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Practicalities And Peculiarities: The Heightened Due Process Standard For Notice Under *Jones v. Flower*

By Emily Riley*

I. INTRODUCTION

Imagine receiving a phone call from a relative and learning that, while you were busy or out of town or ill, the government sold your house, a house you had owned for many years, without your knowledge. Or perhaps you return to your out-of-state vacation home which you frequent every July, only to find that it has been condemned. If a property owner never receives notice that the State plans to sell his property due to tax delinquency, have the due process protections of the Fourteenth Amendment been satisfied?

The Supreme Court in *Jones v. Flower* considered the question of whether, when notice of a tax sale is returned undelivered, the government must take additional steps to provide notice before taking the property.

Jones v. Flowers is an important case because it attempts to clear some of the doctrinal fog surrounding the due process analysis in tax forfeiture cases. In fact, "[t]he lack of clarity about the constitutional requirements applicable to property tax foreclosure procedures profoundly affects the social and financial stability of a local government."[1] Inefficient notice procedures may result in tax

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Ms. Riley wishes to thank her family and Cesar Guerrero for their continuing support and guidance.

1. Frank S. Alexander, *Tax Liens, Tax Sales, and Due Process*, 75 IND. L.J. 747, 751 (2000).

delinquency and property abandonment, and the financial impact of a rising delinquency rate can dramatically impair a local government.[2]

This note explores the Supreme Court's ruling in *Jones v. Flowers*. Part II delves into the historical background, including the legal and statutory background, leading up to *Jones v. Flowers*. Part III of this note will provide an overview of the facts of *Jones v. Flowers*. Part IV provides analysis of both the majority and the dissenting opinions. Part V discusses the judicial, legislative and administrative impacts of this case, and Part VI concludes the discussion of *Jones v. Flowers*.

II. HISTORICAL BACKGROUND

A. Legal Background

The Due Process Clause of the Fourteenth Amendment states that no person shall be deprived of "life, liberty, or property, without due process of law."[3] Since the enactment of the Fourteenth Amendment, the legal standards defining what process is due and what action constitutes a proper means of providing due process have been ever-changing.

At the turn of the century, the Supreme Court decided *Longyear v. Toolan*, *Ballard v. Hunter*, *Leigh v. Green*, and *Winona & St. Peter Land Co. v. Minnesota,* which all found notice by publication alone to be adequate in actions enforcing the payment of delinquent property taxes.[4]

Those cases employed three separate rationales to reach the conclusion that notice by publication was sufficient. First, the Court provided the rationale that "an *in rem* proceeding, which creates no personal liability, requires less notice to owners in order to meet the fairness standard of due process."[5] Second, the Court justified the

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2. *Id.*

3. U.S. CONST. amend. XIV, § 1.

4. *See* Longyear v. Toolan, 209 U.S. 414, 418 (1907); Ballard v. Hunter, 204 U.S. 241, 261-62 (1906); Leigh v. Green, 193 U.S. 79, 93 (1904); Winona & St. Peter Land Co. v. Minnesota, 159 U.S. 526, 537-38 (1895).

5. Alexander, *supra* note 1 at 765. *See Leigh*, 193 U.S. at 90, 92. But it is to be remembered that the primary object of the [*in rem*] statute is to reach the land which has been assessed. . . . "Looked at either from the point of view of history or

holding that notice by publication was sufficient on the basis of the "caretaker" principle, that a property owner is responsible to know about and meet any obligations arising as a result of property ownership.[6] Third, the Court justified notice by publication because of the fact that "[t]he imposition of ad valorem taxes and assessments does not require personal service to the property owner, and so long as some opportunity is given for the owner to contest the accuracy of the tax, no further obligation exists upon enforcement of procedures for nonpayment of the tax."[7]

Thus, up to this point in the Supreme Court's jurisprudence, mere notice by publication was the only measure required by the Court to satisfy the Due Process Clause. However, soon the Supreme Court began moving towards more stringent requirements in order for

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of the necessary requirements of justice, a proceeding *in rem*, dealing with a tangible *res*, may be instituted and carried to judgment without personal service upon claimants within the state, or notice by name to those outside of it, and not encounter any provision of either constitution." *Id.* at 90-92 (quoting Justice Holmes, then Chief Justice of Massachusetts, in Tyler v. Judges of the Court of Registration, 55 N.E. 812, 813 (Mass. 1900)). A proceeding to enforce a lien for delinquent ad valorem taxes usually is a classic *in rem* proceeding, affecting all other interests in the property, precisely because the tax lien is accorded a "super-priority" status.

6. *Id. See Longyear*, 209 U.S. at 418 ("[t]he owner of property whose taxes, duly assessed, have remained unpaid for more than one year must be held to the knowledge that proceedings for sale are liable to be begun . . . ."); *Ballard*, 204 U.S. at 254 ("[t]he land stands accountable to the demands of the state, and the owners are charged with the laws affecting it and the manner by which those demands may be enforced.").

7. *Id. See Leigh*, 193 U.S. at 89 ("'[t]he process of taxation does not require the same kind of notice as is required in a suit at law, or even in proceedings for taking private property under the power of eminent domain.'" (quoting Bell's Gap R. Co. v. Pennsylvania, 134 U.S. 232, 239 (1890))); *Winona*, 159 U.S. at 537-38 (holding that there is no due process violation "if the owner has an opportunity to question the validity or the amount of [the tax] either before that amount is determined or in subsequent proceedings for its collection"). In 1935, the National Municipal League adopted "A Model Real Property Tax Collection Law," which provided for a two step process of notification involving the sale of the property in a nonjudicial proceeding, followed by a period of redemption prescribed by statute. Alexander, *supra* note 1at 766.

notification to comply with due process.[8] The 1950 decision of *Mullane v. Central Hanover Bank & Trust Co.* embodied that shift.[9]

Mullane v. Central Hanover Bank & Trust Co. is the central decision around which discussions of notice requirements imposed by the Due Process Clause revolve. The issue in *Mullane* was whether beneficiaries of a common trust fund established in New York were provided constitutionally sufficient notice of actions affecting their interests in the trust.[10] The New York Banking Law authorized a trust company to establish a common fund and invest the assets of an unlimited number of estates, trusts, or other funds.[11] In 1946, a common trust fund was established by the Central Hanover Bank and Trust Company under the New York Banking Law.[12] Then, in 1947, the Central Hanover Bank and Trust Company sought settlement of its first account for which it had served as common trustee.[13] The gross capital of the trust fund was almost three million dollars, with 113 trusts, approximately half of which were inter vivos and half of which were testamentary trusts.[14] During the proceedings, it became clear that at least some of the numerous beneficiaries did not live in New York, and Central Hanover Bank and Trust needed to notify those beneficiaries.[15]

The Bank attempted to provide notice of the application to settle the trust by publishing the notice in a local newspaper, an action

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8. *Id.*

9. Mullane v. Central Hanover Bank & Trust Co., 339 U.S. 306, 307 (1950).

10. *Id.* at 307.

11. *Id.* at 309-310. The trust functioned as follows: "[e]ach participating trust shares ratably in the common fund, but exclusive management and control is in the trust company as trustee, and neither a fiduciary nor any beneficiary of a participating trust is deemed to have ownership in any particular asset or investment of this common fund. The trust company must keep fund assets separate from its own, and in its fiduciary capacity may not deal with itself or any affiliate. Provisions are made for accountings twelve to fifteen months after the establishment of a fund and triennially thereafter. The decree in each such judicial settlement of accounts is made binding and conclusive as to any matter set forth in the account upon everyone having any interest in the common fund or in any participating estate, trust or fund." *Id.* at 309.

12. *Id.* at 309.

13. *Id.*

14. *Id.*

15. *Id.*

which satisfied the minimum notice requirements set forth in the New York Banking Law.[16] The extent of the notice required by the New York Banking Law was notice by newspaper publication giving the name and address of the Central Hanover Bank and Trust, "the name and the date of establishment of the common trust fund, and a list of all participating estates, trusts or funds."[17] In an effort to provide notice to the beneficiaries of the trust and comply with New York Banking Law § 100-c (12), Central Hanover Bank and Trust published notice of its actions in a local newspaper.[18]

Mullane challenged the sufficiency of the notice given by Central Hanover Bank and Trust, and the Supreme Court held that the government is required to provide "notice reasonably calculated, under all the circumstances, to apprise interested parties of the pendency of the action and afford them an opportunity to present their objections." [19] Thus, the Court found the New York statute requiring lesser forms of notice to be incompatible with the Fourteenth Amendment.[20]

Mullane served to eschew the prior due process interpretations which drew distinctions between the type of notice required where the state possessed in personam jurisdiction versus *in rem* jurisdiction, and held that notice by publication alone is insufficient where the state possesses information regarding the identities and

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16. *Id.* at 309-10. The applicable statute was N.Y. Banking Law § 100-c(12), which stated that

> [a]fter filing such petition [for judicial settlement of its account] the petitioner shall cause to be issued by the court in which the petition is filed an shall publish not less than once in each week for four successive weeks in a newspaper to be designated by the court a notice or citation addressed generally without naming them to all parties interested in such common trust fund and in such estates, trusts or funds mentioned in the petition, all of which may be described in the notice or citation only in the manner set forth in said petition and without setting forth the residence of any such decedent or donor of any such estate, trust or fund.

17. *Id.* at 310.
18. *Id.*
19. *Id.* at 314.
20. *Id.* at 320.

contact information of the interested parties.[21] With regard to this principle, the Court stated that "[c]hance alone brings to the attention of even a local resident an advertisement in small type inserted in the back pages of a newspaper, and if he makes his home outside the area of the newspaper's normal circulation the odds that the information will never reach him are large indeed."[22]

The effect of *Mullane* was to undermine and invalidate prior tax foreclosure procedures existing in many states and create a flexible standard of reasonableness dependent on the circumstances and variables particular to a certain case.[23]

However, while *Mullane* did provide some guidance as to what process is due, it also left some questions open for further inquiry and interpretation. For instance, while the Court in *Mullane* invalidated one of the bases for earlier decisions on this issue, the distinction between notice provided where jurisdiction was in personam versus in rem, the Court did not invalidate either the "caretaker" proposition or the idea that tax policies are unique in nature and allow for the distinct treatment of property tax foreclosure procedures.[24] Also, *Mullane* did not answer the question of whether tax officials were required to delve into public records or conduct title examinations in order to ascertain an interested party's address in order to provide notice.[25]

Six years after *Mullane,* the Supreme Court decided *Covey v. Town of Somers,* which established that a state must take known circumstances into account when providing notice.[26] In *Covey,* a property owner challenged a New York statute which required notice by publication, by posting, and by mailing for publication of tax liens on real property.[27] The statute applied to all property-related actions in the state regardless of the infancy, incompetancy, or absence of the

21. *Id.* at 315; Alexander, *supra* note 1 at 766.
22. *Mullane*, 339 U.S. at 315.
23. Alexander, *supra* note 1 at 767.
24. *Id.*
25. *Id.*
26. Covey v. Town of Somers, 351 U.S. 141, 146-47 (1956).
27. *Id.* at 142.

party in interest and regardless of whether the party in interest was domiciled in another state.[28]

Pursuant to the statute, the town of Somers instituted a procedure to foreclose a tax lien against property owned by an incompetent.[29] In accordance with the statute, notice was served by mail, by posting notice at the post office, and by publication in two local newspapers.[30] When no one responded to the notices, the Town of Somers foreclosed on the woman's home, and a deed to the property was granted to the Town.[31] Five days after the deed was issued to the town, the property owner was certified by the county court to be a person of unsound mind and was committed to a mental hospital the following week.[32] Subsequently, the appellant filed bond as committee of the person and property of the incompetent.[33] Around the time of the sale of the property, the appellant's attorney came before the town board and offered to pay the taxes on the property in exchange for title to the estate, but the offer was refused.[34]

The court below developed a factual record establishing the property owner as a long-time resident of the town of Somers, who owned several properties and possessed the means to meet her financial obligations at all times.[35] Unfortunately, she lived alone with no relatives nearby and no one to assist her with her taxes, despite the fact that she had been an incompetent for over fifteen years.[36] Further, the lower court established that the citizens and the officials of the town of Somers had known of her inability to maintain her finances or understand the significance of notice served upon her, but no one sought appointment of a committee for her person or property until after her property had already been foreclosed.[37]

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28. *Id.* at 143.
29. *Id.* at 144.
30. *Id.*
31. *Id.* at 146.
32. *Id.*
33. *Id.* at 144.
34. *Id.* at 144-45.
35. *Id.* at 145.
36. *Id.* at 146.
37. *Id.*

The Supreme Court held that notice of foreclosure to a woman who was known to be incompetent violated the Due Process Clause.[38] Following the *Mullane* standards, the Court stated:

> An elementary and fundamental requirement of due process in any proceeding which is to be accorded finality is notice reasonably calculated, under all the circumstances, to apprise interested parties of the pendency of the action and afford them an opportunity to present their objections . . . . When notice is a person's due, *process which is a mere gesture is not due process*. The means employed must be such as one desirous of actually informing the absentee might reasonably adopt to accomplish it.[39]

Because the property owner was incompetent, and because the town of Somers knew her to be so, the notice by mail, posting and publication did not satisfy the Due Process Clause.[40] Without specifically stating it, the *Covey* decision seems to imply that, where the state is attempting to notify a known incompetent of a tax foreclosure, the only means of satisfying due process and providing more than "a mere gesture" would be to serve notice on someone acting as a representative or guardian of the incompetent's interests or seek appointment of a committee for the property of the incompetent. Thus, the inquiry is not whether the notice actually reaches the interested party, but whether notice was reasonably calculated to *inform* the interested party.

Only a few months after deciding *Covey* in May of 1956, the Supreme Court decided *Walker v. Hutchinson*.[41] In *Walker*, the city of Hutchinson filed an action to condemn part of Lee Walker's property so as to widen a city street.[42] A Kansas statute provided that notice could take the form of written notice or notice by publication

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38. *Id.* at 147.
39. *Id.* at 146 (quoting *Mullane*, 339 U.S. at 314-15) (emphasis added).
40. *Id.* at 147.
41. Walker v. City of Hutchinson, 352 U.S. 112 (1956).
42. *Id.* at 112-13.

in the city paper.[43] Walker was not notified in writing of the action against his property, and the City only provided notice in the form of publication in the official newspaper of the City.[44] When Walker did not respond to the notice, the City allotted him damages in the amount of $725, and since Walker failed to appeal within the state's statutory period, he filed an action with the District Court.[45] Walker claimed that he received no notice and knew nothing of the condemnation proceedings until after the time for appeal had passed.[46] Walker sought injunctive and equitable relief from the City's action on his property.[47]

The issue before the Court was whether notice by newspaper publication satisfied the Due Process Clause of the Fourteenth Amendment under the circumstances in this case.[48] The Court referred to the standard developed in *Mullane* for constitutionally adequate notice and stated, "[w]e there called attention to the impossibility of setting up a rigid formula as to the kind of notice that must be given; notice required will vary with circumstances and conditions."[49] The Court held that notice by publication alone was not sufficient to satisfy due process in this case because of the "infirmities" of newspaper publication discussed in *Mullane* and the fact that nothing prevented the city from giving a more direct form of notice.[50] The city knew Walker's name, and the official records contained his personal information.[51] The Court stated that, under the circumstances, a letter would have been a superior form of notice.[52]

In sum, the *Walker* Court equated notice by publication to no notice at all.[53] This case served to cast serious doubt upon the use of publication as an accepted form of notice under the Due Process

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43. *Id.* at 113.
44. *Id.* at 113-14.
45. *Id.* at 114.
46. *Id.*
47. *Id.*
48. *Id.* at 115.
49. *Id.* at 115.
50. *Id.* at 116.
51. *Id.*
52. *Id.*
53. *Id.* at 117.

Clause. While not expressly rejecting notice by publication, the Court considered the State's reliance on *Huling v. Kaw Valley Railway & Improvement Co.*, an 1889 case upholding notice by publication on the ground that the landowner was a non-resident of the state, to be "misplaced."[54] The Court did not squarely reach the issue, but stated that, "[s]ince appellant in this case is a resident of Kansas, we are not called upon to consider the extent to which *Mullane* may have undermined the reasoning of the *Huling* decision."[55] This statement further solidified the understanding that *Mullane* did, in fact, undermine the reasoning of the *Huling* decision, and that notice by publication alone is constitutionally inadequate.

Similar to *Walker*, the 1962 case of *Schroeder v. New York* addressed the constitutional validity of notice via publication.[56] In *Scroeder*, the issue to be considered by the Court was whether New York deprived the appellant of due process by failing to provide adequate notice of condemnation proceedings against her Orange County, New York property.[57] The property included one and one-half acres of land and a house. The appellant only occupied the property for two months out of each year.[58]

The appellant's land was condemned pursuant to the New York City Water Supply Act. The Act required notice consisting of publications in two public New York City newspapers and publication in two public newspapers in the county in which the real estate was located.[59] The city complied with those notice requirements, and went beyond the statute by posting twenty-two notices along a seven or eight mile portion of the river in the area surrounding the appellant's property during the month of January when the property sat vacant and no notice was posted on the property itself.[60] The two Orange County newspapers were not published in the community in which appellant's property was located and were, in fact, published in communities "many miles"

54. *Id.* at 116.
55. *Id.*
56. Schroeder v. New York, 371 U.S. 208 (1962).
57. *Id.* at 208.
58. *Id.*
59. *Id.* at 209.
60. *Id.* at 210.

from the property in question.[61] Further, neither the posted notices nor the published notices contained the name of the appellant, information on what action could be taken to recover damages caused by the condemnation of the property, or any information regarding the length of time an affected property owner had to file a claim.[62]

The appellant failed to file within the three year period prescribed by statute, but later brought an equitable action, claiming that she had never received notice of the condemnation and knew nothing of the condemnation until she consulted a lawyer approximately seven years after the condemnation proceedings had begun.[63] Thus, the appellant claimed she had been deprived of property without being afforded due process.[64]

The *Schroeder* Court held that notice by publication and posting did not satisfy the standard of notice required under the Due Process Clause of the Fourteenth Amendment under the circumstances of this case.[65] Quoting *Mullane*, the Court stated:

> Chance alone brings to the attention of even a local resident an advertisement in small type inserted in the back pages of a newspaper, and if he makes his home outside the area of the newspaper's normal circulation the odds that the information will never reach him are large indeed. The chance of actual notice is further reduced when, as here, the notice required does not even name those whose attention it is supposed to attract, and does not inform acquaintances who might call it to attention.[66]

Thus, the *Schroeder* Court affirmed the general rule of *Mullane* that notice by publication is insufficient to satisfy due process requirements when an interested party's name and address are known

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61. *Id.*
62. *Id.*
63. *Id.* at 210-11.
64. *Id.* at 211.
65. *Id.*
66. *Id.* at 212 (quoting *Mullane*, 339 U.S. at 315).

or easily ascertainable.[67] For application of the rule, the *Schroeder* Court considered the similar factual scenario presented in the *Walker* case and stated that the posted notice was neither posted on the appellant's property nor seen by her, so the postings did not constitute personal notice in compliance with *Mullane*.[68] Further, the Court stated that the city was constitutionally obligated to attempt in good faith to provide notice to the appellant, and the simple mailing of a notice letter would have satisfied that obligation.[69] Thus, the Court found the notice in this case to be constitutionally deficient.[70]

In 1982, *Greene v. Lindsey* also dealt with the issue of the extent of notice required to satisfy due process.[71] In *Greene* a Kentucky statute allowed notice in forcible entry or detainer actions to be posted on the door of the residence or apartment.[72] The question before the Supreme Court was whether the Kentucky statute, when invoked in an action against tenants in a public housing project, provided constitutionally adequate notice of the actions against them as required by the Due Process Clause of the Fourteenth Amendment.[73]

The appellees in *Greene* consisted of several tenants of a housing project in Louisville, Kentucky, whose apartments were subject to detainer actions initiated by the Housing Authority of Louisville for repossession of their apartments.[74]

Pursuant to statute, the sheriff posted notice of the actions on the door of each apartment, but the appellees claimed never to have seen the posted writs of forcible entry and detainer. They also claimed never to have learned of the eviction proceedings until they had been served with writs of possession and after their opportunity for appeal had lapsed.[75] The appellees sought declaratory and injunctive relief in the United States District Court, claiming that the posted notice did

67. *Id.* at 212-13.
68. *Id.* at 213.
69. *Id.* at 214.
70. *Id.*
71. Greene v. Lindsey, 456 U.S. 444 (1982).
72. *Id.* at 445.
73. *Id.*
74. *Id.* at 446.
75. *Id.* at 446-47.

not satisfy the constitutional standard for adequate notice set forth in *Mullane*.[76]

The Court began its analysis by stating that due process requires an opportunity to be heard, and the "right to be heard has little reality or worth unless one is informed that the matter is pending and can choose for himself whether to appear or default, acquiesce or contest."[77] The *Greene* Court then referred to the *Mullane* test as the constitutional minimum: "An elementary and fundamental requirement of due process in any proceeding which is to be accorded finality *is notice reasonably calculated, under all the circumstances, to apprise interested parties of the pendency of the action* and afford them an opportunity to present their objections."[78]

The *Greene* Court went on to reject the claim that there is a difference in notice due for *in rem* actions versus *in personam* actions.[79] The appellees were deprived of a property interests in their home, and "[i]n light of this deprivation, it will not suffice to recite that because the action is in rem, it is only necessary to serve notice 'upon the thing itself.'"[80] The test for determining the sufficiency of notice is whether the notice will inform people of the proceedings against them.[81]

However, the *Greene* Court went on to affirm the "caretaker" principle, saying that it is reasonable to rely on a property owner maintaining watch over his or her property, and that significant legal consequences may befall a property owner who does not keep watch over his or her property.[82] So long as that principle provided guidance for state action, a state could safely assume that "the secure posting of a notice on the property of a person is likely to offer that property owner sufficient warning of the pendency of proceedings possibly affecting his interests."[83] The Court further stated that a tenant having a continuing interest in occupying a certain property

76. *Id.* at 447.
77. *Id.* at 449 (quoting *Mullane*, 339 U.S. at 314).
78. *Id.* at 449-50 (quoting *Mullane*, 339 U.S. at 314).
79. *Id.* at 450.
80. *Id.* at 451.
81. *Id.*
82. *Id* at 451-52.
83. *Id.* at 452.

would likely be present and receive the notice, and a tenant who does not receive notice because he or she no longer inhabits the premises would suffer a lesser injury for not receiving the posted notice.[84]

In fact, the *Greene* Court goes so far as to say that, aside from providing personal service, notice posted on a person's residence would constitute "not only a constitutionally acceptable means of service, but indeed a singularly appropriate and effective way of ensuring that a person who cannot conveniently be served personally is actually apprised of proceedings against him."[85] However, the Court eventually determined posted notice to be constitutionally insufficient in this case and under these particular circumstances.[86]

The Court rejected the contention that posted notice is a last resort since the applicable statute failed to provide for a second attempt at personal service which could be carried out at a time when the tenant would be more likely to be on the premises.[87] Further, the fact that a tenant is not present after one attempt at personal service in no way indicates that a tenant is less invested in the property or has abandoned the property.[88] The *Greene* Court then cited notice by mail as a possible remedy for a notification process lacking in constitutional protections.[89] Thus, because of the existence of other reliable means of notification, the state's action in *Greene* did not constitute notice reasonably calculated to inform the parties of the action against them.[90]

While the *Green* Court struck down the use of posted notice based on the facts of the case, it explicitly sanctioned the use of posted notice in other circumstances.[91] Thus, after *Green* the key

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84. *Id.*

85. *Id.* at 453.

86. *Id.* The Court noted that notice posted in apartment complexes are often removed by children or other tenants, never to be received by the party in interest. A deposition of the process servers revealed that the process server had seen children taking down the writs on more than one occasion. *Id.* at 453 n.7.

87. *Id.* at 454.

88. *Id.*

89. *Id.* at 455.

90. *Id.*

91. Arthur F. Greenbaum, *The Postman Never Rings Twice: The Constitutionality of Service of Process by Posting After Greene v. Lindsay,* 33 A.M. U.L. REV. 601, 603 (1984); *Greene*, 456 U.S at 452-53.

issue became the circumstances in which posted notice was proper or improper.[92] Also, the *Greene* decision marked a movement away from the "caretaker" doctrine, which espoused a more duty-oriented view of notice and made it the duty of the person in possession of an interest in property to now be aware of the law and the affect it would have on the property, in favor of a more normative view that notice must be reasonably likely to inform in order to be constitutional.[93]

In 1983, the Supreme Court held in *Mennonite Board of Missions v. Adams* that "a mortgagee's knowledge of delinquency in the payment of taxes is not equivalent to notice that a tax sale is pending."[94] Thus, it cannot be said that a state is exempted from providing notice to the extent required by the Fourteenth Amendment simply because the property owner could have taken steps to prevent the sale of his or her property.[95]

In *Mennonite,* the issue before the Court was whether notice in the form of publication and posting sufficiently notified a mortgagee of a tax sale of the mortgagee's property for failure to pay taxes.[96] Alfred Moore had executed a mortgage in favor of the Mennonite Board of Missions (MBM) on property Moore had purchased from MBM as security for an obligation in the amount of $14,000.[97] Under the agreement, Moore was responsible for paying the property taxes, but unbeknownst to MBM, Moore had failed to do so.[98]

Indiana law required notice to be posted at the county courthouse, published once per week for three consecutive weeks and sent via certified mail to the interested party's last known address.[99] However, until 1980, Indiana law did not provide for notice to mortgagees of property either by mail or personal service.[100] As such, the County provided notice as required by statute, but MBM was not notified by County or by Moore of the impending sale of the

92. Greenbaum, *supra* note 91at 603.

93. *Id.* at 617.

94. Mennonite Bd. of Missions v. Adams, 462 U.S. 791, 800 (1983).

95. *Id.* at 799 (holding that a party's ability to take steps to safeguard its interests does not relieve the state of its constitutional obligation).

96. *Id.* at 792.

97. *Id.*

98. *Id.*

99. *Id.* at 793.

100. *Id.*

property, and the property was subsequently sold.[101] MBM did not learn of the tax sale until after the redemption period had expired, and Moore still owed $8,237.19 under the previous agreement.[102]

The *Mennonite* Court stated that ". . . a mortgagee possesses a substantial property interest that is significantly affected by a tax sale," and as such, is entitled to notice reasonably calculated to apprise the mortgagee of a pending tax sale.[103] Thus, when the interest of a mortgagee is public record, notice by publication no longer suffices, and notice must be either sent by mail to the mortgagee's last known address or conveyed by personal service.[104] Notice by publication no longer suffices where the mortgagee is "reasonably identifiable."[105]

The *Mennonite* case came after centuries of the Supreme Court's deference to the autonomy of the states in the field of property tax collection, and "this decision of the United States Supreme Court cast into doubt the majority of property tax lien and tax sale procedures used throughout the United States."[106] Also, while the holding on the particular facts in *Mennonite* seemed clear, the holding has proven challenging in application and has given birth to varying interpretations.[107] This is because, "[r]eluctant to create bright lines of universally applicable rights and duties, the Court concluded that a party holding a 'legally protected property interest' whose name and address are 'reasonably ascertainable' based upon 'reasonably diligent efforts' is entitled to notice 'reasonably calculated' to inform [the property owner] of the proceeding."[108]

This opinion left open questions of when adequate notice is required, when notice by publication is insufficient, how the state determines the interested parties, and how far the state must go in order to secure the adequate contact information of interested

101. *Id.* at 794.
102. *Id.*
103. *Id.* at 798.
104. *Id.*
105. *Id.*
106. Alexander, *supra* note 1 at 749.
107. *Id.*
108. *Id.* (quoting *Mennonite*, 462 U.S. at 798, 800).

parties.[109] Because of the different interpretations of these questions, ". . . there is virtually no consensus among the state and local taxing jurisdictions on the application of the constitutional requirements to these four subsidiary questions, with many courts and commentators blending inappropriately the analysis of two or more questions."[110] This lack of clarity caused the procedures for notice in tax lien situations in many states to be subject to constitutional challenge, and it also led to inefficient collection of taxes, inconsistencies in the tax lien notice regulations, and an inability on the part of local governments and property owners to predict the result of an action to compel the fulfillment of tax obligations.[111]

Also, the *Mennonite* decision required that constitutionally adequate notice be afforded to parties possessing a "legally protected property interest."[112] The courts have been inconsistent in their determinations of who is entitled to notice, with mortgage interests being considered a legally protected interest in property and constitutional doubt being cast on a procedure where lessees, occupants of property, purchasers under land sale contracts, or the holders of easements or covenants do not receive constitutionally adequate notice.[113] Thus, where the mortgage holder or any of those other parties were not in receipt of constitutionally adequate notice, tax lien purchasers, tax sale purchasers, and title insurance companies were at risk.[114]

Mennonite served to build upon *Mullane* by clarifying, first, that the standards of notice required for *in personam* jurisdiction are the same as those required for *in rem* jurisdiction.[115] Second, *Mennonite* made it clear that both mortgagees and property owners possess legally protected property interests and are entitled to the same degree of notice procedure under the Due Process Clause.[116] Third, the *Mennonite* Court clarified that, where names and address are

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109. *Id.* at 749-50.
110. *Id.* at 750.
111. *Id.*
112. *Id.* (quoting *Mennonite*, 462 U.S. at 798).
113. *Id.*
114. *Id.*
115. *Id. See also Mennonite*, 462 U.S. at 796 n.3.
116. *Id.*

included in the property deed records, that information must be used to provide notice to the interested parties.[117]

The *Mennonite* decision also rejected the "caretaker" justification for notice by posting and publication.[118] After the *Mennonite* decision, efforts to identify parties holding property interests required an examination of the records of the tax collector, and an examination of the public records for title information was also most likely necessary, and the current due process standard required notice which was "reasonably calculated" to inform parties holding legally protected property interests where the parties' names and addresses are "reasonably ascertainable by "reasonably diligent efforts."[119]

In the post-*Mennonite* years, state and local governments have endeavored to statutorily provide for constitutionally adequate notice procedures for property tax collections, but many have not successfully done so.[120] Because of the importance property taxes play in governmental finance, inefficient, complicated, or constitutionally unsound collection procedures burden the governments.[121]

Some of the more recent precedent of the Supreme Court states that due process does not require a State to provide actual notice of a taking of life, liberty or property in order to comply with due process considerations, but a state must *attempt* to provide actual notice.[122]

The Supreme Court chose to hear this case in order to resolve a conflict between the circuit courts and the state supreme courts regarding whether due process requires the government to take "additional reasonable steps to notify a property owner when notice

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117. *Id.*

118. Greenbaum, *supra* note 91 at 618. Although, in later terms, every Justice but Justice Breyer affirmed or validated the "caretaker" principle, so this was likely not a complete rejection of the principle that a person is responsible for the goings on related to his or her own property. *Id.*

119. *Id*; *Mullane,* 462 U.S.at 798. Examination of public record is a requirement that many jurisdictions prefer not to impose on their enforcement and collection agencies. Greenbaum, *supra* note 91 at 618.

120. *Mullane,* 462 U.S at 769.

121. *Id.*

122. Dusenberry v. United States, 534 U.S. 161, 170-72 (2002) (emphasis added) (due process is satisfied where a state attempts notification via certified mail, and someone at the prison where the property owner is incarcerated signs for the notice letter).

of a tax sale is returned undelivered."[123] For example, in *Akey v. Clinton County*, the Second Circuit held that, where a foreclosure notice is returned, the County was required to utilize "reasonably diligent efforts" to ascertain the owner's correct address.[124]

Also, in *Kennedy v. Mossafa*, the New York Court of Appeals rejected the view that the obligation to provide notice under the Due Process Clause is satisfied by simply sending notice to the address listed on the tax roll where the notice is returned as "undeliverable".[125] However, in *Smith v. Cliffs on the Bay Condo Ass'n*, the Supreme Court of Michigan stated that where notice is returned as undeliverable, the State is not required to take further action to see if another address can be located.[126]

In terms of application, the *Mullane* standards for constitutionally adequate notice have presented difficulties for the lower courts, and have produced divergent results.[127] For instance, *Madewell v. Downs* was a case in which the Eighth Circuit considered the due process requirements for seized property.[128] Terry Madewell brought an action against agents of the federal Drug Enforcement Administration (DEA) and against the Missouri State Highway Patrol (MSHP) based on alleged violations of his Fifth Amendment right to due process because of the seizure of currency during Madewell's arrest for conspiracy to distribute marijuana and methamphetamine, and violations of his Fourteenth Amendment due process rights in the transfer of the seized currency from the MSHP to the DEA.[129]

The currency was seized by the DEA pursuant to 21 U.S.C. § 881, and prior to forfeiture, the DEA sent a notice of seizure letter to Madewell at the address given by Madewell upon his arrest via certified mail.[130] The notice was returned and marked as "Moved. Left no address."[131] Subsequently, the DEA published notice in

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123. *Flowers*, 126 S. Ct. at 1713.

124. Akey v. Clinton County, 375 F.3d 231, 236 (2d Cir. 2004).

125. Kennedy v. Mossafa, 100 N.Y. 2d 1, 9 (2003).

126. Smith v. Cliffs on the Bay Condo Ass'n, 463 Mich. 420, 429 (2000).

127. *The Supreme Court, 2005 Term - Leading Cases*, 120 HARV. L. REV. 233 (2006).

128. Madewell v. Downs, 68 F.3d 1030, 1033 (8th Cir. 1995).

129. *Id.*

130. *Id.* at 1035.

131. *Id.*

U.S.A. Today for three consecutive weeks.[132] When no one responded to the published notice, the money was forfeited pursuant to 21 U.S.C. § 881.[133] The named defendants in this action were various DEA and MSHP agents as well as two Lawrence County prosecutors.[134]

Madewell claimed the defendants violated his due process rights because "the notice of the administrative forfeiture proceedings was sent to Madewell at the wrong address when his proper address was known to state and federal agents."[135] Madewell's specific claims were that

> (a) the Appellee DEA agents knew or should have known the Appellant's then-current location, (b) the Appellee DEA agents knew or should have known the name and address of Appellant's attorney, and (c) the resulting constructive notice to the Appellant was in the form of boilerplate in three issues of USA Today.[136]

The Eighth Circuit began by citing *Mullane* for the principle that

> [t]he statutory right to compel an agency to proceed by judicial condemnation is a vital congressional restraint on arbitrary confiscations. Yet, as in other adjudicatory settings, this right has little reality or worth unless one is informed that the matter is pending and can choose for himself whether to appear or default, acquiesce or contest.[137]

The Eighth Circuit further affirmed the *Mullane* requirement of "notice reasonably calculated, under all the circumstances, to apprise interested parties of the pendency of the action and afford them an

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132. *Id.*

133. *Id.*

134. *Madewell*, 68 F.3d at 1035.

135. *Id.*

136. *Id.* at 1036. Terry Madewell had been investigated and was eventually arrested for drug-related crimes in connection with a Missouri drug ring. *Id.* at 1034. He was originally arrested by the MSHP in possession of drugs and $9,400 in United States currency. *Id.* The contraband was seized by the MSHP, but was later "adopted" by the DEA. *Id.*

137. *Id.* at 1046 (quoting *Mullane,* 339 U.S. at 314).

opportunity to present their objections."[138] The Eighth Circuit also cited *Mennonite Bd. of Missions v. Adams* for the principle that failure to deliver statutorily required notice to an address known to be the actual location of the interested party does not comply with the due process requirements.[139]

However, because the DEA sent the notice of forfeiture to the address Madewell had provided after his arrest, because Madewell was not required by the authorities to be in any other location, and because the DEA had no notice of Madewell's second address and contacts between DEA agents and Madewell would not have given the DEA notice of the other address Madewell was occupying, the Eighth Circuit stated that:

> [A]ny confusion about Madewell's actual residence was the result of Madewell's own conduct, not the result of a willful failure to send notice to an address the DEA knew or should have known. Thus, the DEA's endeavors to provide Madewell with written notice by sending such notice to his last known address was 'reasonably calculated, under all the circumstances,' to achieve the result required by due process.[140]

Further, the Eighth Circuit found the notice by publication to be proper and adequate since the DEA pursued this course of action as prescribed by statute upon receiving the returned notice.[141] Accordingly, the Eighth Circuit found that Madewell's due process rights were not offended by the administrative forfeiture and affirmed

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138. *Id.* (quoting *Mullane*, 339 U.S. at 314).

139. *Id.* For purposes of analysis, the Eighth Circuit also considered its own decision in *United States v. Woodall*, in which a claimant "had alleged that the notice of forfeiture was sent to his home, but that it was sent during the pendency of his federal criminal prosecution, the district court had ordered his release to a different residence known to the government, and no notice was mailed either to his correct address or to his attorney." United States v. Woodall, 12 F.3d 791, 794 (8th Cir. 1993). In *Woodall*, the Eighth Circuit held that "if the facts in this case are as Woodall alleges – something we cannot determine on this record -- he did not receive adequate notice of the administrative forfeiture and is entitled to have the forfeiture Declaration voided." *Woodall*, 12 F.3d at 795. However, the Eighth Circuit found this case to be distinguishable. *Madewell*, 68 F.3d at 1046.

140. *Id.* at 1047 (quoting *Woodall*, 12 F.3d at 794-95).

141. *Id.*

the decision of the United States District Court granting summary judgment in favor of the defendants.[142]

In contrast, the Fourth Circuit interpreted the due process notice requirements under *Mullane* in a different manner in *Plemons v. Gale.*[143] Plemons was a property owner who failed to pay her property taxes because of a mistaken belief that the bank from which she acquired financing was paying the property taxes.[144] Because the property taxes were not paid, the sheriff sold a tax lien on the property, and the purchaser followed West Virginia law in filing a list of those who should be served with notice by the county clerk.[145] The list included Plemons, among others, and it also provided three addresses at which Plemons might be reached.[146] In addition to sending notice to three of Plemons' properties, the clerk sent notices to "occupant" at the rental property that was subject to the lien.[147]

The notices were sent via certified mail, and all of them were returned undelivered because Plemons had been renting the properties and living elsewhere.[148] Upon return of the mailed notices, the tax lien holder published notice of Plemons' right of redemption in two local newspapers and also posted notice on the front door of the County Courthouse.[149] On May 7, 2002, a deed was issued to the lienholder; on November 22, 2002, the lienholder conveyed the property to another individual via quitclaim deed; then in January of 2003, Plemons found out about the tax sale of her property.[150] Plemons sought to set aside both the original tax deed and the subsequent deed.[151]

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142. *Id.* at 1047.

143. Plemons v. Gale, 396 F.3d 569 (4th Cir. 2005).

144. *Id.* at 571.

145. *Id.*

146. *Id.*

147. *Id.*

148. *Id.*

149. *Plemons*, 396 F.3d at 571.

150. *Id.* Apparently, Plemons had used her properties as rentals and had taken up residence in a place called Quarry Pointe two or three months before the notices were mailed out. *Id.*

151. *Id.* Under West Virginia law, a person could set aside a tax-sale deed so long as they can show "by clear and convincing evidence" that the purchaser "failed to exercise reasonably diligent efforts to provide notice of his intention to

In determining whether constitutionally sufficient notice was provided to Plemons before her property interest was extinguished, the Fourth Circuit began its analytical journey with the aforementioned *Mullane* requirement of notice that is reasonably calculated to inform the parties of the action and give them a chance to respond.[152] The Fourth Circuit considered the Supreme Court's clarification that "when notice is a person's due, process which is a mere gesture is not due process."[153] The Fourth Circuit further explained that adequate notice must be reasonable and take into account the unique circumstances of each case.[154] Also, *Mullane* held notice by publication to be sufficient only where the location of the interested party cannot be ascertained.[155]

The Fourth Circuit continued on to say that

> [c]ases following *Mullane* have sharpened its rule, but reasonable efforts designed to 'actually inform' a party with a property interest of possible deprivation of that interest remain the touchstone of constitutionally adequate notice. Thus, although the Constitution does not always require actual receipt of notice, it does always require efforts 'reasonably

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acquire such title to the complaining party." *Id.* at 572 (quoting W. Va. Code Ann. § 11A-4-4 (b)(West 2006)). The related West Virginia statutes were interpreted by the lower court to "require a purchaser to exercise due diligence in identifying and locating parties entitled to notice and to allow publication notice only after the exercise of such diligence." *Id.* at 572. Based on its interpretation of *Mullane* and *Mennonite Bd. of Missions*, the lower court found West Virginia's statutory notice requirements to be valid under the United States Constitution and concluded that "when notice sent by certified mail is returned unclaimed, the reasonable diligence standard requires the purchaser to make further inquiry reasonably calculated to locate the interested party's correct address." *Plemons*, 396 F.3d at 572. The lower court further stated that the lienholder had a number of ways in which it could have ascertained Plemons' address such as calling her phone number in the local directory, requesting the assistance of her tenants, or asking her mortgagee for her address. *Id.* The lower court concluded that, because none of these actions were taken, Plemons did not receive constitutionally adequate notice of her right of redemption, and the lower court granted summary judgment in favor of Plemons. *Id.* The lienholders appealed. *Id.*

152. *Plemons*, 396 F.3d at 573.

153. *Id.* (quoting *Mullane*, 339 U.S. at 315).

154. *Id. See Mullane*, 339 U.S. at 314-15.

155. *Plemons*, 396 F.3d at 573. *See Mullane*, 339 U.S. at 317-18.

> calculated under all the circumstances to apprise' a party 'of the pendency' of the deprivation of property.[156]

Further, notice that is known by the party required to give notice to have failed does not satisfy constitutional requirements.[157] And while the particularities of each case are to be considered, "actual notice is a minimum constitutional precondition to a proceeding which will adversely affect the liberty or property interests of any party . . . if its name and address are reasonably ascertainable."[158]

The Fourth Circuit continued on to interpret *Mullane* as requiring that further action be taken where mailed notice is promptly returned.[159] Ultimately, the Fourth Circuit decided that, upon return of the mailed notices, the lienholder should have searched all public county records, and since it was unclear from the record whether the lienholder did so, or whether such efforts would have been fruitful, the Fourth Circuit remanded.[160]

In sum, *Plemons* interpreted due process requirements to contain a duty to take further action when a notice of tax sale is returned undelivered. Further, this case advocated a case-by-case consideration and not only required a determination of whether further action was taken to provide notice, but it also indicated that a decision in a case such as this should depend, at least somewhat, on whether or not the further action prescribed would have been successful, i.e. whether a search of the public records would have unearthed Plemons' true address.

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156. *Plemons*, 396 F.3d at 573 (quoting *Mullane*, 339 U.S. at 315); (quoting *Dusenberry*, 534 U.S. at 168-171) (internal citations omitted).

157. *Id. See Robinson*, 409 U.S. at 40.

158. *Plemons*, 396 F.3d at 573 (quoting *Tulsa Prof'l Collection Servs.*, 485 U.S. at 489, 485) (internal quotations and citations omitted).

159. *Id.* at 575 ("Adopting the rule that prompt return of mailed notice triggers a duty to make reasonable follow-up efforts would seem to best comport with the instruction in *Mullane* that due process requires efforts 'reasonably calculated' to actually 'apprise interested parties' of the possible deprivation; that is, notice consistent with that of 'one desirous of actually informing the absentee,' rather than efforts that are but a 'mere gesture.'") (quoting *Mullane*, 339 U.S. at 314-15).

160. *Id.* at 577.

B. *Statutory Background*

The statute at issue here is Arkansas Code of 1987 Annotated § 26-35-705. It states: "...the sheriff or collector shall be required to mail statements of taxes due by any taxpayer to the address provided by the taxpayer. In the event that the address of the taxpayer changes, the taxpayer has an obligation to furnish the correct address."[161] Thus, the statute requires only notice by mail to the address provided by the property owner.

III. FACTS

In 1967, Gary Jones (hereinafter "Jones") bought a home at 717 North Bryan Street in Little Rock, Arkansas.[162] Jones paid the monthly mortgage every month for thirty years, and then the mortgage company paid the property taxes for the home.[163] In 1993, Jones separated from his wife, and he moved to a Little Rock apartment while his wife continued to live at the North Bryan Street home.[164] Unfortunately for Jones, when he paid off his mortgage in 1997, the mortgage company stopped paying the property taxes, so they went unpaid.[165] Soon thereafter, the property was certified as delinquent.[166]

In April of 2000, the Commissioner of State Lands (hereinafter "Commissioner") mailed a certified letter to Jones at the North Bryan Street address in an attempt to notify Jones of the delinquent status of the property and Jones' right to redeem the property.[167] The information in the certified letter informed Jones that if he did not redeem the property, it would be subject to public sale in two years.[168] When the letter was delivered to the North Bryan Street address, no one was home to sign for it, and no one retrieved the

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161. Ark. Code. Ann. § 26-35-705 (1987).
162. Jones v. Flowers, 126 S.Ct. 1708, 1712 (2006).
163. *Id.*
164. *Id.*
165. *Id.*
166. *Id.*
167. *Id.*
168. *Jones,* 126 S.Ct. at 1712.

letter within the next fifteen days, so the letter was returned to the Commissioner as "unclaimed."[169]

After a period of two years had elapsed, the Commissioner published a notice of public sale in the Arkansas Democratic Gazette just a few weeks before the public sale.[170] Because no bids were submitted for the property, the State negotiated a private sale of the property to respondent, Linda Flowers (hereinafter "Flowers").[171] However, before completing the sale, the Commissioner mailed a second certified letter to Jones at the North Bryan Street address so as to notify him that, if he did not pay his taxes, his property would be sold.[172] The second letter was returned in the same way the first one was, marked as "unclaimed."[173]

As a result, the State sold the house, which had a fair market value of $80,000, for a final sale price of $21,042.15.[174] The thirty-day period for post-sale redemption passed, and Flowers sent an unlawful detainer notice to the North Bryan Street property.[175] That notice was served on Jones' daughter who advised her father of the tax sale of the property.[176]

Upon finding out about the sale of the North Bryan Street property, Jones filed suit in Arkansas state court against both the Commissioner and Flowers and alleged that the failure of the

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169. *Id.* Even if Jones' wife had been home to witness the delivery of the certified letter, she would not have been able to claim it or otherwise determine its contents without Jones' presence and signature. *Id.* at 1718.

170. *Id.*

171. *Id.*

172. *Id.*

173. *Jones*, 126 S.Ct. at 1718.

174. *Id.* at 1713. This sale left Jones, an employee of the United States Social Security Administration, short some $65,000 in equity. *Id.* Ashlea Ebeling, *Surprise! We sold your house,* http://www.forbes.com/services/2006/04/10/supreme-court-foreclosure-cz_ae_0411beltway.html.

175. *Jones*, 126 S.Ct. at 1713.

176. *Id.* The unlawful detainer notice was likely served personally on Jones' daughter, so the inhabitants of the North Bryan Street property had no indication that the property had been sold under receiving notice that they were being ejected from the property. *Id.*

Commissioner to provide notice of the tax sale and of the Jones' rights constituted a taking of his property without due process.[177]

The Commissioner and Flowers filed for summary judgment alleging that the two certified letters sent by the Commissioner satisfied the Constitutional requirements for notice.[178] Jones filed a cross-suit for summary judgment, but the trial court granted summary judgment in favor of the Commissioner and Flowers on the basis that the Arkansas tax sale statute, requiring notice of the type provided by the Commissioner, satisfied constitutional due process requirements.[179]

Jones appealed the trial court's ruling, and the Arkansas Supreme Court affirmed, noting Supreme Court precedent holding that due process does not require actual notice and holding that attempts to provide notice via certified mail satisfied due process.[180] The Supreme Court granted certiorari.[181]

IV. ANALYSIS OF THE OPINION

Chief Justice Roberts wrote the majority opinion in which Justices Stevens, Souter, Ginsburg and Breyer joined. Justice Thomas filed a dissenting opinion in which Justices Scalia and Kennedy joined. Justice Alito did not participate in the decision of this case.[182]

The issue before the Court here was whether the government is required by the Due Process Clause of the Fourteenth Amendment to take "additional reasonable steps" to provide notice of a tax sale to a property owner where prior attempts at notice by mail were returned undelivered.[183]

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177. *Jones*, 126 S.Ct. at 1713.
178. *Id.*
179. *Id.*
180. *Id.*
181. *Id.*
182. *Id.* at 1711.
183. *Jones*, 126 S.Ct. at 1712.

A. Majority Opinion

Chief Justice Roberts began the opinion by affirming the basic principle that the Due Process Clause of the Fourteenth Amendment prevents a state from taking property and selling it without providing the owner of the property with notice and an opportunity to be heard.[184]

However, a government need not provide actual notice to a property owner before taking a delinquent property.[185] Instead, due process requires the government to provide "notice reasonably calculated, under all the circumstances, to apprise interested parties of the pendency of the action and afford them an opportunity to present their objections."[186]

In this case, the Commissioner argued that mailing the certified letters to Jones conformed to the requirements of the Due Process Clause because that action was reasonably calculated to provide notice.[187] Further, the Commissioner contended that a property owner is responsible for maintaining a current address on record, and the Arkansas statute was reasonably calculated to provide notice since it requires that notice be mailed via certified mail to an address for which the owner is responsible.[188] In fact, according to the Commissioner, the Arkansas statutory scheme requires the use of certified mail when provided notice of a tax sale, so it actually provides protection for property owners beyond what the Due Process Clause requires.[189]

In support of the State's position, the Commissioner pointed out that the Supreme Court has heard many cases in which the Court deemed notice by mail sufficient to satisfy due process considerations.[190]

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184. *Id.* at 1712.

185. *Id.* at 1713. *See Dusenberry*, 534 U.S. at 170.

186. *Jones*, 126 S.Ct. at 1713-14 (quoting *Mullane*, 339 U.S. at 314).

187. *Id.* at 1713-14.

188. *Id.* at 1714. *See* ARK. CODE ANN. § 26-35-705 (1997).

189. *Jones*, 126 S.Ct. at 1714.

190. *Id. See e.g.*, *Dusenberry*, 534 U.S. at 169; Tulsa Prof'l Collection Servs., Inc. v. Pope, 485 U.S. 478, 490 (1988); *Mennonite*, 462 U.S. at 798; *Mullane*, 339 U.S. at 318-19.

While the Supreme Court agreed with the Commissioner's position that notice is constitutionally sufficient if it is reasonably calculated to reach its intended recipient, this situation is different from the situations in *Dusenberry* and *Mullane* because, unlike here, the government in *Dusenberry* and *Mullane* had no reason to believe that attempts to provide notice had been unsuccessful.[191]

The issue here is a distinct and novel issue before the Court because the State received the returned notice which the postal service had marked "unclaimed," so the State knew that its attempts to provide Jones with notice had failed.[192] And as the Court previously stated, "notice required will vary with circumstances and conditions."[193] Thus, the question in this case is whether the government's knowledge that the notice did not reach its intended recipient is a "circumstance and condition" that triggers a responsibility to provide a different type of notice.[194]

The Court goes on to say that the decision in *Mullane* required the use of a balancing test when determining whether a State provided sufficient notice in a certain situation.[195] The balancing test arising under *Mullane* involves balancing the State's interests versus the interest of the individual.[196] Ultimately, when a property owner is entitled to due process "[t]he means employed must be such as one desirous of actually informing the absentee might reasonably adopt to accomplish it. . . ."[197]

Here, the Court stated that if the Commissioner really wanted to inform Jones of the impending tax sale of his home, the Commissioner would have taken further action when the letter was returned unclaimed.[198] By way of analogy, Chief Justice Roberts imagined a scenario in which the Commissioner watches as the

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191. *Jones*, 126 S.Ct. at 1714.

192. *Id.*

193. *Id.* (quoting *Walker*, 352 U.S. at 115).

194. *Jones*, 126 S.Ct. at 1714.

195. *Id.* at 1715.

196. *Id.*

197. *Id.* at 1715 (quoting *Mullane*, 339 U.S. at 315).

198. *Id.* at 1716.

postman accidentally drops notices being mailed to delinquent taxpayers into the storm drain and then shrugs and says "I tried".[199]

In that situation, as in this one, the Commissioner knew that the letter had not reached its intended recipient, so the Commissioner's failure to follow up was "unreasonable, despite the fact that the letters were reasonably calculated to reach their intended recipients when delivered to the postman."[200] Additionally, although the State may have made a reasonable calculation of how to reach Jones, it had good reason to suspect, when the notice was returned, that Jones was "no better off than if the notice had never been sent."[201] Thus, if the Commissioner had been "desirous of actually informing" Jones of the tax sale of his home, the Commissioner would have taken further steps to notify Jones of the sale.[202]

The Court further stated that its prior cases have required the government to consider "unique information" about the intended recipient of a communication even where the statutory actions were reasonably calculated to provide notice.[203] For instance, in *Robinson v. Hanrahan*, the Court held that, when the State had knowledge that the owner of a vehicle was in prison, notice of forfeiture proceedings sent to the owner's home address did not suffice.[204]

Similarly, in *Covey v. Town of Somers*, notification of a foreclosure by mailing, positing, and publication did not suffice when the property owner was known by the state to be incompetent and without the protection of a guardian.[205] In *Covey* and *Robinson*, the knowledge of the government that a particular means of providing notice was ineffective triggered an obligation to take further steps to provide notice.[206] In the same way, the Commissioner's knowledge that the notice had not reached its intended recipient triggered an obligation to take further steps to provide notice.[207]

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199. *Id.*
200. *Jones*, 126 S.Ct. at 1716.
201. *Id.* (quoting *Mullane,* 339 U.S. at 315).
202. *Id.*
203. *Id.*
204. *Id. See Robinson*, 409 U.S. at 40.
205. *Id. See Covey*, 351 U.S. at 141.
206. *Jones*, 126 S.Ct. at 1716.
207. *Id.*

The State was also not relieved of its duty to take further action simply because Jones had a legal obligation under the Arkansas statute to update his address on record.[208] In *Robinson,* the determinative factor was not that the vehicle owner had not complied with his statutory obligations to maintain an updated record, but rather the fact that the state knew that the property owner would not be notified by its efforts.[209] Thus, while the Arkansas statute requiring a property owner to maintain an updated address on file with the state provides support for the idea that the notice sent by the Commissioner was reasonably calculated to inform Jones, it does nothing to mitigate the fact that the Commissioner took no further action once it had knowledge of the failure of the means of providing notice.[210]

The Court also disagreed with the Commissioner's arguments that, "after failing to receive a property tax bill and after failing to pay property taxes, a property holder is on inquiry-notice that his property is subject to governmental taking," and that Jones should have left his property in the hands of persons who would have notified him if it were in jeopardy.[211] The fact that a property owner should know that there will be adverse consequences if he does not pay his property taxes does not excuse the state from its constitutional obligation to provide notice before taking private property.[212] In fact, the Court specifically refuted that idea in *Mennonite*, stating that "knowledge of delinquency in the payment of taxes is not equivalent to notice that a tax sale is pending."[213] Further, Arkansas gives a delinquent taxpayer an opportunity to rectify the situation and redeem his property, so failure to pay taxes in itself provides no notice of tax sale.[214]

In terms of Jones' obligation to leave his property in the hands of those who would notify him if his property interest was in jeopardy, the Commissioner referred to a statement in *Mullane*, that seizures

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208. *Id.*
209. *Id.*
210. *Id.*
211. *Id.* at 1717.
212. *Jones*, 126 S.Ct. at 1717.
213. *Id.* (quoting *Mennonite,* 462 U.S. at 800).
214. *Id.*

such as "libel of a ship, attachment of a chattel[,] or entry upon real estate in the name of law. . ." are the seizures that "may reasonably be expected to come promptly to the owner's attention."[215]

However, Chief Justice Roberts stated that an occupant of property is not necessarily acting as an agent for the owner, and "it is quite a leap from Justice Jackson's examples to conclude that it is an obligation of tenancy to follow up with certified mail of unknown content addressed to the owner."[216] Also, the State procedure prevents the occupants of a home from knowing what the certified communication was about since it would have required Jones' signature in order to be claimed.[217] Also, the Court points out that there is no evidential record of notices of attempted delivery left at the North Bryan Street address.[218]

In *Covey and Robinson*, the notice provided was deemed constitutionally insufficient because the State was aware of the circumstances making the notice insufficient.[219] However, here the State was not aware of the circumstances surrounding Jones' absence from the property before sending notice.[220] The Court disposed of this distinction by reaffirming the principle that "the constitutionality of a particular procedure for notice is assessed *ex ante*, rather than *post hoc*," and a certain procedure may be generally adequate but fail in a specific situation.[221]

Ultimately, the Court decided that the State should have taken additional reasonable steps to notify Jones under the circumstances.[222] The notice the Commissioner published in the newspaper a few weeks before the sale of the property did not constitute sufficient additional reasonable steps since "'[c]hance alone' brings a person's attention to 'an advertisement in small type inserted in the back pages of a newspaper.'"[223]

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215. *Id.* at 1718 (quoting *Mullane*, 339 U.S. at 316).
216. *Id.*
217. *Id.*
218. *Jones*, 126 S.Ct. at 1718.
219. *Id.* at 1716.
220. *Id.*
221. *Id.* at 1717; *See also Leading Cases*, 120 HARV. L. REV. 233, 235 (2006).
222. *Jones*, 126 S.Ct. at 1717.
223. *Id.* at 1720 (quoting *Mullane*, 339 U.S.at 315).

Chief Justice Roberts then identified some additional reasonable steps the State could have taken so as to improve the notice such as resending the notice by regular mail, so that a signature would not be required to claim the notice.[224] Also, an occupant finding a letter sent by regular mail might be more likely to write the owner's new address on it or notify the owner directly.[225]

Another possible means of notice would have been to post notice on the front door of the house, or to address the notice to "occupant" so that someone would be sure to open it.[226] These measures would have been more likely to provide notice to Jones, and in fact, Jones learned of the action against his property when an occupant of his home, his daughter, was served with the unlawful detainer notice.[227]

Thus, because it was "possible and practicable" to provide more effective notice of the tax sale to Jones, the notice by publication does not render the Commissioner's actions constitutionally adequate.[228] From a policy standpoint, the Court states that, in effecting a tax sale, "the State is exerting extraordinary power against a property owner—taking and selling a house he owns."[229] As such, "[i]t is not too much to insist that the State do a bit more to attempt to let him know about it when the notice letter addressed to him is returned unclaimed."[230]

B. Justice Thomas' Dissent

Justice Thomas wrote the dissenting opinion in this case, and Justices Scalia and Kennedy joined. The dissenting Justices

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224. *Id. at* 1719. The Court further stated that certified mail might actually make notice less likely to occur since a letter sent via certified mail cannot be left with the occupant and must be claimed from the post office within a certain number of days. *Id.*

225. *Id.*

226. *Id.*

227. *Id.* Chief Justice Roberts stated that the State need not go so far as to search for an interested party's address in the phonebook or other government records. Such an unlimited search for an interested party's address imposes too great a burden on the State. *Id.*

228. *Jones*, 126 S.Ct. at 1719.

229. *Id.* at 1721.

230. *Id.*

considered the methods of providing notice employed by the State of Arkansas to be reasonably calculated to inform and, as such, valid under the Due Process Clause.[231]

Justice Thomas points out that the Supreme Court has, in many cases, recognized notice mailed to an interested party's last known address as satisfying the Due Process Clause.[232] Also, the dissent saw an especially strong basis for the State's action since the notice was sent to the address provided by Jones himself.[233] Justice Thomas states, "[m]y conclusion that Arkansas' notice methods satisfy due process is reinforced by the well-established presumption that individuals, especially those owning property, act in their own interest."[234] As such, the State was "free to 'indulge in the assumption'" that Jones would have provided his current address in the public record or that he had someone at the property who would make him aware of any threat against his property.[235] Thus, Justice Thomas views the crucial question not to be whether the occupants of the property were acting in Jones' interests, but whether Jones was acting in his own interests.[236]

Further, the dissenting Justices identified several reasons for which they disagreed with the idea that the government's knowledge that notice had been ineffectual triggered a further obligation.[237] First, the dissent examined the reasonableness of notice from the perspective of the State at the time the notice was sent, or *ex ante*.[238] The dissent based this conclusion on the decision in *Mullane* where the analysis considered information available to the sender at the time the notice was sent.[239] Also, in *Dusenberry*, the Court refused to determine reasonableness of notice based on information discovered *post hoc*.[240]

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231. *Id.* at 1722 (Thomas, J., dissenting).

232. *Id.* at 1723 (Thomas, J., dissenting). *See Dusenberry*, 534 U.S. at 169; *Mullane*, 339 U.S. at 318; *Mennonite*, 462 U.S. at 798.

233. *Jones*, 126 S.Ct. at 1723.

234. *Id.*

235. *Id.*

236. *Id.*

237. *Id.*

238. *Id.*

239. *Id.*; *See Mullane*, 339 U.S. at 318.

240. *Jones*, 126 S.Ct. at 1723. *See also Dusenberry*, 534 U.S. at 171-72.

Justice Thomas and the dissenting Justices consider the Majority's opinion to be an abandonment of those principles since the proposed improved methods of providing notice are *post hoc* considerations.[241]

Second, the dissent views the attack on the State's notice methods as a departure from the *Dusenberry* principle that actual notice need not be achieved.[242] Because the Majority's rationale requires the State to continually consider additional means that would more likely achieve notice, and since there is no limit to the improvements on notice, the dissent sees this as effectively requiring actual notice contrary to *Dusenberry* and *Mullane*.[243]

Further, "[t]he only circumstances in which this Court has found notice by mail and publication inadequate under the Due Process Clause involve situations where the state or local government knew at the outset that its notice efforts were destined to fail . . . ."[244] Justice Thomas points out that the State did not know its notice would fail at the time the notice was sent, and the fact that the notice sent via certified mail was returned "unclaimed" does not necessarily mean that an address is outdated.[245] As such, "[t]he State cannot be charged to correct a problem of petitioner's own creation and of which it was not aware."[246]

The dissent focuses on the fact that, while notice must be reasonably calculated so as to be effective, "'[h]eroic efforts,' however, are not required."[247] According to Justice Thomas, the Court has previously rejected an interpretation of the Due Process Clause which would "place impossible or impractical obstacles in the way [of the State]."[248] Further, prior cases have not required actual notice and have found constitutional validity where the means for

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241. *Jones*, 126 S.Ct. at 1724.

242. *Id.*; *See Dusenberry*, at 169-70.

243. *Jones*, 126 S.Ct. at 1724.

244. *Id. See Robinson*, 408 U.S. at 39 (*per curiam*) (intended recipient known to be in jail); *Covey*, 351 U.S. at 145 (intended recipient known to be incompetent and without a guardian).

245. *Jones*, 126 S.Ct. at 1725.

246. *Id.*

247. *Id.* at 1722 (quoting *Dusenberry,* 534 U.S. at 170).

248. *Jones*, 126 S.Ct. at 1722 (quoting *Mullane*, 339 U.S. at 313-14).

notification were "reasonably certain" to provide notice.[249] Justice Thomas even goes so far as to advocate the use of notice by publication, saying that such notice is valid under *Mullane* where the address of the interested party is unknown.[250]

Based on this standard, the dissent finds the means employed by Arkansas to be constitutionally adequate.[251] Specifically, the dissent found the Commissioner's sending a letter via certified mail to Jones' address of record to be adequate.[252] Further, the dissent fears that the majority's new requirements for notice will be burdensome for the State, forcing the State to locate thousands of delinquent property owners each year.[253] In conclusion, Justice Thomas states, "The Court's decision today forecloses such a reasonable system and burdens the State with inefficiencies caused by delinquent taxpayers."[254]

V. IMPACT

This case acknowledges that whether notification satisfies due process in a given instance depends on the "circumstances and conditions" surrounding the notice. As such, for the property purchaser, it remains difficult to determine whether one will be purchasing clear title to property if the interested parties have not yet been located.[255]

A. Legislative Impact

The impact of this decision on the laws formulated by the legislature will likely be minimal. Any heightened duty to consider information gained after sending notice but before taking the

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249. *Id.* (quoting *Dusenberry,* 534 U.S. at 169-70).

250. *Id.* at 1725. *See Mullane*, 339 U.S. at 316 ("[P]ublication traditionally has been acceptable as notification supplemental to other action which in itself may reasonably be expected to convey a warning").

251. *Jones*, 126 S.Ct. at 1725.

252. *Id.*

253. *Id.* at 1725. Justice Thomas pointed out that 18,000 properties are certified delinquent on an annual basis. *Id.*

254. *Id.*

255. Lorin Hirrano, *In Non-Judical Tax Sales*, HI. B.J., August, 2006.

property, such as failure of delivery of notice sent via certified mail, is limited by the principle espoused in *Jones v. Flower*, that sending notice by regular mail is constitutionally appropriate.[256] Thus, this decision will only impact legislatures to the extent that they may need to update their statutes regarding notice of actions against real property to provide for further action in the form of a letter sent by regular mail and addressed to "Occupant" where notice sent via certified mail is returned "undelivered."

B. Judicial Impact

Because of the 'nebulous formulations' regarding what types of notice satisfy constitutional requirements, the Justices in both the majority and the dissent justified their positions based on the same due process principles that have historically been applied, and the vagueness of those principles allowed them to use the same precedent and rationales to come to opposite conclusions.[257]

> The Supreme Court, in deciding when constitutional protections apply in non-criminal, adjudicative contexts, has generally failed to specify and articulate the values which underlie due process. Moreover, in those cases in which the Court has attempted to define due process values, it has generally done so in an ambiguous and unsatisfactory fashion.[258]

Both the majority and the dissent agreed on the *Mullane* principle that "[t]he means employed must be such as one desirous of actually informing the absentee might reasonably adopt to accomplish it."[259]

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256. *Flowers*, 126 S.Ct. at 1720; *The Supreme Court, 2005 Term - Leading Cases*, 120 HARV. L. REV. at 241. The idea that notice sent by regular mail is constitutionally sufficient is not a new one. See *Dusenberry*, 534 U.S. at 172-73; *Tulsa Prof'l Collection Servs., Inc.* 485 U.S. at 490; *Mennonite*, 462 U.S. at 799, 800 (1983); *Greene*, 456 U.S. at 455; *Mullane*, 339 U.S. at 319.

257. *The Supreme Court, 2005 Term - Leading Cases* 120 HARV. L. REV. at 233.

258. Richard B. Saphire, *Specifying Due Process Values: Toward a More Responsive Approach to Procedural Protection*, 127 U. PA. L. REV. 111, 113 (1978).

259. *Flowers*, 126 S. Ct. at 1714 (quoting *Mullane*, 339 U.S. at 314); *Id.* at 1722 (Thomas, J., dissenting) (quoting the same text); *The Supreme Court, 2005 Term - Leading Cases*, 120 HARV. L REV. 233, 237 (2006).

Also, the eight participating Justices were in agreement that "the constitutionality of a particular procedure for notice is assessed *ex ante*, rather than *post hoc*."[260]

However, the lack of guidance provided by the principles enable the opinions to diverge while remaining grounded in decisions considered to be standing precedent.[261] One shortcoming with the *Mullane* standard is that it neglects to consider the balancing of government interests versus individual interests.[262] The standard is equally applicable to extremely valuable property and property that is less so.[263]

> The only way around this conclusion is to pack the balancing into the word 'reasonably,' but *Mullane* and other Court precedents seem to imply that *Mullane* reasonableness concerns only the accuracy of the chosen method relative to other normal or customary methods. The language of the *Mullane* test thus appears irredeemably antagonistic towards balancing.[264]

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260. *Flowers*, 126 S.Ct. at 1717 (majority opinion); see *Id.* at 1723 (Thomas, J., dissenting) ("[w]hether a method of notice is reasonably calculated to notify the interested party is determined ex ante . . ."); *The Supreme Court, 2005 Term - Leading Cases,* 120 HARV. L. REV. at 237.

261. *The Supreme Court, 2005 Term - Leading Cases*, 120 HARV. L. REV. at 237.

262. *Id.* at 237. *See* Matthews v. Eldridge, 424 U.S. 319, 334-35 (1976) (due process requires a balancing of the private interest, the risk of erroneous deprivation of that interest, and the value of added procedural protections against the interest of the government); *see also* Hamdi v. Rumsfeld, 124 S. Ct. 2633, 2646 (2004) (plurality opinion) (balancing needed in order to resolve the strain between the autonomy needed by the government in order for it to accomplish some goal and the process due to a citizen before being deprive of his or her right);

263. *The Supreme Court, 2005 Term - Leading Cases*, 120 HARV. L. REV. at 237.

264. *Id.* at 238; *See Greene*, 456 U.S. at 454 ("[t[he reasonableness of the notice provided must be tested with reference to the existence of 'feasible and customary' alternatives and supplements to the form of notice chosen."); *Mullane*, 339 U.S. at 315 ("[t]he reasonableness . . .of any chosen method may be defended on the ground that it is in itself reasonably certain to inform those affected, or, where conditions do not reasonably permit such notice, that the form chosen is not substantially less likely to bring home notice than other of the feasible and customary substitutes." (internal citations omitted)). However, it could be that the *Mullane* test, by its design, provides a balancing test. *See Mullane*, 339 U.S. at 314

However, while the Supreme Court formally espoused *Mullane*, it has not completely discounted the consideration of the property involved and the balancing of interests.[265] For instance, in *Tulsa Professional Collection Services, Inc. v. Pope*, the Court engaged in a balancing inquiry. Other cases such as *Mennonite* and *Walker v. City of Hutchinson* moved slightly closer to a balancing test.[266]

In this case, the Court brought the prior, hidden balancing test to the forefront by creating a two-tiered analysis based on the *Mullane* test as well as a balancing test.[267] In fact, the Court took its role quite somberly in this case since the decision concerned the possible loss of a large individual asset, a home.[268] Thus, this case brought the balancing test into a predominant role in the due process analysis alongside the revered *Mullane* test.[269]

("Against this interest of the State we must balance the individual interest sought to be protected by the Fourteenth Amendment."). However, this still would not take into account the value of the property interest or the situational difficulties a sender might encounter in providing notice. *The Supreme Court, 2005 Term - Leading Cases*, 120 HARV. L. REV. at 239 n.55. On the other hand, it could be that balancing is an improper approach to due process questions because of the "enormous administra[tive] problems [it poses] related to imcommensurability and imprecision." *Id.*

265. *The Supreme Court, 2005 Term - Leading Cases*, 120 HARV. L. REV. at 238.

266. *Id.* at 239 n.52. *See* Tulsa Prof'l Collection Servs., Inc., 485 U.S. at 484, 489-90; *Mennonite*, 462 U.S. at 798 ("[t]o begin with, a mortgagee possesses a substantial property interest that is significantly affected by a tax sale."); *Walker*, 352 U.S. at 115 ("[w]e [in *Mullane*] called attention to the impossibility of setting up a rigid formula as to the kind of notice that must be given; notice required will vary with circumstances and conditions."); T. Alexander Aleinikoff, *Constitutional Law in the Age of Balancing*, 96 YALE L.J. 943, 965-66 (1987) ("[t]he rise of balancing here is closely linked with the recognition of new forms of property protected by the due process clause. The importance of 'entitlements' such as welfare benefits . . . seemed to demand procedural protections against their deprivation, but the ever-increasing size of the welfare state made imposition of procedures a costly enterprise. Balancing provided a flexible strategy that took account of both interests.").

267. *The Supreme Court, 2005 Term - Leading Cases*, 120 HARV. L. REV. at 239. See *Flowers*, 126 S. Ct. at 1715.

268. *The Supreme Court, 2005 Term - Leading Cases*, 120 HARV. L. REV. at 239; *Flowers*, 126 S. Ct. at 1716 (the case involved "such an important and irreversible prospect as the loss of a house.").

269. *The Supreme Court, 2005 Term - Leading Cases*, 120 HARV. L. REV. at 239.

The second fault of the *Mullane* test is that it fails to take into account the differences between an individual seeking to inform another of some important information and the government doing the same.[270] While the government seeks efficiency and standardized procedures in its operations over the *ad hoc* decisionmaking system utilized by individuals, government may avail itself of greater resources and alternate types of notice more easily than an individual may.[271] "Because of this incongruence between doctrine and reality, it seems unlikely that the *Mullane* test is significant beyond its rhetorical force."[272]

Another challenge in terms of application of this case to future cases is that the *ex ante* principle is malleable depending on how the government procedure is defined.[273] For instance, the dissent argued that the *ex ante* principle would be violated by any requirement regarding events following the sending of notice by certified mail, since the procedure to be considered is sending notice by certified mail.[274] Alternatively, the majority viewed the sending of certified mail and the formation of a plan of action should the mail be returned unclaimed as the relevant procedure.[275] Thus, both procedures satisfy the *ex ante* principle, as could any procedure adequately defined.[276] This weak formula is likely to cause confusion for lower courts.[277]

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270. *Id.* at 239-40.

271. *Id.* at 240.

272. *Id.* However, *Mullane* is considered the predominant test for issues of due process. In *Dusenberry*, the Court stated that "Although we have invoked *Mathews* to evaluate due process claims in other contexts, we have never viewed *Mathews* as announcing an all-embracing test for deciding due process claims. Since *Mullane* was decided, we have regularly turned to it when confronted with questions regarding the adequacy of the method used to give notice." *Dusenberry*, 534 U.S. at 167-68.

273. *The Supreme Court, 2005 Term - Leading Cases*, 120 HARV. L. REV. at 240.

274. *Id.*

275. *Id.*

276. *Id* ("for example: certified mail is to be sent and if after the tax sale the taxpayer testifies under oath that he did not receive notice, the tax sale shall be voided.").

277. *Id.*

Perhaps more intriguing than the decision of the Court is the insight it gives into Chief Justice Roberts' Court.[278] This decision marked a split in the conservative Justices, with Chief Justice Roberts distancing himself from conservative Justices Scalia and Thomas and agreeing with Justices Stevens, Souter, Ginsburg, and Breyer.[279]

> The conservative Justices may have split because the question could not be resolved clearly by reference to the original understanding, or because the question of what notice is required is so unclear, given the multiple forms of mail available today, that the original understanding has little value. Without that common point of reference, the conservatives may have revealed a divergence in their approaches: while Justices Scalia and Thomas may be inclined to err on the side of judicial restraint, declining to extend the reach of constitutional rights beyond what precedent mandates, Chief Justice Roberts may be inclined to give priority to another favorite conservative cause-private property rights. The extent of this potential methodological split remains to be seen.[280]

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278. *Id.* at 242.

279. *The Supreme Court, 2005 Term - Leading Cases*, 120 HARV. L. REV. at 242; *See* Hadley Arkes, Playing Well with Others?, National Review Online, May 18, 2006, *available at* http://article.nationalreview.com/?q=NmUyMGQ0MDJlMWM3YjdkNDYzZmRkNjZkMTYzMWRlNjE=; Ashlea Ebeling, Justice Roberts Slams State's Property Seizure, Forbes.com, Apr. 27, 2006, *available at* http://www.forbes.com/businessinthebeltway/2006/04/27/supreme-court-property-foreclosure-cz_ae_0427scotus.html; Posting of D. Benjamin Barros to PropertyProf Blog, http://lawprofessors.typepad.com/property/2006/04/jones_v_flowers, Apr. 26, 2006.

280. *The Supreme Court, 2005 Term - Leading Cases,* 120 HARV. L. REV. at 242-43; *See, e.g.*, Tennessee v. Lane, 124 S. Ct. 1978, 2009 (2004) (Scalia, J., dissenting) ("[a]s a general matter we are ill advised to adopt or adhere to constitutional rules that bring us into constant conflict with a coequal branch of Government."); *See*, e.g., Kelo v. City of New London, 125 S. Ct. 2655, 2671 (2005) (O'Connor, J., dissenting) (joined by Rehnquist, C.J., and Scalia and Thomas, JJ.). *Dusenberry v. United States*, 534 U.S. 161 (2002), was the last due process notice case considered by the Supreme Court, and the decision favored the government, splitting 5-4 along the traditional liberal-conservative lines. However, Barros points out that *Dusenberry* was a case involving a prisoner, and "[Barros has] a personal view that it is a mistake to try to draw conclusions from prisoner

Chief Justice Roberts may have been reacting to the uproar over the prior decision of *Kelo v. City of New London*, or he may have simply believed that the state would have taken further action if it really wanted to notify Jones of the sale of his property, but whatever the reasons may be, this case signals a protection by the more liberal Justices and Chief Justice Roberts of the modest homes of those who may not be particularly wealthy or knowledgeable in matters of property.[281] After all, as Chief Justice Roberts said, "[t]here is no reason to suppose that the State will ever be less than fully zealous in its efforts to secure its tax revenue needs. The same cannot be said for the State's efforts to ensure that its citizens receive proper notice before the State takes action against them."[282]

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cases and apply them to other contexts." Posting of D. Benjamin Barros to PropertyProf Blog, *available at* http://lawprofessors.typepad.com/property/2006/04/jones_v_flowers (Apr. 26, 2006).

281. Hadley Arkes, *Playing Well with Others?*, National Review Online, May 18, 2006, *available at* http://article.nationalreview.com/?q=NmUyMGQ0MDJlMWM3YjdkNDYzZmRkNjZkMTYzMWRlNjE. Also, Professor Ben Barros points out that the liberals and conservatives took opposite sides on the question of due process protections for a property owner's right to maintain ownership of a home in *Jones v. Flowers* and *Kelo*. Although the constitutional questions were unique in each case, the fact remains that Justices who had favored property owners' rights in takings cases (*Kelo*) took a hard line against requiring the government to take additional, modest steps to notify a property owner of a tax sale (*Flowers*). Posting of D. Benjamin Barros to PropertyProf Blog, *available at* http://lawprofessors.typepad.com/property/2006/04/jones_v_flowers (Apr. 26, 2006).

282. Ashlea Ebeling, Justice Roberts Slams State's Property Seizure, Forbes.com, Apr. 27, 2006, *available at* http://www.forbes.com/businessinthebeltway/2006/04/27/supreme-court-property-foreclosure-cz_ae_0427scotus.html. Although, Ben Barros questions the financial rationality of governments and expresses his surprise with the State's position in *Jones v. Flower* since, "[t]ax forfeitures require a lot more effort than taking a few relatively minor steps to provide actual notice to the property owner. In part for this reason, many states require additional efforts to provide notice." Posting of D. Benjamin Barros to PropertyProf Blog, *available at* http://lawprofessors.typepad.com/property/2006/04/jones_v_flowers (Apr. 26, 2006).

C. Administrative Impact

This decision allows state governments to avoid the additional duties that arise when notice is sent by certified mail, such as realizing that the notice was not received when it is returned "unclaimed," by simply sending notice via regular mail, which the Court described as "an inexpensive and efficient mechanism that is reasonably calculated to provide actual notice."[283] However, Justice Thomas opined that regular mail "is arguably less effective than certified mail," so the use of regular mail might actually reduce procedural protections under the Due Process Clause.[284]

While it seems at face value that *Jones v. Flowers* represents an expansion of due process protections for property, the case does not necessarily require any greater protections than those which are already in place in many states.[285] In fact "many States already require in their statutes that the government do more than simply mail notice to delinquent owners either at the outset or as a followup measure if initial mailed notice is ineffective."[286]

The impact of the decision of the Majority here is that a State is now required to take reasonable additional steps to provide notice in order to satisfy the Due Process Clause when the state becomes aware that the notice it has attempted did not serve its purpose. Thus, this case heightens the standard for constitutional notification and makes it more likely that property owners will receive actual notice of actions taken by the State in relation to their property. This case

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283. *Tulsa Prof'l Collection Servs.,*485 U.S. at 490; 120 HARV. L. REV at 241.

284. *Flowers*, 126 S. Ct. at 1726 (Thomas, J., dissenting); 120 HARV. L. REV. at 241.

285. *The Supreme Court, 2005 Term – Leading* Cases, 120 HARV. L. REV. at 233.

> [W]hile advocates of greater procedural due process protections ostensibly won a victory, it was a small one at best, and possibly a step backward. Most states already meet the standard the Court formulated in *Flowers*, and those that do not may have an incentive to cut back their notice procedures rather than expand them.

286. *Flowers*, 126 S. Ct. at 1715; *Id.* at 1715 n.2 (listing states that already use procedures consistent with the decision in *Flowers*); *The Supreme Court, 2005 Term – Leading Cases*, 120 HARV. L. REV. at 242 n.68 (listing states not included in the *Flowers* opinion that already use procedures consistent with *Flowers*).

also seriously undermines any contention that notice by publication will serve in any capacity to defend a State's actions as satisfying the Due Process Clause.

However, as the dissent pointed out, this decision places on the states the burden of increasing their efforts to notify delinquent property owners. A state's system of requiring property owners to maintain current address information combined with authorization to send property notices to addresses of record via certified mail is no longer a viable system.

At the same time, the cost to a state will likely not be greatly increased as a result of this decision since the majority specifically stated that one way to remedy this problem would be to post notice and send notice via regular mail. These measures are not extreme, as regular mail is actually less expensive than certified mail. Thus, for a slight change in state procedure, and possibly a small added cost, property owners gain greater chances for notification and a decreased risk that their property will be sold by tax sale without their knowledge.

Actions beyond mailing notice, such as searching for a property owner's address in the phonebook or public records, are not required by this decision.[287]

VI. CONCLUSION

While upholding its prior principals that actual notice is not necessary, the Court reaffirmed the idea that notice must be reasonably calculated to inform the property owner of actions against his or her property, and held that a state must take further actions to provide notice where the state has received communications indicating that its notice attempts were unsuccessful. Such reasonable steps may take the form of posted notice or notice sent by regular mail.[288] Ultimately, this case represents an attempt by the

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287. Ashlea Ebeling, Justice Roberts Slams State's Property Seizure, Forbes.com, Apr. 27, 2006, *available at* http://www.forbes.com/businessinthebeltway/2006/04/27/supreme-court-property-foreclosure-cz_ae_0427scotus.html.

288. As a result of this decision, the case will be remanded to trial court, and Flowers will be reimbursed for the purchase price of the house. She will no longer have an interest in the property, and Jones will have the opportunity to clear the

Supreme Court to heighten due process protections. However, since many state statutes already comply with the holding in *Jones v. Flower*, the practical impact of this decision remains to be seen.

At the very least, this decision will allow property owners to rest assured that, in the event an action is taken against their property while they are on vacation, or at their principal residence, or ill, they will have a letter providing notice of the action waiting for them upon their return.

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title to his house by paying the back taxes owed to the state. *Id.* Also, the State of Arkansas changed its notification procedures after litigation in this case had begun, but it is unknown whether the statutory change was a result of this case. Posting of D. Benjamin Barros to PropertyProf Blog, http://lawprofessors.typepad.com/property/2006/04/jones_v_flowers (Apr. 26, 2006).