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Constitutional & Property Law—Fourteenth Amendment Due Process Clause & Notice to Be Heard— It Felt So Right but Was All So Wrong: United States Supreme Court Rules Arkansas's Tax-Foreclosure Notice Procedure Fails to Satisfy Due Process Clause When Certified Mail Notice Returns "Unclaimed." Jones v. Flowers, 126 S. Ct. 1708 (2006).

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CONSTITUTIONAL & PROPERTY LAW—FOURTEENTH AMENDMENT DUE PROCESS CLAUSE & NOTICE TO BE HEARD—IT FELT SO RIGHT BUT WAS ALL SO WRONG: UNITED STATES SUPREME COURT RULES ARKANSAS'S TAX-FORECLOSURE NOTICE PROCEDURE FAILS TO SATISFY DUE PROCESS CLAUSE WHEN CERTIFIED MAIL NOTICE RETURNS "UNCLAIMED." *Jones v. Flowers*, 126 S. Ct. 1708 (2006).

I. INTRODUCTION

For thousands of years, governments across the world have used property taxation as a source of revenue.[1] In ancient Egypt, ancient Greece, and the Roman Empire, the government sold the right to collect taxes to private individuals.[2] This practice eventually continued through England and carried over to the United States during the colonial period.[3] Although contemporary collection procedures have mostly abandoned third-party "tax farming," local governments in the United States still rely on real property taxation as a dominant source of revenue.[4] Rather than establish a clear, uniform model of tax collection, the federal government allows each state to develop its own form of governance, resulting in over 150 different tax collection systems within the United States.[5]

Unfortunately, not all property taxes are paid, and the county government must seize the delinquent taxpayer's property in order to fulfill the taxpayer's obligation.[6] Because the state government terminates the delinquent taxpayer's constitutional right to property interest, the Constitution requires the government to give the delinquent taxpayer notice of the pending action.[7] Although recently it appears that the Supreme Court has been increasing the due process requirements for notice before a tax foreclosure

1. Frank S. Alexander, *Tax Liens, Tax Sales, and Due Process*, 75 IND. L.J. 747, 752 (2000).
2. *Id.* at 758.
3. *Id.* at 759.
4. *Id.* at 752.
5. *Id.* at 748. State tax laws are local rather than federal because the federal system permits "experimentation among our various states in achieving the best forms of governance." *Id.*
6. ARK. CODE ANN. § 26-36-201 (2005), *amended by* Ark. Laws Act 706 (April 4, 2007); *see infra* Part II.B.
7. 3 RONALD D. ROTUNDA & JOHN E. NOWAK, TREATISE ON CONSTITUTIONAL LAW—SUBSTANCE & PROCEDURE § 17.8, at 104 (3d ed. 1999). The Due Process Clause of the Fourteenth Amendment provides that no state shall "deprive any person of life, liberty, or property, without due process of law." U.S. CONST. amend. XIV, § 1.

sale,[8] the Court has never clearly stated a due process standard for what constitutes constitutionally adequate notice.[9]

One of the Court's most recent attempts to provide guidelines for sufficient notice before a tax foreclosure proceeding was *Jones v. Flowers*,[10] in which the Court sought to answer the question whether due process requires a state to take additional reasonable steps to provide a property owner with notice of a tax sale when a certified mailing notice of the sale is returned to the state "unclaimed."[11] Although the Court determined that due process required the state to take additional reasonable steps,[12] it failed to provide lower courts with clear guidelines for sufficient additional steps. Instead of providing instruction for local governments and lower courts, the *Jones* decision threatens to unfairly burden state governments by creating additional requirements that they cannot define, thereby increasing the responsibility of the state.

First, this note explores the historical development of the due process notice requirement for tax foreclosure procedures.[13] The first part of the background section begins with the development of the notice requirement in the United States Supreme Court,[14] and the second part focuses on Arkansas's development of the notice requirement.[15] Next, this note discusses the case itself, beginning with a brief overview of the facts involved in *Jones*,[16] and then addressing the reasoning of Chief Justice Roberts's majority opinion[17] as well as Justice Thomas's dissenting opinion.[18] Finally, in the significance section, the note discusses some of the problems with the *Jones* case as well as some questions the Court leaves unanswered.[19] After providing some possible explanations for the deficiencies of the case,[20] the note out-

8. *See* Andrea Lee Negroni, *In the Courts*, 08-06 MTGE. COMPL. LETTER 1, 2006.
9. ROTUNDA & NOWAK, *supra* note 7, at 86 (Supp. 2007).
10. 126 S. Ct. 1708 (2006) ("*Jones II*").
11. *Id.* at 1712.
12. *See infra* Part III.B.1.
13. *See infra* Part II.
14. *See infra* Part II.A.
15. *See infra* Part II.B.
16. *See infra* Part III.A.
17. *See infra* Part III.B.1.
18. *See infra* Part III.B.2.
19. *See infra* Part IV.A. The Court failed to provide a clear, workable standard of what constitutes adequate notice and failed to answer what, if any, additional reasonable steps are required when notice is returned marked something other than "unclaimed." The Court also left unanswered what kind of burden the commissioner has in attempting to identify a property owner's correct mailing address.
20. *See infra* Part IV.B. These include the malleable nature of the due process principles on which the Court relies, as well as the Court's changing membership.

lines some of the immediate effects the Court's decision has within the state of Arkansas.[21]

II. BACKGROUND

This section first examines the United States Supreme Court decisions considering the adequacy of notice before *Jones v. Flowers*,[22] beginning with early developments around the turn of the twentieth century[23] and continuing with significant developments in Supreme Court case law from the 1950s[24] through the beginning of the twenty-first century.[25] Second, this section discusses Arkansas case law concerning the adequacy of notice before a tax foreclosure sale.[26] Finally, this section details the statutory requirements of the current tax foreclosure statute by explaining the process at both county and state levels at all significant times during the foreclosure procedure.[27]

A. Supreme Court Decisions

This subsection begins by examining the early development of the notice requirement under the Due Process Clause of the Fourteenth Amendment.[28] United States Supreme Court decisions in the late nineteenth and early twentieth centuries exhibited two main characteristics in determining the adequacy of notice under due process: (1) a reliance on the distinction between in personam and in rem jurisdiction,[29] and (2) a general deference for state court decisions through the recognition of state sovereignty.[30]

With the advent of automobiles and an increased number of people crossing state lines, the traditional notions of in personam and in rem jurisdiction began to break down,[31] paving the way for the Court's decision in *Mullane v. Central Hanover Bank & Trust Company*,[32] which marked a turning point from the last half-century of Supreme Court cases and which

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21. *See infra* Part IV.C. Immediate effects include increased litigation, an increased burden on state governments, and adding an additional burden to the attempt to cure urban blight.
22. *See infra* Part II.A.
23. *See infra* Part III.A.1.
24. *See infra* Part III.A.2.
25. *See infra* Part III.A.3–5.
26. *See infra* Part III.B.
27. *See infra* Part III.C.
28. *See infra* Part III.A.1.
29. *See infra* Part III.A.1.a.
30. *See infra* Part III.A.1.b.
31. Schaffer v. Heitner, 433 U.S. 186, 202 (1977).
32. 339 U.S. 306 (1950).

serves as one of the guideposts for due process considerations today.[33] After *Mullane*, the Court began to show less deference for state court decisions and began to increase the amount of notice due process required.[34] Although *Mullane* did not answer the question of what notice is due to third-party interests, the Court in later decisions attempted to provide an answer to this issue.[35] Following Justice Jackson's reasoning in *Mullane*, the Court also began to develop a balancing test for determining the adequacy of notice, but Chief Justice Rehnquist eventually rejected this test in *Dusenbery v. United States*,[36] four years before the Court considered *Jones v. Flowers*.[37]

1. *Early Development of the Notice Requirement*

a. The distinction between proceedings in personam and proceedings in rem

Early cases answering the question of what constituted sufficient notice under the Due Process Clause focused on the distinction between two different judicial jurisdiction avenues: (1) in personam jurisdiction, under which an individual had sufficient minimum contacts with the forum state, and (2) in rem jurisdiction, under which the subject matter of the dispute[38] was located within the forum state.[39] Proceedings in rem carried a less substantial notice requirement than proceedings in personam.[40] While in personam proceedings required the state physically to serve an individual within its borders, in rem proceedings required only service upon the thing itself and notice by publication.[41] Eventually, the Supreme Court held that service on the land itself was not required, reasoning that "technical service" on the land itself would be pointless and "add nothing to the procedure" when the owner of the land was unknown.[42]

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33. *See infra* Part III.A.2.
34. *See infra* Part III.A.3.
35. *See infra* Part III.A.4.
36. 534 U.S. 161 (2002).
37. *See infra* Part III.A.5.
38. The property was the subject matter of an in rem proceeding. Alexander, *supra* note 1, at 764.
39. *See id.* The Court's decision in *Pennoyer v. Neff* established the distinction between in personam and in rem proceedings. *See* Pennoyer v. Neff, 95 U.S. 714 (1877). An example of an in personam proceeding is an action to recover on a debt owed, while examples of in rem proceedings include actions to quiet title and foreclosure proceedings.
40. *See* Alexander, *supra* note 1, at 764.
41. Leigh v. Green, 193 U.S. 79, 91 (1904); *see* Alexander, *supra* note 1, at 764.
42. *Leigh*, 193 U.S. at 91 (noting that "publication of notice which described the land is certainly the equal in publicity of any seizure which can be made of it"). *Id.* at 91–92.

Court decisions in the late nineteenth and early twentieth centuries were generally very deferent to state requirements of notice by publication for in rem proceedings.[43] In one of the earliest cases to consider the adequacy of a state notice procedure under the Due Process Clause,[44] the Court held "a tax, assessment, servitude, or other burden . . . cannot be said to deprive the owner of his property without due process of law" as long as the state provides notice to the property owner.[45] Accordingly, a state statute that provided notice by publication to unknown owners of property was sufficient.[46]

In considering the notice required to enforce the payment of property taxes, the Court in *Winona & St. Peter Land Company v. Minnesota*[47] held that notice by publication to all interested parties was "suitable" and "sufficiently answer[ed] the demand of due process of law."[48] Similarly, in *Leigh v. Green*,[49] the Court held that proceedings to enforce the payment of taxes through a tax sale required only notice permitting all interested parties "to ascertain" that the property was for sale and allowing those parties to be heard, whether residents or non-residents of the state.[50] Proceedings in rem did not require actual or personal service, and if the state actually provided personal service to property owners, it was not out of necessity, but out of "tenderness to [the property holder's] interests."[51] Following both *Winona* and *Leigh*, the Court in *Longyear v. Toolan*[52] found that notice by publication to a resident property owner was sufficient because the property owner who failed to pay taxes for a year was presumed to know that tax sale proceedings were imminent.[53]

Even when an owner of property failed to receive notice because his name was misspelled on both mailed and published notices, the Court in *Grannis v. Ordean*[54] affirmed the Minnesota supreme court's holding of

43. *See* Wuchter v. Pizzutti, 276 U.S. 13, 24 (1928) (noting a "general trend of authority toward sustaining the validity of service of process, if the statutory provisions in themselves indicate that there is reasonable probability that if the statutes are complied with, the defendant will receive actual notice"); *see also* Ballard v. Hunter, 204 U.S. 241, 257 (1907) (stating the general principle that "[i]t is not the province of [the] court to interfere with the policy of the revenue laws of the state, nor with the interpretation given to them by their courts") (quoting Witherspoon v. Duncan, 71 U.S. (4 Wall.) 210 (1866)).

44. Davidson v. New Orleans, 96 U.S. 97 (1877).

45. *Id.* at 104–05.

46. *Id.* at 105–06.

47. 159 U.S. 526 (1895).

48. *Id.* at 538.

49. 193 U.S. 79 (1904).

50. *Id.* at 92–93.

51. *Id.* at 90 (quoting Cooley on Taxation, 2d ed. 527).

52. 209 U.S. 414 (1908).

53. *Id.* at 418. Justice Moody stated that the case was indistinguishable from *Winona*. *Id.*

54. 234 U.S. 385 (1914).

sufficient due process.[55] The Court focused on the distinction between in personam and in rem proceedings to conclude that the state must give constructive notice to the property owner through publication or mailing, and the notice must substantially comply with the statutory prescriptions.[56] Justice Pitney noted that substantial compliance with due process did not "impose an unattainable standard of accuracy," nor did it require "ideal accuracy" in affirming the state court's holding.[57]

b. State sovereignty

Just as the Supreme Court was deferent to the state's established notice system, it was also unsympathetic to non-resident property owners alleging that the state's notice system was insufficient under the requirements of due process. Implicit in these decisions, as well as the ones discussed above, was the notion of state sovereignty: a state must have power to control the property within its limits, and therefore it must be able to bring a non-resident into its courts.[58] In *Huling v. Kaw Valley Railway & Improvement Company*,[59] Justice Miller held that non-resident property owners retained duties and obligations to the forum state and could not exempt their property from state-imposed obligations.[60] According to Justice Miller, substituted service like notice of publication "ha[d] always been held to be a sufficient warning," and if the non-resident property owner failed to protect himself so as to receive notice by publication, then it was the non-resident's own fault for doing so.[61] Fifteen years after *Huling*, the Court in *Leigh v. Green* explicitly recognized the sovereign right of a state to collect taxes according to its own terms, therefore the federal government could interfere with the state's right

55. *Id.* at 398. The property owner's correct name was Albert B. Geilfuss, but the personal summons contained the names "Albert Guilfuss" and "Albert B. Guilfuss." *Id.* at 387–88. The sheriff returned the summons, which were then mailed to Albert Guilfuss and Albert B. Guilfuss. *Id.* at 388. Additional service by publication contained the names "Albert Guilfuss" and "Albert B. Guilfuss." *Id.* Except for the misnomer, the state complied with the statutory requirements of notice. *Id.* at 388–89.

56. *Id.* at 393.

57. *Grannis*, 234 U.S. at 395. In this case, the Court asked whether a letter addressed to "Albert Guilfuss" or "Albert B. Guilfuss" would be delivered to Albert B. Geilfuss with reasonable probability, and whether the published notices with the misspellings would come to the attention of Albert B. Geilfus or anyone who knew him. *Id.* at 397.

58. *See* Roller v. Holley, 176 U.S. 398, 404 (1900).

59. 130 U.S. 559 (1889).

60. *Id.* at 563–64.

61. *Id.*

only when necessary to protect the rights guaranteed under the Constitution.[62]

In *Ballard v. Hunter*,[63] non-resident property owners of Arkansas land contended that the state tax-sale statute discriminated against them by creating different notice requirements for resident and non-resident property owners in the event of a tax sale.[64] Although the statute required personal service for resident property owners, it allowed for notice by publication for non-resident property owners.[65] The Court recognized that the state could not give personal notice to every interested party and that indirect notice was usually sufficient in in rem proceedings.[66] Quoting *Huling*, Justice McKenna held that non-resident property owners had a duty to keep informed about their property interests in another state.[67] Because the state could assume that the property was cared for, indirect notice to non-resident property owners was sufficient.[68]

The Court continued to recognize the power and the right of the states to exercise "reasonable methods" of notice in *American Land Company v. Zeiss*,[69] noting that due process only restrains the states from acting so arbitrarily and unreasonably "as to impair or destroy fundamental rights."[70] Where a statute provided for the safeguard and protection of the rights of unknown claimants and gave notice that "would be reasonably likely" to provide notice to the interested parties, then notice was sufficient.[71] An imagined situation in which a property owner was "adversely affected" without receiving actual notice was not a sufficient objection to the adequacy of notice, but instead "denied the power of the state to deal with the subject."[72] Recognizing the duty of the non-resident to his property as established in

62. Leigh v. Green, 193 U.S. 79, at 89. The Court also held that a state's tax foreclosure notice was not required to meet the same standards as notice in "a suit at law." *Id.* (quoting Bell's Gap R. Co. v. Pennsylvania, 134 U.S. 232, 239 (1890)).

63. 204 U.S. 241 (1907).

64. *Id.* at 254.

65. *Id.*

66. *Id.* at 262.

67. *Id.* Justice McKenna also stated that property owners usually do keep themselves informed about their property interests in foreign states. *Id.*

68. *Id.* ("Of what concerns or may concern their real estate men usually keep informed, and on that probability the law may frame its proceedings: indeed, must frame them, and assume the care of property to be universal, if it would give efficiency to many of its exercises.").

69. 219 U.S. 47 (1911).

70. *Id.* at 66.

71. *Id.*

72. *Id.* at 66–67.

Huling,[73] the Court held that actual notice is not required in all cases, only that notice must be just and reasonable under the circumstances.[74]

Despite the Court's strong deference to state notice policies, the states did not have absolute power in determining what notice was sufficient for non-resident property owners. *Roller v. Holly*[75] made it clear that notice must be reasonable for its purpose, refusing to uphold a notice statute that required a non-resident to be subject to a hearing within five days of service.[76] Furthermore, in *McDonald v. Mabee*[77] the Court held that notice by publication in a local newspaper was not sufficient "to bind a person" who had permanently left the state.[78] According to *McDonald*, the least amount of notice required under "substantial justice" was the notice most likely to reach the interested party.[79]

2. *The* Mullane *Decision*

Mullane v. Central Hanover Bank & Trust Company[80] marked a significant departure from the case law developed almost a century before its decision because it proved many assumptions about notice and due process to be erroneous.[81] First, the Supreme Court refused to consider the distinction between in rem and in personam actions in determining the requirements of due process.[82] Second, while declining to establish a set of notice specifications to apply in every case, the Court established a reasonableness test based on the "particularities and practicalities" of an individual case.[83] Third, the Court refused to defer to the state court's decision of what constituted sufficient notice.[84] Scholars recognize the *Mullane* opinion, considered the seminal due process and notice case,[85] as "the keystone of the modern

73. *Id.* at 69. The Court also quoted extensively from *Ballard.*

74. *Id.* at 67.

75. 176 U.S. 398 (1900).

76. *Id.* at 409–10. The property in this case was located in Texas and the non-resident property owner lived in Virginia. *Id.* at 401–02. After looking at the time for appearance provisions in notice statutes from other states, the Court decided that the Texas statute's time period of five days was not reasonable. *Id.* at 411, 413.

77. 243 U.S. 90 (1917).

78. *Id.* at 92.

79. *Id.*

80. 339 U.S. 306 (1950).

81. 4A CHARLES ALAN WRIGHT & ARTHUR R. MILLER, FEDERAL PRACTICE AND PROCEDURE § 1074, at 365 (3d ed. 2002).

82. *Mullane*, 339 U.S. at 312.

83. *Id.* at 314.

84. *Id.* at 315.

85. Erwin Chemerinsky, *Upholding Due Process*, 42-JUL Trial 84, 84 (2006); Patrick J. Borchers, Jones v. Flowers*: An Essay on a Unified Theory of Procedural Due Process*, 40 CREIGHTON L. REV. 343, 344 (2007).

philosophy regarding the due process aspects of a notice requirement,"[86] and *Mullane* serves as the modern standard for testing the constitutionality of notice and service of process.[87]

The cause of action in *Mullane* arose after the Central Hanover Bank and Trust Company in New York ("the Bank") established a common trust fund under the laws of that state.[88] After petitioning the Surrogate's Court for settlement of the first common trust account, the Bank strictly complied with the state statute's[89] minimum notice requirements by publishing notice in a local paper.[90] The published notice included "the name and address of the trust company, the name and the date of establishment of the common trust fund, and a list of all participating estates, trusts, or funds."[91] Although the Bank was located in New York, not all of the beneficiaries in the common trust fund were residents of New York, and Kenneth Mullane, appointed as "special guardian and attorney for all persons known or unknown," contended that the notice to the beneficiaries was inadequate under the Due Process Clause of the Fourteenth Amendment.[92]

Justice Jackson began the majority opinion by considering the power of the state to hear the claim of nonresidents who received no personal service.[93] While the distinction between in rem and in personam actions may have served the legal system in the past,[94] the recognition of intangible forms of property as well as new forms of proceedings had eroded this "old procedural classification."[95] Accordingly, Justice Jackson held that the due

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86. WRIGHT & MILLER, *supra* note 81, at 368.

87. *See* Jeremy A. Colby, *You've Got Mail: The Modern Trend Towards Universal Electronic Service of Process*, 51 BUFF. L. REV. 337 (2003).

88. *Mullane*, 339 U.S. at 309.

89. The New York statute read:

After 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 and 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 interest 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 decedent or donor of any such estate, trust or fund.

N.Y. Banking Law § 100-c(12), *quoted in Mullane*, 339 U.S. at 309–10.

90. *Mullane*, 339 U.S. at 309–10.

91. *Id.* at 310.

92. *Id.* at 309–11.

93. *Id.* at 311.

94. Justice Jackson described the legal system under which this distinction operated as "quite unlike our own." *Id.* at 312.

95. *Id.*

process requirements of the Fourteenth Amendment did not depend on the in rem or in personam classification.[96]

Next, the Court turned to the requirements under the Due Process Clause, holding that, at a minimum, an individual must receive notice and an opportunity to be heard before the state can deprive him of life, liberty, or property.[97] Although personal service was always adequate, it was not always necessary, especially for nonresidents.[98] The type of notice required in a specific case did not depend on any set formula, but the notice used must comply with certain general principles of reasonableness.[99] Primarily, notice must be reasonably calculated to "apprise the interested parties of the pendency of the action," based on the "practicalities and peculiarities" of the case.[100] Furthermore, the means utilized to give notice must be more than a "mere gesture," but must be such "as one desirous of actually informing the absentee might reasonably adopt to accomplish [notice]."[101]

After considering these general notice principles, Justice Jackson held that notice by publication alone was not a reliable means of notice.[102] Although publication may be acceptable as a supplemental notice[103] or in cases in which there is no other possible or practical way to give more adequate notice, Justice Jackson reasoned that it was not sufficient in the case at hand where the beneficiaries' names and addresses were known.[104] Although recognizing that due process did not require "impracticable and extended searches" for unascertainable beneficiaries or beneficiaries with conjectural or future interests, according to Justice Jackson the trustee at least had the duty to send notice by mail to those beneficiaries whose names and ad-

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96. *Mullane*, 339 U.S. at 312. According to Justice Jackson, this classification was elusive, confused, and varied from state to state. *Id.*

97. *Id.* at 313. The Court recognized possible deprivation of property in two ways: (1) by cutting off the beneficiaries' "rights to have the trustee answer for negligent or illegal impairments of their interests," and (2) subjecting the beneficiaries' interest to diminution through fees and expenses of the proceeding. *Id.*

98. *Id.* at 313–14.

99. *Id.* at 314.

100. *Id.* Other reasonableness requirements include reasonably conveying the required information and "afford[ing] a reasonable time for those interested to make their appearance." *Id.*

101. *Mullane*, 339 U.S. at 315.

102. *Id.* at 315. Justice Jackson reasoned, in another often-quoted passage from this case, 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." *Id.* This chance is reduced if the resident lives outside the paper's circulation or if the notice does not name the interested parties, as was the case here. *Id.*

103. For instance, when a state seizes property within its own borders, notice by publication acts as an additional method of notice. The entry upon the real estate in the first place serves as notice to the property owner, who will assumedly guard his own property interest or place it in the hands of a caretaker. *Id.* at 316.

104. *Id.* at 319.

dresses it had at hand.[105] Justice Jackson stopped short of requiring personal service for every individual beneficiary, holding that notice reasonably certain to reach most of the interested parties would likely protect the interest of all beneficiaries.[106]

Although the *Mullane* decision made it clear that notice by publication alone would not be sufficient if the name and address of the interested party are known or easily ascertainable,[107] the case did not establish clear requirements for sufficient notice under the Due Process Clause.[108] What constituted sufficient notice under the *Mullane* reasonableness test depended on a variety of factors,[109] and it was unclear what steps the tax authorities had to take in order to identify interested parties to a suit.[110]

3. *Stepping Up the Requirements After* Mullane

After *Mullane*, state tax authorities could no longer rely on notice by publication alone, and the cases following *Mullane* upheld this rule.[111] In *City of New York v. New York, New Haven and Hartford Railroad Company*,[112] the Supreme Court held that notice by publication of a creditor bar order was not sufficient notice to the city of New York, where the city had imposed liens on the debtor railroad's property and the city never received a copy of the bar order.[113] The Bankruptcy Act required mailing copies of a bar order to creditors who had already appeared in court, while all other creditors were given "constructive notice" through publication.[114] The Court

105. *Id.* 317–18. Justice Jackson recognized ordinary mail as "an efficient and inexpensive means of communication." *Id.* at 319.

106. *Id.* at 319.

107. *Mullane*, 339 U.S. at 319.

108. Alexander, *supra* note 1, at 767.

109. *Id.* These factors included "the nature of the legal proceedings, the due diligence necessary to identify the interested parties and their addresses, the costs associated with such identification, and whether the notice is likely to reach and inform the interested parties of the proceeding." *Id.*

110. *Id.*

111. Marvin N. Bagwell, *Supreme Court Raises Bar for Due Process*, 185 N.J. L.J. 288 (2006); *see* Borchers, *supra* note 85, at 346 ("The consequence of Mullane [sic] and its progency was to strike down statute that relied entirely on notification methods such as newspaper publication, courthouse postings, postings on real estate[,] and the like.").

112. 344 U.S. 293 (1953).

113. *Id.* at 294, 296. The Court debated whether the city of New York was actually a creditor under the Bankruptcy Act. The majority, led by Justice Black, held that New York was a creditor of the railroad, while Justice Frankfurter, in a separate opinion joined by Justice Jackson, argued that New York was not a creditor because its claim was in rem. *Id.* at 296–97.

114. *Id.* at 294.

held that the city did not receive reasonable notice under the *Mullane* standard.[115]

The Court also began to overturn more state court findings of sufficient notice following *Mullane*. In *Walker v. City of Hutchinson*,[116] the Court overturned the Kansas Supreme Court, which had held that notice by publication as provided by the statute was sufficient under the Due Process Clause.[117] Noting that in many cases "notice by publication is no notice at all," the majority in *Walker* held that notice by publication did not meet the requirements of due process because the city knew the party's name.[118]

As a result of the *Mullane* holding, tax authorities actually began to mail notice to the interested party,[119] but these attempted methods of notice were not always sufficient. Where the state knew prior to sending the notice that the mailing of notice would be ineffective, the Court deemed the notice insufficient.[120] In *Covey v. Town of Somers*, the local government sought to foreclose against various delinquent properties, one of which Nora Brainard owned.[121] Although town officials knew Brainard was incompetent "to handle her affairs or to understand the meaning of any notice served upon her" and that she had no appointed guardian, the town followed the statutory notice requirements by sending her notice by mail, posting notice at the post office, and publishing notice in two local papers.[122] The Court held that because the town officials knew that Brainard was incompetent and without the protection of a guardian, compliance with the notice statute did not meet the *Mullane* reasonableness requirement.[123] Similarly, in *Robinson v. Hanrahan*, the Court held that Illinois did not provide notice "reasonably calculated" to apprise the prisoner of the proceedings when the state sent notice to the prisoner's house, even though the local government knew the individual was in prison.[124]

115. *Id.* at 294, 296.

116. 352 U.S. 112 (1956).

117. *Id.* at 114–15.

118. *Id.* at 116–17. In his dissenting opinion, Justice Frankfurter claimed that the landowner's assertion of monetary loss of his property due to the state's exercise of eminent domain was baseless. *Id.* at 120 (Frankfurter, J., dissenting).

119. Bagwell, *supra* note 111, at 288.

120. *See* Covey v. Town of Somers, 351 U.S. 141 (1956); Robinson v. Hanrahan, 409 U.S. 38 (1972) (per curiam).

121. *Covey*, 351 U.S. at 144.

122. *Id.* at 144, 146.

123. *Id.* at 146. In a separate opinion, Justice Frankfurter questioned the rulings of the New York state courts and why they would "sanction such a denial of due process." *Id.* at 147 (Frankfurter, J., concurring).

124. *Robinson*, 409 U.S. at 40 (per curiam).

Notice by posting also came under attack in the case of *Greene v. Lindsey*,[125] in which members of the sheriff's department posted notice of forcible entry and detainer on the doors of a tenant's apartment.[126] The Court noted that notice by posting generally provides a "constitutionally acceptable means of service," and is sometimes the only effective way of providing service short of personal service, because a property owner is presumed to "maintain watch over his property."[127] In most situations, therefore, the state may assume that notice by posting will provide sufficient warning to the interested party.[128] In the instance case, however, testimony suggested that the posted notices were "not infrequently" removed before coming to the attention of the intended recipient.[129] Because notice by mail was "efficient and inexpensive"[130] and could be addressed to the same location as the property in question, the state's reliance on ineffective notice by posting failed to pass the *Mullane* reasonableness test.[131] Although the Court struck down posted notice based on the facts in *Greene*, "it explicitly endorsed the use of posting in other circumstances," thereby leaving unanswered the question of "what circumstances differentiate permissible from impermissible posting."[132]

4. *Notifying Third Parties:* Mennonite *and* Tulsa Professional Collection Services

Although most courts in the country following *Mullane* held that notice by publication alone was inadequate when notice by mail was readily available, they were unable to establish a consensus on the state's duty, if any, to locate and notify third parties with an interest in the property.[133] The Supreme Court in *Mennonite Board of Missions v. Adams*[134] attempted to answer that question by holding that the state was required to provide a mortgagee of the property with actual notice of the tax sale, rather than relying

125. 456 U.S. 444 (1982).

126. *Id.* at 446.

127. *Id.* at 451–52.

128. *Id.* at 452.

129. *Id.* at 453.

130. In her dissenting opinion, Justice O'Connor stated that the majority "reach[ed] this conclusion despite the total absence of any evidence in the record regarding the speed and reliability of the mails." *Id.* at 456 (O'Connor, J., dissenting).

131. Greene v. Lindsey, 456 U.S. 444, 455–56 (1982) (quoting Mullane v. Central Hanover Bank & Trust Co., 339 U.S. 306, 319 (1950)). The Court declined to follow the *McDonald* test, which states that service "that is most likely to reach the defendant is the least that ought to be required." *Id.* at 455 (quoting McDonald v. Mabee, 243 U.S. 90, 92 (1917)).

132. Arthur F. Greenbaum, *The Postman Never Rings Twice: The Constitutionality of Service of Process by Posting After* Greene v. Lindsey, 33 AM. U. L. REV. 601, 603 (1984).

133. Alexander, *supra* note 1, at 767–68.

134. 462 U.S. 791 (1983).

on notice by publication and posting or mailed notice to the property owner.[135]

In *Mennonite*, the local county government initiated tax sale proceedings and provided notice as required under the Indiana statute by posting and publishing notice of the tax sale and mailing notice via certified mail to the owner of the property.[136] The mortgagee on record at the county recorder's office, however, never received notice of the sale and did not learn that the property had been sold until after the redemption period had passed.[137] After stating that the *Mullane* reasonableness test controlled the analysis of the present case, Justice Marshall noted that the mortgagee had a "substantial property interest . . . significantly affected by a tax sale," and therefore was entitled to reasonable notice.[138] Because the mortgage was recorded and the mortgagee was reasonably identifiable, constructive notice alone was not sufficient and should have been supplemented by mailing notice to the mortgagee or by personal service.[139] After evaluating the effectiveness of notice by mail, Justice Marshall concluded that notice "certain to ensure actual notice" is the minimal requirement for a proceeding adversely affecting "the liberty or property interests of *any* party."[140]

Although *Mennonite* may have resolved some lingering issues introduced by the *Mullane* decision,[141] the Court's heightened standards of due process only created new problems.[142] For instance, it was unclear what kind

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135. *Id.* at 799–800. In her dissenting opinion joined by Justices Powell and Rehnquist, Justice O'Connor found the majority's decision "unwarranted" because it "depart[ed] significantly from [the Court's] prior decisions" and applied a "novel and unjustified principle." *Id.* at 800–01 (O'Connor, J., dissenting).

136. *Id.* at 794 (majority opinion).

137. *Id.* The mortgagee did not even know that the property owner had failed to pay the taxes on the property as agreed to under the terms of the mortgage. *Id.* at 792.

138. *Id.* at 798.

139. *Id.* According to Justice Marshall, the state's attempted notices by publication, posting, and mailing to the property owner were not sufficient because they were not methods "such as one desirous of actually informing the [mortgagee] might reasonably adopt to accomplish it." *Id.* at 799 (quoting Mullane v. Central Hanover Bank & Trust Co., 339 U.S. 306, 315 (1950)). Justice Marshall also held that these methods of constructive notice failed in regards to the mortgagee because it would be unlikely for the property owner "who is not in privity with his creditor and who has failed to take steps necessary to preserve his own property interest" to give actual notice to the mortgagee. *Id.*

140. *Mennonite*, 462 U.S. at 799–800 (emphasis in original). Justice O'Connor called this a "novel and unjustified principle." *Id.* at 801 (O'Connor, J., dissenting).

141. According to Frank Alexander, *Mennonite* resolved three issues:

First, the standards of notice applicable to in personam jurisdiction are equally appropriate in in rem jurisdiction. Second, mortgagees, as holders of legally protected property interests, are entitled to the protections of due process just as much as owners. Third, names and addresses available from the deed records must be used to provide notice to interested parties.

Alexander, *supra* note 1, at 768.

142. *Id.* at 768.

of notice the state was obligated to give other potentially interested parties[143] and what kind of efforts constituted reasonable diligence in locating these parties.[144] Furthermore, after *Mennonite* some lower courts began to favor the governmental interest of efficiency in the collection of taxes over other interests, while other lower courts held efficiency subordinate to the requirements of due process.[145]

The Court addressed some of these issues in *Tulsa Professional Collection Services, Inc. v. Pope*,[146] which considered the amount of notice due to a creditor in the context of probate proceedings.[147] Building on the decision in *Mennonite*, Justice O'Connor's majority opinion concluded that the creditor's claim constituted a protected property interest deserving protection from "deprivation by state action."[148] Accordingly, Justice O'Connor held that known or reasonably ascertainable creditors must receive actual notice.[149] The state need not go so far as to locate every individual "who may conceivably have a claim," and the state may forgo actual notice for individuals with only "conjectural" claims.[150] The Court also rejected the claim that the need for efficiency "justifies less than actual notice," noting that it had rejected this argument in other contexts, such as in the administration of claims and in bankruptcy and trust proceedings.[151] The Court stopped short, however, of defining what constitutes "reasonably diligent efforts" in locating "reasonably ascertainable" third parties, instead remanding the case for the lower court to determine whether the present creditor would have been identified using such methods.[152]

143. Other interested parties could include "concurrent owners, holders of subordinate judgment liens, occupants of the property, [and] holders of easements and covenants." *Id.* Some lower courts have held that contract vendees and judgment creditors must receive notice by mail. Bagwell, *supra* note 111, at 288. Furthermore, many state statutes require that the occupants of property receive notice "as a matter of course." Baxter Dunaway, *Other Bars to Foreclosure—Requirement for Notice of Foreclosure*, 2 L. Distressed Real Est. § 15:27 (2006).

144. Alexander, *supra* note 1, at 768–69.

145. *Id.* at 769.

146. 485 U.S. 478 (1988).

147. *Id.* at 479.

148. *Id.* at 485.

149. *Id.* at 490. Notice by publication is sufficient only for creditors who are not "reasonably ascertainable" through "reasonably diligent efforts." *Id.* (quoting Mennonite Bd. of Missions v. Adams, 462 U.S. 791, 798 (1983)).

150. *Id.*

151. *Id.* at 490–91. Justice O'Connor cited *Mullane* as the authority on the rejection of the efficiency argument in trust claims. *Id.* at 491.

152. *Tulsa*, 485 U.S. at 491.

5. *Balancing Interests: Use and Discontinuance*

For a half century after the decision in *Mullane*, the Supreme Court's opinions indicated that judges were required to use both a reasonableness test and a balancing test in determining the adequacy of notice.[153] In *Mullane*, Justice Jackson balanced the interests of the state against the interests of the individual in establishing the reasonableness test, but he did not explicitly develop any kind of balancing test,[154] and at least one author has cited the failure of the *Mullane* standard to incorporate the balancing of government and individual interests as a shortcoming of the Court's decision.[155]

In *Mathews v. Eldridge*,[156] the Court introduced a three-part balancing test in order to determine the adequacy of notice before a termination of Social Security benefits:

> First, the private interest that will be affected by the official action; second, the risk of an erroneous deprivation of such interest through the procedures used, and the probative value, if any, of additional or substitute procedural safeguards; and finally, the Government's interest, including the function involved and the fiscal and administrative burdens that the additional or substitute procedural requirement would entail.[157]

Two years after the *Mathews* decision, the Court in *Memphis Light, Gas & Water Division v. Craft*[158] used the three-part balancing test to determine the "specific dictates of due process" in the case of a utility company terminating a customer's electric, gas, and water services.[159] The Court also used the *Mullane* reasonableness test to determine that notice was not sufficient when the utility company failed to give a customer information "on the availability of a procedure for protesting a proposed termination of utility services as unjustified."[160]

In her dissenting opinion for *Mennonite Board of Missions v. Adams*,[161] Justice O'Connor stated that, according to *Mullane*, the reasonableness of notice depended on a balancing between the state and the individual inter-

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153. ROTUNDA & NOWAK, *supra* note 7, at 26 (Supp. 2007).

154. Mullane v. Cent. Hanover Bank & Trust Co., 339 U.S. 306, 314 (1950) ("[a]gainst this interest of the State we must balance the individual interest sought to be protected by the Fourteenth Amendment."). *See* ROTUNDA & NOWAK, *supra* note 7.

155. *The Supreme Court, 2005 Term—Leading Cases*, 120 HARV. L. REV. 233, 238 (2006) [hereinafter "*Tax Sales*"].

156. 424 U.S. 319 (1976).

157. *Id.* at 335.

158. 436 U.S. 1 (1978).

159. *Id.* at 17.

160. *Id.* at 15.

161. 462 U.S. 791 (1983).

ests.[162] The state's interests included the collection of tax revenues "in whatever reasonable manner that it [chose]" and avoiding the burden of identifying and locating parties with legally protected property interests, while the individual's interests included protection under the Fourteenth Amendment and protecting one's own property.[163] Justice O'Connor concluded that due process did not require the state to "save the [individual] from its own lack of care."[164]

Justice O'Connor got the chance to use her version of the balancing test by writing for the majority in *Tulsa Professional Collection Services, Inc. v. Pope*.[165] In determining whether actual notice was justified, Justice O'Connor stated that the Court should consider "the practicalities of the situation" and the effect of actual notice on "important state interests."[166] Although the State had an interest in resolving probate proceedings expeditiously and without undue cost, Justice O'Connor noted that actual notice is not necessarily "inefficient or burdensome," especially service by mail.[167] Justice O'Connor concluded that "on balance," the requirement that the state send actual notice to known or reasonably ascertainable creditors was not "so cumbersome" as to hinder the efficiency of probate proceedings.[168]

Although the Court in *Mullane* and *Mennonite* failed to offer explicit standards for determining adequate notice under due process, Justice O'Connor's majority opinion in *Tulsa* seemed to establish the balancing test as a clear requirement for determining required notice.[169] In one of the last cases concerning the adequacy of notice before *Jones v. Flowers*, however, the Court explicitly denied application of the *Mathews* balancing test as described by Justice O'Connor.[170]

In *Dusenbery v. United States*, the Court examined the Federal Bureau of Investigation's (FBI) method for providing notice to a federal prisoner.[171] Although recognizing that the Court utilized the *Mathews* balancing test in other contexts, Chief Justice Rehnquist stated that the Court never consi-

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162. *Id.* at 806 (O'Connor, J., dissenting). According to Justice O'Connor, the majority created a rigid general principle to be applied in every case, a practice the Court expressly rejected in *Walker v. City of Hutchinson*. *Id.* at 802.

163. *Id.* at 806–07.

164. *Id.* at 809.

165. 485 U.S. 478, 484 (1988) (noting that since the *Mullane* decision "the Court has adhered to [the] principles . . . [of] balancing the 'interest of the State' and 'the individual interest sought to be protected by the Fourteenth Amendment'" (quoting Mullane v. Cent. Hanover Bank & Trust Co., 339 U.S. 306, 314 (1950))).

166. *Id.* at 489.

167. *Id.* at 489–90.

168. *Id.* at 490.

169. Alexander, *supra* note 1, at 778.

170. Dusenbery v. United States, 534 U.S. 161, 167–68 (2002).

171. *Id.* at 163.

dered *Mathews* as prescribing "an all-embracing test" for due process claims.[172] Instead, the Court returned to the "more straightforward" reasonableness test of *Mullane*.[173] After examining the prisoner's arguments, Chief Justice Rehnquist held that the Due Process Clause did not require "heroic efforts" on the part of the government (like exerting special effort to provide actual receipt of notice to an interested party), only "reasonably calculated" efforts to reach the interested party.[174]

Chief Justice Rehnquist also discussed Justice Ginsburg's dissenting opinion, particularly her argument that notice in the present case was insufficient because it was "substantially less likely to bring home notice" than a reasonable alternative.[175] Because the Bureau of Prisons had upgraded its delivery methods since the filing of this case, Justice Ginsburg reasoned that the government could have "tried harder" to give better notice through a feasible and more reliable alternative.[176] Chief Justice Rehnquist held, however, that the government should not be "penalized" because the Bureau of Prisons had upgraded its policies after the fact, pointing out that the Court had never found that "improvements in the reliability of new procedures" demonstrated inadequacies in the replaced methods.[177] Accordingly, the Court held that the FBI's delivery system satisfied the *Mullane* reasonableness test.[178]

B. Arkansas Law

The tax foreclosure procedure in Arkansas begins at the county level after the property owner fails to pay taxes on the property and the property

172. *Id.* at 167–68.

173. *Id.* The Court cited numerous cases that used *Mullane* when considering the adequacy of notice, all of which have been discussed above. *See Tulsa Prof'l*, 485 U.S. 478 (1988); Mennonite Bd. of Missions v. Adams, 462 U.S. 791, 798 (1983); Greene v. Lindsey, 456 U.S. 444 (1982); Robinson v. Hanrahan, 409 U.S. 38 (1972) (per curiam); Schroeder v. City of New York, 371 U.S. 208 (1962); Walker v. City of Hutchinson, 352 U.S. 112 (1956); New York City v. New York, N.H. & H.R. Co., 344 U.S. 293 (1953).

174. *Dusenbery*, 534 U.S. at 170.

175. *Id.* at 174 (Ginsburg, J., dissenting) (quoting *Mullane*, 339 U.S. at 314–15). While all four dissenting Justices agreed that the *Mullane* reasonableness test was the correct test use in determining the adequacy of notice, they argued that the procedures utilized in this case were not reasonably reliable. ROTUNDA & NOWAK, *supra* note 7, at 28 n.33.70 (Supp. 2007). All of the dissenters in *Dusenbery* joined Chief Justice Roberts in *Jones*. Linda Greenhouse, *Court Puts Teeth in 'Notice' Needed to Seize Property*, N.Y. TIMES, Apr. 27, 2006, at A18.

176. *Dusenbery*, 534 U.S. at 180 (Ginsburg, J., dissenting).

177. *Id.* at 172.

178. *Id.* at 172–73.

becomes delinquent.[179] After verifying the delinquent property and allowing the property owner to pay the delinquent taxes on the property, the county certifies the delinquent property to the Commissioner of State Lands (the "Commissioner") and thereby forfeits the property to the state.[180] At this point, the county's duties to the property end and the Commissioner completes the process of the tax foreclosure sale.[181] The Commissioner sends notice of sale by certified mail to all owners of the property one year before the sale date[182] and again sends notice to all interested parties six months before the sale.[183] At least thirty days before the date of the sale, the commissioner publishes notice of the sale of the property in the newspaper.[184]

Although Arkansas's statute provides a set procedure for tax foreclosure sales, the nature of the sale lends itself to litigation based on due process grounds, especially claims for lack of notice. First, this subsection discusses some of the general principles developed in Arkansas courts concerning the adequacy of notice.[185] The first general principle considered is the extent of due process required before the state may deprive an individual of his or her property.[186] The second general principle is strict compliance to statutory requirements and its effect on tax foreclosure sales.[187] Second, this subsection discusses a case with facts substantially similar to those in *Jones v. Flowers*.[188]

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179. ARK. CODE ANN. § 26-36-201 (2005), *amended by* Ark. Laws Act 706 (April 4, 2007). When the property becomes delinquent, the county collector publishes a list of delinquent properties, by name, in the newspaper for two consecutive weeks. *Id.* § 26-37-107 (Repl. 1997).

180. *Id.* § 26-37-101 (Repl. 1997). At this point, title to the property passes to the state. *Id.* This procedure makes Arkansas a "title theory" state rather than a "lien theory" state with respect to tax foreclosures. Interview with Carol Lincoln, Staff Attorney, Ark. Comm'r of State Lands, in Little Rock, Ark. (Feb. 8, 2007).

181. *Id.* § 25-37-101.

182. *Id.* § 26-37-301(a)–(b) (Repl. 1997). The commissioner is not required to give notice to an individual acquiring an interest in the property after the property is certified by the county to the Commissioner. *Id.* § 26-37-301(d).

183. *Id.* § 26-37-301.

184. *Id.* § 26-37-201(a)(1) (Repl. 1997). The notice must contain the assessed value of the land, the amount of taxes, interest, penalties and other costs due on the land, the name of the owner, the legal description and parcel number of the property, a list of recorded liens against the property known to the commissioner, and must indicate that the property will be sold to the highest bidder as long as the bid meets certain minimum requirements. *Id.* § 26-37-201(b), *amended by* 2007 Ark. Laws Act 706 (April 4, 2007).

185. *See infra* Part II.B.1.

186. *See infra* Part II.B.1.a.

187. *See infra* Part II.B.1.b.

188. *See infra* Part II.B.2.

1. *General Principles*

a. Due process

State of Washington v. Thompson[189] sets out Arkansas's due process requirements.[190] At a minimum, an individual must receive notice and a reasonable opportunity for a hearing before the state deprives the individual of his or her property.[191] Rather than requiring a "universally applicable" and inflexible procedure, due process depends on the circumstances and interests involved in the case.[192] Citing *Mathews*, the Arkansas Supreme Court in *Thompson* stated that the "fundamental requirement of due process [was] the opportunity to be heard at a meaningful time and in a meaningful manner," and that determining what notice is due depends on weighing the three *Mathews* factors: (1) the private interest affected; (2) the risk of "an erroneous deprivation" of the private interest in the property through the state's actions and the probative value of procedural safeguards; and (3) the state's interest in efficient administration of governmental affairs without undue procedural burdens.[193] The extent of due process afforded an individual depends on whether the private interest of avoiding the loss outweighs the state's interests.[194]

b. Strict compliance

In cases involving tax sales of delinquent property, Arkansas courts have consistently held that the state must strictly comply with the notice statute before depriving a property owner of his property.[195] Because of the

189. 339 Ark. 417, 6 S.W.3d 82 (1999).

190. *Id.* at 425–26, 6 S.W.3d at 87. Although *Thompson* involves the enforcement of child support payments, a later Arkansas case concerning the adequacy of notice before the sale of delinquent property cites *Thompson* as authority on the state's due process requirements. *See infra* Part II.B.2.

191. *Thompson*, 339 Ark. at 425, 6 S.W.3d at 87 (citing Owings v. Econ. & Med. Servs., 302 Ark. 475, 790 S.W.2d 438 (1990)).

192. *Thompson*, 339 Ark. at 425–26, 6 S.W.3d at 87 (citing South Cent. Dist., Pentecostal Church of God of America, Inc. v. Bruce-Rogers, 269 Ark. 130, 599 S.W.2d 702 (1980), *abrogated by* Leonards v. E.A. Martin Machinery Co., 321 Ark. 239, 900 S.W.2d 546 (1995)).

193. *Thompson*, 339 Ark. at 426, 6 S.W.3d at 87 (quoting Mathews v. Eldridge, 424 U.S. 319, 334–35 (1976)); *see* McCrory v. Johnson, 296 Ark. 231, 238–39, 755 S.W.2d 566, 569 (1988).

194. *Thompson*, 339 Ark. at 426, 6 S.W.3d at 87.

195. Tsann Kuen Enter. Co. v. Campbell, 355 Ark. 110, 117, 129 S.W.3d 822, 826 (2003); Jones v. Double "D" Props., Inc., 352 Ark. 39, 44, 98 S.W.3d 405, 407 (2003); Sanders v. Ryles, 318 Ark. 418, 423, 885 S.W.2d 888, 891 (1994); Pyle v. Robertson, 313 Ark. 692, 694, 858 S.W.2d 662, 663 (1993); Trs. of First Baptist Church v. Ward, 286 Ark. 238,

strict compliance standard, Arkansas courts have been unwilling to look outside the statute in an attempt to imply legislative intent. Instead, Arkansas courts will construe a statute "just as it reads" if the language of the statute is clear and unambiguous.[196] For instance, the court in *Wilson v. Daniels*[197] was concerned that the statute in that case did not provide a time period under which the commissioner must give notice of a tax sale, and the Arkansas Court of Appeals concluded that it could not require more than what was provided in the statute.[198]

As a result of this unwillingness to look outside the specific requirements of a statute, Arkansas courts have repeatedly held that the state is not required to take additional procedures after attempted notice by certified mail returns unclaimed.[199] In *Wilson*, the commissioner first sent notice of tax delinquency to a wrong address, which was returned "attempted not known," and then sent a second notice to the property owner's correct address, which was also returned "unclaimed or refused."[200] Although the property owner never received the notice of her tax delinquency, the trial court ruled that the commissioner had fully complied with the statute requiring the commissioner to notify the owner at the owner's last known mailing address, and the Arkansas Court of Appeals affirmed.[201]

Similarly, in *Jones v. Double "D" Properties*[202] the commissioner sent notice via certified mail to the property owner's last known mailing address, which was returned "unclaimed."[203] Citing *Wilson*, the Arkansas Supreme Court held that the commissioner strictly complied with the statute by "notify[ing] the owner, at the owner's last known address, by certified mail, of the owner's right to redeem."[204] The court noted that the commissioner must not "take every step possible to see that the letter arrives in the property owner's hand," only that the commissioner strictly comply with the statute's requirements.[205]

241, 691 S.W.2d 151, 152 (1985) (holding notice to be void because it was not given during the statutorily defined time period); Wilson v. Daniels, 64 Ark. App. 181, 183, 980 S.W.2d 274, 275 (1998).

196. *Double "D" Props.*, 352 Ark. at 46, 98 S.W.3d at 408.

197. 64 Ark. App. 181, 980 S.W.2d 274 (1998).

198. *Wilson*, 64 Ark. App. at 184, 980 S.W.2d at 276.

199. *See* Tsann Kuen Enter. Co. v. Campbell, 355 Ark. 110, 129 S.W.3d 822 (2003); Jones v. Double "D" Props., Inc., 352 Ark. 39, 98 S.W.3d 405 (2003); *Wilson*, 64 Ark. App. 181, 980 S.W.2d 274.

200. *Wilson*, 64 Ark. App. at 182–83, 980 S.W.2d at 275.

201. *Id.* at 184, 980 S.W.2d at 276.

202. 352 Ark. 39, 98 S.W.3d 405 (2008).

203. *Double "D" Props.*, 352 Ark. at 45, 98 S.W.3d at 408.

204. *Id.* at 45–46, 98 S.W.3d at 408–09.

205. *Id.* at 45, 98 S.W.3d at 408.

2. Tsann Kuen

In *Tsann Kuen Enterprises Company v. Campbell*,[206] before failing to pay its property taxes, the corporation property owner Tsann Kuen moved its corporate office without providing the new mailing address to the county tax collector.[207] After the county tax collector certified the property as delinquent, the commissioner sent notice of delinquency to Tsann Kuen's last known mailing address, which was returned marked "unclaimed" and "forwarding order expired."[208] Before selling the property, the commissioner performed a title search on the delinquent property, and the only address listed for Tsann Kuen was its old mailing address.[209] The commissioner sent notice by certified mail to the address generated by the title search, which was also returned marked "forwarding order expired."[210] After the sale, the purchasers of the property posted a "Notice of Unlawful Detainer" on the property and asked the trial court to remove Tsann Kuen from the property.[211]

Rather than simply contesting the validity of the tax sale because it never received notice, Tsann Kuen challenged the constitutionality of the notice statute, Arkansas Code Annotated section 26-37-301,[212] by alleging that the statute failed to provide sufficient notice to nonresident landowners.[213] After considering the United States Supreme Court cases *Mullane* and *Mennonite*, as well as discussing the state due process requirements set out in *Thompson*, the Arkansas Supreme Court balanced Tsann Kuen's interest in the property against the state's interest against "unduly burdensome" procedural requirements.[214] According to the court, the risk of the state erroneously depriving the property owner of his property through a tax sale was diminished by the requirement that a taxpayer provide his or her correct address in the event of an address change.[215] While the commissioner had strictly complied with the tax sale statute, Tsann Kuen had failed to notify

206. 355 Ark. 110, 129 S.W.3d 822 (2003).

207. *Id.* at 115, 129 S.W.3d at 825.

208. *Id.*

209. *Id.*

210. *Id.* at 116, 129 S.W.3d at 825. County and state officials also published notice in the local county and state newspapers. *Id.*

211. *Id.*, 129 S.W.3d at 825.

212. ARK. CODE ANN. § 26-37-301 (Repl. 1997).

213. *Tsann Kuen*, 355 Ark. at 117, 129 S.W.3d at 826. Tsann Kuen conceded that the commissioner strictly complied with the notice statute. *Id.*

214. *Id.* at 120, 129 S.W.3d at 828.

215. *Id.*, 129 S.W.3d at 828; *see* ARK. CODE. ANN. §§ 26-35-705 and 26-37-301 (Repl. 1997).

the tax collector of its new addressed as required by statute and had caused its own lack of notice.[216]

Next, the court rejected Tsann Kuen's argument that the statute provided insufficient notice because the legislature later amended section 26-37-301 to require the commissioner to provide actual notice in certain circumstances.[217] Under Arkansas case law, a litigant may "challenge the constitutionality of a statute [only] if the statute is unconstitutional as applied to the litigant;"[218] because the amended statute was not effective at the time of the suit, Tsann Kuenn could show no injury as a result of the application of the amended statute.[219] The court also refused to issue an advisory opinion "based on facts not in evidence and events that have not yet occurred," or to determine "speculative and abstract questions of law."[220] Finally, the court rejected Tsann Kuen's arguments that posting on the affected property should have been required in its case, due to the fact that other Arkansas statutes require notice by posting in other situations.[221] This was because the statute Tsann Kuen offered in support of this argument actually provided less notice than the applicable tax sale statute.[222]

Concluding its opinion, the court turned to other jurisdictions that have also held that mailed notice to the property owner's last known address is sufficient under the due process requirements.[223] The court also turned to foreign jurisdiction in support of its conclusion that the commissioner was not required to post notice on the delinquent property or mail notice to the physical address of the delinquent property after receiving the returned notices as "undeliverable."[224]

Two years after deciding *Tsann Kuen*, the Arkansas Supreme Court certified the *Jones* case in order to determine whether the commissioner provided adequate notice of a tax foreclosure sale to a property owner who failed to update his mailing address with the state.

III. THE CASE

The cause of action for *Jones v. Flowers* began in Arkansas in 1997, when Gary Jones failed to pay his property taxes on a house in which he

216. *Tsann Kuen*, 355 Ark. at 121, 129 S.W.3d at 829.
217. *Id.* at 122–23, 129 S.W.3d at 829.
218. Chapman v. Bevilacqua, 344 Ark. 262, 269, 42 S.W.3d 378, 382 (2001).
219. *Tsann Kuen*, 355 Ark. at 122, 129 S.W.3d at 829.
220. *Id.* at 122–23, 129 S.W.3d at 829–30.
221. *Id.* at 123, 129 S.W.3d at 830.
222. *Id.*
223. *Id.* at 125, 129 S.W.3d at 831.
224. *Tsann Kuen*, 355 Ark. at 126, 129 S.W.3d at 823.

used to live with his wife.[225] After the county certified the property as delinquent, the state sold the property to Linda Flowers.[226] Although the state attempted to notify Jones of the tax sale, he never received any of the state's certified mail and first learned about the tax sale after the state served a notice of eviction on his daughter.[227] Jones sued Mark Wilcox, the Arkansas Commissioner of State Lands ("the Commissioner"), in Arkansas state court, alleging the state did not provide him with adequate notice before the tax sale.[228] The trial court granted summary judgment in favor of the commissioner and concluded that the state's notice procedure complied with due process.[229] Jones appealed the trial court's decision, and the Arkansas Supreme Court affirmed.[230] The United States Supreme Court granted certiorari, and a five-to-three majority lead by Chief Justice Roberts reversed and remanded, holding that the state did not provide Jones with adequate notice when the certified mail returned "unclaimed,"[231] and that the state could have taken reasonable additional steps to provide adequate notice.[232] Justice Thomas disagreed, and in a dissent joined by two others he argued that the majority misconstrued court precedent[233] and that the majority's decision would create an undue burden on the state.[234]

A. Facts

In 1967, Arkansas resident Gary Jones purchased a house at 717 North Bryan Street in Little Rock, Arkansas, where he lived with his wife until they separated in 1993.[235] After the separation, Jones moved into an apartment while his wife continued living in the house.[236] For thirty years Jones made timely mortgage payments on the house, with the mortgage company

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225. *See infra* Part III.A.
226. *See infra* Part III.A.
227. *See infra* Part III.A.
228. *See infra* Part III.A.
229. *See infra* Part III.A.
230. *See infra* Part III.A.
231. *See infra* Part III.B.1.a.
232. *See infra* Part III.B.1.b.
233. *See infra* Part III.B.2.a.
234. *See infra* Part III.B.2.b.
235. *Jones II*, 126 S. Ct. 1708, 1712 (2006).
236. *Id.* Jones did not notify the tax collector of his new address when he moved to the apartment as was legally required by Arkansas code section 26-35-705. Respondent's Brief on the Merits at 4, *Jones I*, 126 S. Ct. 1708 (2006) (No. 04-1477); *see* Jones v. Flowers, 359 Ark. 443, 446, 198 S.W.3d 520, 522 (2004) ("*Jones I*"). While Jones admitted to this failure to notify, according to him this information was "readily ascertainable from multiple sources, including the Little Rock phone book, the Pulaski County roll of registered voters, and the state income tax rolls." Petition for a Writ of Certiorari at 3, *Jones II*, 126 S. Ct. 1708 (2006) (No. 04-1477).

paying the property taxes, but after the mortgage was paid off in 1997, the property taxes went unpaid.[237] As a result, on February 24, 2000, the property was certified as delinquent.[238]

Pursuant to Arkansas Code Annotated section 26-37-301, the commissioner sent a letter to Jones, via certified mail, at the North Bryan Street address in an attempt to notify Jones of the tax delinquency and his right to redeem.[239] Nobody signed for the letter, and after the letter remained unclaimed at the post office for fifteen days,[240] the post office returned the notice to the commissioner as "unclaimed."[241]

Two years later,[242] on April 1, 2002, the commissioner posted notice of a public sale of the North Bryan Street property in the *Arkansas Democrat-*

237. *Jones II*, 126 S. Ct. at 1712. The property taxes for the years 1997, 1998, 1999, and 2000 were unpaid. *Jones I*, 359 Ark. at 446, 198 S.W.3d at 522.

238. *Jones I*, 359 Ark. at 446, 198 S.W.3d at 522. Prior to the Pulaski County Collector's certification of forfeiture to the commissioner, the collector published redemption information and notice of pending forfeiture following a failure to redeem in the *Arkansas Democrat-Gazette* on January 18, 2000, pursuant to Arkansas code section 26-37-102. Brief for Respondent Linda K. Flowers at 1, *Jones II*, 126 S. Ct. 1708 (2006) (No. 04-1477). The collector also listed the North Bryan Street property along with other delinquent lands in a permanent record open to public inspection according to Arkansas code section 26-37-106. *Id.* Also prior to certification, the Pulaski County Assessor verified the assessment of taxes for 1997, as well as the name and last known address of the owner of the North Bryan Street property in accordance with Arkansas code section 26-37-103. *Id.* at 1–2.

239. *Jones II*, 126 S. Ct. at 1712. According to the notice, the North Bryan Street property would be subject to a public sale on April 17, 2002, unless Jones redeemed the property. *Id.* The packet of information the commissioner sent also contained a proposed Petition to Redeem and instructions on the right to redeem. Brief for Respondent Linda K. Flowers, *supra* note 238, at 2.

240. The post office attempted to deliver the written notice three times. Respondent's Joint Response Brief in Opposition to Petition for Writ of Certiorari at 2, *Jones II*, 126 S. Ct. 1708 (2006) (No. 04-1477).

241. *Jones II*, 126 S. Ct. at 1712. When certified mail is returned, a form accompanying the returned mail indicates the return either as: "(1) unclaimed; (2) refused; (3) attempted—not known; (4) insufficient address; (5) no such street/no such number; or (6) no such office in state." Respondent's Brief on the Merits, *supra* note 236, at 5 n.4. The form may also indicate that there is no forwarding address or that the one on record has expired. *Id.* "When certified mail is returned as unclaimed, this indicates that a written notice was left at the address, but that no party went to the post office to receive delivery of the mail." *Id.* According to Flowers, "[t]here was no indication on the face of the letter that a forwarding order for Mr. Jones had expired" or that the letter was undeliverable. Brief for Respondent Linda K. Flowers, *supra* note 238, at 3.

242. During this time, the Commissioner purchased a title report on the North Bryan property. Respondent's Joint Response Brief in Opposition to Petition for Writ of Certiorari, *supra* note 240, at 2. The title report showed, among other things, that (1) "Gary Kent Jones was the record owner of title to the property when it was certified to the Commissioner of State Lands in 2000;" (2) he continued to be the record owner on February 14, 2002; and (3) the 717 North Bryan address was the "address of record" for the owner of the property. Res-

Gazette.[243] Although no one submitted bids on the date of public sale,[244] Linda Flowers submitted a purchase offer on February 5, 2003.[245] On February 19, 2003, the commissioner sent another letter by certified mail to Jones at the North Bryan Street address, notifying Jones that his house would be sold on March 21, 2003, if he did not pay the delinquent taxes on the property and associated penalties.[246] This notice was also returned to the commissioner's office marked "unclaimed."[247] Flowers's purchase offer was approved,[248] and she purchased the home on May 28, 2003.[249] After the thirty-

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pondent's Joint Response Brief in Opposition to Petition for Writ of Certiorari, *supra* note 240, at 2–3.

243. *Jones II*, 126 S. Ct. at 1712. The *Arkansas Democrat-Gazette* was the newspaper of record in Pulaski County, where the property was located. The notice included the sale date of April 17, 2002, and redemption information. Respondent's Joint Response Brief in Opposition to Petition for Writ of Certiorari, *supra* note 240, at 3.

244. The lack of bids permitted the state to enter into a private sale on the property. *Jones II*, 126 S. Ct. at 1712; *see* ARK. CODE ANN. § 26-37-202(b) (LEXIS 2004), *amended by* 2007 Ark. Laws Act 706 (April 4, 2007).

245. *Jones I*, 359 Ark. 443, 447, 198 S.W.3d 520, 522 (2004). According to the commissioner and Flowers, the commissioner's office performed additional research at this point, which included "another review of real property records to confirm ownership and address information, a visit to the property to determine whether it still existed as described in the legal description and deed records, and a physical description of the house and the immediate vicinity." Respondent's Joint Response Brief in Opposition to Petition for Writ of Certiorari, *supra* note 240, at 3. The Joneses claimed that the state "made no effort to ascertain the correct mailing address for Mr. Jones or to provide effective notice of the impending sale," noting that the state could easily discover Jones's address and that the state did not post notice on the home when its personnel visited the property. Petition for a Writ of Certiorari, *supra* note 236, at 4.

246. *Jones I*, 359 Ark. at 447, 198 S.W.3d at 522.

247. *Jones II*, 126 S. Ct. at 1712. Not surprisingly, the commissioner and Flowers placed the blame on Mrs. Jones for her failure to inform her husband of the commissioner's attempts to notify him: "Mrs. Jones, living at the property, again failed and refused to pick up this mail." Respondent's Joint Response Brief in Opposition to Petition for Writ of Certiorari, *supra* note 240, at 4. Once again, there was no indication that "a forwarding order for Mr. Jones had expired" or that the letter was undeliverable. Brief for Respondent Linda K. Flowers, *supra* note 238, at 4.

248. The commissioner approved Flowers's offer on April 11, 2003, and the Arkansas Attorney General approved Flowers's offer on May 28, 2003. Respondent's Joint Response Brief in Opposition to Petition for Writ of Certiorari, *supra* note 240, at 4.

249. *Jones I*, 359 Ark. at 447, 198 S.W.3d at 522. The commissioner issued Flowers a Limited Warranty Deed. Respondent's Joint Response Brief in Opposition to Petition for Writ of Certiorari, *supra* note 240, at 4. Flowers purchased the house for $21,042.15, and at trial the parties stipulated that the house had a fair market value of $80,000. *Jones II*, 126 S. Ct. at 1713.

day statutory redemption period passed,[250] the commissioner posted an unlawful detainer notice at the house.[251]

After learning of the tax sale, Jones initiated a lawsuit in Arkansas state court against the commissioner and Flowers.[252] Jones alleged that the sale of his home was invalid and constituted the taking of his property without due process because the commissioner failed to provide him with actual notice of the tax sale or his right to redeem the property.[253] On August 20, 2003, Flowers filed a counterclaim for unlawful detainer[254] and later filed a motion for summary judgment, arguing that the notices sent by the State "provided constitutionally sufficient notice."[255] The commissioner filed a similar motion for summary judgment on November 17, 2003.[256] Subsequently, Jones filed a cross-motion for summary judgment on the basis that the commissioner admitted having no knowledge of Jones receiving the two notices.[257]

On January 14, 2004, the trial court found that Arkansas code section 26-37-301,[258] which outlines the notice procedure the commissioner fol-

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250. ARK. CODE ANN. § 26-37-202(e) (LEXIS 2004), *amended by* 2007 Ark. Laws Act 706 (April 4, 2007).

251. *Jones II*, 126 S. Ct. at 1713. Court opinions and documents differ on how the commissioner actually served the unlawful detainer notice. According to the United States Supreme Court opinion, the commissioner served Jones's daughter with the notice. *Id.* According to the Arkansas Supreme Court, however, the notice was posted on the door of the North Bryan Street house. *Jones I*, 359 Ark. at 447, 198 S.W.3d at 522. Similarly, Jones's Petition for Writ of Certiorari also states that the commissioner posted notice on the door of the house. Petition for a Writ of Certiorari, *supra* note 236, at 4. Jones changed his position in his brief for the Supreme Court, however, by stating that the commissioner served his daughter Cindy Edrington with notice. Brief for Petitioner at 4, *Jones II*, 126 S. Ct. 1708 (2006) (No. 04-1477).

252. *Jones II*, 126 S. Ct. at 1713. Jones filed his complaint on July 28, 2003, in the Circuit Court of Pulaski County, Arkansas, Sixth Division (CV 2003-8565). Respondent's Brief on the Merits, *supra* note 236, at 6.

253. *Jones I*, 359 Ark. at 447, 198 S.W.3d at 522. Jones also challenged Arkansas code section 26-37-301, but did not challenge any other section of the code, nor did he attack "the statutory scheme as a whole." Respondent's Joint Response Brief in Opposition to Petition for Writ of Certiorari, *supra* note 240, at 5.

254. *Jones I*, 359 Ark. at 447, 198 S.W.3d at 522. In his answer to Flowers's counterclaim, Jones "admitted that he received actual notice of [the] notice to vacate, posted on the property on July 2[, 2003]." *Id.* In an amended complaint filed September 17, 2003, Jones added his wife as a plaintiff because she was living in the house. *Id.* By the time the case reached the United States Supreme Court, Mrs. Jones was no longer a party to the action. Respondent's Brief on the Merits, *supra* note 218, at 6 n.7.

255. *Jones I*, 359 Ark. at 447, 198 S.W.3d at 522.

256. *Id.*

257. *Id.* "Attached to the motions were affidavits by Mr. Jones and Mrs. Jones averring that they never received notice of their right to redeem the property after the tax sale." *Id.* Jones also claimed that he was entitled to actual notice for failure to pay his taxes. Respondents' Brief on the Merits, *supra* note 236, at 6–7.

258. ARK. CODE ANN. § 26-37-301 (Repl. 1997), *amended by* 2007 Ark Laws Acts 706, 1036, and 827 (2007). Effective January 1, 2004, this statute was amended "to require per-

lowed, "complied with the constitutional due process requirements."[259] The trial court granted Flowers's and the commissioner's motions for summary judgment, thereby denying Jones' motion.[260] The court also granted Flowers's counterclaim for unlawful detainer, entitling her to immediate possession of the North Bryan Street property.[261] Jones then appealed, and the Arkansas Supreme Court certified this case.[262]

On appeal, Jones argued that Arkansas Code Annotated section 26-37-202(e) was unconstitutional "because it [did] not require notice of the property owner's right to redeem after the tax sale,"[263] and that the trial court should have ruled that the state was required "to locate Mr. Jones's correct address after the tax-sale notices were returned to the State unclaimed."[264] On November 18, 2004, the Arkansas Supreme Court affirmed[265] the trial court's order, holding that the trial court did not err in concluding that the commissioner had complied with section 26-37-301 by attempting to provide notice through certified mail and publication, and upholding the trial

sonal service of process on the owner of a homestead, if the State fails to receive proof that the notice sent by certified mail was received by the owner." Brief for Petitioner, *supra* note 251, at 5 n.3. The amendment does not apply to this case. *Id.*

259. *Jones II*, 126 S. Ct. at 1713.

260. *Jones I*, 359 Ark. at 448, 198 S.W.3d at 522.

261. *Id.*

262. Brief of Petitioner, *supra* note 251, at 5; Petition for Writ of Certiorari, *supra* note 236, at 5. The Arkansas Supreme Court heard the appeal without oral argument. Respondents' Joint Response Brief in Opposition to Petition for Writ of Certiorari, *supra* note 240, at 5.

263. The Arkansas Supreme Court did not address this argument because it was not preserved for appellate review. *Jones I*, 359 Ark. at 448–49, 198 S.W.3d at 523. In order for an issue to be considered on appeal, a party must obtain a ruling on the issue. *Id.* In this case, the failure of the trial court to rule on the issue of "whether [§] 26-37-202(e) is unconstitutional for failing to include a notice requirement" acted as a procedural bar to appellate consideration of the issue. *Id.* at 448, 198 S.W.3d at 523. Furthermore, the Arkansas Supreme Court stated that "constitutional arguments must be raised and fully developed in the trial court." *Id.* While Jones raised the issue of the constitutionality of Arkansas Code Annotated section 26-37-202(e) in his "Brief in Support of Motion for Summary Judgment" and "Plaintiff's Memorandum to Defendant's Response to Motion for Summary Judgment," the trial court did not address the issue, and it would have been inappropriate for the court to do so. *Id.*

264. *Id.* at 449, 198 S.W.3d at 523. Jones argued that due process required the commissioner "to conduct a reasonable search of public records in an attempt to ascertain Mr. Jones's correct address before selling his property." Respondents' Brief on the Merits, *supra* note 236, at 7. The Arkansas Supreme Court agreed with Flowers and the commissioner that due process only requires an attempt to provide actual notice. *Jones I*, 359 Ark. at 449, 198 S.W.3d at 523. Not only did Jones fail to comply with Arkansas code section 26-35-705 by failing to notify the tax collector of his new address when he moved out of the North Bryan Street house, but his brief also admitted that due process does not require actual notice. *Id.* at 453, 198 S.W.3d at 526.

265. The court unanimously affirmed the decision. Brief for Respondent Linda K. Flowers, *supra* note 238, at 6; Respondents' Joint Response Brief in Opposition to Petition for Writ of Certiorari, *supra* note 240, at 5.

court's finding that the tax sale was valid.[266] Citing the United States Supreme Court, the Arkansas Supreme Court stated that due process requires that notice be reasonably calculated "to apprise interested parties of the pendency of [an] action and afford them an opportunity to present their objections."[267] The court held that the state's notice procedures complied with this standard,[268] and therefore due process did not require the commissioner to provide Jones with actual notice.[269]

Jones filed a Petition for Rehearing in the Arkansas Supreme Court, which the court denied unanimously without argument.[270] On September 27, 2005, the United States Supreme Court granted certiorari[271] to resolve the issue of "whether the Due Process Clause requires the government to take additional reasonable steps to notify a property owner when notice of a tax sale is returned undelivered."[272]

B. Reasoning

In *Jones v. Flowers*,[273] the United States Supreme Court sought to determine whether a state is required to take additional reasonable steps to provide a property owner with notice of a tax sale when attempted notice of the sale is returned to the state "unclaimed."[274] In chief Justice Roberts's majority opinion,[275] the Court began its analysis by examining the adequacy of Arkansas's notice system before selling an individual's home by a tax sale.[276] After concluding that the state should have taken additional reasonable steps after receiving the returned notice, the Court discussed whether such additional steps were available.[277] Although stopping short of prescribing exactly what additional steps the state should take,[278] the Court made certain suggestions in concluding that additional reasonable steps were

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266. *Jones I*, 359 Ark. at 454, 198 S.W.3d at 527.

267. *Id.* at 450, 198 S.W.3d at 524 (quoting *Mullane*, 339 U.S. at 314 (1950)).

268. Petition for a Writ of Certiorari, *supra* note 236, at 5.

269. *Jones II*, 126 S. Ct. 1708, 1713 (2006).

270. Brief for Respondent Linda K. Flowers, *supra* note 238, at 6; Respondents' Joint Response Brief in Opposition to Petition for Writ of Certiorari, *supra* note 236, at 5–6.

271. Jones v. Flowers, 126 S. Ct. 35 (2005).

272. *Jones II*, 126 S. Ct. at 1713.

273. 126 S. Ct. 1708 (2006).

274. *Id.* at 1712.

275. Chief Justice Roberts was joined by Justices Stevens, Souter, Ginsburg and Breyer. Justice Alito took no part in the consideration or decision of the case. *Id.*

276. *See infra* Part III.B.1.a.

277. *See infra* Part III.B.1.b.

278. *Jones II*, 126 S. Ct. at 1718 (noting that it is not the Court's responsibility "to prescribe the form of service that the [government] should adopt" (quoting Greene v. Lindsey, 456 U.S. 444, 455 (1982)).

available and dismissed the commissioner's arguments against additional requirements.[279]

In a dissent joined by two others,[280] Justice Thomas argued that Arkansas's notice system satisfied the requirements of the Due Process Clause, and therefore the Constitution did not require the state to take additional reasonable steps after receiving the returned notice.[281] After distinguishing the present case from others the majority cited in reaching its decision, Justice Thomas concluded that the additional methods the majority proposed were unnecessary, burdensome, impractical, and unlikely to achieve the desired result of providing more effective notice.[282] Because the property owner failed to protect his own interest, Justice Thomas reasoned that the state should not be burdened with additional obligations.[283]

1. *Chief Justice Roberts's Majority Opinion*

a. The inadequacy of the Arkansas notice system

In determining the adequacy of Arkansas's notice system, the Court first examined what kind of notice due process requires when the state seeks to take an individual's property.[284] The state does not have to provide actual notice to the property owner, but only notice that is "reasonably calculated" to inform the property owner of the pending tax sale and to allow the property owner the opportunity to object to the sale.[285] If the notice is reasonably calculated to reach the intended recipient at the time it is sent, then the notice is sufficient.[286] According to the Court, however, this case presented a new issue of whether the government has an additional responsibility to provide notice after it learns that its first attempt to provide notice failed.[287]

In order to answer what it considered a "new wrinkle," the Court examined opinions from the courts of appeals and state supreme courts consi-

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279. *See infra* Part III.B.1.b.

280. Justice Thomas was joined by Justices Scalia and Kennedy in his dissenting opinion. *Jones II*, 126 S. Ct. at 1721.

281. *See infra* Part III.B.2.a.

282. *See infra* Part III.B.2.b.

283. *See infra* Part III.B.2.b.

284. *Jones II*, 126 S. Ct. at 1713–14.

285. *Id.* According to the commissioner, the state satisfied the due process requirement when it sent Jones notice via certified mail, because this method of notice was reasonably calculated "to apprise Jones of the impending tax sale." *Id.* at 1714.

286. *Id.* at 1714 (noting that in the cases reaching this decision, the government had sent notice but heard nothing back suggesting that the notice had failed).

287. *Id.* According to the Court, the notice required in a particular case "will vary with circumstances and conditions," and therefore it must determine whether the knowledge on the part of the government that its attempted notice failed constitutes a "circumstance and condition that varies the notice required." *Id.* (internal quotations omitted).

dering the new issue and found that most of these courts require the state government to take additional steps after the government discovers its attempted notice failed.[288] Likewise, the Court noted that many state statutes require the government to go beyond "simply mail[ing] notice."[289] Although the Court itself had considered the adequacy of notice in other situations,[290] this case involved the adequacy of notice "prior to the [s]tate extinguishing a property owner's interest in a home."[291] After stating the rule that the means used to give notice "must be such as one desirous of actually informing the absentee might reasonably adopt to accomplish it,"[292] the Court concluded that a person actually "desirous" of informing a property owner of a tax sale on his home would do more than nothing when certified notice of the sale was returned unclaimed.[293] Because the state in this case took no further action when the notice was returned, it did not act "[as] someone 'desirous of actually informing' Jones would do."[294]

Next, in considering the adequacy of notice in the present case, the Court turned to other cases in which it required the government to consider an intended recipient's specific information when sending notice, even though the "statutory scheme" was ordinarily sufficient.[295] For instance, if

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288. *Id.*

289. *Id.* at 1715. Additional required steps include giving notice to the occupants of the property, posting notice "on the property or at the property owner's last known address," or making a "diligent inquiry" to find the correct address of a property owner when the notice is returned. *Id.* at 1715 n.2.

290. The Supreme Court had previously considered the adequacy of notice in relation to "beneficiaries of a common trust fund, . . . a mortgagee, . . . owners of seized cash and automobiles, . . . creditors of an estate, . . . and tenants living in public housing." *Jones II*, 126 S. Ct. 1708, 1715 (2006).

291. *Id.*

292. *Id.* (quoting Mullane v. Central Hanover Bank & Trust Co., 339 U.S. 306, 315 (1950)).

293. *Id.* at 1716. The Court then gave a very eloquent example in order to highlight its conclusion:

> If the Commissioner prepared a stack of letters to mail to delinquent taxpayers, handed them to the postman, and then watched as the departing postman accidentally dropped the letters down a storm drain, one would certainly expect the Commissioner's office to prepare a new stack of letters and send them again. No one "desirous of actually informing" the owners would simply shrug his shoulders as the letters disappeared and say "I tried."

Id.

294. *Id.* The Court reasoned that someone will ordinarily try to resend a returned letter, especially if the subject matter of the letter is important, and that the state should have known that Jones was "no better off than if the notice had never been sent" when the post office returned the notice letter unclaimed. *Id.* (quoting Malone v. Robinson, 614 A.2d 33, 37 (D.C. 1992)).

295. *Id.*

the state knew that the property owner was in prison[296] or that the property owner was incompetent,[297] the Court held that the normal notice procedures were insufficient because the government knew that ordinary notice would be ineffective.[298] Knowledge on the part of the government that notice would be ineffective constituted a "praticalit[y] and peculiarit[y]" that the Court considered in determining the constitutional adequacy of the notice.[299] Even though the commissioner in this case did not discover that the notice was ineffective until after he sent it, the Court determined that it should take into account the state's knowledge of ineffective notice in the same way it had in previous cases determining the adequacy of the notice.[300]

After briefly discussing how to assess the constitutionality of a particular notice procedure,[301] the Court noted three of the commissioner's arguments that due process did not require additional notice after the post office returned the letter unclaimed.[302] First, because the state sent notice to an address that Jones had a legal obligation to update, Jones's failure to update his address as required by statute forfeited his right to constitutionally sufficient notice.[303] Although the Court agreed with the commissioner and noted that the Arkansas statute requiring the address change[304] strongly supported the argument that notice sent to the North Bryan Street address was reasonably calculated to reach Jones, the Commissioner was still unreasonable in doing nothing when the notice returned as unclaimed.[305]

According to the commissioner's second argument, the government put Jones on inquiry notice that it would take his property after he failed to pay his property taxes and did not receive a property tax bill.[306] The Court dis-

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296. *See* Robinson v. Hanrahan, 409 U.S. 38, 40 (1972). The Court found that "forfeiture proceedings sent to a vehicle owner's home address [were] inadequate." *Jones II*, 126 S. Ct. 1708, 1716 (2006).

297. *See* Covey v. Town of Somers, 351 U.S. 141, 146–47 (1956). Mailing, posting, and publicizing notice of foreclosure was inadequate. *Jones II*, 126 S. Ct. at 1716.

298. *Jones II*, 126 S. Ct. at 1716.

299. *Id.* (quoting Mullane v. Central Hanover Bank & Trust Co., 339 U.S. 306, 314–15 (1950)).

300. *Id.* The majority dismissed the dissent's concern that the state did not discover that the notice was ineffective until "long after the fact," because the state had to wait two years before taking possession of the property. *Id.*

301. *Id.* at 1717 (noting that "the failure of notice in a specific case does not establish the inadequacy of the attempted notice," and that the constitutionality of a notice procedure "is assessed *ex ante*, rather than *post hoc*").

302. *Id.* After first stating the commissioner's three arguments, the Court held that they were insufficient in relieving the state "of its constitutional obligation to provide adequate notice." *Id.*

303. *Id.*

304. *See* ARK. CODE ANN. § 26-35-705 (Repl. 1997).

305. *Jones II*, 126 S. Ct. at 1717.

306. *Id.*

missed this argument through one of its previous holdings, which stated that "knowledge of delinquency in the payment of taxes is not equivalent to notice that a tax sale is pending."[307] The government must still provide constitutionally sufficient notice even though the property owner knows that the government can take his property when his property taxes go unpaid.[308] Furthermore, because a delinquent taxpayer may redeem his property, the failure to pay taxes alone cannot justify inadequate notice.[309]

For its third and final position, the commissioner argued that the state could assume that Jones left his property in the hands of someone who would alert Jones if his property was in danger.[310] Although the commissioner's assumption was based on Court precedent, the Court distinguished the present case from other seizures where the absent owner would quickly realize his dilemma, such as "libel of a ship, attachment of a chattel[,] or entry upon real estate in the name of law."[311] According to the Court, a property occupant is not required to serve as the owner's agent in all situations, especially in the present case where the occupant is prevented from receiving certified mail for the owner without the owner's signature.[312] Furthermore, a certified mail slip from the commissioner in no way obviates the danger that the owner might lose his property.[313] Although the Court recognized that Jones "should have been more diligent" in taking care of his property, it concluded that the state was still required under due process to provide Jones with adequate notice before seizing his property.[314]

b. Additional reasonable steps

Having concluded that the state "should have taken additional reasonable steps to notify Jones," the Supreme Court next considered whether any

307. *Id.* (quoting Mennonite Bd. of Missions v. Adams, 462 U.S. 791, 800 (1983)).

308. *Id.* The Court used an analogy to highlight this point. Even though most people know that they have the "right to remain silent" when arrested, that does not mean that a police officer is not required to provide an arrestee with his *Miranda* warnings. *Id.* at 1717–18.

309. *Id.* at 1718.

310. *Id.* ("[T]he [s]tate can assume an owner leaves his property in the hands of one who will inform him if his interest is in jeopardy.") (citing Mullane v. Central Hanover Bank & Trust Co., 339 U.S. 306, 316 (1950)).

311. *Jones II*, 126 S. Ct. at 1718 (quoting *Mullane*, 339 U.S. at 316).

312. *Id.*

313. *Id.* The purpose of the certified mail would be unknown to the occupant, and the commissioner might write to property owners on other matters like state parks or highway construction. *Id.*

314. *Id.* ("[B]efore forcing a citizen to satisfy his debt by forfeiting his property, due process requires the government to provide adequate notice of the impending taking.") (citing *Mennonite*, 462 U.S. at 799).

additional steps were practically available.[315] After stating that the Court has no duty actually to prescribe a form of notice for the government, the Court concluded that several additional reasonable steps were available to the state.[316]

The first additional reasonable step the Court suggested was resending the notice by regular mail, which would eliminate the problem of requiring the recipient's signature.[317] Although the commissioner asserted that certified mail was more likely to provide actual notice to the property owner, the Court held that certified mail would be less likely to provide actual notice in some circumstances.[318] Regular mail, on the other hand, increases the chance of notice when the property owner has moved, because the occupant might leave the property owner's correct address for the postman or might notify the property owner directly of the notice.[319]

Two other suggested additional reasonable steps were: (1) posting notice on the front door of the home, or (2) addressing mail to "occupant."[320] Both of these methods would increase the likelihood that the property owner would receive notice: The occupant would be less likely to ignore them and there would be a "significant chance" that the occupant would contact the property owner, if only out of concern for their own occupancy of the property.[321] The Court declined, however, to go so far as to require the state to search for Jones's new address in public and government records,[322] stating that such an "open-ended search" would place a far heavier burden on the state than its other recommendations.[323]

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315. *Id.* (noting that "if there were no reasonable additional steps the government could have taken . . . it cannot be faulted for doing nothing").

316. *Id.* Whether a step is reasonable depends on what kind of additional information the state receives. For instance, in the present case, the return of the notice as "unclaimed" meant one of two things: (1) Jones still lived at the North Bryan Street house but was not home to receive the letter and did not go pick it up at the post office, or (2) Jones no longer lived at that address. *Id.* The additional reasonable steps suggested by the Court are directed at these two possibilities.

317. *Jones II*, 126 S. Ct. at 1718–19.

318. *Id.* at 1719. According to the Court, "certified mail makes actual notice more likely . . . [only] when someone is home to sign for the letter, or to inform the mail carrier that he has arrived at the wrong address." *Id.* Certified mail might be less likely to provide actual notice because it cannot be left at the address to be examined later and "can only be retrieved from the post office for a specified period of time." *Id.* As far as dispatching and handling the mail in transit, certified mail and regular mail are treated the same. *Id.*

319. *Id.*

320. *Id.*

321. *Id.* (noting that Jones first learned about the tax sale after his daughter, who living at the house at the time, was served with an unlawful detainer notice).

322. *Id.* Including the phone book (public record) and income tax rolls (government record). *Id.*

323. *Jones II*, 126 S. Ct. at 1719. The Court cited several reasons for this decision: (1) the return of the notice as "unclaimed" did not necessarily mean that the notice was sent to the

After suggesting several additional reasonable steps that the state could have taken, the Court turned to the commissioner's complaint that these additional steps would place a heavy burden on the state.[324] The first problem with this argument, according to the Court, was that Arkansas required the additional step of personal service for homestead owners if the certified mail notice was returned.[325] Second, the commissioner offered no facts to support the view that he would now have to locate "tens of thousands of properties every year."[326] The Court also dismissed the assertion that posted notice could be removed by "children or vandals," thus rendering it ineffective,[327] and stated that, in general, posting notice is "a singularly appropriate and effective way of ensuring that a person . . . is actually apprised of proceedings against him."[328] Furthermore, the state could have avoided the cost associated with completing a tax sale[329] if the state had taken the Court's "relatively easy" suggestions to provide notice in an attempt to collect efficiently Jones's unpaid taxes.[330]

The commissioner's attempt to notify Jones by publishing notice in the state newspaper also failed to impress the Court, even though this "followup measure[]" was not constitutionally required.[331] A property owner will find notice by publication through "[c]hance alone,"[332] and notice by publication is adequate only if other means of providing adequate warning are not available.[333] Therefore, because other means were available to provide Jones with

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wrong address; (2) Jones was obligated to update his address with the tax collector pursuant to Arkansas code section 26-35-705 (1997). *Id.*

324. *Id.*

325. *Id.*; *see* ARK. CODE ANN. § 26-37-301(e) (Supp. 2005). The Court also cited the fact that the State "transfers the cost of notice to the taxpayer or the tax sale purchaser" as further reason for undermining the Commissioner's argument. *Jones II*, 126 S. Ct. at 1719.

326. *Jones II*, 126 S. Ct. at 1719–20.

327. The Solicitor General raised this point in his Brief for United States as *Amicus Curiae*, citing the Court's decision in *Greene v. Lindsey*. *Id.* at 1720.

328. *Id.* (quoting Greene v. Lindsey, 456 U.S. 444, 452–53 (1982)).

329. Costs included "the burden and expense of purchasing a newspaper advertisement, conducting an auction, and then negotiating a private sale of the property to Flowers." *Id.*

330. *Id.* The Court asserted that "[s]uccessfully providing notice is often the most efficient way to collect unpaid taxes," citing *Jones I* ("more effective notice may ease [the] burden on [the] State if [the] recipient arranges to pay delinquent taxes prior to sale") as well as the parties' oral arguments before the Court ("[eighty-five] percent of tax delinquent properties in Arkansas are redeemed upon notice of delinquency."). *Id.*

331. *Id.* The Court also considered the Solicitor General's argument that the Court's suggested methods of providing notice were no more effective than the methods already in place, like certified mail. *Id.* Although the Court noted that certified mail provides some security against false claims, it added that this security comes with the price of also knowing when notice has not been received, which is information the State cannot ignore. *Id.*

332. *Jones II*, 126 S. Ct. at 1720 ("[C]hance alone brings a person's attention to an advertisement in small type inserted in the back pages of a newspaper.").

333. *Id.*

adequate notice of the tax sale, notice by publication was not constitutionally adequate.[334]

In the final part of the majority decision, the Court examined some "basic principles about constitutionally required notice," which Justice Thomas relied on in his dissenting opinion, and with which the Court found no reason to disagree.[335] First, the Court will reject a notice rule if it does not comply with *Dusenbery*[336] and significantly departs from *Mullane*.[337] The Court distinguished the present case from the holding in *Dusenbery* because the commissioner here had knowledge that the attempted notice had failed when it was returned unclaimed.[338] The present case was also a significant departure from *Mullane* because the commissioner should have done more to notify Jones of the tax sale after the notice was returned unclaimed, and the commissioner had additional means available.[339] The majority therefore used the same precedent as the dissent in restating its conclusions that (1) Arkansas should have done more to try and inform Jones of the tax sale after the attempted notice letter was returned unclaimed and (2) there were additional reasonable steps available to the state.[340]

The Court concluded its opinion by reasoning that it was not placing too heavy of a burden on the state by requiring it to take additional steps to provide notice, because the state exerts "extraordinary power against a property owner" in taking and selling his property.[341] Accordingly, the Court held that the state's attempted methods of notice did not satisfy the requirements of the Due Process Clause and therefore reversed the judgment of the Arkansas Supreme Court and remanded the case.[342]

334. *Id.*

335. *Id.*

336. Dusenbery v. United States, 534 U.S. 161 (2002).

337. Mullane v. Central Hanover Bank & Trust Co., 339 U.S. 306 (1950); *Jones II*, 126 S. Ct. 1708, 1720 (2006).

338. *Jones II*, 126 S. Ct. at 1720. The Court in *Dusenbery* found that notice sent to a prison inmate was adequate, even though the state knew someone else had signed for the prisoner's letter and the state could have required the prisoner himself to sign for the letter, thereby making notice more likely. *Id.*

339. *Id.* at 1721. *Mullane* provides that "when notice is a person's due . . . [t]he means employed must be such as one desirous of actually informing the absentee might reasonably adopt to accomplish it." *Id.* (quoting *Mullane*, 339 U.S. at 315).

340. *Id.* The Court also restated its position that it is not responsible for prescribing a form of service for the state, and that the state should decide for itself "how to proceed in response to our conclusion." *Id.*

341. *Id.*

342. *Id.*

2. *Justice Thomas's Dissent*

a. Court precedent

After briefly discussing the facts and procedural history of the case, Justice Thomas concluded that Court precedent supports the finding that Arkansas's notice procedure fully satisfies the Due Process Clause requirements.[343] In the first part of the dissent, Justice Thomas examined the Court precedent that supported his decision.[344] Before seizing an individual's property, the state must provide that individual with notice that is "reasonably calculated" to inform the individual of the pending seizure.[345] Although the method for providing notice must be the kind that someone "desirous of actually informing the absentee" would use,[346] the state is not required to use "heroic efforts" in giving notice,[347] nor must it abide by notice procedures that "place impossible or impracticable obstacles in the way [of the state]."[348] In fact, actual notice is not required, and a method is valid as long as it is "reasonably certain" to inform the affected parties.[349] Based on the facts of the case, Justice Thomas concluded that Arkansas's means of attempting to provide notice satisfied the Due Process Clause because they were "reasonably calculated" to inform Jones of the tax sale.[350]

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

344. As discussed *supra* text accompanying notes 292, 296–97, 299, 307, 310–11, 328, 336–39, most of the precedent cited by Justice Thomas was also cited by Chief Justice Roberts in the majority opinion.

345. *Jones II*, 126 S. Ct. at 1722 (Thomas, J., dissenting); *see* Mullane v. Central Hanover Bank & Trust Co., 339 U.S. 306 (1950).

346. *Jones II*, 126 S. Ct. at 1722 (Thomas, J., dissenting) (quoting *Mullane*, 339 U.S. at 315).

347. *Id.* (quoting Dusenbery v. United States, 534 U.S. 161, 170 (2002)).

348. *Id.* (quoting *Mullane*, 339 U.S. at 313–14).

349. *Id.* (quoting *Dusenbery*, 534 U.S. at 169–70).

350. *Id.* Justice Thomas considered the following facts in reaching his decision:

> The State mailed a notice by certified letter to the address provided by the petitioner. The certified letter was returned to the State marked "unclaimed" after three attempts to deliver it. The State then published a notice of public sale containing redemption information in the [state paper]. After Flowers submitted a purchase offer, the State sent yet another certified letter to petitioner at his record address. That letter, too, was returned to the State marked "unclaimed" after three delivery attempts.

Id. While the majority held there was no evidence that the post office had left notices of attempted certified mail delivery at the North Bryan Street address, Justice Thomas pointed out that postal carriers are required by United States Postal policy to leave notice "indicating that delivery of certified mail had been attempted." *Id.* at 1722 n.1.

According to Justice Thomas, Arkansas's attempts to provide notice through certified mail alone were sufficient under due process,[351] especially because the state sent the notices to an address that Jones had provided.[352] The state could presume that Jones would act in his own interest as a property owner by updating his mailing address or leaving his home in the hands or someone who would protect his property interest and notify him if that interest was in danger.[353] Furthermore, although the majority was unimpressed with the state's notice by publication, Justice Thomas noted that this method exceeded the minimum constitutional requirement as a secondary method of notice, rather than the only method of providing notice, as the majority seemed to consider it.[354]

Next Justice Thomas turned to the majority's conclusion that the state had an obligation to take additional steps to provide notice when it learned that the "normal procedure was ineffective."[355] Justice Thomas disagreed on two points. First, the majority abandoned its traditional practices and considerations in determining whether the state's attempted notice was sufficient.[356] Rather than considering the reasonableness of the attempted notice at the time the notice was sent, the majority based its decision on "information that was unavailable when notice was sent."[357] According to Justice Thomas, the majority's reasoning ran afoul of the Court's position that it will evaluate the reasonableness of a notice procedure "by comparing it to alternative methods that are identified after the fact."[358] Justice Thomas also chided the majority's consideration of Arkansas's recently amended homestead notice requirement, finding it contrary to a previous Court decision in

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351. *Id.* Justice Thomas cited previous Supreme Court holdings to justify this position. *See* Tulsa Professional Collection Services, Inc. v. Pope, 485 U.S. 478, 490 (1988) ("mail service is an inexpensive and efficient mechanism that is reasonably calculated to provide actual notice.").

352. *Jones II*, 126 S. Ct. at 1723 (Thomas, J., dissenting). The Court had previously found that "notice *mailed* to [the affected party's] *last known available address*" was sufficient for a tax sale. *Id.* (quoting Mennonite Bd. of Missions v. Adams, 462 U.S. at 792, 798) (internal quotations omitted) (emphasis in original).

353. *Id.*; *see Mullane*, 339 U.S. at 316 ("It is the part of common prudence for all those who have interest in [a thing], to guard that interest by persons who are in a situation to protect it," and "[t]he ways of an owner with tangible property are such that he usually arranges means to learn of any direct attack upon his possessory or proprietary rights."). According to Justice Thomas, the majority got the issue wrong in characterizing it as whether the occupant of the property must act as the owner's agent. Instead, the issue was "whether [the] petitioner discharged his *own* duty to guard his interests." *Jones II*, 126 S. Ct. at 1723 n.3 (Thomas, J., dissenting) (emphasis in original).

354. *Jones II*, 126 S. Ct. at 1723 n.2 (Thomas, J., dissenting).

355. *Id.* at 1723.

356. *Id.* at 1723–24.

357. *Id.*

358. *Id.*; *see* Dusenbery v. United States, 534 U.S. 161, 171–72 (2002).

which a state official could not be "penalized and told to 'try harder'" after the state had "upgraded its policies."[359] Second, Justice Thomas argued that the majority's decision created a new rule contrary to Court precedent.[360] As a result of the majority's ruling, the state must consider additional notice methods every time it becomes doubtful whether an interested party has received notice, a requirement based on "speculative, newly acquired information."[361]

According to Justice Thomas, only twice before had the Court held that attempted notice by mail and publication was insufficient, and in both of those cases the state knew its method of notice would fail before attempting to send the notice.[362] In *Robinson v. Hanrahan*,[363] the state knew that the person it intended to serve was in prison, but the state sent notice proceedings to the individual's home address, and therefore the Court held that the attempted notice was not "reasonably calculated" to notify the interested party.[364] In the second case, *Covey v. Town of Somers*,[365] the local officials knew that the intended recipient of notice was incompetent, incapable of handling her affairs, and was "unable to comprehend the meaning of the notices."[366] In spite of this knowledge, the local government attempted notice three separate ways, and the Court concluded that these methods were not reasonably calculated to inform the interested party of the proceedings.[367] Justice Thomas distinguished the present case from those above because Arkansas did not know its method of notice would fail when it sent the notice via certified mail.[368] The state had no reason to know that Jones no longer lived at the North Bryan Street address when the notice returned "unclaimed,"[369] and Jones was legally obligated to keep his mailing address

359. *Jones II*, 126 S. Ct. at 1724 (Thomas, J., dissenting) (quoting Dusenbery v. United States, 534 U.S. 161, 172 (2002)).

360. *Id.* Specifically, the majority's decision "is contrary to *Dusenbery* and a significant departure from *Mullane*." *Id.*

361. *Id.*

362. *Id.*

363. 409 U.S. 38 (1972).

364. *Jones II*, 126 S. Ct. at 1724 (Thomas, J., dissenting).

365. 351 U.S. 141 (1956).

366. *Jones II*, 126 S. Ct. at 1724–25 (Thomas, J., dissenting).

367. *Id.* at 1724. The local government attempted notice by mailing it, posting it, and publishing it in the newspaper. *Id.*

368. *Id.* at 1725.

369. *Id.* Justice Thomas noted that "'[u]nclaimed' does not necessarily mean that an address is no longer correct; it may indicate than an intended recipient has simply failed or refused to claim mail." *Id.* The Postal Service uses different labels to indicate different things. For instance, "Moved, Left No Address" indicates the addressee "moved and filed no change-of-address order." Similarly, "Not Deliverable as Addressed—Unable to Forward" indicates the mail is "undeliverable at address given; no change-of-address order on file; forwarding

up to date.[370] Therefore, Arkansas lacked the specific knowledge that notice would fail at the time the notice was sent, and the state was not obligated "to correct a problem of petitioner's own creation."[371]

b. Undue burden and ineffective recommendations

Justice Thomas next attacked the majority's suggested notice methods on the ground that they are "burdensome, impractical," and unlikely to provide notice more effectively than those that Arkansas actually used.[372] First, the majority decision overturns a notice system that Arkansas has found to be "efficient and fair," and instead requires the state to locate those delinquent property owners whose own inefficiencies unreasonably burden the state.[373] Justice Thomas also noted that there is no basis for assuming that requiring the state to find Jones's correct address would place significantly greater burdens on the state than the suggestions that the majority outlined.[374]

Second, regular mail, posting notice, and addressing mail to "occupant" are "no more reasonably calculated to achieve notice" than certified mail or notice by publication.[375] Regular mail is even less effective than certified mail because it is not tracked and delivery attempts are not recorded, which invites interested parties to challenge the adequacy of the notice.[376] Posting notice is impracticable because the state organizes its records by legal description rather than address, making locating the properties very difficult.[377] Furthermore, in *Greene v. Lindsey*[378] the Court stated that "posting is an inherently unreliable method of notice."[379] As for addressing mail to "occupant" rather than sending a certified letter to a specific individual, Justice

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order expired." *Id.* at 1725, n.4. See *supra* note 241 for an explanation of the different kinds of labels available for returned mail.

370. *Jones II*, 126 S. Ct. at 1725 (Thomas, J., dissenting). Justice Thomas claimed the majority's "storm drain" hypothetical was unpersuasive and stated that it presented a different problem than the one present in this case. *Id.* at 1725 n.5.

371. *Id.* at 1725. Justice Thomas also noted that publication would have been sufficient under *Mullane* even if Arkansas had known that Jones no longer lived at the North Bryan Street address. *Id.*

372. *Id.*

373. *Id.*

374. *Id.* at 1726 n.6. Justice Thomas reaches this conclusion even though Jones's proposal for requiring the state to locate his correct mailing address is "severely flawed," noting the commonality of the name "Jones." *Id.*

375. *Id.* at 1725–26.

376. *Jones II*, 126 S. Ct. at 1726 (Thomas, J., dissenting). Essentially, regular mail is "untraceable." *Id.*

377. *Id.*

378. 456 U.S. 444 (1982).

379. *Jones II*, 126 S. Ct. at 1726 (Thomas, J., dissenting).

Thomas considered it "sheer speculation" that an occupant who ignored a certified mail slip would instead read "a letter addressed to them (even as 'occupant')" rather than throwing it out as junk mail.[380] The majority itself recognized "the deficiencies of its proposed methods" with repeated use of the word "might,"[381] but justified its decision by reasoning that its suggested methods "would increase the likelihood that the owner would be notified that he was about to lose his property."[382] According to Justice Thomas, however, the Court rejected this kind of reasoning in *Dusenbery*, and he therefore found it unpersuasive.[383]

Justice Thomas concluded his dissenting opinion by stating that difficulties created by a property owner's own failure to take care of his interests should be a deciding factor in cases involving title to property.[384] Just as "[t]he meaning of the Constitution should not turn on the antics of tax evaders and scofflaws," neither should Jones's own "self-created conundrum" justify burdening the state with additional notice requirements.[385] Therefore, according to Justice Thomas, Arkansas's attempted methods of notice satisfied the requirements of the Due Process Clause and the Court should have affirmed the judgment of the Arkansas Supreme Court.[386]

IV. SIGNIFICANCE

Despite the fact that the *Jones* case has been described as "remarkably uninteresting" and a "yawn,"[387] application of the Court's ruling spreads to all states and "all levels of government, from the Internal Revenue Service to local tax collectors," because of the court's interpretation of the Constitution.[388] While scholars and critics disagree as to exactly what effect the

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380. *Id.*

381. Examples of such language include "[f]ollowing up with regular mail *might* . . . increase the chances of actual notice"; "occupants who ignored certified mail slips . . . *might* scrawl the owner's address on the notice packet"; and "a letter addressed to [occupant] *might* be opened and read." *Id.* (emphasis in original).

382. *Id.*

383. *Id.* In *Dusenbery*, the Court rejected an argument that "the FBI's notice was constitutionally flawed because it was 'substantially less likely to bring home notice' than a feasible substitute." *Id.* (quoting *Dusenbery*, 534 U.S. at 171).

384. *Id.* at 1726–27.

385. *Jones II*, 126 S. Ct. 1708, 1727 (2006) (Thomas, J., dissenting).

386. *Id.*

387. Editorial, *Unremarkable Case Marks End of the Honeymoon for New Chief Justice*, AUGUSTA CHRON., May 7, 2006, at A05; *see* Borchers, *supra* note 85, at 343 ("When the history of the United States Supreme Court in the early twenty-first century is written, Jones v. Flowers [sic] will not be celebrated as one of the Court's great achievements.").

388. G. Savage, *High Court Rules Against State's Seizure of House*, L.A. TIMES, Apr. 27, 2006, at 10; *see also* Cheese Whiz, *No Need to Pay Taxes Anymore: Officials Did Not Do*

Jones ruling will have, the Court still leaves unanswered some important questions that will continue to cause problems in the future.[389] Potential causes for the Court's lack of guidance in certain areas include its disregard for precedent and the addition of Chief Justice Roberts to the Court.[390] Immediate effects of the Court's ruling include increased litigation,[391] an increased burden on state governments,[392] and the creation of another obstacle in the effort to cure urban blight.[393]

Rather than drawing a bright line for this state and others, the Court creates a murky future for tax foreclosure sales. One of the most significant reasons for the inadequacies of *Jones* is the absence of a fully-developed court record.[394] Because the Arkansas court decided the case based on motions for summary judgment, not all of the facts of the case made it into the court record, and therefore the record does not reflect the state's additional steps after the notice returned "unclaimed."[395] For instance, the commissioner sent a follow-up non-certified letter to Jones's address as well as a notice to "occupant."[396] The majority in *Jones* recommended both of these methods as additional reasonable steps the state should take when notice returns "unclaimed," but because the lower court granted summary judgment to Flowers and the commissioner, this fact remained outside the record and outside the Court's consideration.

A. Unanswered Questions

One of the biggest problems with the *Jones* decision is the Court's failure to provide a clear standard for what exactly constitutes additional reasonable requirements. Instead of providing definitive rules for the states to follow, the majority hides behind the rule that it is not the Court's "responsibility to prescribe the form of service that the [government] should

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Enough When They Sent Certified Mail to 717 North Bryan Street, KAN. CITY STAR, June 1, 2006, at A1.

389. *See infra* Part IV.A; ROTUNDA & NOWAK, *supra* note 7, at 27–28 (Supp. 2007) ("The . . . *Jones* opinion[] leave[s] the lower court judges with no clear guidelines for resolving future cases regarding the adequacy of notice by mail, or by publication, in property forfeiture cases.").

390. *See infra* Part IV.B.

391. *See infra* Part IV.C.1.

392. *See infra* Part IV.C.2.

393. *See infra* Part IV.C.3.

394. Interview with Carol Lincoln, Staff Attorney, Ark. Comm'r of State Lands, in Little Rock, Ark. (Feb. 8, 2007).

395. Michael R. Wickline, *Tax Sale Invalid, Justices Conclude: Supreme Court Reverses State, 5–3*, ARK. DEMOCRAT-GAZETTE, Apr. 27, 2006.

396. *Id.*

adopt,"[397] and instead offers only suggestions that one critic has called "nebulous formulations of what constitutes proper notice."[398] Even Erwin Chemerinsky, an advocate of due process who hails the *Jones* ruling as an important one that "reaffirms the government's duty to provide meaningful notice," writes that the *Jones* Court fails to answer the key question of the case, namely "what constitutes sufficient effort by the government."[399] Short of providing actual notice, the Court does little to explain what additional steps the state must take, and the decision "highlights the difficulty in attempting to obtain clear title through a tax sale in those instances where the delinquent owners or lienors are unknown or unlocatable."[400]

Although the majority makes some suggestions as to what additional steps a state may take when notice returns "unclaimed," the majority fails to provide a workable standard and helps the state as little as possible. Although regular mail initially appears satisfactory as an additional step,[401] regular mail lacks the record of proof afforded by certified mail, and therefore the state could not prove it sent regular mail in a contest raised by a taxpayer.[402] Furthermore, habitual delinquent taxpayers could learn that avoiding regular mail from the commissioner is just as effective as avoiding certified mail from the commissioner, and therefore notice by regular mail would fail to provide additional notice. Posting notice would likewise be ineffective at providing additional notice for the reasons outlined in *Greene*,[403] namely that others could remove the notice before it would come to the attention of the property owner, and that vacant property is difficult to post. Furthermore, it is impossible for the commissioner to post notice on every delinquent land within the state.[404]

Another question the Court fails to answer is what, if any, additional reasonable steps are required when notice is returned marked something other than "unclaimed."[405] The post office may mark undelivered certified mail in a variety of ways,[406] and the majority offers no guidance for the sce-

397. *Jones II*, 126 S. Ct. 1708, 1718 (2006) (quoting Greene v. Lindsey, 456 U.S. 444, 455 n.9 (1982)).

398. *Tax Sales*, *supra* note 155, at 233.

399. Chemerinsky, *Upholding Due Process*, *supra* note 85, at 85.

400. Lorrin Hirano, Note, *Notice in Non-Judicial Tax Sales*, 10-AUG HAW. B.J. 4, 4 (2006).

401. After the *Jones* decision, the commissioner began sending regular mail to all delinquent property owners. Interview with Carol Lincoln, *supra* note 394.

402. *See infra* Part IV.B.1.

403. *See supra* Part II.A.3.

404. Interview with Carol Lincoln, *supra* note 394.

405. Carol Lincoln, the staff attorney to the Arkansas Commissioner of State Lands, agrees with this assertion.

406. See *supra* note 241 for an explanation of the different ways the post office may mark undelivered certified mail.

nario in which the commissioner receives undelivered certified mail marked "insufficient address," "refused," or "attempted." Instead, the state must determine what more it has to do when notice returns other than "unclaimed" and how many additional steps it must take.

Jones also offers no guidance as to what kind of burden the commissioner has in attempting to identify a property owner's correct mailing address.[407] For instance, how far back must the state search for the correct address, and where should the state look?[408] Marianne Jennings offers a somewhat tongue-in-cheek, yet critical answer: "[T]he tax official must determine what type of notice [is] appropriate[] using crystal balls, family situations, nature of the residential block, nosy neighbors, local bars, or any other resource available for finding the taxpayer."[409]

B. Possible Explanations for Unanswered Questions

1. *Malleable Principles of Due Process and Ignored Precedent*

The lack of a definitive standard of adequate due process when notice returns "unclaimed" stems partially from the fact that the majority and dissent both used the same longstanding precedent to reach different results.[410] One explanation for this phenomenon is that the principles on which the Court relied are "sufficiently vague and inclusive" to allow for "widely divergent applications."[411] By relying on these "pliant" principles and failing to provide a bright-line rule, the Court creates confusion that, for the lower courts, could lead to increased litigation.[412]

While the Court's own malleable principles effectively allowed the majority in *Jones* to say whatever it wanted, the Court simply ignored Arkansas's precedents for notice procedure, which reached as far back as 1950 and as recently as 2002.[413] As the dissent correctly points out, the majority's opinion forecloses Arkansas's "reasonable system" of requiring the property owner to update his current address and authorizing the state to send property notices to this address.[414]

Furthermore, the *Tsann Kuen* decision should have been controlling in this case. In both *Tsann Kuen* and *Jones*, the taxpayer changed addresses

407. Interview with Carol Lincoln, *supra* note 394.

408. *Id.*

409. Marianne M. Jennings, *The Tax Man Cometh,* Ex Ante *and* Post Hoc: Jones v. Flowers, *126 S. Ct. 1708 (2006)*, 35 REAL EST. L. J. 442, 445 n.11 (2006).

410. *Tax Sales*, *supra* note 155, at 233.

411. *Id.* at 237. Because the underlying due process principles "are so malleable," they are "jurisprudentially useless." *Id.*

412. *Id.* at 240–41; *see infra* Part IV.C.1.

413. Editorial, *supra* note 387, at A05.

414. *Jones II*, 126 S. Ct. 1708, 1725 (2006) (Thomas, J., dissenting).

without updating his or her mailing address with the county tax collector as required by law. In both cases, the commissioner sent notice of the tax sale by certified mail to the taxpayer's last known address on record. The post office returned the mailed notices as "unclaimed" in both instances. Likewise, the commissioner in both cases performed a title search, which produced the same incorrect address on record, and the commissioner again sent notice to that address. In both *Tsann Kuen* and *Jones*, the Arkansas Supreme Court focused on the taxpayer's duty to maintain an accurate, current mailing address with the county tax collector in determining that the commissioner's strict compliance with the notice statute satisfied due process requirements. In other words, the taxpayers in both *Tsann Kuen* and *Jones* caused their own lack of notice, but the majority in *Jones* failed to consider this crucial point and instead shouldered the state with the burden of "inefficiencies caused by delinquent taxpayers."[415]

2. *Different Court Members*

Critics and scholars have also pointed to the Court's changed composition in membership as a source of the Court's most recent opinions.[416] Although the Court's 2005–2006 term began with a short period of unanimity and "narrowly phrased decisions," the Court transitioned away from Chief Justice Roberts's initial goal of soft-spoken, unanimous decisions after the addition of Justice Alito.[417] Chief Justice Roberts highlighted the Court's transition by switching sides away from the conservative justices in *Jones*,[418] which was the Chief Justice's first opinion to provoke a dissent.[419] In this

415. *Id.* at 1725; *see* Jennings, *supra* note 409, at 449 ("Failure to get notice to the taxpayer, even when the failure is the result of the taxpayer's non-compliance with the address notification requirements, means that due process has failed.").

416. *See generally* Charles H. Whitebread, *The 2005–2006 Term of the United States Supreme Court: A Court in Transition*, 28 WHITTIER L. REV. 3 (2006). For those who might think that a justice's views do not affect his decisions, see Symposium, *Seeing the Emperor's Clothes: Recognizing the Reality of Constitutional Decision Making*, 86 B.U. L. REV. 1069, 1070 (2006) ("[Erwin Chemerinsky] was present at a conference of federal courts of appeals judges when Justice Scalia said that his views do not affect his decisions. . . . The federal court of appeals judge sitting next to [him] rolled her eyes and said, 'What nonsense.'").

417. Linda Greenhouse, *Roberts Is at Court's Helm, But He Isn't Yet in Control*, N.Y. TIMES, July 2, 2006, at 11; *see also* Perry A. Craft & Michael G. Sheppard, *2006 Supreme Court Review for Tennessee Lawyers*, 42-SEP TENN. B.J. 26, 26 (2006). According to Charles Whitebread, this transitioning status makes future decisions "uncertain" and "almost impossible to predict." Whitebread, *supra* note 416, at 173.

418. Editorial, *supra* note 387, at A05. One writer suggests that the conservative split between Chief Justice Roberts and the other conservative justices stems from a divergence of approaches to constitutional issues. *Tax Sales*, *supra* note 155, at 242–43.

419. Greenhouse, *supra* note 175, at A18. Chemerinsky identifies the *Jones* case as the only one "in which either Chief Justice Roberts or Justice Alito did not come to the conclu-

case, Chief Justice Roberts broke with the conservative justices and with the Bush administration lawyers arguing in favor of the state government, instead aligning himself with the Court's liberal justices.[420]

Although Chief Justice Roberts's opinion in *Jones* favors a "flexible" approach that "accommodate[s] human frailty"[421] and shows that the Chief Justice can be a "practical person and a realist,"[422] this ability to bend the rules and allow a "play in the joints" of the legal system comes at the expense of certainty afforded by bright-line rules.[423] According to one critic, Chief Justice Roberts's opinion led the court "into a swamp of gooey generosity" highlighted by "gummy" reasoning.[424]

C. Immediate Effects

1. *Increased Litigation*

The Arkansas Commissioner of State Lands' office has already faced an increase in litigation over tax sales of delinquent property, especially in cases with unclaimed notice letters that would have otherwise been adequate sales.[425] Because there is no statute of limitations for a due process violation, a property owner who lost his property through a tax foreclosure sale may bring a cause of action at a much later date after the sale and may eventually have the tax sale voided, thereby divesting the property from the new purchaser.[426] Increased litigation, in turn, makes it much more difficult for the state taxing authority to sell delinquent property.[427] Because a title insurer must pay the purchaser of the delinquent land in case the purchaser loses title to the property, the title underwriter will be reluctant to insure the property or may "downright refus[e]" to do so.[428]

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sion that would be regarded as the 'conservative result.'" Erwin Chemerinsky, *The Kennedy Court*, 9 GREEN BAG 2d 335, 346 n.1.

420. Savage, *supra* note 388, at 10. Chemerinsky finds it "disturbing" that Scalia, Kennedy and Thomas dissented "and would have allowed the government to sell a person's home with no more of an effort at notice than mailing a couple of letters." Chemerinsky, *supra* note 79, at 85.

421. Michael Halley, *Chief Justice Roberts Shows a Surprising Willingness to Bend the Rules*, LEGAL INTELLIGENCER, May 24, 2006, at 7.

422. Savage, *supra* note 388, at 10.

423. Halley, *supra* note 421, at 7.

424. Editorial, *supra* note 387, at A05 (calling this kind of reasoning "spearmint jurisprudence").

425. Interview with Carol Lincoln, *supra* note 394.

426. Bagwell, *supra* note 111, at 288.

427. *Id.*

428. *Id.*

Another issue with the potential to spawn increased litigation concerns equal protection for delinquent property.[429] For instance, if the state government does a lot of work in attempting to notify the delinquent property owner of one parcel but does not do as much work with another parcel,[430] then the owner of the second parcel may bring an equal protection action.[431] By basing notice on the particularities of a certain case and thereby allowing for a variety of notices, the Court allows a delinquent property owner to point to the efforts made by the state in one case "and complain that those same actions were not taken in his or her situation."[432] Any attempt by the state to reduce these causes of action necessarily leads to an increased burden on the state government to develop a uniform notice procedure.

2. *Increased Burden on State Governments*

Some scholars indicate that the *Jones* case will actually have little effect on state notice requirements because the facts of the case limit the Court's holding.[433] Despite these speculations, *Jones* "requires a revolution in the states' processes for sales of land for delinquent taxes."[434] Although the commissioner's chief of staff said that the ruling "really doesn't change anything," stating further that the government would not have to do anything except amend the Arkansas code, he admitted that the commissioner's office could not post notice on every property.[435]

A large amount of the increased burden on the state could stem from the state's attempt to avoid litigation. State governments can no longer rely on time-honored and longstanding notice procedures; they must change their notice procedures in order to avoid debates over what types and forms of additional notice due process requires.[436] Accordingly, states must develop a "uniform Plan B" to address the possibility of failed due process.[437]

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429. Interview with Carol Lincoln, *supra* note 394.

430. This is especially true with vacant lots, where there is no structure on which the government can post notice.

431. Interview with Carol Lincoln, *supra* note 394.

432. Jennings, *supra* note 409, at 448.

433. *See, e.g.*, *Tax Sales*, *supra* note 155, at 237 ("[T]he effect of the decision will be limited, both doctrinally and practically.").

434. Jennings, *supra* note 409, at 448; *see* Borchers, *supra* note 85, at 346 ("Arkansas (and probably several other states) will have to amend their tax sales statutes to require follow-up measures of the kind the Court endorsed.").

435. Wickline, *supra* note 395. Carol Lincoln also stated that it would be impossible for the State to post notice on every delinquent property. Interview with Carol Lincoln, *supra* note 394.

436. *See* Jennings, *supra* note 409, at 448; *see also* Part IV.C.1 *supra*.

437. Jennings, *supra* note 409, at 449. Jennings offers several steps for the states to take in order to decrease litigation to set aside tax foreclosure sales for lack of notice:

Rather than helping the government achieve its goal of receiving tax payments, the *Jones* decision may create a loophole for delinquent taxpayers.[438] Essentially, *Jones* instructs a delinquent taxpayer never to pick up his certified mail.[439] Because the post office will return the undelivered certified mail notice, and because the state cannot prove that it sent regular mail, the state is left with the options of either posting notice on every property or personally serving the taxpayer.[440] The amount of property certified to the commissioner as delinquent effectively prevents posting notice on every delinquent parcel, and therefore the government is left with the option of personal service, which the Court has expressly rejected.[441]

3. *Another Obstacle in the Attempt to Cure Urban Blight*

Jones also has the potential to create a further obstacle in the process of curing urban blight in Little Rock and other larger Arkansas cities. It is already extremely difficult to cure blight in Arkansas because of the state's long tax foreclosure process and because of the delinquent taxpayer's ability to redeem.[442] Arkansas's tax foreclosure process is one of the longest in the country, with tax-delinquent property taking at least five years to work its way through the process with an additional two years before a new owner may make any improvements.[443] Furthermore, if the delinquent property owner pays back taxes before the property is auctioned, then the process begins again, requiring at least another seven years before a new purchaser may make improvements to the property.[444] Various organizations within

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> Clarify with tax notices the need for up-to-date addresses for owners; [c]onsider additional legislation that is applicable to mortgage lenders that requires them to notify property owners, upon satisfaction of underlying mortgage debt, that the tax payments that have been part of the loan arrangements end and that the responsibility for payment of taxes now shifts to them individually; [p]rovide statutory steps for notice, particularly actions required when letters are returned "unclaimed;" [c]onsider the application of personal service standards either *ab initiio* or following "unclaimed" results from mailed notice; [p]rovide clear time requirements for notices and follow-ups.

Id. at 448–49. All of these recommendations require immediate action, thereby increasing the burden on the state tax officials and state legislatures. *Id.* at 449.

438. Interview with Carol Lincoln, *supra* note 394.

439. *Id.* This is especially true with habitually delinquent taxpayers who are going to know not to pick up their mail. *Id.*

440. *Id.*

441. *Id.*

442. Jennifer Barnett Reed, *New Tools to Fight Blight: Legislation Would Allow City to Form a "Land Bank" to Redevelop Abandoned Property*, ARK. TIMES, Mar. 15, 2007, at 9.

443. *Id.* "The former owner has two years to challenge the sale" after the new buyer purchases the property, and the new buyer will not receive any investment back from improvements if the former owner wins the suit. *Id.*

444. *Id.*

Little Rock buy delinquent property in the Downtown and Little Rock Central High School areas in an attempt to renovate these properties into productive pieces of land, but the *Jones* decision adds uncertainty to the effectiveness of the tax sale, which could effectively discourage improvement of blighted areas.[445]

The Arkansas Eighty-Sixth General Assembly recently passed legislation that may mitigate against *Jones*'s negative effect on curing urban blight.[446] First, Act 1036 (Senate Bill 373) shortens both the time the commissioner may sell delinquent property from one year to two and the time a former property owner may contest the sale.[447] Second, Act 1037 (Senate Bill 377) makes it easier for purchasers of delinquent property to get title insurance.[448] Third, Act 854 (Senate Bill 372) allows "cities to foreclose on abandoned properties if owners failed to repay the city for maintenance costs."[449] Senate Bill 376, which would have given larger cities within the state the power to establish land banks,[450] failed to pass the House.

D. Conclusion

In essence, the *Jones* decision fails to consider the interests of the state in requiring additional steps after the post office returns attempted notice "unclaimed." Just as it was unfair for the Court to ask the commissioner to "think outside the box" of longstanding local rules and requirements in this particular case, it is unfair to require the government to change its notice proceeding without providing some indication of what direction the state should follow. Furthermore, the Court offers no guarantees that any new notice procedures will pass due process muster, and the vague and malleable principles on which the Court relies allow the Court effectively to say whatever it wants. After bringing together competing interests of the delinquent property owner and the state, the Court leaves it to the state government to sort out the mess it has created, allowing for the real possibility for future litigation and due process claims. Rather than clarifying the due process issue, the Court has only further muddied the waters and provided an escape

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445. *See* Warwick Sabin, *Downtown Partnership Wants Expansion*, ARK. TIMES, Nov. 11, 2006 (discussing the efforts of the Downtown Partnership to revitalize downtown Little Rock).

446. *See id.* The Arkansas Times published Reed's article before the Eighty-Sixth General Assembly was completed, and the article only gives reference to the Senate Bill numbers. I have given the new Act numbers as well as the Senate Bill numbers referenced in the Reed article.

447. *Id.*; *see* Act of Apr. 4, 2007, No. 1036, 2007 Ark. Acts 1036.

448. Reed, *supra* note 442, at 9; *see* Act of Apr. 4, 2007, No. 1037, 2007 Ark. Acts 1037.

449. Reed, *supra* note 442, at 9; *see* Act of Apr. 3, 2007, No. 854, 2007 Ark. Acts 854.

450. Reed, *supra* note 442, at 9.

hatch for delinquent taxpayers to cheat the system and get away with disregarding their obligations under the law.

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