COMMENT

LEARNING TO LIVE WITH *JONES v. FLOWERS*: A "NEW WRINKLE" FOR AN OLD STANDARD

INTRODUCTION

First-class mail versus certified mail. Posting notice versus publishing notice. These may seem like inconsequential choices at first, but in the end they may make the difference between keeping your house and losing your house. At least they did to Gary Jones. The Supreme Court was faced with determining the consequences of these decisions in *Jones v. Flowers*.[1] What began as a simple misunderstanding with Jones's mortgage company regarding his responsibility to pay property taxes soon turned into a tax foreclosure sale.[2] When the Arkansas Tax Commissioner's tax sale notice sent by certified mail was returned as unclaimed, the Supreme Court had to decide whether Jones was unconstitutionally deprived of his property.[3]

One fundamental concept of due process in the United States is that when the government attempts to take a property interest, it must give notice.[4] This notion is grounded in the Fourteenth Amendment, which includes the provision that a state shall not "deprive any person of life, liberty, or property, without due process of law."[5]

This phrase has consistently caused great consternation among judges, attorneys, and law students, even in the seemingly narrow context of real estate foreclosures. In the seminal case regarding notice, *Mullane v. Central Hanover Bank & Trust Co.*, the Supreme Court noted the difficulty of interpreting the Due Process Clause: "Many controversies have raged about the cryptic and abstract words of the Due Process Clause but there can be no doubt

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1 547 U.S. 220 (2006).

2 *See id.* at 223–24.

3 *See id.* at 225.

4 *See* Mullane v. Cent. Hanover Bank & Trust Co., 339 U.S. 306, 313 (1950) (noting that a government taking of property requires that "notice and hearing . . . measure up to the standards of due process"). A tax sale constitutes such a taking. *See* Mennonite Bd. of Missions v. Adams, 462 U.S. 791, 798 (1983) (recognizing that a mortgagee's property interests are "significantly affected by a tax sale").

5 U.S. CONST. amend. XIV, § 1.

that at a minimum they require that deprivation of life, liberty or property by adjudication be preceded by notice."[6] Mullane also provided the standard used for the past fifty years: notice must be "reasonably calculated, under all the circumstances, to apprise interested parties of the pendency of the action and afford them an opportunity to present their objections."[7]

Courts' applications of a flexible "reasonableness" standard in different contexts makes the jurisprudence surrounding notice difficult to describe succinctly, especially when the context is the enforcement of property taxes.[8] Adding to the confusion is the fact that no two states employ the same tax foreclosure procedures. Across the country, there are over 150 enforcement procedures for collecting property taxes, with differences even evident from county to county.[9] Determining what type of notice is due, to whom it is owed, and when in the enforcement of a property tax delinquency it must be sent can create heartburn for all parties involved.

In *Jones v. Flowers*, the Court faced a "new wrinkle," which required a determination of whether additional steps are necessary when notice is sent to a delinquent property taxpayer but returned as unclaimed.[10] Before *Flowers*, various state courts and lower federal courts addressed the issue but failed to reach a consensus.[11] Many courts found that the government should take additional steps to notify the homeowner of the foreclosure once the government learns that the initial notice was returned as unclaimed.[12] Other courts, however, determined that governments satisfy due process by sending the notice by certified mail and that no further steps must be taken, even if the notice is returned as unclaimed.[13]

This inconsistency was addressed by the Court in *Flowers*, where it held that when notice of a tax foreclosure sale is sent by certified mail and returned, a state must take additional reasonable steps to provide notice to the property

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[6] *Mullane*, 339 U.S. at 313; *see also* A. Benjamin Spencer, *Jurisdiction to Adjudicate: A Revised Analysis*, 73 U. CHI. L. REV. 617, 627 (2006).

[7] *Mullane*, 339 U.S. at 314 (citations omitted).

[8] *See* Frank S. Alexander, *Tax Liens, Tax Sales, and Due Process*, 75 IND. L.J. 747, 770 (2000) ("Application of a due process balancing test of reasonableness in particular circumstances yields a seemingly infinite range of conclusions on the permutations of the property tax foreclosure procedures.").

[9] *See id.* at 748 ("Most states have at least two entirely different approaches for enforcing payment of the property tax . . . . Other states leave the enforcement of the property tax to local governments . . . .").

[10] *See* Jones v. Flowers, 547 U.S. 220, 227 (2006).

[11] *See infra* Part I.C.

[12] *See id.*

[13] *See id.*

owner, if practicable.[14] This Comment analyzes the conclusions and distinctions made in *Flowers*, identifies unresolved questions, and assesses the impact that *Flowers* may have on future court rulings and legislative decisions. *Flowers* emanates from a line of notice cases where courts have employed a fluid standard to protect due process rights. This type of flexible standard, while sometimes difficult to grasp, is particularly suited to a context such as property tax foreclosures, which has varied procedures across jurisdictions.

Part I of this Comment explains the basic context of property taxes and foreclosure procedures, considers the cases that have shaped notice requirements, and identifies the pre-*Flowers* split among federal and state courts as to the necessity of taking additional reasonable steps after notice is returned as unclaimed. Part II presents the facts leading up to *Flowers* and analyzes the Court's opinion. Part III considers the test employed by the Supreme Court, why it is appropriate, and how its flexible standard can be adapted to other fact patterns. Part IV considers the impact of *Flowers* on future legislative modifications and suggests guidelines for states to employ in their notice requirements.

I. TAXES, FORECLOSURES & NOTICE BEFORE *FLOWERS*

It is helpful to understand the underlying context that creates the necessity for notice because the sufficiency of notice depends on the specific facts.[15] In *Flowers*, the subject matter faced by the Court—property taxes and their enforcement—was one that has long caused trouble and confusion.[16] The following sections will consider not only property taxes and relevant enforcement procedures, but also influential notice cases and the split of state and federal courts that the *Flowers* Court confronted.

A. *Property Taxes*

Property taxes are a means for local governments to fund entities such as public schools, police departments, and sanitation services.[17] Property values

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[14] *Flowers*, 547 U.S. at 225.

[15] *See* Tulsa Prof'l Collection Servs., Inc. v. Pope, 485 U.S. 478, 484 (1988) (stating that "whether a particular method of notice is reasonable depends on the particular circumstances").

[16] *See, e.g.*, Alexander, *supra* note 8, at 767–69 (discussing confusion before and after *Mennonite Board of Missions v. Adams*, 462 U.S. 791 (1983)).

[17] *See* Stewart E. Sterk & Mitchell L. Engler, *Property Tax Reassessment: Who Needs It?*, 81 NOTRE DAME L. REV. 1037, 1037 (2006).

serve as the basis for calculating property taxes, although states differ in their calculation methods.[18]

Property taxes in the United States can be traced back to colonial times.[19] Although there has been significant debate about the utility and fairness of property taxation,[20] municipalities continue to use it as a means of raising revenue largely because of this historical pedigree.[21]

Prior to the American colonial period, private third-parties who bought the right to collect past-due taxes collected the majority of delinquent property taxes.[22] This collection method played a more limited role in America, with local government officials beginning to handle more collections in the nineteenth century.[23] Today, the historical pedigree of selling the right to collect on delinquent property taxes is evident as private individuals in some jurisdictions may purchase the government's tax lien on delinquent property through a private sale.[24] The property tax lien carries the government's power and is the first and senior lien against the delinquent property.[25] A modern innovation in this context includes the packaging of delinquent tax liens and placing them on the market as securities.[26]

Today, there are seemingly endless forms of property tax enforcement procedures across state and local jurisdictions.[27] Other than providing a lien and some enforcement thereof, jurisdictions differ in regards to the specific enforcement mechanisms, the amount of judicial involvement, and other aspects of tax lien procedures.[28] Most jurisdictions satisfy property tax

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[18] *See id.* at 1041 & nn.15–17 (citing examples of various state property tax valuation methods).

[19] *See* Arthur D. Lynn Jr., *Property-Tax Development: Selected Historical Perspectives*, *in* PROPERTY TAXATION USA 7, 10–12 (Richard W. Lindholm ed., 1967). Property tax equivalents were levied as far back as 596 B.C. in Athens. *Id.* at 8.

[20] In 1921, economist E.R.A. Seligman stated that "the general property tax as actually administered is beyond all doubt one of the worst taxes known in the civilized world." *Id.* at 7.

[21] During the era of informal record keeping, collecting taxes on property was more efficient than withholding taxes. *See* Sterk & Engler, *supra* note 17, at 1047–48. Relative land holdings also were historically a good measure of wealth and ability to pay taxes. *Id.* Finally, foreclosure provided an easy way, at least theoretically, to enforce delinquent tax payments. *Id.*

[22] *See* Alexander, *supra* note 8, at 758–59.

[23] *See id.* at 759.

[24] *See id.* at 760.

[25] *Id.* at 770.

[26] *See id.* at 760–63. For a thorough consideration of tax lien securitization, see Georgette C. Poindexter, LizabethAnn Rogovoy & Susan Wachter, *Selling Municipal Property Tax Receivables: Economics, Privatization, and Public Policy in an Era of Urban Distress*, 30 CONN. L. REV. 157 (1997).

[27] *See* Alexander, *supra* note 8, at 770–71.

[28] *See id.* at 772–74.

deficiencies either through sale of the lien or sale of the property itself.[29] That process includes a requirement of judicial involvement in nearly half of the jurisdictions.[30] Some jurisdictions do not utilize a public auction; rather, they recognize "strict foreclosure."[31] Strict foreclosure involves setting a final deadline for payment of taxes, after which nonpayment results in the transfer of the property to the government.[32]

Other variables include whether the jurisdiction recognizes a statutory right of redemption and how long that right exists.[33] A statutory right of redemption, which arises after a foreclosure sale, allows the taxpayer to redeem his property by paying the foreclosure sale price.[34] The numerous variables involved in the foreclosure process only add to the difficulty of creating and applying a framework for analyzing adequate notice procedures.

B. Notice Jurisprudence

The government must satisfy state and federal due process requirements for all forms of property tax enforcement.[35] The basis for this requirement is that state action, such as the enforcement of tax delinquencies, invokes the protections of the Fourteenth Amendment.[36] Courts have interpreted the Fourteenth Amendment to at least require notice and an opportunity to present objections before an individual can be deprived of his or her property.[37]

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[29] *Id*. at 772. Another possibility is the sequential sale of the lien and then the property. *Id*.

[30] *See id*. at 773. For an example of a statute requiring judicial involvement, see ALASKA STAT. § 29.45.370 (2006) (requiring a court to make a decision on any objection filed by a person having an interest in a lot on the foreclosure list).

[31] *See* Alexander, *supra* note 8, at 772 & nn.136–37. For an example of a statute recognizing "strict foreclosure," see ALASKA STAT. § 29.45.390(a) (2006) (requiring the transfer of foreclosed properties to the municipality for the lien amount upon nonpayment).

[32] Alexander, *supra* note 8, at 772 & nn.136–37.

[33] *See id*. at 774–75.

[34] *See, e.g.*, ALA. CODE § 40-10-29 (2003); *see also* Dominex, Inc. v. Key, 456 So. 2d 1047, 1053 (Ala. 1984) ("Unlike the *equity* of redemption, which exists *prior* to foreclosure and is deemed an interest in the property, the *statutory right* of redemption arises *after* foreclosure and is a mere personal privilege conferred by statute; it is not property or a property right."); Alexander, *supra* note 8, at 775 & n.148.

[35] *See supra* notes 5–7 and accompanying text.

[36] *See* Tulsa Prof'l Collection Servs., Inc. v. Pope, 485 U.S. 478, 487 (1988).

[37] *See* Mullane v. Cent. Hanover Bank & Trust Co., 339 U.S. 306, 313 ("[T]he Due Process Clause . . . require[s] that deprivation of life, liberty or property by adjudication be preceded by notice and opportunity for hearing appropriate to the nature of the case."). This Comment contemplates property tax enforcement by state actors. The application of due process standards to private purchasers of tax liens is less clear and is not considered in this Comment. *See* Alexander, *supra* note 8, at 763–64 & n.102 (noting the "uncertainty [for a tax lien investor] created by the application of the due process standards of *Mennonite Board of Missions v. Adams* to the tax lien foreclosure procedure").

Courts have had difficulty defining exactly what steps are necessary to satisfy the notice requirement.[38] Constitutional due process requirements have consistently evolved over the years.[39] *Flowers* was influenced, in particular, by three pivotal Supreme Court decisions—*Mullane v. Central Hanover Bank & Trust Co.*,[40] *Mennonite Board of Missions v. Adams*,[41] and *Dusenbery v. United States*[42]—that comprise a portion of the framework for notice jurisprudence in this context.

In *Mullane*, the Court was faced with an issue regarding the constitutionality of notice procedures provided to beneficiaries of a common trust fund.[43] The Court had to determine whether notice by publication in a local newspaper was constitutionally sufficient.[44] When giving notice, the factual vagaries of each case require courts to engage in an individualized analysis, balancing the interests of the state with the individual interests sought to be protected.[45] Most importantly, the Court set forth the test that has been employed by courts since: "An elementary and fundamental requirement of due process in any proceeding which is to be accorded finality is notice reasonably calculated, under all the circumstances, to apprise interested parties of the pendency of the action and afford them an opportunity to present their objections."[46]

The Court employed this "reasonableness" test to determine whether the actions to provide notice satisfied due process.[47] For those beneficiaries whose names and addresses were ascertainable through due diligence, notice by publication was not sufficient.[48] Only for those individuals whose names and addresses were unknown would notice by publication be sufficient to survive

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[38] *See* Alexander, *supra* note 8, at 764.

[39] *See* Marvin N. Bagwell, *Tax Sale Notice: Court Raises Bar for Due Process*, 185 N.J. L.J. 288 (2006).

[40] 339 U.S. 306.

[41] 462 U.S. 791 (1983).

[42] 534 U.S. 161 (2002).

[43] *Mullane*, 339 U.S. at 307. Although *Mullane* did not deal directly with tax foreclosures, the notice required in *Mullane* is equally applicable in the context of property tax foreclosures. *See, e.g.*, *Mennonite*, 462 U.S. at 798 (1983) ("This case [which deals with a mortgagee's right to notice in a tax sale] is controlled by the analysis in *Mullane*.").

[44] *Mullane*, 339 U.S. at 310–11.

[45] *See id.* at 314 ("The Court has not committed itself to any formula achieving a balance between these interests in a particular proceeding or determining when constructive notice may be utilized or what test it must meet.").

[46] *Id.* at 314 (citations omitted).

[47] *Id.* at 315–20.

[48] *See id.* at 318–19.

constitutional scrutiny.[49] Stated broadly in the context of property tax foreclosures, due process—as interpreted under *Mullane*'s reasonableness test—requires more than notice by publication before an individual can be deprived of his property based on tax delinquencies.[50] After *Mullane*, courts struggled to apply consistently the elastic framework created by the Court.[51]

The second key Supreme Court decision came thirty-three years after *Mullane* when the Court considered what forms of notice are owed to different types of parties. In *Mennonite Board of Missions v. Adams*, a lender with a recorded mortgage challenged an Indiana law that provided mailed notice to the owner of property that was to be sold for nonpayment of taxes, but only provided the mortgagee with notice by publication.[52] The Supreme Court held that if the name and address of a mortgagee—who necessarily holds a "legally protected property interest"—is "reasonably ascertainable" from public records, then constructive notice by publication must be supplemented by a notice letter mailed to the last known available address or by personal service.[53]

Mennonite expanded the types of parties entitled to more than notice by publication to those with a "legally protected property interest."[54] Although the Court did not define the term, examples of parties with a "legally protected property interest" include owners, mortgagees, and creditors.[55] The Court's attempt to guarantee further due process protections to more types of parties has also resulted in further uncertainty, caused by jurisdictions varying in their interpretations of the decision and their individual attempts to balance due process interests with their needs to collect delinquent taxes.[56]

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49 *Id.* at 317.

50 *See id.*

51 *See* Alexander, *supra* note 8, at 767–68.

52 462 U.S. 791, 792–93 (1983). Under Indiana law, the mortgagee was not considered an "owner" of the mortgaged property and therefore could not benefit from the heightened notice requirements owed to an "owner." *See id.* at 793 n.1.

53 *Id.* at 798; *see also id.* at 800 ("Notice by mail or other means as certain to ensure actual notice is a minimum constitutional precondition to a proceeding which will adversely affect the liberty or property interests of *any* party . . . if its name and address are reasonably ascertainable.").

54 *Id.* at 798; *see* Alexander, *supra* note 8, at 768; *see also* Michael H. Rubin & E. Keith Carter, *Notice of Seizure in Mortgage Foreclosures and Tax Sale Proceedings: The Ramifications of* Mennonite, 48 LA. L. REV. 535, 541–73 (1988) (explaining the variety of parties that hold "legally protected interests").

55 *See* Alexander, *supra* note 8, at 783–89.

56 *See id.* at 768–69.

The third key Supreme Court decision involved whether the government must provide actual notice or merely *attempt* to provide actual notice.[57] In 2001, the Court held in *Dusenbery v. United States* that notice sent by certified mail to a prison housing the interested party is constitutionally sufficient to satisfy due process requirements.[58] *Dusenbery* emphasized the Court's commitment to *Mullane*'s "reasonably calculated" standard.[59]

The government has the burden of *attempting* to provide actual notice but is not *required* to prove actual receipt of notice.[60] Due process "does not require such heroic efforts by the Government; it requires only that the Government's effort be 'reasonably calculated' to apprise a party of the pendency of the action."[61] *Dusenbery*, along with *Mullane* and *Mennonite*, provide the foundation for the issues eventually decided in *Jones v. Flowers*.

C. The Maze of Options and Results

The foundational Supreme Court decisions shaping due process requirements and tax foreclosure procedures—*Mullane*, *Mennonite*, and *Dusenbery*—provided ammunition for parties on both sides of the debate in cases preceding *Flowers*. The issue at the center of *Flowers* was whether knowledge of the failure of notice delivered by certified mail requires the government to take additional reasonable steps to provide notice before the property could be sold at a tax foreclosure sale.[62] This question had not been considered by the Supreme Court, but it had been addressed by other courts.[63]

Many courts dealing with similar situations prior to *Flowers* determined that due process requires that the government take additional reasonable steps.[64] For example, the Fourth Circuit in *Plemons v. Gale*[65] held that "when prompt return of an initial mailing makes clear that the original effort at notice

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[57] *See* Dusenbery v. United States, 534 U.S. 161, 168–72 (2002).

[58] *See id.*

[59] *See id.* at 167–68; *see also* W. Alexander Burnett, Casenote, Dusenbery v. United States*: Setting the Standard for Adequate Notice*, 37 U. RICH. L. REV. 613, 626 (2003) ("In *Dusenbery*, the Court affirmed—in no unclear terms—that the *Mullane* standard is the appropriate analytical framework for determining whether a method of delivery of notice satisfies the due process requirements . . . .").

[60] *Dusenbery*, 534 U.S. at 169–70. The Petitioner took *Mennonite* out of context in believing that he was owed actual notice. *See id.*

[61] *Id.* at 170 (quoting Mullane v. Cent. Hanover Bank & Trust Co., 339 U.S. 306, 315 (1950)).

[62] *See* Jones v. Flowers, 547 U.S. 220, 225 (2006).

[63] *See id.* at 226–27 (characterizing the issue before the Court as a "new wrinkle").

[64] *See id.* at 227–28 (citing cases from ten federal courts of appeals and state supreme courts).

[65] 396 F.3d 569 (4th Cir. 2004).

has failed, the party charged with notice must make reasonable efforts to learn the correct address before constructive notice will be deemed sufficient."[66] The *Plemons* court further held that "additional reasonable steps" did not necessarily include probing the local telephone directory, asking the tenants on the delinquent property, or contacting the mortgagee bank.[67] One example of a reasonable step suggested by the court would be an "examination (or re-examination) of all available public records."[68]

In contrast, other courts have held that the government does not have to take any additional steps when it learns that postal notice has not been received.[69] In *Smith v. Cliffs on the Bay Condominium Ass'n*, the government mailed notice, which was then returned "Not Deliverable As Addressed."[70] The Michigan Supreme Court held that the returned letter "does not impose on the state the obligation to undertake an investigation to see if a new address for the association could be located."[71] The differing opinions concerning this issue led the Supreme Court to quell the uncertainty by granting certiorari in *Jones v. Flowers*.[72]

II. WHAT IS REASONABLE?

Courts have tried to grasp the slippery character of "notice reasonably calculated" since the *Mullane* Court put forth the standard in 1950.[73] In *Flowers*, the Court held that due process required the Arkansas Tax Commissioner to take additional reasonable steps to inform a taxpayer when

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66 *Id.* at 576.

67 *Id.* at 577. The court rejected these steps for three reasons. *See id.* First, a telephone directory search would have been futile because the owner could no longer be reached at that number. *Id.* Second, contacting the tenants was an unreasonable burden given that mailed notice was returned. *Id.* Third, contacting the mortgagee would not be sufficient because the bank was not in privity with the mortgagor. *Id.* The court was careful to note that the reasonableness of various efforts depends on the particular circumstances of the case. *Id.* (citing Mullane v. Cent. Hanover Bank & Trust Co., 339 U.S. 306, 314 (1950)).

68 *Id.* at 577 (citations omitted); *see also* Kennedy v. Mossafa, 789 N.E.2d 607, 611 (N.Y. 2003) (holding that, when notice is returned, a reasonable search of the public record should be conducted for additional addresses or interested parties).

69 *See, e.g.*, Tsann Kuen Enters. Co. v. Campbell, 129 S.W.3d 822, 832 (Ark. 2003); Smith v. Cliffs on the Bay Condo. Ass'n, 617 N.W.2d 536, 541 (Mich. 2000); Dahn v. Trownsell, 576 N.W.2d 535, 541–42 (S.D. 1998); Elizondo v. Read, 588 N.E.2d 501, 504 (Ind. 1992).

70 *Smith*, 617 N.W.2d at 538.

71 *Id.* at 541.

72 *See* Jones v. Flowers, 547 U.S. 220, 225 (2006).

73 *See* Mullane v. Cent. Hanover Bank & Trust Co., 339 U.S. 306, 314 (1950).

notice of a delinquency sent via certified mail is returned.[74] This Part discusses the facts of the case, the Arkansas Supreme Court opinion, and the majority and the dissenting opinions of the United States Supreme Court. Future courts will use *Flowers* as the framework to decide property tax notice disputes.

A. Facts of the Case

The dispute that evolved into *Jones v. Flowers* began rather innocently. In 1967, Gary Jones purchased a home in Arkansas, in which he and his wife lived until 1993.[75] At that time, Jones separated from his wife and moved out of the house, while his wife remained at the residence.[76] From 1967 to 1997, Jones made monthly mortgage payments to his mortgage company that, in turn, paid his property taxes.[77] After Jones paid off his mortgage, he failed to assume his property tax payments and the property was certified as delinquent.[78]

In compliance with the Arkansas notice statute,[79] the Commissioner of State Lands mailed a certified letter to Jones at the physical address of the delinquent property.[80] No one was present at the home to sign for the letter.[81] When no one retrieved the letter from the post office within fifteen days, the letter was returned to the Commissioner marked "unclaimed."[82]

Two years later, the Commissioner published a notice in the *Arkansas Democrat Gazette* stating that a public sale of the property would take place.[83] Because no one offered to purchase the property at the public sale, the Commissioner was permitted to negotiate a private sale.[84] Respondent Linda

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74 *See Flowers*, 547 U.S. at 229–31.

75 *Id.* at 223.

76 *Id.*

77 *Id.*

78 *Id.*

79 *See* ARK. CODE ANN. § 26-37-301(a)(1) (1997) ("Subsequent to receiving tax-delinquent land, the Commissioner of State Lands shall notify the owner, at the owner's last known address, by certified mail, of the owner's right to redeem . . . .").

80 The letter stated that "unless Jones redeemed the property, it would be subject to public sale two years later on April 17, 2002." *Flowers*, 547 U.S. at 223.

81 *Id.* at 223–24.

82 *Id.* at 224.

83 *Id.*

84 *Id.* The relevant portion of the statute reads, "If no one bids at least the assessed value, the Commissioner may negotiate a sale." ARK. CODE ANN. § 26-37-202(b) (1997).

Flowers made an offer to purchase the delinquent property.[85] The Commissioner attempted to notify Jones that his house would be sold to Flowers by mailing a second certified letter to the address of the delinquent property.[86] Again, the letter was returned "unclaimed."[87]

Flowers purchased the house for $21,042.15.[88] The Commissioner granted Flowers a deed to the property and delivered an unlawful detainer notice to the premises.[89] Jones's daughter received the detainer notice and contacted Jones to inform him of the tax sale.[90]

Jones filed suit against the Commissioner and Flowers in Arkansas state court, alleging that he was deprived of due process because the Commissioner failed to provide adequate notice of both the tax sale and of Jones's right to redeem.[91] Jones, as well as the Commissioner and Flowers, moved for summary judgment.[92] The trial court granted summary judgment to the Commissioner and Flowers, concluding that the Arkansas notice statute comported with constitutional due process.[93]

Jones then appealed to the Arkansas Supreme Court.[94] The Arkansas Supreme Court affirmed the trial court's judgment, determining that reasonable attempts to provide actual notice were made and, thus, due process was satisfied.[95] The Supreme Court of the United States granted certiorari to settle the conflict among the lower courts over whether the Due Process Clause requires the government to take additional reasonable steps to inform a property owner of a tax sale when notice is returned as unclaimed.[96]

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85 *Flowers*, 547 U.S. at 224.

86 *Id.*

87 *Id.*

88 *Id.* The parties stipulated at trial that the house had a fair market value of $80,000. *Id.*

89 *Id.* The Arkansas Code provides for a limited warranty deed to be issued thirty days after the date of the sale. *See* ARK. CODE ANN. § 26-37-202(e) (1997).

90 *Flowers*, 547 U.S. at 224.

91 *Id.* The delinquent taxpayer has the right to redeem the property either before the sale or within thirty days after the sale. *See* ARK. CODE ANN. §§ 26-37-202(e), 26-37-311(a) (1997).

92 *Flowers*, 547 U.S. at 224.

93 *Id.* at 224–25.

94 *Id.* at 225.

95 *See* Jones v. Flowers, 198 S.W.3d 520, 527 (Ark. 2004). The Arkansas Supreme Court relied, in part, on its decision in *Tsann Kuen Enterprises Co. v. Campbell*, 129 S.W.3d 822 (Ark. 2003), in which the court applied the notice statute to analogous facts and determined that the government did not violate due process requirements. *See Flowers*, 198 S.W.3d at 524–26.

96 *Flowers*, 547 U.S. at 225.

Jones argued that the Commissioner deprived him of his property without due process based on the alleged failure to take adequate steps to apprise him of the tax delinquency.[97] Jones contended that a reasonable person, upon learning that notice has failed, would take additional steps to provide notice by searching for the correct address.[98] These actions would impose minimal burdens, Jones argued, because his correct address was readily available from a variety of sources.[99]

The State of Arkansas responded that due process requirements are satisfied when notice of a tax sale is mailed to the delinquent property owner's last known address.[100] The respondent noted that actual notice is not required; rather, notice must be reasonably calculated to inform the party of the tax deficiency.[101] Additional measures are not required to satisfy due process if the government discovers that notice has failed.[102]

Moreover, the Commissioner argued that the state went beyond the requirements that the Supreme Court had previously required.[103] The Court previously held that regular mail[104] is a sufficient method to provide notice when the address is known.[105] The Arkansas notice statute exceeds this standard by sending notice by certified mail[106] and requiring the homeowner to keep the correct address on file with the Commissioner.[107] Also, the Commissioner published notice of the tax sale in the *Arkansas Democrat Gazette* after the letters were returned as "unclaimed."[108] The Commissioner

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[97] *See* Brief for Petitioner at 6, Jones v. Flowers, 547 U.S. 220 (2006) (No. 04-1477). Jones argued that the State's procedures did not satisfy *Mullane*. *See id.*

[98] *Id.*

[99] *Id.*

[100] *See* Respondent's Brief on the Merits at 11–15, Jones v. Flowers, 547 U.S. 220 (2006) (No. 04-1477).

[101] *Id.* at 8.

[102] *See id.* The respondent cited *Walters v. National Ass'n of Radiation Survivors*, 473 U.S. 305, 321 (1985), which states, "[T]he very nature of the due process inquiry indicates that the fundamental fairness of a particular procedure does not turn on the result obtained in any individual case . . . ." *Id.* (citations omitted).

[103] *See* Respondent's Brief on the Merits, *supra* note 100, at 8–9.

[104] The term "regular mail" is used throughout this Comment and refers to ordinary first-class mail.

[105] *See, e.g.*, Tulsa Prof'l Collection Servs. v. Pope, 485 U.S. 478, 491 (1988) ("[I]f appellant's identity . . . was known or 'reasonably ascertainable,' then the Due Process Clause requires that appellant be given '[n]otice by mail or other means as certain to ensure actual notice.'") (third alteration in original) (citation omitted).

[106] *See* Respondent's Brief on the Merits, *supra* note 100, at 14–15 (quoting Whiting v. United States, 231 F.3d 70, 76 (1st Cir. 2000) (noting that "certified mail has further safeguards (i.e., signature of recipient upon delivery and return of the signed receipt card)")).

[107] *See id.* at 15; *see also* ARK. CODE ANN. § 26-35-705 (1997) ("In the event that the address of the taxpayer changes, the taxpayer has an obligation to furnish the correct address.").

[108] *See* Respondent's Brief on the Merits, *supra* note 100, at 9.

argued that requiring any further actions to locate Jones's current address "would impose significant and unnecessary fiscal, administrative, and security burdens on the States."[109]

B. Doing What is Reasonable

Chief Justice Roberts delivered the opinion of the Court and was joined by Justices Stevens, Souter, Ginsburg, and Breyer in holding that additional steps to provide notice are required.[110] Justice Thomas, joined by Justices Scalia and Kennedy, dissented.[111] In evaluating each party's arguments, the Court kept in mind the potential loss of Jones's house as well as the burdens on the government of taking additional steps to give notice.[112] The Court reversed the judgment of the Arkansas Supreme Court and held that "[w]hen mailed notice of a tax sale is returned unclaimed, the State must take additional reasonable steps to attempt to provide notice to the property owner before selling his property, if it is practicable to do so."[113] The Court referenced the *Mullane* reasonableness test and explained that actual notice is not necessary, but that due process requires "notice reasonably calculated, under all the circumstances, to apprise interested parties of the pendency of the action and afford them an opportunity to present their objections."[114]

The fact that differentiated this case—the "new wrinkle" as Chief Justice Roberts termed it—was that the government knew that its previous attempts at notice had failed.[115] The Court had to determine whether the government's knowledge that notice was never delivered is among the "circumstances and conditions" that alter the traditional *Mullane* analysis.[116] This new wrinkle required the Court to consider the notice procedures that would be taken by someone desiring to actually inform the delinquent owner of the impending tax sale.[117] In holding that additional reasonable steps must be taken, the Court

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[109] *Id.* at 23.

[110] Jones v. Flowers, 547 U.S. 220, 222 (2006).

[111] *Id.* Justice Alito did not participate because the case was argued before his nomination to the Court was confirmed by the Senate. *Id.* *See also generally* 152 CONG. REC. S340-01 (2006) (nomination hearing of then-Judge Alito to the Supreme Court).

[112] *See Flowers*, 547 U.S. at 226–39.

[113] *Id.* at 225.

[114] *Id.* at 226 (quoting Mullane v. Cent. Hanover Bank & Trust Co., 339 U.S. 306, 314 (1950)).

[115] *Id.* at 227.

[116] *Id.* (quoting Walker v. City of Hutchinson, 352 U.S. 112, 115 (1956)).

[117] *See id.* at 229. The government must "consider unique information about an intended recipient regardless of whether a statutory scheme is reasonably calculated to provide notice in the ordinary case." *Id.* at

reasoned that an individual who actually sought to inform a property owner of the risk that their house could be sold at a foreclosure sale would not simply stop trying to inform this property owner if notice sent by certified mail is returned as unclaimed.[118]

The Court responded to arguments[119] centering on the timing of the evaluation of the notice procedure.[120] The fact that the Commissioner did not have knowledge of the notice's failure until after the letter was sent does not contravene the policy of analyzing due process issues ex ante, rather than post hoc.[121] The Commissioner knew ex ante when he sent the letter that he would be informed as to whether the delivery was successful.[122] Where the government's procedure provides feedback regarding its effectiveness, evaluating what the government does with this feedback is not inconsistent with the ex ante viewpoint and will not lead to second guessing.[123]

The Court next considered three arguments raised by the Commissioner.[124] First, the Commissioner argued that Arkansas law required Jones to keep his mailing address updated.[125] Second, the Commissioner insisted that Jones was on "inquiry notice" after failing to receive a tax bill and pay property taxes.[126] Third, the Commissioner contended that Jones should be responsible for the individuals living on his property and their failure to notify him of the tax sale.[127]

The Court responded to the first argument by explaining that Jones's statutory obligation did not override the government's duty of providing

230 (citing Robinson v. Hanrahan, 409 U.S. 38, 40 (1972); Covey v. Town of Somers, 351 U.S. 141, 146–47 (1956)).

[118] *Flowers*, 547 U.S. at 229. The Court gave the example of a Commissioner preparing notice letters, handing them to a postman, and watching as the letters are accidentally dropped down a storm drain. *Id*. An individual "desirous of actually informing" the owners would not allow the original effort at notice to be the only step taken. *Id.*

[119] *See id.* at 243–46 (Thomas, J., dissenting).

[120] *See id.* at 230–31 (majority opinion).

[121] *Id.* at 231.

[122] *Id.*

[123] *Id.*

[124] *Id.*

[125] *Id.*; *see also* ARK. CODE ANN. § 26-35-705 (1997).

[126] *Flowers*, 547 U.S. at 231–32. "Inquiry notice" is "notice attributed to a person when the information would lead an ordinarily prudent person to investigate the matter further." BLACK'S LAW DICTIONARY 1091 (8th ed. 2004). The Commissioner argued that the knowledge that property may be taken was sufficient to excuse the government from providing notice. *See Flowers*, 547 U.S. at 232.

[127] *Flowers*, 547 U.S. at 232.

constitutionally sufficient notice.[128] In response to the Commissioner's second argument, the Court reiterated that "knowledge of delinquency in the payment of taxes is not equivalent to notice that a tax sale is pending."[129] Finally, the occupants of the property did not have a duty to act as Jones's agent and inquire about the possibility of a tax sale.[130] Certainly, the Court admitted, Jones was negligent in failing to manage his property taxes; that, however, did not excuse the government's failure to provide sufficient notice.[131]

After finding that additional steps were necessary, the Court discussed practicable reasonable steps that the Commissioner could have taken to notify Jones.[132] The Court tempered this discussion by stating that it is not the Court's "responsibility to prescribe the form of service that the [government] should adopt."[133] Although there are no baseline requirements, the Court did set out three additional steps that the Commissioner could have taken based on these facts.[134]

First, the Commissioner could have sent a follow-up notice by regular mail.[135] When the original certified letter was returned as unclaimed, the Commissioner could have reasonably concluded that Jones did not pick up the letter from the post office during the specified period or that he no longer lived at the property.[136] A second letter sent by regular mail may be more effective since there would not be a time limit on its availability and the recipient would not have to sign for it.[137] Furthermore, if the owner no longer resides at the address, the occupant may be more likely to take steps to forward the letter to the owner than he would be if he only received a notice of certified mail addressed to the owner.[138] Therefore, resending notice through regular mail is an example of an additional procedure that could have satisfied due process.[139]

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128 *Id.*

129 *Id.* at 232–33 (quoting Mennonite Bd. of Missions v. Adams, 462 U.S. 791, 800 (1983)).

130 *Id.* at 233.

131 *Id.* at 234.

132 *See id.* at 234–36.

133 *Id.* at 234 (quoting Greene v. Lindsey, 456 U.S. 444, 455 n.9 (1982)) (alteration in original). The Court also mentioned that in the past it has not tried to redraft the states' notice statutes. *See id.* at 238; *see also, e.g.*, Tulsa Prof'l Collection Servs., Inc. v. Pope, 485 U.S. 478, 490–91 (1988).

134 *See Flowers*, 547 U.S. at 234–35.

135 *Id.* at 234.

136 *Id.*; *see also* United States Postal Service, 507 Mailer Services, http://pe.usps.gov/text/dmm300/507.htm#wp1222545 (last visited Oct. 12, 2007) (explaining that when mail is returned unclaimed, the reason for nondelivery is that the "[a]ddressee abandoned or failed to call for mail").

137 *Flowers*, 547 U.S. at 234–35.

138 *Id.* at 235.

139 *See id.* at 234–35.

Other available options include posting notice on the front door or addressing the letter to "occupant."[140] Each of these steps would have significantly increased the likelihood of Jones receiving notice, even if he no longer resided at the property.[141] If the Commissioner posted notice on the door, Jones or the occupant would almost certainly have been made aware of the deficiency.[142] Also, if the letter had been addressed to "occupant," the residents of the home would have been more likely to open it and take steps to notify Jones, rather than ignoring a letter not addressed to them.[143]

The Court stopped short of requiring the Commissioner to search the local phonebook and government records, explaining that "[a]n open-ended search for a new address—especially when the State obligates the taxpayer to keep his address updated with the tax collector—imposes burdens on the State significantly greater than the several relatively easy options outlined above."[144] Finally, the Court emphasized that the burden of taking additional steps to notify the owner is slight relative to the State's great power to sell homes to account for delinquent taxes.[145]

C. Doing More Is Not Reasonable

In dissent, Justice Thomas argued that the Commissioner's actions satisfied due process.[146] In Justice Thomas's view, the Commissioner's actions fulfilled the requirement of being reasonably calculated when he took the following steps: (1) mailing a notice by certified mail three times to an address provided by Jones; (2) publishing notice in the local newspaper; and (3) attempting three more times to mail a certified notice letter to Jones after Flowers submitted a purchase offer.[147]

The Court had held in several cases, including *Dusenbery*, *Mullane*, and *Mennonite*, that sending a certified letter to an individual's record address satisfies due process.[148] The fact that Jones had provided the mailing address

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[140] *Id.* at 235.
[141] *Id.*
[142] *Id.*
[143] *Id.*
[144] *Id.* at 235–36 (citation omitted).
[145] *See id.* at 239.
[146] *See Flowers*, 547 U.S. at 240 (Thomas, J., dissenting). Justices Scalia and Kennedy joined in the dissent. *See id.* at 239.
[147] *Id.* at 241.
[148] *See id.* at 241–42.

himself was even more evidence that the notice procedures were adequate.[149] The Commissioner then went one step further by publishing notice in the *Arkansas Democrat Gazette*.[150] The dissent argued that the presumption that a property owner will act in his best interest to protect his property is in the background of the state's actions.[151] Thus, the Commissioner was reasonable in assuming that Jones had provided the proper mailing address and that he had left someone at the property that would inform him of the delinquency.[152]

The dissent argued that the majority opinion was an assault on traditional notice jurisprudence embodied in cases such as *Mullane* and *Dusenbery*.[153] In *Mullane*, the Court measured whether notice was reasonably calculated from an ex ante perspective, based on the information "at hand" when the notice was sent.[154] Similarly, in *Dusenbery*, the Court refused to find notice insufficient simply because new procedures may be more effective.[155]

According to the dissent, the majority violated the principles of these cases by examining the notice procedures from a post hoc perspective to find that the Commissioner's actions did not meet the appropriate constitutional standard.[156] In fact, the additional reasonable steps that the majority suggested were based on knowledge discovered only after notice had been sent.[157] Moreover, the dissent argued, the majority decision will weaken the Court's past refusal to require actual notice because people will now question whether state officers took additional reasonable steps each time notice fails.[158]

Besides the allegedly misguided interpretation of constitutional standards, the dissent criticized the examples of "additional reasonable steps"[159] put forth

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149 *Id.* at 242; *see* ARK. CODE ANN. § 26-35-705 (1997) (requiring that if the taxpayer's address changes, the taxpayer has an obligation to furnish the correct address).

150 *Flowers*, 547 U.S. at 239 (Thomas, J., dissenting).

151 *See id.* at 242–43. Justice Thomas quoted *Mullane* for the proposition that "'[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.'" *Flowers*, 547 U.S. at 242 (Thomas, J., dissenting) (quoting Mullane v. Cen. Hanover Bank & Trust Co., 339 U.S. 306, 316 (1950)).

152 *See id.* at 242–43.

153 *See id.* at 243–44.

154 *See id.* at 243 (quoting *Mullane*, 339 U.S. at 318).

155 *See* Dusenbery v. United States, 534 U.S. 161, 172 (2002) (explaining that "our cases have never held that improvements in the reliability of new procedures necessarily demonstrate the infirmity of those that were replaced").

156 *Flowers*, 547 U.S. at 243 (Thomas, J., dissenting).

157 *Id.*

158 *Id.* at 244.

159 *See id.* at 225 (majority opinion).

by the majority for being "constitutionally unnecessary, . . . burdensome, impractical, and no more likely to effect notice than the methods actually employed by the State."[160] Justice Thomas insisted that "[t]he meaning of the Constitution should not turn on the antics of tax evaders and scofflaws."[161] These points were outweighed, however, by the view of the majority that the government cannot simply turn a deaf ear to the calls that notice was returned.[162]

III. SMOOTHING THE WRINKLE

Jones v. Flowers added another ingredient to the requirements of providing notice. *Flowers* follows the trend of raising the bar for satisfying due process.[163] Prior to *Flowers*, *Mullane* established that the government could not rely on notice by publication for property owners whose names and addresses were known.[164] *Mennonite* held that lenders and other interested parties were owed the same notice protections.[165] With *Flowers*, notice by certified mail is insufficient if the government learns that the letter was not received.[166]

Lower courts confronted with similar circumstances were split on whether the government had to take additional steps when notice was returned.[167] Accordingly, there was anticipation that the Supreme Court's decision would provide a clear answer on a rather murky area of law.[168] Simply by looking to the case law evolution from *Mullane* through *Flowers*, a flexible standard had to be employed to deal with the variant factual patterns created in this context.[169]

In *Flowers*, the Court did not articulate a new test, but added a new dimension and clarified *Mullane*'s reasonableness test—"notice reasonably

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[160] *Id.* at 246 (Thomas, J., dissenting).

[161] *Id.* at 248.

[162] *See id.* at 229–30 (majority opinion).

[163] *See* Bagwell, *supra* note 39, at 3.

[164] *See* Mullane v. Cent. Hanover Bank & Trust Co., 339 U.S. 306, 318–19 (1950).

[165] *See* Mennonite Bd. of Missions v. Adams, 462 U.S. 791, 798 (1983).

[166] *See Flowers*, 547 U.S. at 225.

[167] *See supra* Part I.C.

[168] *See, e.g.*, Ashlea Ebeling, *Surprise! We Sold Your House*, Forbes.com, Apr. 11, 2006, http://www.forbes.com/finance/2006/04/10/supreme-court-foreclosure-cz_ae_0411beltway.html.

[169] *See, e.g.*, Dusenbery v. United States, 534 U.S. 161, 161–62 (2002) (noting that the Court "has regularly turned to *Mullane* when confronted with questions regarding the adequacy of the method used to give notice").

calculated, under all the circumstances, to apprise interested parties of the pendency of the action."[170] Since *Mullane*, courts have remained within the confines of this test because of its ability to fit cases of all shapes and sizes.[171]

For example, in *Schroeder v. City of New York*, the Supreme Court emphasized "the practical considerations which make it impossible to draw a standard set of specifications as to what is constitutionally adequate notice, to be mechanically applied in every situation."[172] The *Flowers* Court was able to use the malleable reasonableness standard to answer the issue presented.[173] Future courts must recognize the simplicity and clarity of *Flowers*'s interpretation of *Mullane*, rather than stall when considering the limitless applications possible in the realm of notice jurisprudence.

This Part analyzes the clarity and simplicity of the *Flowers* opinion. The Court's decision will have a great effect on future courts and how they deal with fact specific issues that arise before them. This Part discusses both *Flowers*'s requirement of additional reasonable steps as well as potential unanswered questions. Legislatures will have to consider carefully their current notice statutes and whether they should be amended in light of *Flowers*.

A. Additional Reasonable Steps

Flowers proposed three steps that could have been taken: first, send supplemental notice by regular mail; second, post notice on the premises; and third, address the letter to "occupant."[174] However, the Court did not require the Commissioner to search the local phonebook or "government records such as income tax rolls."[175] Significantly, the Court noted that it was not responsible for crafting the notice procedure to be used by all jurisdictions;[176] rather, the Court set forth examples of reasonable procedures based on the facts present in *Flowers*.[177]

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[170] *See Flowers*, 547 U.S. at 226 (quoting Mullane v. Cent. Hanover Bank & Trust Co., 339 U.S. 306, 314 (1950)).
[171] *See, e.g.*, Schroeder v. City of New York, 371 U.S. 208 (1962).
[172] *Id.* at 212.
[173] *See Flowers*, 547 U.S. 226–27.
[174] *See id.* at 234–36.
[175] *Id.* at 235–36.
[176] *See id.* at 234.
[177] *See id.* at 234–37.

That limitation is key because it highlights the fact that a procedure that is sufficient under one set of circumstances may be constitutionally insufficient under another set of circumstances.[178] In the future, courts should be careful to understand that Flowers is signaling that some type of additional step or steps must be taken, but not trying to impose the additional steps in Flowers onto every fact pattern.[179] Judges must remain within the broad scope of Flowers, but the answers to all questions of reasonableness cannot be found in Flowers. In order to justify the Court's decision to mandate some additional steps, an examination of the utility of the steps considered in Flowers is set forth below.

1. First-Class Mail

The burdens of resending notice by first-class mail are miniscule.[180] Since the government would be using the same address as the notice previously sent by certified mail, it would not incur any new search costs related to finding an address.[181] Using the mail system has been praised in other cases as an inexpensive and efficient means of providing notice.[182] The delinquent taxpayer stands a good chance of receiving notice because letters sent by first-class mail remain in the mailbox. This allows the taxpayer or occupant extra time to retrieve the letter and become aware of the delinquency.[183] Tax officials should not utilize first-class mail alone as an initial procedure,[184] but it is an inexpensive and easy way to potentially meet the reasonableness standard and should be combined with other notice mechanisms as an additional step when notice by certified mail fails.

2. Posting Notice on the Property

The second suggested step, posting notice on the property, however, would involve more time and expense than mailing notice. Opponents criticize

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[178] *See* Tulsa Prof'l Collection Servs., Inc. v. Pope, 485 U.S. 478, 484 (1988) (noting that "whether a particular method of notice is reasonable depends on the particular circumstances").

[179] *See Flowers*, 547 U.S. at 234–37 (describing possible additional steps).

[180] The Court reasoned that sending notice by first-class mail would increase the chance that Jones would receive it because it would be left in the mailbox, rather than the post office, and if Jones had moved, the new resident may write the correct address on the envelope and return it to the post office. *See id.* at 235.

[181] *Id.* at 234.

[182] *See, e.g.*, Mullane v. Cent. Hanover Bank & Trust Co., 339 U.S. 306, 319 (1950).

[183] *See Flowers*, 547 U.S. at 234–35 (noting that "[certified mail] can only be retrieved from the post office for a specified period of time").

[184] Regular mail does not provide the same documentation as certified mail. *See id.* at 237.

posting notice as both burdensome[185] and unreliable.[186] Arguments highlighting the potential burden created by posting notice on a large amount of properties are exaggerated considering that the properties obviously would need to be located in order to sell them at a foreclosure sale. Justice Thomas cited to *Greene v. Lindsey* in the dissent to support the proposition that posting notice is unreliable.[187] The *Greene* Court, however, explained that "[s]hort of providing personal service, then, posting notice on the door of a person's home would, in many or perhaps most instances, constitute not only a constitutionally acceptable means of service, but indeed a singularly appropriate and effective way of ensuring [notice]."[188] Posting notice can be an effective means to communicate to the delinquent taxpayer or occupant that the property is at risk of foreclosure.

3. *Addressing Notice to "Occupant"*

Addressing a notice to "occupant" is another option that the Court noted.[189] Although this method may not be the most effective,[190] tax commissioners can utilize the procedure to fill in the gaps potentially left by other procedures. The tactic is most useful in situations where the taxpayer does not live on the property, such as with rental property or, as in *Flowers*, when a family member not living on the property pays the taxes.[191] Occupants who receive letters not addressed to themselves or letters addressed to an individual not living on the property may discard the letter as a mistake or unimportant.[192] While the same

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[185] Justice Thomas noted both that "approximately 18,000 parcels of delinquent real estate are certified annually" in Arkansas and "the State will bear the burden of locating thousands of delinquent property owners." *Id*. at 246 (Thomas, J., dissenting) (citing Tsann Keun Enters. Co. v. Campbell, 129 S.W.3d 822, 828 (Ark. 2003)).

[186] Justice Thomas cited to a case where the Court held that posting notice was unreasonable because it was unreliable. *See id.* at 248 (citing Greene v. Lindsey, 456 U.S. 444, 453–54 (1982) (holding that posting notice was not reasonable because the notices were frequently removed from the apartment doors by children or other tenants)).

[187] *See Flowers*, 547 U.S. at 248 (Thomas, J., dissenting).

[188] *Greene*, 456 U.S. at 452–53.

[189] *Flowers*, 547 U.S. at 235 (majority opinion).

[190] Justice Thomas criticized this procedure as likely to be viewed as junk mail and "speculative" in nature. *Id.* at 244, 248 (Thomas, J., dissenting). According to Justice Thomas, "It is sheer speculation to assume, as the Court does, that although occupants . . . might disregard a certified mail slip . . . , a letter addressed to them (even as 'occupant') might be opened and read." *Id.* at 248 (internal quotations omitted).

[191] *See id.* at 235 (majority opinion). This Comment only considers the use of a letter addressed to "occupant" to satisfy the *Flowers* standard of additional reasonable steps; it does not consider the potential argument that a letter addressed to "occupant" is necessary because occupants have a "legally protected interest." *See* Mennonite Bd. of Missions v. Adams, 462 U.S. 791, 805 (1983).

[192] *Flowers,* 547 U.S. at 235.

issue could potentially be remedied by posting notice, addressing a letter to "occupant" is another example of a low-cost method for attempting to effectuate notice.

These steps were criticized by the dissent for being "constitutionally unnecessary."[193] Furthermore, Justice Thomas stated that the additional steps proposed by the Court were "burdensome, impractical, and no more likely to effect notice than the methods actually employed by the State."[194] He argued that regular mail is ineffective and untraceable, posting notice is burdensome, and addressing letters to "occupant" is "speculative."[195]

Despite Justice Thomas's claims, courts have repeatedly upheld notice by first-class mail as an effective means of providing notice.[196] The fact that mailed notice does not always translate into actual notice does not make this procedure inadequate.[197] The standard for whether an action satisfies due process has never been that the action must be certain to establish actual notice;[198] rather, it must be reasonable under the circumstances.[199]

Another flaw in Justice Thomas's dissent is that he separates each procedure before elaborating on potential flaws. In doing so, Justice Thomas never considers the efficacy of these procedures when combined. The majority never explicitly stated which or how many steps must be undertaken, with good reason, because the analysis must be done on a case-by-case basis with the only overarching rule being that *some* form of further steps be taken.[200] Although it is foreseeable that taking only one additional step would be reasonable in many cases, states would be wise to implement some combination of mailed notice and posted notice to ensure that their actions are reasonably calculated and, thus, constitutionally sufficient.

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193 *Id.* at 246 (Thomas, J., dissenting).

194 *Id.*

195 *Id.* at 244, 247–48.

196 *See, e.g.*, Mullane v. Cent. Hanover Bank & Trust Co., 339 U.S. 306, 319 (1950) (finding that mail service is "an efficient and inexpensive means of communication"); *see also Mennonite*, 462 U.S. at 799 (1983); Greene v. Lindsey, 456 U.S. 444, 454–55 (1982).

197 Justice Thomas criticized mailed notice as speculative because the delinquent taxpayer "might" receive actual notice. *Flowers*, 547 U.S. at 247 (Thomas, J., dissenting).

198 *See* Dusenbery v. United States, 534 U.S. 161, 171 (2002) (noting that the Court's "cases have never required actual notice").

199 *See Mullane*, 339 U.S. at 314.

200 *See Flowers*, 547 U.S. at 234 ("What steps are reasonable in response to new information depends upon what the new information reveals.").

Ignoring for the moment the constitutional requirement that tax officials take additional steps, Justice Thomas's concerns[201] about the "burdensome" steps that the states will now have to take should be eased simply by the fact that many states already adhere to similar principles in their own statutes.[202] Although, as discussed below, it is difficult to apply uniform mandates in the context of property tax foreclosures, the movement of some states toward requiring additional steps on their own should ease some of the difficulty. For the states that have already implemented additional notice procedures for situations in which certified letters are returned, only minor changes, if any, should be necessary to appease courts in light of *Flowers*. These states will also be able to act as laboratories to test different notice procedures, allowing other states implementing new procedures to use methods already tested.

4. Record Search for Other Addresses

After discussing acceptable additional steps, Chief Justice Roberts noted that searching phonebooks and public records would be unnecessarily burdensome.[203] Such a search, however, may not be unduly burdensome in many cases.[204] At least one court has stated:

> [Tax authorities should] use ordinary common sense business practices to ascertain proper addresses where notice of the tax sale may be given. Where notice is obviously not effectively reaching the owners of record, the taxing bureau must go beyond the mere ceremonial act of notice by certified mail. However, due process does not require the taxing bureau to perform the equivalent of a title search or to make decisions to quiet title.[205]

In his brief, Jones listed several options for finding his correct address, including searching the phonebook, voter registration rolls, Internet search engines and online directories, driver's license records, or utility records, as well as asking his employer.[206] The Commissioner could have found Jones's

201 *See id.* at 246–47 (Thomas, J., dissenting).

202 *See id.* at 228 n.2.

203 *See id.* at 235–36.

204 *See* Erwin Chemerinsky, *Upholding Due Process*, TRIAL, July 2006, at 85 ("It is troubling that the Court said the government did not need to look up the owner's new address in the phone book or in its tax or motor vehicle records.").

205 *In re* Tax Sale of Real Prop. Situated in Jefferson Twp., 828 A.2d 475, 479 (Pa. Commw. Ct. 2003) (citations omitted).

206 Brief for Petitioner, *supra* note 97, at 11–12.

address by searching the Little Rock phonebook.[207] Obviously, finding new addresses may be more difficult in some situations than in others.[208] Although unnecessary in order to meet the reasonable additional steps standard in *Flowers*, neither tax officials nor courts should dismiss public record searches as unnecessary in all situations.[209] In states that have easily searchable databases, courts may find the failure to use such technology as insufficient and not befitting of a "person who actually desired to inform a real property owner of an impending tax sale of a house he owns."[210]

Record searches are becoming easier as technology increases the methods for collecting and storing public records[211] that could be helpful in locating delinquent taxpayers.[212] Both the Internet[213] and proprietary state databases can be helpful tools for locating names and addresses.[214] Local governments should not interpret the Court's reluctance to mandate a search of public records in *Flowers* as holding that such a search is never required. Due process may require these searches in instances where the government has actual notice or reason to believe that the address where the notices were sent is no longer appropriate.[215]

B. *Applying the Standard*

The previous sections considered the costs and benefits of each additional step the Court discussed. It should be emphasized that the Court's inclusion or exclusion of certain steps in *Flowers*[216] should not establish the framework by

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[207] *Id.* at 11.

[208] For instance, finding new addresses would be impossible in situations where no other addresses are contained within the public records and unnecessary when the individual still lives at the original address.

[209] Some states "require a diligent inquiry to find a property owner's correct address when mailed notice is returned." *Flowers*, 547 U.S. at 228 n.2; *see also, e.g.*, MISS. CODE ANN. § 27-43-3 (2006); NEV. REV. STAT. § 361.595(3)(b) (2003); PA. STAT. ANN. tit. 72, § 5860.607a (2007); R.I. GEN. LAWS § 44-9-25.1 (2005).

[210] *Flowers*, 547 U.S. at 229.

[211] A public record is broadly defined as "[a] record that a governmental unit is required by law to keep." BLACK'S LAW DICTIONARY 1301 (8th ed. 2004); *see also* Daniel J. Solove, *Access and Aggregation: Public Records, Privacy and the Constitution*, 86 MINN. L. REV. 1137, 1138 (2002) (discussing how technology can increase the ways that information can be used to gather personal information).

[212] *See id.* at 1151–52.

[213] *See id.* at 1152–53 ("Many websites now compile public records from across the country . . . . These companies have constructed gigantic databases of public records that were once dispersed throughout different agencies, offices, and courthouses.").

[214] *See, e.g.*, Justice Network, http://www.pajnet.state.pa.us/pajnet/site/default.asp (last visited Feb. 8, 2008) (providing, through a state database, access to offender records and other criminal justice information).

[215] *See infra* notes 228–33 and accompanying text.

[216] *See Flowers*, 547 U.S. at 234–37.

which all future acts of providing notice are measured. The additional steps discussed by the Court are merely examples of what would have been appropriate under the circumstances of *Flowers*. The most important principle to take from *Flowers* is that some additional step or steps must be taken. The Court's holding ends at this point; lower courts must determine the specific procedure required according to the facts of each case.[217]

For example, in *Rice v. Compro Distributing, Inc.*, a Pennsylvania court considered the case's specific facts, rather than using a bright-line test.[218] In *Rice*, a county tax bureau sold delinquent property at a tax sale after a series of notice attempts.[219] Pennsylvania law requires tax officials to take reasonable steps to discover the whereabouts of the person if notice by certified mail is returned unclaimed.[220] Statutorily imposed "reasonable steps" include a search of local phonebooks, tax records, and deed records, but are not limited to these procedures.[221] In *Rice*, the county tax office searched several directories and records[222] when the certified letters were returned.[223]

Despite taking the steps suggested by the Pennsylvania statute and an additional step of searching the state criminal record database,[224] the court found that the county did not exercise reasonable efforts.[225] The court reasoned that after receiving multiple notices that the forwarding address had expired, the tax officials should have investigated the situation by contacting the post office or the tax collector.[226] Pennsylvania law requires additional

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217 *See supra* text accompanying notes 176–80; Rice v. Compro Distrib., Inc., 901 A.2d 570 (Pa. Commw. Ct. 2006).

218 *Rice*, 901 A.2d 570.

219 *Id.* at 572.

220 *See* 72 PA. STAT. ANN. § 5860.607a(a) (2006).

221 *See id.*

222 Specifically, the tax officials searched the following sources:

> (1) [T]wo local telephone directories for the Williamsport area; (2) the address on file with the Lycoming County Assessment Office; (3) filings or markings on files that could determine a more accurate address in the Office of the Prothonotary and the Recorder of Deeds; and (4) the Pennsylvania criminal record computer index, known as "J-Net," which would have revealed any [homeowner's name] holding a Pennsylvania driver's license and his address.

Rice, 901 A.2d at 573.

223 The notices were returned as undeliverable, and two of those notices included a notation signaling that the forwarding address order had expired. *See id*. at 572.

224 *See id.* at 573. The statute does not require the additional step of searching the criminal record computer system. *See* § 5860.607a(a).

225 *See Rice*, 901 A.2d at 577.

226 *See id.*

reasonable steps that are not mandated by *Flowers*.[227] *Rice* illustrates the principle that whether actions are reasonable is a fact-specific determination. Here, the county went beyond its statutorily imposed duty, but the court still held the county's actions to be unreasonable.

There are numerous other foreseeable instances in which the application of the flexible reasonableness standard could lead to different additional steps from those employed in *Flowers*. Such fact patterns could involve the government having actual notice that the address at hand is not the most appropriate for use by someone "desirous of actually informing" the owners.[228] Examples of these situations are set forth below.

Issues could arise when certified mail notice is returned as unclaimed because the homeowner lives elsewhere for significant periods of time.[229] The tax official will have to consider reasonable steps in light of the taxpayer's noncontinuous presence at the property.[230] Additionally, the tax officials could be attempting notification with property that is vacant or was recently abandoned.[231] Tax officials will also have to consider appropriate steps for taxpayers who are deceased or otherwise incapacitated. Such instances could include property in probate proceedings or situations where the government learns that the delinquent taxpayer is in the hospital or mentally ill.[232]

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227 *See* Jones v. Flowers, 547 U.S. 220, 234–36 (2006). The *Flowers* Court did not require a search of public records because "[a]n open-ended search for a new address—especially when the State obligates the taxpayer to keep his address updated with the tax collector . . .—imposes burdens on the State significantly greater than the several relatively easy options outlined above." *Id.* at 236.

228 *See id.* at 229 (quoting Mullane v. Cent. Hanover Bank & Trust Co., 339 U.S. 306, 315 (1950)) (discussing the adequacy of notice given by a state).

229 *See, e.g.*, Luessenhop v. Clinton County, 2007 WL 1063650, at *2, *5–9 (N.D.N.Y. Apr. 6, 2007) (holding that qualified immunity protected the county's actions where the homeowner was temporarily living in England when notices were sent to the home in Washington, D.C.).

230 *See id.* at *6.

231 *See, e.g.*, Fernandez v. Tax Claim Bureau of Northampton County, 925 A.2d 207, 213 (Pa. Commw. Ct. 2007) (holding that notice of tax delinquency regarding vacant property required publication, posting, and certified mail, including efforts to locate appropriate mailing address by consulting with tax assessment offices); *see also* Kidder v. Cirelli, 821 So. 2d 1106, 1108–12 (Fla. Dist. Ct. App. 2002) (Harris, J., dissenting) (arguing that when certified mail sent to vacant land is returned as undeliverable because there was "no such number," the clerk has a constitutional obligation to search for a different address).

232 *See, e.g.*, *In re* Application of County Collector, 867 N.E.2d 941, 953 (Ill. 2007) (holding that notice was sufficient where tax company sent certified letters to the homeowner and "occupant" that were returned as unclaimed and took other additional steps including a tract search of the property and attempts at personal service, while guardian claimed that it was known that delinquent taxpayer was hospitalized for schizophrenia); Vosilla v. Rosado, 944 So. 2d 289, 301 (Fla. 2006) (ruling that notice sent to a home was insufficient after an individual notified the tax collector that the address on the tax roll was no longer appropriate and that an incapacitated relative and caretaker were currently living in the house).

The majority did not directly address the issue of what would be required if the Commissioner discovered, upon receiving return of unclaimed mail, that Jones no longer lived at the address of the property in dispute. Justice Thomas concluded in the dissent that even if the Commissioner became aware that the taxpayer did not live at the record address, publication of notice in a newspaper would be sufficient under *Mullane*.[233]

Still, based on the language of *Flowers*, publication of notice is hard to justify as being constitutionally sufficient. Someone that is "desirous of actually informing the absentee"[234] would seemingly do more than simply publish notice in the local newspaper. By taking further steps, the tax official would not disturb the ex ante principle because he would know at the outset that by sending certified mail there is a possibility of receiving knowledge relating to the location of the delinquent taxpayer.[235] In instances where tax officials have actual notice of circumstances that would make standard procedures ineffective, courts are likely to define a reasonableness standard as requiring a procedure that is specifically tailored to the individual situation and, therefore, likely resulting in more extensive steps then those required in *Flowers*.[236]

C. Applying Flowers from State to State

The Court's decision in *Flowers* is relatively simple: if notice is returned as unclaimed, the tax official must take additional steps to attempt to notify the individual. While this precept may be easy to understand, applying it is much more difficult. It may be difficult to apply *Flowers* with any sense of uniformity because no two states are alike in their foreclosure procedures.[237]

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[233] *See Flowers*, 547 U.S. at 246 (Thomas, J., dissenting) ("Even if the State had divined that petitioner was no longer at the record address, its publication of notice in a local newspaper would have sufficed because *Mullane* authorizes the use of publication when the record address is unknown.") (citing Mullane v. Central Hanover Bank & Trust Co., 339 U.S. 306, 316 (1950)).

[234] *Id.* at 229 (majority opinion) (quoting *Mullane*, 339 U.S. at 315).

[235] *See id.* at 231 ("But if a feature of the State's chosen procedure is that it promptly provides additional information to the government about the effectiveness of notice, it does not contravene the *ex ante* principle to consider what the government does with that information in assessing the adequacy of the chosen procedure.").

[236] Greater steps likely would be required to meet the standard of an individual "desirous of actually informing" the taxpayer of the foreclosure. *Id.* at 229.

[237] *See* Alexander, *supra* note 8, at 770 ("[N]o two states have the same procedures, many states have more than one possible procedure which can be utilized, and a significant number of states with strong home-rule provisions permit cities and counties to adopt their own independent provisions.").

The application of *Flowers* at the state level is complicated by inconsistencies among state foreclosure procedures, as the event that prompts notice can vary.[238] Professor Frank Alexander argues that the foreclosure mechanism can be broadly classified in three ways.[239] First, the foreclosure can be a single event, without a redemption period.[240] An example of this mechanism would be one of Washington's foreclosure procedures.[241] Washington's statute provides that the county treasurer will issue a certificate of delinquency following three years from the date of the delinquency.[242] The tax delinquency can be redeemed during the three year period before the property is sold, but once the foreclosure sale is completed, no right of redemption exists.[243] Here, notice should only be required once, given that there is only one event contemplated in the process.[244]

The second classification, like the first, is comprised of one event; this event, however, is followed by a right of redemption that expires after a set period of time.[245] For example, an Ohio statute allows for redemption up to one year after the sale of a tax certificate or lien.[246] Again, notice should only be required once for this procedure because the redemption period automatically starts from the time of the foreclosure sale, when notice is given, and terminates after a set period of time.[247] Notice at the beginning of the process is sufficient to inform the party of the eventual termination of the redemption period as well.[248]

Finally, some jurisdictions utilize a procedure with an initial tax sale, followed by an independent extinguishment of the right of redemption.[249] For example, New Hampshire authorizes a tax lien procedure that is two distinct steps. The first step allows for a tax lien by the tax collector in the event of

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[238] *Id.* at 779–82.
[239] *Id.* at 779.
[240] *Id.*
[241] *See* WASH. REV. CODE § 84.64.050 (2004).
[242] *See id.*
[243] *See id.*; Alexander, *supra* note 8, at 775 n.150. Washington provides for a limited post-sale redemption period for property owners who are minors or declared incompetent. *See* WASH. REV. CODE ANN. § 84.64.070.
[244] *See* Alexander, *supra* note 8, at 782.
[245] *See id.* at 779.
[246] *See* OHIO REV. CODE ANN. § 5721.38(C)(1) (West 2006).
[247] *See* Alexander, *supra* note 8, at 782.
[248] *See id.*; *see also* Calhoun v. Jennings, 512 N.E.2d 178, 184 (Ind. 1987) (stating that notice is due at the time of the tax sale, but that "it would [also] require an unwarranted expansion of *Mennonite* to conclude that the interested parties are entitled to notice of a lapse of the redemption period").
[249] *See* Alexander, *supra* note 8, at 779–80.

unpaid taxes.[250] A right of redemption exists until the tax collector issues a deed.[251] In the absence of redemption, step two occurs at least two years later, when the tax collector can issue a deed.[252]

Courts have held that notice must be given at each stage of the enforcement process because notice at the first stage does not necessarily inform the party of the time in which their property will ultimately be divested.[253] The party may know that divestment occurs some time after the expiration of a certain period in time, but may not possess any additional information.[254]

Flowers's application will vary, considering the variety of foreclosure procedures employed by states. In a state that utilizes a one-step procedure, the application of *Flowers* will only be concerned with whether notice is received for one event. In states that utilize a two-step process, the *Flowers* framework will have to be applied at two different steps if notice is returned as unclaimed at either step.

IV. *FLOWERS*'S EFFECT ON LEGISLATION

As discussed above, state statutes in the property tax foreclosure context are extremely varied.[255] At the state level, the government must satisfy the Supreme Court's interpretation of the Due Process Clause through *Flowers*, as well as the state constitution[256] and the particular foreclosure procedure that the state utilizes. It is yet to be seen how many state statutes will be changed by the *Flowers* decision, although change is already beginning to take place.

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250 *See* N.H. REV. STAT. ANN. § 80:59 (2006).

251 *See id.* § 80:69.

252 *See id*. § 80:76.

253 *See* Alexander, *supra* note 8, at 782 (explaining that "[i]n multistaged tax enforcement proceedings, adequate notice of an initial event is not adequate notice of the final event"); First N.H. Bank v. Town of Windham, 639 A.2d 1089, 1095 (N.H. 1994) (requiring notice of the issue date of the tax lien deed, the expiration date of the rights of redemption, and a warning that the mortgage will be eradicated by the tax lien deed if the property is not redeemed); *In re* Foreclosure of Liens for Delinquent Taxes, 607 N.E.2d 1160, 1163 (Ohio Ct. App. 1992) (finding that knowledge "that the sale of the subject property would take place some time in the future is not equivalent to notice of the time and place of sale").

254 Alexander, *supra* note 8, at 781.

255 *See id.* at 758, 779–82.

256 The protections offered by the state constitution can exceed that which could be offered by the Supreme Court's interpretation of the federal constitution. *See* Michigan v. Mosley, 423 U.S. 96, 120 (1975) (Brennan, J., dissenting) (stating that "it is appropriate to observe that no State is precluded by the decision from adhering to higher standards under state law").

A. *Post-*Flowers *Statutory Changes*

Following *Mennonite*, many states modified or rewrote their notice statutes for property tax enforcement; however, a degree of uniformity did not follow.[257] As the states make changes brought on by *Flowers*, it will be interesting to see whether patterns and accord develop across the states. There is unlikely to be a *Mennonite*-like rewriting of state notice statutes, considering that many states were already in line with the mandate of *Flowers*.[258]

At least one state has already started to change its statutes. On July 26, 2006, New York amended its Real Property Tax Law to comport with *Flowers*.[259] Prior to *Flowers*, New York officials were required to send notice to the owner only by first-class mail.[260] The statute did not provide direction for officials in the event that the letter was returned as undeliverable.[261]

The amended statute calls for the tax official to send notice to the delinquent taxpayer by certified and regular mail.[262] Notice is deemed received unless notices sent by both methods are returned to the post office within forty-five days.[263] In the event that both the notice sent by regular mail and certified mail are returned within forty-five days, further procedures are outlined.[264]

First, the government officer must attempt to find an alternative mailing address from the post office.[265] If an alternative address is obtained from the post office, notice must be sent by both first-class regular and certified mail to the alternative address.[266] If an alternative address is not obtained from the post office, notice must be posted on the property.[267]

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257 Mennonite Bd. of Missions v. Adams, 462 U.S. 791 (1983); *see also supra* text accompanying notes 49–54; Alexander, *supra* note 8, at 750.

258 *See* Jones v. Flowers, 547 U.S. 220, 228–29 & n.2 (describing various state notice procedures); *see also* Leading Case, *Tax Sales of Real Property—Notice and Opportunity to be Heard*, 120 HARV. L. REV. 233, 241–42 & n.68 (same).

259 *See Stricter Delinquent Tax Foreclosure Notice Law Takes Effect Nov. 23*, UNIF. STANDARD (N.Y. State Office of Real Prop. Servs., Albany, N.Y.) Oct. 2, 2006, at 4–5, http://www.orps.state.ny.us/ref/pubs/survey/oct06/print.pdf.

260 *Id.*; *see* N.Y. REAL PROP. TAX LAW § 1125 (McKinney 2007).

261 *See* N.Y. REAL PROP. TAX LAW § 1125 (McKinney 2007); *Stricter Delinquent Tax Foreclosure Notice Law Takes Effect Nov. 23*, *supra* note 259.

262 N.Y. REAL PROP. TAX LAW § 1125(b)(i) (McKinney 2007).

263 *Id.*

264 *Id.*

265 *Id.*

266 *Id.* § 1125(b)(ii).

267 *Id.* § 1125(b)(iii). Personal service is a sufficient substitute for posting notice. *Id.* § 1125(c).

The amended statute outlines procedures in situations where the homeowner's name is listed as "unknown" on the tax roll and cannot be found in the public record.[268] In these situations, notice must be sent to the delinquent property's address by regular mail, addressed to "occupant," and posted on the property.[269] The statute limits what could be an endless search of the public records by defining "public records" as

> [T]he books maintained by the recording officer of the county in which the property is located . . . the books kept by the clerk of the surrogate's court of the county in which the property is located . . . , the tax rolls in the possession of the enforcing officer dated from the applicable lien date forward.[270]

B. Suggested Procedures

In light of *Flowers*, state and local governments must evaluate whether their notice procedures are constitutionally adequate or whether they need to be altered to satisfy the nebulous structure of constitutional due process.[271] Tax authorities and legislators must not only consider *Flowers*, but other factors

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[268] § 1125(b)(iv).

[269] *Id.*

[270] § 1125(e). In *Flowers*, the Court did not require the Commissioner to undertake a search for an alternate address because "[a]n open-ended search for a new address . . . imposes burdens on the State significantly greater than the several relatively easy options outlined above." Jones v. Flowers, 547 U.S. 220, 236 (2006).

[271] Many states already required more than mailed notice before *Flowers*. The *Flowers* court noted that: "Many States require that notice be given to the occupants of the property as a matter of course." *Flowers*, 547 U.S. at 228 n.2. (citing CAL REV. & TAX. CODE § 3704.7 (West 2007); GA. CODE ANN. § 48-4-45(a)(1)(B) (2006); 35 ILL. COMP. STAT. ANN. 200/21-75(a), 200/22-10, 200/22-15 (West 2006); ME. REV. STAT. ANN. tit. 36, § 1073 (1990); MD. CODE ANN., TAX-PROP. § 14-836(b)(4)(i)(2) (LexisNexis 2007); MICH. COMP. LAWS ANN. § 211.78i(3) (West 2005); MINN. STAT. ANN. § 281.23(6) (West 2007); MONT. CODE ANN. §§ 15-18-212(1)(a), -212(2)(A) (2006); N.D. CENT. CODE § 57-28-04(3) (2005); OLKA. STAT. ANN. tit. 68, § 3118(A) (West 2006); S.D. CODIFIED LAWS § 10-25-5 (2004); UTAH CODE ANN. § 59-2-1351(2)(a) (2006); WIS. STAT. ANN. § 75.12(1) (West 2004); WYO. STAT. ANN. § 39-13-108(e)(v)(B) (2007)).

Additionally, the court noted that "[s]ome States require that notice be posted on the property or at the property owner's last known address . . . at the outset." *Id.* (citing DEL. CODE ANN. tit. 9, §§ 8724, 8772 (1989 and 2006); GA. CODE ANN. § 48-4-78(d) (2006); HAW. REV. STAT. ANN. § 246-56 (LexisNexis 2003); MD. TAX-PROP. CODE ANN. § 14-836(b)(6) (LexisNexis 2007); OKLA. STAT. ANN. tit. 68, § 3118(A) (West 2006)). Other states require that notice be posted on the property "as a followup measure when personal service cannot be accomplished or certified mail is returned." *Id.* (citing FLA. STAT. ANN. § 197.522(2)(a) (West 2007); MINN. STAT. ANN. § 281.23(6) (West 2007); S.C. CODE ANN. § 12-51-40(c) (2005)).

Finally, the Court explained that "a few States require a diligent inquiry to find a property owner's correct address when mailed notice is returned." *Id.* (citing MISS. CODE ANN. § 27-43-3 (2006); NEV. REV. STAT. § 361.595(3)(b) (2003); 72 PA. STAT. ANN. § 5860.607a (West 1990); R.I. GEN. LAWS § 44-9-25.1 (2005)).

such as the particular tax foreclosure procedure, constitutional law, and other state statutes.

Legislatures must also consider what administrative burdens they are willing to impose on their states in order to satisfy due process. On one end of the spectrum, legislatures could provide almost certain protections for the taxpayer such as personal service of process, but at the expense of the government's resources.[272] The Court, however, has never required that government entities take such steps.[273] States should weigh the administrative cost against the burden of satisfying due process to create an appropriate notice procedure.

Opposition to the steps discussed below, or new procedures in general, will likely be grounded in cost concerns. Tax officials could recover their costs by adding the cost of these notice procedures to the amount already owed.[274] If the individual chooses to redeem the property or the property is sold at a foreclosure sale, states could require the taxpayer to pay the delinquent tax amount plus reasonable costs, not to exceed the fair market value of the property.

Crafting a model procedure that could be implemented by all states would be nearly impossible without overhauling significant amounts of state law because of the number of variables within each state's system. However, there are certain steps that can be recommended in most situations.[275]

Flowers should not affect the initial step of sending certified mail for the states that choose to do so.[276] Although personal service may prove more

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[272] Personal service is considered the safest way of informing an individual that the state is taking action against them. *See* Thomas Beach, Recent Decision, *The Constitutionality of Ordinary First-Class Mail as a Method of Initial and Original Service of Process*, 57 MD. L. REV. 949, 951 (1998).

[273] *See* Dusenbery v. United States, 534 U.S. 161, 162 (2002).

[274] *See* Note, *The Constitutionality of Notice by Publication in Tax Sale Proceedings*, 84 YALE L.J. 1505, 1515 (1975).

[275] Possible new legislation that could help avoid the situation of unpaid taxes in the first place, in situations like *Flowers*, is to require mortgage lenders to notify mortgagees once the mortgage debt is extinguished that the property owner is now solely responsible for paying the property taxes. *See* 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, 448–49 (2006).

[276] *See, e.g.*, GA. CODE ANN. § 48-4-45(a)(2) (2005) (requiring that notice be "sent by registered or certified mail or statutory overnight delivery"); ME. REV. STAT. ANN. tit. 36, § 1073 (1990) (requiring that notice to be delivered "in person, or by registered mail with receipt demanded, or by leaving at his last and usual place of abode"); MD. CODE ANN., TAX-PROP. § 14-836(b)(4)(ii) (LexisNexis 2007) (requiring that notice "be sent by certified mail, postage prepaid, return receipt requested, bearing a postmark from the United States Postal Service"); MICH. COMP. LAWS § 211.78i(2) (West 2005) (requiring that notice be sent "by

reliable than other methods, it is not required and frequently is not possible.[277] Sending notice by certified mail is still "reasonably calculated" to inform the individual of the tax proceeding. Certified mail has the advantage of documentation when delivery attempts are made and when the letter is picked up.[278]

The certified letter should be supplemented by notice sent by regular mail.[279] Although this step may not be necessary to satisfy due process, it is an inexpensive and effective means of improving the odds that notice will be received. From the tax collector's perspective, the main goal should be the collection of delinquent taxes, rather than foreclosure, and supplementing the first mailing should help achieve this goal.[280]

If the certified letter is returned as unclaimed, several additional reasonable steps can be taken. These additional steps should be taken as long the certified letter is returned, even if the first-class letter is not.[281] The reason is that if the certified letter is returned, but the first-class letter is not, courts may have a hard time determining whether the regular letter was mailed and received in the first place, given its lack of documentation.[282]

If the letter is returned as unclaimed, some situations may call for a limited search of public records. A limited search of public records can be a cheap and

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certified mail, return receipt requested"); *see also* Mullane v. Cent. Hanover Bank & Trust Co., 339 U.S. 306, 319 (1950) (stating that "the mails . . . are an efficient and expensive means of communication); Beach, *supra* note 272, at 953.

[277] *See* Beach, *supra* note 272, at 953.

[278] *See* United States Postal Service, Certified Mail, http://www.usps.com/send/waystosendmail/extraservices/certifiedmailservice.htm (last visited Feb. 10, 2008).

[279] A letter sent by regular mail should not be substituted for a letter sent by certified mail because of its lack of documentation.

[280] Local and state governments should send notice by regular mail and certified mail at the very least at this point in time and that they should be encouraged to undertake even further steps. *See, e.g.*, GA. CODE ANN. § 48-4-78(d) (2005) (requiring that after taxes become delinquent, and before a foreclosure sale, the tax commissioner must mail notice to the delinquent taxpayer via certified mail, and must also send notice by first-class mail to the occupants of the property and post notice on the property).

[281] The recent New York statutory changes allow for no additional steps, unless both letters, one sent by regular first-class mail and the other sent by certified mail, are returned. *See* N.Y. REAL PROP. TAX LAW § 1125 (McKinney 2006); *see also Stricter Delinquent Tax Foreclosure Notice Law Takes Effect Nov. 23*, *supra* note 259, at 5 (explaining that when "both [the certified mailing and regular mailing] are returned within the 45-day period, further obligations are imposed upon the district").

[282] The difficulty of this argument was noted in *Flowers*. The Solicitor General argued that the government will have an incentive to use procedures that do not have a documentation mechanism to avoid a *Flowers*-like situation. Jones v. Flowers, 547 U.S. 220, 237 (2006). The Court rebutted this argument, stating that "we have no doubt that the government repeatedly finds itself being asked to prove that notice was sent and received." *Id.*

nonburdensome way to discover whether the delinquent taxpayer lives at a different residence than what is listed on the tax roll. As seen in the recently amended New York statute, the scope of this search can be limited by specifically defining what constitutes a "public record."[283] Other methods could include a search of a particular state database, such as Pennsylvania's "J-Net."[284]

By defining the search, a costly "open ended" search, such as the one with which the Court was concerned,[285] can be avoided. If the search results in a new address being found, notice by certified mail and regular mail should be sent to this address.

In the event that a different address is not found or additional letters are returned as unclaimed, notice should be posted on the property and sent by regular mail addressed to "occupant." Even if the taxpayer no longer lives at the property, the occupants of the house are likely to inform the taxpayer if either of these procedures is used.[286] After all of these steps have been undertaken, a court should hold, in most foreseeable situations, that due process has been satisfied even if the individual does not receive actual notice.

CONCLUSION

Jones v. Flowers added another piece to the due process puzzle. The Court determined that additional steps must be taken when notice of a tax foreclosure sale is returned as unclaimed. These additional steps are necessary to meet the reasonableness standard employed since *Mullane*.[287] Exactly what steps are required cannot be found in *Flowers*, but must be determined on a case-by-case basis.

Flowers will affect numerous parties, including but not limited to, homeowners, tax officials, courts, and legislatures. Importantly, homeowners will be protected against tax foreclosure sales occurring without attempts to provide actual notice. Whether the taxpayer is culpable in not paying the property taxes is not an issue; the Court made clear that the negligence of the

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[283] *See supra* note 270.

[284] *See* Justice Network, *supra* note 214; *see also supra* note 211–13 and accompanying text.

[285] *Flowers*, 547 U.S. at 236.

[286] *Id.* at 235.

[287] *See* Mullane v. Cent. Hanover Bank & Trust Co., 339 U.S. 306, 314 (1950).

taxpayer was not an excuse for the government to skirt due process standards.[288]

For tax officials, the task is to undertake appropriate steps that will satisfy due process requirements. Tax officials should not be disturbed by the *Flowers* decision. They now know that some form of additional steps must be taken and it remains in their discretion to weigh the costs and the benefits of each additional step in an attempt to satisfy *Flowers*. *Flowers* is signaling, as it should, that individuals' rights to receive adequate notice that potentially halts the deprivation of one's property is more important than tax officials' constant peace of mind in knowing that the same standard form notice procedures is sufficient in all situations.

For courts, the unbounded standard of *Flowers* should not be viewed as imprecise, but rather as an opportunity to evaluate each step of a contested notice procedure to ensure that tax officials are acting as individuals that would actually desire that the delinquent taxpayers receive notice. Considering that courts have been dealing with the *Mullane* reasonableness test for over half of a century, the *Flowers* test should not pose too great of a challenge.

Legislatures that did not have adequate notice statutes prior to *Flowers* now have the opportunity to craft procedures that satisfy due process when notice is returned as unclaimed. Legislatures will have to balance the costs of extensive notice procedures with the benefits of avoiding any constitutional challenges to property tax foreclosure sales. In instances where notice sent by certified mail is returned, legislatures should consider a combination of regular and certified mail (addressed to the taxpayer of record as well as "occupant"), posting notice, and in limited situations, a public record search for an alternate address.

As homeowners, tax officials, courts, and legislators individually deal with the implications of *Flowers*, observers can see the reflection of the *Mullane* reasonableness test. *Flowers* should be viewed as an application of *Mullane* in an untapped area of law, rather than as a new test that contradicts over fifty

[288] *See Flowers*, 547 U.S. at 234 ("Jones should have been more diligent with respect to his property, no question . . . . But before forcing a citizen to satisfy his debt by forfeiting his property, due process requires the government to provide adequate notice of the impending taking.") (citations omitted).

years of entrenched notice jurisprudence. The Court did not have to break away from precedent; rather, it was able to handle a "new wrinkle" while remaining within the confines of *Mullane*, *Mennonite*, and other cornerstone cases of due process.

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