subject to a state’s jurisdiction in other situations.



# *Asahi Metal Industry Co., Ltd.*

## **480 U.S. 102 (1987)**

- O'Connor decision (4 votes): merely placing a product into the stream of commerce is not an act of purposeful direction towards the state – additional contact “may indicate an intent or purpose to serve the market in the forum state,” such as “advertising in the forum State,” “establishing channels for providing regular [in-state] advice to customers” or “marketing the product through a distributor who has agreed to serve as the [in-state] sales agent”.
- Brennan decision (4 votes): “stream of commerce” sufficient where party is aware of “regular and anticipated flow of products” into the forum state irrespective as to whether party directly conducts business in the state, or engages in additional conduct directed towards that state.

# Stream of Commerce Theory

- Placing goods into a state's stream of commerce for consumer purchase constitutes the requisite minimum connection under the Due Process Clause.
- However, the *Asahi* decision left an ambiguity as to whether just putting the good into the stream of commerce is enough or must the goods target a specific jurisdiction.
  - Some of this ambiguity is resolved in the Court's more recent decisions.

*Quill Corp.*, 504 U.S. 298 (1992)Physical Presence and Separation of Commerce/Due Process  
Clauses

- In *Quill* the United States Supreme Court held that the due process clause “requires some definite ink, some minimum connection, between a state and the person, property or transaction it seeks to tax.”
- In its analysis, the Court held that “if a foreign corporation purposefully avails itself of the benefits of an economic market in the forum State, it may subject itself to the State’s *in personam* jurisdiction even if it has no physical presence in the State.”
- *Quill* often cited for Court’s affirmance that a remote seller needs to have a physical presence before a state can be require such seller to collect and remit its sales/use tax.
- The Court in *Quill* also clearly noted the nexus differences under the Due Process Clause and Commerce Clause:
  - Due Process Clause “Minimum Contacts”
    - Nexus threshold ultimately subject to the Court’s review
  - Commerce Clause “Substantial Nexus”
    - Congress has the ability to address

# After *Quill*: Death of the Due Process Clause

- In *Quill*, the Supreme Court first made explicit that the Due Process Clause & Commerce Clause impose distinct standards.
  - Due Process: Minimum contacts with jurisdiction such that, “the maintenance of the suit does not offend traditional notions of fair play and substantial justice.”
    - A foreign corporation subjects itself to a state’s jurisdiction if it “purposefully avails itself of the benefits of an economic market in the form state” regardless of whether it has physical presence.
  - Commerce Clause: Requires substantial nexus, or something more than minimum contacts.
- After *Quill*, taxpayers, practitioners & courts have concluded that the Commerce Clause imposes a stronger limitation on states’ ability to imposes taxes than the Due Process Clause.
- **Result: Taxpayers forgot that Due Process stands as a separate limitation.**

***J. McIntyre Machinery, Ltd. v. Nicastro,***  
**564 U.S. 873 (2011)**

- Nicastro suffers accident using machine manufactured and sold by British company, McIntyre, through exclusive U.S. distributor.
- Nicastro sues McIntyre in New Jersey court for product liability.
- Facts: McIntyre sent no employees to New Jersey and did not advertise there; sent trade show reps to several U.S. states but not New Jersey; made one sale to New Jersey through U.S. distributor; as many as four of its products ended up in New Jersey
- New Jersey Supreme Court reverses trial court's dismissal, finds foreign company has sufficient contacts with state

### In *McIntyre*, Justice Kennedy announced 3 Core Principles to Determine if a Foreign Person Purposefully Directed its Activities at a State:

- The foreign person must engage in some action, beyond placing the goods in the stream of commerce that is specifically directed at building or enhancing the market for its goods in the state;
- Nexus determinations must be made using a “forum by forum,” or “sovereign by sovereign” basis/analysis so that the activities of a foreign person directed at the U.S. do not in and of themselves support a finding of nexus in a particular state; and
- Even if nexus is found under the first two prongs, it must not “offend (*International Shoe*) traditional notions of fair play and substantial justice.”

## After *McIntyre*

### Kennedy's Plurality Decision:

- **Purposeful Availment** requires something more than “imprecise placement” of goods into the stream of commerce, as suggested by *Asahi Metal*.
  - Principal inquiry is whether the Defendant’s activities “manifest an intention to submit to the power of the sovereign.”
- **Stream of Commerce** may be appropriate in some circumstances, such as intentional torts, but the more limited general rule of purposeful availment applies in most specific jurisdiction cases.
- **Result:** A taxing jurisdiction may not impose tax or tax collection requirements on a taxpayer that has not “targeted the forum” or, at the very least, has directed only one sale into the jurisdiction.

## U.S. Supreme Court Breathes Life Back into Due Process Clause – General Jurisdiction

### ***Goodyear Dunlop Tires Operations, S.A. v. Brown, 564 U.S. 915 (2011)***

- In *Goodyear*, the estate of two North Carolina residents killed in a bus accident in France brought a wrongful death suit in North Carolina against the tire manufacturer, its American subsidiary, Goodyear USA, and three of its foreign subsidiaries. The three foreign subsidiaries manufactured tires for European and Asian markets and had no contacts with North Carolina.
- On appeal, the Supreme Court quickly dismissed any claim of specific jurisdiction as the tires in question lacked any connection to North Carolina.
- The Court rejected the state courts' holding that the foreign subsidiaries were subject to state jurisdiction because they placed their tires into the stream of commerce with the possibility that they could possibly be sold in North Carolina. The Court reasoned that the "stream of commerce" argument could bolster a finding of specific jurisdiction but was not a sufficient basis by itself for the imposition of general jurisdiction.



## *Daimler Chrysler AG v. Bauman*, 571 U.S. 117 (2014): General Jurisdiction

- Does it violate due process for a court to exercise general personal jurisdiction over a foreign corporation solely on the fact that an indirect corporate subsidiary performs services on behalf of Daimler Chrysler AG in California?
- The Supreme Court revised the ruling of the Ninth Circuit and held that Daimler Chrysler AG is not amenable to suit in California for injuries allegedly caused by conduct of MB Argentina that took place totally outside of the United States.
- 9-0 decision

## *Walden v. Fiore*, 571 U.S. 277 (2014) Specific Jurisdiction

- Mr. Walden was a police officer stationed at the Atlanta airport and was sued with three other officials for supposedly violating Fiore's Fourth Amendment rights.
- Ms. Fiore is a professional gambler and was flying from San Juan to Las Vegas, with a layover in Atlanta.
- The U.S. District Ct. of Nevada dismissed the case based on it lacking personal jurisdiction; the Ninth Circuit Court reversed based on it finding that Mr. Walden knew via an asserted false affidavit that Ms. Fiore had significant connections with Nevada.

## *Walden v. Fiore* (cont'd)

- Addressed minimum contacts required for specific jurisdiction.
- For a state to exercise jurisdiction consistent with due process, that relationship must arise out of contacts that the defendant himself creates with the forum, and must be analyzed with regard to the defendant's contacts with the forum itself, not with persons residing there.
- Here, Petitioners cannot be the only link that the Respondent has to the forum.

# Select State Tax Background Cases

- *Geoffrey, Inc. v. S.C. Tax Comm’n*, 437 S.E.2d 13 (S.C. 1994) (& its direct progeny): No physical presence Commerce Clause requirement where income tax and in-state licensing facilitated by affiliate; due process requirement met);
- *KFC Corp. v. Iowa Dep’t of Revenue*, 792 N.W.2d 308 (Iowa 2010): No physical presence requirement where income and in-state licensing effected by non-affiliate; due process requirement met); and
- *Tax Commissioner v. MBNA America Bank, N.A.*, 640 S.E. 2d 226 (W. Va. 2006) and *Capital One Bank v. Comm’r of Revenue*, 899 N.E.2d 76 (Mass. 2009): No physical presence requirement where income tax and in-state credit card receivables that exceed certain dollar threshold; due process requirement met.
  - *MBNA* articulates a “significant economic presence” Commerce Clause test.

# Select State Tax Due Process Cases

## *Scioto Ins. Co. v. Okla. Tax Comm'n*, 279 P.3d 782 (Okla. 2012)

- *Scioto*, a Vermont captive insurance co. of Wendy's Int'l and its affiliates with no physical presence in Oklahoma.
- *Scioto* holds intellectual property ("IP"), trademarks & operating practices, used in Wendy's restaurants which it licenses to Wendy's Int'l for royalties.
- Wendy's Int'l sublicenses the IP to Wendy's restaurants, including in OK
- Court held OK had no basis on which to impose income tax on *Scioto* – a VT corporation with no connection to OK
- Court states "due process is offended by OK's attempt to tax an out of state corporation that has no contact with OK other than receiving payments from an OK taxpayer"
- What about *Geoffrey, Inc. v. Oklahoma Tax Comm'n*, 132 P.2d 632 (Okla. 2006)?

# Select State Tax Cases

## “Sales Tax and “Physical Presence”

- *Scripto v. Carson*, 362 U.S. 207 (1960): In-state representatives provide sales tax nexus whether employees or independent contractors.
- *Tyler Pipe Indus. v. Washington State Dep’t of Revenue*, 483 U.S. 232 (1987): “[T]he crucial factor governing nexus is whether the activities performed in this state on behalf of the taxpayer are significantly associated with the taxpayer's ability to establish and maintain a market in this state for the sales.”
- *Scholastic Book Clubs, Inc. v. Comm’r of Revenue*, 38 A.3d 1183 (Conn. 2012): “We first observe that the language in *Bellas Hess* and *Quill* describing *Scripto* as representing the ‘furthest’ extension of the state's taxing power was no more than an observation concerning the state of the law at that time, and was not necessarily intended to mean that a substantial nexus between the out-of-state retailer and the state could not be found in other, as of yet undefined, circumstances.”

# Select State Tax Due Process Cases

## *Griffith v. ConAgra Brands, Inc.*, 728 S.E. 74 (W. Va. 2012)

- ConAgra Foods, Inc. established and transferred various trademarks and trade names to its wholly owned sub, ConAgra Brands, Inc.; ConAgra Brands also acquired various other IP from unrelated subsidiaries
- Food products bearing the trademarks and trade names were manufactured outside WV but delivered in-state
- ConAgra Brands did not have a physical presence in WV, nor did it control how the licensees distributed the products bearing its marks
- WV S. Ct. holds ConAgra Brands did not have nexus with WV:
  - Lacked purposeful direction under Due Process Clause
  - Did not engage in continuous and systematic solicitation and promotion in the state
- What about *Tax Comm'r of West Virginia v. MBNA America Bank*, 640 S.E.2d 226 (W. Va. 2006)?

## Select State Tax Due Process Cases

### *Gore Enterprise Holdings, Inc. v. Comptroller*, 87 A.3d 1263 (MD. 2014)

- Maryland Court of Appeals upholds assessment against two subs of Gore, a corporation with significant in-state activity, where subs conducted no business in MD
- One sub held Gore's patents; the other performed investment functions
- Lower Tax Court had upheld assessment based upon existence of a "unitary business" conducted with parent
- Court of Appeals disagrees, but affirms because finds subs did not have economic substance as separate entities (*see Comptroller v. SYL, Inc.* 825 A.2d 399 (2003))
  - Also: Court upholds state's application of Gore's apportionment factors with respect to subs



## Select State Tax Due Process Cases

*Harley Davidson, Inc. v. Cal. Franchise Tax Bd., Cal. Sup. Ct., San Diego (California)*, Docket No. CASD-37-2011-00100846-CU-MC-CTL (May 1, 2013)

- Bankruptcy-remote special purpose entities created for purpose of bundling and selling securitized loans held to have nexus with California
- Though the entities lacked in-state physical presence, court found nexus because of the entities' deeply integrated relationships with the in-state financing subs, as evidenced by the entities' interdependence and the circular flow of funds
- Similar to *Gore*?

# Current Due Process Questions & Implications

- Does our existing Due Process analysis have to change given how nexus is being found right now and considering how people and companies are exploiting the market?

# Questions?

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