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Bringing Clarity to Title Clearing: Tax Foreclosure and Due Process in the Internet Age

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BRINGING CLARITY TO TITLE CLEARING: TAX FORECLOSURE AND DUE PROCESS IN THE INTERNET AGE

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The foreclosure of property tax liens performs an essential economic function by reconnecting underutilized properties to the real estate market. To clear title in an efficient and just manner, local jurisdictions foreclosing on tax liens require clear, balanced procedures for the provision of notice to affected parties. In its 2006 decision in Jones v. Flowers, the U.S. Supreme Court found that the foreclosing jurisdiction's lack of direct follow-up on returned notice mailings denied the addressee due process because the foreclosing party did not take steps that would be chosen by "one desirous of actually informing" the property owner.[1] *In subjecting to direct constitutional review the myriad notification decisions a foreclosure petitioner must make in conducting diligent attempts at notification,* Jones, *though rightly decided, threatens the validity of tax foreclosure proceedings and the titles that result from them in a fundamentally different way than earlier precedents that made notification more rigorous without loss of clarity. After demonstrating the Court's historical use of rules and standards in this area of notice and opportunity to be heard, this Article will show how the development of constitutional safe harbors can be used to resolve the shortcomings of the rule-standard dichotomy. Deploying a theoretical framework for the judicial fostering of fair and efficient constitutional safe harbors, this Article advocates legislative enactment of and judicial support for detailed notification protocols tailored to the particular needs and behaviors of the different types of land interest holders entitled to foreclosure notice.*

In order to provide reliable guidance to foreclosing parties, these notice procedures should be designed to meet a higher standard developed in the Court's due process jurisprudence. If a court finds a set of legislated protocols "reasonably certain to inform" the interested parties for whom they were designed, then that court should judge the constitutionality of notification choices that come before it against that certified rule. Such an approach would be preferable to reviewing those decisions directly using vague, albeit generally less restrictive, constitutional standards such as "reasonably calculated . . . to apprise" or "chosen by one desirous of actually informing." Notification protocols that meet this due process "super standard" of reasonable certainty can become "safe harbors" for

1. Jones v. Flowers, 547 U.S. 220, 238 (2006) (citing Mullane v. Cent. Hanover Bank & Trust Co., 339 U.S. 306, 314 (1950)).

those pursuing tax foreclosure remedies while still assuring full compliance with the guarantees of notice and opportunity to be heard embodied in constitutional jurisprudence.

I. INTRODUCTION

"Water, water everywhere; Nor any drop to drink."[2] Like Coleridge's thirsty mariner, Baltimore development advocates find themselves adrift on a sea of vacant properties unable to draw up land suitable for development.[3] Much of the property is less than one mile away from Baltimore's downtown Class A office space. These potentially vital vacant land resources, however, are almost all small row-house lots. Moreover, each property comes with its own particular set of title issues.[4] Land assembly costs pose a formidable initial barrier to redevelopment on any significant scale. The process of buying up this "cheap" land is not particularly cheap. As a result, developers that could re-use previously urbanized land in older cities instead devour pristine green space on the metropolitan fringe—aggravating, rather than alleviating, urban sprawl.

As the owners of vacant lots and abandoned houses are frequently also delinquent on property taxes and other municipal fees,[5] public sale and foreclosure of these properties can play a key role in municipal efforts to make urban communities more viable.[6] Visionary local leaders

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2. SAMUEL TAYLOR COLERIDGE, THE RIME OF THE ANCIENT MARINER, *reprinted in* THE OXFORD BOOK OF ENGLISH VERSE, 1250–1918, at 645, 649 (Arthur Quiller-Couch ed., 2d ed. 1961).

3. The older neighborhoods of Baltimore, for instance, are divided into thousands of fifteen-foot wide row-house lots. Built out to house its 1950 population of a million people, Baltimore's 40% decline in population has resulted in approximately more than 30,000 vacant lots and houses. John Fritze, *City Gets New Power to Sell its Vacant Property*, BALTIMORE SUN, May 14, 2008, at 4B.

4. To paraphrase the opening line of a famous novel: clear titles are all alike; every clouded title is clouded in its own way. *See* LEO TOLSTOY, ANNA KARENINA 1 (Louise Shanks Maude & Aylmer Maude trans., Oxford University Press 1998) (1877).

5. As of 2004, of the approximately 14,000 privately-owned buildings in Baltimore cited as visibly uninhabitable, nearly 8,000 had been put up for tax sale in the previous two years. Baltimore city data set on file with author. Baltimore has a title clearing remedy aimed at properties that are not tax delinquent, but are also not in compliance with local building codes. *See* James J. Kelly, Jr., *Refreshing the Heart of the City: Vacant Building Receivership as a Tool for Neighborhood Revitalization and Community Empowerment*, 13 J. AFFORDABLE HOUSING & COMMUNITY DEV. L. 210 (2004). Many of the tax lien foreclosure notification issues discussed in this article also apply to vacant building receivership sales and eminent domain.

6. Paul C. Brophy & Jennifer S. Vey, *Seizing City Assets: Ten Steps to Urban Land Reform*, THE BROOKINGS INST. CEOS FOR CITIES RES. BRIEF 10–12 (Washington, D.C.), Oct. 2002, *available at* http://www.brookings.edu/~/media/Files/rc/reports/2002/10metropolitanpolicy_brophy/brophyveyvacantsteps.pdf. *See also* JENNIFER S.VEY, RESTORING PROSPERITY: THE STATE ROLE IN REVITALIZING AMERICA'S OLDER INDUSTRIAL CITIES 53–55 (2007).

have initiated vacant land assembly programs, such as Baltimore's Project 5000[7] and the Genesee County Land Bank[8] in Flint, Michigan; these acquisition efforts have used tax foreclosure to make properties available for development without destabilizing the neighborhoods they seek to revive.[9] By consolidating fractionated titles to scattered parcels and assembling the properties under the unitary ownership of a land bank authority,[10] city governments can reduce critical transaction costs that inhibit publicly beneficial development.

The viability of tax foreclosure both as a means of collecting property taxes and as a vehicle for clearing title to abandoned properties depends on well-designed notice procedures. A community's interest in a functional land title system requires the use of foreclosure mechanisms that neither seize properties arbitrarily nor leave them in limbo.[11] Homeowners in general need to be assured that, even if their property taxes go unpaid, they will be still given a meaningful opportunity to save their homes; they should have confidence that their city or county will make sure that they receive prior notice of any action to levy on their homes. Residents who live near a boarded-up, tax delinquent house need

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7. *See* Project 5000, http://www.baltimorehousing.org/index/ps_5000.asp (last visited July 7, 2008). The author served as Legal Consultant for Project 5000 from 2002–2004. In that capacity, the author designed tax foreclosure notification protocols in consultation with two leading attorneys for local title underwriters. *See infra* note 23.

8. *See* Genesee County Land Bank, Home, http://www.thelandbank.org/ (last visited July 7, 2008).

9. Although eminent domain has been held up as the indispensable redevelopment land assembly mechanism, tax lien foreclosure allows cities to focus on those properties which have been truly abandoned by their stakeholders. Condemnations have no mechanism for redemption, tax lien foreclosure processes allow defaulting owners and lienors to preserve their interests by paying off the tax debt. Because property tax liens target owners who have failed to meet a basic public obligation, foreclosure on those liens does not cause the same kind of widespread landowner insecurity that condemnations do. Most statutory schemes for the collection of unpaid property taxes provide for a redemption period during which a delinquency can be cured without loss of the property. *See* discussion *infra* Part II.A. Some jurisdictions provide for a redemption period before the property is sold and some allow redemption after it is sold. Frank S. Alexander, *Tax Liens, Tax Sales, and Due Process*, 75 IND. L.J. 747, 750 (2000). This opportunity to preserve in-kind entitlements, even after a tax delinquency occurs, allows the foreclosure process to sort out those owners who will continue to invest in their properties from those who will not.

10. *See* FRANK S. ALEXANDER, LOCAL INITIATIVES SUPPORT CORP., LAND BANK AUTHORITIES: A GUIDE FOR THE CREATION AND OPERATION OF LOCAL LAND BANKS 2–3 (2005), *available at* http://content.knowledgeplex.org/kp2/cache/documents/1112/111259.pdf. For an examination of the need for Federal support of local and regional land banking, especially in the wake of the ongoing mortgage foreclosure crisis, see Frank S. Alexander, *Land Banking as Metropolitan Policy,* THE BROOKINGS INST. BLUEPRINT FOR AMERICAN PROSPERITY: UNLEASHING THE POTENTIAL OF A METROPOLITAN NATION (Washington, D.C.) Oct. 2008, *available at* http://www.brookings.edu/~/media/Files/rc/papers/2008/1028_mortgage_crisis_alexander/1028_mortgage_crisis_alexander.pdf.

11. *See* Charles H. Koch, Jr., *A Community of Interest in the Due Process Calculus*, 37 HOUS. L. REV. 635 (2000).

to know that the transfer and rehabilitation of that property will not be held up by a requirement to track down the owner. An open-ended search for the noncompliant owner seems particularly unwarranted when that owner may literally be hiding from the responsibility of keeping the property up to basic building code.[12]

The U.S. Constitution does not guarantee actual notice to any party facing foreclosure;[13] rather, the U.S. Supreme Court has defined constitutionally adequate notice as "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."[14] Applying this broad standard in its decision in *Mennonite Board of Missions v. Adams*,[15] the Court concluded that "[n]otice 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, whether unlettered or well versed in commercial practice, if its name and address are reasonably ascertainable."[16] Because the Court determined that notice by publication is not as reliable as notice by mail,[17] legislators are not free to skip notice by mail altogether even in the special situation of nuisance properties.

In its 2006 decision in *Jones v. Flowers*,[18] a divided Supreme Court ruled that the proper mailing of a tax foreclosure notice did not excuse the sender's inaction when the notice was known not to have reached its intended destination.[19] *Jones*'s holding did not explicitly require that a foreclosure petitioner, when faced with the information of failed notification, use every feasible means to identify, locate, and personally serve interested parties.[20] Instead, the Court urged a case-by-case balancing approach to determine whether a foreclosing party's follow-up decisions were those of one "desirous of actually informing the absentee."[21] Local jurisdictions collecting delinquent tax revenue and

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12. *See infra* notes 217–18 and accompanying text.

13. Jones v. Flowers, 547 U.S. 220, 227–29 (2006); Dusenbery v. United States, 534 U.S. 161 (2002); Mullane v. Cent. Hanover Bank & Trust Co., 339 U.S. 306, 314 (1950). *See infra* note 51 and accompanying text.

14. *Mullane*, 339 U.S. at 314. *See infra* notes 73–84 and accompanying text.

15. 462 U.S. 791 (1983).

16. *Id.* at 800 (emphasis in original). *See infra* notes 87–98 and accompanying text.

17. *See Mennonite Bd. of Missions*, 462 U.S. at 799–800 ; Schroeder v. City of New York, 371 U.S. 208, 211–12 (1962); *Mullane*, 339 U.S. at 315–16.

18. 547 U.S. 220 (2006).

19. *Id.*

20. *Id.*

21. *Id.* at 229 (citing *Mullane*, 339 U.S. at 315).

clearing title to vacant properties, however, will be just as lost in applying a vague, subjective standard as they would be in following a strict mandate to try everything practicable before resorting to publication notice.

In striking a careful balance between the rigor of standards for diligent notification and ease of completion, policymakers must fashion guidelines for adequate notice that are clear and stable. By clearly defining the process for identifying and notifying persons facing liquidation of real property interests in the tax sale and foreclosure processes, courts and legislatures would not only promote effective notice to respondents, but would also establish standards by which the validity of tax titles could be evaluated.[22] Detailed procedures for naming, finding, and notifying those in title on a tax delinquent property then become checklists for those carrying out the foreclosure and for the settlement agents that would determine whether the resulting titles were insurable and therefore potentially financeable for redevelopment.[23] However, vague or obsolete notification requirements could cause abandoned properties to remain in limbo just as indefinitely as unattainable notice standards would. Attorneys clearing title cannot bring tax delinquent, vacant properties out of limbo if they themselves are forced into a netherworld of ad hoc procedural standards for notifying property owners and other affected parties. Foreclosure is all about appropriate finality.[24] Unsurprisingly, title clearing needs clarity.

Just at the time when *Jones* is prodding foreclosing petitioners to use ill-defined cost-benefit analyses to make everyday decisions on pursuing notification by mail, the Internet is rapidly expanding the feasibility of obtaining corrected information as to the identities and locations of parties affected by foreclosure.[25] Courts following the *Jones* approach

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22. Failure to give legally required notice renders transfer of title a nullity. ALEXANDER, *supra* note 10, at 782, 798–800; *cf.* 2 RUFFORD G. PATTON & CARROLL G. PATTON, PATTON ON LAND TITLES §§ 468, 490 (2d ed. 1957) (discussing that whether failure to give required notice voids a title transfer varies by jurisdiction and discussing that methods of notification in tax foreclosures vary by jurisdiction).

23. In his work as a legal consultant for Baltimore's Project 5000, the author created the protocols for tax foreclosure notification in consultation with regional counsel for two title insurance underwriters. The primary goal of Project 5000 is to create unified insurable title in the City of Baltimore to make these properties available for productive use. *See* Project 5000, http://www.baltimorehousing.org/index/ps_5000.asp (last visited July 7, 2008). For a discussion of how the fractionation phenomenon known as "anticommons" frustrates market allocation indefinitely, see *infra* note 198 and accompanying text.

24. For a brief examination of the historical development of foreclosure, see Carol M. Rose, *Crystals and Mud in Property Law*, 40 STAN. L. REV. 577, 583–85 (1988).

25. *See infra* note 131 and accompanying text; *cf.* Stewart E. Sterk, *Tax Sale Foreclosures: What Notice is Due?*, 17 NO. 6 N.Y. REAL EST. L. REP. 1 (2007) (noting that "as computers and the Internet

will continue to second-guess the diligence of foreclosing jurisdictions that have complied with statutory requirements without achieving actual notice. By subjecting specific "follow-up" decisions to a vague constitutional balancing of the interests, courts eliminate predictability and stability from the tax foreclosure system.[26] An insistent and unmediated use of standards to answer questions about acceptable follow-up measures to failed mailings will move the jurisprudence of notice and the opportunity to be heard toward the same kind of incoherence plaguing the regulatory takings doctrine.[27] To achieve the appropriate "meta-balance"[28] between the use of rules and the use of standards, courts should develop an alternative set of standards by which safe harbor rules can be judged. In the context of tax foreclosure, tailored and detailed notification protocols that are found to be "reasonably certain to inform"[29] targeted foreclosure respondents would be the sole referents for the constitutional adequacy of notice to interested parties. If a legislature failed to offer a valid systematic approach to follow-up decisions, foreclosing jurisdictions would still be able to show adequate notice in any particular case by demonstrating diligence under the more general constitutional standards.

Without returning to the formalism of the pre-*Mullane v. Central Hanover Bank & Trust Co.*[30] era, legislators and court administrators should systematize these evolving "practicalities and peculiarities"[31] of tax foreclosure raised by the many follow-up questions occasioned by mail notice. The courts, in their adjudicative capacity, should support and encourage these efforts, even as they strictly limit the extent to which these rules diverge from the standards they seek to replace.[32] Even though all stakeholders in a property are entitled to an attempted

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make it increasingly feasible to locate a property owner with a few clicks of a mouse, notice 'reasonably calculated, under all the circumstances' may require more than just a mailing to the address found in the public records . . . .").

26. *See* Louis Kaplow, *Rules Versus Standards: An Economic Analysis*, 42 DUKE L.J. 557 (1992) (discussing the differences between standards and rules); *cf.* Frank H. Easterbrook, *The Supreme Court, 1983 Term—Foreword: The Court and the Economic System*, 98 HARV. L. REV. 4 (1984) (arguing that judges should analyze rules using an ex ante viewpoint instead of an ex post viewpoint).

27. Procedural due process in the context of follow-up measures is developing its own conceptual severance problem. *See infra* notes 143–49 and accompanying text.

28. Alexander Aleinikoff used this term to describe how courts interpreting constitutional provisions moderate their use of standards, which foster case-by-case balancing. T. Alexander Aleinikoff, *Constitutional Law in the Age of Balancing*, 96 YALE L.J. 943, 979 (1987). For a discussion of the comparative advantages of rules and standards, *see infra* Part III.E.2.

29. Mullane v. Cent. Hanover Bank & Trust Co., 339 U.S. 306, 315 (1950).

30. 339 U.S. 306 (1950).

31. *Id.* at 314.

32. *See infra* notes 171–85 and accompanying text.

mailing, the guidelines for follow-up measures in carrying out notice by mail should reflect the different ways by which each class of stakeholders relates to their property interests.[33] Rules tailored to the needs and actions of different types of stakeholders can provide not only appropriate levels of notification certainty, but also use methods particularly well-suited to each class of interested parties.

Additionally, rule-makers that can, with confidence of judicial support and appropriate deference, invest the time in crafting tax foreclosure procedures will provide for a stable and efficient process even as communication technology continues to advance. For instance, mortgagees that trade their interests on the Internet like corporate stocks may benefit from a completely different approach to notification—one that looks to the Internet not only as a complex and evolving source of postal address information, but also as a principal vehicle for efficient exchange of foreclosure information. Just as the postal service displaced newspaper publication as the legitimate means of foreclosure notice, so too is the Internet reshaping our understanding of how information about events affecting land titles, including tax sales and foreclosures, should be disseminated. Electronic recordation of title documents not only reduces the transaction costs of real estate transfers, but also creates an entirely new information space where parties in title—especially sophisticated, commercial ones—can cheaply maintain virtual contact with the status of their real estate interests.

The next Part of the Article begins by setting out the historical development and analytic framework of the law of adequate notice in the current tax foreclosure notification system. It then analyzes *Jones*'s problematic application of the "desirous of actually informing" standard to tax foreclosure responses to known failure to achieve direct notice of affected parties. Part II ends by arguing for the deployment of the "reasonably certain to inform" standard to evaluate the validity of comprehensive tax foreclosure notification protocols as extrajudicially generated constitutional safe harbors. Part III of the Article sets out an array of approaches to notification follow-up differentiated by property interest type. It then shows how the judicial deference required by the proposed system of constitutional safe harbors will not only clarify and stabilize notice by mail but may also lay the groundwork for "e-

33. For instance, since owner-occupants stand to lose a great deal in foreclosure and can be expected to receive notice, it would make sense to require foreclosing entities to make, and possibly confirm delivery of, notice to the subject property address. For the absentee owner of a vacant building known to be in violation of local building code, however, the rules for notice by mail should sharply limit the prospect of a wild goose chase for an owner who has most likely abandoned his property. *See infra* III.B.

notification" as a radically different but constitutionally acceptable form of tax foreclosure notification.

II. TAX FORECLOSURE NOTIFICATION BEFORE AND AFTER *MULLANE*

A. The Foreclosure of Property Tax Liens

Every state provides some statutory scheme for collecting unpaid property taxes by levying on the property itself.[34] Nearly all of these can be characterized as a type of tax foreclosure. Only those few states that auction off co-ownership interests in the delinquent property can be said to avoid the need to foreclose completely the debtor-owner's equity of redemption.[35] The rest divest the owner of all interests in the property.[36]

The vast majority of jurisdictions rely on a combined sale and foreclosure process to make sure both that the taxes due are paid in full and that any surplus value in the property is made available to the stakeholders whose interests have been liquidated.[37] These collection processes generally provide a set period of time for redemption either

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34. Judicial: ALA. CODE § 40-10-12 (2008); ALASKA STAT. § 29.45.370 (2008); ARIZ. REV. STAT. ANN. § 42-18201 (2008); CONN. GEN. STAT. ANN. § 12-157 (West 2008); DEL. CODE ANN. tit. 9, § 8742 (2008); FLA. STAT. ANN. § 197.502 (West 2008); IDAHO CODE ANN. § 63-1003 (2008); 35 ILL. COMP. STAT. ANN. 200/21-75 (West 2008); IND. CODE ANN. § 6-1.1-24-4.7 (West 2008); KAN. STAT. ANN. § 79-2801 (2007); KY. REV. STAT. ANN. § 134.420 (West 2008); LA. REV. STAT. ANN. § 13:5031 (2007); ME. REV. STAT. ANN. tit. 36, § 552 (2008); MD. CODE ANN., TAX-PROP. § 14-834 (West 2008); MASS. GEN. LAWS ANN. ch. 60, § 65 (West 2008); MINN. STAT. ANN. § 279.01 (West 2008); MISS. CODE ANN. § 27-41-11 (West 2008); MO. ANN. STAT. § 140.190 (West 2008); MONT. CODE ANN. § 15-16-403 (2007); NEB. REV. STAT. § 77-1902 (2007); NEV. REV. STAT. ANN. § 361.5648 (2007); N.J. STAT. ANN. § 54:5-6 (West 2008); N.M. STAT. ANN. § 7-38-48 (West 2008); N.Y. REAL PROP. TAX LAW § 1123 (McKinney 2008); N.C. GEN. STAT. ANN. § 105-355 (West 2008); N.D. CENT. CODE § 57-02-40 (2007); OHIO REV. CODE. ANN. § 5721.10 (West 2008); OR. REV. STAT. ANN. § 312.010 (West 2007); 72 PA. CONS. STAT. ANN. § 5860.301 (2008); R.I. GEN. LAWS § 44-9-25 (2007); S.C. CODE ANN. § 12-51-40 (2007); S.D. CODIFIED LAWS § 10-22-21 (2008); TEX. TAX CODE ANN. § 33.91 (Vernon 2007); VT. STAT. ANN. tit. 32 § 5191 (2008); VA. CODE ANN. § 58.1-3340 (West 2007); WASH REV. CODE § 84.56.020 (2007). Nonjudicial: ARK. CODE ANN. § 26-37-101 (West 2008); CAL. REV. & TAX. CODE § 3691 (West 2007); COLO. REV. STAT. ANN. § 39-11-101 (West 2008); GA. CODE ANN. § 48-3-3 (2007); HAW. REV. STAT. § 246-56 (2007); IOWA CODE ANN. § 446.15 (West 2008); MICH. COMP. LAWS ANN. § 211.60 (West 2007); N.H. REV. STAT. ANN. § 80:59 (2008); OKLA. STAT. ANN. tit. 68, § 3105 (West 2008); TENN. CODE ANN. § 67-5-2003 (West 2007); UTAH CODE ANN. § 59-2-1303 (West 2008); W. VA. CODE § 11A-2-1 (2007); WIS. STAT. ANN. § 75.12 (West 2008); WYO. STAT. ANN. § 39-13-108 (2007).

35. Iowa, for example, allows bidders willing to pay the full amount of taxes due on a property to acquire undivided ownership interests in the property. IOWA CODE ANN. § 446.15 (West 2008).

36. Foreclosure results unless, of course, there is a redemption of the property or the successful assertion of a defense such as the invalidation of the underlying debt.

37. Michigan provides for a public sale but applies the age old remedy of strict foreclosure. Thus, failure to redeem the property by payment of the taxes due results in a total forfeiture of the property with any surplus going to the governmental creditor. MICH. COMP. LAWS ANN. § 211.60(4) (2008).

before the sale, before final, indefeasible title has passed to the new owners, or before both.

Some states grant longer or shorter periods of redemption for different types of property interests. For instance, Kansas provides for a two-year post-sale redemption period during which counties must postpone foreclosure to allow owners to save their property interests by paying off any delinquencies.[38] For homestead properties, however, owners have three years to redeem.[39] Owners of vacant buildings, on the other hand, receive only one year after the sale to prevent foreclosure.[40] While Kansas recognizes the importance of the equity of redemption for all owners, it has made the decision that homestead owners should have enhanced stability of tenure. At the same time, the community as represented by the local taxing authority should not have to be as patient with unoccupied properties where "there has been a failure to perform reasonable maintenance."[41]

The super-priority nature of the property tax lien allows tax foreclosure to clear out not only the ownership interests, but also any existing private lien interests in the subject property.[42] Unlike a judgment lien for a private debt, a property tax lien allows its holder to foreclose on interests that were created and recorded prior to any delinquency by the property owner. For this reason, tax foreclosure can be an extremely powerful tool for restoring unity to a title that has become broken up by multiple mortgages and various judgment liens; the lack of investment that makes the property a nuisance becomes the very means of freeing it for future use.

Because claims for unpaid property taxes take priority over pre-existing private liens, all parties with substantial interests in the property are entitled to notice of their opportunity to redeem.[43] A mortgagee pursuant to a properly recorded deed of trust or other mortgage interest cannot be deprived of its security interest in the property unless and until

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38. KAN. STAT. ANN. § 79-2401a(a)(1) (2007).

39. KAN. STAT. ANN. § 79-2401a(b)(1) (2007).

40. KAN. STAT. ANN. § 79-2401a(a)(2) (2007). Maryland provides two types of accelerated post-sale foreclosure processes. MD. CODE ANN., TAX-PROP. § 14-833 (West 2008). Persons that purchase properties as part of a special tax sale of abandoned properties may commence foreclosure proceedings the day after the sale. § 14-833(f). Even a property sold at a conventional sale can be foreclosed upon six months after the sale, half the normal time period, if a building on the property has been certified as needing substantial repair. § 14-833(e).

41. KAN. STAT. ANN. § 79-2401a(a)(2) (2007).

42. ALEXANDER, *supra* note 10, at 760.

43. Because mortgagees and judgment creditors have no actual ownership rights, their right to redeem allows them to preserve their remedies for collecting money owed to them by the property owners. GRANT S. NELSON & DALE A. WHITMAN, REAL ESTATE FINANCE LAW 558, 689–94 (4th ed. 2001).

it has been afforded adequate notice of the need to prevent foreclosure.[44] The Supreme Court has also extended the right of meaningful notice and opportunity to be heard to those claiming a lien on a property pursuant to a money judgment against its owner.[45]

In designing notification protocols, legislatures balance the community's need for title clearing and the stakeholders' need for stability of ownership, just as they do in establishing foreclosure timetables. Legislatures approach the establishment of redemption periods and the design of notice procedures differently, however, because of the procedural due process requirements imposed on the latter by the Constitution. Failure to give constitutionally adequate notice to a stakeholder leaves that stakeholder's interest in the subject property unaffected by the tax foreclosure proceeding.[46] Constructive notice, such as publication of an advertisement in a newspaper of general circulation, can constitute constitutionally adequate notice, but only after diligent attempts at direct notification have been made.[47]

Direct notice consists of three stages: identifying the interest holder affected by the foreclosure, locating the interest holder, and delivering notice for the interest holder to the foreclosure location. If either the interest itself or the party holding it is undiscoverable, then constructive notice will suffice to clear out that interest. Likewise, if a named stakeholder cannot be located, then no mailing is necessary for the title to be valid.[48] Failure in the delivery phase, on the other hand, frequently reveals some problem in the information obtained in either of the first two steps. If a party cannot receive mail at an address attributed to him or her, it is probably because he or she no longer lives there, or is no longer living.[49]

Foreclosing parties that realize they have not achieved actual notification constantly face the same question as to when further efforts at identification, location, or delivery are no longer warranted. Both the effectiveness of notice to property stakeholders and the stability of tax titles hinge on the soundness of this answer. An examination of the progression of constitutional jurisprudence on notice and opportunity to

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44. Mennonite Bd. of Missions v. Adams, 462 U.S. 791, 798 (1983).

45. Tulsa Prof. Collection Services v. Pope, 485 U.S. 478, 485 (1988).

46. PATTON & PATTON, *supra* note 22, §§ 468, 490. For a discussion of the variety of consequences of invalid tax foreclosure proceedings, see ALEXANDER, *supra* note 10, at 798–800.

47. Mennonite Bd. of Missions v. Adams., 462 U.S. 791, 798 (1983).

48. *Id.*

49. Returned mail can indicate the need to re-send the notice to the same address, but it can also reveal that the property interest holder has not yet been properly located or even properly identified. *See* discussion *infra* Part III.C.1 and text accompanying notes 125–28.

be heard provides the resources needed to generate a clear, stable approach to appropriate follow-up measures in tax foreclosure notification.

B. The Caretaker Principle and Pennoyer*'s Bright-Line Rule*

Courts have consistently held that the legitimacy of all judgments in civil litigation depends on the ability of parties affected by them to participate in the processes that produce them.[50] Nevertheless, the jurisprudence of notice and opportunity to be heard includes no general constitutional entitlement to actual notice. Rather, due process requires adequate notice only.[51] The balance fashioned by this doctrine necessarily leaves a would-be respondent's ability to participate in proceedings against him somewhat to chance. As courts have acknowledged, "[d]ue process 'does not require with regard to notice that the state . . . erect an ideal system for the administration of justice which is impervious to malfunctions.'"[52] The jurisprudence of adequate notice, however, also reflects the judiciary's lack of comfort with the role that happenstance has to play in this foundational aspect of procedural justice. Courts continuously reappraise the balance between diligence and practicability looking for opportunities to secure more substantial guarantees of actual notice for named respondents.[53] As communication and information technologies make strides, yesterday's acceptable means of notification must yield to the more effective notice methods of today.

In the early nineteenth century, the need for effective adjudication of land titles was strong, but the ability to track down and directly notify nonlocal litigants was weak. Nineteenth century landowners, whether or not they continuously occupied their properties, were expected to make sure that they received notice of legal actions affecting their title by maintaining contact, directly or indirectly, with their land. As Chief

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50. "The fundamental requisite of due process of law is the opportunity to be heard." Grannis v. Ordean, 234 U.S. 385, 394 (1914). *See also* Greene v. Lindsey, 456 U.S. 444, 449 (1982); Mullane v. Cent. Hanover Bank & Trust Co., 339 U.S. 306, 314 (1950). Lawrence Solum has identified this participation principle as the first principle of procedural justice. Lawrence B. Solum, *Procedural Justice*, 78 S. CAL. L. REV. 181, 273–74 (2004) ("Procedures that purport to bind without affording meaningful rights of participation are fundamentally illegitimate.").

51. Jones v. Flowers, 547 U.S. 220, 227–29 (2006); Dusenbery v. United States, 534 U.S. 161 (2002); Mullane v. Cent. Hanover Bank & Trust Co., 339 U.S. 306, 314 (1950).

52. Griffin v. Bierman, 941 A.2d 475, 482 (Md. 2008) (quoting Carroll v. D.C. Dep't of Employment Serv., 487 A.2d 622, 623 (D.C. 1985)).

53. *See, e.g.*, Jones v. Flowers, 547 U.S. 220, 227–29 (2006).

Justice Marshall stated in *The Mary*:[54]

> [I]t is a principle of natural justice, of universal obligation, that before the rights of an individual be bound by a judicial sentence, he shall have notice, either actual or implied, of the proceedings against him. Where these proceedings are against the person, notice is served personally, or by publication; where they are in rem, notice is served upon the thing itself. This is necessarily notice to all those who have any interest in the thing, and is reasonable because it is necessary, and because it is the part of common prudence for all those who have any interest in it, to guard that interest by persons who are in a situation to protect it.[55]

The Mary was a ship, the seizure of which might have been more noticeable to its owners than that of land, which is clearly much less portable. Nevertheless, courts used this caretaker principle to facilitate the foreclosure of land owned by nonresidents.[56] Posting of the property was offered as the analogue to seizure of a chattel.[57] Publication of a legal notice in a local newspaper supplemented these efforts to notify the owner of the land or its caretaker.[58]

Sixty years later, *Pennoyer v. Neff*[59] defended constructive notice as crucial to the functioning of a territorial jurisdictional system.[60] While state courts at that time could assert personal jurisdiction on anyone physically present within their territorial boundaries, their inability to determine the rights and liabilities of persons not present in the state was just as clear. The need for state courts to resolve disputes over the ownership of land within their borders even if non-residents were among the claimants required an alternative theory of jurisdiction. The majority opinion in *Pennoyer* cited the tradition that seizure of a person's property located within a state gives a court jurisdiction to determine the disposition of that property.[61] Believing that seizure itself was the primary form of notification, the Court presented notice by publication as a sufficient supplemental means of notice.[62] *Pennoyer*'s formalistic approach set down the caretaker principle as full justification for reliance on published notice and identified valid constructive notice directly with the in rem action.

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54. 13 U.S. (9 Cranch) 126 (1815).
55. *Id.* at 144.
56. *See* Mullane v. Cent. Hanover Bank & Trust Co., 339 U.S. 306 (1950).
57. *Id.* at 316.
58. *Id.* at 315–16.
59. 95 U.S. 714 (1877), *overruled in part by* Shaffer v. Heitner, 433 U.S. 186 (1977).
60. *Id.*
61. *Id.* at 727–28.
62. *Id.* at 727.

The caretaker principle was indispensable to an effective system of adjudication based on territorial jurisdiction. Not only was the prospect of out-of state notification by mail much less certain in the nineteenth century than in the twentieth, but prevailing understandings of comity among state courts also precluded the sending of process generated by one state court into the territory of another state.[63] At the turn of the century, the U.S. Supreme Court, on four occasions, affirmed notice by publication by governmental entities to prosecute tax foreclosure actions.[64] Confident in the basis for notification by publication, state legislatures began to enact statutes that allowed for foreclosure of tax delinquent properties through notice by publication.[65] Even as they did so, however, the legitimizing foundations for constructive notice in tax foreclosure and other in rem proceedings were eroding.

As state courts became increasingly involved in interstate litigation, territoriality as a basis for jurisdiction over the rights and obligations of parties revealed its flaws. Forum shopping plaintiffs brought actions against nonresident defendants solely because they were served within a state's territorial borders.[66] Others initiated quasi in rem actions by attaching property located within a state to hale in nonresident defendants on tort or contract matters that had little to do with any activity in the state or even with the property seized.[67] In *International Shoe Co. v. Washington*,[68] the U.S. Supreme Court rejected *Pennoyer*'s territorial understanding of jurisdiction over parties in favor of a "minimum contacts" standard.[69] The collapse of territorial formalism in the constitutional foundations for personal jurisdiction presaged a parallel rejection of the formal divisions between in rem and in personam matters with regard to notice and opportunity to be heard. With the availability of direct notice by mail, plaintiffs seeking in rem relief could no longer justify a categorical entitlement to proceeding on constructive notice by publication.

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63. Shaffer v. Heitner, 433 U.S. 186, 197-98 (1977).

64. *See* Longyear v. Toolan, 209 U.S. 414, 418 (1908); Ballard v. Hunter, 204 U.S. 241, 261–62 (1907); Leigh v. Green, 193 U.S. 79, 93 (1904); Winona & St. Peter Land Co. v. Minnesota, 159 U.S. 526, 537–38 (1895); *cf.* Huling v. Kaw Valley Ry. & Improvement Co., 130 U.S. 559, 562–64 (1889) (holding that notice by publication of the proposed taking of land for a railroad is sufficient due process).

65. ALEXANDER, *supra* note 10, at 764–66.

66. *See, e.g.*, Int'l Shoe Co. v. Washington, 326 U.S. 310, 316 (1945).

67. *Id.* at 316–18.

68. 326 U.S. 310 (1945).

69. *Id.* at 316. This case-by-case fair play approach was not imposed on tax foreclosure and other quasi in rem cases in which land located within the jurisdiction was the subject of the proceedings. Shaffer v. Heitner. 433 U.S. 186, 207-08 (1977). States must be able to settle their own property disputes even if some claimants have no other connection to the forum. *Id.*

The steady expansion of U.S. mail service in the decades that followed the Civil War led to free delivery service for nearly a quarter of the nation's population in 1890.[70] Nearly all of these mail recipients were city dwellers; the introduction of the Rural Free Delivery and Village Delivery systems during the next twenty years put America on a rapid path to universal, written communication by mail.[71] By the middle of the twentieth century, newspapers crowded with legal notices could not hope to compete as a means of notification with the simplicity and directness of mailing a letter. *Pennoyer*'s formalistic divide had to give way; courts could no longer require that meaningful notice be given to defendants for in personam matters and simultaneously provide for only the illusion of such notice for the holders of property interests affected by proceedings in rem.

C. Mullane*'s Standard(s) for Adequate Notice*

Five years after *Pennoyer*'s territorial formalism as the basis for evaluating the constitutionality of long-arm personal jurisdiction was rebuffed in *International Shoe*,[72] the Supreme Court rendered a parallel rejection of it in the area of notice and opportunity to be heard.[73] *Mullane v. Central Hanover Bank & Trust* involved publication notice by a major financial institution as part of a proceeding to merge and settle claims regarding certain trusts.[74] The bank used the statutorily prescribed method of notice by advertisement against parties for whom it was a fiduciary and with whom it was in regular mail communication.[75] As Justice Jackson's opinion suggested, the bank need not have even made a separate mailing to notify the affected beneficiaries but could have merely included a conspicuous notice in the remittances it was already sending out periodically.[76] The Court did not bother to determine whether or not the matter could be classified as some form of in rem proceeding;[77] instead, it offered an alternative inquiry for determining the adequacy of notice that could be applied to all cases. According to *Mullane*, all determinations as to the adequacy of notice and opportunity to be heard must be evaluated by a single

70. CARL H. SCHEELE, A SHORT HISTORY OF THE MAIL SERVICE (1970).

71. *Id.*

72. *See* Int'l Shoe Co. v. Washington, 326 U.S. 310 (1945).

73. *See* Mullane v. Central Hannover Bank & Trust Co., 339 U.S. 306 (1950).

74. *Id.* at 307–10.

75. *Id.* at 310.

76. *Id.* at 318–19.

77. *Id.* at 312–13.

standard: "notice reasonably calculated, under all the circumstances, to apprise interested parties of the pendency of the action and afford them an opportunity to present their objections."[78]

Mullane did not reject the caretaker principle, only its formalistic application to all in rem proceedings. The Court approvingly cited Justice Marshall's explanation of the caretaker principle in *The Mary*.[79] In his account of the vigilance to be expected of normally prudent property owners, Justice Jackson saw a similar weighing of costs and benefits as that which informs the "reasonably calculated" standard.[80] The Court refused, however, to encase the balancing of the parties' interests in a rule that identified constructive notice with in rem proceedings simply because the caretaker principle applied to those cases generally. An owner's actual or expected interaction with his property was just one of many factors to consider in calculating the likelihood of a particular notification method's effectiveness.[81]

In reasserting the importance of meaningful notice in matters in rem as well as in personam, the Court stated: "[W]hen notice is a person's due, process which is a mere gesture is not due process. The means employed must be such as one desirous of actually informing the absentee might reasonably adopt to accomplish it."[82] The word "desirous" as used here implicitly suggests a balancing of the interests of petitioner and respondent by having the former internalize, if only through imagination, the benefits of providing actual notice as well as the costs. Substantively, the computation of cost and benefit is the same as the "reasonably calculated" formula.[83] This construction of the notifying party as a fiduciary for the notice recipient, however, allows for a departure from the system design approach. Now, the party carrying out notice is not only expected to follow reasonably designed rules but may be called upon to apply them in a way that takes into account the interests of those being notified as well.[84] Subsequent

78. *Id.* at 314.

79. *Id.* at 316 (noting that "'[i]t is the part of common prudence for all those who have any interest in (a thing), to guard that interest by persons who are in a situation to protect it.'" (quoting The Mary, 13 U.S. (9 Cranch) 126 (1815))).

80. *Mullane*, 339 U.S. at 314–316. Even as the Court in *Mullane* found notice by publication fundamentally ineffective as a means of notice, it invoked the caretaker principle to allow for the possibility that it may be justified in certain cases where an owner "has left tangible property in the state . . . ." *Id.* at 316. The other justification stemmed from the owner's abandonment of the property, in which case lack of effective notice would "deprive him of nothing . . . ." *Id.*

81. *Id.* at 313–17.

82. *Id.* at 315.

83. *See id.*

84. *See id.* Conflict of interest, especially for private purchasers of tax lien certificates interested in taking title to the property, has suffused judicial analysis of notification choices with suspicion of the

Supreme Court decisions interpreting *Mullane* have uniformly proclaimed their commitment to evaluating efforts to give notice from an ex ante perspective.[85] An analysis, however, of the move from formalistic rules, to general standards applied to system choices, and then to subjective standards used for case-by-case balancing shows that doctrine of notice and opportunity to be heard is rapidly becoming ex ante in name only.[86]

D. Mennonite*: Mail as a "Notice [System] Reasonably Calculated to Apprise"*

In *Mennonite Board of Missions v. Adams*,[87] the Court explicitly rejected the argument that a stakeholder's actual or constructive knowledge of tax delinquency absolved the foreclosing state actor of its duties to provide notice as prescribed by *Mullane*.[88] Moreover, it extended the right of direct notification of the tax sale to any party with a legally protected interest in the subject property.[89] The majority opinion also established mail as the minimum constitutional standard for effective notification systems.[90] While the Court did not specifically require states to prescribe the use of the U.S. Postal Service to notify stakeholders, any alternative system would have to be "as certain to ensure actual notice . . . [to] *any* party, whether unlettered or well versed in commercial practice, if its name and address are reasonably ascertainable."[91] Therefore, after *Mennonite*, aside from personal service itself, mail stood alone as the only adequate primary method of notification.[92]

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petitioner's motives whenever actual notice is not achieved; *cf.* Slattery v. Friedman, 636 A.2d 1, 6–7 (Md. Ct. Spec. App. 1994) (requiring holders of certificates of sale to have the "objective" of finding the owners of the property because holders have "little incentive" to search extensively because holders "will often benefit if the owners are not located"); ALEXANDER, *supra* note 10, at 794 (recognizing that imposing a broader duty on certificate holders to locate and notify property owners is justified by the conflict of interest between owners and holders).

85. *See, e.g.*, Jones v. Flowers, 547 U.S. 220, 231 (2006); Dusenbery v. United States, 534 U.S. 161, 167–68 (2002).

86. *See infra* Part II.E. Judge Easterbrook has argued that balancing for substantive fairness on a case-by-case basis is inevitably an ex post exercise that corrodes the predictability of an ex ante rule-based approach. Easterbrook, *supra note* 26, at 11.

87. 462 U.S. 791 (1983).

88. *Id.* at 799–800.

89. *Id.* at 800.

90. *Id.*

91. *Id.* (emphasis in original).

92. *See id.* The Court eliminated notice by posting on the subject premises as an equivalent to mail service in *Greene v. Lindsey*, 456 U.S. 444 (1982).

Although *Mullane* and other cases striking down notice by publication for real estate takings[93] encouraged many states to reform their tax foreclosure procedures, the *Mennonite* decision invalidated tax foreclosure procedures in the majority of states.[94] Over the next few decades, state legislatures instituted new procedures for identifying and locating stakeholders to be notified by mail as well as by other means.[95] These procedures guided tax foreclosing plaintiffs through identification and notification steps likely to give the proper parties actual notice and to result in valid titles should the proceeding end in a final foreclosure.[96] Courts interpreting *Mennonite* generally supported the efforts of legislatures to reasonably define the public records to be searched in identifying and locating stakeholders with legally protected property interests.[97] With the parameters of the title search established, the notification itself consisted of sending out the prescribed notice by the particular form or forms of mail provided for by statute, court rule, or both. Once these systems were established and sustained after constitutional challenge, title insurance carriers had the means to judge valid tax titles. Although individual mailings made for a more complex notification method than a single publication, *Mennonite*'s clear, delineated endorsement of mail as a reasonable system offered unambiguous guidance to legislatures as to the Court's expectations.

Balancing competing interests does not always cause instability. When standards have been used to evaluate the basic choice of a direct notification system and the initial procedures for implementing any notification system emulating personal delivery, the results have been positive. At this level of generality, the broad reasonableness standard has produced uniform rules that apply to all tax foreclosures. *Mennonite* requires jurisdictions foreclosing on tax liens to notify all holders of substantial property interests by mail or some other equally effective system.[98] The real test, however, for any rule-based approach to fundamental rights presents itself when a court's strict application of the particular rule conflicts with a principle of fundamental fairness. Mailed notice as a minimum requirement cannot conflict with the demands of due process, but a rule that declares mailed notice to be an inherently adequate means of notification may, in certain cases, deprive would-be

93. *See* Schroeder v. City of New York, 371 U.S. 208 (1962) (holding that notice by publication and notice by posting on the premises do not satisfy due process where no letter is mailed).

94. ALEXANDER, *supra* note 10, at 767–69.

95. *Id.* at 789–92.

96. *Id.*

97. *Id.*

98. Mennonite Bd. of Missions v. Adams, 462 U.S. 791, 798 (1983).

respondents of their right to participate in legal proceedings. Even properly addressed and stamped mailings sometimes fail to reach their intended recipients. Postal procedures for certified mail make this mode particularly vulnerable to returns marked "unclaimed."[99] These circumstances, if relevant to the question of notice adequacy, require courts to move from the basic approach to notification to more particularized implementation issues.

More than a decade prior to its decision in *Mennonite*, the Supreme Court confronted the issue of a failed notice by mail in *Robinson v. Hanrahan*.[100] In that case, the Court held, per curiam, that notice mailed to the defendant's home address in a forfeiture proceeding was inadequate because the State knew that the defendant was in jail.[101] Because the defendant's incarceration was known at the time of the mailing, the notification sent to the defendant's former home was not "reasonably calculated" to provide actual notice.[102] More recently, the Court upheld the adequacy of a forfeiture notice that failed to reach a prisoner because the sender lacked actual knowledge that the prison authorities had failed to give it to the inmate addressee.

In *Dusenbery v. United States*,[103] the Court resisted the prisoner's attempts to have the government's actions subjected to the procedural balancing test put forward in *Mathews v. Eldridge*.[104] Instead, Chief Justice Rehnquist, writing for the majority, insisted that *Mullane*, governed the case, not *Mathews*.[105] The Court reasoned that the cost-effective improvements prison officials subsequently made to their procedures for handling certified mail addressed to prisoners did not invalidate the overall system of using certified mail to notify prisoners of civil forfeiture proceedings.[106] The ex ante perspective of *Mullane*'s reasonably calculated requirement allowed the Court to concentrate its analysis on the rationality of the system, rather than on the reasonableness of the government's actions in that particular situation.[107]

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99. Jones v. Flowers, 547 U.S. 220, 245–46 (2006) (Thomas, J., dissenting).

100. 409 U.S. 38 (1972) (per curiam).

101. *Id.*

102. *Id.* at 40.

103. 534 U.S. 161 (2002).

104. *Id.* at 167–68; *see* Mathews v. Eldridge, 424 U.S. 319 (1976).

105. *Dusenbery*, 534 U.S. at 167–68.

106. *Id.* at 171–72.

107. *See id.* Interestingly, Justice Ginsburg, in dissent, did not employ *Mathews*' balancing factors either. Instead, citing *Mullane*, she argued that the system for handling mail at the prison was itself inadequate because a feasible alternative existed that was "substantially more likely to bring home notice." *Id.* at 180 (Ginsburg, J., dissenting) (quoting Mullane v. Cent. Hanover Bank & Trust Co., 339 U.S. 306, 315 (1950)).

Does a foreclosing jurisdiction that has designed a system of notification by mail "reasonably calculated, under all the circumstances,"[108] to achieve actual notice have any further obligation when it learns the system has failed to actually notify a holder of a substantial property interest to be liquidated in foreclosure? While courts around the country had confronted this question in each of the three stages of notice by mail,[109] neither *Robinson* nor *Dusenbery* presented facts that required the Supreme Court to do so. The Court, however, could not avoid the issue indefinitely. In 2006, the Court addressed this "new wrinkle" in *Jones v. Flowers.*[110]

E. "What Would Jones Do?": The Problem with Follow-Up Decisions as Made by "One Desirous . . . of Actually Informing"

1. Jones v. Flowers

Jones v. Flowers involved a tax foreclosure brought against an Arkansas property owner, Gary Jones, who no longer lived at the subject property.[111] Jones had not provided the Commissioner of State Lands with his new address despite a statutory obligation to do so.[112] While Jones had a mortgage on the property, his taxes were escrowed as part of his monthly payments.[113] After he paid off the mortgage, however, the taxes became delinquent and the local taxing authority commenced proceedings.[114] A state statute required that notice be given twice by certified mail to the address of record—in this case that of the subject property.[115] The certified mailings were both returned marked "unclaimed."[116]

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108. *Mullane*, 339 U.S. at 314.

109. *See* Plemons v. Gale, 396 F.3d 569, 576 (4th Cir. 2005); Hamilton v. Renewed Hope, Inc., 589 S.E.2d 81, 85 (Ga. 2003); Dahn v. Trownsell, 576 N.W.2d 535, 541–42 (S.D. 1998), *abrogated by* Jones v. Flowers, 547 U.S. 220 (2005); Malone v. Robinson, 614 A.2d 33, 38 (D.C. 1992); Elizondo v. Read, 588 N.E.2d 501, 504 (Ind. 1992), *abrogated by* Jones v. Flowers, 547 U.S. 220 (2005); St. George Antiochian Orthodox Christian Church v. Aggarwal, 603 A.2d 484, 490 (Md. 1992); Wells Fargo Credit Corp. v. Ziegler, 780 P.2d 703, 705 (Okla. 1989); Rosenberg v. Smidt, 727 P.2d 778, 780–83 (Alaska 1986); Giacobbi v. Hall, 707 P.2d 404, 408 (Idaho 1985); Tracy v. County of Chester, Tax Claim Bureau, 489 A.2d 1334, 1338–39 (Pa. 1985); City of Atlantic City v. Block C-11, Lot 11, 376 A.2d 926, 928 (N.J. 1977), *abrogated by* Jones v. Flowers, 547 U.S. 220 (2005).

110. 547 U.S. 220, 227 (2006).

111. *Id.* at 223–24.

112. *Id.* at 231.

113. *Id.* at 223.

114. *Id.*

115. *Id.* at 223–24.

116. *Id.*

The Court found that the Commissioner had complied with the letter of the notice requirements, standards that were not invalid on their face. Nevertheless, the fact that the Commissioner knew that his attempts at notification had failed gave rise to a duty to make some other reasonable effort at notification.[117] In the absence of further guidance from the statute, the Commissioner had an affirmative constitutional duty to improvise.[118]

Mennonite extended *Mullane*'s direct notice protection to mortgagees faced with possible loss due to the tax sale of their collateral.[119] While this application of *Mullane*'s circumstances test greatly increased the scope of the notice-by-mail system, it did not make tax foreclosure notification any less systematic. *Jones*, on the other hand, used *Mullane*'s construction of the party giving notice as "one desirous of actually informing the absentee"[120] to require repeated and varied attempts at direct notification in the face of information that prior efforts had failed.[121] When notice was first sent out to Jones by certified mail, such notification met the requirements that it be reasonably calculated to provide actual notice.[122]

In his dissent in *Jones*, Justice Thomas insisted that the Court should fix its ex ante perspective at the time of the sending of the notice and sustain not only the system but also the Commissioner's adherence to it.[123] Writing for the Court, however, Chief Justice Roberts drew upon *Mullane*'s construction of the notice provider as a fiduciary for the notice recipient to emphasize the need for the fiduciary to be proactive in its protection of the would be notice recipient's interests.[124] By forcing foreclosing parties into a case-by-case evaluation of the

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117. *Id.* at 225.

118. *Id.* Under *Jones*, foreclosing entities that actually did follow up appropriately, even though the statute did not explicitly require such additional action, would nevertheless have achieved adequate service. Thus, they would not encounter the jurisdictional problem the Court found in *Wuchter v. Pizzutti*. 276 U.S. 13 (1928). In that case, the Court held that because a New Jersey statutory scheme for notice to out-of-state residents did not require the constitutionally mandated notice by mail, the mailed notice that was actually sent did not meet due process requirements. *Id.*

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

120. Mullane v. Cent. Hanover Bank & Trust Co., 339 U.S. 306, 315 (1950).

121. Jones v. Flowers, 547 U.S. 220, 229 (2006).

122. *Id.*

123. *Id.* at 245–46 (Thomas, J., dissenting). The dissent correctly pointed out the majority's move toward the ad hoc balancing that *Dusenbery* had explicitly rejected in choosing to apply *Mullane* and not *Mathews*. *Id.* at 243–44. Although neither the dissent nor the majority opinion in *Jones* mentioned *Mathews* by name, the majority clearly emphasized the need for case-by-case balancing of constitutionally significant interests to evaluate every follow-up measure available. *Id.* at 229 (majority opinion). Unfortunately, the dissent's simple-rule alternative eliminates any inquiry into appropriate follow-up actions in response to a returned mailing. *See infra* notes 155–57 and accompanying text.

124. *Id.* at 229–31.

adequacy of follow-up efforts, the *Jones* Court tugged hard on a loose thread that threatens to unravel the entire weave that is the mailed notice system. But, the majority opinion also recognized the dangers of having specific application of such balancing used to second-guess a wide variety of tax foreclosures.

The majority opinion declined to impose an obligation on tax foreclosure plaintiffs to seek out additional addresses even when the information they have tells them that notification will not occur without such a search.[125] The Court found that the Commissioner in *Jones* did not face such a choice, since the envelopes returned as "unclaimed" left open the possibility that another form of delivery at the subject address might succeed in notifying the owner.[126] The opinion went on to state that:

> An 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 [of posting the notice at the subject property or resending it by regular mail to the owner and/or occupant].[127]

The *Jones* Court sidestepped the troubling question of what the Commissioner should have done if and when he discovered that Jones no longer resided at the subject property. It did not, however, close the door on the possibility that a tax foreclosure plaintiff's knowledge of failure to notify a stakeholder could necessitate a search for other mailing addresses.[128]

By using the construction of the "desirous of actually informing" notice provider to create its follow-up requirement, *Jones* extended the cost-benefit calculation from the initial choice of the system of notification to the physical delivery of notice and, inevitably, to locating and identifying interest holders as well.[129] As the majority opinion in *Jones* noted, courts are already divided on this important issue of a search for alternate mailing addresses.[130] While *Jones* can be read to

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125. *Id.* at 235–36.

126. *Id.* at 234–35.

127. *Id.* at 236 (internal citations omitted).

128. *Id.*

129. For an application of "desirous of actually informing" to notice in class action suits, see Todd B. Hilsee, Gina M. Intrepido & Shannon R. Wheatman, *Hurricanes, Mobility and Due Process: The "Desire to Inform" Requirement is Highlighted by Katrina*, 80 TUL. L. REV. 1771 (2006).

130. *Jones*, 547 U.S. at 225. *Compare*, Akey v. Clinton County, 375 F.3d 231, 236 (2d Cir. 2004) ("In light of the notice's return, the County was required to use 'reasonably diligent efforts' to ascertain Akey's correct address." (quoting Mennonite Bd. of Missions v. Adams, 462 U.S. 791, 798 n.4 (1983))), *and* Kennedy v. Mossafa, 789 N.E.2d 607, 611 (N.Y. 2003) ("[W]e reject the view that the enforcing officer's obligation is always satisfied by sending the notice to the address listed in the tax roll, even

support those courts that have refused to impose a follow-up address search requirement, its balancing test puts those decisions on shaky ground.[131]

The problem with the *Jones* Court's use of the fiduciary approach lies not with the standard itself.[132] Rather, the confusion and unpredictability that *Jones* is causing[133] stems from its application of a standard, one that is both demanding and open-ended, to the particular notification decisions made by those initiating the foreclosure. Substantively, *Jones*'s use of the desirous of actually informing standard will lead to such demanding due diligence in notice by mail that mailed notice will become functionally equivalent to personal service. Procedurally, *Jones* imposes the difficult task of applying this open-ended standard on the lawyers, paralegals and clerks who must daily face the decision of how to respond to a known failure to notify. The doctrinal, or meta-doctrinal, problems confronted here are—at root—controversies concerning the choice between standards and rules as appropriate modes of legal reasoning. To understand the unsatisfactory nature of the alternatives that the majority and the minority opinions in *Jones* offer, we first need to examine them both in light of the theoretical understanding of rules and standards as complementary and competing forms of legal reasoning.

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where the notice is returned as undeliverable."), *with* Smith v. Cliffs on the Bay Condominium Ass'n, 617 N.W.2d 536, 541 (Mich. 2000) (per curiam), *abrogated by* Jones v. Flowers, 547 U.S. 220 (2006) ("The fact that one of the mailings was returned by the post office as undeliverable does not impose on the state the obligation to undertake an investigation to see if a new address . . . could be located."). *See infra* note 133.

131. The direct application of a cost-benefit standard to a particular notification decision makes it inevitable that some form of alternate address search will be required. Ready access to address and identity information on the Internet makes it ever harder to ignore opportunities to find current mailing addresses for respondents in tax foreclosure proceedings. For example, Accurint can identify mailing addresses with unique identifiers such as date of birth and social security number. *See* Accurint, http://www.accurint.com (last visited July 16, 2008). As attorneys for unsecured creditors make resources like these everyday tools for locating debtors so as to establish in personam jurisdiction, it will become more and more difficult for foreclosure petitioners to claim that they should not be required to use such tools as part of their diligent search efforts.

132. *Mennonite Board of Missions* also invoked the "desirous of actually informing" standard in evaluating the state of Indiana's systemic decision to not offer any direct notice of tax sales to affected mortgagees. Mennonite Bd. of Missions v. Adams, 462 U.S. 791 (1983).

133. Although *Jones* explicitly avoided a finding that the Commissioner was required to engage in a secondary address search, two cases that held that secondary address searches are not required are now recognized as being abrogated by *Jones*. Elizondo v. Read, 588 N.E.2d 501, 504 (Ind. 1992), *abrogated by* Jones v. Flowers, 547 U.S. 220 (2005); Smith v. Cliffs on the Bay Condominium Ass'n, 617 N.W.2d 536, 541 (Mich. 2000) (per curiam), *abrogated by Jones*, 547 U.S. at 220.

2. Rules and Standards

Normative principles designed to govern conduct are generally expressed either as rules or as standards.[134] Rules condition and express their directives in factual terms that require a minimum of normative judgment by those who interpret them.[135] They draw lines between what is permitted and what is forbidden.[136] Rules express answers to moral questions; standards, on the other hand, tend to use normative terms such as "reasonable" or "diligent" in describing the scope of sanctioned behavior. Such a word or phrase often acts as an embedded question, such as "What is reasonable under these circumstances?" These singular norms frequently comprise and balance competing concerns, disguising indeterminacy, if not outright self-contradiction. Standards express moral judgments,[137] but not in the purely descriptive terms to which rules aspire. Standards flexibly summarize relevant moral considerations,[138] whereas rules offer "entrenched generalization[s]."[139]

Rules often generate normative outcomes that differ from those that would be produced by thoughtful application of the justifications they seek to promote.[140] They can be overinclusive. That is, they can prohibit behavior that the underlying moral principles would, if properly applied, permit.[141] Likewise, rules—sometimes the same rules that tend towards overinclusion—can, in other circumstances, also be underinclusive. Their rigidity and simplicity allow them to be evaded by persons exploiting loopholes and engaging in sham compliance.[142]

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134. Larry Alexander and Emily Sherwin describe the distinction as follows:

> Rules are legal norms that are formal and mechanical. They are triggered by a few easily identified factual matters and are opaque in application to the values that they are designed to serve. Standards, on the other hand are flexible, content-sensitive legal norms that require evaluative judgments in their application. A paradigmatic standard is "Drive Safely."

LARRY ALEXANDER & EMILY SHERWIN, THE RULE OF RULES 158 (2001).

135. *Id.*

136. Or if they are affirmative rules, between what actions are required and what are discretionary.

137. In this way, the standard, "One should act reasonably" differs, arguably, from the moral tautology, "One should do that which one should do."

138. ALEXANDER & SHERWIN, *supra* note 134 at 158.

139. For a discussion of rules as entrenched generalizations, see FREDERICK SCHAUER, PLAYING BY THE RULES, 78, 77–111 (1991).

140. *Id.* at 31–34.

141. *Id.* As discussed above, this overinclusiveness can be seen as a benefit when an underlying moral principle such as general welfare maximization is faulted for permitting atrocities. The tendency of a rule to be overly restrictive can also be beneficial in cases where those applying a standard would be tempted into being excessively casual and generate underinclusive results.

142. The development of adequate notice doctrine illustrates many of these points. *Pennoyer*'s bright-line rule concerning constructive notice for in rem matters contributed to the abuse of attachment

3. *Jones* as the Displacement of Rules in Favor of Standards

By recasting the substantive critique in the theoretical language of rules and standards, we can see that *Jones*'s application of the "desirous to actually inform" standard opens the door to overprotection of the right to adequate notice. Under the majority's approach, every failure to engage in some reasonable act that might have led to notification is judged in isolation from all the steps that were previously taken but known to have failed.[143] Just as rules tend to generalize and ignore possibly relevant differences, standards involve case-by-case balancing, which tends to focus on the individual case to the neglect of the bigger picture.[144] In *Jones,* the decision whether or not to take another follow-up step is framed as a choice between notice by mail and notice by publication.[145] By defining each follow-up decision as the choice between meaningful and illusory respect for the notice recipient's due process rights, courts replicate the same kind of conceptual severance that has led some takings analyses to treat nearly every diminution of land value as an abrogation of a particularized property right.[146]

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jurisdiction. By limiting direct notification to cases involving in personam relief, notice formalism failed to protect the participation rights of many out-of-state defendants. Likewise, a rule that does not contemplate universal mail service or a national economy increasingly centered around intangible property cannot maintain its relevance in the twentieth century. *Pennoyer*'s rule was superseded—not by an updated, more complex rule but—by a general standard that transcended particular telecommunication systems and modes of business dealing. Even as that general standard took on shape in rules that required mailed notice, or the like, to affected parties when feasible, new questions about how a mailed system would be implemented were answered by a return to standards in *Jones*. *See supra* Part I.B–C.

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

144. Frederick Schauer uses lessons learned from cognitive psychology to illustrate the extent to which case-by-case adjudication may distort doctrine. He argues that these biases go beyond Holmes's statement that "[g]reat cases like hard cases make bad law." Frederick Schauer, *Do Cases Make Bad Law?*, 73 U. CHI. L. REV. 883, 884 (2006) (citation omitted).

145. *Jones*, 547 U.S. at 229–33. The *Jones* majority defended its picking apart of notification lapses without drawing a bright line past which follow-up procedures would be adequate despite known failure. "As noted, '[i]t is not our responsibility to prescribe the form of service that the [government] should adopt.'" *Id.* at 240 (citation omitted). It is true that courts are not suited to fashioning effective notification systems. *See infra* notes 184–85 and accompanying text. But, if the courts disregard legislated follow-up procedures when they are known to have failed, courts will be preventing legislatures and judicial administrative bodies from creating rules that can provide complying parties assurance that their actions are constitutional.

146. *See* Margaret Jane Radin, *The Liberal Conception of Property: Cross Currents in the Jurisprudence of Takings*, 88 COLUM. L. REV. 1667, 1674–78 (1988).

> [Conceptual severance in the takings context] consists of delineating a property interest consisting of just what the government action has removed from the owner, and then asserting that that particular whole thing has been permanently taken. Thus, this strategy hypothetically or conceptually "severs" from the whole bundle of rights just those strands that are interfered with by the regulation, and then hypothetically or conceptually

Instead of a respondent having a single right to a reasonably implemented system of mailed notice, the *Jones* analysis is leading courts to confer upon the party facing foreclosure an indefinite series of rights to a variety of cost-effective steps that could lead to actual notice.[147] The known failure to achieve actual delivery by certified mail triggers the right to notice by regular mail. If and when that regular mailing apparently fails to achieve actual notice, then posting on the property may become required. If the visit to the property leads to information that the person to be notified resides elsewhere, then the decision to search for other addresses becomes just another iteration of the choice between direct notification and constructive notice by publication. If, as *Jones* suggests, known failure renders all prior efforts irrelevant,[148] the decision whether or not to follow-up on a failed attempt at direct notification is nothing more and nothing less than the original choice between a meaningful attempt to achieve actual notice and the "mere gesture"[149] of constructive notice.

In isolation from one another, none of the steps above are likely to present costs out of proportion to the possible gain of achieving actual notice. Thus, a court asked to review a failure to take a particular follow-up action may apply *Mullane*'s cost-benefit standard and find the failed notification efforts to be constitutionally inadequate under *Jones*. Even when the set of possible follow-up measures are considered in the aggregate, the total amount of time and money invested would probably not be prohibitive. But, the atomized analysis of each and every possibly cost-effective means of providing direct notification makes the follow-up requirements exhaustive without any clear guidance as to when feasible methods have been exhausted. The foreclosing party cannot identify, with any confidence whatsoever, that it has satisfied all the obligations imposed upon it for achieving direct notification and can move forward with the foreclosure despite its knowledge that it has failed to achieve actual notice.

Jones may not lead all interpreting courts to conclude that all known failures to achieve direct notification must be second-guessed as to the

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construes those strands in the aggregate as a separate whole thing.

Id. at 1676.

147. *See, e.g.*, Luessenhop v. Clinton County, 466 F.3d 259 (2d Cir. 2006) (finding that knowledge of failure to notify requires foreclosing petitioner to inquire as to the existence of any practicable steps that might achieve actual notice).

148. The majority opinion in *Jones* emphasizes the connection between known failure and complete nullification of the attempt by comparing the sender's receipt of the certified letter as "unclaimed" to the sender watching the postman throw his posted letter into the sewer. *Jones*, 547 U.S. at 229.

149. Mullane v. Central Hanover Bank & Trust, 339 U.S. 306, 315 (1950).

possibility of some cost-effective step not attempted.[150] Apart from its distorting effect on the expectations of foreclosing petitioners, the direct application of the "desirous of actually informing" standard also places procedural burdens on those actually making the decisions of how to effect notice of tax foreclosure proceedings. Even if the standards could be applied without flaw by judges in compelling individual cases,[151] *Jones*'s implicit expectation that those initiating tax foreclosure proceedings will be able to anticipate those judgments places these practitioners in a difficult position. First, they have limited knowledge of the relevant facts. Even if the courts maintain their commitment to evaluating notification decisions from the ex ante perspective of those attempting notice, many questions remain regarding the availability of relevant resources.[152] Second, these practitioners have limited knowledge of the vague and changing law in this matter. Some are lawyers, but many are clerks with no training that would allow them to appreciate, for instance, the courts' various appraisals of the comparative effectiveness of certified and regular mail. Third, their decisions will always be suspect because they are 'fiduciaries' that often, if not always, have conflicts of interest with the notice recipients they are charged to look out for. Far from being given the benefit of the doubt, they will be often be assumed to be less than motivated in their efforts to provide actual notice.[153] These practitioners, then, make for poor managers of the uncertainty engendered by the "desirous of actually informing" formulation of the *Mullane* reasonableness standard. They need guidance not only to avoid sometimes paralyzing doubt, but also to help them promote the core value of participation underlying notice requirements.[154]

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150. Soon after *Jones* was decided, the Supreme Court, without hearing argument, vacated and remanded the Illinois Supreme Court's decision in *Estate of Lowe ex rel. Harris v. Apex Tax Investments, Inc.* for reconsideration of the matter in light of the *Jones* holding. 547 U.S. 1145 (2006) (mem.). In its original decision, the Illinois Supreme Court held that a purchasing tax investor's known failure to notify the owner of an unoccupied property did not invalidate its title. *In re* Application of County Collector, 838 N.E.2d 907 (Ill. 2005). Upon remand, the Illinois Supreme Court reasserted its prior position and held that the possible availability of information that the owner was incapacitated and resided in a nearby mental health care facility did not impose a duty to investigate on the party taking title. *In re* Application of County Collector, 867 N.E.2d 941(Ill. 2007), cert den'd 128 S.Ct. 253 (2007) (mem.).

151. *See supra* note 144.

152. Rules can play a coordinating role by conveying information from experts about standard resources and best practices. Rules can also provide an opportunity to those receiving notice to put themselves in a better position to receive notification. For more about the ability of rules to coordinate activity, see ALEXANDER & SHERWIN, *supra* note 134, at 14–15; SCHAUER, *supra* note 139, at 162–66. *See also infra* note 223.

153. *See supra* note 84.

154. For a discussion of how appropriate rules governing secondary address searches can give

Such a two-fold condemnation of the aggressive application of *Mullane*'s fiduciary standard to follow-up decisions would apparently compel agreement with the three dissenting justices in *Jones*.[155] The dissent in *Jones,* however, recognized the overly aggressive use of standards, but did not offer a promising alternative. Justice Thomas argued in favor of an ex ante perspective locked into the moment of the sending of the notice. The dissent's position would eliminate any review of follow-up decisions. It would make the mere creation of a mailed notice system a safe harbor. Under such a strict limitation of the *Mullane* standard, the courts would be able to confirm that a notice by mail system was in use but would lack any ability to look at how it was being implemented. Transforming the *Mennonite* rule requiring the mailing of a notice from a necessary condition to a per se sufficient condition for constitutional adequacy could sanction the denial of meaningful notice efforts in a wide range of circumstances.[156] The dissent is correct in charging that the majority's directive regarding failed notice attempts "has no natural end point, and, in effect, requires the States to achieve something close to actual notice."[157] It does not follow, however, that the result in *Jones* was wrong. If a reasonableness standard, particularly one couched in the language of fiduciary obligations, cannot provide the finality needed, then the Court should look to another formulation of *Mullane*'s test for adequate notice to validate a rule or set of rules that offers both access to legal relief for petitioners and fairness to affected parties.

F. "Reasonably Certain to Inform" as a Standard for Constitutional Safe Harbors

Legal scholarship concerning judicial decision-making has generally presented well-defined rules and flexible balancing tests as opposite

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foreclosing petitioners useful information as to how to locate a respondent to a foreclosure action, see *supra* note 152 and *infra* note 223.

155. *Jones* was decided by a 5–3 vote (Justice Alito took no part in the decision or consideration of the case) with Justices Thomas, Scalia, and Kennedy in dissent. Jones v. Flowers, 547 U.S. 220 (2006).

156. The *Jones* case provides a good example. From the Commissioner's ex ante perspective, Jones was a homeowner who was going to be deprived of his home without actual notice. The Commissioner may have succeeded in providing notice merely by sending the exact same letter by an even less expensive method than had already been tried. Under the dissent's approach, even this simple follow-up step would not have been constitutionally mandated.

157. *Jones*, 547 U.S. at 244.

poles on a continuous spectrum of forms of legal reasoning.[158] Between the bright-line rule of *Pennoyer*'s broad exemption from personal service for in rem cases and *Jones*'s cost-benefit analysis of every possible follow-up option lay a number of legal reasoning approaches that can be used to strike an appropriate "meta-balance."[159] In confronting the case of the notice provider who knowingly abandons direct notification after formal compliance with written requirements, the *Jones* majority invoked *Mullane* in its move toward a step-by-step cost-benefit analysis. The desirous notice provider construct, unmediated by comprehensible guidelines, has the potential to dissolve every tax title obtained by a foreclosing party that knew or should have known that actual notice had not been accomplished.[160] *Mullane*, however, contains additional language that courts can use to support and manage the creation of constitutional safe harbors.

Just after the passage describing the "desirous" notice provider, the *Mullane* Court offered a two-tiered analysis of adequate notice:

> The reasonableness and hence the constitutional validity of any chosen method may be defended on the ground that it is *in itself* reasonably certain to inform those affected, or, where conditions do not reasonably permit such notice, that the form chosen is not substantially less likely to bring home notice than other of the feasible and customary substitutes.[161]

The Court stated a goal of reasonable certainty to which all notification procedures should aspire but do not necessarily have to achieve in order to be considered "reasonably calculated . . . to apprise."[162] A notice system that is "reasonably certain to inform" those affected would be per se constitutionally valid.[163] In situations where such a system is not practicable, the Court urged a method that is not clearly inferior to other feasible means.[164] The *Mullane* Court's division of its own test into higher and lower standards offers an opportunity for courts to declare well-constructed notification protocols so comprehensively effective, so "reasonably certain to inform," as to assure all complying parties of the constitutional adequacy of their notification efforts, even if they are

158. Kathleen M. Sullivan, *The Supreme Court, 1991 Term—Foreword: The Justices of Rules and Standards*, 106 HARV. L. REV. 22, 61–62 (1992); James G. Wilson, *Surveying the Forms of Doctrine on the Bright Line-Balancing Test Continuum*, 27 ARIZ. ST. L.J. 773 (1995).

159. Wilson, *supra* note 158, at 773–78.

160. *See supra* notes 120–33 and accompanying text.

161. Mullane v. Cent. Hanover Bank & Trust Co., 339 U.S. 306, 315 (1950) (emphasis added) (internal citations omitted).

162. *Id.* at 314.

163. *Id.* at 315.

164. *Id.*

ultimately unsuccessful.[165]

Courts can and should apply the "reasonably certain" standard to induce legislatures to devise detailed protocols that adequately address the follow-up issues likely to arise in carrying out notice by mail. If a direct notification system, judged as a whole, contains adequate consideration for appropriate follow-up measures, then foreclosing jurisdictions and title insurers can rely on it in making their own due diligence determinations. When regulators face the question of how to manage the vagueness of a statutorily created facts and circumstances test, they often address the need for predictability by offering adherents safe harbor, a more clearly defined and generally more restrictive set of requirements that ensure a finding of compliance.[166] In the wake of the *Jones* decision, interpreting courts should afford legislatures the opportunity to create notification follow-up protocols that are sufficiently detailed as to guarantee constitutionally valid notice.

1. Safe Harbors in Constitutional Jurisprudence

The experience with and scholarship on safe harbors offers three reasons to look to them as a way of finding a proper "meta-balance" between rules and standards in the context of procedural due process. First, in their basic form, they promote greater efficiency without weakening compliance restrictions by being intentionally overinclusive.[167] Regulatory agencies have turned to the safe harbor approach to give clear guidance when charged with the specification and enforcement of broad statutory standards. To most closely delimit the actual contours of a vague standard, an agency will promulgate regulations that offer a facts and circumstances test designed to inform regulated parties of the various factual issues that the agency will focus on in determining compliance with the standard. But, the agency supplements the list of relevant factors with a separate safe harbor track. The rule-based alternative produces a precise measuring stick by which affected organizations can assure themselves of their own compliance.[168]

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165. Although the author is unaware of any prior cases in which a court has used the "reasonably certain to inform" standard to declare a notification system adequate per se, the Supreme Court has cited this language to show that even a system that is clearly adequate need not guarantee actual notice.

166. For example, Gideon Parchomovsky and Kevin Goldman have recently proposed the use of safe harbors to give needed predictability to the fair use doctrine. *See* Gideon Parchomovsky & Kevin A. Goldman, *Fair Use Harbors*, 93 VA. L. REV. 1483 (2007).

167. Overinclusive, here and throughout, denotes a rule that is comparatively more restrictive and more protective of a fundamental value—in this case, the right to be notified of proceeding affecting one's rights in property.

168. For instance, the Internal Revenue Service, in interpreting Section 501(c)(3) of the Internal

The bright-line rule gives certainty to those groups that can comply with it. Others can turn to the broader but less well-defined facts and circumstances test. Second, as discussed below, safe harbors have already been used by the Supreme Court in the context of unreasonable search and seizure doctrine to deal with the need for guidance as to constitutional standards. Third, when a complete set of stabilizing rules is needed, the guardian of a constitutional standard can be a gatekeeper, as opposed to creator, of constitutional safe harbors. The courts need not generate the safe harbor notification protocols themselves, but can instead set out a standard which challenges other rulemaking bodies to craft detailed procedures that provide finality while assuring there will be no violation of due process rights.

Although the rare scholarly[169] and judicial[170] references to the phrase "constitutional safe harbor" have tended to be occasions for skepticism, one commentator has recognized the utility of the constitutional safe harbor, at least when it is properly constrained. In the context of constitutional criminal procedure, Susan Klein not only identifies particular examples of the judicially created constitutional safe harbor but also sketches a brief theory of its parameters.[171] The Fourth Amendment safe harbors she describes outline certain criminal-suspect search procedures and types of searches that effectively preclude a viable critical inquiry into the particular circumstances of the search.[172]

Revenue Code, 26 U.S.C. § 501(c)(3) (2006), has included "relief of the poor, and distressed" as a charitable purpose qualifying an organization for federal income tax exemption. 26 C.F.R. 1.501(c)(3)-1(d) (2008). This regulation, while offering some degree of helpful specificity, still operates at the level of broad generalities. Nonprofit organizations providing safe, decent affordable housing to those unable to meet their needs in the local private real estate market would understandably want more definitive guidance as to whether or not their activities for development of affordable rental and homeownership units would qualify as charitable activities. In 1996, the Service released further regulatory direction. Revenue Procedure 96-32 offered both a facts and circumstances test and a safe harbor provision. Rev. Proc. 96-32, 1996-20 I.R.B. 14. The latter requires that the housing developments created by qualifying organizations dedicate certain percentages to households that are low-income and below. 26 C.F.R. 601.201 (2008). The percentages are fixed and the qualifying incomes are calculated based on the Area Median Income (AMI) for the relevant locality. The safe harbor builds in indices to match varying local economies, giving it important flexibility, without losing any of the descriptive precision which makes it "safe."

169. *See, e.g.*, Nicole Stelle Garnett, *Planning as Public Use?*, 34 ECOLOGY L.Q. 443, 444 (2007) (criticizing the Supreme Court's decision in Kelo v. City of New London, 545 U.S. 469 (2005), as effectively exempting from "public use" scrutiny those eminent domain condemnations that have undergone a public planning process).

170. *See, e.g.*, Santa Fe Ind. Dist v. Doe, 530 U.S. 290, 317 (2000) (finding that the defendant school district's superficial changes to its public prayer policies did not afford it "constitutional safe harbor").

171. Susan R. Klein, *Identifying and (Re)Formulating Prophylactic Rules, Safe Harbors, and Incidental Rights in Constitutional Criminal Procedure*, 99 MICH. L. REV. 1030 (2001).

172. *Id.* at 1044–47.

These protected searches are deemed to be per se reasonable. To show these safe harbors to be properly entrenched generalizations, Klein demonstrates that they have been faithfully applied even when they part ways with the considerations that gave rise to them.[173] In protecting the constitutional freedom from unreasonable search and seizure, the Court has been willing to tolerate a rule that is, at least to some extent, underinclusive.

Klein is quick to point out that the Court is rightly reluctant to extend safe harbor protection in the realm of constitutional rights.[174] Klein offers two preconditions for the employment of a constitutional safe harbor. First, it must be demonstrated that the traditional method of adjudicating the constitutional issue on a case-by-case basis is not feasible.[175] Second, the costs imposed by the use of the constitutional safe harbor must be acceptable.[176]

Although Klein devotes little or no explicit attention to the defense of these propositions, this Article's discussion of constitutional rules and standards provides significant support for each of them. Rules that protect constitutional rights can provide enough efficiency through their clarity to justify any overinclusion that might result. But, the risk of underinclusion raises the need for greater caution. A constitutional safe harbor rule should not trump a less determinate, but more accurate, standard unless the application of that standard is intolerably indeterminate.[177] Even when the true need for the creation of a constitutional safe harbor has been demonstrated, the risk of underinclusion must be strictly limited. Safe harbor rules cannot be valid if they sanction blatant violations of a constitutional norm.[178] Moreover,

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173. *Id.* The rule sanctioning a police officer's search of a suspect's grab area incident to a valid arrest has its justification in the need for a police officer to feel protected against sudden violent action by the suspect. *Id.* at 1045 n.66 (citing Chimel v. California, 395 U.S. 752 (1969)). The Supreme Court found it necessary to give clear rules validating all searches of containers and vehicle passenger compartment areas because it did not want to impose the need for interpretation of a less well-defined standard while in a situation of possible personal danger. As a consequence, the Court followed the rule even in cases where the searches would not have been validated by direct application of the underlying standard rule. Klein, *supra* note 171, at 1044–47.

174. *Id.* at 1046–47 nn. 75,76 (citing Illinois v. Wardlow, 528 U.S. 119 (2000); Richards v. Wisconsin, 520 U.S. 385 (1997)).

175. Klein, *supra* note 171, at 1033.

176. *Id.* Klein illustrates this latter point in a diagram at the end of the article. She states that underinclusion in the context of a basic right will be as small as possible in a well-designed constitutional safe harbor rule. *Id.* at 1080.

177. On this issue, I agree with Klein's implication that a constitutional safe harbor rule must address a substantial need for increased certainty. In the cases dealing with search incident to arrest, a vague standard's aggravation of the necessity for spot decision-making compromised officer safety. *See supra* note 171.

178. *See supra* note 156 and accompanying text; *cf.* Klein, *supra* note 171, at 1046.

those instances in which the safe harbor rule is acceptably more permissive than the unworkable standard would be must be justified by the benefits of certainty brought about by the use of the safe harbor.

2. A Standard for Rules that Preempt Standards

These two criteria inform the content of *Mullane*'s "super standard" of "reasonably certain to inform." To be granted the protective abilities of a constitutional safe harbor, a detailed notification protocol should consist of directives that would protect against any outright denial of adequate notice.[179] It must provide this guarantee for all circumstances contemplated within its categorical limits.[180] It also must balance any downward departures from the general adequacy of notice standard with the gains of coordination, predictability and efficiency associated with well-defined instructions. In certain instances, a "reasonably certain" follow-up protocol may not allow for any outcome that would be found inadequate under the general standard.[181] In cases where such a demanding rule would not be practicable, a promulgated set of "reasonably certain" notification protocols could protect a notification attempt that complied with the rule but resulted in known failure despite the possibility of another means of follow-up that could have achieved actual notice.[182]

Rules are, by their nature, "suboptimal" approaches to normative articulation.[183] Advance directives about how foreclosing petitioners should respond to known failures to identify, locate, or deliver notice to foreclosure respondents must be sufficiently tailored to relevant circumstances to eliminate unacceptably permissive outcomes without resorting to the indeterminate language of standards. One single rule for how to respond to a returned mailing is not likely to suffice for the many different contexts that require such a response. The courts have been

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179. In order to be declared a constitutional safe harbor, a follow-up protocol would have to pass a test that is the real opposite of the standard for facial constitutional challenges announced in *U.S. v. Salerno*, 481 U.S. 739 (1987). Where the Supreme Court has held that, in general, a statute will not be found unconstitutional on its face unless "no set of circumstances exists under which the Act would be valid", *Id.* at 745, the "reasonably certain to inform" test would look to all possibilities within the scope of the protocol to rule out the possibility of invalid application.

180. As articulated infra in Part III, the categories are generated by mapping the three types of direct notification failure, *see supra* notes 47–49 and accompanying text, against appropriately defined types of property interest holders, *see infra* Part III.A–B.

181. *See, e.g., infra* Part III.B.1 ("reasonably certain" follow-up to failed notice to homeowner would involve actual delivery of notice to subject property.).

182. *See infra* notes 217–22 and accompanying text.

183. SCHAUER, *supra* note 139, at 100–02.

able to fashion workable safe harbors in the Fourth Amendment context from the relatively frequent challenges made to evidence obtained through controversial police searches. Balancing the need for officer safety with the constitutional rights of criminal defendants has required not just one entrenched generalization but several.[184] The rigidity of rules and the attendant problems of inaccuracy[185] are exacerbated in the judicial context because courts must wait for the cases to come before them in order to shape a comprehensive doctrine. In the context of adequate notice of proceedings, appellate decisions are less common and provide fewer occasions for judicial creation of safe harbors. The lack of opportunities to fine tune constitutional safe harbors decrease the likelihood that courts could deploy workable rules that adequately protect constitutional rights.

Those creating a rule should not attempt to subject a great variety of cases to it; rules should be properly tailored. A safe harbor approach to notification protocols needs to be multi-faceted. The courts, as passive auditors of disputes brought before them, cannot efficiently construct such a system. Legislatures and judicial administrative bodies should enact tax foreclosure notification procedures with sufficient detail to resolve these questions of proper follow-up to failed notification attempts. Because legislatures, courts, and tax administrators are already writing out notification requirements for both judicial and nonjudicial foreclosure processes, these bodies would be the natural sources of constitutional safe harbors. To do so, they would need to consciously draft protocols for the purpose of protecting compliant actions from destabilizing constitutional review. In crafting these protocols, these rulemaking bodies would become interpreters of the constitutional protections afforded persons affected by foreclosure actions.[186]

Following *Mennonite*'s one-size-fits-all approach, legislatures could try to construct a single system for follow-up notification that would apply equally to all interested parties with substantial property interests. Such a set of protocols would have the advantage of simplicity. Notification procedures that make no provision for how to address returned mailings and subsequently acquired information are already difficult to understand. Even with no differentiation among types of stakeholders, enacted protocols would have to separately address follow-

184. Klein, *supra* note 171, at 1044–47.

185. For discussion of rules' under- and over-inclusiveness, see *supra* notes 140–42 and accompanying text. *See also*, SCHAUER, *supra* note 139, at 31–34.

186. For a discussion of the legislative and executive branches as interpreters of constitutional law, see Edward A. Harnett, *Modest Hope for a Modest Roberts Court: Deference, Facial Challenges and the Comparative Competence of Courts*, 59 SMU L. REV. 1735 (2006).

up mechanisms for identification of, location of, and delivery to interested parties.[187] Because simple rules better convey information to would-be adherents than more complex ones, legislatures should enact specialized rules only when they provide some advantage.[188]

If policymakers wish to tailor rules to apply to a subset of interested parties, they should make the classifying criteria as clear and simple as possible. Tailoring follow-up notification protocols to match different types of stakeholders justifies the cost of complexity in two ways. First, specified secondary efforts rules will allow legislators to afford different levels of certainty in notification to various groups of interest holders. Even though all stakeholders receive the basic entitlement of direct notification provided for by *Mennonite,* certain groups may justly expect especially rigorous supplemental procedures. The *Jones* Court realized the relevance of this distinction, remarking on the "important and irreversible . . . loss" that Jones faced in foreclosure of his house.[189] The Commissioner's knowledge of the kind of interest Jones held imposed an especially high burden on the Commissioner with regard to assuring actual notice.[190] Second, certain strategies for supplementing basic notice by mail may work particularly well with certain stakeholders. Even if mail works fairly well for all types of affected parties,[191] foreclosing attorneys whose initial attempts at notice fail should take into account information about the type of stakeholder when pursuing appropriate follow-up measures. *Mullane* recognized the continuing relevance of stakeholder vigilance in constructing adequate notice. The rise of the mails as the dominant mode of foreclosure notice has made affected parties very passive partners in the notification process. Nevertheless, understanding the general nature and the mechanics of stakeholder interaction with property can give us an understanding of the extent and focus of follow-up protocols.

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187. For instance, in anticipation of a foreclosing party receiving a returned mailing indicating that the sole owner of record for the property is deceased, the legislature could provide for a follow-up search of probate records to determine the existence of an administered estate and the identity of the new party to receive notice. Some jurisdictions provide for this as part of the initial title search to identify and locate the persons entitled to notice. *See, e.g.*, MD. CODE. ANN., TAX-PROP. § 14-836(b) (West 2008).

188. *See* Kaplow, *supra* note 26, at 590–93.

189. Jones v. Flowers, 547 U.S. 220, 230 (2006).

190. *Id.*

191. I argue below that mail is becoming less effective for mortgagees who are increasingly dependent on the Internet for information regarding their holdings. *See* discussion *infra* Part III.C.

III. TAILORING TAX FORECLOSURE NOTIFICATION PROTOCOLS

A. Protocols for "Reasonably Certain" Notification

Thirty-five years ago, in an article entitled *Property Rules, Liability Rules, and Inalienability: One View of the Cathedral* (the *Cathedral*), Guido Calabresi and A. Douglas Melamed introduced a tripartite taxonomy of property rights classified by the types of protection legal institutions offered to protect them.[192] Inalienable entitlements could not be separated from their holders, not even by voluntary transfer for value.[193] Rights protected by liability rules, on the other hand, could be taken away, even involuntarily, but appropriate compensation would be due.[194] Property rule entitlements were protected not by a mere damages award but by specific injunction, and thus could be transferred only with the consent of the holder.[195]

In the language of the *Cathedral*, the process of tax sale and foreclosure provides the liability rule liquidation of the property rule entitlements held by the affected interest holders. The owners' failure to pay property taxes on time puts their ownership entitlements, as well as the lien interests of their secured creditors, at risk. But, as long as any of these parties has a right of redemption, that stakeholder can preserve his or her interest by curing the delinquency. To finalize transfer of title, the equity of redemption of all stakeholders is foreclosed out and they are left with the surplus proceeds of the tax sale, if any. Like other liability rule mechanisms, tax sale and foreclosure convert in-kind entitlements to monetary values.

Foreclosure provides an example of property rules giving way to liability rules. Abraham Bell and Gideon Parchomovsky have given the name "pliability rules" to processes that move across the boundaries between property and liability rule realms.[196] Foreclosure, as a pliability rule structure, offers property rule entitlement holders one final chance to preserve their interests in-kind. When stakeholders fail to redeem, they face the liquidation of their interests by a liability rule mechanism designed to pay off the underlying debt and distribute any surplus. While a foreclosure sale may seem to be only a liability rule mechanism, its attention to interested parties' rights of redemption shows it to actually

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192. Guido Calabresi & A. Douglas Melamed, *Property Rules, Liability Rules, and Inalienability: One View of the Cathedral*, 85 HARV. L. REV. 1089 (1972).

193. *Id.* at 1092–93.

194. *Id.* at 1092.

195. *See id.*

196. Abraham Bell & Gideon Parchomovsky, *Pliability Rules*, 101 MICH. L. REV. 1 (2002).

be a pliability rule mechanism. The strength of the right of redemption depends upon timely notice by the foreclosing jurisdiction to stakeholders of its expiration. A foreclosure process that insistently imposes an open-ended commitment to actual notice gives stronger property rule protection for affected parties' rights in the subject parcel. To the extent that a right of redemption must bow to the need for practicable notification standards, liability rule liquidation becomes the respondents' remaining safeguard.

Pliability rule mechanisms can bring just and efficient balance when a property rights system must contend with dysfunctional property rule entitlements.[197] The gridlock caused by excessive fractionation requires resort to a liquidation mechanism such as eminent domain.[198] Unlimited use of such a powerful liability rule process, however, can itself hamper investment by depriving landowners of security of tenure.

When property owners fail to stay current on secured debts their property rights become less stable. Uncertainty about their abilities to retain their property rights will limit their willingness to invest in those properties. They may abandon their properties altogether, even before foreclosure proceedings begin. Foreclosure does not create the delinquency or the title insecurity that follows; rather, it culminates in cutting off the interests of those in default. But, properties may also be redeemed by full payment of the tax delinquencies. While the essential goal of foreclosure is finality, that end can be served just as well by redemption as it can by dissolution.

Notice in foreclosure proceedings is the indispensable first step in protecting the equity of redemption. The length of time afforded to an owner or other redeeming party to cure the delinquency may ultimately determine the strength of the right, but, without notice of the opportunity to exercise the right, it has little effectiveness. Because notice is so important to the legitimacy of the foreclosure process, its success in achieving finality depends on compliance with notification requirements. Failure to give adequate notice of a tax foreclosure creates the very title insecurity that foreclosure, as a pliability rule mechanism, is designed to resolve.

Chief Justice Roberts implicitly recognized the distinctive importance

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197. *See id.* at 31–32.

198. Michael Heller has identified the problem caused by overlapping rights of exclusion as the "tragedy of the anticommons." Michael A. Heller, *The Tragedy of the Anticommons: Property in the Transition from Marx to Markets*, 111 HARV. L. REV. 621, 622 (1998); *see also* MICHAEL HELLER, THE GRIDLOCK ECONOMY: HOW TOO MUCH OWNERSHIP WRECKS MARKETS, STOPS INNOVATION AND COSTS LIVES (2008); Ben Depoorter & Sven Vanneste, *Putting Humpty Dumpty Back Together: Experimental Evidence of Anticommons Tragedies*, 3 J.L. ECON. & POL'Y 1 (2006).

of foreclosure notice to owners, as opposed to mortgagees and judgment lien creditors, when he wrote in *Jones* that the reasonability of follow-up notification was especially apparent when "the subject matter . . . concerns such an important and irreversible prospect as the loss of a house."[199] The in-kind entitlement of land ownership, especially homeownership, is particularly and irreparably vulnerable to foreclosure in a way in which security interests are not.[200] Land is unique—no one parcel is absolutely identical to another. For many absentee owners, land holdings are fungible commodities; a property in one location can be replaced by a similar parcel in a different location having identical investment features. Conversely, homeowners, although also concerned with resale values, tend to value particular details about their homes and may not be easily amenable to substitutes, especially by involuntary dispossession.[201] Loss of the property may deprive them of a sense of place and membership in their community.[202] Even an adequate liquidation process—one that gives homeowners fair value for their property—can never return to them what they have lost.

By focusing on categories of property interest holders, legislators can not only address the general question of how extensively to follow up, but also how to focus the secondary search efforts of foreclosing parties. Although the caretaker principle may seem like an excuse for not making any substantial efforts to personally notify owners of seized property, it does support a system that at least attempts to strike a balance between the needs of the foreclosing and the foreclosed. With the basic right to direct notification well-established, policymakers should be free to design supplemental processes that reflect the different kinds of vigilance they can and should expect from stakeholders. As we will see when discussing mortgagees, an exploration of the ways in which mortgagees manage their business affairs may eventually lead notification away from mailed notice altogether.

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199. Jones v. Flowers, 547 U.S. 220, 230 (2006).

200. For more in-depth treatment of the special legal status of the home, see D. Benjamin Barros, *Home as a Legal Concept*, 46 SANTA CLARA L. REV. 255 (2006).

201. James J. Kelly, Jr., *"We Shall Not Be Moved": Urban Communities, Eminent Domain and the Socioeconomics of Just Compensation*, 80 ST. JOHN'S L. REV. 923 (2006).

202. *See* MINDY THOMPSON FULLILOVE, ROOT SHOCK: HOW TEARING UP CITY NEIGHBORHOODS HURTS AMERICA, AND WHAT WE CAN DO ABOUT IT (2004); Marc A. Fried, *Grieving for a Lost Home: Psychological Costs of Relocation, in* URBAN RENEWAL: THE RECORD & THE CONTROVERSY 359–79 (James Q. Wilson ed., 1966); Marisela B. Gomez & Carlos Muntaner, *Urban Redevelopment and Neighborhood Health in East Baltimore, Maryland: The Role of Institutional and Communitarian Social Capital*, 15 CRITICAL PUB. HEALTH 83 (2005); Mindy Thompson Fullilove, *Psychiatric Implications of Displacement: Contributions from the Psychology of Place*, 153 AM. J. PSYCHIATRY 1516 (1996); Lee Rainwater, *Fear and the House-as-Haven in the Lower Class*, 32 J. AM. INST. PLANNERS 23 (1966).

B. Owners: Stabilizing Notice by Mail

A properly tailored protocol for owners would most likely have a single standard for following up on information about the death of an owner or dissolution. Just as returned mailings frequently state that the addressee has moved, they also sometimes inform the sender that the owner of the subject property has died. This information generally obligates the notice provider to identify the administrator of the owner's estate and any possible heirs.[203] Some states anticipate this situation by including a search of probate records in the scope of the original title search.[204] Any state seeking to establish a complete set of well-defined protocols would do well to specify that the parties should receive notice of a tax foreclosure in the event of death of the owner or dissolution. Because the ways in which different types of owners relate to their properties has little or no bearing on the disposition of their properties after their demise, one rule should suffice for all owners.

When dealing with returned mailings that indicate that the owner must be found at another location, differences among various types of owners play important theoretical and practical roles. The *Jones* Court clearly wished to avoid a broad mandate for indefinite searches for alternate addresses.[205] Yet, an owner who has moved and not updated his or her address with the registrar of deeds or the local property tax authority has not given up all rights to direct notification.[206] The proponent of notification follow-up protocols, therefore, must be very careful in defining the extent and manner of the inquiry for secondary mailing addresses. Attention to owners' varying relationships to the subject property address can inform both aspects of the search parameters.

1. Homeowners

Adequate notice to homeowners should come closest to assuring actual notice not only because homeowners' redemption rights are so important, but also because notification of homeowners is comparatively straightforward. Because they occupy the property being foreclosed, notice to residential owner-occupants should not involve an open-ended search for the mailing addresses of persons with the same names as the

203. *See* Closser v. Hanson Land Co., 177 N.W. 196 (Mich. 1920).

204. *See, e.g.*, MD. CODE ANN., TAX-PROP. § 14-833 (West 2008).

205. *See supra* text accompanying notes 125–28.

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

owner.[207] Foreclosing petitioners can focus their delivery efforts on one address—the address of the property subject to foreclosure. Homeowners, by definition, relate to their property interests through actual occupancy. Consequently, a cost-benefit standard categorically confined to homeowners readily generates both initial and follow-up procedures for each of the three stages of mail notification that will qualify as "reasonably certain to inform." The identification and location phases are significant only insofar as they verify the occupancy of the owner and the consequent applicability of the delivery protocols. If the land records and the property tax records confirm that the debtor is a homeowner, then the foreclosing party can focus all efforts on delivering notice to the subject property address. In the context of an owner-occupied home, *Jones*'s constitutional mandate to follow up on every known failed delivery attempt provides important protection against irreparable harm without engendering instability in the notification protocols. Even if both certified and regular mailings are returned, the foreclosing party can assure delivery—to the site, if not to the actual owner—by posting at the occupied premises.

Homeowners are often afforded greater property rule protection than those that hold more fungible property interests. A system that guarantees delivery of notice to the subject property does not necessarily assure actual notice, but it does qualify as "reasonably certain to inform" homeowners. A less demanding failed delivery follow-up protocol might also qualify as a constitutional safe harbor but it seems doubtful.[208] Klein's standard for a constitutional safe harbor is that there cannot be any circumstance in which the rule would permit a serious violation of the constitutional right. In the case of the right to notice and opportunity to be heard, a follow-up protocol must eliminate those outcomes in which actual notice is left purely to chance despite the availability of a

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207. This does not mean that persons more properly characterized as homeowners rather than absentee owners cannot receive mail at alternative addresses. *See* Estate of Lowe *ex rel.* Harris v. Apex Tax Invs., Inc., 547 U.S. 1145 (2006) (mem.). Likewise, absentee owners frequently list the property address as their mailing address and some even falsely claim it as a principal residence. *See* discussion *infra* Part III.B.2. These ambiguities merely accentuate the need to confront the problem of an alternative address search under the category of absentee owners. *See id.*

208. A rule that was drawn up to be even more skewed towards overinclusion would more clearly qualify as a constitutional safe harbor. A statutory requirement that the foreclosing party confirm delivery to the subject property creates appropriately stronger property rule protection for the homeowner without opening up the foreclosure to endless delay. But, if a rule is too closely identified with actual notice, it may cease to be a safe harbor at all. Arkansas provides that a failed attempt at certified mailing to a homestead owner must be followed up by "actual notice to the owner of a homestead by personal service of process . . . ." ARK. CODE ANN. § 26-37-301(e)(1) (2008). Even in the homeowner context, any requirement of actual notice creates a significant possibility that notification will never be satisfactorily completed.

promising and inexpensive means of achieving it. By requiring an exhaustive approach to subject property delivery of foreclosure notices addressed to homeowners, the protocol eliminates the need to rely on publication alone without resorting to a never-ending series of notice measures.[209]

The real challenge, of course, for a constitutional safe harbor arises when it validates aborted notification attempts that the standard it replaces would declare constitutionally inadequate. A look at categories of property interest holders apart from homeowners presents greater notification challenges and possibly a diminished commitment to actual notice. When entertaining the possibility of a follow-up protocol that could be underinclusive when compared to *Mullane*'s cost-benefit standard, our dedication to promote the more comprehensible rule over the less determinate—but more flexible—standard is tested. As Duncan Kennedy has stated, a clearly defined system of rules cannot last if judges are "unwilling to bite the bullet, shoot the hostages, break the eggs to make the omelette and leave the passengers on the platform."[210] Constitutional safe harbors do not require that fundamental rights be sacrificed to the predictability of a rule scheme.[211] But the authors of "reasonably certain" protocols, to provide their adherents assurance of constitutional compliance, must be afforded sufficient deference. Courts must allow for some marginal cases in which the generally, but not exclusively, overinclusive rule validates known failure to notify that the underlying standard would disallow.

2. Absentee Owners

Just as the problem of the indefinite address search can be eliminated by single-minded concentration on the address of an owner-occupied property, it can also be avoided in a very different category of property owners. Owners of vacant buildings[212] that have clearly disassociated

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209. *Cf.* Brycie Michelle Loepp, Note, Jones v. Flowers*: What is Required When the Noticer Knows the Noticee Has No Notice?*, 32 OKLA. CITY U. L. REV. 505, 519 (2007) ("notice aimed at the subject property would appear to be most beneficial to the property owner without putting too much burden on the State.").

210. Duncan Kennedy, *Form and Substance in Private Law Adjudication*, 89 HARV. L. REV. 1685, 1701 (1976).

211. *See supra* notes 161–71 and accompanying text.

212. By vacant building, I do not mean a property that is merely unoccupied but one that has such serious building code violations as to render it uninhabitable and visibly so. *See, e.g.*, BALT, MD INT'L BUILDING CODE §115.4.1 ("'Vacant structure' means an unoccupied structure that is unsafe or unfit for human habitation or other authorized use.") Kansas has already adjusted the tax foreclosure pliability rule mechanism in this context by shortening the period of redemption for such properties. *See supra*

themselves from their property should not receive the benefits of an intensive, and quite probably fruitless, search to locate them. In such a context, even those follow-up notice requirements that meet the demanding "reasonably certain" standard can take into account the full range of costs borne by the foreclosing local government.[213] State tax foreclosure procedure rule-makers should be supported by reviewing courts if and when they elect to establish a straightforward system of sending out a single mailing to the address of record in the title documents and, if different, the address or addresses known to the property tax authorities. The costs of an indefinite search for alternate addresses, or even repeated attempts to make delivery to an address the addressee no longer visits, go beyond the modest monetary cost of postage and online records inquiries. Such best efforts requirements inevitably open the door to second-guessing and title insecurity. Any constitutionally mandated follow-up requirements should be limited to those occasioned by the notice provider's recognition of its failure to comply with its own basic procedures, such as failure to address the envelope properly or to put sufficient postage on the letter.

Owners with especially strong or weak ties to the subject property allow rulemakers to create reasonably certain systems that sidestep the issue of a search for alternative addresses. Owners who merely reside somewhere other than the subject premises certainly cannot all be characterized as "free riding" speculators who deserve minimal notice. Homeowners generally have stronger attachment to their properties than absentee owners do; owner-occupants have a stronger interest in preserving the in-kind nature of their property rights because the land provides them use value apart from a source of income. Absentee owners that view their land purely as a form of investment should be indifferent to having that investment converted to another type of asset that has similar risk and return characteristics. It would be wrong, however, to presume that all non-resident owners look at properties only as fungible investments. While some rent their properties to others, these owners still retain a right of reversion and can decide to personally occupy the property. Likewise, other owners may move out of their homes with the express intention of returning.

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note 40.

213. Secondary address search requirements that are less restrictive with respect to vacant property owners than with absentee owners generally are not underinclusive. The rule dispensing with follow-up address searches in the foreclosure of vacant properties expresses a relevant difference between these two groups of property owners that flows directly from the general principles articulated in *Mullane*. *See supra* Part II.C. For an instance of true underinclusion by a "reasonably certain" secondary address search protocol, see *infra* note 225.

Nevertheless, achieving actual delivery to an address other than that of the subject property should not be given the importance expressed by the *Jones* requirements. As the dissent in that case observed, the return of a certified mailing as unclaimed may indicate the addressee's lack of willingness to go to the post office and pick it up.[214] A broad rule that a foreclosing party must use any and every feasible means to deliver notice to an absentee owner's address of record would be wasteful and inefficient. The question of the need to search for alternative addresses, however, remains open.

Certainly, even in cases of vacant properties, a notice provider receiving credible information that an owner can be reached at another address cannot ignore this information. Many states make it clear that foreclosing parties must use not only the address of record, but also addresses that they actually know about, including those that they may become aware of during the notification process.[215] While such a requirement may not be constitutionally mandated in all cases,[216] a system that seeks the benefits of a constitutional safe harbor would do well not to set up rules that disregard information already known to the foreclosure petitioner. By doing so, a system that is "reasonably certain to inform" protects itself from sanctioning grossly inequitable outcomes.

The issue, then, is what constitutes constructive knowledge of alternative addresses, such that supplemental mailings should be required. For example, what sources of address information should be imputed to be "known" to a foreclosing party? *Mennonite* limited the world of required addresses to those that could be "ascertained by reasonably diligent efforts."[217] With vacant property owners, we can argue that even a system "reasonably certain to inform" can have a very narrow standard for constructive knowledge of alternative addresses.[218] But, for absentee owners generally, even a system of notification that aspires to eliminate any occasion for violation of due process should

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214. Jones v. Flowers, 547 U.S. 220, 245 (2006) (Thomas, J., dissenting) (citing U.S. POSTAL SERVICE, DOMESTIC MAIL MANUAL § 507, Exh. 1.4.1, *available at* http://pe.usps.gov/text/dmm300/507.htm).

215. *See, e.g.*, MD. CODE ANN., TAX-PROP. § 14-833 (West 2008).

216. *Jones* sought to limit the scope of its improvisation requirement by restricting it to those instances in which the petitioner had actual knowledge that notification efforts had failed. The Court recognized, but was not persuaded by, the Solicitor General's argument that such an approach might discourage rule-makers from choosing means, such as certified mail, that provide valuable information about the success of notification efforts. *Jones*, 547 U.S. at 237. The constitutional safe harbor approach advocated in this Article would allow the overall effectiveness of a notification system to be evaluated, as opposed to setting one aspect of a system against another.

217. Mennonite Bd. of Missions v. Adams, 462 U.S. 791, 798 (1983).

218. *See supra* note 193 and accompanying text.

require those notice providers who know that the addresses they have for an owner will not provide actual notice to consult readily accessible and reliable records to find addresses that can be definitively linked to the notice recipient.

The search for alternative addresses can quickly become a labyrinth of information that may or may not be relevant to the notification of actual owners. When a search for a "Gary K. Jones"[219] turns up half a dozen possibilities, including several "G. Jones" addresses, it might be tempting to say that the "cost" of sending out a few extra notices by mail is so small as to be discounted in the overall campaign to achieve actual notice. But, this blithe attitude is wrong for several reasons. First, just as agents of unsecured creditors should not send "dunning" letters demanding payment from persons who have no connection to the debt, neither should foreclosure attorneys "notify" people of a last chance to "redeem" a property that they do not own. Second, including individuals with similar names opens up the possibility that receipt of notice will lead to a false sense of completion of notification. For these (and other) reasons, constitutionally mandated searches for alternative addresses should not go beyond sources that can produce addresses that can be linked to the actual owner and the subject property address.[220]

In response to *Jones*, New York has modified its tax foreclosure protocols to require, as a follow-up on incorrect addresses, that the foreclosing governmental subdivision request any alternative address information held by the U.S. Postal Service.[221] This method of follow-up avoids the problem of false positives by focusing on information connected to the previous mailing address. The question remains, however, as to whether or not the Postal Service is a sufficient source for such information.

A follow-up system for locating absentee owners that claims reasonable certainty would include other governmental records as secondary sources for addresses. If not already required in the primary address search, the foreclosing party, upon learning that the primary

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219. Gary K. Jones was the appellant in *Jones v. Flowers*, 547 U.S. 220 (2006).

220. *Cf.* Elizondo v. Read, 588 N.E.2d 501 (Ind. 1992), *abrogated by* Jones v. Flowers, 547 U.S. 220 (2006).

> It is not, however, reasonable to require the auditor to speculate as to whether these possible alternatives are addresses for the property owner who owes taxes on the property in question or another taxpayer with the same name. This type of confusion may not be very great when the auditor is searching for an Urbano Elizondo in Marshall County. It does pose a problem, however, when the auditor of Marion County is attempting to find an address for Mary Smith, or the auditor of Lake County is searching for a John Jones.

Id. at 505.

221. N.Y. REAL PROP. TAX LAW § 1125(1)(b) (McKinney 2008).

address is no longer valid, should be required to consult other local property-based records such as water billing or code enforcement, these records are often maintained separately from property tax address information. But, even though voter registration rolls and motor vehicle registration records may provide useful information, a reasonably certain standard should mandate their use only to the extent they can provide a new address connected to the subject property address. If these public record entries have no link to the subject property, then any attempt to obtain valid addresses will probably depend on name matches. If they archive obsolete address information, on the other hand, a diligent investigator can be reasonably expected to look for links between former addresses associated with the interested party and more up-to-date mailing address information. If, however, these records only contain current address information, they cannot assure the foreclosing party that the persons named have any connection to the subject property.

By constructing a thorough notification system that balances the need for finality against the commitment to actual notice, rulemakers can bring clarity to foreclosure notice for both notice providers and notice recipients. When policymakers have, after due consideration for the rights of all parties involved, struck a balance between actual notice and practicability of notice completion, courts should respect that determination and substitute their own judgment only when the system falls short of the reasonably certain standard. When those enacting rules for notice by mail neglect to resolve the issue of how a foreclosing party should respond to bad address information, then courts will have no choice but to bring the general constitutional standards directly to bear on the notification decisions of the foreclosing party. For instance, a court faced with a complaint of lack of actual notice by an owner with a very unique name might conclude that a constitutionally mandated secondary address search would have included Internet phone listings or available voter registration records. However, that same court should respect the legislature's attempt to systematize such searches if the legislature decided that such open-ended inquiries should not be part of a required follow-up protocol.[222] The true test of the "super standard" comes when the legislated rule creates a reasonably certain method of notification that validates a notification choice that a court would find unconstitutional if it were directly subjected to review under the desirous-of-actually-informing formulation.

In this crucial question of defining the sources for secondary addresses, New York has mandated one specific source, the United

222. *See supra* Part II.F.

States Postal Service.[223] In requesting forwarding address information, as opposed to consulting a directory of names, the foreclosing petitioner would be avoiding the aforementioned trap of false positives. Whether or not this post office source alone provides a thorough enough coverage of confirmed secondary address information as to eliminate the need for other sources is an empirical question.[224] A court evaluating the New York protocol as a per se diligent search would have to know of the postal service records' comparative effectiveness relative to other inexpensive sources of secondary address information. If a court could conclude that an exclusive focus on the post office as a source of confirmed alternative addresses did not ignore other methods that must be tried,[225] then the New York protocol would be deemed "reasonably certain to inform" absentee owners. Consequently, if a particular absentee owner came forward claiming that his unusual name or the availability of other identifying information such as his social security number made him particularly easy to find, the court would respond that the system created provided such a level of certainty that it should not be undermined by special cases.

C. Mortgagees: Moving Beyond Notice by Mail

This Article's examination of the loss owners suffer in foreclosure supports the creation of follow-up procedures for failed notice to most types of property owners. Although *Mennonite* extended the basic entitlement of notice by mail to mortgagees, *Jones* did not explicitly require follow-up on unsuccessful notification to mortgagees. While the right to redeem is extended both to owners and their secured creditors, the policies that underpin the two classes of redemption rights differ.

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223. *See supra* note 221 and accompanying text. By requiring foreclosing parties to request available alternative addresses from the Postal Service, New York is not only directing notifiers to a potentially valuable resource they might have otherwise overlooked, but also instructing potential foreclosure respondents to keep their address information with the Postal Service up to date. By specifying a particular approach, rules can enhance efficiency by coordinating activity. *See supra* notes 152, 154.

224. The effectiveness of class action notification is regularly measured through considerable statistical research. *See* Todd B. Hilsee, Shannon R. Wheatman & Gina M. Intrepido, *Do You Really Want Me to Know My Rights?: The Ethics behind Due Process in Class Action Notice is More than Just Plain Language: A Desire to Actually Inform*, 18 GEO. J. LEGAL ETHICS 1359, 1370–75 (2005).

225. In the absence of an explicit alternate address protocol, a court might, now or in the near future, conclude that readily accessible Internet databases such as Accurint.com, *see supra* note 131, are generally required alternate addresses resources for a foreclosing party that knows the social security number of the person to be notified. That same court, however, might defer to a legislative determination that absentee owners whose social security numbers are known should be treated the same as those for whom such information is unavailable provided a "reasonably certain" method for obtaining alternate address information is offered.

Owners are given the opportunity to protect their in-kind entitlements because liquidation presents a qualitative loss and the possibility of a quantitative loss. With the junior lienors, by contrast, the prospect of a less than vigorous auction process raises the risk of an unnecessary quantitative loss; but, the liquidation of their security in the subject property does not represent the same sort of in-kind deprivation.[226] The fact that a foreclosure inflicts monetary damages on a mortgagee or judgment lien creditor does not make those losses insignificant or even less important than the injuries suffered by owners. Indeed, in many cases, a prime mortgagee may be the only party with the inclination or the ability to redeem a tax delinquent property. If the value of the subject property has declined since the mortgage was originated, the owner's equity may have no monetary value.

Regardless, the reality that mortgagees may be more motivated than owners to redeem properties from an inefficient and unfair liquidation process does not make actual notice of the proceedings an indispensable safeguard. If an involuntary sale is conducted irregularly or yields grossly inadequate consideration, the injured junior lienholder may be able to avoid the sale as to its interest as a fraudulent conveyance.[227] In tax foreclosure, there also may be remedies against the governmental entity that failed to give adequate protection to the secured creditor's interests. Lienholders and others with purely financial interests in the property are more amenable to protection by the liability rule process. Affording them the same or similar equity of redemption as owners may protect against faulty liability rule mechanisms, but it is not the only, or even necessarily the most efficient, way.[228]

The nature of the mortgagee's relationship to the subject property fundamentally differs from that of the owner, even an absentee owner. Nevertheless, the importance of redemption rights in protecting the monetary value of the entitlement and preserving its in-kind nature makes mortgagees no less deserving of reasonable follow-up notification efforts than owners enjoy. At this point, one might conclude that mortgagees should be treated the same as absentee owners in follow-up notification protocols. Legislatures seeking a reasonably certain system

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226. It is possible that a quantitatively adequate payout for a liquidated lien could still be less than totally satisfactory because the cash given would not have the same risk and return characteristics as the original investment. *See* Kelly, *supra* note 201, at 954. This prepayment problem, however, is not truly a qualitative loss if acceptable investments for the funds exist. *Id.*

227. *See* NELSON & WHITMAN, *supra* note 43, at 667–69; David B. Simpson, *Real Property Foreclosures: The Fallacy of* Durrett, 19 REAL PROP. PROB. & TR. J. 73, 80 (1984).

228. One could argue that allowing mortgagees to rescue their valuable properties from sale proceedings that are systematically dysfunctional merely relieves pressure for important reforms and contributes to inefficiency in liability rule liquidation mechanisms.

should enact protocols for mortgagees identical to those for absentee owners. An inquiry into the way mortgagees relate to their property interests might inspire a supplemental approach to notifying them of a pending tax foreclosure—an approach that could potentially transform our conception of notice itself.

Currently, corporate mortgagees named in judicial tax foreclosure proceedings are generally served in the same manner as defendants in other cases. For instance, the summons and complaint are delivered to the nominated resident agent,[229] and the resident agent may be an officer of the corporation or its attorney. Large corporations commonly enlist the services of a third party, such as Corporation Trust, to receive service of process and forward it to their offices. At some point, someone must open the delivered notice and forward it to the appropriate department or person within the company. Such routing usually succeeds, but not always.[230] The paradigm of the property stakeholder passively waiting for and opening the mail that comes to him or her becomes more complex and potentially dysfunctional in the context of a large corporation increasingly dependent on electronic information.

The three-fold approach to direct notification by identifying, locating, and making delivery to affected property interest holders is constructed around in-hand delivery of an appropriately worded letter of warning as the paradigm for actual notice. The development of a notification by mail system to make it "reasonably certain to inform" also presumes that the postal service is the most efficient means of alerting property interest holders of their last chance to redeem. But, by encouraging rulemakers to strive for optimal balance of fairness and efficiency in notification standards, courts may set the stage for a revolution in the way in which foreclosure notification is conceived.

1. The Possibilities for Notification via the Internet

The financing of land purchases, especially in the residential context, has been transformed over the last several decades by the emergence of

229. Scott v. Seek Lane Venture, Inc., 605 A.2d 942 (Md. Ct. Spec. App. 1992). Notice to the resident agent has also been required in nonjudicial tax foreclosures. Mont. Earth Res. Ltd. P'ship v. N. Blaine Estates, Inc., 967 P.2d 376 (Mont. 1998); Reeder Assoc. II v. Chicago Belle, Ltd., 778 N.E.2d 828 (Ind. Ct. App. 2002).

230. For an example of how internal misdirection of tax lien foreclosure notification can lead to state supreme court litigation, see Ashness v. Tomasetti, 643 A.2d 802 (R.I. 1994), *abrogated by* Kildeer Realty v. Brewster Realty Corp., 826 A.2d 961 (R.I. 2003).

the secondary mortgage market.[231] For more than a decade, the majority of money for conventional home mortgages has come from the issuance of mortgage-backed securities.[232] For the large financial institutions that acquire loans to package in the capital markets, computers networked to the information superhighway manage all critical information related to these assets.

Internet connectivity is just as universal for commercial mortgagees and institutions that acquire mortgages on the secondary market as postal delivery. Several different modes of digital transmission present themselves as candidates for notification of tax foreclosure pendency, such as electronic mail (e-mail), web publication, and linked databases. Each mode offers a different lens on the transition to paperless communication of information. The first two methods model the notification modes of postal delivery and newspaper publication. Only the last, however, offers a truly transformative improvement over paper-based notice methods.

E-mail, as the Internet Age analogue to postal delivery, may seem the obvious choice; it is fast and inexpensive for both the notifier and the recipient. Like "snail mail," the sender can confirm both delivery and receipt.[233] The transmission of notice by e-mail also fits with the current paradigm of the desirous notifier actively seeking out and contacting a passive, unaware notice recipient.[234] The ways in which people use e-mail, however, differ significantly from how they interact with regular mail. The sheer volume of e-mails a typical working person receives reduces the expectation that a person will read all or most e-mails received.[235] Moreover, e-mail replicates and aggravates some of the problems involved in postal delivery of notice in the corporate setting. Like physical mailboxes, virtual mailboxes are generally assigned to individuals. While title records may identify the entity name of a foreclosure respondent, a supplemental search may be required to identify the agent for receiving service of process. There may come a

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231. *See* Michael H. Schill, *The Impact of the Capital Markets on Real Estate Law and Practice*, 32 J. MARSHALL L. REV. 269 (1999).

232. *Id.*

233. Notably, the documentation features of e-mail do not decrease the chances of actual delivery. However, as noted in *Jones*, the delivery restrictions placed on certified mail can frequently make it less likely than regular mail to reach its intended recipient. Jones v. Flowers, 547 U.S. 220, 234–35 (2006).

234. For a discussion of e-mail as an alternative form of service for in personam proceedings, see Jeremy A. Colby, *You've Got Mail: The Modern Trend Towards Universal Electronic Service of Process*, 51 BUFF. L. REV. 337 (2003).

235. Only about one-third of e-mails received in the workplace are even opened. Laura A. Dabbish et al., *Understanding Email Use: Predicting Action on a Message*, 2005 PROC. OF THE SIGCHI CONFERENCE ON HUMAN FACTORS IN COMPUTING SYS. 691.

time when listing for resident agents include electronic as well as postal delivery information, but even then e-mail would bring only a small improvement, if any, over snail mail for overcoming the problem of failed notification.

In some ways, the Internet already serves as a means of notification for tax foreclosure respondents. Many newspapers that carry legal notices announcing property litigation also run these same advertisements on their websites.[236] Potential respondents interested in making sure that their interests are not referenced in legal notices no longer need to thumb through the printed pages; instead, if they have access to the website, they need not even look at all the current notices. Many of these newspaper websites have internal search engines that allow users to search for key terms; they need only to be told what to look for.[237] Nevertheless, web publication of legal notices, even if fully searchable, presumes a great deal of effort from the respondents in seeking information from the Internet about the viability of their claims to a property. Even if a vigilant land interest holder could search all the relevant newspapers using one search engine, these inquiries would have to be renewed again and again to find important notices in time to act on them. Ultimately, notice by publication is not likely to be revived in any form as a viable means of notification for any tax foreclosure respondent.

Both e-mail and textual web pages as media for communicating news about the initiation of tax foreclosure fail to take full advantage of the Internet's capacity for efficient, automated sharing of massive amounts of information. While foreclosure notification systems can function quite well by depending on some activity by those who initiate the litigation, any reliance on actions by the still unaware notice recipient creates problems.[238] An Internet-based notification system that continues to treat the computer as a plugged-in mailbox or newspaper that must be checked by humans raises the same issues of constant vigilance by property interest holders. The widespread availability of postal delivery and mailing address information has made notification by mail difficult to beat from the perspective of the notice recipient.[239] But computers

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236. Maryland Daily Record, Public Notices, *available at* http://www.mddailyrecord.com/pn.cfm (last visited January 1, 2009); NYLawyer.com, Public Notices, *available at* http://www.nylawyer.com/display.php/file=/publicnotices/index (last visited November 22, 2008).

237. *Id.*

238. As shown above, *Jones* reduced the anticipated cooperation of tax lien foreclosure respondents to checking their own mailboxes and reading what they find. *See* discussion *supra* Part II.B.1.

239. As shown above, it is the development of universal postal delivery throughout the United States that has marginalized the caretaker principle once so central to the jurisprudence of notice and

networked locally and through the Internet offer a new way of managing information that fundamentally alters the paradigm for balancing the expectations the law has of plaintiffs and respondents in facilitating notification.

2. An Interactive Electronic Title Recordation System

Electronic databases have transformed all aspects of business decision-making. Databases are no longer just silent repositories of figures. They not only provide the source material for reports, but also can be programmed to decide when reports are issued and to whom. The Internet allows data stored in one computer to access and interact with information thousands of miles away. If applied to the context of tax foreclosure notification, these features would allow mortgage interest holders to receive, in real time, information regarding foreclosure actions on properties concerning them. The mortgagee could plan for its own way of distributing that information so as to prepare an appropriate response.[240]

Digital standardization in the secondary mortgage market is already providing the data infrastructure needed for electronic registration of mortgage interests. Ten years ago, Fannie Mae and other major players in the secondary mortgage market founded the Mortgage Electronic Registry System (MERS) to make it cheaper for real estate loans to be bundled and resold.[241] Acting as the public face for the mortgagee, MERS serves as the nominee for a lender and its loan servicer.[242] Naming MERS in recording documents eliminates the need for re-recording the loan every time it is transferred.[243] From a data management perspective, the heart of the MERS system is its Mortgage Identification Number (MIN).[244] This 18-digit number allows mortgages

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opportunity to be heard. *See* discussion *supra* Part II.B.

240. This pre-programmed reaction to the new information might consist of an internal e-mail to the appropriate person or persons within the company to make a business decision about redemption. The contents of that e-mail could include not only the essential notice information about the foreclosure, but also essential data about the loan and the underlying collateral. These generated reports would allow mortgagees to make quicker, better-informed decisions about redeeming the property and protecting the collateral.

241. Poonkulali Thangavelu, *Commercial Gets a Turn*, 11 MORTGAGE TECH. 36 (2004), *available at* http://www.mortgage-technology.com/plus/archive/?id=135281.

242. *Id.*

243. *Id.*

244. Carson A. Mullen, *Faster Settlements Can Be Yours — With MERS® System*, 82 TITLE NEWS 4 (2003), *available at* http://www.alta.org/publications/titlenews/03/04_04.cfm (last visited January 1, 2009).

to be digitally tracked as they are sold and resold.[245] As paperless mortgages become the industry standard, identifying both mortgage interests and their holders through digital identifiers will become increasingly important and commonplace.[246]

With a proper system for unique identifiers for both interest holders and the interests themselves, electronic notification may move beyond the uncertainty surrounding mortgagee notice by mail both for the notifier and the corporate foreclosure respondent. *Mennonite*'s test for an alternative to service by mail measures the actual likelihood of a particular means to succeed in bringing notice to the relevant class of respondents. If proponents of an Internet-based notification system can produce empirical evidence that it is as effective as mail, then "e-notification" may someday serve as the sole means of informing mortgagees of pending tax sales. Such a computer-based approach to sharing tax foreclosure information could succeed, however, only if the notice recipients' computers are directed at the relevant data sets. This programming would be done by the foreclosure respondents themselves. If courts recognize how the Internet has transformed information technology, then the expectation that a corporate mortgagee would link its database to its electronically recorded interests may be no different than the belief that it will check its incoming mail in a timely fashion. Final determinations may hinge on the details of the conditions and requirements imposed upon a group of notice recipients and on the precise definition of the group expected to receive information in this manner.

At relatively little expense, large holders of mortgage interests could obtain direct access to the electronic repository of records by which the priorities of their claims are determined. Even if the cost of creating these data paths does not actually outweigh the losses from internally misdirected mailed notices, the savings from electronic recordation itself would be the driving force behind the investment. All tax sales and tax foreclosures would occasion the digital notices of pendency. When either a tax sale was scheduled or a foreclosure initiated on a property, any mortgagee with an interest in the property and a confirmed

245. *Id.*

246. For nearly a decade, the real estate industry has been working toward the creation of the e-mortgage, a totally paperless real property loan, as an ideal for maximizing the use of computer technology to reduce transaction costs. *Longing for the Golden Apple*, 12 MORTGAGE TECH. 44 (2005), *available at* http://www.mortgage-technology.com/plus/archive/?id=135448 (last visited January 1, 2009). The growth of the secondary mortgage market has fostered standardization in an area of law and business that has been intensely parochial. The Mortgage Industry Standards Maintenance Organization, since 1999, has been working to define the precise data parameters that would allow mortgages throughout the nation to be expressed in a common digital language. *Id.* at 46.

functioning link[247] to the electronic local land records would be deemed to have received notice.[248] What the connected mortgagees do with the data once they receive it would be up to them. By immediately integrating the foreclosure notice information with their existing databases, these lenders will be better able to make quick and efficient business decisions.

Nothing in *Mennonite* requires perfect passivity from foreclosure respondents.[249] The proposed digital notification system would no doubt impose costs, but would also bring benefits to the recipients. If properly managed, the data stream provided by the new system would increase the likelihood of actual notice and improve the flow of this critical information within the complex corporate systems administering loan portfolios. If the confirmation mechanism were reliable, the actual notice rate of efficiency could be nearly perfect. The resulting system of notification would not only be less costly for the foreclosing party but more efficient for all involved.

The Supreme Court has consistently stated that it should not be expected to design optimal notification methods.[250] That project rightly falls to state legislatures and judicial rulemaking bodies. By granting these system designers not only the responsibility for but appropriate latitude in constructing constitutionally compliant notification protocols, courts will not only stabilize direct notification methods as they contend with myriad implementation issues, but also encourage the creation of radically new and more effective ways of securing due process efficiently.

IV. CONCLUSION

Without institutional encouragement for initiatives such as the one herein described, foreclosure notice may be unable to move into the digital age. The *Jones* majority has framed adequacy of notice in terms of two questions: First, did the foreclosing petitioner know it had failed

247. Once a state has fully implemented electronic recordation, it should condition a mortgagee's ongoing access to that system on its consent to maintain a data link to its digitally recorded interests, including those that the state has converted to digital records from prior paper filings. Technology would allow the condition to be enforced by periodically sending the mortgagee's computer system "dummy" data that would require a confirming response.

248. Inversely, any mortgagee not confirmed as receiving data from the system would not be deemed to have been notified. The consequence for lack of connection would be temporary denial of access to further electronic recording rather than a futile attempt to claim waiver of due process rights.

249. *See supra* notes 87–98 and accompanying text.

250. Jones v. Flowers, 547 U.S. 220, 240 (2006); Greene v. Lindsey, 456 U.S. 444, 455, n.9 (1982). *See supra* note 145.

to give notice? Second, if so, was there something else that could have been done to achieve actual notice? In the context of mailed delivery to an owner-occupied property being subjected to a foreclosure, such questions might make sense. But, if courts show enough deference to legislative, executive, and judicial entities that craft notification rules, they can encourage the creation of tax foreclosure protocols that give steady guidance to foreclosing petitioners contending with a rapidly evolving world of information technology. If courts considered notification standards merely as minimum requirements that must be supplemented by subjecting all notification decisions directly to constitutional scrutiny, then rulemaking bodies will have little incentive to seek out best practices.

Given the experience with *Pennoyer* and the evolution of the mail system, it is small wonder that rules are associated with obsolescence. Those who put forth rules struggle to minimize normative inaccuracy by confining their scopes to appropriately homogenous circumstances. Even when the development of salient categories facilitates that effort, change can soon make that work outdated. But, by scaling back the use of standards to allow for the creation of constitutional safe harbors, courts can foster innovative approaches that produce net gains for foreclosure petitioners and respondents alike. Homeowners can be assured that notice will in fact reach them. At the same time, foreclosure petitioners will not be forced to attempt personal service on absentee owners and mortgagees with no assurance that their efforts will result in clear title. By setting a goal of comprehensive assurance that notification will be made by the best means available, courts can pave the way for those institutions best suited to the task to design and implement the forward-looking approaches to notification that the law of foreclosure due process so keenly needs in the Internet Age.

In his book *The Mystery of Capital*, Hernando De Soto illustrates the critical role that functional titling structures play in the flourishing of markets and societies.[251] He points out that policy makers in the developed world have taken for granted the efficiency and security provided by a reliable land records system.[252] As inner-cities throughout the United States deal with growing abandonment problems, we must take care that our ignorance of our own past does not become neglect of our future.

Tax lien foreclosure plays a vital role, along with other title clearing

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251. HERNANDO DE SOTO, THE MYSTERY OF CAPITAL: WHY CAPITALISM TRIUMPHS IN THE WEST AND FAILS EVERYWHERE ELSE 148–49 (2000).

252. *Id.*

mechanisms, in resolving the anticommons deadlock that often follows investment failure in economically struggling areas. If the impracticability of tax foreclosure fueled by an unrestrained commitment to actual notice continues to raise the transaction costs of tax foreclosure, then municipalities may be deprived of one of their most effective liquidation tools for renewing communities. This article has set out an understanding of tax foreclosure notification that allows for innovation and adaptation while maintaining stability in everyday use. Standards that express fundamental principles of fairness play an indispensable role in keeping procedural design in step with the times. But, if tax foreclosure notification procedures are going to have the clarity and stability necessary to produce marketable titles, then these standards cannot be applied directly to the many different diligence questions that foreclosure notification efforts continually generate. By creating a system of tailored rules that meet particularly high standards of adequacy, legislatures can satisfy the needs of both notice recipients and notice providers. Such a thoroughly balanced system can see an effective land title system through many years of change.