Florida Law Review

Volume 59 | Issue 2 Article 5

January 2022

Constitutional Law: What to Do When a State Fails to Take Notice that its Notice has Failed

Dustin G. Hall

CONSTITUTIONAL LAW: WHAT TO DO WHEN A STATE FAILS TO TAKE NOTICE THAT ITS NOTICE HAS FAILED?

Jones v. Flowers, 126 S. Ct. 1708 (2006)

*Dustin G. Hall**

After Petitioner[1] paid off his mortgage, his annual property taxes went unpaid.[2] Respondent, Commissioner of State Lands, subsequently certified Petitioner's property as delinquent.[3] Under the applicable state statute,[4] Respondent sent, via certified mail, a notice of delinquency to Petitioner's property.[5] The notice indicated that the property would be sold unless Petitioner redeemed the property.[6] The notice, however, was returned to Respondent as "unclaimed."[7]

Following sale of the property, the purchaser caused a notice of detainer to be served upon Petitioner's daughter.[8] Subsequently, Petitioner brought suit in Arkansas state court alleging that his due process rights had been violated.[9] The trial court granted Respondent's motion for summary judgment and the Arkansas Supreme Court affirmed.[10] The United States

---

* J.D. expected May 2008, University of Florida Levin College of Law. For my parents, Bud and Barbara Hall, and brother and sister, Chuck and Eylin Hall, whose love and support I cherish deeply.

1. Jones v. Flowers, 198 S.W.3d 520 (Ark. 2004), *rev'd*, 126 S. Ct. 1708 (2006).

2. Jones v. Flowers, 126 S. Ct. 1708, 1712 (2006). As is common practice, during the thirty years that Petitioner was paying his mortgage, his mortgage company paid the annual property taxes. *Id.*

3. *Jones*, 198 S.W.3d at 522.

4. *See* ARK. CODE ANN. § 26-37-301(a)(1) (2002).

5. *Jones*, 126 S. Ct. at 1712.

6. *Id.* Under the applicable statute, Petitioner had two years in which to redeem his property. *See* ARK. CODE ANN. § 26-37-301(b) (2002).

7. *Jones*, 126 S. Ct. at 1712. Pursuant to the statute, Respondent sent another letter two years later, via certified mail, to Petitioner's property, indicating that the property would be sold unless Petitioner paid the delinquent taxes. *Id.* This second letter was also returned to Respondent as "unclaimed," and Respondent subsequently attempted to sell the property. *Id.* at 1712-13. Respondent first attempted to sell Petitioner's property at auction, and when the auction failed to draw any bids, Respondent was then authorized to negotiate a private sale. *See id.* at 1712. Several months after the auction publication, Respondent privately negotiated the sale of Petitioner's property with Linda Flowers, an additional respondent in the instant case. *Id.* at 1712-13.

8. *Id.* at 1713.

9. *Id.*

10. Jones v. Flowers, 198 S.W.3d 520, 527 (Ark. 2004), *cert. granted*, 126 S. Ct. 35 (2005), *rev'd*, 126 S. Ct. 1708 (2006). Both the trial court and the Arkansas Supreme Court concluded that the applicable statute's procedures provided sufficient due process, and because Respondent followed the notice procedures mandated by the statute, Petitioner's due process rights were not violated. *See id.*

Supreme Court granted certiorari and HELD that when mailed notice is returned "unclaimed," the government must take further practicable and reasonable steps to provide notice to a property owner before a forced sale.[11]

The Fourteenth Amendment's Due Process Clause provides, in part, that no state shall "deprive any person of life, liberty, or property, without due process of law."[12] Fundamental to due process is the requirement that notice of governmental action resulting in the deprivation of property must be "reasonably calculated, under all the circumstances, to apprise [all] interested parties" of the deprivation and grant them an opportunity to be heard.[13]

Mullane v. Central Hannover Bank & Trust Co.[14] is the seminal case addressing the constitutional requirements for notice.[15] In *Mullane*, the Court addressed whether publication in a local newspaper of judicial settlement of a common trust fund[16] provided sufficient notice to all interested parties.[17] Although personal service will always provide

---

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

12. U.S. CONST. amend. XIV, § 1. This Comment addresses only procedural due process and not substantive due process. For a general discussion of the distinction between these two concepts, see ERWIN CHEMERINSKY, CONSTITUTIONAL LAW 545-49 (3d ed. 2006). Various areas of law face unique procedural and substantive due process concerns. *See, e.g.*, Carole J. Buckner, *Due Process in Class Arbitration*, 58 FLA. L. REV. 185 (2006) (discussing particular due process concerns in the class arbitration setting); William W. Heiser, *Forum Selection Clauses in State Courts: Limitations on Enforcement After* Stewart *and* Carnival Cruise, 45 FLA. L. REV. 361 (1993) (discussing unique due process issues raised by forum selection clauses); Jordan G. Lee, Note, *Section 12 of the Clayton Act: When Can Worldwide Service of Process Allow Suit in any District?*, 56 FLA. L. REV. 673 (2004) (discussing peculiar due process concerns raised by the Clayton Act).

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

14. 339 U.S. 306 (1950).

15. *See id.*; *see also* Dusenbery v. United States, 534 U.S. 161, 168 (2002) (noting that the Court regularly turns to *Mullane* when analyzing adequacy of notice cases); Mennonite Bd. of Missions v. Adams, 462 U.S. 791, 795-97 (1983) (describing the Court's unwavering adherence to the principles in *Mullane*). Because the instant case dealt with state action where the state attempted to sell real property, it is important to note that the *Mullane* Court abolished the distinction between the notice required for in rem and in personam actions. *See Mullane*, 339 U.S. at 312-13. The *Mullane* Court reasoned that the requirements of the Due Process Clause of the Fourteenth Amendment do not depend upon such "elusive and confused" classifications. *Id.* at 312. Thus, in its post-*Mullane* decisions, the Court has announced that a state is required to make efforts to provide actual notice to interested parties comparable to the efforts that were previously required only for in personam actions. *See, e.g.*, *Mennonite*, 462 U.S. at 796 n.3.

16. The common trust fund was established and managed under the New York Banking Law. *Mullane*, 339 U.S. at 308. Under the Banking Law, publication in a local newspaper had to state only the name and address of the trust company, the name and date of the establishment of the common trust fund, and a list of all participating estates, trusts, and funds. *Id.* at 309-10.

17. *See id.* at 307, 309. The Court noted that the judicial settlement of the common trust fund may result in a deprivation of property because the settlement would cut off beneficiaries' rights to bring suit against the trustee for negligent or illegal management of the fund; therefore, notice

adequate notice,[18] the Court noted that it must balance the state's interest in timely settlement of a pending action with an individual's interest possibly protected by the Fourteenth Amendment.[19] Therefore, personal service of written notice is not always required.[20] Rather, the chosen method of notice must be one that would be reasonably adopted by a person actually desirous of informing interested parties.[21]

As to beneficiaries whose whereabouts were unknown, the Court held that publication met due process requirements because no other reasonable method could have provided more adequate notice.[22] However, as to beneficiaries whose whereabouts were known, publication of the trust's settlement did not meet due process requirements.[23] In drawing this distinction between different classes of interested parties,[24] the Court emphasized that due process requirements cannot be met by theoretically sufficient methods, but that sufficiency will depend on the specific facts in each particular instance.[25]

In *Mennonite Board of Missions v. Adams*,[26] the Court extended to sophisticated creditors the same due process protections provided for trust beneficiaries in *Mullane* by holding that publication and posting did not provide constitutionally sufficient notice to a real property mortgagee.[27]

---

of the settlement had to meet the requirements of the Due Process Clause. *Id.* at 313.

18. *See id.* at 313.

19. *Id.* at 314.

20. *See id.*

21. *See id.* at 315. In an attempt to clarify due process requirements, the Court stated that the reasonableness and constitutionality of a chosen method of notice can be defended on the ground that the method is "reasonably certain" to inform interested parties of the action, or when no method would be reasonably certain to inform them, an alternative method cannot be substantially less likely to provide notice than some other "feasible or customary" substitute. *Id.*

22. *Id.* at 317. The Court stated that when conditions such as missing persons or persons whose whereabouts are unknown do not practicably permit a method that is reasonably certain to inform interested parties, due process requires only that the method of notice chosen not be substantially less likely to apprise the parties than some other feasible or customary substitute would be. *Id.* at 315. The Court, however, did not attempt to indicate any other feasible or customary substitutes, providing only that indirect and probably futile means will nonetheless be constitutionally sufficient. *Id.* at 317.

23. *See id.* at 319. The Court reasoned in part that chance alone brings an interested party's attention to a newspaper publication, and as such is nothing more than a feint of notification. *See id.* at 315. The Court further opined that publication traditionally has been acceptable as notification supplemental to other reasonably calculated methods of notice. *Id.* at 316.

24. That is, differentiating between those parties whose whereabouts were known versus those whose whereabouts were unknown. This distinction is important because it makes clear that the state must use a method of notice that is tailored not only to its pending action but also to the situation of the interested party.

25. *Mullane*, 339 U.S. at 320.

26. 462 U.S. 791 (1983).

27. *See Mennonite*, 462 U.S. at 799-800. In *Mennonite*, under the applicable statute, real

The *Mennonite* Court relied on the *Mullane* rule, which requires that the chosen method of notice be reasonably calculated under all circumstances to apprise all interested parties of the pendency of state action.[28] The Court refined the requirements of the *Mullane* rule, however, providing that the sufficiency of the method of notice does not depend on an interested party's ability to safeguard its own interests.[29]

Although the mortgagee in *Mennonite* could have, and perhaps should have, learned of the pending tax sale of the property, the Court concluded that the state was not relieved of its obligation to provide constitutionally sufficient notice.[30] Rather, the Court indicated that the state had to make reasonably diligent efforts to ascertain the mortgagee's mailing address.[31]

---

property with delinquent property taxes could be sold by the county auditor of the county in which the property was located. *Id.* at 792-93. However, prior to any such "tax sale," written notice had to be sent to the property owner via certified mail to her last known address. *Id.* at 793. For the purposes of the applicable statute, a mortgagee was not considered an owner; therefore, the mortgagee was not entitled to receipt of written notice of the tax sale. *Id.* at 793 n.1. Before *Mennonite* was decided, but after the property in question in *Mennonite* was sold, Indiana amended its statute to require that notice by certified mail be sent to any mortgagee of real property. *See id.* at 793 n.2. It is important to note that the Court subsequently held that statutory requirements were not dispositive as to the sufficiency of notice mandated by the Due Process Clause (i.e., who is entitled to due process before the deprivation of property does not depend on how a statute classifies that party); rather, due process is a constitutional question that can be answered only by the judiciary. *See* Cleveland Bd. of Educ. v. Loudermill, 470 U.S. 532, 541 (1985).

28. *See Mennonite*, 462 U.S. at 795 (citing *Mullane*, 339 U.S. at 314). Although requiring that notice must be given to *all parties* with an interest in the property may seem like an under-the-radar expansion of the notice requirements (i.e., notice must be given not only to the property owner, but also to everyone with an interest in the property), this provision does nothing more than recognize that various parties, in various ways, may have an interest in property (e.g., the legal title holder, the equitable title holder, any tenants, and any mortgagees). Notwithstanding this recognition, it is not clear whether holders of less obvious interests (e.g., remainders, executory interests, mechanics' liens) have a right to receive notice of a pending state action.

29. *Id.* at 799. This refinement is important because the Court had earlier decided that if a state is aware of inexperienced or incompetent parties, then it may be required to take particularly extensive efforts to provide notice. *See id.* (citing Covey v. Town of Somers, 351 U.S. 141, 146-47 (1956)). In *Mennonite*, the Court made clear that the inverse situation (i.e., experienced or competent parties) does not imply that particularly narrow efforts to provide notice are constitutionally sufficient. *See id.* at 799-800. This refinement makes invalid any argument by the State that it was relieved of its obligation to notify an interested party because the party had knowledge—or could have taken steps to gain knowledge—of the State's action. *See id.*

30. *Id.* at 799-800.

31. *Id.* at 798 n.4. Taking steps to ascertain the mortgagee's address was required because the mortgage in the public records did not supply a street address, but listed only the county in which the mortgagee was located. *Id.* The Court believed the mortgagee's address could have been ascertained, and that even if the address could not be ascertained, simply mailing a letter to the county with the name of the mortgagee listed on the envelope quite likely would have provided notice. *Id.* The Court attempted to refine the extent of these additional steps by noting that "extraordinary efforts" were not required, but the Court did not hint at what exactly would constitute an "extraordinary effort." *Id.*

Thus, by focusing on the fact that the mortgagee did not apprise itself of the property's situation, the Court reinforced the notion that due process requires, at a minimum, that states choose a method of notice that is reasonably certain to provide actual notice to interested parties.[32] Therefore, in some situations, a state may have to take additional steps to meet this requirement.[33]

In *Dusenbery v. United States*,[34] the Court shifted its focus to the theoretical sufficiency of a state's method of notice.[35] In *Dusenbery*, the Court addressed the sufficiency of the method of notice used to inform a federal inmate of the FBI's intended forfeiture action against the inmate's cash.[36] In accordance with the applicable statutes, the FBI mailed and published notices of its intent to seize over twenty-thousand dollars belonging to the inmate.[37] When the FBI received no response to its notices, it declared the cash "administratively forfeited."[38] The inmate subsequently argued that because he was under the exclusive control of the federal government, the government violated his due process rights.[39] Specifically, the inmate claimed that because the government did not take reasonably diligent steps to ensure he received notice, the notice procedures employed were not constitutionally sufficient.[40]

---

32. *See id.* at 800. This conclusion makes clear that both the mortgagee's sophistication and the fact that the mortgagee should have apprised itself of the property's situation are irrelevant to the state's burden of providing sufficient notice.

33. *See id.* at 799-800. Despite noting that the State should have mailed notice to the County in which the mortgagee was listed, the Court did not give any suggestions as to what additional steps might be necessary or sufficient. *See supra* note 22 (noting the *Mullane* Court's failure to indicate what additional steps would be sufficient).

34. 534 U.S. 161 (2002).

35. Although *Dusenbery* involved federal action and could have been addressed solely under the Fifth Amendment's Due Process Clause, the Court made clear that the analysis is the same under the Fifth and Fourteenth Amendments. *See id.* at 167. Therefore, the Court's analysis demonstrated that due process requirements do not differ between state or federal actions.

36. *Id.* at 166-67. The Court defined the issue very narrowly by stating the issue in terms of what the Due Process Clause requires the U.S. government to do when it seeks the forfeiture of the property of a federal inmate who *appears* to have an interest in property. *Id.* This narrow framing suggests that the Court recognized the inequity of the decision generally but felt it permissible because the specific individual whose property was being taken was a convicted drug dealer. *See infra* note 63 (noting the inequity of basing decisions on the status of defendants).

37. *See Dusenberry*, 534 U.S. at 163-64. The FBI mailed forfeiture notices to the inmate's correctional facility, the inmate's listed residence at the time of his arrest, and the inmate's mother's address. Additionally, the FBI published notice in a newspaper where the forfeiture proceeding was brought. *Id.*

38. *Id.*

39. *Id.* at 170.

40. *See id.* As part of its theoretical bent, the Court exaggerated the inmate's claim when it suggested that, indeed, the FBI could have chosen another method of notice that would have assured actual notice. For example, a correctional facility officer could escort the inmate to the post

In a five-to-four decision, the Court held that the method of notice was constitutionally sufficient because mailing the notice was reasonably calculated to apprise the inmate of the action.[41] Diverging from *Mullane* and *Mennonite*, the majority reasoned that because mail notice was previously found to be sufficient, mail notice in this case was also sufficient.[42] The Court, however, had never declared that mail notice would be sufficient in all situations.[43] Rather, the Court always examined the particular facts at issue to determine whether a state's chosen method was substantially less likely to achieve actual notice than that of a feasible substitute.[44] Further, the dissent was persuaded by the fact that mail distribution procedures in federal correctional facilities had been modified to require that inmates sign for all packages received.[45]

The instant Court further expanded the protections of the Due Process Clause by holding that the state must take additional steps to provide notice of a tax sale when it is aware that its notice attempts have failed.[46] The instant Court began with the basic notion that due process does not require that a property owner actually receive notice of state action.[47] Rather, the state had only to use a method of notice reasonably calculated under the circumstances to notify the owner of the action.[48] Notwithstanding actual receipt of notice, however, Respondent's method of providing notice was still subject to the "reasonably calculated" requirement.[49]

---

office so that he could sign for the package. However, the Court noted that such "heroic efforts" surely were not required to meet due process requirements. *Id. But see infra* note 45 and accompanying text (discussing the dissent's consideration of the new procedures requiring inmates to sign for packages).

41. *See Dusenbery*, 534 U.S. at 172-73.

42. *See id.* at 172.

43. *See id.* at 177 (Ginsburg, J., dissenting).

44. *Id.* at 178 (citing Mullane v. Cent. Hanover Bank & Trust Co., 339 U.S. 306, 315 (1950)).

45. *See id.* at 180. Although the dissent admitted that the government should not be penalized for upgrading mail procedures, the fact that the procedures were changed to require signatures demonstrated that this was a feasible alternative that would not have been overly burdensome and that was certainly more likely to bring notice to the inmate. *See id.* Therefore, any argument by the government that requiring inmate signatures would be an extraordinary effort has been foreclosed.

46. *See* Jones v. Flowers, 126 S. Ct. 1708, 1713 (2006).

47. *Id.*

48. *Id.* at 1713-14; *see also Dusenbery*, 534 U.S. at 170; *Mullane*, 339 U.S. at 314. The instant Court acknowledged that Petitioner's failure to receive actual notice had no impact on the analysis of the constitutional sufficiency of Respondent's method of notice. *See Jones*, 126 S. Ct. at 1717.

49. *Jones*, 126 S. Ct. at 1713-14 (quoting *Mullane*, 339 U.S. at 314). That is, the mere fact that a property owner did not receive actual notice, does not in itself demonstrate that a state's method of notice was constitutionally insufficient; rather, sufficiency of notice is determined by the reasonableness of the state's method.

The instant Court clarified the reasonably calculated requirement, noting that the method must be *reasonably certain* to inform those affected.[50] Furthermore, the constitutional sufficiency of notice will vary with the circumstances and conditions at issue.[51] The instant Court emphasized that Respondent had to consider the unique information it had about Petitioner and his property when it attempted to notify him.[52] In the instant case, Respondent knew that Petitioner did not receive either of the notice letters because both letters were returned "unclaimed."[53] Thus, Respondent's failure to take any further steps demonstrated that Respondent did not actually desire to inform Petitioner of the action against his property.[54]

The instant Court stated that Respondent's knowledge of the lack of actual notice required additional reasonable steps to attempt to notify Petitioner.[55] The instant Court suggested that such steps could have included sending notice via regular mail,[56] posting notice on the front door,[57] or addressing the notice to "occupant."[58] Because Respondent failed to take any reasonable additional steps to notify Petitioner, the instant Court held that Respondent's method of notice failed to meet the requirements of the Due Process Clause.[59]

In a measured dissent, Justice Thomas relied on indulgences into what Petitioner should have done to apprise himself of his property's situation to conclude that Respondent's method of notice was sufficient.[60] As the *Dusenbery* majority similarly reasoned, the dissent in the instant case declared that Respondent's multiple attempts to notify Petitioner through

---

50. *See id.* at 1714.

51. *Id.*

52. *See id.* at 1716. In other words, the Court clarified that the reasonableness of the method in ordinary situations is irrelevant when considering the specific situation where notice is required. *See id.*

53. *Id.* at 1712.

54. *Id.* at 1716.

55. *Id.* at 1718-19.

56. *Id.* The instant Court reasoned that regular mail was reasonable because it would not have required Petitioner's signature for delivery, and therefore the notice could have been left at the property, which may have led to actual notice. *Id.* at 1719. Moreover, the instant Court suggested that even if occupants ignored certified mail pick-up notices, they may readdress regular mail to the owner's new address and then leave it for the postal worker to retrieve, or more likely, they may notify a property owner of the notice themselves. *Id.*

57. *Id.* The instant Court noted that Petitioner learned of Respondent's actions only after his daughter was served at the property with an unlawful detainer notice; thus, Petitioner probably would have been notified by his daughter if notice had been posted on the front door. *See id.*

58. *Id.* The instant Court reasoned that the occupant is likely to open mail addressed to "occupant," in which case, the occupant would probably notify Petitioner of the notice. *Id.*

59. *Id.* at 1721.

60. *See id.* at 1721-27 (Thomas, J., dissenting).

the mail were sufficient.[61] The dissent recognized the theoretical basis of its analysis when it admitted that Respondent in the instant case was free to indulge in the assumption that Petitioner took steps to keep apprised of his property's condition.[62] Thus, the dissent would have held that Respondent had not violated Petitioner's due process rights simply because mailing notice was theoretically sufficient.[63]

By relying on common sense and focusing on the "unique information"[64] and "practicalities and peculiarities of the case,"[65] the instant Court returned to the reasoning of *Mullane* and *Mennonite*.[66] This reliance on common sense, rather than on sophisticated legal analysis,[67]

---

61. *See id.* at 1723. In support of its blanket statement that notice by certified mail will always be sufficient, the dissent cited other cases in which the Court concluded that mailed notice was a sufficient method of notice. *See id.* (citing Dusenbery v. United States, 534 U.S. 161, 169 (2002); Tulsa Prof'l Collection Servs., Inc. v. Pope, 485 U.S. 478, 490 (1988); Mennonite Bd. of Missions v. Adams, 462 U.S. 791, 792, 798 (1983); Mullane v. Cent. Hanover Bank & Trust Co., 339 U.S. 306, 318 (1950)). However, the dissent failed to appreciate that in all but one of the cases it cited, i.e., *Dusenbery*, the Court had relied on the specific facts of the case to conclude that mailing notice was sufficient in each situation.

62. *See id.* This indulgence is in direct contradiction to the demands of due process as they were set forth in *Mullane* and *Mennonite*. *See supra* notes 25, 32 and accompanying text.

63. *See Jones*, 126 S. Ct. at 1727. As in *Dusenbery*, where the majority seemed at ease in relying on theoretically sufficient notice to a convicted drug dealer, *Dusenbery*, 534 U.S. at 166-67, the dissent in the instant case seemed willing to undermine due process protections for certain classes of people when it declared that the "Constitution should not turn on the antics of tax evaders and scofflaws." *Jones*, 126 S. Ct. at 1727. The dissent would have done well to remember that the true extent of many of our most fundamental rights and liberties have been guaranteed to just such unsavory classes of people. *See, e.g.*, Kyllo v. United States, 533 U.S. 27 (2001) (finding that the Fourth Amendment prohibits the use of sense-enhancing technology to observe the activities of persons growing marijuana in their home); Texas v. Johnson, 491 U.S. 397 (1989) (concluding that the First Amendment protects the expression of a flag-burner); Enmund v. Florida, 458 U.S. 782 (1982) (concluding that the Eighth Amendment forbids capital punishment of a participant in a robbery that resulted in the death of two individuals).

64. *Jones*, 126 S. Ct. at 1716 (majority opinion).

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

66. In analyzing the instant Court's decision not to follow the *Dusenbery* logic, which would have led it to uphold the Arkansas Supreme Court's decision, we may be tempted merely to look at the makeup of the United States Supreme Court at the time of *Dusenbery* and at the time of the instant case and realize that the dissenters in *Dusenbery* (Justices Ginsburg, Stevens, Souter, and Breyer) became the majority in the instant case when current Chief Justice Roberts joined the bench. Although such a realization does little as far as assessing the instant Court's decision, it does bring into sharp relief the obvious facts, which are often overlooked, that questions reaching the United States Supreme Court are difficult, often depend on an individual Justice's preconceptions, and almost always could have turned out differently. *See generally* JEROME FRANK, COURTS ON TRIAL 148-49, 157-64 (1949); JEROME FRANK, LAW AND THE MODERN MIND 133 (Coward-McCann, Inc. 1949) (1930).

67. The instant Court's reasoning is reminiscent of the oft-quoted, "I know it when I see it," line of thought from Justice Stewart's concurrence in *Jacobellis v. Ohio*, 378 U.S. 184, 197 (1964) (Stewart, J., concurring).

inexorably led the instant Court to its appropriate conclusions and holding.[68] Moreover, this straightforward, simple reasoning allowed the instant Court to properly dismiss Respondent's arguments as practically irrelevant.[69]

In rejecting Respondent's arguments regarding the sufficiency of its attempts to notify Petitioner, the instant Court examined two things Respondent actually did after its notices failed.[70] First, the instant Court analyzed the additional reasonable steps Respondent could have taken to notify Petitioner[71] in light of the burdensome and expensive steps Respondent took to sell Petitioner's property.[72] Second, the instant Court took note that Respondent changed its notice procedures to the more burdensome alternative of requiring personal service rather than mail after

---

68. The instant Court crafted a hypothetical to make apparent its common sense reasoning. *See Jones*, 126 S. Ct at 1716. The instant Court's hypothetical stated:

> If the [Respondent] prepared a stack of letters to mail to delinquent taxpayers, handed them to the postman, and then watched as the departing postman accidentally dropped the letters down a storm drain, one would certainly expect the [Respondent's] office to prepare a new stack of letters and send them again . . . . Failure to follow up would be unreasonable, despite the fact that the letters were reasonably calculated to reach their intended recipients when delivered to the postman.

Id.

69. *Id.* Respondent had three arguments why its failure to take further steps to notify Petitioner did not violate due process. *See id.* at 1717. First, because Petitioner did not update his address, as was his legal obligation, Respondent's mailing notice to the address on file was sufficiently calculated to reach Petitioner and therefore met due process requirements. *See id.* Second, when Petitioner did not receive any tax bills, he was put on inquiry notice that his property would be sold at a tax sale; thus, Respondent did not have to give Petitioner actual notice. *See id.* Finally, Respondent could reasonably assume that Petitioner left his property with someone who would alert him of the actions against his property. *See id.* With slight variations, the instant Court dismissed each of Respondent's arguments by noting the simple fact that Respondent knew Petitioner did not get the notices. *See id.* at 1717-18.

70. In addition to its consideration of Respondent's actions, the instant Court also properly considered an additional fact in its reasoning. Namely, the instant Court noted that Respondent should have taken additional steps to notify Petitioner when the notification concerned such "an important and irreversible prospect as the loss of a house." *Id.* at 1716.

71. *See id.* at 1718-19. For example, the Court analyzed sending notice via regular mail and posting on property. *See id.*

72. *See id.* at 1720. The instant Court noted that Respondent had to purchase an advertisement, conduct an auction, and negotiate a private sale. *Id.* As to Respondent's choice to pursue a private sale, the instant Court sardonically commented that a state will always be zealous in its efforts to secure revenue but will be apathetic in its efforts to notify its citizens of actions against them. *See id.* at 1721. Such economically self-interested behavior on a state's part is clearly in tension with due process protections.

its notice failed.[73] The instant Court properly concluded that both of Respondent's own voluntary actions were more burdensome than those that would have provided constitutionally sufficient notice to Petitioner;[74] therefore, Respondent's own behavior nullified any argument that providing sufficient notice to Petitioner would have been too burdensome.

By focusing on the specific facts, the instant Court crafted a narrow holding requiring a state to take additional reasonable steps only when mailed notices of tax sales are returned "unclaimed."[75] This narrow holding is likely the result of the instant Court's discomfort with placing "extraordinary" burdens on a state in situations when notification has failed.[76] However, the instant Court's discomfort is unnecessary because its careful use of language supplies various constitutionally sufficient steps a state may take when it knows that its efforts to notify have failed.[77] These steps do not infringe on a state's rights or its ability to effectively operate government programs.

However, by explicitly refining Fourteenth Amendment Due Process Clause requirements, the instant Court may have preempted arguments in future cases seeking to further due process protections. By denying Petitioner's contentions that Respondent should have searched for Petitioner's current address in other public records,[78] the instant Court undermined the requirement that a state must take additional reasonable steps when it knows its notice attempts have failed.[79] The current state of electronic public recordkeeping allows such quick, convenient, and

---

73. *See id.* at 1719.

74. *See id.* at 1720.

75. *Id.* at 1713.

76. The instant Court was occupied with assuring states that they will not have to take extraordinary efforts or "'[h]eroic efforts.'" *Id.* at 1722 (quoting Dusenbury v. United States, 534 U.S. 161, 170 (2002)); *cf. Dusenbery*, 534 U.S. 161 at 170 (indicating that limitations must be placed on the additional steps states must undertake to provide sufficient notice); Mennonite Bd. of Missions v. Adams, 462 U.S. 791, 798 n.4 (1983) (same).

77. *See Jones*, 126 S. Ct. at 1718-19; *see also supra* notes 56-58 and accompanying text. The instant Court's worry is even more unfounded given that the Court explicitly rejected the Petitioner's suggestions as to what additional steps Respondent should have taken. *See Jones*, 126 S. Ct. at 1719. Although Petitioner's suggestions do not seem very burdensome, the instant Court makes clear that Respondent was not required to conduct an "open-ended search" of phonebooks or tax rolls, even if such a search would have led to Petitioner's current address. *Id.* Thus, the additional steps that Respondent was required to take were "close-ended," which seems to suggest that they were limited to steps aimed only at the property in question and not at Petitioner himself. Notwithstanding the careful reasoning and narrow holding, the instant case is likely to have far-reaching effects. *See, e.g.*, United States v. Sodders, No. 1:05-CV-96-TS, 2006 U.S. Dist. LEXIS 45848, at *19 (N.D. Ind. June 21, 2006) (providing that notice sent via regular mail may supply sufficient due process although notice via certified mail may not); Patricia Weingarten Assocs. v. Jocalbro, Inc., 932 So. 2d 587, 588 (Fla. 5th DCA 2006) (remanding in light of *Jones* decision).

78. *See Jones*, 126 S. Ct. at 1719.

79. *See id.* at 1713.

inexpensive access that it seems a search of these records should be reasonable.[80] By stating this conclusion, the instant Court failed to follow its own common sense and fact-specific reasoning because Petitioner's suggestions are a common and simple practice in the world at large.[81]

Compared to the dissenting opinion, the majority's reasoning in the instant case is both more persuasive and more in line with due process jurisprudence. *Dusenbery* is the leading case in due process jurisprudence that accepts the theoretical adequacy of a state's method of notice.[82] Dusenbery's conclusory reasoning is not only unpersuasive, but it is also contrary to the logic of *Mullane* and *Mennonite* and undermines due process protections.[83] The bedrock of due process requires that notice of an action be reasonably calculated to notify the interested party under *all* circumstances, not merely under typical circumstances.[84] Thus, the instant Court's factual focus and requirement of additional reasonable steps both refine and strengthen the protections guaranteed by due process.[85]

At its core, the Due Process Clause of the Fourteenth Amendment protects private property interests from governmental overreaching. Operating under pragmatic and fact-specific logic, the instant Court has properly and powerfully ensured that the government cannot shirk its due process responsibilities by mechanically doing what it has always done. Rather, the instant decision demands that the government do more than merely go through the standard motions: The government must look at the concrete facts and act accordingly.[86] Requiring such individually tailored

---

80. *See* Mullane v. Cent. Hanover Bank & Trust Co., 339 U.S. 306, 319-20 (1950). The instant Court would have been advised to pay careful attention to the *Mullane* Court's statements that "[i]n some situations the law requires greater precautions in its proceedings than the business world accepts for its own purposes. In few, if any, will it be satisfied with less." *Id.* This statement suggests that the business world's regular and necessary use of electronic public records should dictate that states must avail themselves of those technologies as well because the world of law should require just as much, if not more, than the world of business.

81. The instant Court would also have been well advised to remember the admonishment of the *Mullane* Court: "Great caution should be used not to let fiction deny the fair play that can be secured only by a pretty close adhesion to fact." *Id.* at 320 (quoting McDonald v. Mabee, 243 U.S. 90, 91 (1917)).

82. *See supra* notes 42-44 and accompanying text; *see also supra* note 61 (singling out *Dusenbery* as the only cited case in which the Court did not rely upon specific facts to assess sufficiency of notice).

83. As noted above, the dissent in *Dusenbery* was quick to point out this divergence and its effect of undermining due process protections. *See* Dusenbery v. United States, 534 U.S. 161, 177-78 (2002) (Ginsburg, J., dissenting).

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

85. *See, e.g.*, Mathews v. Eldridge, 424 U.S. 319, 334 (1976) (noting that due process is not a static conception, but "is flexible and calls for such procedural protections as the particular situation demands" (quoting Morrissey v. Brewer, 408 U.S. 471, 481 (1972))).

86. States are in effect being told: "Try not. Do . . . or do not. There is no try." STAR WARS: EPISODE V-THE EMPIRE STRIKES BACK (Lucasfilm Ltd. 1980) (quoting Jedi Master Yoda).

action is proper given that the Due Process Clause does not speak about theoretical *people* but speaks about protecting an actual *person*. Thus, by requiring that the government meet its explicit due process obligations, the instant Court has ensured that every person will be afforded proper due process protections.