JONES V. FLOWERS: AN ESSAY ON A UNIFIED THEORY OF PROCEDURAL DUE PROCESS

PATRICK J. BORCHERS

When the history of the United States Supreme Court in the early twenty-first century is written, *Jones v. Flowers*[1] will not be celebrated as one of the Court's great achievements. The stakes were small as Supreme Court cases go and its direct precedential relevance limited. But latent in the Court's reasoning is a theme that if fully developed could bring all of procedural due process under one banner to the benefit of constitutional jurisprudence and the practical administration of civil cases.

The whole matter began humbly enough as Supreme Court cases often do. In 1967 Gary Jones bought a house in Little Rock, Arkansas.[2] He lived there a long time with his wife.[3] In 1993 they separated, and Jones moved out to an apartment but continued to pay the mortgage on the house.[4] Of course, as long as he had a mortgage, he had an escrow account that paid the property taxes.[5] But after he paid off the mortgage in 1997, there was no escrow account to pay the taxes and nobody did.[6] Maybe Jones forgot or did not know he had to pay the taxes; the record does not say.

After three years of not getting tax payments, the Commissioner of State Lands attempted to notify Jones of the delinquency and what he could do about it. The Commissioner did so by sending a certified letter to the address of the house, which seemed like a sensible enough course of action and was required by the relevant statutes.[7] Nobody at the address signed for the letter and nobody appeared at the Post Office to claim it within fifteen days.[8] So it was returned unopened to the Commissioner.[9]

Two years after the letter was returned to sender, the Commissioner placed a notice of public sale of the property in the local pa-

1. 126 S. Ct. 1708 (2006).
2. Jones v. Flowers, 126 S. Ct. 1708, 1712 (2006).
3. *Jones*, 126 S. Ct. at 1712.
4. *Id.*
5. *Id.*
6. *Id.*
7. *Id.*
8. *Id.*
9. *Id.*

per.[10] Unsurprisingly, Jones did not see it, and the sale went forward with no bidders.[11] The Commissioner then negotiated a private sale to Linda Flowers.[12] The Commissioner then sent another certified letter to Jones – this one informing him of his right to redeem the property – at the address of the house, but it too went unclaimed.[13] Flowers then purchased the house for just over $20,000, which was about $60,000 under its market value.[14] Flowers then brought a suit to evict the occupants of the house, including Jones's daughter, who was actually served with process in the eviction action.[15] Realizing that something serious was afoot, the daughter then notified Jones.[16] Jones brought suit in Arkansas state court to set aside the sale on the grounds that the efforts at notifying him did not comport with the constitutional requirement of due process.[17]

Students of civil procedure can hardly avoid seeing the ironic parallels between *Jones* and the almost 140-year-old decision in *Pennoyer v. Neff*.[18] In *Pennoyer,* the case most often thought to link due process and jurisdiction,[19] Marcus Neff (played by Gary Jones in this case) discovered his land sold to Sylvester Pennoyer (played by Linda Flowers in this case) to pay off a debt that was only a small fraction of the value of the land.[20] Like the victorious Neff of several generations ago, Jones too would win on due process grounds. Moreover, as I shall argue below, the *Jones* case could perhaps prove to be a significant link in the chain that binds due process back together after it began an unraveling in the wake of *Pennoyer.*

The key question in *Jones* was whether the efforts to notify him of the sale met the constitutional standard articulated in *Mullane v. Central Hanover Trust Co.*[21] In *Mullane*, the seminal notice case, the Court held that the constitutional minimum is to provide "notice reasonably calculated, under all the circumstances, to apprise interested parties of the pendency of the action and afford them an opportunity

10. *Id.*
11. *Id.*
12. *Id.* at 1712-13.
13. *Id.* at 1712.
14. *Id.* at 1713.
15. *Id.*
16. *Id.*
17. *Id.*
18. 95 U.S. 714 (1877).
19. Pennoyer v. Neff, 95 U.S. 714, 733 (1877) ("Since the adoption of the Fourteenth Amendment to the Federal Constitution, the validity of such judgments may be directly questioned, and their enforcement in the State resisted, on the ground that proceedings in a court of justice to determine the personal rights and obligations of parties over whom that court has no jurisdiction do not constitute due process of law.").
20. In *Pennoyer*, the underlying debt was about $300 and the value of the land was alleged to be about $15,000. *Pennoyer*, 95 U.S. at 719.
21. 339 U.S. 306 (1950).

to present their objections."[22] While this flexible formulation might have been some comfort to Jones, the specific application of it in the *Mullane* case seemed to create a safe harbor rule for notification by mail.[23] Because of the reasonable certainty of accurate delivery of first-class mail, the *Mullane* Court held that its use satisfies due process assuming that the interested party's address can be learned relatively easily.[24]

That formulation might have been sufficient to resolve the case against Jones, because the Commissioner made two separate efforts to notify him by mail. Indeed, that was essentially the tack taken by the *Jones* dissent.[25] But the nagging problem was that the letters had not actually notified Jones, and the Commissioner knew or should have known this as they were twice returned undelivered.[26] While it would be impracticable to have a due process standard that required certain *success* of notification, the majority was troubled by a scheme that—at least in Jones's case—ended in certain *failure*.[27]

The Court colorfully made this point by analogizing the attempts at notification in *Jones* to the Commissioner preparing a stack of notices and then seeing "the departing postman accidentally drop[ ] the letters down the storm drain."[28] As the majority pointed out, nobody who actually *wanted* the interested party to find out about the action "would simply shrug his shoulders as the letters disappeared and say 'I tried.'"[29] In fact, a person actually desirous of giving notice would surely follow up. And "especially . . . when . . . the subject matter of the letter concerns such an important and irreversible prospect as the loss of a house."[30] In a case such as this, in which the Commissioner had "unique" information that Jones had not been notified, the majority concluded that reasonable follow-up steps were needed.[31] These might have been as simple as re-sending the letter by ordinary mail so that no signature was required or sending the letter to "occupant," a step that the majority noted was already required by many states with similar statutes.[32]

22. Mullane v. Cent. Hanover Trust Co., 339 U.S. 306, 314 (1950).
23. *Mullane*, 339 U.S. at 318-19.
24. *Id.* at 318 ("Where the names and post office addresses of those affected by a proceeding are at hand, the reasons disappear for resort to means less likely than the mails to apprise them of its pendency.").
25. *Jones*, 126 S. Ct. at 1723 (Thomas, J., dissenting).
26. *Id.* at 1712.
27. *Id.* at 1716.
28. *Id.*
29. *Id.*
30. *Id.*
31. *Id.*
32. *Id.* at 1718-19.

This is essentially all there is to *Jones*, which is why I began this Essay with the observation that it will not go down in the annals of famous Supreme Court decisions. The immediate consequence is that Gary Jones gets his house back, assuming he comes up with the money to pay the back taxes. The indirect consequence is that Arkansas (and probably several other states) will have to amend their tax sale statutes to require follow-up measures of the kind the Court endorsed. By Supreme Court standards, these are modest consequences.

I believe, however, that the significance of *Jones* is considerably broader. The constitutional requirement of due process – emanating from the Fifth Amendment[33] in application to the federal government and the Fourteenth Amendment[34] to the states – has always had many facets. One facet is its "substantive" component that protects citizens from "irrational" governmental classifications and invasions of fundamental rights without a compelling governmental justification.[35] Much, of course, has been written on substantive due process.[36] It is, however, in truth, a constitutional doctrine closely related to equal protection and quite removed from procedural due process.[37]

If we turn to the procedural (or really more accurately "non-substantive") aspect of due process, we observe that it has at least three different facets. One is the "notice" facet displayed in *Jones*. It took on its modern form in the *Mullane* case upon which *Jones* heavily relied. *Mullane* insisted that before an individual could suffer an adverse consequence in a civil case, some reasonable effort must be made to notify him of the pendency of the action. The consequence of *Mullane* and its progeny was to strike down statutes that relied entirely on notification methods such as newspaper publication,[38] courthouse postings,[39] postings on real estate[40] and the like, which had little chance of coming to the attention of the interested party.

Its second facet is the requirement of reasonable procedures for deciding controversies involving the "life, liberty, or property" of affected citizens. In its modern incarnation, this doctrine emanates

33. U.S. CONST. amend. V.

34. U.S. CONST. amend. XIV.

35. *See, e.g.*, Lawrence v. Texas, 539 U.S. 558, 580 (2003) (O'Connor, J., concurring) (noting that substantive due process protects against invasions of fundamental rights and irrational classifications).

36. *See, e.g.*, Steven J. Eagle, *When Does Retroactivity Cross the Line?*: Winstar, Eastern Enterprises *and Beyond: Substantive Due Process and Regulatory Takings: A Reappraisal*, 51 ALA. L. REV. 977 (2000).

37. *See, e.g.*, City of Cuyahoga Falls v. Buckeye Cmty. Hope Found., 538 U.S. 188 (2003) (considering both equal protection and substantive due process challenges).

38. *See, e.g.*, Walker v. City of Hutchinson, 352 U.S. 112 (1956).

39. *See, e.g.*, Mennonite Bd. of Missions v. Adams, 462 U.S. 791 (1983).

40. *See, e.g.*, Greene v. Lindsey, 456 U.S. 444 (1982).

from *Mathews v. Eldridge*.[41] In *Mathews*, the Court rejected earlier, more absolutist formulations[42] of the "fair procedures" requirement in favor of a cost-benefit analysis of a particular procedure.[43] At issue in *Mathews* was whether a claimant for Social Security disability benefits was entitled to a trial-type administrative hearing before his benefits were cut off. Although then-recent Supreme Court decisions strongly suggested an affirmative answer to this question,[44] the Court held that because it was essentially a medical determination, which could be resolved with reasonable accuracy on a paper record, a pre-termination trial-type hearing was not cost-justified.[45] Having live testimony would not contribute sufficiently to an accurate resolution of the matter to require its use given the amount at stake for the claimant and the costs that it would impose on the government.[46]

The third facet of non-substantive due process is jurisdictional due process. Although due process was first arguably connected to state-court jurisdiction in *Pennoyer*, that connection had less significance until it was applied directly to state courts.[47] That direct restraint led to a spate of efforts by state legislatures to expand the reach of their courts to reach certain classes of defendants, such as non-resident motorists who were involved in accidents in their states.[48] Finally, in 1945 the Supreme Court relaxed the constitutional standards for state-court jurisdiction by holding in *International Shoe Co. v. Washington*[49] that "'traditional notions of fair play and substantial justice'" required only that a defendant have "certain minimum contacts"[50] with the forum state in order for its courts to reach the defendant.

Currently, the Supreme Court and commentators think of these three lines of cases in isolation. The *Jones* decision, for example, cites cases that are mostly in the *Mullane* line. State-court jurisdiction cases rely almost exclusively on cases in the "minimum contacts" line

41. 424 U.S. 319 (1976).

42. *See, e.g.*, Goldberg v. Kelly, 397 U.S. 254 (1970).

43. Commentators have noted that *Mathews* essentially embodies cost-benefit analysis. *See, e.g.*, RICHARD A. POSNER, ECONOMIC ANALYSIS OF LAW 550 (4th ed. 1992).

44. *Goldberg*, 397 U.S. at 264 ("[W]hen welfare is discontinued, only a pre-termination evidentiary hearing provides the recipient with procedural due process.").

45. Mathews v. Eldridge, 424 U.S. 319, 339-49 (1976).

46. *Mathews*, 424 U.S. at 339-49.

47. Riverside & Dan River Cotton Mills v. Menefee, 237 U.S. 189 (1915) (striking down on due process grounds a North Carolina state court decision asserting jurisdiction based solely upon service of a corporate officer while in the forum).

48. *See, e.g.*, Hess v. Pawloski, 274 U.S. 352 (1927) (Massachusetts statute upheld).

49. 326 U.S. 310 (1945).

50. Int'l Shoe Co. v. Washington, 326 U.S. 310, 316 (1945) (quoting Milliken v. Meyer, 311 U.S. 457, 463 (1940)).

of cases.[51] The "reasonable procedures" cases in the *Mathews* line are essentially all lumped under the heading of "administrative due process."[52] Commentary, including my own, has mostly treated the lines as distinct.[53]

But what if we began to think of these as one, rather than several issues? My contention is that doing so would promote analytical clarity. The problems of notice and jurisdiction only began to separate in the minimum contacts era of state court jurisdiction. To return to *Pennoyer*, intuitively, the injustice to Marcus Neff seems the same as the injustice visited on Gary Jones: neither one had a reasonable chance to learn of the proceeding that would cost him his real property. But the Supreme Court in *Pennoyer* rescued Neff from his plight not because of a failure of *notice*, but rather because the state court there had not done enough to assert its *power* at the beginning of the case in failing to seize the land until after judgment.[54] The *Pennoyer* Court treated notice as an afterthought noting that

> [t]he law assumes that property is always in the possession of its owner, in person or by agent; and it proceeds upon the theory that its seizure will inform him, not only that it is taken into the custody of the court, but that he must look to any proceedings authorized by law upon such seizure for its condemnation and sale.[55]

While that might well have been a fanciful assumption in Neff's case (he was living in another state at the time), the Court clearly treated the questions of jurisdictional power and notice as interdependent. And, of course, the primary method of obtaining *in personam* jurisdiction was physical service of summons and complaint while the defendant was present in the state, a method still sufficient both to notify the defendant and to demonstrate the state court's power over him.[56]

The unwinding of notice and state court jurisdiction was a slow process. Even as state court jurisdictional bases began to grow with enactments like the non-resident motorist statutes, the Court spoke of the problem of jurisdiction and notice as if they were identical. The Court upheld non-resident motorist statutes with reasonable notice

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51. *See, e.g.*, Asahi Metal Indus. Co. v. Superior Court, 480 U.S. 102 (1987).

52. *See, e.g.*, Schaffer v. Weast, 546 U.S. 49 (2005).

53. *See, e.g.*, Patrick J. Borchers, *The Death of the Constitutional Law of Personal Jurisdiction: From* Pennoyer *to* Burnham *and Back Again*, 24 U.C. DAVIS L. REV. 19 (1990).

54. *Pennoyer*, 95 U.S. at 727-28.

55. *Id.* at 727.

56. *See, e.g.*, Burnham v. Superior Court, 495 U.S. 604 (1990).

schemes but struck down those without them.[57] It was not until *Mullane* and then its swift application to *in rem* proceedings—in which it was still thought that seizure of the property might be sufficient both for notice and power purposes[58]—that it became clear that the issues were quite distinct.

So where does *Jones* fit in all of this? The fascinating suggestion in *Jones* is that the *Mathews* cost-benefit analysis is now part of the constitutional standard for notice. Although the *Jones* Court did not cite *Mathews*, *Jones*'s holding that better efforts are required especially when "the subject matter of the letter concerns such an important and irreversible prospect as the loss of a house"[59] imports that framework. In other words, the Court was saying, sensibly enough I think, that it would have been a different case had it involved a twenty-five dollar parking ticket rather than $60,000 worth of equity in a home. The critical insight of *Mathews* is that more is required when a lot is at stake and there is much room for disagreement and compromise.

But what about the minimum contacts cases? One of the important developments in this line of cases has been the growth of an independent reasonableness test alongside the requirement of minimum contacts. This reasonableness test involves the weighing of five factors, which are "'the burden on the defendant,' 'the forum State's interest in adjudicating the dispute,' 'the plaintiff's interest in obtaining convenient and effective relief,' 'the interstate judicial system's interest in obtaining the most efficient resolution of controversies,' and the 'shared interest of the several States in furthering fundamental substantive social policies.'"[60] This test is the *Mathews* test recast for the issue of the choice of a state forum. The elements of the test that include the burden on the defendant and the plaintiff's interest are essentially the costs to those parties of various forum choices. If the parties differ as to the appropriate forum, then these factors should point toward the forum that is the least burdensome in the aggregate to all of the parties. This is essentially the *Mathews* test's required balancing of the cost of providing an additional procedure against the value of the claimant's interest. The three "state interest" factors can

57. *Compare Hess*, 274 U.S. 352 (statute upheld), *with* Wuchter v. Pizzutti, 276 U.S. 13 (1928) (statute held to violate due process because of lack of a reasonably certain notice scheme).

58. *See, e.g.*, Schroeder v. City of New York, 371 U.S. 208 (1962) (condemnation action).

59. *Jones*, 126 S. Ct. at 1716.

60. Burger King Corp. v. Rudzewicz, 471 U.S. 462, 476-77 (1985) (quoting World-Wide Volkswagen Corp. v. Woodson, 444 U.S. 286, 292 (1980)); *see also Asahi Metal Indus. Co.*, 480 U.S. at 113 (quoting same five factors).

be thought of as proxies for the prong of *Mathews* that focuses on the accuracy of resolution.

In other words, the "reasonableness" test for state-court jurisdiction might be thought of this way. A reasonable forum is the one that is the least expensive in the aggregate to all of the parties, provided that this forum choice does not exact an unjustified cost in the accuracy of the resolution of the case. In practice, this test would lead to the invalidation of relatively few forum choices. In most cases, the plaintiff will pick out a forum that is the least burdensome and expensive to him and one that has the best chance of accurate resolution of the case through access to the evidence and the witnesses. The plaintiff has an incentive to make such a choice because he bears the burden of proof and without reasonable and cost-effective access to the proof cannot make his case.

The portion of the state-court jurisdictional test that needs to be jettisoned or at least considerably relaxed—if this re-unification is to take place—is the insistence that each defendant have minimum contacts with the forum. In practice, the insistence that the plaintiff be required to establish independently that each defendant has purposeful, claim-related contacts has served to defeat reasonable forum choices.

The Supreme Court's decision in *World-Wide Volkswagen Corp. v. Woodson*[61] provides a good example of how over-zealous application of the purposeful contacts requirement can have this effect. In that case, plaintiffs with a products liability claim for the placement of the gas tank in their Audi sued in an Oklahoma state court, which is where the wreck and the fire took place. The plaintiffs sued two defendants over which Oklahoma's jurisdiction was essentially undisputed: the manufacturer and the importer of the car. Two other defendants, the New York car dealer and the regional distributor, contested jurisdiction, and the Supreme Court held that their lack of purposeful contacts made them immune to Oklahoma's assertion of jurisdiction. But, measured by the reasonableness standard, Oklahoma was a justified choice.[62] Requiring the plaintiffs to split their action and pursue two of the defendants in New York would have exacted costs from the plaintiffs greatly in excess of the cost savings to the defendants

61. 444 U.S. 286 (1980).

62. Further evidence that Oklahoma was a reasonable choice is that no party actually contemplated New York as a forum. The desire to have the deal and the distributor dismissed was driven by a desire to create complete diversity of citizenship under 28 U.S.C. § 1332 and remove the case from Oklahoma state court to Oklahoma federal court, which was perceived by the defendants to be more friendly. *See* Charles W. Adams, Worldwide Volkswagen v. Woodson—*The Rest of the Story*, 72 NEB. L. REV. 1122 (1993).

and could well have contributed to an inaccurate resolution of the case because of the possibility of conflicting judgments. Moreover, forcing all or part of the case away from Oklahoma, the forum with the best access to the evidence necessary to resolve the case, imposed costs with no corresponding benefit and could also contribute to an inaccurate resolution of the case.

In contrast, *Burger King Corp. v. Rudzewicz*[63] was a case in which the Court was correct to find the forum choice reasonable. In that case, a Florida-based franchisor sued one of its Michigan franchisees for defaulting on its contractual obligations. There the burdens were essentially mirror images of each other: Michigan was less burdensome for the defendant and Florida less so for the plaintiff. So in the aggregate, Florida was no more expensive. Florida presented no significant costs with respect to inaccurate resolution of the case as the parties had stipulated to the application of Florida law.[64] Of course, had the franchisee sued first in a Michigan court seeking a declaratory judgment, it might well be that Michigan would have been found to be a reasonable choice, too. But if we limit the due process question to the one posed by *Mathews*, of whether the chosen procedure imposes unjustified costs, then there was no reason to defeat the Florida forum choice.

This is not to say that the defendant's contacts or connections with a forum ought to have no bearing on the resolution of a jurisdictional challenge. The more significant the defendant's contacts with the forum, the less credible the defendant's argument that the forum choice will impose unjustified costs. But to insist, as the Court has on several occasions,[65] that each defendant meet a particular threshold for forum contacts without regard to the costs of alternative forums is to give the defendant an unjustified forum veto.[66]

The trend is to free procedural due process doctrine from formalisms. With regard to fair procedures, it was the abandonment of the nearly unalterable right to a trial-type hearing. With regard to fair notice, it was the abandonment of the notion that ritualized steps could be sufficient no matter how unlikely to effect actual notice. It is with regard to state-court jurisdiction where formalism retains the

63. 471 U.S. 462 (1985).

64. *Burger King Corp.*, 471 U.S. at 481.

65. *See, e.g.*, World-Wide Volkswagen v. Woodson, 444 U.S. 286 (1980) (products liability action not allowed to proceed against dealer and distributor in state of injury); Kulko v. Superior Court, 436 U.S. 84 (1978) (child support action not allowed to go forward in home state of children); Shaffer v. Heitner, 433 U.S. 186 (1977) (shareholders' derivative action not allowed to proceed in state of incorporation).

66. *See, e.g.*, Robert J. Condlin, *"Defendant Veto" or "Totality of the Circumstances"? It's Time for the Supreme Court to Straighten out the Personal Jurisdiction Standard Once Again*, 54 CATH. U. L. REV. 53 (2004).

strongest hold because of the insistence of a minimum territorial connection for each defendant with the forum state. But with the development of the reasonableness test, as well as lower court erosion of the requirement of a territorial nexus at least when the case is pursued in a federal court,[67] that last formalist pillar may be crumbling. The Court could thus substantially unify procedural due process either by abandoning the minimum contacts test in favor of the five-factor reasonableness test or, perhaps, subordinating the minimum contacts requirement to the reasonableness test. Under current doctrine, the minimum contacts test is the primary one with reasonableness acting as a secondary check. If the Court reversed the priority of the two, it would go a good distance toward completing the much-needed unification of procedural due process that it continued in *Jones*.

67. *See, e.g.*, Republic of Panama v. BCCI Holdings (Luxembourg) S.A., 119 F.3d 935 (11th Cir. 1997) (contacts with forum state not necessary if forum choice reasonable).