dants' rights and to ensure accuracy in jury determinations of guilt or innocence, the courts must strive to parse psychiatric evidence more finely, carefully sifting the useful from the misleading without dismissing a scientific discipline wholesale.

2. Tax Sales of Real Property — Notice and Opportunity To Be Heard. — The postman may always ring twice, but that is not enough for the Supreme Court. In recent years, lower courts have reached divergent results in applying the requirements for constitutionally adequate notice set out in the seminal case of *Mullane v. Central Hanover Bank*.[1] Expanding on the line of cases articulating those requirements, last Term in *Jones v. Flowers*,[2] the Supreme Court held that when notice of a tax sale is returned unclaimed, the State must take further reasonable steps to attempt to give notice to the owner before selling the property. Because of the nebulous formulations of what constitutes proper notice, Justices in both the majority and dissent purported to adhere to the same longstanding due process principles while reaching opposite results. Further, while advocates of greater procedural due process protections ostensibly won a victory, it was a small one at best, and possibly a step backward. Most states already meet the standard the Court formulated in *Flowers*, and those that do not may have an incentive to cut back their notice procedures rather than expand them.

For thirty years, while Gary Jones paid the mortgage on his house, the mortgage company paid his property taxes.[3] After Jones paid off the mortgage on the house, in which he no longer resided, he failed to pay his property taxes and Arkansas classified his property as delinquent.[4] The Commissioner of State Lands mailed a certified letter to the property to notify Jones of his tax delinquency; the letter stated that the property would be subject to a public sale if Jones did not pay his taxes within two years.[5] Following three attempts to deliver the letter[6] with nobody answering the door to sign for it, and after the letter had been held for fifteen days at the post office, the postal service returned the letter to the Commissioner marked "unclaimed."[7] Two years later, the State published notice of the public sale in a local newspaper.[8] Having received no bids for months, the State negotiated a private sale with Linda Flowers.[9] Before finalizing the sale, the

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[1] 339 U.S. 306 (1950). *Compare, e.g.*, Madewell v. Downs, 68 F.3d 1030, 1035, 1045–47 (8th Cir. 1995), *with* Plemons v. Gale, 396 F.3d 569, 576 (4th Cir. 2005).

[2] 126 S. Ct. 1708 (2006).

[3] *Id.* at 1712.

[4] *Id.*

[5] *Id.*

[6] *Id.* at 1722 (Thomas, J., dissenting).

[7] *Id.* at 1712 (majority opinion).

[8] *Id.*

[9] *Id.* at 1712–13.

Commissioner mailed Jones a second certified letter at the property address to inform him that the State would sell his house to Flowers if he did not pay his taxes.[10] Again, the letter was returned to the Commissioner marked "unclaimed."[11] The State sold Flowers the house, and immediately after the thirty-day post-sale redemption period had expired, Flowers had an unlawful detainer notice served on the property.[12] Jones's daughter received it and notified Jones of the sale.[13]

Jones filed suit in Arkansas state court alleging that the Commissioner and Flowers had taken his property without due process because they failed to provide notice of the tax sale and Jones's right to redeem.[14] The trial court held that the State's notice procedure was constitutionally adequate, and the Arkansas Supreme Court affirmed the judgment.[15]

The Supreme Court reversed. Writing for the majority, Chief Justice Roberts[16] ruled that "when mailed notice of a tax sale is returned unclaimed, the State must take additional reasonable steps to attempt to provide notice to the property owner before selling his property, if it is practicable to do so," and that, in Jones's case, "additional reasonable steps were available to the State."[17] The Court explained that although due process does not require actual notice, the government must provide "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."[18] Moreover, the means of giving notice "must be such as one desirous of actually informing the absentee might reasonably adopt to accomplish it."[19] The Court concluded that someone desirous of actually informing Jones would have taken further reasonable steps to inform him that his house was subject to a taking after becoming aware that the initial attempt at notice had been unsuccessful.[20]

The Court likened the case to its precedents addressing notice to known prisoners[21] and incompetents,[22] which "required the govern-

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[10] *Id.* at 1712.

[11] *Id.* at 1712–13.

[12] *Id.* at 1713.

[13] *Id.*

[14] *Id.*

[15] *Id.*

[16] Justices Stevens, Souter, Ginsburg, and Breyer joined Chief Justice Roberts's opinion.

[17] *Flowers*, 126 S. Ct. at 1713.

[18] *Id.* at 1713–14 (quoting Mullane v. Cent. Hanover Bank & Trust Co., 339 U.S. 306, 314 (1950)) (internal quotation marks omitted).

[19] *Id.* at 1715 (quoting *Mullane*, 339 U.S. at 315) (internal quotation mark omitted).

[20] *Id.* at 1716.

[21] In *Robinson v. Hanrahan*, 409 U.S. 38 (1972), the Court held that notice of forfeiture proceedings sent to a home address was inadequate when the State knew the owner was in prison. *Id.* at 40.

ment to consider unique information about an intended recipient regardless of whether a statutory scheme [was] reasonably calculated to provide notice in the ordinary case."[23] In those cases, the State's attempt at notice was insufficient because it knew of the circumstances that made the notice ineffective *before* it decided the means by which to provide notice.[24] In contrast, the State in *Flowers* was not aware of Jones's circumstances before it sent notice. However, the initial notice letter was returned to the State less than three weeks after it had been sent, and the State was not permitted to take the property for two years to give Jones time to redeem it.[25] In response to these facts, the Court reaffirmed the "*ex ante* principle": "the constitutionality of a particular procedure for notice is assessed *ex ante*, rather than *post hoc*," since a procedure may be adequate though it fails in a specific instance.[26] The Court explained, however, that a state's notice procedure may violate due process because of ex post inaction "if a feature of the State's chosen procedure is that it promptly provides additional information to the government about the effectiveness of notice."[27]

The Court proceeded to describe reasonable steps that were available to Arkansas to provide notice before taking Jones's property. One option entailed the State's resending the notice by regular mail so that the recipient's signature would not have been required.[28] This might have made actual notice more likely because the letter would have been left in the mailbox to be retrieved at any time.[29] Another possibility called for the State "to post notice on the front door, or to address otherwise undeliverable mail to 'occupant.'"[30] The Court con-

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[22] In *Covey v. Town of Somers*, 351 U.S. 141 (1956), the Court held that notice of foreclosure by mailing, posting, and publication was inadequate when town authorities knew the property owner "to be an incompetent who [was] without the protection of a guardian." *Id.* at 144, 146–47.

[23] *Flowers*, 126 S. Ct. at 1716.

[24] *Id.*

[25] *Id.*

[26] *Id.* at 1717.

[27] *Id.* The Court then responded to three arguments the Commissioner presented for why the State should not have been required to pursue reasonable follow-up measures in Jones's case. First, the Court made clear that although notice was reasonably calculated to reach Jones because the Commissioner sent it to an address that Jones had a legal obligation to keep updated, it was not reasonable for the Commissioner to take no further action when notice was promptly returned as "unclaimed." Second, the Court maintained that "the common knowledge that property may become subject to government taking when taxes are not paid does not excuse the government from complying with its constitutional obligation of notice before taking private property." Third, the Court argued that although a property owner should act diligently to ensure that the occupant of his property would notify him if he were in danger of losing the property, an occupant "is not charged with acting as the owner's agent in all respects" and does not have an obligation "to follow up with certified mail of unknown content addressed to the owner." *Id.* at 1717–18.

[28] *Id.* at 1719.

[29] *Id.*

[30] *Id.*

sidered this more likely to have reached Jones because either he would have become aware of it on the property or a current occupant would have seen it and notified him.[31] Finally, the Court explained that Arkansas's publication of notice was inadequate because it was "reasonably possible or practicable to give more adequate warning."[32]

Justice Thomas dissented,[33] arguing that the meaning of due process "should not turn on the antics of tax evaders and scofflaws."[34] He deemed Arkansas's process "reasonably calculated to inform" Jones of the tax sale.[35] He contended that due process is satisfied when the State attempts to notify a delinquent by certified mail at an address that he has provided and that the minimum requirements are exceeded when the State publishes effective notice in a local newspaper.[36] Justice Thomas then accused the Court of abandoning the ex ante principle as well as the established practice of refusing to assess the reasonableness of the State's chosen method of notice "by comparing it to alternative methods that are identified after the fact."[37] He explained that the Court held Arkansas's notice process unconstitutional based on information that was unavailable to the State when notice was sent and that the Court's suggested methods of notice were "entirely the product of *post hoc* considerations, including the discovery that members of [Jones's] family continued to live in the house."[38] Distinguishing cases requiring specially tailored notice for prisoners and incompetents,[39] Justice Thomas pointed out that "Arkansas did not know at the time it sent notice to [Jones] that its method would fail."[40] Justice Thomas also read the majority opinion as a departure from the rule in *Dusenbery v. United States*[41] that due process does not require "actual notice,"[42] since "[u]nder the majority's logic, each time a doubt is raised with respect to whether notice has reached an interested party, the State will have to consider additional means better calculated to achieve notice."[43] Finally, Justice Thomas found the Court's proposed

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[31] *Id.*

[32] *Id.* at 1720 (quoting Mullane v. Cent. Hanover Bank & Trust Co., 339 U.S. 306, 317 (1950)) (internal quotation mark omitted).

[33] Justices Scalia and Kennedy joined Justice Thomas's dissent.

[34] *Flowers*, 126 S. Ct. at 1727 (Thomas, J., dissenting).

[35] *Id.* at 1722.

[36] *Id.* at 1723.

[37] *Id.* at 1724.

[38] *Id.*

[39] *See* Robinson v. Hanrahan, 409 U.S. 38 (1972) (prisoners); Covey v. Town of Somers, 351 U.S. 141 (1956) (incompetents).

[40] *Flowers*, 126 S. Ct. at 1725 (Thomas, J., dissenting).

[41] 534 U.S. 161 (2002).

[42] *Id.* at 169–70.

[43] *Flowers*, 126 S. Ct. at 1724 (Thomas, J., dissenting).

methods of notice to be "burdensome, impractical, and no more likely to effect notice than the methods actually employed by the State."[44]

In *Flowers*, both the majority and dissent purported to adhere to the same longstanding principles of due process — a consensus made possible because the principles themselves are sufficiently vague and inclusive to accommodate widely divergent applications.[45] However, regardless of the confusion in *Flowers* over the treatment of *Mullane* and the scope of the ex ante principle, the effect of the decision will be limited, both doctrinally and practically. Nonetheless, it may provide a preview of Chief Justice Roberts's jurisprudence.

The Court enjoyed unanimity on two principles for assessing the requirements for constitutionally adequate notice. First, the majority and dissenting opinions agreed on the *Mullane* conceptualization that "[t]he means employed must be such as one desirous of actually informing the absentee might reasonably adopt to accomplish it."[46] Second, all eight participating Justices concurred that "the constitutionality of a particular procedure for notice is assessed *ex ante*, rather than *post hoc*."[47] Nonetheless, the Justices were worlds apart in their applications of these principles. This divergence occurred because those principles provide virtually no guidance; they are so malleable and impracticable as to be jurisprudentially useless.

The longstanding *Mullane* standard suffers from two related infirmities. First, it fails to incorporate the touchstone of the due process inquiry: the balancing of government and individual interests.[48] For

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[44] *Id.* at 1725.

[45] Commentators have long criticized the lack of principled content in the Court's procedural due process analysis. *See, e.g.*, Richard B. Saphire, *Specifying Due Process Values: Toward a More Responsive Approach to Procedural Protection*, 127 U. PA. L. REV. 111, 113 (1978) ("[T]he Supreme Court, in deciding when constitutional protections apply in non-criminal, adjudicative contexts, has generally failed to specify and articulate the values which underlie due process. Moreover, in those cases in which the Court has attempted to define due process values, it has generally done so in an ambiguous and unsatisfactory fashion.").

[46] *Flowers*, 126 S. Ct. at 1714 (quoting Mullane v. Cent. Hanover Bank & Trust Co., 339 U.S. 306, 314 (1950)); *id.* at 1722 (Thomas, J., dissenting) (quoting the same text).

[47] *Id.* at 1717 (majority opinion); *see id.* at 1723 (Thomas, J., dissenting) ("[W]hether a method of notice is reasonably calculated to notify the interested party is determined *ex ante* . . . .").

[48] *See* Mathews v. Eldridge, 424 U.S. 319, 334–35 (1976) (stating that due process requires a balancing of "the private interest that will be affected," the "risk of an erroneous deprivation of such interest," and "the probable value, if any, of additional or substitute procedural safeguards" against the "Government's interest"); *see also* Hamdi v. Rumsfeld, 124 S. Ct. 2633, 2646 (2004) (plurality opinion) (highlighting the balancing needed to resolve "the tension that often exists between the autonomy that the Government asserts is necessary in order to pursue effectively a particular goal and the process that a citizen contends he is due before he is deprived of a constitutional right"); Zinermon v. Burch, 494 U.S. 113, 127 (1990) (explaining that due process "is a flexible concept that varies with the particular situation" and that it requires the Court to "weigh several factors"); United States v. Salerno, 481 U.S. 739, 748 (1987) (holding, in the preventive detention context, that "the Government's regulatory interest in community safety can, in appropriate circumstances, outweigh an individual's liberty interest"). In addition to the Court's proce-

example, the test is indifferent to whether the property at issue is valuable, like a house, or comparatively less important. Put another way, whether one is "desirous" of actually delivering a message has nothing to do with the content of the message. The only way around this conclusion is to pack the balancing into the word "reasonably," but *Mullane* and other Court precedents seem to imply that *Mullane* reasonableness concerns only the accuracy of the chosen method relative to other normal or customary methods.[49] The language of the *Mullane* test thus appears irredeemably antagonistic towards balancing. This is what the *Dusenbery* Court meant when it said that *Mullane*, rather than *Mathews v. Eldridge*,[50] the more recent case that sets out the general procedural due process balancing framework, "supplies the appropriate analytical framework" for the evaluation of notice.[51]

Nevertheless, it appears that the Court, in evaluating notice practices since *Mullane*, has not been tone-deaf to the competing interests involved, even as it has continued to adhere formally to the *Mullane* formulation in most cases.[52] In *Flowers*, the balancing that may have

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dural due process cases, decisions delimiting substantive due process rights have incorporated balancing. *See, e.g.*, Planned Parenthood of Se. Pa. v. Casey, 505 U.S. 833, 850 (1992) (stating that due process "has represented the balance which our Nation, built upon postulates of respect for the liberty of the individual, has struck between that liberty and the demands of organized society" (quoting Poe v. Ullman, 367 U.S. 497, 542 (1961) (Harlan, J., dissenting))); Cruzan v. Dir., Mo. Dep't of Health, 497 U.S. 261, 279 (1990) (explaining, in the context of an alleged right to refuse life-sustaining treatment, that whether a person's "constitutional rights have been violated must be determined by balancing his liberty interests against the relevant state interests" (quoting Youngberg v. Romeo, 457 U.S. 307, 321 (1982)) (internal quotation mark omitted)).

49 *See* Greene v. Lindsey, 456 U.S. 444, 454 (1982) ("[T]he reasonableness of the notice provided must be tested with reference to the existence of 'feasible and customary' alternatives and supplements to the form of notice chosen."); *Mullane*, 339 U.S. at 315 ("The reasonableness . . . of any chosen method may be defended on the ground that it is in itself reasonably certain to inform those affected, or, where conditions do not reasonably permit such notice, that the form chosen is not substantially less likely to bring home notice than other of the feasible and customary substitutes." (internal citations omitted)).

50 424 U.S. 319 (1976).

51 534 U.S. 161, 167 (2002) (citing *Mathews*, 424 U.S. 319). The Court went on to write:

> Although we have . . . invoked *Mathews* to evaluate due process claims in other contexts, we have never viewed *Mathews* as announcing an all-embracing test for deciding due process claims. Since *Mullane* was decided, we have regularly turned to it when confronted with questions regarding the adequacy of the method used to give notice.

Id. at 167–68 (internal citation omitted); *see also* Mennonite Bd. of Missions v. Adams, 462 U.S. 791, 802 (1983) (O'Connor, J., dissenting) ("Without knowing what state and individual interests will be at stake in future cases, the Court espouses a general principle ostensibly applicable whenever *any* legally protected property interest may be adversely affected.").

52 The one previous case in which the Court explicitly engaged in balancing was *Tulsa Professional Collection Services, Inc. v. Pope*, 485 U.S. 478, 484, 489–90 (1988). Nonetheless, some cases have hinted at an underlying balancing of interests. *See Mennonite*, 462 U.S. at 798 ("To begin with, a mortgagee possesses a substantial property interest that is significantly affected by a tax sale."); Walker v. City of Hutchinson, 352 U.S. 112, 115 (1956) ("We [in *Mullane*] called attention to the impossibility of setting up a rigid formula as to the kind of notice that must be given; notice required will vary with circumstances and conditions."). It may be that the Court has shied away

silently undergirded the Court's decisions in the past came bubbling to the surface: the Court presented the inquiry as a *two*-step process involving both the *Mullane* test and a general balancing test.[53] Indeed, in holding for Jones, the Court relied, seemingly dispositively, on the fact that the case concerned "such an important and irreversible prospect as the loss of a house."[54] Thus, balancing achieved doctrinal primacy in *Flowers*. Despite the majority's efforts, however, the traditional *Mullane* test simply cannot be reconciled with a flexible due process inquiry centered on weighing competing individual and government interests, and the Court exposed this by fatally juxtaposing the two.[55] Since the *Mullane* test was a hollow recitation, it was easy for the majority to invoke it and move on to its real considerations.

The *Mullane* test suffers from a second shortcoming: it seeks to attribute a standard derived from the behavior of real people to govern-

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from explicit balancing in the notice context because most cases, with the exception of *Mullane* (common trust fund) and *Tulsa Professional Collection Services* (hospital expenses), have involved traditional property interests, namely real estate. As one scholar has incisively observed:

> The rise of balancing here is closely linked with the recognition of new forms of property protected by the due process clause. The importance of "entitlements" such as welfare benefits . . . seemed to demand procedural protections against their deprivation, but the ever-increasing size of the welfare state made imposition of procedures a costly enterprise. Balancing provided a flexible strategy that took account of both interests.

T. Alexander Aleinikoff, *Constitutional Law in the Age of Balancing*, 96 YALE L.J. 943, 965–66 (1987).

[53] *See Flowers*, 126 S. Ct. at 1715.

[54] *Id.* at 1716.

[55] A counterargument is that the *Mullane* test has a balancing component built into its original design. *See Mullane*, 339 U.S. at 314 ("Against this interest of the State we must balance the individual interest sought to be protected by the Fourteenth Amendment."). But if this is the only point at which the Court has balanced the relevant interests, constitutional notice hinges on an exceptionally crude scheme that does not take into account such seemingly elementary considerations as the magnitude of the property interest at stake or the unique difficulties for the sender associated with giving notice in a certain situation. This would be an extreme doctrinal outlier in the Court's due process jurisprudence. *See* cases cited *supra* note 48.

Another counterargument would attack the balancing formula itself. Admittedly, it poses enormous administrability problems related to incommensurability and imprecision. *See, e.g.*, Edward L. Rubin, *Due Process and the Administrative State*, 72 CAL. L. REV. 1044, 1138 (1984) ("This reliance on 'weight,' which is a useful approach for dealing with bananas, leaves something to be desired where factors such as those in *Mathews* are concerned."). But the point of this Comment is not to defend interest balancing against a more finely grained constitutional doctrine of specific rules. It is only to show that explicit interest balancing is preferable to interest balancing hidden by a test that is doing no doctrinal work. And for those in favor of more specific rules, interest balancing is at least a way to prevent arguments about due process from devolving into nebulous "fairness" inquiries. *See* Gary Lawson, Katherine Ferguson & Guillermo A. Montero, *"Oh Lord, Please Don't Let Me Be Misunderstood!": Rediscovering the* Mathews v. Eldridge *and* Penn Central *Frameworks*, 81 NOTRE DAME L. REV. 1, 5 (2005) ("There is no algorithm for determining fairness in [the due process] context . . . . The most that one can do is to channel the fairness inquiry in a fashion that lends itself to the stylized arguments of an adversarial legal culture. . . . A properly constructed framework — whether consisting of two factors, three factors, or more — can in principle serve that modest but significant function even if it is useless as a tool for making or predicting ultimate decisions.").

ments. A person who desires to inform another of a piece of information faces entirely different constraints than does a government.[56] On one hand, governments place high premiums on standardized procedures, for instance, while an individual can develop a more ad hoc approach to different cases. On the other hand, governments have more resources at their disposal than the average person and can thus more cheaply alternate between different types of notice. Because of this incongruence between doctrine and reality, it seems unlikely that the *Mullane* test is significant beyond its rhetorical force.

The ex ante principle stressed by the *Flowers* dissent and evidently acceded to by the majority is equally untenable. As the majority's careful maneuvering demonstrates, the whole game is in how one defines the proposed government procedure.[57] The dissent claimed that the relevant procedure is sending the notice by certified mail, so any requirement imposed based on subsequent events would violate the ex ante principle.[58] Responding to this argument, the majority described the relevant procedure as sending certified mail and setting up a plan for action if the mail is returned unclaimed.[59] Framed this way, the majority's procedure also satisfies the ex ante principle. Indeed, it seems that virtually *any* procedure that could respond to the future receipt of new information could satisfy the ex ante principle so long as it is defined with the requisite particularity (for example: certified mail is to be sent and if after the tax sale the taxpayer testifies under oath that he did not receive notice, the tax sale shall be voided). The

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[56] Professor Daryl Levinson makes a related point in *Making Government Pay: Markets, Politics, and the Allocation of Constitutional Costs*, 67 U. CHI. L. REV. 345 (2000). He criticizes damage remedies for constitutional torts because "we cannot assume that government will behave like a private, profit-maximizing firm." *Id.* at 356. On the contrary, "[g]overnment does not behave like a wealth-maximizer, and therefore does not attach any intrinsic disutility to financial outflows — just as it attaches no intrinsic utility to financial inflows. Rather, government internalizes only *political* incentives." *Id.* at 357. This Comment argues, in a similar vein, that what is "reasonable" for a private citizen — when the inquiry relates at least in some loose sense to a balancing of costs and benefits — might be very different from what is "reasonable" for a government entity.

[57] This problem of defining the relevant constitutional object recurs cross-doctrinally. The most frequently discussed example is in fundamental rights jurisprudence. Justices Brennan and Scalia famously argued over the degree of specificity at which a proposed right ought to be defined. In defending his choice — "the most specific level" — Justice Scalia wrote:

> The need, if arbitrary decisionmaking is to be avoided, to adopt the most specific tradition as the point of reference — or at least to announce . . . some other criterion for selecting among the innumerable relevant traditions that could be consulted — is well enough exemplified by the fact that in the present case Justice Brennan's opinion and Justice O'Connor's opinion, which disapproves this footnote, *both* appeal to tradition, but on the basis of the tradition they select reach opposite results.

Michael H. v. Gerald D., 491 U.S. 110, 128 n.6 (1989) (opinion of Scalia, J.) (citation omitted). Similarly, in *Flowers*, without a criterion for selecting the relevant procedure, the ex ante principle was able to dictate opposite results.

[58] *See Flowers*, 126 S. Ct. at 1723–24 (Thomas, J., dissenting).

[59] *See id.* at 1717, 1720 (majority opinion).

Court's reliance on these pliant formulations will only create confusion for lower courts and litigants in an area greatly in need of determinate rules to avoid protracted litigation about a peripheral issue.[60]

Notwithstanding the *Flowers* Court's competing approaches to deep-rooted precedents and its failure to clarify the relevant due process inquiries regarding notice, the decision is closely circumscribed, both doctrinally and practically.[61] The Court's decision is limited doctrinally because whatever duty governments now have to take into account information received after attempting notice but before taking property is capped by the longstanding principle, affirmed in *Flowers*,[62] that regular mail service is a constitutionally adequate means of providing notice.[63] Although the Court predicted that state governments would continue to have incentives to use certified mail, they can avoid any resultant duties to take additional steps by simply sticking with regular mail — "an inexpensive and efficient mechanism that is reasonably calculated to provide actual notice"[64] — or any other method of notice that is approximately as likely to reach the intended recipient. If Justice Thomas is right that regular mail "is arguably less effective than certified mail,"[65] the case may actually lead to fewer procedural due process protections.[66]

Practically, the Court's decision in *Flowers* is also limited because it does not affect the established notice procedures in most states. The Court said as much in a footnote, listing the "[m]any States [that] already require in their statutes that the government do more than simply mail notice to delinquent owners either at the outset or as a followup measure if initial mailed notice is ineffective."[67] Further, most of those states not listed in the opinion already use procedures that are

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[60] *See* Frank S. Alexander, *Tax Liens, Tax Sales, and Due Process*, 75 IND. L.J. 747, 805 (2000) (noting that the "elusive nature" of the *Mullane* test "poses significant barriers to predictability, certainty, and stability in the tax foreclosure process," and advocating a more comprehensive approach than interest balancing). The case for determinate legal rules is strongest for issues that go not to the substance of a legal dispute, but rather to the structure and procedures of the legal process. Even in the area of constitutional procedural protections, the concern for ex ante clarity arguably outweighs the benefits of ex post equitable discretion in most contexts.

[61] *See Flowers*, 126 S. Ct. at 1721.

[62] *See id.* at 1720.

[63] *See* Dusenbery v. United States, 534 U.S. 161, 172–73 (2002); Tulsa Prof'l Collection Servs., Inc. v. Pope, 485 U.S. 478, 490 (1988); Mennonite Bd. of Missions v. Adams, 462 U.S. 791, 799, 800 (1983); Greene v. Lindsey, 456 U.S. 444, 455 (1982); Mullane v. Cent. Hanover Bank & Trust Co., 339 U.S. 306, 319 (1950).

[64] *Tulsa Prof'l Collection Servs.*, 485 U.S. at 490.

[65] *Flowers*, 126 S. Ct. at 1726 (Thomas, J., dissenting).

[66] However, the majority predicted that States would be reluctant to abandon the use of certified mail because it "provides the State with documentation of personal delivery and protection against false claims that notice was never received." *Id.* at 1720 (majority opinion).

[67] *Id.* at 1715; *see id.* at 1715 n.2.

consistent with *Flowers*.[68] Thus, the decision is unlikely to reverberate through the pages of the Federal Reporter or the halls of state courts.

The decision does, however, offer an early glimpse into how the new Chief Justice may develop his jurisprudence. Chief Justice Roberts broke with fellow conservative Justices Scalia and Thomas, providing the deciding vote in siding with Justices Stevens, Souter, Ginsburg, and Breyer.[69] The conservative Justices may have split because the question could not be resolved clearly by reference to the original understanding, or because the question of what notice is required is so unclear, given the multiple forms of mail available today, that the original understanding has little value. Without that common point of reference, the conservatives may have revealed a divergence in their approaches: while Justices Scalia and Thomas may be inclined to err on the side of judicial restraint, declining to extend the reach of constitutional rights beyond what precedent mandates,[70] Chief Justice Rob-

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[68] *See* ALASKA STAT. § 29.45.330 (2004) (regular mail); ARIZ. REV. STAT. ANN. § 42-18108 (2006) (regular mail); ARK. CODE ANN. § 26-37-301 (Supp. 2005) (certified mail plus actual notice by personal service of process if no proof that notice sent by mail was received by property owner); COLO. REV. STAT. § 39-11-101 (Supp. 2005) (regular mail); HAW. REV. STAT. ANN. § 246-56 (LexisNexis 2003) (registered mail plus posting on the property); IOWA CODE § 446.2 (2003) (regular mail); KAN. STAT. ANN. § 79-2801 (Supp. 2005) (personal service or regular mail); KY. REV. STAT. ANN. § 134.440 (West 2005) (regular mail); LA. REV. STAT. ANN. § 47:2183 (Supp. 2006) (certified mail plus personal service if notice sent by mail is returned unclaimed); MASS. GEN. LAWS ch. 60, § 53 (2004) (personal service or leaving notice at property owner's dwelling house); MONT. CODE ANN. § 15-18-212 (2005) (notice to current occupant of property); N.J. STAT. ANN. § 54:5-27 (West 2002) (regular mail); 2006 N.Y. Sess. Laws 415 (McKinney) (amending N.Y. REAL PROP. TAX LAW § 1125 (McKinney 2000)) (certified mail and regular first-class mail plus an attempt to obtain an alternative mailing address and posting on the property if certified mail and first-class mail are returned by postal service); OR. REV. STAT. § 312.125 (2005) (certified mail and regular first-class mail); 72 PA. STAT. ANN. § 5860.602 (West 1990) (certified mail plus first-class mail if notice sent by certified mail is returned unclaimed); S.C. CODE ANN. § 12-51-40 (Supp. 2005) (certified mail plus posting on the property if notice sent by mail is returned unclaimed); TENN. CODE ANN. § 67-5-2502 (2003) (personal service if possible; otherwise, leaving notice at property owner's dwelling house); VA. CODE ANN. § 58.1-3965 (2004) (notice to property address); WASH. REV. CODE § 84.64.050 (2004) (certified mail plus regular first-class mail if notice sent by certified mail is returned unclaimed). Idaho's statute may or may not be in compliance with *Flowers*, depending on how it is applied. IDAHO CODE ANN. § 63-1005 (2000) (certified mail plus publication if the notice by certified mail is "returned undelivered after attempting to locate and serve the record owner").

[69] The Chief Justice's break with the conservatives was noticed in the blogosphere, as well as in more traditional media outlets. *See, e.g.*, Hadley Arkes, *Playing Well with Others?*, NATIONAL REVIEW ONLINE, May 18, 2006, http://article.nationalreview.com/?q=NmUyMGQoMDJlMWM3YjdkNDYzZmRkNjZkMTYzMWRlNjE; Ashlea Ebeling, *Justice Roberts Slams State's Property Seizure*, FORBES.COM, Apr. 27, 2006, http://www.forbes.com/businessinthebeltway/2006/04/27/supreme-court-property-foreclosure-cz_ae_0427scotus.html; Posting of D. Benjamin Barros to PropertyProf Blog, http://lawprofessors.typepad.com/property/2006/04/jones_v_flowers.html (Apr. 26, 2006).

[70] *See, e.g.*, Tennessee v. Lane, 124 S. Ct. 1978, 2009 (2004) (Scalia, J., dissenting) ("As a general matter we are ill advised to adopt or adhere to constitutional rules that bring us into constant conflict with a coequal branch of Government.").

erts may be inclined to give priority to another favorite conservative cause — private property rights.[71] The extent of this potential methodological split remains to be seen.

D. Equal Protection

Redistricting — Partisan Gerrymandering. — Breakdowns in the democratic process initially appear to present especially appropriate opportunities for judicial intervention. Because groups that are excluded from elections cannot ordinarily remedy their disfranchisement through the political process, courts seem to offer a crucial check on malapportioned political power. However, despite having stepped into the "political thicket"[1] in 1962,[2] the Supreme Court has hesitated to appear as though it is imposing its own view of a properly functioning democracy unless it is particularly confident in its judgment. Last Term, in the latest manifestation of this self-doubt, *League of United Latin American Citizens (LULAC) v. Perry*,[3] the Court held that an electoral district in Texas impermissibly disadvantaged Latinos under section 2 of the Voting Rights Act of 1965[4] but rejected a broader claim that the underlying statewide redistricting scheme was an unconstitutional partisan gerrymander. The Court's decision creates new tensions in its application of the Voting Rights Act. However, *LULAC* is most noteworthy as an example of the Court's continued inability to address partisan gerrymandering claims coherently. This inability discourages both judicial and nonjudicial solutions to political gerrymandering and leads to a misplaced emphasis on the divisive issue of race in politics. The Court should make up its mind: it should either categorically foreclose claims of partisan gerrymandering or adopt a standard that will consistently address the issue.

In 2003, the Republican-dominated Texas legislature drew a new set of congressional districts entitled Plan 1374C to increase Texas Republicans' representation in Congress.[5] As part of the plan, a majority-Latino district in southwestern Texas, District 23, was redrawn to include more Republican Anglo voters and exclude Democratic Latino

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[71] *See, e.g.*, Kelo v. City of New London, 125 S. Ct. 2655, 2671 (2005) (O'Connor, J., dissenting) (joined by Rehnquist, C.J., and Scalia and Thomas, JJ.).

[1] The phrase "political thicket" has its origin in Justice Frankfurter's objection in *Colegrove v. Green*, 328 U.S. 549 (1946), that "[c]ourts ought not to enter th[e] political thicket" presented by equal protection challenges to electoral apportionment. *Id.* at 556 (plurality opinion).

[2] *See* Baker v. Carr, 369 U.S. 186, 208–10 (1962) (holding that an equal protection challenge to a state's electoral apportionment constituted a justiciable issue).

[3] 126 S. Ct. 2594 (2006).

[4] 42 U.S.C. § 1973 (2000).

[5] *See LULAC*, 126 S. Ct. at 2606–07 (plurality opinion). Plan 1374C replaced a set of districts that had been drawn by a district court in order to comport with the Constitution's one-person, one-vote requirement. *Id.* at 2606.