

1988

The Constitutionality of Request Notice Provisions in In Rem Tax Foreclosures

Ellen F. Friedman

Follow this and additional works at: <https://ir.lawnet.fordham.edu/flr>



Part of the [Law Commons](#)

Recommended Citation

Ellen F. Friedman, *The Constitutionality of Request Notice Provisions in In Rem Tax Foreclosures*, 56 Fordham L. Rev. 1209 (1988).

Available at: <https://ir.lawnet.fordham.edu/flr/vol56/iss6/8>

This Article is brought to you for free and open access by FLASH: The Fordham Law Archive of Scholarship and History. It has been accepted for inclusion in Fordham Law Review by an authorized editor of FLASH: The Fordham Law Archive of Scholarship and History. For more information, please contact tmelnick@law.fordham.edu.

THE CONSTITUTIONALITY OF REQUEST NOTICE PROVISIONS IN IN REM TAX FORECLOSURES

INTRODUCTION

The taxation of real property provides local governments with an essential source of revenue.¹ Consequently, real property tax delinquency is an urgent problem facing municipalities today.² To collect past due property taxes and discourage delinquency, states and municipalities rely on tax sale or in rem tax foreclosure proceedings.³

Because these proceedings result in the loss of constitutionally protected property rights,⁴ they must satisfy the due process requirements⁵ of notice and an opportunity to be heard.⁶ State and municipal statutes provide for various methods of alerting owners, mortgagees, and other interested parties of impending tax sales and foreclosures. These methods include constructive notice⁷ by either publication⁸ or posting⁹ and

1. See *Rosewell v. Chicago Title & Trust Co.*, 99 Ill. 2d 407, 416, 459 N.E.2d 966, 970, *appeal dismissed*, 467 U.S. 1237 (1984). All fifty states and the District of Columbia raise revenue by taxing real property. See Casenote, *Constitutional Law—Due Process—Notice By Publication Is Constitutionally Inadequate in a Tax Sale Proceeding*, 24 Wayne L. Rev. 1463, 1464 & n.11 (1978). Although state governments also rely on the taxation of real property, it serves primarily as a revenue-raising device for local governments. See C. Harriss, *Property Taxation in Government Finance* 9, 11 (1974); J. Heilbrun, *Urban Economics and Public Policy* 448, 468 (2d ed. 1981); *Property Tax Reform 1* (G. Peterson ed. 1973); Godfrey, *Enforcement of Delinquent Property Taxes in New York*, 24 Alb. L. Rev. 271, 280-81 (1960); Note, *In Search of Due Process: Notice in New York Administrative Tax Sales*, 61 St. John's L. Rev. 113, 113-14 (1986). For instance, in 1984, the collection of property taxes provided over \$92.5 billion in revenue to local governments, but less than \$4 billion of state government revenue. See Bureau of the Census, U.S. Dep't of Commerce, 1987 Statistical Abstract of the United States 253 (Chart No. 432) (107th ed. 1986) [hereinafter 1986 Bureau of the Census Statistics].

2. See *Rosewell v. Chicago Title & Trust Co.*, 99 Ill. 2d 407, 409, 459 N.E.2d 966, 967, *appeal dismissed*, 467 U.S. 1237 (1984); S. Olson & M. Lachman, *Tax Delinquency in the Inner City 1* (1976); P. Salins, *The Ecology of Housing Destruction* 112 (1980); Daley & Meislin, *New York City, the Landlord: A Decade of Housing Decay*, N.Y. Times, Feb. 8, 1988, at A1, col. 1.

3. For a discussion of tax sale and foreclosure procedures, see *infra* notes 27-31 and accompanying text.

4. See *infra* notes 32-33 and accompanying text.

5. See *infra* notes 34-35 and accompanying text.

6. See *Schroeder v. City of New York*, 371 U.S. 208, 212 (1962); *Mullane v. Central Hanover Bank & Trust Co.*, 339 U.S. 306, 313 (1950); *McCann v. Scaduto*, 71 N.Y.2d 164, 172, 519 N.E.2d 309, 311, 524 N.Y.S.2d 398, 401 (1987); 2 R. Rotunda, J. Nowak & J. Young, *Treatise on Constitutional Law* § 17.8, at 261 (1986) [hereinafter Rotunda].

7. Notice by publication or posting is considered constructive notice. See *Mennonite Bd. of Missions v. Adams*, 462 U.S. 791, 798-99 (1983); *Mullane v. Central Hanover Bank & Trust Co.*, 339 U.S. 306, 315 (1950).

8. A typical publication statute requires the state to cause notice of the tax sale, including the description of the property to be sold, the name of the owner, and the amount of taxes due, to be published in a newspaper. See, e.g., N.Y. Real Prop. Tax Law § 1002 (McKinney 1972); see also *infra* note 36 and accompanying text (discussing statutes that provide for publication).

9. Posting generally refers to displaying a notice of the tax sale, including the description of the property, the owner's name, and the amount of delinquent taxes, in the

actual notice, generally by mail.¹⁰ The Supreme Court has called into doubt the constitutional sufficiency of publication and posting.¹¹ As a compromise, several states have enacted "request notice" provisions,¹² which condition the state's obligation to send notice by mail to interested parties on the parties' having requested such notice beforehand.¹³ In *Mennonite Board of Missions v. Adams*,¹⁴ the Supreme Court expressly left open the question of the constitutionality of these provisions.¹⁵

Since the *Mennonite* decision, several courts have been confronted with cases involving request notice provisions. Some have taken the position that these provisions violate the due process clause of the fourteenth amendment because they relieve the state of its obligation to provide interested parties with actual notice.¹⁶ Others hold that these provisions strike a reasonable balance between the state's need to collect delinquent taxes in an economical manner and the interested parties' constitutional right to receive notice prior to a proceeding that will affect their property interests.¹⁷

This Note argues that request notice provisions are constitutional. Part I discusses the importance of real estate taxation to the financial

local courthouse. See, e.g., Ariz. Rev. Stat. Ann. § 42-388A (1980) (notice to be posted on the outside of the county treasurer's office); see also *infra* note 36 and accompanying text (discussing statutes that provide for notice by posting).

10. See *infra* note 37 and accompanying text.

11. The determination of whether or not a particular method of notice meets the requirement of due process is made according to reasonableness under the totality of the circumstances. See *Mullane v. Central Hanover Bank & Trust Co.*, 339 U.S. 306, 314 (1950); *infra* notes 67-73 and accompanying text. Using the *Mullane* test, the Supreme Court has found notice by publication insufficient in a variety of contexts. See *Tulsa Professional Collection Servs., Inc. v. Pope*, 108 S. Ct. 1340 (1988) (probate proceedings); *Mennonite Bd. of Missions v. Adams*, 462 U.S. 791, 798 (1983) (tax sale); *Schroeder v. City of New York*, 371 U.S. 208, 211 (1962) (condemnation proceedings); *Walker v. City of Hutchinson*, 352 U.S. 112, 116 (1956) (same); *Mullane*, 339 U.S. at 315-16 (final settlement of trust fund).

12. See *infra* note 44 (collecting statutes).

13. See Note, *Requirements of Notice in In Rem Proceedings*, 70 Harv. L. Rev. 1257, 1268 (1957) [hereinafter Note, *Requirements of Notice*] (A request notice provision makes notice by mail "contingent upon prior registration of [the interested party's] name and address with the tax authorities."); Note, *Constitutional Law—Tax Sales: Notice to Interested Parties*, 62 N.C.L. Rev. 1091, 1098 (1984) [hereinafter Note, *Constitutional Law*]. The notice provided by these statutes has been called "conditional." See Comment, *Mennonite Board of Missions v. Adams: Insufficient Notice Under the New York In Rem Statutes*, 33 Buffalo L. Rev. 389, 407-08 (1984); Note, *supra* note 1, at 124 & n.50.

14. 462 U.S. 791 (1983).

15. See *id.* at 793 n.2; *infra* note 104 and accompanying text.

16. See, e.g., *Wylie v. Patton*, 111 Idaho 61, 65-66, 720 P.2d 649, 653-54 (Idaho Ct. App. 1986); *Town of Phillipsburg v. Block 22 Lots 14, 15, 16*, 218 N.J. Super. 558, 564, 528 A.2d 98, 100 (1987); *In re Foreclosure of Tax Liens by the County of Erie*, 103 A.D.2d 636, 639-40, 481 N.Y.S.2d 547, 550 (4th Dep't 1984).

17. See, e.g., *Homemakers Fin. Serv., Inc. v. Jones*, No. 83-1856, slip op. at 4 (S.D. Ind. Sept. 4, 1984); *In re Tax Foreclosure No. 35*, 127 A.D.2d 220, 227, 514 N.Y.S.2d 390, 394 (2d Dep't), *appeal dismissed*, 70 N.Y.2d 694, 512 N.E.2d 556, 518 N.Y.S.2d 1030 (1987); *In re Foreclosure of Tax Liens by the County of Erie*, 103 A.D.2d at 641, 481 N.Y.S.2d at 551 (Boomer, J., concurring).

welfare of state and municipal governments and the use of the tax sale and in rem tax foreclosure to collect delinquent property taxes. Part II traces the development of the constitutional requirements for notice of tax sales and other in rem proceedings. Part III examines the conflict in the lower courts regarding the constitutionality of request notice provisions, and concludes that request notice provisions strike a reasonable balance between the practical and fiscal needs of municipalities and the due process rights of property owners, mortgagees and other interested parties.

I. TAXATION OF REAL PROPERTY AND IN REM TAX FORECLOSURES

The taxation of real property is an important source of revenue for states and municipalities.¹⁸ Each year, state and local governments raise billions of dollars through the taxation of real property.¹⁹ Unfortunately, property tax delinquency is rampant,²⁰ particularly in major urban centers.²¹ Statistics indicate that tax delinquent properties nationwide number in the hundreds of thousands²² and that cities lose billions of dollars in uncollected property taxes each year.²³ Scholars and local government studies posit a connection between high rates of property tax delinquency and other manifestations of urban blight, such as housing abandonment and the growing problem of homelessness.²⁴ Because of

18. See *supra* note 1 and accompanying text.

19. See 1986 Bureau of the Census Statistics, *supra* note 1, at 251 (Chart No. 429) (state and local governments collected \$96.5 billion in property taxes in 1984); The Nelson A. Rockefeller Institute of Gov't, State Univ. of New York, 1985-86 New York State Statistical Yearbook 386 (Table M-44) (12th ed. 1986) [hereinafter New York State Statistical Yearbook] (New York state collected over \$37 billion in real property taxes and assessments in 1984).

20. See S. Olson & M. Lachman, *supra* note 2, at 1; Comment, *supra* note 13, at 404 & n.82.

21. See *Rosewell v. Chicago Title & Trust Co.*, 99 Ill. 2d 407, 409, 459 N.E.2d 966, 967, *appeal dismissed*, 467 U.S. 1237 (1984); S. Olson & M. Lachman, *supra* note 2, at 1; Comment, *supra* note 13, at 404 & n.82.

22. See *Rosewell*, 99 Ill. 2d at 409, 459 N.E.2d at 967 (121,000 parcels of tax-delinquent real estate in one year period in Chicago, Illinois); Appellant's Brief at 38, *Alliance Property Management and Dev., Inc. v. Andrews Ave. Equities, Inc.*, 70 N.Y.2d 831, 517 N.E.2d 1327, 523 N.Y.S.2d 441, *aff'g*, 133 A.D.2d 30, 518 N.Y.S.2d 804 (1st Dep't 1987) ("From 1982 to 1986 alone, 35,000 parcels in the City of New York were the subject of *in rem* tax foreclosure actions.") (available in the files of the Fordham Law Review); S. Olson & M. Lachman, *supra* note 2, at 1 (over 11,000 tax delinquent parcels in Cleveland in 1974).

23. See S. Olson & M. Lachman, *supra* note 2, at 1; Comment, *supra* note 13, at 404 & n.82.

24. Tax delinquency often precedes residential abandonment. See J. Heilbrun, *supra* note 1, at 355. It is symptomatic of the cycle of neglect in which urban landlords "milk" borderline properties by collecting rent but not paying taxes or providing essential services and ultimately abandoning the properties when they are of no further economic value. See *id.* Such properties also are more likely to be targets of vandalism and arson. See Langsdorf, *Urban Decay, Property Tax Delinquency: A Solution in St. Louis*, 5 Urb. Law. 729, 736 (1973). As one author wrote, "[p]roperty tax delinquency is not only the

the importance of real estate taxes to the fiscal viability and overall health of municipalities,²⁵ procedures for collecting tax arrears must be efficient and economical.²⁶

In order to collect delinquent real estate taxes, states and municipalities promulgate statutes providing for tax sales or in rem tax foreclosures.²⁷ Although the names given these procedures and the methods

surest indicator of the degree to which the ecology of housing destruction has taken hold; for the properties that manifest it, it is also unquestionably the preliminary stage to their imminent disappearance from the housing stock." P. Salins, *supra* note 2, at 111. Inasmuch as the cycle of tax delinquency, abandonment and housing destruction reduces available housing in the inner city, it can be tied to the growing problem of homelessness. See Daley & Meislin, *supra* note 2, at A1, col. 1. Cities must be able to minimize housing destruction by moving swiftly to take properties from tax delinquent, negligent landlords, thereby salvaging precious housing stock. See *id.*; see also M. Stegman, *Housing and Vacancy Report: New York City, 1987*, at 207 (1988) (suggesting that New York City's in rem laws, by streamlining the tax foreclosure process, allow the city to "assume effective control over marginal residential real estate before it is abandoned").

The problem of abandonment is a national one. See M. Stegman, *The Dynamics of Rental Housing in New York City 207* (1982) ("The General Accounting Office reported in a 1978 study that 113 of the 149 responding cities had an abandonment problem."). See generally Sternlieb & Burchell, *Residential Property Tax Delinquency: A Forerunner of Residential Abandonment*, 1 Real Est. L.J. 256, 263 (1973) (analyzing the relationship of tax delinquency to residential abandonment).

25. Property tax delinquency makes it more difficult for municipalities to provide important services, such as police and fire protection, public education and street repairs. See W. Va. Code § 11A-3-1 (1987); S. Olson & M. Lachman, *supra* note 2, at 1; Godfrey, *supra* note 1, at 278. Property tax delinquency also increases the burden on those responsible property owners who regularly pay their taxes. See W. Va. Code § 11A-3-1 (1987); Godfrey, *supra* note 1, at 278.

26. See *In re Tax Foreclosure No. 35*, 127 A.D.2d 220, 226, 514 N.Y.S.2d 390, 393 (2d Dep't), *appeal dismissed*, 70 N.Y.2d 694, 512 N.E.2d 556, 518 N.Y.S.2d 1030 (1987); *In re Foreclosure of Tax Liens by the County of Erie*, 103 A.D.2d 636, 641, 481 N.Y.S.2d 547, 551 (4th Dep't 1984) (Boomer, J., concurring); W. Va. Code § 11A-3-1 (1987); Note, *supra* note 1, at 113-14 (1986).

27. See, e.g., Ala. Code §§ 40-10-1 to -10-166 (1975 & Supp. 1987); Alaska Stat. § 29.45.320 (1986); Ariz. Rev. Stat. Ann. § 42-312 (1980), § 42-381 (Supp. 1987); Ark. Stat. Ann. § 26-37-101 (Supp. 1987); Cal. Rev. & Tax Code §§ 3361, 3391 (West 1987); Colo. Rev. Stat. §§ 39-11-101 to -11-151 (1973 & Supp. 1987); Conn. Gen. Stat. Ann. § 12-157 (West Supp. 1988); Del. Code Ann. tit. 9, § 8701 (1975); Fla. Stat. Ann. § 197.180 (West 1971); Ga. Code Ann. § 48-4-1 (Supp. 1987); Haw. Rev. Stat. § 246-56 (1985); Idaho Code § 63-1126A (Supp. 1987); Ill. Ann. Stat. ch. 120, ¶¶ 719-733 (Smith-Hurd 1970 & Supp. 1987); Ind. Code Ann. §§ 6-1.1-24-1 to -25-19 (Burns 1984 & Supp. 1986); Iowa Code Ann. § 446.7 (West Supp. 1988); Kan. Stat. Ann. § 79-2301 (1984); Ky. Rev. Stat. § 134.430 (1982); La. Rev. Stat. Ann. § 47:2180 (Supp. 1988); Me. Rev. Stat. Ann. tit. 36, § 1071 (West 1978); Md. Tax-Prop. Code Ann. § 14-808 (1986); Mass. Ann. Laws. ch. 60, §§ 37, 53 (1971); Mich. Comp. Laws Ann. § 211.60 (West 1986); Minn. Stat. Ann. §§ 280.01, 280.02 (West 1969 & Supp. 1988); Miss. Code Ann. § 27-41-55 (Supp. 1987); Mo. Ann. Stat. § 140.150 (Vernon Supp. 1988); Mont. Code Ann. § 15-17-211 (1987); Neb. Rev. Stat. § 77-1801 (1986); Nev. Rev. Stat. Ann. § 361.595 (Michie 1986); N.H. Rev. Stat. Ann. § 80.20 (1971); N.J. Stat. Ann. §§ 54:5-1 to :5-129 (West 1986); N.M. Stat. Ann. § 7-38-65 (1986); N.Y. Real Prop. Tax Law §§ 1000-1094, §§ 1100-1174 (McKinney 1972 & Supp. 1988); N.C. Gen. Stat. §§ 105-369, 105-374, 105-375 (1985 & Supp. 1987); N.D. Cent. Code §§ 57-24-01 to -24-31 (1983 & Supp. 1987); Ohio Rev. Code Ann. §§ 5721.18, 5721.19 (Anderson Supp. 1987); Okla. Stat. Ann. tit. 68, § 24311 (West Supp. 1988); Or. Rev. Stat. § 312.010 (1985); Pa. Stat. Ann. tit. 72, § 5860.601 (Purdon 1968); R.I. Gen. Laws §§ 44-9-1 to -9-46 (1980 & Supp. 1987); S.C.

they employ vary from statute to statute,²⁸ all accomplish the same purpose: the property on which the taxes have not been paid is sold in order to satisfy the tax arrears.²⁹ While the primary goal of these procedures is to collect the back taxes,³⁰ the threat of foreclosure also encourages the

Code Ann. §§ 12-51-40 to -51-170 (Law. Co-op 1976 & Supp. 1987); S.D. Codified Laws Ann. §§ 10-23-1 to -23-29 (1982 & Supp. 1987); Tenn. Code Ann. §§ 67-6001 to -6096 (1983); Tex. Tax Code Ann. §§ 34.01 to .08 (Vernon 1982 & Supp. 1988); Utah Code Ann. § 59-2-1363 (1987); Vt. Stat. Ann. tit. 32, § 5252 (1981); Va. Code Ann. § 58.1-3965 (Supp. 1988); Wash. Rev. Code Ann. §§ 84.64.010 to .64.460 (West 1962 & Supp. 1988); W. Va. Code §§ 11A-3-1 to -44 (1987); Wis. Stat. Ann. §§ 75.01 to .70 (West 1957 & Supp. 1987); Wyo. Stat. Ann. §§ 39-3-101 to -109 (1987).

Municipalities may utilize the state tax sale or tax foreclosure statutes or adopt their own provisions. See Blyth, *Tax Titles*, in *Real Estate Titles* 367, 369 (1984); Note, *supra* note 1, at 113, 119; Note, *The Constitutionality of Notice by Publication in Tax Sale Proceedings*, 84 Yale L.J. 1505, 1505 n.1 (1975); see, e.g., N.Y.C. Admin. Code §§ 11-401 to -428 (1986).

28. Compare, e.g., N.Y. Real Prop. Tax Law § 1102(2) (McKinney 1972) (tax sale); R.I. Gen. Laws § 44-9-7 (1980) (same); Tex. Tax Code Ann. § 34.01 (Vernon 1982) (same); Vt. Stat. Ann. tit. 32, § 5252 (1981) (same); Wis. Stat. Ann. § 74.39 (West 1957) (same) with, e.g., N.J. Stat. Ann. §§ 54:5-104.29 to -104.75 (West 1986) (tax foreclosure); N.Y. Real Prop. Tax Law §§ 1120-1138 (McKinney 1972) (same).

In rem tax foreclosures offer municipalities a quicker, less expensive method of taking over chronically tax delinquent property than traditional tax sales. See Godfrey, *supra* note 1, at 271 n.1; Lebar, *Sidewalks in the Woods: Evolution of In Rem Tax Foreclosure*, N.J. Law., Nov. 1981, at 14, 15. Both tax sales and in rem tax foreclosures are considered actions in rem. See Comment, *supra* note 13, at 393; Note, *Due Process of Law and Notice By Publication*, 32 Ind. L.J. 469, 483 (1957).

In addition to their provisions for tax sales, both New York State and New York City have provisions for in rem tax foreclosures. See N.Y. Real Prop. Tax Law §§ 1120-1138 (McKinney 1972); N.Y.C. Admin. Code, §§ 11-401 to -428 (1986). As part of its policy for dealing with its housing crisis, the City of New York retains the properties it seizes through in rem foreclosures and acts as a landlord for an indefinite period of time. See M. Stegman, *Housing and Vacancy Report*: New York City, 1987, at 207 (1988); Daley & Meislin, *supra* note 2, at A1, col. 1.

In both traditional tax sales and in rem tax foreclosures, the owner may be given an opportunity to redeem the property before the issuance of a deed to the tax sale purchaser or state. See, e.g., N.Y. Real Prop. Tax Law § 1010 (McKinney 1972); R.I. Gen. Laws §§ 44-9-19, 44-9-21 (1980); S.C. Code Ann. § 12-51-90 (Law. Co-op. Supp. 1987); Tex. Tax Code Ann. § 34.21 (Vernon 1982); Utah Code Ann. § 59-2-1345 (1987); Vt. Stat. Ann. tit. 32, § 5260 (1981); Wash. Rev. Code Ann. § 84.64.360 (West 1962).

29. See, e.g., N.J. Stat. Ann. § 54:5-19 (West 1986); N.Y. Real Prop. Tax Law § 1000 (McKinney 1972); Va. Code Ann. § 58.1-3965 (1984).

30. See *Almon v. Champion Int'l Corp.*, 349 So. 2d 15, 17 (Ala. 1977); *Township of Berkeley v. Berkeley Shore Water Co.*, 213 N.J. Super. 524, 532, 517 A.2d 1199, 1203 (App. Div. 1986); *Tracy v. County of Chester*, 507 Pa. 288, 297, 489 A.2d 1334, 1339 (1985); W. Va. Code § 11A-3-1 (1987). The West Virginia statute authorizing the sale of land for tax delinquency, for example, emphasizes three purposes:

First, to provide for the speedy and expeditious enforcement of the tax claims of the State and its subdivisions; second, to provide for the transfer of delinquent lands to those more responsible to, or better able to bear, the duties of citizenship than were the former owners; and third, in furtherance of the policy favoring the security of land titles, to establish an efficient procedure that will quickly and finally dispose of all claims of the delinquent former owner and secure to the new owner the full benefit of his purchase.

W. Va. Code § 11A-3-1 (1987).

prompt payment of property taxes and discourages tax delinquency.³¹

Tax sales and in rem tax foreclosures necessarily result in the loss of property rights³² and thus implicate the due process clause of the fourteenth amendment.³³ Since due process requires that parties be notified and given an opportunity to be heard before the state deprives them of their property,³⁴ statutes that authorize the sale of land for failure to pay taxes provide for the notification of interested parties before the property is sold.³⁵ They provide for one of two basic methods of giving notice:

31. See *Almon*, 349 So. 2d at 17; M. Stegman, Housing and Vacancy Report: New York City, 1987, at 207 (1988); Godfrey, *supra* note 1, at 274; Comment, *supra* note 13, at 402 n.70.

32. See *Cooper v. Makela*, 629 F. Supp. 658, 661 (W.D.N.Y. 1986). In *Mennonite Board of Missions v. Adams*, 462 U.S. 791 (1983), the Supreme Court found that a mortgagee's "property interest . . . is significantly affected by a tax sale," *id.* at 798, because "the tax sale may result in the complete nullification of the mortgagee's interest, since the purchaser acquires title free of all liens and other encumbrances," *id.*

33. See *Mennonite*, 462 U.S. at 795; 4 C. Wright & A. Miller, Federal Practice & Procedure § 1070, at 423 (1987); Note, *Constitutional Law*, *supra* note 13, at 1091; see also U.S. Const. amend. XIV, § 1 ("nor shall any State deprive any person of life, liberty, or property, without due process of law").

34. See *Schroeder v. City of New York*, 371 U.S. 208, 212 (1962); *Mullane v. Central Hanover Bank & Trust Co.*, 339 U.S. 306, 313 (1950); *McCann v. Scaduto*, 71 N.Y.2d 164, 172, 519 N.E.2d 309, 311, 524 N.Y.S.2d 398, 401 (1987); *Rotunda*, *supra* note 6, § 17.8, at 261-63.

35. See, e.g., Ala. Code § 40-10-4 (1985); Alaska Stat. § 29.45.330 (1986); Ariz. Rev. Stat. Ann. §§ 42-387, 42-388 (1980 & Supp. 1987); Ark. Stat. Ann. §§ 26-37-107, 26-37-201, 26-37-301 (Supp. 1987); Cal. Rev. & Tax Code §§ 3363, 3365, 3702 (1987); Colo. Rev. Stat. §§ 39-11-101, 39-11-102 (1973 & Supp. 1987); Conn. Gen. Stat. Ann. § 12-157 (West Supp. 1988); Del. Code Ann. tit. 9, §§ 8724, 8771-8772 (1975 & Supp. 1986); Fla. Stat. Ann. § 197.343 (West Supp. 1988); Ga. Code Ann. §§ 48-4-45, 48-4-46 (1982); Haw. Rev. Stat. § 246-56 (1985); Idaho Code § 63-1126B (Supp. 1987); Ill. Ann. Stat. ch. 120, § 722a (Smith-Hurd Supp. 1987); Ind. Code Ann. §§ 6-1.1-24-4, 6-1.1-24-4.2 (Burns 1984 & Supp. 1986); Iowa Code Ann. § 446.9 (West Supp. 1988); Kan. Stat. Ann. § 79-2303 (1984); Ky. Rev. Stat. §§ 134.440, 134.500 (1982 & Supp. 1986); La. Rev. Stat. Ann. § 47:2180 (Supp. 1988); Me. Rev. Stat. Ann. tit. 36, §§ 1071, 1073 (1978); Md. Tax-Prop. Code Ann. §§ 14-812, 14-813 (1986 & Supp. 1987); Mass. Ann. Laws ch. 60, §§ 40, 42, 53 (Law. Co-op. 1978); Mich. Comp. Laws Ann. §§ 211.61a, 211.63, 211.64 (West 1986); Minn. Stat. Ann. §§ 297.07, 297.08 (West Supp. 1988); Miss. Code Ann. §§ 27-43-3, 27-43-5 (1972 & Supp. 1987); Mo. Ann. Stat. § 140-170 (Vernon Supp. 1988); Mont. Code Ann. § 15-17-122 (1987); Neb. Rev. Stat. § 77-1804 (1986); Nev. Rev. Stat. Ann. § 361.565(6)(a)(1) (Michie 1986); N.H. Rev. Stat. Ann. § 80:21 (Supp. 1987); N.J. Stat. Ann. §§ 54:5-26, 54:5-27, 54:5-104.42 (West 1986); N.M. Stat. Ann. §§ 7-38-66, 7-38-67 (1986); N.Y. Real Prop. Tax Law § 1002(4) (McKinney Supp. 1987); N.C. Gen. Stat. §§ 105-369, 105-375(c) (1985 & Supp. 1987); N.D. Cent. Code §§ 57-24-01, 57-24-02, 57-24-07 (1983); Ohio Rev. Code Ann. §§ 5721.18(B)(1) (Anderson Supp. 1987); Okla. Stat. Ann. tit. 68, § 24312 (West Supp. 1988); Or. Rev. Stat. § 312.040 (1985); Pa. Stat. Ann. tit. 72, § 5860.602 (Purdon Supp. 1988); R.I. Gen. Laws §§ 44-9-9, 44-9-10, 44-9-11 (1980 & Supp. 1987); S.C. Code Ann. §§ 12-49-220, 12-49-300, 12-51-140 (Law. Co-op. 1977 & Supp. 1987); S.D. Codified Laws Ann. §§ 10-23-2, 10-23-2.1, 10-23-2.2 (1982 & Supp. 1987); Tenn. Code Ann. § 67-6012 (1983); Tex. Tax Code Ann. § 33.04 (Vernon Supp. 1988); Utah Code Ann. §§ 59-2-1342, 59-2-1363 (1987); Vt. Stat. Ann. tit. 32, § 5252 (1981); Va. Code Ann. § 58.1-3965 (Supp. 1988); Wash. Rev. Code Ann. §§ 84.64.030, 84.64.050, 84.64.080 (West 1962 & Supp. 1988); W. Va. Code § 11A-3-2

constructive notice by publication or posting³⁶ or actual notice by personal service or mail.³⁷ Notice by personal service or mail is expensive and time-consuming,³⁸ but more likely to reach parties with an interest in

(1987); Wis. Stat. Ann. § 75.521 (West 1957 & Supp. 1987); Wyo. Stat. Ann. § 39-3-104 (1985).

These statutes may provide for different types of notice to owners as opposed to mortgagees or persons with other interests in real property. Compare, e.g., N.Y. Real Prop. Tax Law § 1124 (McKinney 1972 & Supp. 1988) (mailed notice to owner) with, e.g., N.Y. Real Prop. Tax Law § 1126 (McKinney 1972) (mailed notice to mortgagee who previously filed statement with tax authority).

36. See, e.g., Ariz. Rev. Stat. Ann. § 42-388 (1980); Ind. Code Ann. § 6-1.1-24-3 (Burns 1984); N.J. Stat. Ann. § 54:5-104.42 (West 1986); N.Y. Real Prop. Tax Law § 1124; S.D. Codified Laws Ann. § 10-23-2 (Supp. 1987); Utah Code Ann. § 59-2-1363 (1987); Va. Code Ann. § 58.1-3965 (1984); Wyo. Stat. § 39-3-104 (1985); N.Y.C. Admin. Code § 11-406 (1986).

37. See, e.g., Ind. Code Ann. § 6-1.1-24-4 (Burns 1984) (notice by certified mail to owner at last known address); Ind. Code Ann. § 6-1.1-24-4.2 (Burns Supp. 1986) (notice by certified mail to mortgagees and others with "substantial property interest of public record"); N.Y. Real Prop. Tax Law § 1002 (4) (McKinney Supp. 1987) (notice by first class mail to owner); R.I. Gen. Laws § 44-9-10 (Supp. 1987) (notice by registered or certified mail to taxpayer who is resident of state); R.I. Gen. Laws § 44-9-11 (1980) (notice by registered or certified mail to mortgagees); S.D. Codified Laws Ann. § 10-23-2.1 (Supp. 1987) (notice by first class mail to owner); Utah Code Ann. § 59-2-1363 (1987) (notice by certified mail to record owner and record lienholders); Vt. Stat. Ann. tit. 32, § 5252(3)-(4) (1981) (notice by registered mail to delinquent taxpayer, mortgagee, or lienholder). Some states permit personal service by handing a copy of the notice to the addressee. See, e.g., Ala. Code § 40-10-4 (1985); Ga. Code Ann. § 48-4-46(b) (1982); La. Rev. Stat. Ann. § 47:2180(B) (Supp. 1988); Me. Rev. Stat. Ann. tit. 36, § 1073 (1978); Miss. Code Ann. § 27-43-3 (Supp. 1987).

38. See, e.g., *Homemakers Fin. Serv., Inc. v. Jones*, No. 83-1856, slip op. at 4 (S.D. Ind. Sept. 4, 1984); *Rosewell v. Chicago Title & Trust Co.*, 99 Ill. 2d 407, 412, 459 N.E.2d 966, 968-69, *appeal dismissed*, 467 U.S. 1237 (1984); *In re Tax Foreclosure No. 35*, 127 A.D.2d 220, 226, 514 N.Y.S.2d 390, 393 (2d Dep't), *appeal dismissed*, 70 N.Y.2d 694, 512 N.E.2d 556, 518 N.Y.S.2d 1030 (1987); *In re Foreclosure of Tax Liens by the County of Erie*, 103 A.D.2d 636, 641, 481 N.Y.S.2d 547, 551 (4th Dep't 1984) (Boomer, J., concurring). The expense of mailed notice goes beyond the cost of mailing it; it includes "hav[ing] someone check the records and ascertain with respect to each delinquent taxpayer whether there is a mortgagee, perhaps whether the mortgage has been paid off, and whether there is a dependable address." See *Mennonite Bd. of Missions v. Adams*, 462 U.S. 791, 806 (1983) (O'Connor, J., dissenting). This generally will require the government to perform a title search. See Comment, *supra* note 13, at 403 n.81.

A number of courts have held that absent an express statutory requirement, a state should not be required to undertake the expense of a title search. See *Homemakers Fin. Serv.*, slip op. at 4-5; *Rosewell*, 99 Ill. 2d at 412-14, 459 N.E.2d at 968-69; *Tax Foreclosure No. 35*, 127 A.D.2d at 226, 514 N.Y.S.2d at 393; *Foreclosure of Tax Liens by the County of Erie*, 103 A.D.2d at 641-42, 481 N.Y.S.2d at 551 (Boomer, J., concurring). Some statutes, however, do require that the state perform a title search. See, e.g., Ariz. Rev. Stat. Ann. § 42-462(A) (Supp. 1987); Haw. Rev. Stat. § 246-56 (1985); Miss. Code Ann. § 27-43-5 (1972).

In the case of someone with an unrecorded interest in a tax delinquent property, such as a tenant with a leasehold, a municipality would have to send an investigator to the premises in order to inform her of a pending tax foreclosure. See *W.S. 23 Realty Corp. v. City of New York*, 106 Misc. 2d 271, 273, 431 N.Y.S.2d 272, 274 (Sup. Ct. 1980). Some have argued that mailed notice, in the long run, proves the more economical method because many delinquent taxpayers will pay their arrears if they receive actual notice. See *Mennonite Bd. of Missions v. Adams*, 462 U.S. 791, 800 n.5 (1983); Comment, *supra*

real property.³⁹ Notice by publication or posting, while less expensive,⁴⁰ is less likely to alert interested parties.⁴¹ For this reason the Supreme Court has cast serious doubt on its constitutional sufficiency.⁴²

In order to conform to the fourteenth amendment's mandate without adopting the costly requirement of mailed notice to all parties, many state and local governments have enacted statutes making mailed notice of a tax sale or an in rem tax foreclosure contingent upon an interested party's having filed a statement requesting it.⁴³ Under these statutes, mortgagees, other parties, and in the case of New York City, owners, must apprise the local tax authority of their name, address, and interest in the property in order to receive actual notice.⁴⁴ Those parties that

note 13, at 402 n.70. *But see* *Mennonite*, 462 U.S. at 806 n.4 (O'Connor, J., dissenting) (arguing that the majority incorrectly took this factor into account).

39. *See Mennonite*, 462 U.S. at 798; *Mullane v. Central Hanover Bank & Trust Co.*, 339 U.S. 306, 318 (1950).

40. *See* Comment, *supra* note 13, at 394.

41. The Supreme Court in *Mullane v. Central Hanover Bank & Trust Co.*, 339 U.S. 306 (1950) aptly stated the problems with publication as the sole form of notice:

Chance alone brings to the attention of even a local resident an advertisement in small type inserted in the back pages of a newspaper, and if he makes his home outside the area of the newspaper's normal circulation the odds that the information will never reach him are large indeed.

Id. at 315. In *Mennonite Board of Missions v. Adams*, 462 U.S. 791 (1983), the Supreme Court applied the *Mullane* rationale to mortgagees in tax sales and stated that notice by publication was not "means 'such as one desirous of actually informing the [mortgagee] might reasonably adopt to accomplish it.'" *Id.* at 799 (quoting *Mullane*, 339 U.S. at 315 (alteration in original)).

42. *See supra* note 11; *infra* notes 80-91 and accompanying text.

43. Because most state statutes provide for unconditional mailed notice to property owners, *see, e.g.*, Ind. Code Ann. § 6-1.1-24-4 (Burns 1984); N.Y. Real Prop. Tax Law § 1002 (4) (McKinney Supp. 1987); R.I. Gen. Laws § 44-9-10 (Supp. 1987); S.D. Codified Laws Ann. § 10-23-2.1 (Supp. 1987), most request notice provisions apply to mortgagees, lienors or anyone else holding other than a fee simple interest in the property, *see, e.g.*, Alaska Stat. § 29.45.350 (1986); Idaho Code § 63-1126B(4) (Supp. 1987); Mass. Ann. Laws ch. 60, § 38 (Law. Coop. 1978); N.J. Stat. Ann. § 54:5-104.48 (West 1986); N.Y. Real Prop. Tax Law § 1126 (McKinney 1972); N.Y.C. Admin. Code § 11-417 (1986). *But see* N.J. Stat. Ann. § 54:5-104.48 (West 1986) (owners and mortgagees must file notice stating name and address to be served with notice of foreclosure); N.Y.C. Admin. Code § 11-416 (1986) (owners must file owners' registration cards to receive notice). *See generally* Note, *Constitutional Law*, *supra* note 13, at 1098-1100 (discussing constitutionality of request notice provisions); Comment, *supra* note 13, at 407-11 (same).

44. *See* Alaska Stat. § 29.45.350 (1986) (holder of mortgage can request that copy of foreclosure list be sent by certified mail); Fla. Stat. Ann. § 197.344 (West Supp. 1988) (mortgagee can request notice of tax delinquency); Haw. Rev. Stat. § 246-57 (1985) (notice by mail to mortgagees who have registered mortgages with registrar of land court); Idaho Code § 63-1126B(4)(c) (Supp. 1987) (notice by certified mail to a party in interest if she has previously filed a written request for a copy of notice); Iowa Code Ann. § 446.9 (West Supp. 1988) (notice to mortgagees and others with an interest in real property who have requested notice); La. Rev. Stat. Ann. § 47:2180.1 (West Supp. 1988) (notice by mail to mortgagees who notify tax collectors of their interest); Mass. Ann. Laws ch. 60, § 38 (Law. Co-op. 1978) (If mortgagee gives notice to tax collector, "demand for payment shall be made on the mortgagee instead of the mortgagor."); Nev. Rev. Stat. Ann. § 361.565(6)(a)(3) (Michie 1986) (notice by mail to holders of recorded security interests who have requested notice); N.J. Stat. Ann. § 54:5-104.48 (West 1986) (notice of foreclo-

request notice will receive mailed notice of either the fact of delinquency,⁴⁵ the impending tax sale or foreclosure itself,⁴⁶ or the expiration of a period during which the property may be redeemed,⁴⁷ depending on the specific statute. To evaluate the constitutionality of these notice provisions, it is necessary to examine the Supreme Court's evolving due process jurisprudence.

II. DUE PROCESS AND NOTICE REQUIREMENTS IN IN REM PROCEEDINGS

Traditionally, the due process notice requirement was less stringent for in rem proceedings, including tax sales, than for actions in personam.⁴⁸

sure to be served on owners, mortgagees and other parties who have filed notice with tax district); N.Y. Real Prop. Tax Law § 1126 (McKinney 1972) (notice to mortgagees and other parties in interest who file notice with enforcing officer); N.C. Gen. Stat. § 105-375(c) (Supp. 1987) (notice to lienholders who have filed requests for notice); S.C. Code Ann. § 12-49-240 (Law. Co-op. 1977) (For mortgagee to be entitled to notice of levy, she should file a list with all mortgages as to which notice is desired annually.); S.D. Codified Laws Ann. § 10-23-2.2 (Supp. 1987) (if person in possession, person in whose name property is taxed, mortgagee or her assignee or any other person who has an interest in real estate annually has requested notice of sale of real property and paid a \$3.00 mailing fee, county treasurer will send notice by certified mail); see also N.Y.C. Admin. Code § 11-416 (1986) (Commissioner of Finance to mail notice of foreclosure to owners who have filed owner's registration cards); N.Y.C. Admin. Code § 11-417 (1986) (Commissioner of Finance to mail notice to mortgagees and others who have filed "in rem card" requesting it); cf. Va. Code Ann. § 58.1-3926 (1984) (mortgagees and other interested parties can request statement indicating whether or not property taxes have been paid).

45. See, e.g., Va. Code Ann. § 58.1-3926 (1984).

46. See, e.g., N.Y. Real Prop. Tax Law § 1126 (McKinney 1972); S.D. Codified Laws Ann. § 10-23-2.1 (Supp. 1987); N.Y.C. Admin. Code § 11-417 (1986).

47. See, e.g., S.D. Codified Laws Ann. § 10-26-5.1 (Supp. 1987).

48. See *Mullane v. Central Hanover Bank & Trust Co.*, 339 U.S. 306, 312 (1950); *Pennoyer v. Neff*, 95 U.S. 714, 726-27 (1877). Actions in personam are proceedings in which "the object . . . is a person." *Fraser, Actions in Rem*, 34 Cornell L.Q. 29, 29 (1948); see Note, *Property-Meeting the Due Process Requirements of Notice to Mortgagees in Tax Sales*, 7 U. Ark. Little Rock L.J. 437, 438 (1984) [hereinafter Note, *Property*]. An action in rem involves the determination of rights with respect to property within the court's jurisdiction. See *Fraser, supra*, at 29; 4 C. Wright & A. Miller, *supra* note 33, § 1070, at 422. Unlike in personam jurisdiction, "in rem jurisdiction operates directly on the property and the court's judgment is effective against all persons who have an interest in the property." *Id.* For a more comprehensive discussion of actions in rem, see *Fraser, supra*, at 29-33.

In the nineteenth century, the Supreme Court, in *Pennoyer v. Neff*, 95 U.S. 714 (1877), articulated the traditional distinction in notice requirements between actions in rem and actions in personam. *Id.* at 726-27. The Court wrote that notice by publication

may answer in all actions which are substantially proceedings in rem. But where the entire object of the action is to determine the personal rights and obligations of the defendants, that is, where the suit is merely in personam, constructive service in this form upon a non-resident is ineffectual for any purpose.

Id. at 727. The Supreme Court later eliminated this distinction in *Mullane v. Central Hanover Bank & Trust Co.*, 339 U.S. 306, 312-13 (1950). For further discussion of the historical distinction between actions in rem and actions in personam with respect to notice requirements, see 4 C. Wright & A. Miller, *supra* note 33, § 1070, at 416-425; Note, *supra* note 28, at 471-72; Note, *Due Process in Tax Sales in New York: The Insuffi-*

Thus, while publication long was held to provide adequate notice in actions in rem,⁴⁹ actions in personam required personal service.⁵⁰ Courts justified this distinction on several grounds. First, in actions in personam, notice literally was necessary to acquire jurisdiction over the parties.⁵¹ Because the state was deemed already to have jurisdiction over all property within its borders,⁵² notice in actions in rem merely served to inform parties that the res was subject to a proceeding.⁵³ Historically, courts also embraced the "caretaker theory"—the notion that nonresident property owners had local caretakers to guard their land and apprise them of any published notices affecting their property.⁵⁴ Further, the law generally charged landowners with the responsibility of keeping informed about the condition of their land.⁵⁵ Courts deemed each of these grounds to mitigate the need to give personal notice to the landowner of impending in rem actions.

Notice requirements for tax sale proceedings were even less stringent than for other actions in rem.⁵⁶ The state's strong interest in collecting taxes justified this relaxed standard.⁵⁷ In addition, property owners were presumed to know the laws affecting their property,⁵⁸ including the requirement that they pay property taxes, with the attendant risk that failure to do so would result in a tax sale or foreclosure.⁵⁹

The Supreme Court's due process jurisprudence has evolved considerably since the days of *Pennoyer v. Neff*.⁶⁰ In the area of personal jurisdic-

ciency of Notice By Publication, 25 Syracuse L. Rev. 769, 770-75 (1974) [hereinafter Note, *Tax Sales in New York*]; Casenote, *supra* note 1, at 1469; Note, *supra* note 27, at 1506-08.

49. See *Ballard v. Hunter*, 204 U.S. 241, 262 (1907); *Leigh v. Green*, 193 U.S. 79, 92 (1904); *Pennoyer v. Neff*, 95 U.S. 714, 726-27 (1877).

50. See *Pennoyer*, 95 U.S. at 726-27; *McCann v. Scaduto*, 71 N.Y.2d 164, 173, 519 N.E.2d 309, 312, 524 N.Y.S.2d 398, 401 (1987); Note, *supra* note 28, at 470.

51. See Note, *supra*, note 28, at 470.

52. See *Pennoyer*, 95 U.S. at 722; *Fraser*, *supra* note 48, at 29; Note, *Requirements of Notice*, *supra* note 13, at 1260.

53. See Note, *Requirements of Notice*, *supra* note 13, at 1260; Note, *supra* note 28, at 471.

54. See *Ballard v. Hunter*, 204 U.S. 241, 262 (1907); *Huling v. Kaw Valley Ry. and Improvement Co.*, 130 U.S. 559, 564 (1889); *McCann v. Scaduto*, 71 N.Y.2d 164, 174-75, 519 N.E.2d 309, 312-13, 524 N.Y.S.2d 398, 401-02 (1987).

55. See *Ballard*, 204 U.S. at 262; *McCann*, 71 N.Y.2d at 173, 519 N.E.2d at 312, 524 N.Y.S.2d at 401.

56. See *Leigh v. Green*, 193 U.S. 79, 89 (1904).

57. See *Longyear v. Toolan*, 209 U.S. 414, 417 (1908); *Ballard*, 204 U.S. at 256-57; *Leigh*, 193 U.S. at 89-90; *McCann*, 71 N.Y.2d at 174, 519 N.E.2d at 312, 524 N.Y.S.2d at 401; Note, *Tax Sales in New York*, *supra* note 48, at 771; Note, *supra* note 27, at 1507 n.13.

58. See *Texaco, Inc. v. Short*, 454 U.S. 516, 532 & n.25 (1982); *Ballard*, 204 U.S. at 254-55; *Sheehan v. County of Suffolk*, 67 N.Y.2d 52, 59, 490 N.E.2d 523, 525, 499 N.Y.S.2d 656, 658, *cert. denied*, 478 U.S. 1006 (1986); *cf.* Note, *Tax Sales in New York*, *supra* note 48, at 771 (property owners have duty to familiarize themselves with laws affecting their property); Note, *supra* note 27, at 1507 (same).

59. See *Longyear v. Toolan*, 209 U.S. 414, 418 (1908); Note, *supra* note 27, at 1511-12.

60. 95 U.S. 714 (1877).

tion, the Court's analysis has developed from the rigid and artificial concepts of territoriality and state sovereignty enunciated in *Pennoyer*⁶¹ to the "highly realistic" balancing test exemplified by the Court's opinion in *Burger King Corp. v. Rudzewicz*.⁶² Similarly, the Court's examination of notice requirements for in rem actions has expanded from acceptance of the legal fiction of "constructive notice" by publication⁶³ to the requirement that notice be reasonably geared to reach interested parties.⁶⁴ Thus, the Court has stated 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."⁶⁵ The Supreme Court first enunciated its modern approach to notice for in rem proceedings in *Mullane v. Central Hanover Bank & Trust Co.*⁶⁶

A. *Mullane v. Central Hanover Bank & Trust Co.*

In *Mullane v. Central Hanover Bank & Trust Co.*,⁶⁷ the Supreme Court eliminated the traditional distinction between the notice required for actions in rem and actions in personam.⁶⁸ It held that notice in all actions must be reasonably calculated to reach those parties whose names and addresses are known,⁶⁹ and that constructive notice by publication is not sufficient for such parties.⁷⁰ While this test does not appear to be difficult to meet, it represents a much stricter notice requirement than previously had applied to actions in rem.⁷¹

61. See *id.* at 722 ("[E]very State possesses exclusive jurisdiction and sovereignty over persons and property within its territory. . . . [Consequently] the laws of one State have no operation outside of its territory. . . .").

62. 471 U.S. 462, 476-77 (1985) ("Once it has been decided that a defendant purposefully established minimum contacts within the forum State, these contacts may be considered in light of other factors to determine whether the assertion of personal jurisdiction would comport with 'fair play and substantial justice.'"). For a general discussion of the historical development of jurisdiction, see 4 C. Wright & A. Miller, *supra* note 33, § 1070.

63. See *Pennoyer v. Neff*, 95 U.S. 714, 726-27 (1877); *McCann v. Scaduto*, 71 N.Y.2d 164, 173-74, 519 N.E.2d 309, 312-13, 524 N.Y.S.2d 398, 401-02 (1987); see also *supra* note 36 and accompanying text (discussing constructive notice); *supra* notes 51-59 and accompanying text (discussing various justifications advanced for acceptance of constructive notice in actions in rem).

64. See *Mullane v. Central Hanover Bank & Trust Co.*, 339 U.S. 306, 314 (1950); Note, *Requirements of Notice*, *supra* note 13, at 1257-60; Note, *supra* note 27, at 1507-08.

65. *Mennonite Bd. of Missions v. Adams*, 462 U.S. 791, 800 (1983) (emphasis omitted).

66. 339 U.S. 306 (1950). See Casenote, *supra* note 1, at 1470; cf. *Shaffer v. Heitner*, 433 U.S. 186, 206, 212 (1977) (modern analysis of basis of jurisdiction analogous to *Mullane's* analysis of notice).

67. 339 U.S. 306 (1950).

68. See *id.* at 312-13; *Shaffer*, 433 U.S. at 206.

69. See *Mullane*, 339 U.S. at 314, 317-18.

70. See *id.* at 318.

71. See Casenote, *supra* note 1, at 1470; Note, *supra* note 28, at 472. *Mullane* involved the establishment of a common trust fund under the banking laws of New York State. See *Mullane*, 339 U.S. at 308. The relevant statute provided for notice to trust beneficiaries of a binding settlement of accounts by publication in a local newspaper. See

The *Mullane* Court set forth the principle that "[a]n elementary and fundamental requirement of due process in any proceeding which is to be accorded finality is notice reasonably calculated, under all the circumstances, to apprise interested parties of the pendency of the action and afford them an opportunity to present their objections."⁷² To determine whether the method of notice was "reasonably calculated, under all the circumstances," the Court applied a balancing test.⁷³ It began by examining the state's strong interest in settling common trust funds, and stated that a "construction of the Due Process Clause which would place impossible or impractical obstacles in the way could not be justified."⁷⁴ Against the state's interest, it then balanced the individual's interest in receiving notice and an opportunity to be heard prior to an action affecting her property.⁷⁵ The Court employed a functional test, emphasizing that it had "not committed itself to any formula achieving a balance between these interests in a particular proceeding or determining when constructive notice may be utilized or what test it must meet."⁷⁶

Thus, while *Mullane* did impose a stricter notice requirement than previously had applied to in rem proceedings, it did not reject completely notice by publication⁷⁷ or lay down any rigid rule as to what method of notice was required in a particular situation.⁷⁸ Instead, the Court emphasized flexibility and reasonableness under the totality of particular circumstances.⁷⁹ More than thirty years later, in *Mennonite Board of Missions v. Adams*,⁸⁰ the Court applied the principles of *Mullane* to a mortgagee in a tax sale proceeding, holding that where a mortgagee's

id. at 309-10. The Court rejected publication as the sole means of notifying such known beneficiaries, stating that while publication was constitutionally sufficient for unknown beneficiaries, it was inadequate as to known beneficiaries, "not because in fact it fails to reach everyone, but because under the circumstances it is not reasonably calculated to reach those who could easily be informed by other means at hand." *Id.* at 319. Thus, *Mullane* has sometimes been read to stand for the proposition that "the means *most* likely to give actual notice of the proceeding is the minimum standard required by the fourteenth amendment." Note, *supra* note 28, at 473 (emphasis in original).

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

73. *See id.*

74. *Id.* at 313-14.

75. *See id.* at 314.

Put otherwise, the *Mullane* test compares the minimal expense of providing notice to known parties with the substantial cost of not receiving notice of a proceeding that affects one's property rights. *See id.* at 313-14.

76. *Id.*

77. *See id.* at 317; *Mennonite Bd. of Missions v. Adams*, 462 U.S. 791, 804 (1983) (O'Connor, J., dissenting); Note, *Tax Sales in New York*, *supra* note 48, at 773. In a recent case involving notice to creditors of an estate, the Supreme Court reiterated that for parties "who are not 'reasonably ascertainable,' publication notice can suffice." *Tulsa Professional Collection Servs., Inc. v. Pope*, 108 S. Ct. 1340, 1347 (1988).

78. *See Mullane*, 339 U.S. at 314-15. The Court stated that "notice must be of such nature as reasonably to convey the required information But if with due regard for the practicalities and peculiarities of the case these conditions are reasonably met, the constitutional requirements are satisfied." *Id.*

79. *See id.*; Note, *Tax Sales in New York*, *supra* note 48, at 773-74.

80. 462 U.S. 791 (1983).

identity and location are reasonably ascertainable, publication and posting does not provide constitutionally sufficient notice.⁸¹

B. Mennonite Board of Missions v. Adams

In *Mennonite Board of Missions v. Adams*,⁸² the Court addressed the constitutionality of an Indiana statute that provided for mailed notice of a pending tax sale to property owners, but only constructive notice by publication to others, including mortgagees.⁸³ After the property owner in the case failed to pay her real estate taxes, the county commenced tax sale proceedings and, pursuant to the statute, published and posted notice and mailed notice to the owner by certified mail.⁸⁴ The county, however, did not mail notice to the mortgagee of the property, and the mortgagee never received actual notice of the proceeding.⁸⁵ After the property was sold at a tax sale, the mortgagee argued that it had not received constitutionally sufficient notice of the proceedings.⁸⁶ The Supreme Court held that the Indiana statute violated the due process clause of the fourteenth amendment.⁸⁷

The *Mennonite* Court began its analysis by stating that *Mullane* controlled the case,⁸⁸ but instead of balancing the interests of both the state and the individual as it had in *Mullane*, it looked solely at the interest of the mortgagee.⁸⁹ The Court stated that "[s]ince a mortgagee clearly has a legally protected property interest, he is entitled to notice reasonably calculated to apprise him of a pending tax sale,"⁹⁰ and continued that "[w]hen the mortgagee is identified in a mortgage that is publicly recorded, constructive notice by publication must be supplemented by notice mailed to the mortgagee's last known available address, or by

81. See *id.* at 798, 800.

82. 462 U.S. 791 (1983).

83. See *id.* at 793.

84. See *id.* at 794.

85. See *id.*

86. See *id.* at 795.

87. See *id.* at 800.

88. See *id.* at 798. Although the *Mennonite* Court claimed to follow *Mullane*, see *id.* at 798-99, some controversy exists over whether it really did so. For the proposition that *Mennonite* follows from *Mullane*, see *id.*; McCann v. Scaduto, 71 N.Y.2d 164, 175-76, 519 N.E.2d 309, 313, 524 N.Y.S.2d 398, 402-03 (1987); *In re* Foreclosure of Tax Liens by the County of Erie, 103 A.D.2d 636, 639, 481 N.Y.S.2d 547, 550 (4th Dep't 1984); Note, *Due Process Notice Required For Real Estate Tax Sales*, 49 Mo. L. Rev. 385, 387-88 (1984). For the proposition that *Mennonite* departs from the *Mullane* standard, see *Mennonite*, 462 U.S. at 801-05 (O'Connor, J., dissenting); Comment, *Mennonite Board of Missions v. Adams: Expansion of the Due Process Notice Requirements*, 46 La. L. Rev. 311, 316 (1985). For the proposition that *Mennonite* extends, but does not necessarily reject, *Mullane*, see Bender v. City of Rochester, 765 F.2d 7, 10-11 (2d Cir. 1985) ("though the standard may have become slightly more rigorous, the basic flexibility of the *Mullane* standard has not been discarded.").

89. Compare *Mennonite Bd. of Missions v. Adams*, 462 U.S. 791, 798 (1983) with *Mullane v. Central Hanover Bank & Trust Co.*, 339 U.S. 306, 313-14 (1950).

90. *Mennonite*, 462 U.S. at 798.

personal service."⁹¹

Justice O'Connor, in a strong dissent, declared that the majority opinion represented a marked departure from Supreme Court precedent.⁹² She stated that had the Court "observed its prior decisions and engaged in the balancing required by *Mullane*, it would have reached the opposite result."⁹³ In contrast to the majority, Justice O'Connor performed a full-scale balancing test, emphasizing the state's "vital interest in the collection of its tax revenues in whatever reasonable manner that it chooses."⁹⁴ She went on to stress that the mortgagee reasonably might have taken steps to protect its interest in the property,⁹⁵ noting that "[w]hen a party is unreasonable in failing to protect its interest despite its ability to do so, due process does not require that the State save the party from its own lack of care."⁹⁶ She concluded that "[t]he balance required by *Mullane* clearly weighs in favor of finding that the Indiana statutes satisfied the requirements of due process."⁹⁷

The *Mennonite* decision left open a number of questions. First, inasmuch as *Mennonite* specifically addressed the issue of notice to mortgagees,⁹⁸ courts and commentators have differed as to the extent to which

91. *Id.*

92. Justice O'Connor wrote:

Today, the Court departs significantly from its prior decisions and holds that before the State conducts *any* proceeding that will affect the legally protected property interests of *any* party, the State must provide notice to that party by means certain to ensure actual notice as long as the party's identity and location are "reasonably ascertainable." Applying this novel and unjustified principle to the present case, the Court decides that the mortgagee involved deserved more than the notice by publication and posting that were provided.

Id. at 800-01 (citation omitted) (emphasis in original); see Note, *Constitutional Law*, *supra* note 13, at 1095; Note, *supra* note 1, at 122 n.40. For a discussion of Justice O'Connor's influence on the Supreme Court, including her dissent in *Mennonite*, see Sherry, *Civic Virtue and the Feminine Voice in Constitutional Adjudication*, 72 Va. L. Rev. 543, 604-05, 607 (1986).

93. *Mennonite*, 462 U.S. at 805-06 (O'Connor, J., dissenting).

94. *Id.* at 806.

95. See *id.* at 806-07. Justice O'Connor suggested that the mortgagee, in addition to checking the local newspaper for advertisements concerning the sale of the property could have insisted that the mortgagor "provide it with copies of paid tax assessments, or could have required that [the mortgagor] deposit the tax moneys in an escrow account, or could have itself checked the public records to determine whether the tax assessment had been paid." *Id.* at 808-09.

96. *Id.* at 809.

97. *Id.*

Given the relatively insignificant cost to the state of mailing notice, Justice O'Connor's full-scale balancing test should not lead to a different result than that reached by the majority. See *supra* note 75 and accompanying text.

However, Justice O'Connor, in asking what the mortgagee might reasonably have done to ensure that it received notice, see *Mennonite*, 462 U.S. at 808-09 (O'Connor, J., dissenting), adds another element to the balancing test. In doing so, she follows the *Mullane* Court's suggestion that the constitutionality of notice be determined "with due regard for the practicalities and peculiarities of the case." See *Mullane v. Central Hanover Bank & Trust Co.*, 339 U.S. 306, 314 (1950).

98. See *id.* at 792.

its result applies to parties with other interests in real property.⁹⁹ Thus, the sufficiency of published notice to property owners on the one hand, and those with lesser interests, such as easements and mechanics' liens, on the other, remains in doubt.¹⁰⁰ Second, courts have grappled with the *Mennonite* Court's message that, while the state must notify by mail those parties who are reasonably ascertainable,¹⁰¹ the state need not "undertake extraordinary efforts to discover the identity and whereabouts of a mortgagee."¹⁰² This has resulted in uncertainty concerning the precise lengths to which a state or municipality must go in order to locate and identify an interested party.¹⁰³ Finally, in a footnote, the Supreme Court

99. See *McCann v. Scaduto*, 71 N.Y.2d 164, 176, 519 N.E.2d 309, 314, 524 N.Y.S.2d 398, 403 (1987) (*Mennonite* implicitly applies to owners as well as mortgagees); Note, *supra* note 88, at 387 (questions raised by *Mennonite* include "whether notice to owners, where not already required by statute, is now necessary" and "what notice to other interested parties is required"); Note, *Constitutional Law*, *supra* note 13, at 1100-01 (discussing distinction between owners and mortgagees, stating that the Court "has not yet squarely faced the question whether notice by publication in tax sales meets the due process test for property owners" as opposed to mortgagees).

100. See Note, *supra* note 88, at 394-98 (questioning applicability of *Mennonite* to deed of trust beneficiaries and trustees, possessors of mineral interests and leasehold interests, remaindermen, owners of easements, judgment lienors); Note, *Property*, *supra* note 48, at 446 n.108 ("Other situations in which a person other than the owner may be entitled to notice include persons with an easement of record, persons with a leasehold interest in the property, probate proceedings, divorce proceedings, and custody/adoption proceedings."). Courts, however, have applied the *Mennonite* standard to other property interests. See *Wittmyer v. Cole*, 689 P.2d 720, 721-22 (Colo. Ct. App. 1984) (owner of an easement entitled to notice of tax sale); *Wylie v. Patton*, 111 Idaho 61, 65, 720 P.2d 649, 653 (Ct. App. 1986) (applying *Mennonite* to a deed of trust beneficiary). But see also Note, *supra* note 88, at 396 (owner of easement not affected by tax sale and hence does not require actual notice).

101. See *Mennonite*, 462 U.S. at 800.

102. *Id.* at 798 n.4.

103. Justice O'Connor expressed a concern that,

[u]nder the Court's decision today, it is not clear how far the State must go in providing for reasonable efforts to ascertain the name and address of an affected party. . . . This uncertainty becomes particularly ominous in the light of the fact that the duty to ascertain identity and location, and to notify by mail or other similar means, exists whenever any legally protected interest is implicated.

Id. at 805 (O'Connor, J., dissenting). For cases after *Mennonite* addressing the question how far the state must go to find and notify an interested party, see *Bender v. City of Rochester*, 765 F.2d 7, 11 (2d Cir. 1985) (task of examining Surrogate's Court records beyond that involved in *Mennonite*); *Rosewell v. Chicago Title & Trust Co.*, 99 Ill. 2d 407, 413, 459 N.E.2d 966, 969 (referring to the "chaotic situation" that the task of performing 121,000 title searches would produce), *appeal dismissed*, 467 U.S. 1237 (1984); *Township of Brick v. Block 48-7, Lots 34, 35, 36*, 202 N.J. Super. 246, 249, 494 A.2d 829, 832 (1985) (examination by local tax authorities of outdated tax rolls, and communication with property owners to determine whether addresses remain correct are tasks beyond the dictates of due process), *cert. denied*, 107 S. Ct. 2181 (1987).

In a recent opinion, the Supreme Court reaffirmed the requirement that those interested parties who are "known or reasonably ascertainable" receive actual notice. See *Tulsa Professional Collection Servs., Inc. v. Pope*, 108 S. Ct. 1340, 1348 (1988). The case involved a hospital, the creditor of an estate, which had not received actual notice of the commencement of probate proceedings. Under the relevant Oklahoma statute, the execu-

specifically left open the question whether request notice provisions satisfy the due process requirement of notice in tax sale proceedings.¹⁰⁴ The lower courts that have addressed this issue since *Mennonite* have reached conflicting results.¹⁰⁵

III. THE CONSTITUTIONALITY OF REQUEST NOTICE PROVISIONS

Since the Supreme Court's decision in *Mennonite*, a number of courts have examined request notice provisions analogous to the one referred to in the opinion's footnote. Some courts, claiming to follow the reasoning of the *Mennonite* majority, maintain that a state cannot transfer its constitutional obligation to property owners or mortgagees by requiring them to request notice.¹⁰⁶ These courts rely heavily on the *Mennonite* dictum that "a party's ability to take steps to safeguard its interests does not relieve the State of its constitutional obligation."¹⁰⁷ Others apply the *Mullane* balancing test as elaborated on by Justice O'Connor in her *Mennonite* dissent,¹⁰⁸ the outcome of which allows the state to place the burden on the property owner or mortgagee to request notice.¹⁰⁹ These

trix was required to publish notice, but did not have to mail notice to creditors. *See id.* at 1342. The Court held that where a creditor is "known or 'reasonably ascertainable,' . . . the Due Process Clause requires that [it] be given '[n]otice by mail or other means as certain to ensure actual notice.'" *Id.* at 1348 (quoting *Mennonite Bd. of Missions v. Adams*, 462 U.S. 791, 800 (1983)). However, it remanded the case to determine whether, under the circumstances, the creditor's identity was "known or reasonably ascertainable" by the executrix. *See id.* Significantly, it noted that, although the executrix was aware of her husband's lengthy stay at the hospital, "it is not clear that this awareness translates into a knowledge of appellant's claim." *Id.*

104. *See Mennonite*, 462 U.S. at 793 n.2. In 1980, after the events which were the subject of the *Mennonite* case, but before the decision issued, Indiana amended its code to include a request notice provision. *See Ind. Code Ann. § 6-1.1-24-4.2* (Burns 1984). The *Mennonite* Court stated that "[b]ecause the events in question in this case occurred before the 1980 amendment, the constitutionality of the amendment is not before us." 462 U.S. at 793 n.2. Indiana subsequently amended its code again, and it now provides for unconditional mailed notice to mortgagees as well as owners. *See Ind. Code Ann. § 6-1.1-24-4.2* (Burns Supp. 1986).

105. *Compare, e.g., In re Tax Foreclosure No. 35*, 127 A.D.2d 220, 226-27, 514 N.Y.S.2d 390, 393-94 (2d Dep't) (holding request notice provision constitutional), *appeal dismissed*, 70 N.Y.2d 694, 512 N.E.2d 556, 518 N.Y.S.2d 1030 (1987) *with, e.g., In re Foreclosure of Tax Liens by the County of Erie*, 103 A.D.2d 636, 640, 481 N.Y.S.2d 547, 550 (4th Dep't 1984) (holding request notice provision unconstitutional).

106. *See Wylie v. Patton*, 111 Idaho 61, 64-65, 720 P.2d 649, 652-53 (Ct. App. 1986); *Town of Phillipsburg v. Block 22 Lots 14, 15, 16*, 218 N.J. Super. 558, 564, 528 A.2d 98, 100 (1987); *Foreclosure of Tax Liens by the County of Erie*, 103 A.D.2d at 639-40, 481 N.Y.S.2d at 550; *Seattle-First Nat'l Bank v. Umatilla County*, 77 Or. App. 283, 289-90, 713 P.2d 33, 36 (1986) (en banc).

107. *Mennonite Bd. of Missions v. Adams*, 462 U.S. 791, 799 (1983). *See Town of Phillipsburg*, 218 N.J. Super. at 564, 528 A.2d at 100; *Foreclosure of Tax Liens by the County of Erie*, 103 A.D.2d at 639, 481 N.Y.S.2d at 550; *Seattle-First Nat'l Bank*, 77 Or. App. at 288-89, 713 P.2d at 35-36.

108. *See supra* note 73 and accompanying text (discussing *Mullane* balancing test); notes 92-97 and accompanying text (discussing Justice O'Connor's dissent).

109. *See, e.g., Homemakers Fin. Serv., Inc. v. Jones*, No. 83-1856, slip op. at 4 (S.D. Ind. Sept. 4, 1984); *In re Tax Foreclosure No. 35*, 127 A.D.2d 220, 227, 514 N.Y.S.2d

decisions properly focus on the strength of the state's interest in efficient and economical notice procedures,¹¹⁰ as well as the reasonableness of requiring the property owner or mortgagee to take a minimal step to protect her interest.¹¹¹ Under this test, and the guidance offered by *Mennonite*, request notice provisions are constitutional.

Request notice statutes are functionally dissimilar from the type of statute addressed in *Mennonite*.¹¹² The constitutionality of request notice provisions can best be analyzed by direct reference to the *Mullane* test, which formed the basis of the *Mennonite* opinion.¹¹³ Under *Mullane v. Central Hanover Bank & Trust Co.*,¹¹⁴ courts must "balance the individual interest sought to be protected by the Fourteenth Amendment"¹¹⁵ against the state's interest in efficiently collecting its taxes.¹¹⁶ *Mullane* also stresses that the determination whether notice in a given proceeding satisfies due process must be made "under all the circumstances."¹¹⁷

390, 394 (2d Dep't), *appeal dismissed*, 70 N.Y.2d 694, 512 N.E.2d 556, 518 N.Y.S.2d 1030 (1987); *In re Foreclosure of Tax Liens by the County of Erie*, 103 A.D.2d 636, 641, 481 N.Y.S.2d 547, 551 (4th Dep't 1984) (Boomer, J., concurring); *cf. Save Our Dunes v. Alabama Dep't of Env. Management*, 834 F.2d 984, 989-90 (11th Cir. 1987) (state can require interested parties to request notice of proceedings affecting property); *Mid-State Homes, Inc. v. Portis*, 652 F. Supp. 640, 645 (W.D. La. 1987) (finding it reasonable for state to require interested parties to request notice of seizure and sale of property).

110. *See Homemakers Fin. Serv., Inc. v. Jones*, No. 83-1856, slip op. at 4 (S.D. Ind. Sept. 4, 1984); *In re Tax Foreclosure No. 35*, 127 A.D.2d 220, 226, 514 N.Y.S.2d 390, 393 (2d Dep't), *appeal dismissed*, 70 N.Y.2d 694, 512 N.E.2d 556, 518 N.Y.S.2d 1030 (1987); *In re Foreclosure of Tax Liens by the County of Erie*, 103 A.D.2d 636, 641, 481 N.Y.S.2d 547, 551 (4th Dep't 1984) (Boomer, J., concurring).

111. *See Homemakers*, slip op. at 4-5; *Tax Foreclosure No. 35*, 127 A.D.2d at 226, 514 N.Y.S.2d at 393-94; *Foreclosure of Tax Liens by the County of Erie*, 103 A.D.2d at 642, 481 N.Y.S.2d at 551 (Boomer, J., concurring).

112. The statute at issue in *Mennonite* made no provision for notice to mortgagees other than by publication. *See id.* at 793. In contrast, request notice provisions provide actual notice to those mortgagees who take the minimal step of requesting notice. *See supra* note 111. In *Mennonite*, the Court emphasized that it was unreasonable to expect an interested party to "keep abreast of" published or posted notices, on the one hand, or constantly inquire into the tax delinquent status of a piece of property on the other. *See Mennonite*, 462 U.S. at 799. The requirement of filing a request for notice, however, is a simple act, which, once accomplished, guarantees mailed notice of a tax sale. *See Homemakers Fin. Serv., Inc. v. Jones*, No. 83-1856, slip op. at 5 (S.D. Ind. Sept. 4, 1984); *In re Tax Foreclosure No. 35*, 127 A.D.2d 220, 226-27, 514 N.Y.S.2d 390, 394 (2d Dep't), *appeal dismissed*, 70 N.Y.2d 694, 512 N.E.2d 556, 518 N.Y.S.2d 1030 (1987).

113. *See Mennonite*, 462 U.S. at 798. There is some controversy as to whether the *Mennonite* decision follows from *Mullane*. *See supra* note 88.

114. 339 U.S. 306 (1950).

115. *Id.* at 314.

116. *See Mennonite*, 462 U.S. at 806 (O'Connor, J., dissenting).

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

Under the balancing test and totality of the circumstances approach established by *Mullane*, request notice provisions satisfy the requirements of due process. As Justice O'Connor stated in her *Mennonite* dissent, "[i]f the members of a particular class generally possess the ability to safeguard their interests, then this fact must be taken into account when we consider the 'totality of circumstances,'" 462 U.S. at 803, and that "[w]hen a party is unreasonable in failing to protect its interest despite its ability to do so,

The state's need for efficient and economical collection of property taxes is manifest.¹¹⁸ Property tax delinquency represents a critical problem that may contribute to a variety of other symptoms of urban blight.¹¹⁹ Tax delinquency often precedes housing abandonment,¹²⁰ and to help prevent the housing decay and destruction that results from abandonment,¹²¹ cities need procedures that allow them to take possession of tax delinquent properties as quickly as possible.¹²² Moreover, the greater the threat of a quick foreclosure, the more likely it is that owners will not allow their properties to fall into tax arrears.¹²³ As a general fiscal matter, the state has an interest in having the most economical and least time-consuming tax collection methods possible.

The Supreme Court acknowledged early in this century that the state had considerable leeway in the area of collection of delinquent taxes,¹²⁴ resulting in diminished protection for landowners,¹²⁵ and that less notice would suffice in this area than in others.¹²⁶ Thus, courts traditionally have deferred to state and municipal tax authorities in the area of property tax collection procedures.¹²⁷ They have acknowledged that a state's interest in the efficient and inexpensive collection of delinquent taxes may be more compelling today than ever before.¹²⁸ As Justice O'Connor

due process does not require that the State save the party from its own lack of care," *id.* at 809; *cf. Weigner v. City of New York*, 852 F.2d 646, 651 n.5 (2d Cir. 1988) ("[I]n making the initial determination of what notice is reasonable, the likelihood that a party will learn of the proceedings without notice from the state and his ability to protect himself are relevant circumstances.").

118. *See supra* notes 24-26 and accompanying text.

119. *See supra* note 24.

120. *See J. Heilbrun, supra* note 1, at 355; P. Salins, *supra* note 2, at 111; *supra* note 24.

121. *See P. Salins, supra* note 2, at 111; *supra* note 24.

122. *See Daley & Meislin, supra* note 2, at A1, col. 1 (suggesting that New York City's problematic role as landlord of the buildings that it has taken in in rem tax foreclosures stems in part from the fact that by the time the city seized the buildings they were run down.); *see also supra* note 24 (discussing problems stemming from tax delinquency).

123. *See supra* note 31 and accompanying text.

124. *See Longyear v. Toolan*, 209 U.S. 414, 417 (1908); *Leigh v. Green*, 193 U.S. 79, 89 (1904); Note, *supra* note 27, at 1507 n.13.

125. *See Mennonite Bd. of Missions v. Adams*, 462 U.S. 791, 806-07 (1983) (O'Connor, J., dissenting); *Longyear v. Toolan*, 209 U.S. 414, 417 (1908); *Ballard v. Hunter*, 204 U.S. 241, 254 (1907); *Leigh v. Green*, 193 U.S. 79, 89 (1904); Note, *supra* note 27, at 1507.

126. *See Ballard*, 204 U.S. at 262.

127. *See Longyear v. Toolan*, 209 U.S. 414, 417 (1908); *Leigh v. Green*, 193 U.S. 79, 89 (1904); Note, *supra* note 27, at 1507 n.13. As Justice O'Connor noted in her dissent in *Mennonite*, "[t]he Court neglects the fact that the State is a better judge of how it wants to settle its tax debts than is this Court." *Mennonite*, 462 U.S. 799, 806 n.4 (O'Connor, J., dissenting).

128. *See Rosewell v. Chicago Title & Trust Co.*, 99 Ill. 2d 407, 416, 459 N.E.2d 966, 970, *appeal dismissed*, 467 U.S. 1237 (1984); *Alliance Property Management and Dev., Inc. v. Andrews Ave. Equities, Inc.*, 133 A.D.2d 30, 33, 518 N.Y.S.2d 804, 807 (1st Dep't) (Sandler, J., dissenting), *aff'd on other grounds*, 70 N.Y.2d 831, 517 N.E.2d 1327, 523 N.Y.S.2d 441 (1987); *In re Tax Foreclosure No. 35*, 127 A.D.2d 220, 226, 514 N.Y.S.2d 390, 393 (2d Dep't), *appeal dismissed*, 70 N.Y.2d 694, 512 N.E.2d 556, 518 N.Y.S.2d 1030 (1987).

stated in her dissent in *Mennonite*, the state has a "vital interest in the collection of its tax revenues in whatever reasonable manner that it chooses."¹²⁹ In view of this important state interest, requiring the state to identify, locate, and notify all parties with an interest in a tax delinquent property is unreasonable, especially when compared to the minimal inconvenience to such parties of requesting notice.¹³⁰

Requiring the state to locate and identify all interested parties is not only burdensome but also wasteful. Such a rule could force states to perform title searches¹³¹ or resort to even more costly measures.¹³² Moreover, requiring actual notice is unnecessary for most interested parties. The vast majority of mortgagees in this country are institutional lenders¹³³ who routinely pay the property taxes for their mortgagors¹³⁴ and therefore have firsthand knowledge whether the taxes are delinquent.¹³⁵ These and even most noncommercial mortgagees are likely to

129. *Mennonite Bd. of Missions v. Adams*, 462 U.S. 791, 806 (1983) (O'Connor, J., dissenting).

130. *Cf. United States v. Locke*, 471 U.S. 84, 104 (1985) (where an important state interest is served, government can condition retention of existing property rights on an interested party's taking a reasonable step to protect her interest).

131. *See, e.g., Homemakers Fin. Serv., Inc. v. Jones*, No. 83-1856, slip op. at 4 (S.D. Ind. Sept. 4, 1984); *Rosewell v. Chicago Title & Trust Co.*, 99 Ill. 2d 407, 413, 459 N.E.2d 966, 969, *appeal dismissed*, 467 U.S. 1237 (1984); *Alliance Property Management and Dev., Inc. v. Andrews Ave. Equities, Inc.*, 133 A.D.2d 30, 33, 518 N.Y.S.2d 804, 807 (1st Dep't) (Sandler, J., dissenting), *aff'd on other grounds*, 70 N.Y.2d 831, 517 N.E.2d 1327, 523 N.Y.S.2d 441 (1987); *In re Tax Foreclosure No. 35*, 127 A.D.2d 220, 226, 514 N.Y.S.2d 390, 393 (2d Dep't), *appeal dismissed*, 70 N.Y.2d 694, 512 N.E.2d 556, 518 N.Y.S.2d 1030 (1987); *In re Foreclosure of Tax Liens by the County of Erie*, 103 A.D.2d 636, 641, 481 N.Y.S.2d 547, 551 (4th Dep't 1984) (Boomer, J., concurring). *But see Seattle-First Nat'l Bank v. Umatilla County*, 77 Or. App. 283, 291, 713 P.2d 33, 37 (1986) (not necessary to perform a title search "to discover . . . who may have a recorded interest in a parcel of real property").

132. For instance, the addresses on recorded instruments are notoriously inaccurate, *see Mennonite Bd. of Missions v. Adams*, 462 U.S. 791, 806 (1983) (O'Connor, J., dissenting), and the state must go beyond the record to locate the party, *see id.* In the case of tenants and others whose interests are unrecorded, the state must investigate even further. *See W.S. 23 Realty Corp. v. City of New York*, 106 Misc. 2d 271, 273, 431 N.Y.S.2d 272, 274 (Sup. Ct. 1980) ("Plaintiff's lease is not a matter of public record, and the only way the city collector could find out about it would be a visit to the premises."). *See generally supra* note 38 (discussing expense involved in alternative methods of notice).

133. *See Mennonite*, 462 U.S. at 808 (O'Connor, J., dissenting) ("[A]pproximately 95% of the mortgage debt outstanding in the United States is held by private institutional lenders and federally supported agencies."); 1986 Bureau of the Census Statistics, *supra* note 1, at 489 (Chart No. 822) (majority of outstanding mortgage debt in 1985 held by banks, life insurance companies, federal agencies, and other institutional lenders).

134. *See Homemakers Fin. Serv., Inc. v. Jones*, No. 83-1856, slip op. at 4 (S.D. Ind. Sept. 4, 1984). In *Mennonite*, Justice O'Connor stated that "[i]t is highly unlikely, if likely at all, that a significant number of mortgagees are unaware of the consequences that ensue when their mortgagors fail to pay taxes assessed on the mortgaged property." 462 U.S. at 808.

135. *See Homemakers*, slip op. at 4 (majority of commercial lenders pay real property taxes for their mortgagors, collecting the taxes along with the monthly mortgage payment).

possess the minimal sophistication required to file requests for notice in advance of a tax sale.¹³⁶ Therefore, unconditional mailed notice to these mortgagees would be expensive, time-consuming, and unnecessary.

While this argument is convincing where sophisticated creditors are concerned, some assert that it is unreasonable to require a layperson to acquaint herself with such an obscure statutory requirement as a request notice provision.¹³⁷ The filing of a request notice form, however, is only one of several statutorily required acts associated with any real estate transaction.¹³⁸ Others include recording a deed or mortgage¹³⁹ and paying recording, transfer, mortgage, or capital gains tax.¹⁴⁰ Failure to execute properly any one of these acts may result in the complete loss of the property interest.¹⁴¹ Thus, it is not unreasonable to require those who purchase an interest in real property or who lend money secured by real property to acquaint themselves with request notice provisions or to consult with qualified counsel or an experienced realtor before entering into real estate transactions.¹⁴² Most people who obtain a security or other

136. See *Alliance Property Management and Dev., Inc. v. Andrews Ave. Equities, Inc.*, 133 A.D.2d 30, 33, 518 N.Y.S.2d 804, 807 (1st Dep't) (Sandler, J., dissenting), *aff'd on other grounds*, 70 N.Y.2d 831, 517 N.E.2d 1327, 523 N.Y.S.2d 441 (1987); *In re Foreclosure of Tax Liens by the County of Erie*, 103 A.D.2d 636, 642, 481 N.Y.S.2d 547, 551 (4th Dep't 1984) (Boomer, J., concurring); Brief for Respondent at 44, *In re Tax Foreclosure No. 35*, 127 A.D.2d 220, 514 N.Y.S.2d 390 (2d Dep't), *appeal dismissed*, 70 N.Y.2d 694, 512 N.E.2d 556, 518 N.Y.S.2d 1030 (1987) (available in the files of the Fordham Law Review).

137. See *In re Foreclosure of Tax Liens by the County of Erie*, 103 A.D.2d 636, 641, 481 N.Y.S.2d 547, 550. The court was concerned that the problem of mortgagees who lose their property interests because they do not receive notice of tax sales, "would only be exacerbated by the recent trend in which many noninstitutional lenders, particularly private persons who engaged in seller financing, finance real estate transactions." *Id.* at 640, 480 N.Y.S.2d at 550. See also Comment, *supra* note 13, at 409 (most laypersons are ignorant of existence of request notice provisions and it would be unreasonable to require that they familiarize themselves).

138. See Brief for Respondent at 44, *In re Tax Foreclosure No. 35*, 127 A.D.2d 220, 514 N.Y.S.2d 390 (2d Dep't), *appeal dismissed*, 70 N.Y.2d 694, 512 N.E.2d 556, 518 N.Y.S.2d 1030 (1987) (available in the files of the Fordham Law Review).

139. See, e.g., Ind. Code Ann. § 32-1-2-11 (Burns Supp. 1986); N.J. Stat. Ann. § 46:22-1 (West 1940); N.Y. Real Prop. Law § 291 (McKinney Supp. 1988).

140. See, e.g., Del. Code Ann. tit. 30, § 5402 (1974) (realty transfer tax); N.Y. Tax Law §§ 220-245 (McKinney 1986) (transfer tax); N.Y. Tax Law §§ 250-267 (McKinney 1986 & Supp. 1988) (mortgage tax); N.Y. Tax Law §§ 1400-1410 (McKinney 1987) (real estate transfer tax); N.Y. Tax Law §§ 1440-1449-c (McKinney 1987) (gains tax). See generally Rifkin, *Summary of New York State Gains Tax; Mortgage Recording Tax; New York City and New York State Real Property Transfer Tax*, in *Real Property Transfer Gains Tax* 312-45 (1984).

141. An unrecorded interest in real property is not enforceable against a subsequent purchaser for value. See, e.g., Ind. Code Ann. § 32-1-2-11 (Burns Supp. 1986); N.J. Stat. Ann. § 46:22-1 (West 1940); N.Y. Real Prop. Law § 291 (McKinney 1972 & Supp. 1988). If recording, transfer, or gains taxes are not paid, recordation of an interest will not be allowed. See, e.g., N.Y. Tax Law § 1403(a) (McKinney 1987). See generally Moonan, *The Nature of Title and Estates in New York*, in *Real Estate Titles* 1, 17-20 (1984) (discussing purpose of recording statutes and consequences of failure to record); Rifkin, *Search and Examination of Title*, in *Real Estate Titles* 31, 46-49 (1984) (same).

142. See *In re Foreclosure of Tax Liens by the County of Erie*, 103 A.D.2d 636, 642,

interest in real property do so with the assistance of counsel and a realtor,¹⁴³ who are familiar with the complicated scheme of real estate regulation of which request notice provisions form a relatively simple part. It would be unreasonable to require the state to seek out all interested parties in order to reach those few who refuse to avail themselves of the benefits of counsel or familiarize themselves with the laws that pertain to their property interests.

Further support for the constitutionality of request notice provisions is found in the judicial recognition that in a variety of contexts, the state can condition the retention of property rights on an affirmative act on the part of an interested party.¹⁴⁴ In many of these contexts the interested party receives no more notice than the existence of a statute on the books.¹⁴⁵ Thus, the very existence of request notice provisions suffices to put parties on notice of the filing requirements.¹⁴⁶

The Supreme Court has also stated explicitly that due process rights, such as the right to notice and a hearing, may be waived.¹⁴⁷ While the

481 N.Y.S.2d 547, 551 (4th Dep't 1984) (Boomer, J., concurring). Justice Marshall, the author of the *Mennonite* majority opinion, also wrote the majority opinion in *United States v. Locke*, 471 U.S. 84, 95 (1985), a decision that upheld the constitutionality of a statute requiring holders of unpatented mining interests to file an annual notice of intent to retain their interests. See *id.* at 108. Justice Marshall wrote that where the plaintiffs' entire property interest was conditioned upon their meeting the statutory filing requirement, "it was incumbent upon them . . . to have consulted an attorney for legal advice." *Id.* at 95.

143. See *In re Foreclosure of Tax Liens by the County of Erie*, 103 A.D.2d 636, 642, 481 N.Y.S.2d 547, 551 (4th Dep't 1984) (Boomer, J., concurring); cf. *United States v. Locke*, 471 U.S. 84, 95 (1985) (failure to consult counsel about filing requirement unreasonable where failure to file properly resulted in massive forfeiture of property rights).

144. See, e.g., *Locke*, 471 U.S. at 106 (state can condition retention of rights of holders of certain claims on federal lands on filing requirement); *Texaco, Inc. v. Short*, 454 U.S. 516, 530-31 (1982) (state can condition retention of mineral interests on compliance with statutory filing requirement); *Conley v. Barton*, 260 U.S. 677, 679, 681-82 (1923) (state can impose statutory condition of recording an affidavit on mortgagee as part of foreclosure procedure). In *Locke*, the Court stated that "[e]ven with respect to vested property rights, a legislature generally has the power to impose new regulatory constraints on the way in which those rights are used, or to condition their continued retention on performance of certain affirmative duties." 471 U.S. at 104.

145. See *Locke*, 471 U.S. at 108 ("legislature generally provides constitutionally adequate process simply by enacting [a] statute"); *Texaco, Inc. v. Short*, 454 U.S. 516, 532 (1982) ("Generally, a legislature need do nothing more than enact and publish the law, and afford the citizenry a reasonable opportunity to familiarize itself with its terms and to comply."). A statute that is too vague does not provide adequate notice to meet the requirement of due process. See *Lambert v. California*, 355 U.S. 225, 229-30 (1957).

146. See *Alliance Property Management and Dev., Inc. v. Andrews Ave. Equities, Inc.*, 133 A.D.2d 30, 34, 518 N.Y.S.2d 804, 807 (1st Dep't) (Sandler, J., dissenting), *aff'd on other grounds*, 70 N.Y.2d 831, 517 N.E.2d 1327, 523 N.Y.S.2d 441 (1987).

147. See *D.H. Overmeyer Co. v. Frick Co.*, 405 U.S. 174, 185 (1972) (execution of note with cognovit clause, by which it consented to judgment in event of nonpayment, waived debtor's due process rights to notice and hearing); *National Equip. Rental Ltd. v. Szukhent*, 375 U.S. 311, 315-16 (1964) (contracting parties may agree to waive due process requirement of notice); *Monsanto Co. v. Ruckelshaus*, 753 F.2d 649, 654 (8th Cir. 1985) (parties may waive due process rights). See generally Rotunda, *supra* note 6, at 749-53 (discussing waiver of due process rights).

Court has emphasized that a waiver of constitutional rights must be knowing and voluntary,¹⁴⁸ it has acknowledged that statutory notice can suffice¹⁴⁹ and that, in certain circumstances, a waiver can be less than totally voluntary.¹⁵⁰ The existence of request notice statutes and the presumption that individuals will acquaint themselves with the laws that govern their real estate transactions satisfy the knowledge requirement.¹⁵¹ Moreover, courts have held that the burden of requesting notice or a hearing under the fourteenth amendment constitutionally can be placed on the individual whose rights are affected.¹⁵² Thus, an interested party who fails to take the affirmative step of filing a request for notice has waived her right to receive actual notice.¹⁵³

Practically speaking, the burden imposed on a person who will not receive actual notice of a tax proceeding unless she requests it is not much different from that imposed on one for whom a statute mandates unconditional mailed notice. The law imposes on owners and others with an interest in real property a duty to familiarize themselves and comply with statutory and common law rules concerning their property.¹⁵⁴ One such rule requires persons liable for the payment of property taxes to notify the state of their mailing address when they first

148. See, e.g., *Brady v. United States*, 397 U.S. 742, 748 (1970); *Aetna Ins. Co. v. Kennedy*, 301 U.S. 389, 393 (1937).

149. Cf. *United States v. Locke*, 471 U.S. 84, 108 (1985) (State generally provides sufficient notice "by enacting the statute, publishing it, and . . . affording those within the statute's reach a reasonable opportunity both to familiarize themselves with the general requirements imposed and to comply with those requirements."); *Texaco, Inc. v. Short*, 454 U.S. 516, 531-32 (1982) (adequate notice given merely by publishing statute and providing members of public opportunity to acquaint themselves with its provisions).

150. See *Insurance Corp. of Ireland v. Compagnie des Bauxites de Guinee*, 456 U.S. 694, 703-04 (1982) (finding implied or constructive consent to personal jurisdiction where party refused to comply with discovery order); *Lassiter v. Department of Social Servs.*, 452 U.S. 18, 33 (1981) (parent waived right to counsel by failing to express interest in attending parental termination hearing).

151. See *Alliance Property Management and Dev., Inc. v. Andrews Ave. Equities, Inc.*, 133 A.D.2d 30, 33, 518 N.Y.S.2d 804, 807 (1st Dep't) (Sandler, J., dissenting), *aff'd on other grounds*, 70 N.Y.2d 831, 517 N.E.2d 1327, 523 N.Y.S.2d 441 (1987); *In re Tax Foreclosure No. 35*, 127 A.D.2d 220, 227, 514 N.Y.S.2d 390, 394 (2d Dep't), *appeal dismissed*, 70 N.Y.2d 694, 512 N.E.2d 556, 518 N.Y.S.2d 1030 (1987).

152. See *United States v. An Article of Device "Theromatic"*, 715 F.2d 1339, 1343 (9th Cir. 1983) (burden could be placed on defendant to request hearing in seizure case), *cert. denied*, 465 U.S. 1025 (1984); *Tax Foreclosure No. 35*, 127 A.D.2d at 227, 514 N.Y.S.2d at 394 (burden could be placed on property owner to request notice in tax foreclosure).

153. See *Tax Foreclosure No. 35*, 127 A.D.2d at 227, 514 N.Y.S.2d at 394.

154. See *United States v. Locke*, 471 U.S. 84, 108 (1985); *Texaco, Inc. v. Short*, 454 U.S. 516, 533 (1982); *North Laramie Land Co. v. Hoffman*, 268 U.S. 276, 283 (1925); *Ballard v. Hunter*, 204 U.S. 241, 254-55 (1907); *Bender v. City of Rochester*, 765 F.2d 7, 11-12 (2d Cir. 1985); *Township of Brick v. Block 48-7, Lots 34, 35, 36, 202 N.J. Super. 246, 249, 494 A.2d 829, 832 (1985)*, *cert. denied*, 107 S. Ct. 2181 (1987); *Sheehan v. County of Suffolk*, 67 N.Y.2d 52, 58, 490 N.E.2d 523, 525, 499 N.Y.S.2d 656, 658, *cert. denied*, 478 U.S. 1006 (1986); *Congregation Yetev Lev D'Satmar, Inc. v. County of Sullivan*, 59 N.Y.2d 418, 423, 452 N.E.2d 1207, 1211, 465 N.Y.S.2d 879, 883 (1983); *Girrbach v. Levine*, 132 A.D.2d 41, 43, 522 N.Y.S.2d 276, 277-78 (3d Dep't 1987).

purchase real property,¹⁵⁵ and to keep taxing authorities apprised of changes in their address in order to receive tax bills and notice of tax proceedings.¹⁵⁶ Thus, while all states require actual notice of an impending tax foreclosure to property owners,¹⁵⁷ this notice is, in effect, conditioned on the owners' keeping the taxing authorities abreast of their whereabouts, an affirmative step analogous to requesting notice.

Two factors that the *Mennonite* majority considered important also weigh in favor of the constitutionality of request notice provisions. First, in holding publication an insufficient form of notice in tax sale proceedings, the Court emphasized that it was unreasonable to expect an interested party to "keep abreast of" published or posted notices,¹⁵⁸ on the one hand, or constantly to inquire into the tax delinquent status of a piece of real property, on the other.¹⁵⁹ In contrast, the requirement of filing a request for notice is a simple act, which, once accomplished, guarantees mailed notice of a tax sale.¹⁶⁰ Further, as Justice O'Connor emphasized in her dissent, the fourteenth amendment does not obligate the state to save parties who unreasonably fail to safeguard their own property interests.¹⁶¹ Second, the *Mennonite* Court focused on the unreasonableness of a statute that made no provision whatsoever for actual

155. See, e.g., N.Y.C. Admin. Code § 11-416 (1986).

156. See *Township of Brick v. Block* 48-7, Lots 34, 35, 36, 202 N.J. Super. 246, 249, 494 A.2d 829, 832 (1985), cert. denied, 107 S. Ct. 2181 (1987); *Girrbach v. Levine*, 132 A.D.2d 41, 43, 522 N.Y.S.2d 276, 277-78 (3d Dep't 1987); cf. *Bender v. City of Rochester*, 588 F. Supp. 1405, 1408 (finding administrator of estate had duty to apprise tax authorities of property owner's death) (W.D.N.Y. 1984), affirmed, 765 F.2d 7 (2d Cir. 1985).

157. Statutes that provide for actual notice to owners generally state that it should be mailed to their "last known address;" they make no provision for seeking out such persons whose addresses have changed but who have not informed the taxing authorities. See, e.g., Ind. Code Ann. § 6-1.1-24-4 (Burns 1984 & Supp. 1986); N.Y. Real Prop. Tax Law § 1002(4) (McKinney Supp. 1988); R.I. Gen. Laws § 44-9-10 (Supp. 1987); S.D. Codified Laws Ann. § 10-23-2.1 (1982); Utah Code Ann. § 59-2-1363 (1987); Vt. Stat. Ann. tit. 32, § 5252 (1981); Va. Code Ann. § 58.1-3965 (1984). But see N.Y.C. Admin. Code § 11-416 (1986) (notice only to those owners who have filed owners' registration card).

158. See *Mennonite Bd. of Missions v. Adams*, 462 U.S. 791, 799 (1983).

159. See *id.* at 799-800.

160. See *supra* note 44. The New York State and New York City provisions are unique in that they specifically uphold the validity of a foreclosure that takes place after a failure to send, in the case of the state, or receive, in the case of the city, notice. See N.Y. Real Prop. Tax Law § 1126 (McKinney 1972); N.Y.C. Admin. Code §§ 11-416, 11-417 (1986). The state provision is the more egregious of the two, since it, in effect, tells mortgagees "that their efforts to receive notice of pending tax foreclosure proceedings by filing their names and addresses with the taxing authorities may be meaningless, since the taxing authorities may ignore the filing without consequence." *In re Foreclosure of Tax Liens by the County of Erie*, 103 A.D.2d 636, 640-41, 481 N.Y.S.2d 547, 551 (4th Dep't 1984) (Boomer, J., concurring).

161. See *Mennonite*, 462 U.S. at 809 (O'Connor, J., dissenting); cf. *Weigner v. City of New York*, 852 F.2d 646, 651 (2d Cir. 1988) (Delinquent taxpayer "can reasonably be expected to know that foreclosure is imminent and to take the steps necessary to protect her interests.").

notice.¹⁶² Request notice provisions offer interested parties a simple method of assuring themselves of notice "reasonably calculated to apprise [them] of a pending tax sale."¹⁶³ This distinction is of constitutional significance.

CONCLUSION

Although individuals have a constitutional right to receive notice of proceedings that will affect their interests in property, the Supreme Court's modern due process jurisprudence emphasizes reasonableness, flexibility and a balancing of interests under the totality of the circumstances. Given the gravity of the state's interest in real property taxation, request notice provisions strike a reasonable balance between the individual's constitutional right to receive notice of an impending tax sale and the state's need to collect delinquent property taxes inexpensively and expeditiously.

Ellen F. Friedman

162. See *Mennonite*, 462 U.S. at 798, 799.

163. *Id.* at 798.