

In Search of Due Process: Notice in New York Administrative Tax Sales

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IN SEARCH OF DUE PROCESS: NOTICE IN NEW YORK ADMINISTRATIVE TAX SALES

In the state of New York, the real property tax is a locally levied and administered tax.¹ In addition to the New York Real Property Tax Law ("RPTL"), which contains general procedures that may be used statewide for the administration of property taxes,² many localities impose property taxes under their local laws.³ Taxes on real property have been and continue to be the

¹ See N.Y. CONST. art. IX, § 2(c)(8). This section of the state constitution allows localities to levy and collect property taxes. See *infra* note 3. Real property taxes are levied by each "assessing unit," defined by the New York Real Property Tax Law ("RPTL") as "a city, town, county having a county department of assessment with the power to assess real property, or a village . . ." N.Y. REAL PROP. TAX LAW § 102(1) (McKinney Supp. 1987). "With minor exceptions, there have been no taxes on real property actually levied by the State of New York itself since 1928, all such taxes being levied by municipalities." Godfrey, *Enforcement of Delinquent Property Taxes in New York*, 24 ALB. L. REV. 271, 274 n.7 (1960). The real property tax is an *ad valorem* tax, based upon the value of the property taxed. See N.Y. REAL PROP. TAX LAW § 102(14) (McKinney Supp. 1987); *Ampco Printing-Advertiser's Offset Corp. v. City of New York*, 14 N.Y.2d 11, 22, 197 N.E.2d 285, 288, 247 N.Y.S.2d 865, 870, *appeal dismissed*, 379 U.S. 5 (1964). The most attractive aspect of a real property tax is the theoretical ease and certainty of collection; the land itself is a readily available, unconcealable asset from which the taxing authority may satisfy the taxes due. See Godfrey, *supra*, at 273-74; REPORT OF THE STATE OF NEW YORK TEMPORARY COMMISSION ON THE REAL PROPERTY TAX 1-2 (1979) [hereinafter TAX COMMISSION REPORT].

² See N.Y. REAL PROP. TAX LAW §§ 900-1097 (McKinney 1972 & Supp. 1987). The RPTL consolidated the general laws relating to assessment and taxation of real property. See *Town of Harrison v. County of Westchester*, 46 Misc. 2d 1035, 1040-41, 261 N.Y.S.2d 627, 633 (Sup. Ct. Westchester County 1965), *modified on other grounds*, 25 App. Div. 2d 759, 269 N.Y.S.2d 508 (2d Dep't), *modified on other grounds*, 18 N.Y.2d 759, 222 N.E.2d 742, 276 N.Y.S.2d 124 (1966). "The memorandum of the Advisory Committee to the Board of Equalization and Assessment On the Real Property Tax Law made it clear that it was a consolidation, recodification, rearrangement, simplification and restatement of *general laws relating to assessment and taxation of real property*. . ." *Id.*; see also N.Y. REAL PROP. TAX LAW § 1570 (McKinney Supp. 1987) (authorizing Board of Equalization and Assessment to establish minimum standards for real property tax administration).

³ See N.Y. CONST. art. IX, § 2(c)(ii) "[E]very local government shall have power to adopt and amend local laws not inconsistent with the provisions of this constitution or any general law relating to the following subjects . . . (8) The levy, collection and administration of local taxes authorized by the legislature and of assessments for local improvements, consistent with laws enacted by the legislature." *Id.* "This chapter shall not be deemed to repeal or otherwise affect the provisions of any special or local law . . . it being the intention of the legislature that the same shall continue in full force and effect. . ." N.Y. REAL PROP. TAX LAW § 1606 (McKinney 1972). Some of the largest municipalities in the state use their

largest single source of revenue for New York's municipalities.⁴ Thus, it is important for the financial health of the municipality that the real property tax be efficiently enforced.⁵ The methods used to enforce the payment of delinquent property taxes include: levying upon any personal property of the delinquent taxpayer,⁶ instituting supplementary proceedings akin to an action upon a judgment docketed;⁷ foreclosure of tax liens, as in an action to

own tax sale procedures. See, e.g., NEW YORK, N.Y., ADMIN. CODE §§ 11-201 to 11-428 (1986); WESTCHESTER COUNTY, N.Y., ADMIN. CODE §§ 283.091 to .671 (1987), reprinted in 1 N.Y. State & Loc. Tax Serv. (P-H) ¶¶ 34,060-34,095 (1962); NASSAU COUNTY, N.Y., ADMIN. CODE §§ 5-2.0 to 6-29.0 (1981), reprinted in 1 N.Y. St. & Loc. Tax Serv. (P-H) ¶¶ 33,810-33,871 (1961). The rationale for "home rule" in New York is "a recognition that essentially local problems should be dealt with locally and that effective local self-government is the desired objective." *Kelley v. McGee*, 57 N.Y.2d 522, 535, 443 N.E.2d 908, 912, 457 N.Y.S.2d 434, 438 (1982). See generally Godfrey, *supra* note 1, at 287-90 (historical discussion of "home rule" collection of property taxes).

⁴ See THE TEMPORARY STATE COMMISSION ON STATE AND LOCAL FINANCES, VOL. 2: THE REAL PROPERTY TAX 6 (1975); Godfrey, *supra* note 1, at 274.

For the fiscal year ending in 1984, local governments in New York State raised \$11,782.2 million (of their total revenues of \$37,049.7 million, which includes money from the state and federal governments) from real property taxes. THE NELSON A. ROCKEFELLER INSTITUTE OF GOVERNMENT, 1985-86 NEW YORK STATE STATISTICAL YEARBOOK 386 (12th ed. 1986).

⁵ See *Harris v. Gaul*, 572 F. Supp. 1554, 1554-57 (N.D. Ohio 1983) (discussing how property tax administration caused financial problems for Cleveland); Comment, *Mennonite Board of Missions v. Adams: Insufficient Notice Under the New York In Rem Statutes*, 33 BUFFALO L. REV. 389, 404 n.82 (1984) (large dollar amounts lost to delinquent property taxes in Boston, Chicago, and New York City); see also L. SCHROEDER & D. SJOQUIST, THE PROPERTY TAX AND ALTERNATIVE LOCAL TAXES: AN ECONOMIC ANALYSIS 1-10 (1975) (suggesting real property taxes may be incapable of meeting needs of large cities).

⁶ See N.Y. REAL PROP. TAX LAW § 926(2) (McKinney 1972). Once notice of the auction has been posted for at least six days in three public places in the city or town where the sale is to take place, the owner's personal property is then seized and sold at public auction. *Id.* § 926(2), (3) (McKinney 1972). This action is taken by the collecting officer of the municipality. *Id.* § 926(2); see also N.Y. REAL PROP. TAX LAW § 102(5) (McKinney 1984) (collecting officer defined). Levying upon personal property is possible because the owner of real property is personally liable for the tax due on his property. See *id.* § 926(1) (McKinney 1972). This remedy is rarely invoked by taxing authorities, presumably because to do so on a regular basis would require procedures that are inefficient relative to proceedings against property. See 1 N.Y. St. & Loc. Tax Serv. (P-H) ¶ 31,570 (May 7, 1986); 3 N.Y. Tax Serv. (MB) ¶ 76.20 (1987).

⁷ See N.Y. REAL PROP. TAX LAW § 990 (McKinney 1972); NASSAU COUNTY, N.Y., ADMIN. CODE § 5-32.0 (1981), reprinted in 1 N.Y. St. & Loc. Tax Serv. (P-H) ¶1 33,826 (May 22, 1948). This action is taken by the county treasurer after the collecting officer has returned the tax unpaid. N.Y. REAL PROP. TAX LAW § 990(1) (McKinney 1972); see also N.Y. CIV. PRAC. L. & R. 5201-5252 (McKinney 1978 & Supp. 1987) (describing procedures for enforcement of judgment docketed). The advantage of these procedures is that the delinquent taxpayer is brought into court to determine whether there are any assets from which the tax may be satisfied. See N.Y. CIV. PRAC. L. & R. 5231 (McKinney 1978). Again, these procedures are rarely used due to tax districts' preference for the more reliable proceedings against

foreclose a mortgage,⁸ and the oldest and most controversial procedure, the administrative tax sale.⁹

The administrative tax sale is viewed as a relatively quick way to collect delinquent property taxes and to transfer property from delinquent taxpayers to persons willing and able to pay their taxes.¹⁰ Implicit in this procedure is a conflict between the interest of the municipality in seasonably collecting the tax due and the constitutional right of the delinquent taxpayer to receive due process before being deprived of his property.¹¹ Recently, several courts have differed as to the constitutionality of administrative tax sale procedures used in New York.¹² Nassau County has re-

reality. See 1 N.Y. St. & Loc. Tax Serv. (P-H) ¶ 31,570 (May 7, 1986); 3 N.Y. Tax Serv. (MB) ¶ 76.20 (1987).

⁸ See N.Y. REAL PROP. TAX LAW §§ 1110-1116 (McKinney 1972 & Supp. 1987). Article 11 of the RPTL is New York's enactment of the Uniform Delinquent Tax Enforcement Act ("Uniform Act"), which allows any tax district to adopt provisions for the foreclosure of tax liens, as in an action to foreclose a mortgage, instead of the traditional administrative tax sale procedures embodied in article 10 of the RPTL. *Id.* § 1104(3). In addition, the Uniform Act allows tax districts to adopt procedures to foreclose tax liens owned by the tax district itself by an action *in rem*, displacing the procedures of article 10 of the RPTL for tax liens which are not less than four years old. *Id.* The major advantage of the *in rem* proceedings over the administrative tax sale procedures is that a tax district which does not wish to sell tax liens to private speculators does not have to go through the formality of a tax sale to itself. Compare N.Y. REAL PROP. TAX LAW § 1120(1) (McKinney Supp. 1987) ("Whenever it appears that a tax district owns a tax lien which has been due and unpaid for a period of at least four years . . . such tax lien . . . shall be summarily foreclosed . . . notwithstanding any omission to hold a tax sale prior to such foreclosure") with N.Y. REAL PROP. TAX LAW § 1008(3) (McKinney Supp. 1987) ("the board of supervisors of any county may by resolution authorize and direct the county treasurer to purchase lands at the tax sale, without competitive bidding, for the gross amount due thereon.")

⁹ See N.Y. REAL PROP. TAX LAW §§ 1000-1030 (McKinney 1972 & Supp. 1987); *infra* notes 19-26 and accompanying text.

¹⁰ See *Elinor Homes Co. v. St. Lawrence*, 113 App. Div. 2d 25, 32-33, 494 N.Y.S.2d 889, 894-95 (2d Dep't 1985); see also Note, *Tax Sale Law in New Jersey: A Re-Examination*, 26 RUTGERS L. REV. 266, 276, 288-89 (1973) (suggesting less burdensome procedures on individual tax sale purchasers as essential to effective tax collection). But see Godfrey, *supra* note 1, at 277-79 (suggesting that administrative tax sale is ineffective when delinquent realty becomes unmarketable); HILLHOUSE & CHATTERS, TAX REVERTED PROPERTIES IN URBAN AREAS 9 (1942) (people less willing to buy delinquent properties).

¹¹ See *Mennonite Bd. of Missions v. Adams*, 462 U.S. 791, 806-07 (1983) (O'Connor, J., dissenting); Note, *The Constitutionality of Notice by Publication in Tax Sale Proceedings*, 84 YALE L.J. 1505, 1511-15 (1975). The fourteenth amendment provides in part: "nor shall any State deprive any person of life, liberty, or property, without due process of law . . ." U.S. CONST. amend. XIV, § 1.

¹² See, e.g., *Cooper v. Makela*, 629 F. Supp. 658, 660-62 (W.D.N.Y. 1986) (holding RPTL sections 1002 and 1014 unconstitutional as applied to mortgagees); *Sheehan v. County of Suffolk*, 67 N.Y.2d 52, 56-59, 490 N.E.2d 523, 524-25, 499 N.Y.S.2d 656, 657-58, (tax sale procedures in Suffolk, Orange, and Sullivan counties provide constitutional notice)

sponded to criticism by enacting sweeping procedural changes to avoid constitutional challenges.¹³

Challenges to administrative tax sales have focused on the adequacy of the notice informing property owners that they might lose their properties.¹⁴ Although *in rem* proceedings, including tax sales, were historically thought to require only minimal notice,¹⁵ the United States Supreme Court long ago rejected that theory in *Mullane v. Central Hanover Bank & Trust Co.*¹⁶ More recently, in *Mennonite Board of Missions v. Adams*,¹⁷ the Court held the general standards of due process applicable in the context of an administrative tax sale.¹⁸

cert. denied, 106 S. Ct. 3299 (1986); *McCann v. Scaduto*, 123 App. Div. 2d 111, 116, 510 N.Y.S.2d 149, 153 (2d Dep't 1986) (per curiam) (provisions of Nassau County, N.Y., Administrative Code ("NCAC") in effect before November, 1986 held constitutional).

¹³ See NASSAU COUNTY, N.Y. LOCAL LAW No. 13 (Nov. 17, 1986); see also *Nassau County Ends Home Tax-Lien System*, N.Y. Times, Nov. 24, 1986, at D14, col. 1. (discussing amendments to NCAC tax sale procedures).

¹⁴ See *Cooper*, 629 F. Supp. at 659; *Sheehan*, 67 N.Y.2d at 56, 490 N.E.2d at 524, 499 N.Y.S.2d at 657; *McCann*, 123 App. Div. 2d at 112, 510 N.Y.S.2d at 150.

¹⁵ See *Longyear v. Toolan*, 209 U.S. 414, 417-18 (1908); see also *Ballard v. Hunter*, 204 U.S. 241, 262 (1907) (notice by publication did not deprive owner of due process); *Leigh v. Green*, 193 U.S. 79, 90-93 (1904) (publication of notice which merely described land adequate).

The rationale for requiring less notice in proceedings against property stemmed from the territorial theory of jurisdiction, under which a state could adjudicate matters relating only to persons and property within its borders. See *Pennoyer v. Neff*, 95 U.S. 714, 720 (1878). Thus, states developed *in rem* proceedings to gain jurisdiction over the property of nonresident owners against whom notice by publication was deemed sufficient. *Id.* at 727. This minimal notice rule was then invoked in *in rem* proceedings against resident property owners despite the availability of personal service. See *Leigh*, 193 U.S. at 92. Notice by publication in tax sales was justified by: the fiction that the proceeding was against the land only and that the owner was deemed to have a duty to keep informed of actions affecting his property—the "caretaker theory," see, e.g., *Huling v. Kaw Valley Ry. & Improvement Corp.*, 130 U.S. 559, 563-64 (1889); the argument that when one does not pay the property taxes due on his land, he *knows* that his property will be sold, see *Botens v. Aronauer*, 32 N.Y.2d 243, 248-49, 298 N.E.2d 73, 74-75, 344 N.Y.S.2d 892, 895, *appeal dismissed*, 414 U.S. 1059 (1973); and the government's strong interest in collecting taxes. See *supra* notes 4-5 and accompanying text; Note, *supra* note 11, at 1511-14.

¹⁶ 339 U.S. 306 (1950).

¹⁷ 462 U.S. 791 (1983).

¹⁸ *Id.* at 798. Articulating the standard for notice that satisfies due process, the *Mullane* Court stated that notice should be "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." 339 U.S. at 314. *Mullane* expressly rejected the contention that the notice required should hinge on the classification of an action as *in personam*, *in rem*, or *quasi in rem*. *Id.* at 312. Nonetheless, before *Mennonite*, several state courts, including the New York Court of Appeals, held that publication was adequate notice of a pending tax sale. See, e.g., *Botens*, 32 N.Y.2d at 249, 298 N.E.2d at 75, 344 N.Y.S.2d at 896 (distinguish-

This Note will analyze existing law regarding administrative tax sales in New York and will discuss procedures which may lack the degree of notice required by the due process clause. The Note will outline the RPTL enforcement procedures with respect to delinquent tax and compare them with the procedures used by Nassau County. These procedures will be evaluated in light of recent case law, and it will be suggested that several major municipalities in New York must amend their administrative tax sale procedures to provide to property owners actual notice prior to any tax sale. Furthermore, it will be suggested that the RPTL, as well as several local laws, must be changed to afford mortgagees, and others with an interest in the property, notice prior to a tax sale.

CURRENT PROCEDURE FOR ADMINISTRATIVE TAX SALE IN NEW YORK

The RPTL requires administrative tax sale proceedings to be initiated whenever unpaid taxes are returned to the county treasurer.¹⁹ If those taxes remain unpaid for a locally specified period, the county treasurer commences a tax sale proceeding by sending notice of the sale by first class mail to the name and address of the owner or occupant listed on the assessment roll, and publishing a notice describing the properties to be sold.²⁰ When the statutory

ing *Mullane* because a delinquent taxpayer *should* know his property will be sold); see also Comment, *supra* note 5, at 395 n.33 (collecting cases).

In *Mennonite*, the Court attempted to end this controversy by applying the *Mullane* standards to tax sales. See *Mennonite*, 462 U.S. at 798. Plaintiff, the Mennonite Board of Missions, was the mortgagee of certain property which, pursuant to Indiana law, was sold at a tax sale when the mortgagor failed to pay the property tax. *Id.* at 792-94. The Mennonite Board did not receive actual notice either prior to the tax sale or before expiration of the period during which the property could be redeemed. See *id.* at 794. Thus the only notice informing the Mennonite Board of the threat to its valuable interest in the property was the notice posted in the county courthouse and published three times in a newspaper. See *id.* at 793. The Court, citing *Mullane*, held that the notice provisions of the Indiana code violated the mortgagee's right to due process. See *id.* at 798; see also *Mullane*, 339 U.S. at 315 ("It would be idle to pretend that publication alone as prescribed here, is a reliable means of acquainting interested parties of the fact that their rights are before the courts.").

¹⁹ See N.Y. REAL PROP. TAX LAW §§ 936, 1000 (McKinney 1972 & Supp. 1987). Upon the return of the unpaid delinquent taxes, five percent of the tax is added to the total amount due. See *id.* § 936(2) (McKinney 1972). This Note will be limited primarily to county procedures since counties are generally responsible for the enforcement of real property taxes; special rules are applicable to other governmental units. See *id.* §§ 1300-1342 (school districts); §§ 1400-1412 (villages) (McKinney 1972 & Supp. 1987).

²⁰ See N.Y. REAL PROP. TAX LAW §§ 1000, 1002 (McKinney 1972 & Supp. 1987); see, e.g., 17 Op. State Compt. 58 (1961) (treasurer must hold tax sale of properties on which taxes are delinquent). In most counties following the RPTL, tax sale proceedings commence

notice requirements are satisfied, the county treasurer must "sell the property" for the amount of tax owing on it.²¹ Following the sale, the owner, occupant, mortgagee, or other interested party may, within a one-year period, redeem the property.²² Moreover, at least three months prior to the expiration of the one year redemption period, the county treasurer must publish a notice of unredeemed property and must, prior to publication, send notice by first class mail to the name and address of the owner or occupant.²³

on August 1, if the tax is still unpaid as of that date. *See* N.Y. REAL PROP. TAX LAW § 1000 (McKinney 1972 & Supp. 1987). The mailed notice must "contain a brief description of such parcel, the aggregate amount due on such parcel at the time of sale, and a statement that unless such amount is paid prior to the commencement of tax sale proceedings the parcel will be sold." *Id.* § 1002(4) (McKinney 1972 & Supp. 1987) The published notice should include a brief description of the parcel, the name of the owner or occupant appearing on the tax rolls, and the aggregate amount of taxes due at the time of the sale. *Id.* § 1002(1). The published notice must appear in two newspapers designated by the county board of supervisors, and must be published once every other week for a six week period prior to the day of the tax sale. *See id.* § 1002(2).

²¹ N.Y. REAL PROP. TAX LAW § 1006 (McKinney 1972). The sale price includes the amount of the original tax plus: five percent of the original tax, added pursuant to section 936; ten percent per annum interest from the day of February following the levy of the tax; and expenses chargeable against the parcel, including the expense of mailing the notice of the tax sale. *Id.* § 1002 (McKinney 1972 & Supp. 1987).

At the tax sale the purchaser does not actually obtain the property, rather he receives a tax sale certificate; this certificate represents an inchoate right to a conveyance of the realty that will mature only in the event that a redemption payment is not made. *See* United States v. General Douglas MacArthur Senior Village, Inc., 366 F. Supp. 302, 304 (E.D.N.Y. 1973), *aff'd*, 508 F.2d 377 (2d Cir. 1974).

²² *See* N.Y. REAL PROP. TAX LAW § 1010 (McKinney Supp. 1987). Payment is made to the county treasurer for the benefit of the tax sale purchaser. *See id.* The redemption price includes the amount paid at the tax sale plus interest and other amounts assessed on the property. *See id.* "The right to redeem land sold to enforce the collection of taxes assessed against it exists only as permitted by [the RPTL] and under such conditions as are expressed therein." *See* Elinor Homes Co. v. St. Lawrence, 113 App. Div. 2d 25, 29, 494 N.Y.S.2d 889, 892 (2d Dep't 1985). A one year redemption period is extended to three years in the case of occupied or mortgaged property. N.Y. REAL PROP. TAX LAW §§ 1022, 1024 (McKinney 1972 & Supp. 1987); *see infra* note 24 and accompanying text.

²³ *See* N.Y. REAL PROP. TAX LAW § 1014 (McKinney 1972 & Supp. 1987). The notice must contain, *inter alia*, "the amount necessary to redeem the parcel computed to the last day on which such redemption can be made and . . . [must state] that unless such parcel is redeemed on or before such day it will be conveyed to the purchaser." *Id.* § 1014(3) (McKinney Supp. 1987). The mailed notice must be given at least fourteen days prior to the commencement of the published notice, and the expense of such notice is deemed part of the tax due on the property so that either the redeeming owner or the tax sale purchaser who eventually takes title to the property must pay said tax. *See id.* The mailed notice required by section 1014 should be addressed to the owner of record at the time of the mailing. *See* Op. Couns. St. Bd. Equalization & Assessment No. 68. Section 1022 requires that notice to redeem be given to the occupant, but failure to do so merely extends the redemption period. *See* N.Y. REAL PROP. TAX LAW § 1022 (McKinney 1972 & Supp. 1987); *see, e.g.,* Congrega-

If the property is not redeemed, the county treasurer will execute a recordable conveyance of the property, which vests absolute title in fee in the tax sale purchaser.²⁴

Local laws also govern administrative tax sales and where the RPTL differs, local law controls.²⁵ The Nassau County Administrative Code ("NCAC"), unlike the RPTL, provides advance notice of the tax sale solely by publication.²⁶ In addition, the RPTL and several local laws do not provide notice to mortgagees and others with similar interests in real property.²⁷ The NCAC had been severely

tion *Yetev Lev D'Satmar, Inc. v. County of Sullivan*, 59 N.Y.2d 418, 452 N.E.2d 1207, 465 N.Y.S.2d 879 (1983) (mailed notice to record owner, though different from occupant, is sufficient).

²⁴ N.Y. REAL PROP. TAX LAW §§ 1018(1), 1020(1) (McKinney 1972 & Supp. 1987). The tax sale purchaser must, within five years, apply to the county treasurer for a conveyance of the property otherwise his certificate becomes void. *Id.* § 1018(2), (3) (McKinney 1972). In tax districts that have adopted Title Two of the Uniform Act (RPTL sections 1110-1116), tax purchasers may, in the alternative, foreclose their tax lien as in an action to foreclose a mortgage pursuant to the real property actions and proceedings law. *Id.* §§ 1114, 1116 (McKinney 1972 & Supp. 1987). It would, however, be highly unusual for a tax lien speculator to elect to go through the expensive foreclosure proceeding merely to recoup his investment plus interest; he could more easily take a conveyance of the property in fee and dispose of it, possibly receiving windfall profits. *See McCann v. Scaduto*, 123 App. Div. 2d 111, 120, 510 N.Y.S.2d 149, 155 (2d Dep't 1986) (Lazer, J., dissenting) ("Not surprisingly, nearly all lienholders opted for the much simpler procedure 'to elect to accept a deed of conveyance of such property'" under similar provisions of NCAC).

The redemption period for occupied or mortgaged parcels, or both, is extended to three years. N.Y. REAL PROP. TAX LAW §§ 1022, 1024 (McKinney 1972 & Supp. 1987). The purchaser, after receiving a conveyance upon the expiration of section 1018's one year redemption period, may limit the three year period to six months (effectively making the minimum redemption period one year and six months) by personally serving the occupant or a mature member of his family, or, when the occupant resides outside the city or town where the property is located, by mailing a duly prescribed notice of redemption and filing within one month an affidavit stating that the notice was duly served. *See id.* (McKinney 1972 & Supp. 1987). If notice is duly served and recorded, and the property has not been redeemed, the purchaser acquires indefeasible title to the property and all others shall be forever barred from redeeming such real property. *See id.* §§ 1022(1)(c), 1024(1) (McKinney 1972 & Supp. 1987). Thereafter, the conveyance may be cancelled only upon a finding, within five years of the expiration of the redemption period, that the tax sale, or the underlying tax, was unconstitutional or otherwise illegal. *Id.* § 1020(3) (McKinney 1972); *see, e.g., Union & New Haven Trust Co. v. People*, 26 Misc. 2d 831, 215 N.Y.S.2d 88 (1960) (when assessment of land invalid, tax deed to land void), *aff'd*, 15 App. Div. 2d 1, 221 N.Y.S.2d 320 (3d Dep't 1961).

²⁵ *See* 1 N.Y. St. & Loc. Tax Serv. (P-H) ¶(P 33),650-34,097 (1986); *see also* Godfrey, *supra* note 1, at 281-85 (discussing local tax procedure).

²⁶ *See* NASSAU COUNTY, N.Y., ADMIN. CODE §§ 5-37.0, 5-39.0 (1982). The NCAC provides for publication in a designated newspaper once in each of three successive calendar weeks and provides for sale of the tax liens "without further notice." *See id.*

²⁷ *See* N.Y. REAL PROP. TAX LAW § 1002 (McKinney 1972 & Supp. 1987); NASSAU COUNTY, N.Y., ADMIN. CODE § 5-37.0 (1982); Suffolk County Tax Act, ch. 311, §§ 43, 45, [1920] N.Y. Laws 867, as amended by Ch. 650, § 1, [1964] N.Y. Laws 1735, *reprinted in* 1

criticized because of its notice by publication provisions,²⁸ and the intricate legal jargon contained in mailed notices.²⁹

Nassau, in November 1986, amended the NCAC.³⁰ Residential "class one" property owned by county residents now requires that notice to redeem must be *personally* served on the owner.³¹ With regard to *all* property, the notice must "be printed in a clear and coherent manner using words with common and everyday meanings."³² Moreover, those holding liens on residential property may no longer "elect to accept a conveyance to the property." Instead, their remedy "shall be limited to an action to foreclose the tax lien."³³ Although these amendments to the NCAC are a welcome

N.Y. St. & Loc. Tax Serv. (P-H) ¶¶ 34,018-34,019 (1986).

²⁸ NASSAU COUNTY, N.Y., ADMIN. CODE § 5-37.0 (1982); see *McCann v. Scaduto*, 123 App. Div. 2d 111, 119, 510 N.Y.S.2d 149, 155 (2d Dep't 1986) (Lazer, J., dissenting) (amendments to NCAC "prompted in part . . . by the extreme results" it allowed). The NCAC has been criticized for permitting private individuals, hoping to get title to properties for much less than market value, to speculate in tax liens. See *Newsday*, Nov. 16, 1986, at 22.

²⁹ See *Newsday*, Nov. 16, 1986, at 5; *N.Y. Times*, Nov. 24, 1986, at D14, col. 1 ("people who lost their homes [thought] . . . the letter [informing them that they had three months to redeem their property] was unclear and did not spell out the consequences of the action"). When notice is mailed to the owner, its only reference to the consequences of nonredemption is an indication of the "day upon which the holder of the tax lien may elect to accept a deed of conveyance of such property or to call his money and foreclose his tax lien." NASSAU COUNTY, N.Y., ADMIN. CODE § 5-51.0 (as amended Nov. 17, 1986). A conveyance under the NCAC entails consequences radically different from those of a conveyance under the RPTL: the conveyance in Nassau entitles the holder, upon recordation, to obtain actual possession of the property; whereas even after a conveyance pursuant to RPTL section 1018, in the case of occupied or mortgaged property, or both, there is an additional redemption period of up to two years. Compare NASSAU COUNTY, N.Y., ADMIN. CODE §§ 5-52.0, 5-56.0 (1981) with N.Y. REAL PROP. TAX LAW § 1020(2) (McKinney 1972 & Supp. 1987). See also N.Y. REAL PROP. TAX LAW §§ 1022, 1024 (McKinney 1972 & Supp. 1987) (sections extending redemption period even after conveyance).

³⁰ See NASSAU COUNTY, N.Y., LOCAL LAW No. 13 (as amended Nov. 17, 1986).

³¹ See NASSAU COUNTY, N.Y., ADMIN. CODE 5-51.0(c) (as amended Nov. 17, 1986). Notice to nonresident owners is by certified mail. See *id.* Personal service to a natural person is delivery to the person to be notified or delivery to a qualified other person at the home or business, provided that in the latter case notice must also be mailed to the person's last known residence. See N.Y. CIV. PRAC. L. & R. 308(1), (2) (McKinney Supp. 1987). If neither of these methods is possible, personal service may be accomplished by affixing a notice to the door of the person's business or home and mailing notice to the last known address. N.Y. CIVIL PRAC. L. & R. 308(4) (McKinney 1987); see also N.Y. CIV. PRAC. L. & R. 309, 310, 311 (McKinney 1972 & Supp. 1987) (personal service upon infants and incompetents; partnerships; and corporations, respectively).

"Class one" property is defined in the RPTL to include all one, two and three family residential property. See N.Y. REAL PROP. TAX LAW § 1802(1) (McKinney Supp. 1987).

³² NASSAU COUNTY, N.Y., ADMIN. CODE § 5-51.0(b) (as amended Nov. 17, 1986).

³³ See NASSAU COUNTY, N.Y., ADMIN. CODE § 5-75.0 (added Nov. 17, 1986) (only applicable to residential "class one" property). The clear benefit of limiting the remedy to foreclo-

step towards more equitable administration of the real property tax, it is submitted that the changes made in Nassau and other counties, particularly with respect to notice procedures, still do not satisfy the due process clause of either the federal or New York constitution.³⁴

CONSTITUTIONAL NOTICE DUE PERSONS SUBJECT TO A TAX SALE

A. Notice to Owners and Occupants

Notice by personal service, though certainly more reliable than other methods,³⁵ has never been held to be constitutionally required in tax sales.³⁶ The requirement that tax lienors of residen-

sure of the lien is the avoidance of a complete forfeiture of the owner's interest in cases in which the amount of the lien is far less than the value of the property. This is true because, in a foreclosure proceeding, after all liens on the property and expenses of the mortgage proceeding have been paid, the prior owner of the property, as owner of the equity of redemption, is entitled to any surplus. See N.Y. REAL PROP. ACTS. LAW §§ 1311, 1361 (McKinney 1979). Thus, the tax sale purchaser's recovery would be limited to the amount he paid at the sale plus interest and costs. See *id.* § 1354 (McKinney 1979 & Supp. 1987).

The only other significant amendment to the NCAC is the establishment of a "Hardship Review Board" which has the power, in cases of hardship applicable only to "class one" residential property that the owner uses as his principal dwelling place, and upon application within two years of the tax sale, to grant a one year extension to pay back taxes, interest, and other charges. NASSAU COUNTY, N.Y., ADMIN. CODE §§ 5-76.0(c), 5-24.0(8) (as amended Nov. 17, 1986).

³⁴ See U.S. CONST. amend. XIV, § 1; N.Y. CONST. art. 1, § 6. In the administration of property taxes, the state constitution has no greater notice requirements than those of the federal Constitution. See *Botens v. Aronauer*, 32 N.Y.2d 243, 248-49, 298 N.E.2d 73, 74-75, 344 N.Y.S.2d 892, 894-96, *appeal dismissed*, 414 U.S. 1059 (1973); *In re 801-15 East New York Ave.*, 290 N.Y. 236, 240-41, 48 N.E.2d 502, 504 (1943). See also Godfrey, *Enforcement of Delinquent Property Taxes in New York (Part III)*, 25 ALB. L. REV. 212, 225 n.72 (1961) (citing New York Court of Appeals cases).

³⁵ See *Mullane v. Central Hanover Bank & Trust Co.*, 339 U.S. 306, 313 (1950) ("Personal service of written notice within the jurisdiction is the classic form of notice always adequate in any type of proceeding").

³⁶ See *Mennonite Bd. of Missions v. Adams*, 462 U.S. 791, 800 (1983); see also *Mullane*, 339 U.S. at 314 ("Personal service has not in all circumstances been regarded as indispensable to the process due to residents. . . . We disturb none of the established rules on these subjects."). The factors that weigh against providing personal notice are: the sheer expense of providing such service to delinquent taxpayers, see *Harris v. Gaul*, 572 F. Supp. 1554, 1556-57 (N.D. Ohio 1983); Comment, *supra* note 5, at 403-04 n.81; the fact that taxpayers are charged with the knowledge that taxes must be paid regularly, see *Congregation Yetev Lev D'Satmar, Inc. v. County of Sullivan*, 59 N.Y.2d 418, 427, 452 N.E.2d 1207, 1212, 465 N.Y.S.2d 879, 884 (1983); cf. *Mennonite*, 462 U.S. at 807-08 (O'Connor, J., dissenting) (state tax assessment occurs with regularity and predictability); *Texaco, Inc. v. Short*, 454 U.S. 516, 532 (1982) (that persons owning property within State charged with knowledge of relevant statutory provisions affecting control or disposition of such property); and the need of local government to collect the tax expeditiously, see *Mennonite*, 462 U.S. at 805-06

tial property foreclose the lien instead of simply accepting a conveyance, as they had formerly done, is likewise not constitutionally required, because the forfeiture involved in the automatic conveyance occurs only after a lengthy redemption period.³⁷ Similarly, the requirement that notice be in comprehensible language is a reform that enhances the likelihood that the tax will be paid *and* protects property owners by informing them clearly of the consequences of inaction.³⁸ Therefore, while the amendments to the NCAC give greater protection to property owners, they are not constitutionally required. Nassau County and several other counties in New York, however, still give notice prior to the tax sale *only by publication*.³⁹ In light of the holding in *Mennonite* that "[t]he tax sale immediately and drastically diminishes the value" of the property,⁴⁰ it is argued that, at minimum, mailed notice must be given to the owner in fee *prior* to the tax sale.⁴¹

The Court in *Mennonite* stated that, before conducting a tax sale at which a lien diminishing a person's property interest will be granted, and which "may result in the complete nullification" of

(O'Connor, J., dissenting).

³⁷ See, e.g., *Chapman v. Zobelein*, 237 U.S. 135, 138 (1915); *Sheehan v. County of Suffolk*, 67 N.Y.2d 52, 59-60, 490 N.E.2d 523, 525-26, 499 N.Y.S.2d 656, 658-59, *cert. denied*, 106 S. Ct. 3299 (1986); *McCann v. Scaduto*, 123 App. Div. 2d 111, 127-28, 510 N.Y.S.2d 149, 160-61 (2d Dep't 1986) (Lazer, J., dissenting).

³⁸ See *supra* note 29 (problems with unclear notice); cf. N.Y. GEN. OBLIG. LAW § 5-702 (McKinney Supp. 1987) ("plain English" statute for certain consumer contracts).

³⁹ See, e.g., NASSAU COUNTY, N.Y., ADMIN. CODE §§ 5-37.0, 5-39.0 (1981) (*unchanged by NASSAU COUNTY, N.Y., LOCAL LAW NO. 13, 1986*); WESTCHESTER COUNTY, N.Y., ADMIN. CODE § 283.391 (1987), *reprinted in* 1 N.Y. St. & Loc. Tax Serv. (P-H) ¶ 34,071.15 (June 11, 1962) (providing for only constructive notice, published and posted); Niagara County Tax Act, ch. 160, § 7, [1937] N.Y. Laws 611, *reprinted in* 1 N.Y. St. & Loc. Tax Serv. (P-H) ¶ 33,894 (Apr. 19, 1937) (published notice). *But see* N.Y. REAL PROP. TAX LAW § 1002(4) (McKinney Supp. 1987) (requiring first class mail notice sent to owner or occupant).

⁴⁰ *Mennonite*, 462 U.S. at 798. Justice O'Connor's vigorous dissent in *Mennonite* did not question the majority's assertion that the tax sale diminished the value of the mortgagee's interest. See *id.* at 806-09 (O'Connor, J., dissenting).

⁴¹ See *McCann*, 123 App. Div. 2d at 124, 510 N.Y.S.2d at 158 (Lazer, J., dissenting) (attributing failure to comply with *Mullane* in tax sales to "apparent reluctance to upset widespread traditional practices"). Justice Lazer recognized that notice of the tax sale mailed to the owner is a fundamental due process requirement. See *id.* at 123, 510 N.Y.S.2d at 157 (Lazer, J., dissenting). It was erroneously assumed that Nassau County's amendments to the NCAC provided for such notice. *Id.* at 125, 510 N.Y.S.2d at 159 (Lazer, J., dissenting). Justice Lazer also mistakenly asserted that "until [Nassau County's] recent repair of relevant portions of the code, it remained alone among the counties in the State to retain publication as the only method of giving notice of tax lien sales." *Id.* In fact, other counties in the state use publication as the sole method of notice of impending tax sale. See *supra* note 39 and accompanying text.

his property interest, the municipality must give due process notice to those affected.⁴² Both the granting of a lien and the ultimate divestment of the property are basic to tax lien sales, as are the NCAC procedures.⁴³ When the interested party is "reasonably identifiable" this requirement is not met solely by constructive notice.⁴⁴ The Court found that mortgagees who have recorded their mortgages in the public land records are "reasonably ascertainable."⁴⁵ Furthermore, owners have a greater property interest than mortgagees,⁴⁶ and are easier to identify and locate.⁴⁷ Therefore, mandatory mailed notice to owners and occupants, *before* the

⁴² *Mennonite*, 462 U.S. at 798.

⁴³ See NASSAU COUNTY, N.Y., ADMIN. CODE §§ 5-39.0, 5-58.0 (1981); Godfrey, *supra* note 1, at 282-85. The *McCann* court justified Nassau County's notice by publication by distinguishing the NCAC tax sale provisions from the Indiana statute at issue in *Mennonite*. See *McCann*, 123 App. Div. 2d at 116-17, 510 N.Y.S.2d at 153. The majority stated the dispositive factor in *Mennonite* was that "title to the mortgaged premises passed to the purchaser at the sale, subject to defeasement only if the former owner redeemed the property by paying his taxes." *Id.* at 116, 510 N.Y.S.2d at 153. The court used the word "title" because the Indiana statute employed the following language: "The county treasurer shall sell the real property. . . ." IND. CODE ANN. § 6-1.1-24-5(e) (West Supp. 1986). But, just as under New York's RPTL and Nassau's Administrative Code, the purchaser in Indiana does *not* actually become the owner in fee simple until a lengthy redemption period has expired. See IND. CODE ANN. § 6-1.1-25-4 (West 1982); N.Y. REAL PROP. TAX LAW §§ 1018, 1020, 1022, 1024 (McKinney 1972 & Supp. 1987). The *McCann* majority "distinguished" the NCAC, noting that "[t]he tax lien purchaser [in Nassau County] does not obtain title to the premises on the date of the sale but merely acquires a tax lien and does not become entitled to exercise any possessory interest in the premises until the end of the statutory two year redemption period." *McCann*, 123 App. Div. 2d at 117, 510 N.Y.S.2d at 153; NASSAU COUNTY, N.Y., ADMIN. CODE § 5-52.0 (1981). The same statement, however, describes the precise rights of the tax sale purchaser under the statutes addressed in *Mennonite*. See IND. CODE ANN. § 6-1.1-24-9(b) (West 1982).

A tax sale under the NCAC or the RPTL is a condition precedent to the owner losing his property and gives the purchaser "a lien which ha[s] priority over other liens and over the owner's fee title as well," see *McCann*, 123 App. Div. 2d at 127, 510 N.Y.S.2d at 160 (Lazer, J., dissenting), which is precisely the way the Supreme Court analyzed the Indiana statute. See *Mennonite*, 462 U.S. at 793 (purchaser acquires certificate of sale which constitutes lien against real property for amount paid). The liens acquired by tax sale purchasers in New York "immediately and drastically diminishes the value" of any other interest in the property, as do the liens under Indiana law, and *Mennonite* demands that those with such an interest be given notice prior to the tax sale. See *McCann*, 123 App. Div. 2d at 130, 510 N.Y.S.2d at 162 (Lazer, J., dissenting).

⁴⁴ See *Mennonite*, 462 U.S. at 798.

⁴⁵ See *id.*

⁴⁶ See Comment, *Mennonite Board of Missions v. Adams: Expansion of the Due Process Requirement*, 46 LA. L. REV. 311, 319 (1985).

⁴⁷ See N.Y. REAL PROP. TAX LAW § 502 (McKinney 1984). The name of the property owner is recorded on the tax rolls at the county treasurer's office, so there is no need to search land records to give owners notice. See *id.*

value of their interests is lessened by the tax sale, is necessary to satisfy due process and should be required in all municipalities that do not already do so.

B. Notice to Mortgagees and Those With Similar Interests

New York's RPTL provides for conditional notice to mortgagees under article 11 *in rem* foreclosures,⁴⁸ but mortgagees do not receive such notice under the administrative tax sale of article 10⁴⁹ nor the various local laws.⁵⁰ The Supreme Court refined the *Mullane* standard in *Mennonite*, extending the due process notice requirement to administrative tax sales.⁵¹ In *Mennonite*, the Court held that a mortgagee, as a party with a substantial property interest, was entitled, when his identity was reasonably ascertainable, to actual notice prior to the tax sale,⁵² but it declined to decide whether notice could be conditioned upon such persons filing with the taxing authority.⁵³ Thus, the Court shifted its focus from whether, under all the circumstances, the notice was reasonably calculated to inform, to whether the names of such persons are reasonably ascertainable.⁵⁴

⁴⁸ See N.Y. REAL PROP. TAX LAW § 1126 (McKinney 1972). Such notice is given without charge and the filing is valid for five years. *Id.*

⁴⁹ See N.Y. REAL PROP. TAX LAW § 1002 (McKinney 1972 & Supp. 1987). When the mortgagee is not given mailed notice before the tax sale, conditional or otherwise, *Mennonite* is applicable, see *supra* notes 42-45 and accompanying text, therefore, this provision was held unconstitutional as applied to mortgagees. See *Cooper v. Makela*, 629 F. Supp. 658, 662 (W.D.N.Y. 1986).

⁵⁰ See *supra* note 39. One New York appellate court divided on the issue of conditional notice. See *In re Foreclosure of Tax Liens by County of Erie*, 103 App. Div. 2d 636, 639-40, 481 N.Y.S.2d 547, 550 (4th Dep't 1984) (applying *Mennonite* in holding unconstitutional *in rem* tax foreclosure giving mortgagee only conditional notice); but see *id.* at 640-41, 481 N.Y.S.2d at 551 (Boomer, J., concurring) (due process satisfied if conditional notice statute was properly drafted, so that once mortgagee files, the sending of notice mandatory, not discretionary).

⁵¹ *Mennonite Bd. of Missions v. Adams*, 462 U.S. 791, 795-800 (1983).

⁵² *Id.* at 798.

⁵³ See *id.* at 793 n.2. In 1980, after the tax sale at issue had already occurred, Indiana provided for mailed notice to mortgagees if the mortgagee requested such notice each year and paid a fee to cover the cost of mailing notice. See IND. CODE ANN. § 6-1.1-24-4.2 (West 1982). The statute was amended in 1986 and now provides for mandatory, unconditional notice to mortgagees, and others with a substantial interest in the realty. See IND. CODE ANN. § 6-1.1-24-4.2 (West Supp. 1986).

⁵⁴ See *Mennonite*, 462 U.S. at 800. "Notice 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 interest of any party, . . . if its name and address are reasonably ascertainable." *Id.* This shift was criticized by the dissent as an unwarranted departure from the *Mullane* standards. See *id.* at 800-01 (O'Connor, J., dissenting).

The relative difficulty or ease of determining affected persons' names and addresses should be only one factor which must be weighed against the government's strong interest in collecting taxes and the burden involved in giving notice.⁵⁵ The *Mennonite* decision was criticized as increasing the burden on the notifier beyond that intended by *Mullane*,⁵⁶ yet the Court explicitly found *Mullane* to be controlling.⁵⁷ Because the *Mullane* balancing standards have been universally followed,⁵⁸ issues such as conditional notice of tax sales to mortgagees, should be decided based upon application of these standards rather than seeking rigid rules as to whom receives a particular form of notice.⁵⁹

While *Mennonite* left many questions unanswered, it is submitted that a careful application of the *Mullane* balancing approach⁶⁰ reveals that conditional notice to mortgagees is "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."⁶¹ The names and addresses of mortgagees may be difficult and expensive to ascertain, thereby infringing on the state's interest in efficient collection of taxes,⁶²

⁵⁵ See *Mennonite*, 462 U.S. at 806-07 (O'Connor, J., dissenting); *Mullane v. Central Hanover Bank & Trust Co.*, 339 U.S. 306, 313-14 (1950).

⁵⁶ See *supra* note 54.

⁵⁷ *Mennonite*, 462 U.S. at 798.

⁵⁸ See *id.* at 797 ("this Court has adhered unwaveringly to the principle announced in *Mullane*.")

⁵⁹ See, e.g., *Mathews v. Eldridge*, 424 U.S. 319, 334-35 (1976); *Cafeteria & Restaurant Workers v. McElroy*, 367 U.S. 886, 895 (1961); *Walker v. City of Hutchinson*, 352 U.S. 112, 115 (1956).

⁶⁰ See *Mullane*, 339 U.S. at 313-16 (against state interest, balance individual interest protected by fourteenth amendment). The dissent in *Mennonite* was critical of the majority for its cursory application of the *Mullane* balancing test, believing too little weight was given to the state's interest in collecting taxes. See *Mennonite*, 462 U.S. at 800-09 (O'Connor, J., dissenting); see also Comment, *supra* note 46, at 315.

⁶¹ See *Mullane*, 339 U.S. at 314 (emphasis added).

⁶² See *Mennonite*, 462 U.S. at 806 (O'Connor, J., dissenting). "[T]hat burden is not limited to mailing notice. Rather, the State must have 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." *Id.* (O'Connor, J., dissenting); see also *In re Foreclosure of Tax Liens by the County of Erie*, 103 App. Div. 2d 636, 641, 481 N.Y.S.2d 547, 551 (4th Dep't 1984) (Boomer, J., concurring) (heavy burden will be placed upon Erie County if required to make title search of each of thousands of properties in tax foreclosure proceedings); Comment, *supra* note 5, at 403 n.81 (expense of title search in Buffalo, New York: \$75-100). The interest of the taxing municipality, which represents all of its residents, is analogous to the trust plan in *Mullane*, where beneficiaries not "on the books" did *not* have to be given actual notice. See *Mullane*, 339 U.S. at 317-18. "Nor do we consider it unreasonable for the State to dispense with more

whereas the mortgagees' interest, though substantial, is not as important as that of the property owner.⁶³ Since it is the common business practice of mortgagees to keep themselves informed of actions affecting their interest, conditional notice is a reasonable mechanism for providing due process in light of the comparatively greater burden of requiring actual notice.⁶⁴ Thus, it is suggested that the due process clause of the Constitution demands notice be given to mortgagees, and those with similar interests; but this notice may be conditioned on their filing with the taxing authority.

CONCLUSION

New York's law governing delinquent property taxes divides responsibility among too many governing bodies and is based upon antiquated procedures.⁶⁵ This may help explain why, thirty-seven years after the Supreme Court specified requisite notice procedures in *Mullane*, some New York municipalities still hold administrative tax sales without adequate notice. Recent reforms in Nassau County are an encouraging sign, but Nassau and other counties still give only published notice prior to tax sales. It is submitted that these counties must minimally provide to delinquent property owners mailed notice of the impending tax sale to comply with constitutional requirements. Further, it is submitted that tax sale laws such as RPTL article 10, which do not provide actual notice to mortgagees, are likewise unconstitutional. Due, however, to the practical difficulties of ascertaining the identity and location of mortgagees and others with a substantial interest in the delinquent property, notice may be conditioned upon such persons filing with the taxing authority.

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certain notice to those . . . whose interests . . . although they could be discovered upon investigation, do not in due course of business come to [the] knowledge [of the person giving notice]." *Id.* As only the owner in fee is personally liable for property taxes, mortgagees do not appear on the tax rolls and thus "do not in due course of business come to [the] knowledge" of the taxing authority. See N.Y. REAL PROP. TAX LAW § 502 (McKinney 1984 & Supp. 1987).

⁶³ See Comment, *supra* note 46, at 321.

⁶⁴ See *Mennonite*, 462 U.S. at 806-09 (O'Connor, J., dissenting); *In re Foreclosure of Tax Liens by County of Erie*, 103 App. Div. 2d 636, 641, 481 N.Y.S.2d 547, 551 (4th Dep't 1984) (Boomer, J., concurring).

⁶⁵ Godfrey, *supra* note 1, at 285-86.