Georgia Law Review

Volume 45 | Number 4 Article 5

2011

EXTRA! Read All About It: Why Notice by Newspaper Publication Fails to Meet Mullane's Desire-to-Inform Standard and How Modern Technology Provides a Viable Alternative

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NOTES

EXTRA! READ ALL ABOUT IT: WHY NOTICE BY NEWSPAPER PUBLICATION FAILS TO MEET *MULLANE*'S DESIRE-TO-INFORM STANDARD AND HOW MODERN TECHNOLOGY PROVIDES A VIABLE ALTERNATIVE

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Notice by publication is a poor and sometimes a hopeless substitute for actual service of notice. Its justification is difficult at best.[1]

I. INTRODUCTION

Due process—as guaranteed by the Constitution[2]—requires an opportunity to be heard.[3] Since early in our Nation's history, the Supreme Court has preferred personal service and greatly disfavored the use of service by publication as a means of effectuating notice.[4] Even so, the Supreme Court has repeatedly found that notice by newspaper publication comports with the Constitution's due process requirements where other forms of service are impracticable.[5] Specifically, in the landmark case *Mullane v. Central Hanover Bank & Trust Co.*,[6] the Court set forth a "desire-to-inform" standard by stating that the means of service "must be such as one desirous of actually informing the [party] might reasonably adopt."[7] This desire-to-inform standard remains the constitutional standard for constructive notice.[8]

In addition to the constitutional standard for notice, there is a procedural standard for meeting due process requirements. The Federal Rules of Civil Procedure (Federal Rules) provide the procedural standard for notification in federal district courts.[9]

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[1] City of New York v. N.Y., New Haven & Hartford R.R. Co., 344 U.S. 293, 296 (1953) (emphasis added).

[2] *See* discussion *infra* Part II.A.

[3] Tennessee v. Lane, 541 U.S. 509, 523 (2004).

[4] *See* Pennoyer v. Neff, 95 U.S. 714, 727 (1877) (disallowing service by publication on a nonresident defendant for in personam actions and requiring that the defendant be personally served within the boundaries of the state for jurisdiction to exist), *overruled in part by* Shaffer v. Heitner, 433 U.S. 186 (1977). *But see id.* (allowing service by publication for actions concerning property within the state that had been seized from a nonresident owner).

[5] Mullane v. Cent. Hanover Bank & Trust Co., 339 U.S 306, 317 (1950) (allowing service by publication "in the case of persons missing or unknown").

[6] 339 U.S 306.

[7] *Id.* at 315.

[8] *See infra* note 60 and accompanying text. Constructive notice is "[s]ervice accomplished by a method or circumstance that does not give actual notice." BLACK'S LAW DICTIONARY 1491 (9th ed. 2009) [hereinafter BLACK'S].

[9] *See* discussion *infra* Part II.C.

Although the Federal Rules do not expressly authorize service of process by publication,[10] newspaper publication has been the ultimate fallback option for meeting the constitutional requirements for notice for decades.[11]

Since *Mullane* was decided in 1950, technology has changed how Americans live, travel, and communicate.[12] In 1950, more than 80% of American adults read a weekday newspaper. Since that time, newspaper circulation has steadily declined, to the point where only 50% of Americans now read a daily paper.[13]

Even when *Mullane* was decided, the Supreme Court acknowledged that service by newspaper publication was a disfavored option—a last resort for meeting constitutional due process requirements.[14] This general discontent with service by publication has continued.[15] In short, the constitutionality of notice by newspaper publication seems only to be based on a total inability of any other, preferred service procedure to provide notice.[16] It has become America's last resort. It is our bottom—the lowest bar permitted that we are willing to hold up as constitutional.

However, given the dramatic decline in newspaper circulation,[17] it can no longer be said that notice by newspaper publication is constitutional. Newspapers are no longer "reasonably calculated"

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[10] *See* FED. R. CIV. P. 4(e)(1) (allowing service which follows state law governing in the jurisdiction where the district court is located).

[11] *See infra* notes 96–97 and accompanying text.

[12] *See* discussion *infra* Part III.A.

[13] *See infra* Figure 3 and accompanying text.

[14] *See* Mullane v. Cent. Hanover Bank & Trust Co., 339 U.S 306, 315 (1950) (opining that the odds that "even a local resident [will not see] an advertisement in small type inserted in the back pages of a newspaper" are large).

[15] *See, e.g.*, Boddie v. Connecticut, 401 U.S. 371, 382 (1971) ("[S]ervice by publication . . . is the method of notice least calculated to bring to a potential defendant's attention the pendency of judicial proceedings."); Polansky v. Richardson, 351 F. Supp. 1066, 1069 (E.D.N.Y. 1972) ("Service of process by means of publication has long been constitutionally suspect."); Abu-Dalbouh v. Abu-Dalbouh, 547 N.W.2d 700, 703 (Minn. Ct. App. 1996) ("[S]ervice by publication is not a reliable means of notifying interested parties . . . .").

[16] Brady v. Brauer, 529 A.2d 159, 162 (Vt. 1987) ("[Publication is] rooted in the necessity raised by the total inability of other service procedures to be used to provide notice.").

[17] *See* discussion *infra* Part III.A.*2*.

to notify.[18] The constitutional requirement has not changed since *Mullane* was decided, but the steady advancement of technology has pulled our society farther and farther from an idle populace that remains in one place, gets its news from one source, and learns about a community while sitting on a neighbor's front porch swing. Just because newspapers existed in 1950 and still exist today does not mean that the newspapers of today meet the constitutional mandate of due process as articulated by the *Mullane* Court's desire-to-inform standard. Society's advancement has created too great of a distance between the American public and the notification announcements in the back pages of local newspapers. If notice by publication was disfavored in 1950 because it provided little, if any, notice,[19] it cannot be constitutionally acceptable in an era where newspaper penetration is nearly half of what it was in 1950.[20]

Another "bottom" is needed. Newspapers can no longer be our last resort. We can do better in meeting our Constitution's call for due process. The same technological advancements that have suppressed newspaper readership can, and should, be leveraged to provide a new notification method. Technology allows people to access the same information from virtually anywhere in the world. The Court should embrace technology and create a centralized, online notification system. The notification system should provide people with a greater opportunity to monitor challenges to their property rights than they have when the Court asks them to stumble upon a legal posting in the fine print in the back pages of a newspaper.[21]

This Note examines the constitutionality of notice by newspaper publication in federal district courts in light of the remarkable technological shifts in information dissemination over the past half-century. This Note focuses on service of process on

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[18] *Mullane*, 339 U.S. at 314.

[19] *See id.* at 315 ("[T]he odds that the information will never reach [the party to be notified] are large indeed.").

[20] *See* discussion *infra* Part III.A.*2* (describing the decline in newspaper readership and penetration).

[21] *See Mullane*, 339 U.S. at 315 ("Chance alone brings to the attention of even a local resident an advertisement in small type inserted in the back pages of a newspaper . . . .").

individuals within the United States.[22] The analysis does not extend to service of process on people or other entities in foreign countries.[23] Because notice by publication is the focus of this Note, the analysis assumes that (1) personal service on the party to be notified is impossible or impracticable and that (2) the party attempting notification has provided the court with a factual basis for why service by publication is warranted.[24]

Part II outlines the constitutional and procedural due process requirements for notice in U.S. district courts. Its discussion of the historical background of the notification standard provides context for the current constitutional requirement for notice. Additionally, Part II assesses the acceptance of service of process by newspaper publication.

Part III analyzes trends in population mobility, newspaper readership, and Internet use over the past several decades. Notice by newspaper publication is then evaluated in light of these trends to determine whether it remains constitutionally adequate. Finally, an alternative method of publication is proposed as a modern-era replacement to the antiquated newspaper publication standard.

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[22] Although not within the scope of this Note, the legal background and analysis can be readily extended to corporations, partnerships, and associations. *See* FED. R. CIV. P. 4(h) for procedural rules related to these entities.

[23] For commentary relating to these issues, see, for example, David P. Stewart & Anna Conley, *E-mail Service on Foreign Defendants: Time for an International Approach?*, 38 GEO. J. INT'L L. 755, 802 (2007) (suggesting that the U.S. legal system needs to adapt to growing Internet use in transnational legal practice); Yvonne A. Tamayo, *Catch Me if You Can: Serving United States Process on an Elusive Defendant Abroad*, 17 HARV. J.L. & TECH. 211, 245 (2003) (concluding that under some circumstances electronic service on international defendants will meet constitutional and procedural due process requirements).

[24] Export-Import Bank v. Asia Pulp & Paper Co., No. 03Civ.8554, 2005 WL 1123755, at *4 (S.D.N.Y. May 11, 2005) ("[A] court may[ ] require parties . . . to show that they have reasonably attempted to effectuate service on the defendant[ ] . . . ." (quoting Ryan v. Brunswick Corp., No. 02-CV-0133, 2002 WL 1628933, at *2 (W.D.N.Y. May 31, 2002))).

II. BACKGROUND: (DUE) SERVICE OF PROCESS REQUIREMENTS

Although a federal civil action begins when the plaintiff files a complaint,[25] a federal court cannot constitutionally exercise jurisdiction over the parties until the defendant is properly served with the summons and the complaint.[26] Proper service requires satisfying both constitutional due process standards[27] and the provisions of applicable federal or state rules governing service.[28] The following sections detail the constitutional and federal procedural requirements for providing adequate notice.

A. THE CONSTITUTIONAL REQUIREMENT

The Fifth Amendment prohibits the federal government from depriving any person of "life, liberty, or property without due process of law."[29] The Fourteenth Amendment prohibits the states from doing the same.[30] The long-standing tradition of the Supreme Court[31] is that civil judgments which threaten Fifth and Fourteenth Amendment rights are legitimate only if the affected parties can participate in the processes that produce the judgments.[32] A fundamental component of participation in civil

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[25] FED. R. CIV. P. 3.

[26] *See* FED. R. CIV. P. 4(k)(1) (describing how serving process establishes personal jurisdiction over the defendant); *see also* Murphy Bros. v. Michetti Pipe Stringing, Inc., 526 U.S. 344, 350 (1999) ("In the absence of [service,] a court ordinarily may not exercise power over [the named defendant]."); Earle v. McVeigh, 91 U.S. 503, 503–04 (1875) ("Due notice to the defendant is essential to the jurisdiction of all courts . . . .").

[27] *See* discussion *infra* Part II.A.

[28] *See* discussion *infra* Part II.C.

[29] U.S. CONST. amend. V.

[30] U.S. CONST. amend. XIV, § 1.

[31] The U.S. Supreme Court addressed procedural due process and service of process as early as 1877. Pennoyer v. Neff, 95 U.S. 714, 733 (1877), *overruled in part by* Shaffer v. Heitner, 433 U.S. 186 (1977).

[32] *See* Greene v. Lindsey, 456 U.S. 444, 449 (1982) ("The fundamental requisite of due process of law is the opportunity to be heard." (quoting Grannis v. Ordean, 234 U.S. 385, 394 (1914))); *see also* 3 RONALD D. ROTUNDA & JOHN E. NOWAK, TREATISE ON CONSTITUTIONAL LAW: SUBSTANCE AND PROCEDURE 123 (4th ed. 2008) (listing as essential elements of due process: "adequate notice" and "an opportunity to present evidence"); Lawrence B. Solum, *Procedural Justice*, 78 S. CAL. L. REV. 181, 273–74 (2004) (arguing that participation is the first principle of procedural justice).

litigation is the opportunity to be heard.[33] Consequently, awareness of a pending matter concerning a party's property interest is a prerequisite to fair litigation.[34]

It is well understood that the right to be heard is not protected unless a party is notified that a claim is pending against him.[35] Service gives the defendant notice of the pending action, provides information regarding the claimant and the claim, and informs the defendant of when and where he is to appear so that his objections can be heard.[36] It is only when an individual has such notice that he can fairly choose to contest, acquiesce, or default.[37] Where service satisfies due process requirements, the court gains jurisdiction over the action,[38] and that action may result in deprivation of the defendant's property without violating the defendant's constitutional rights.[39]

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[33] *See* Baldwin v. Hale, 68 U.S. 223, 233 (1863) ("Common justice requires that no man shall be condemned in his . . . property without notice and an opportunity to make his defence."); *supra* note 32 (indicating that the opportunity to be heard is a fundamental component of due process).

[34] *See* Fuentes v. Shevin, 407 U.S. 67, 80 (1972) ("[T]he central meaning of procedural due process [is] clear: Parties whose rights are to be affected are entitled to be heard; and in order that they may enjoy that right they must first be notified." (quoting *Baldwin*, 68 U.S. at 233) (internal quotation marks omitted)); *see also* Grannis v. Ordean, 234 U.S. 385, 394 (1914) ("The fundamental requisite of due process of law is the opportunity to be heard. . . . And it is to this end . . . that summons or equivalent notice is employed."); Roller v. Holly, 176 U.S. 398, 409 (1900) (finding that a person is entitled to some notice that is "reasonable and adequate for the purpose" before he can be deprived of his property).

[35] *See supra* notes 32–34 and accompanying text.

[36] *See* FED. R. CIV. P. 4(a)(1) (providing requirements for the contents of the summons for a claim filed in federal court); FED. R. CIV. P. (4)(c)(1) (stating that a copy of the complaint must accompany the summons); FED. R. CIV. P. 8 (detailing contents that are required to be in the complaint); *see also* Rachel Cantor, Comment, *Internet Service of Process: A Constitutionally Adequate Alternative?*, 66 U. CHI. L. REV. 943, 945 (1999) (discussing service of process under the Federal Rules).

[37] Mullane v. Cent. Hanover Bank & Trust Co., 339 U.S. 306, 314 (1950).

[38] *See supra* note 26 and accompanying text. Other requirements necessary to create jurisdiction are assumed for the purposes of this Note.

[39] *See Mullane*, 339 U.S. at 313–14 (holding that notice and an opportunity to present objections are fundamental to due process); *see also* Weimer v. Amen, 870 F.2d 1400, 1405 (8th Cir. 1989) ("The cornerstone of due process is the prevention of abusive governmental power.").

B. THE CONSTITUTIONAL REQUIREMENT'S HISTORICAL CONTEXT

Historically, jurisdictional power to confer a judgment derived from territorial boundaries and individual state sovereignty.[40] Therefore, to establish personal jurisdiction under constitutional law, the nonresident defendant needed to either voluntarily appear to defend against the action or be personally served while physically within the state.[41] Where service within the state was not possible, limited instances of alternative service were held to provide adequate notice.[42]

Pennoyer v. Neff,[43] the defining case for territorial boundaries serving as jurisdictional limits, defended geographically constricted service as crucial to the functioning of a territorial jurisdictional system.[44] The Court in *Pennoyer* made it clear that states could not assert personal jurisdiction over anyone not physically present within their territorial boundaries.[45]

As society became more interconnected, jurisdiction based on geographic boundaries manifested problems. For example, plaintiffs could select an amenable forum and sue nonresident defendants simply by serving them when they entered a state's territory.[46] Also, plaintiffs could circumvent *Pennoyer*'s presence requirement by attaching property located within a state to gain

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[40] *See* Pennoyer v. Neff, 95 U.S. 714, 722 (1877) (holding that "no State can exercise direct jurisdiction . . . over persons or property [outside of] its territory"), *overruled in part by* Shaffer v. Heitner, 433 U.S. 186 (1977).

[41] *Id.* at 733.

[42] *See id.* at 727 (citing seizure and notice by publication as an adequate alternative theory of jurisdiction); *see also* John M. Murphy III, Note, *From Snail Mail to E-mail: The Steady Evolution of Service of Process*, 19 ST. JOHN'S J. LEGAL COMMENT. 73, 77–86, 98–99 (2004) (providing a history of the acceptance of alternative forms of process including service by mail, publication, telefax, facsimile, and e-mail).

[43] 95 U.S. 714.

[44] *See generally id.* (holding that a court may exert personal jurisdiction over a party if that party is served with process while physically within the state's territory).

[45] *See supra* note 40.

[46] *See, e.g.*, Smith v. Gibson, 3 So. 321, 321 (Ala. 1888) (upholding the Alabama court's jurisdiction when a nonresident defendant was served process while present in the state); *see also* Stewart v. Ramsay, 242 U.S. 128, 129 (1916) (recognizing an exception to the general rule that a defendant is subject to suit where served process when the defendant is personally served in the forum but is present only to serve as a witness in an unrelated case).

quasi-in-rem personal jurisdiction over nonresident defendants for matters unrelated to the attached property or the defendant's in-state acts.[47]

Responding to the problems associated with the strict, geography-based rule propounded in *Pennoyer*, the Supreme Court supplemented territory-based jurisdiction with a "minimum contacts" standard.[48] The minimum contacts standard as expressed by the Court noted:

> [D]ue process requires only that in order to subject a defendant to a judgment *in personam*, if he be not present within the territory of the forum, he have certain minimum contacts with it such that the maintenance of the suit does not offend traditional notions of fair play and substantial justice.[49]

The Court found substituted service to be adequate where it gave "reasonable assurance that the notice [would] be actual."[50]

Inevitably, the Court's expansion of personal jurisdiction over nonresident defendants—combined with an increasingly mobile and interconnected society—opened the door to new questions related to service of process. Five years after the Court reexamined *Pennoyer*'s territorial formalism, the Court set out new constitutional notice requirements for service of process.[51] Specifically, in *Mullane v. Central Hanover Bank & Trust Co.*,[52] the Court revolutionized many assumptions about notice and due

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[47] *See, e.g.*, Ownbey v. Morgan, 256 U.S. 94, 111 (1921) ("[A] property owner who absents himself from the territorial jurisdiction of a state, leaving his property within it, must be deemed . . . to consent that the state may subject such property to judicial process to answer demands made against him . . . .").

[48] *See* Int'l Shoe Co. v. Washington, 326 U.S. 310, 316 (1945) (recognizing that personal jurisdiction exists when "certain minimum contacts" within the forum are established).

[49] *Id.* (internal citation omitted).

[50] *See id.* at 320 (upholding service of process by mail as sufficient where a lawsuit was pending against a defendant who had systematic and continuous business contacts with the state).

[51] *See infra* notes 52–59 and accompanying text.

[52] 339 U.S. 306 (1950).

process.[53] First, the Court refused to distinguish in rem and in personam actions when evaluating sufficiency of process.[54] Furthermore, the Court established a reasonableness test for service of process based on the "practicalities and peculiarities" of the individual case,[55] holding that, at a minimum, an individual must receive "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."[56] Under the facts in *Mullane*, the Court found that constructive notice via publication in a newspaper was constitutionally adequate where individuals' names and addresses were not known or reasonably ascertainable.[57] However, the Court found that similar publication was not reasonably calculated to notify the intended individuals—and thus constitutionally inadequate—where individuals' names and addresses were known or where the published notice did not name the known individuals it was intending to inform.[58] Asserting the importance of meaningful notice, the Court stated that "[service of] process which is a mere gesture is not due process. The means employed must be such as one desirous of actually informing the absentee might reasonably adopt to accomplish it."[59]

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[53] *See* 4A CHARLES ALAN WRIGHT & ARTHUR R. MILLER, FEDERAL PRACTICE AND PROCEDURE § 1074, at 365 (3d ed. 2002) ("[M]any of the assumptions about notice were proven erroneous by the Mullane decision.").

[54] *See Mullane*, 339 U.S. at 312 (criticizing distinctions between in rem and in personam actions); *see also* WRIGHT & MILLER, *supra* note 53, § 1074, at 364–65 ("Prior to the Supreme Court's decision in Mullane v. Central Hanover Bank & Trust Company, service by publication had been a normal means of service in actions in rem and quasi-in-rem."); *id.* at 366 ("The Supreme Court made it clear [in *Mullane*] that due process of law should not depend upon whether an action is classified as in personam or in rem or quasi-in-rem.").

[55] *Mullane*, 339 U.S. at 314–15.

[56] *Id.* at 314.

[57] *Id.* at 317–18 (distinguishing service upon known beneficiaries from service upon unknown beneficiaries).

[58] Notably, the Court recognized that service by publication was sufficient for those parties whose addresses could not be discovered with due diligence. *Id.*

[59] *Id.* at 315.

Mullane's desire-to-inform standard has provided the constitutional framework for notice for over sixty years.[60] Although personal service is always adequate,[61] it is not always necessary.[62] Furthermore, there is no set formula for determining the sufficiency of alternative service. Rather, the process used must simply be reasonably calculated to "apprise interested parties of the pendency of the action," based on the "practicalities and peculiarities of the case."[63] In short, under *Mullane*'s desire-to-inform standard, the notification method "must be such as one desirous of actually informing the absentee might reasonably adopt" and must be more than a "mere gesture."[64]

C. THE PROCEDURAL REQUIREMENT

In addition to constitutional due process requirements,[65] proper service requires satisfying procedural requirements provided in applicable statutes.[66] The Federal Rules govern service of process

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[60] *See, e.g.*, Jones v. Flowers, 547 U.S. 220, 226–34 (2006) (describing the constitutional requirements of notice and finding that mailed notice which returned unopened to the sender did not meet *Mullane*'s desire-to-inform standard); Dusenbery v. United States, 534 U.S. 161, 168 (2002) (applying *Mullane*'s "reasonably calculated" standard); Tulsa Prof'l Collection Serv., Inc. v. Pope, 485 U.S. 478, 484–85 (1988) (same); Mennonite Bd. of Missions v. Adams, 462 U.S. 791, 797 (1983) ("[The Supreme Court] has adhered unwaiveringly to the principle announced in *Mullane*."); Greene v. Lindsey, 456 U.S. 444, 449–50 (1982) (applying *Mullane*'s "reasonably calculated" standard); Robinson v. Hanrahan, 409 U.S. 38, 39–40 (1972) (per curiam) (same); Schroeder v. City of New York, 371 U.S. 208, 213 (1962) (same); Walker v. City of Hutchinson, 352 U.S. 112, 115–17 (1956) (same).

[61] *See Mullane*, 339 U.S. at 313 ("Personal service [is] always adequate in any type of proceeding.").

[62] *See id.* at 317–19 (allowing service via mail to known beneficiaries and service by publication to unknown beneficiaries).

[63] *Id.* at 314. Other requirements include reasonably conveying the required information and allowing a reasonable time for interested parties to appear. *Id.*

[64] *Id.* at 315.

[65] *See* discussion *supra* Part II.A.

[66] Shurr v. City of Newark, No. CIV.03-523-SLR, 2004 WL 332508, at *1 (D. Del. Jan. 28, 2004) ("Personal jurisdiction must be effected through proper service of process, and actual notice by a defendant does not satisfy this constitutional requirement.").

for civil cases filed in U.S. district courts.[67] Specifically, Rule 4 of the Federal Rules governs service for federal courts.[68]

By providing procedures for effective service, the Federal Rules reinforce the constitutional right to due process. Proper service requires a plaintiff to employ methods consistent with the formal requirements of the applicable rule governing service.[69] Even if a defendant has actual notice of the action, the court cannot exercise personal jurisdiction over the defendant if she was not served according to the specific requirements of the applicable rule.[70] In short, the court has no jurisdiction if service of process is not in compliance with the Federal Rules.[71]

The Federal Rules provide multiple options for effectuating proper service.[72] However, these methods generally fall within two distinct methods of service of process: actual (or personal) service and constructive service.[73]

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[67] *See* FED. R. CIV. P. 1 (setting forth the scope of the Federal Rules); *see also* LARRY L. TEPLY & RALPH U. WHITTEN, CIVIL PROCEDURE 319 (4th ed. 2009) (listing various methods of serving process including "in-hand service, service by leaving a copy of the process at the defendant's home, usual residence, or place of business, and service by publication").

[68] TEPLY & WHITTEN, *supra* note 67, at 319. For an overview of Rule 4, see WRIGHT & MILLER, *supra* note 53, § 1089.

[69] *See* FED. R. CIV. P. 4(k) (delineating when service of summons establishes personal jurisdiction).

[70] *See, e.g.*, McGinnis v. Shalala, 2 F.3d 548, 550–51 (5th Cir. 1993) (dismissing a plaintiff's complaint because, though delivery by mail may have provided actual notice of suit, it did not satisfy the service requirements of the Federal Rules); Mid-Continent Wood Prods., Inc. v. Harris, 936 F.2d 297, 301 (7th Cir. 1991) (holding that "valid service of process is necessary in order to assert personal jurisdiction over a defendant"); Dahl v. Kanawha Inv. Holding Co., 161 F.R.D. 673, 681 (N.D. Iowa 1995) (stating that indications of the defendant's actual notice of the action do not "dispense with the requirements for proper service of process").

[71] *See* FED. R. CIV. P. 4(k) (describing the conditions under which service of summons gives the court personal jurisdiction over the defendant).

[72] *See, e.g.*, FED. R. CIV. P. 4(e)(2) (permitting service on an individual by: (1) personal service; (2) leaving process at the individual's dwelling; or (3) delivering process to an authorized agent).

[73] McCoy v. Hickman, 15 A.2d 427, 429 (Del. Super. Ct. 1940) ("The law provides two methods of service of process: one is actual service, as by reading the original process to the defendant or delivering to him a copy thereof; the other is a substitutional or constructive service . . . ."). Note that parties may also elect to waive service requirements. FED. R. CIV. P. 4(d).

For personal service, the identity and location of a party is known, and service of process is effectuated by providing the person with notice of the proceedings directly[74] or by leaving such notice with the person's legally designated agent.[75] Moreover, where a person is unavailable but his living arrangements are known, personal service can be achieved by leaving the documents at that person's dwelling.[76]

Personal service[77] is the preferred method of effectuating service[78] because it "guarantees actual notice of the pendency of a legal action."[79] However, it is not always possible or practicable to serve the defendant personally.[80] Where personal service is not possible, notice by an alternative method like mail[81] or

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[74] FED. R. CIV. P. 4(e)(2)(A); *see, e.g.*, Gage v. Bani, 141 U.S. 344, 357 (1891) (holding that, where personal service is required by state law and where there is a lack of clear and convincing evidence that such notice was provided directly to the party, the legal requirements for personal service were not met).

[75] FED. R. CIV. P. 4(e)(2)(C); *see, e.g.*, Nelson v. Swift, 271 F.2d 504, 505 (D.C. Cir. 1959) (per curiam) (quashing service where the agent was not authorized to bind his principal and agency was not authorized by law); Szabo v. Keeshin Motor Express Co., 10 F.R.D. 275, 276 (N.D. Ohio 1950) (upholding service on a statutorily appointed agent).

[76] FED. R. CIV. P. 4(e)(2)(B); *see, e.g.*, Nowell v. Nowell, 384 F.2d 951, 952–54 (5th Cir. 1967) (allowing service upon the defendant's apartment complex manager); Karlsson v. Rabinowitz, 318 F.2d 666, 667–69 (4th Cir. 1963) (upholding substituted service on defendant's wife where defendant himself moved to another state but his wife stayed behind in the state where service was made to complete the sale of their house); Smith v. Kincaid, 249 F.2d 243, 244, 246 (6th Cir. 1957) (permitting substituted service on defendant's landlady).

[77] *See* BLACK'S, *supra* note 8, at 1259 (defining personal service as "[a]ctual delivery of the notice or process to the person to whom it is directed"). Personal service is also referred to as actual service. *See supra* note 73.

[78] *See* Greene v. Lindsey, 456 U.S. 444, 449 (1982) (noting that personal service "presents the ideal circumstance under which to commence legal proceedings").

[79] *Id.*

[80] *See, e.g.*, Mfrs. Hanover Trust Co. v. Ponsoldt, 51 F.3d 938, 938, 941 (11th Cir. 1995) (permitting substituted service of process pursuant to state law, particularly given defendant's successful attempts to evade personal service); New England Merchs. Nat'l Bank v. Iran Power Generation & Transmission Co., 495 F. Supp. 73, 80–81 (S.D.N.Y. 1980) (directing plaintiffs to serve defendants by telex and via service of the pleadings on defendants' counsel after defendants successfully resisted service despite their knowledge of the action).

[81] Though the Federal Rules do not specifically mention service by mail, they authorize service pursuant to the law of the state in which the district court is located. FED. R. CIV. P. 4(e)(1). Many states authorize service by mail. *See, e.g.*, ALASKA CT. R. 4(h) (permitting service of process by registered or certified mail); ARIZ. R. CIV. P. 4.1(m) (allowing

publication[82] may be permitted if state law allows such methods of service.[83] Generally, service by mail is only practicable if the person's name and address are known or readily ascertainable. If—as is assumed for purposes of this Note[84]—the person's name or address is unknown and not readily ascertainable, service by publication is authorized by many state statutes and, therefore, permissible under the Federal Rules.[85]

D. ALTERNATIVE METHOD OF SERVICE: PUBLICATION

Because personal service is the optimal method for ensuring knowledge of a pending legal action,[86] when parties desire to use alternative forms of service,[87] which provide only constructive notice,[88] courts often determine the adequacy of these substitute

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alternative service "in [any] such manner, other than by publication, as the court . . . may direct"); CAL. CIV. PROC. CODE § 415.30(a) (2004) (providing circumstances where service by mail is permitted); O.C.G.A. § 9-11-4(e)(6) (2006) (permitting mailed service in conjunction with posting); N.Y. C.P.L.R. 308.2, 308.4 (McKinney 2010) (allowing mailed service in combination with other alternative service methods); OHIO R. CIV. P. 4.3(B)(1) (allowing various methods for service by mail); OR. R. CIV. P. 7(D)(1) (listing numerous methods of permissible service including service by mail).

[82] The Federal Rules similarly do not specifically provide for service by publication. However, the Federal Rules do allow service pursuant to the law of the state in which the district court is located, FED. R. CIV. P. 4(e)(1), and many states have authorized service by publication. *See infra* note 85.

[83] The Federal Rules allow service permitted by state law in the state where the district court is located or where service was made. FED. R. CIV. P. 4(e)(1).

[84] *See supra* pp. 1098–99 (outlining limitations on the scope of this Note).

[85] *See, e.g.*, ALASKA CT. R. (4)(d)(10) (allowing notice by publication for unknown parties); ARIZ. R. CIV. P. 4.1(n) (allowing alternative service by publication on unknown parties under limited circumstances); CAL. CIV. PROC. CODE § 415.50 (2004) (permitting service by publication where the party to be served cannot be found with reasonable diligence); O.C.G.A. § 9-11-4(f)(1)(A) (2006) ("When the person on whom service is to be made resides outside the state, or has departed from the state, or cannot, after due diligence, be found within the state, or conceals himself or herself to avoid the service of the summons . . . the judge or clerk may grant an order that the service be made by publication . . . ."); OR. R. CIV. P. 7(D)(1) (listing many methods of permissible service including service by publication).

[86] *See supra* notes 78–79 and accompanying text.

[87] *See* BLACK'S, *supra* note 8, at 1491 (defining substituted (or constructive) service as "[a]ny method of service allowed by law in place of personal service, such as service by mail").

[88] *See id.* (defining constructive notice as "[s]ervice accomplished by a method or circumstance that does not give actual notice").

methods by comparing their possible effectiveness to the guarantee of actual notice[89] that personal service provides.[90] It is not uncommon for a method of service that is permissible and sufficient to meet due process requirements in one case to be insufficient, and thus impermissible, in another.[91] As a result, courts perform a balancing test—weighing the interests of the notice giver against the rights and interests of the individual being served.[92]

One alternative method of service which has been authorized by courts—both before and since *Mullane*—is notice by publication.[93] Courts generally accept notice by publication where the identity and address of the party to be notified is unknown or could not be reasonably determined.[94] Providing constructive notice of process by publication is typically accomplished by posting a legal notification in a community newspaper.[95] Though lacking any real belief that newspaper publication will actually notify parties of

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[89] *See supra* text accompanying note 79.

[90] *See* Greene v. Lindsey, 456 U.S. 444, 452–53 (1982) (finding that if personal service is not possible, posting notice on the door of a person's home would, in many circumstances, constitute a constitutionally acceptable means of service because it is likely to ensure that the party is actually apprised of proceedings against him); *see also* Mullane v. Cent. Hanover Bank & Trust Co., 339 U.S. 306, 315–16 (1950) (explaining why actual notice is typically preferred over notice by publication).

[91] *See* Miserandino v. Resort Props., Inc., 691 A.2d 208, 212 (Md. 1997) (noting that "[p]rocedures adequate under one set of facts may not be sufficient in a different situation" (quoting Dep't of Transp. v. Armacost, 474 A.2d 191, 203 (Md. 1984)) (internal quotation marks omitted)); Dobkin v. Chapman, 236 N.E.2d 451, 458 (N.Y. 1968) ("[W]hat might be inadequate notice in one kind of situation will amount to due process in another.").

[92] *See Mullane*, 339 U.S. at 313–14 (balancing interests of the state against the interest of the individual to be protected by the Constitution); *Miserandino*, 691 A.2d at 212 (requiring balancing of interests between the notice giver and the individual whose interest is constitutionally protected).

[93] Notice by publication has been accepted for well over a century. *See, e.g.*, Pennoyer v. Neff, 95 U.S. 714, 727 (1877) (allowing service by publication for in rem actions), *overruled in part by* Shaffer v. Heitner, 433 U.S. 186 (1977).

[94] *See supra* note 85 for examples of current statutes which authorize notice by publication.

[95] *See, e.g.*, *Mullane*, 339 U.S. at 309–10 (describing service by publication in the local newspaper by publishing the notice once a week for four successive weeks).

pending actions,[96] courts continually find that it comports with the constitutional due process requirement, and thus uphold newspaper publication as a constitutional method of serving process where the name or location of the party to be notified is unknown.[97]

III. ANALYSIS

Though courts consistently hold that an ability to participate in the processes which produce a civil judgment is a fundamental constitutional requirement,[98] there is no constitutional requirement that a party receive *actual* notice of the pending action.[99] Due process simply requires *adequate* notice,[100] and the Supreme Court has found notice by publication in newspapers to provide adequate notice for more than 100 years.[101] But, in a world where modern technology and increasing mobility have

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[96] *See id.* at 315 ("Chance alone brings to the attention of even a local resident an advertisement in small type inserted in the back pages of a newspaper, and . . . the odds that the information will never reach him are large indeed.").

[97] *See, e.g., id.* at 317 (holding that notification by newspaper publication was sufficient process upon unknown beneficiaries); *see also* United States v. Robinson, 434 F.3d 357, 367–68 (5th Cir. 2005) (finding that service by publication which met statutory requirements was sufficient despite the existence of an alternative newspaper which would have been more likely to provide notice).

[98] "The fundamental requisite of due process of law is the opportunity to be heard." Grannis v. Ordean, 234 U.S. 385, 394 (1914) (citation omitted); *see also* Greene v. Lindsey, 456 U.S. 444, 449 (1982) (quoting the proposition stated above from *Grannis*); *Mullane*, 339 U.S. at 314 (quoting with acceptance the principle stated above from *Grannis*). This participation principle has been identified as a bedrock principle of procedural justice. *See* Solum, *supra* note 32, at 274 ("Procedures that purport to bind without affording meaningful rights of participation are fundamentally illegitimate.").

[99] *See* Jones v. Flowers, 547 U.S. 220, 226 (2006) (stating that due process does not require that the party receive actual notice); Dusenbery v. United States, 534 U.S. 161, 170 (2002) (noting that the Court has not required actual notice).

[100] *See Jones*, 547 U.S. at 234 (requiring adequate notice before the government can force a citizen to forfeit his property).

[101] *See, e.g.*, Longyear v. Toolan, 209 U.S. 414, 418 (1908) (finding that "[i]t is no objection that the notice was by publication"); Ballard v. Hunter, 204 U.S. 241, 261–62 (1907) (finding notice by publication sufficient for an in rem action); Winona & St. Peter Land Co. v. Minnesota, 159 U.S. 526, 537–38 (1895) (affirming state tax proceedings where notice was provided by publication); Huling v. Kaw Valley Ry. & Improvement Co., 130 U.S. 559, 563 (1889) (finding publication sufficient to notify landowners of pending condemnation by railroad).

changed how and where people live, does notice by newspaper publication still satisfy *Mullane*'s desire-to-inform standard? Is there a better, more reasonably calculated method for attempting to notify an unknown party that is more likely to protect that party's constitutional right to due process?

This Section describes how mobility, technology, and the way American's receive information has changed in recent history. Following this overview of historical trends, the constitutionality of notice by newspaper publication is analyzed. Finally, a new method for notification is proposed and analyzed under *Mullane*'s desire-to-inform standard to show how notice by newspaper publication might be replaced by a more constitutionally acceptable method of notification.

A. TRENDS IN MOBILITY, NEWSPAPER READERSHIP, AND INTERNET USE

1. Population Mobility. The American populace is mobile, and this mobility leads to incomplete and inaccurate physical address data.[102] United States census data show that 12.5% of all residents—more than 37 million people—moved between 2008 and 2009.[103] On average, 18% of U.S. residents move each year.[104] Although many movers relocate within their home state and county, more than one-third of all movers have historically relocated to different counties within the same state or to different states altogether.[105] This constant movement makes it difficult to

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[102] *See* Todd B. Hilsee et al., *Hurricanes, Mobility, and Due Process: The "Desire-to-Inform" Requirement for Effective Class Action Notice is Highlighted by Katrina*, 80 TUL. L. REV. 1771, 1789–90 (2006) (discussing U.S. Postal Service change of address statistics and inaccuracies).

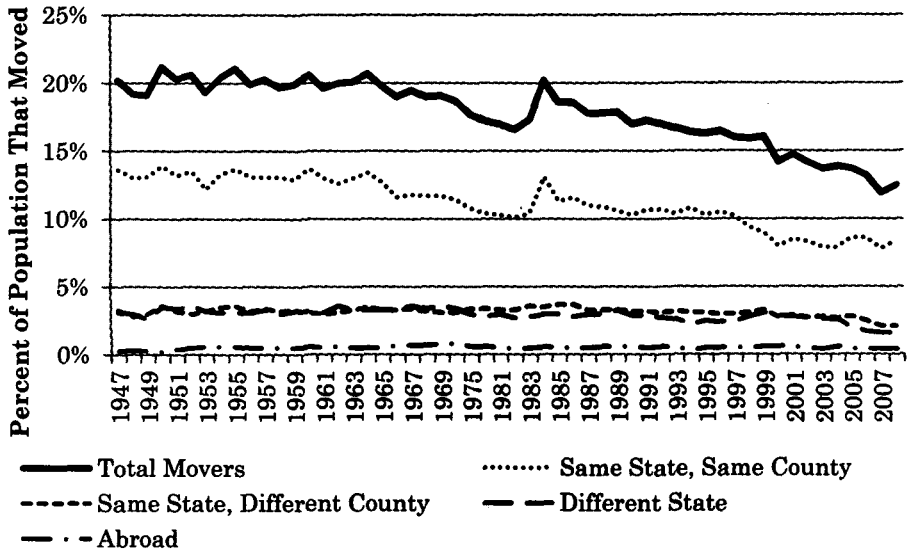
[103] U.S. CENSUS BUREAU, CURRENT POPULATION SURVEY, TABLE A-1. ANNUAL GEOGRAPHICAL MOBILITY RATES, BY TYPE OF MOVEMENT: 1947–2009 (May 2010) [hereinafter MOBILITY RATES], http://www.census.gov/population/socdemo/migration/tab-a-1.xls.

[104] *See id.* (averaging all values in the "Percent" subheading of the "Total Movers" column).

[105] *See id.* (summing averages of values in the "Different County – Total" and "Movers from Abroad" columns provides that 37% of movers relocated outside of their county).

maintain complete and accurate address data.[106] Similarly, cross-border relocation also makes it less likely that notification posted in a local newspaper will be viewed by a party if that party is no longer living in the area of her last known address.

Figure 1. U.S. Annual Geographical Mobility Rate.[107]



2. Newspaper Penetration and Readership. In 1950, when *Mullane* was decided, the average U.S. household received 1.2 newspapers each weekday.[108] That is, on average, each U.S. household had more than one newspaper. By 2000, newspaper penetration had dropped to approximately 0.53 newspapers per U.S. household.[109] Thus, only one-half of U.S. homes now receive a weekday newspaper.

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[106] *See* Hilsee et al., *supra* note 102, at 1788–89 (noting that approximately 40% of movers do not report their moves to the post office and stating that, even where address information is provided to the post office, it can be inaccurate).

[107] Created from data provided in MOBILITY RATES, *supra* note 103.

[108] *See infra* Figure 2.

[109] *See infra* Figure 2.

The declining trend of newspaper use is also revealed by readership data. Newspaper readership has steadily declined since the 1960s.[110] In 1964, more than 80% of adults read a weekday newspaper.[111] But, by 2007, weekday readership of daily newspapers had declined to nearly 48%.[112] Additionally, only 33% of Americans read *local* weekly newspapers.[113]

In addition to the marked decline in newspaper readership, there has been a decline in the amount of time spent reading the newspapers that are received. Time devoted to reading the newspaper dropped from an average of eighteen minutes per day in 1998 to an average of thirteen minutes per day in 2008.[114]

The decline in overall readership and newspaper penetration makes it unlikely that the party to be notified will actually possess or read the newspaper containing the relevant legal notification. Moreover, even if the party reads the newspaper containing the notice, statistics show that he will spend little time reading that paper,[115] and thus, it is unlikely that the party will reach the back pages of the paper to find a small black-and-white legal posting notifying him of the pending action.

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[110] *See infra* Figure 3; *see also* LEE BURNS, BUSY BODIES: WHY OUR TIME-OBSESSED SOCIETY KEEPS US RUNNING IN PLACE 238 (1993) ("Each year the proportion of adults reading a daily newspaper drops by one percentage point . . . .").

[111] *Daily Newspaper Readership Trend – Total Adults (1964–1997)*, NEWSPAPER ASS'N AM. (Oct. 2004) [hereinafter *Newspaper Data 1964–1997*], http://www.naa.org/docs/Research/Daily_National_Top50_64-97.pdf.

[112] *Daily Newspaper Readership Trend – Total Adults (1998–2007)*, NEWSPAPER ASS'N AM. (Aug. 2007) [hereinafter *Newspaper Data 1998–2007*], http://www.naa.org/docs/Research/Daily_National_Top50_1998-2007.pdf; *see also Audience Segments in a Changing News Environment: Key News Audiences Now Blend Online and Traditional Sources*, PEW RES. CENTER, 3 (Aug. 17, 2008) [hereinafter *News Audiences Survey*], http://people-press.org/reports/pdf/444.pdf (showing 34% newspaper readership in 2008).

[113] *News Audiences Survey*, *supra* note 112, at 19.

[114] *Id.* at 9. Time spent reading newspapers has declined for decades. *See* JOHN P. ROBINSON & GEOFFREY GODBEY, TIME FOR LIFE: THE SURPRISING WAYS AMERICANS USE THEIR TIME 250 (2d ed. 1999) (reading newspapers is "an activity that has been eroding steadily since 1965"); *see also id.* at 145, 149 (noting that both the time spent reading and the proportion of that time which is dedicated to reading newspapers declined between 1965 and 1985).

[115] *See supra* note 114 and accompanying text.

Figure 2. Weekday Newspaper Penetration.[116]

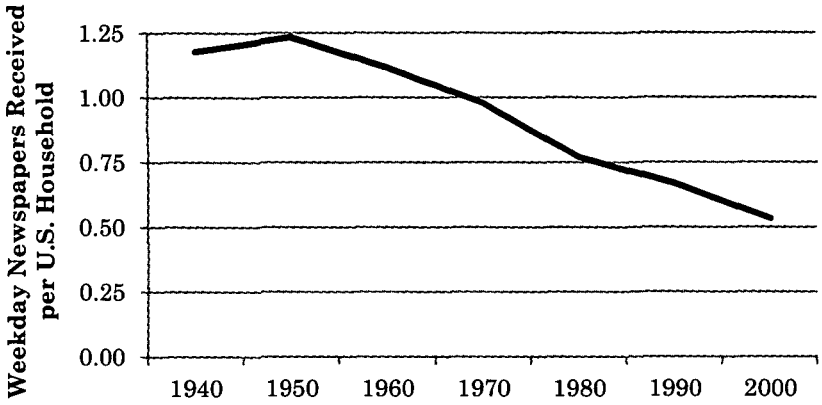
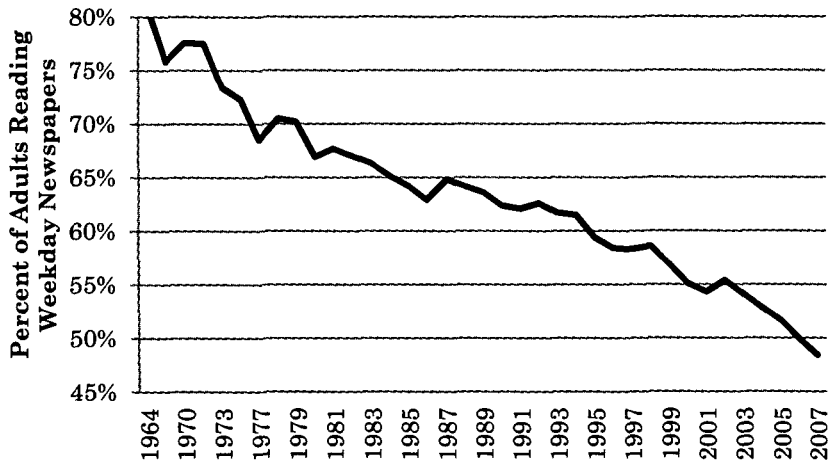


Figure 3. Weekday Newspaper Readership.[117]



[116] Penetration is calculated by the number of newspapers as a percent of households. Chart created from data provided in, *The State of the News Media 2004: An Annual Report on American Journalism*, JOURNALISM.ORG (2004) (on file with the author).

[117] Created from data provided in *Newspaper Data 1964–1997*, *supra* note 111, and *Newspaper Data 1998–2007*, *supra* note 112. Beginning in 1998, readership data is based on top fifty markets and is not comparable to previous years. *Newspaper Data 1998–2007*, *supra* note 112.

3. Internet Access and Use. The Internet has rapidly permeated everyday life.[118] In 1997, less than 20% of Americans had broadband Internet access in their homes.[119] In just over a decade, Internet availability ballooned so that—as of 2009—nearly 70% of Americans had in-home, Internet access.[120] The Internet has exerted great influence over how Americans and American businesses communicate.[121] Nearly 60% of the U.S. adult population uses the Internet from home at least once a day, and 85% of the population uses the Internet from home at least once a week.[122] Even with the surge in Internet use and the creation of online newspapers, gains in online newspaper readership have not kept pace with the loss of printed readership.[123] Thus, overall newspaper readership, including both printed and online newspapers, continues to decline.

Even as overall newspaper readership has declined, the number of people getting their news online—albeit not in the traditional "newspaper" format—has increased.[124] In fact, online news consumption has nearly tripled since 1998 such that 37% of the

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[118] *See* John A. Bargh & Katelyn Y.A. McKenna, *The Internet and Social Life*, 55 ANN. REV. PSYCHOL. 573, 574 (2004) (discussing the profound effects of the Internet on everyday social life); *see also* Carl E. Brody, Jr., *Catch the Tiger by the Tail: Counseling the Burgeoning Government Use of Internet Media*, 27 COMPUTER & INTERNET LAW. 14, 14 (2010) ("The phenomenon of Internet media has grown exponentially over the past decade . . . .").

[119] *See* U.S. CENSUS BUREAU, CURRENT POPULATION SURVEY: OCTOBER 2009, APP. TABLE A. HOUSEHOLDS WITH A COMPUTER AND INTERNET USE: 1984–2009 (Feb. 2010) [hereinafter HOME INTERNET USE], http://www.census.gov/population/socdemo/computer/2009/Appendix-TableA.xls (revealing that 18% of U.S. households used the Internet at home in 1997).

[120] *See id.* (revealing that 68.7% of U.S. households used the Internet at home in 2009).

[121] *See* Bargh & McKenna, *supra* note 118, at 577–85 (discussing the effects of the Internet on personal and business communications); *see also* discussion *infra* pp. 1117–18 (describing the increase in Internet-based advertisements); *infra* note 147 and accompanying text (noting that virtual, Internet addresses are popular among businesses).

[122] *See* Lee Rainie, *Internet, Broadband, and Cell Phone Statistics*, PEW RES. CENTER, 11 (Jan. 5, 2010), http://www.pewInternet.org/~/media//Files/Reports/2010/PIP_December09_update.pdf (providing results of survey on home Internet use). Figures are determined by adding appropriate columns of current home Internet users.

[123] *See News Audiences Survey*, *supra* note 112, at 3 (showing a 3% decline in newspaper readership from 2006 to 2008 when considering both print and online sources).

[124] *See id.* at 1, 21 (claiming that "the number of people getting news online has surged").

public regularly receives news from online sources.[125] Americans use a variety of online sources to receive their news, including online news feeds, news updates via cell phones, and social networking sites.[126] More than one in five Americans has a customizable web page where she receives news.[127] Furthermore, one-half of web news consumers use tools to tailor news to their own needs and time constraints.[128] For instance, among web news consumers, 36% have customized web pages with news streams, 12% receive news via RSS feeds,[129] and 25% receive news alerts via e-mail.[130] Additionally, 68% of Internet users have received a news story from a friend or associate via e-mail.[131]

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[125] *See id.* at 21 (showing an increase in regular, online news consumption from 13% in 1998 to 37% in 2008). In fact, 25% of the public receives news from online sources on a daily basis. *Id.* at 22.

[126] *Id.* at 21.

[127] *See id.* (noting that 22% of Americans include news items on their customizable web pages like iGoogle). iGoogle—a service of Google—is a customizable start page or personal web portal. *See* Michael Liedtke, *Google Dubs Personal Home Page 'iGoogle,'* MSNBC.COM, Apr. 30, 2007, http://www.msnbc.msn.com/id/18405212.

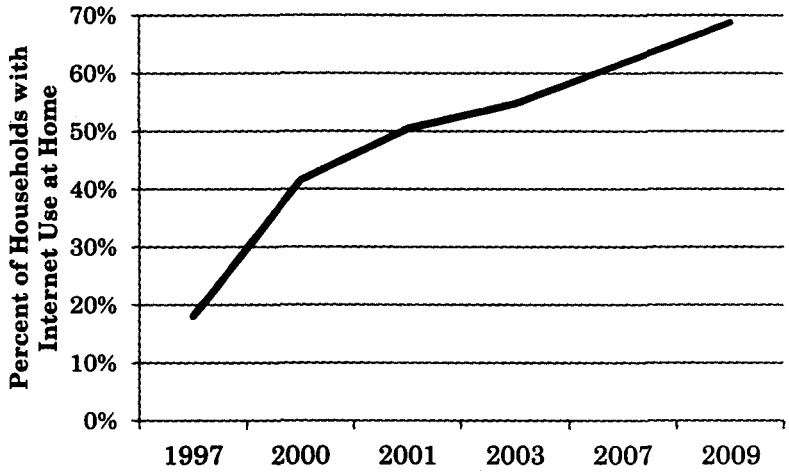
[128] *News Audiences Survey*, *supra* note 112, at 28.

[129] An RSS feed provides timely updates for frequently updated works like news headlines from favored websites or other sources to an Internet-based device such as a computer or cell phone.

[130] *News Audiences Survey*, *supra* note 112, at 28.

[131] *Id.* at 29.

Figure 4. Household Internet Use.[132]



News consumers are not the only demographic turning away from print newspapers and embracing the Internet. Businesses are decreasing their use of newspapers for advertisements as well. Newspaper advertisement spending has dropped remarkably in recent history.[133] By contrast, Internet advertisements have largely increased.[134] These trends indicate that people are more likely to be exposed to advertisements—including legal notifications—on the Internet.

[132] Created from data provided in HOME INTERNET USE, *supra* note 119. *See also* Rainie, *supra* note 122, at 3 (showing similar trends in Internet use).

[133] *See infra* Table 1.

[134] *See infra* Table 1.

Table 1. U.S. Advertisement Spending by Medium[135]
(Percent Growth from Prior Year)

Medium	2007	2008	2009
Newspaper	-9.4%	-17.7%	-27.2%*
Internet	25.8%	10.7%	-3.2%*

* All media (e.g., direct mail, television, radio, magazines) experienced a decline in advertising spending from 2008–2009. Internet spending experienced the smallest decline, and newspaper spending experienced the greatest decline.[136]

The rapid and continuing growth in Internet use and access, combined with the trend of seeking news from online sources, suggests that the American public is increasingly more likely to view news and advertisements via the Internet than through printed media.

B. CONSTITUTIONAL INADEQUACY OF NOTICE BY NEWSPAPER PUBLICATION

Since the *Mullane* Court put forth the desire-to-inform standard in 1950, courts have wrestled with how best to ensure constitutional due process while also working within the practical limits of providing notice to a party whose name or address is unknown.[137] Courts have found various methods of alternative service of process—including notice by newspaper publication—to meet *Mullane*'s standard.[138] However, because newspaper

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[135] U.S. POSTAL SERVICE, THE HOUSEHOLD DIARY STUDY: MAIL USE AND ATTITUDES IN FY 2009, at 39 (2010), *available at* http://www.usps.com/householddiary/2009files/2009FullReport_PDF/USPS_HDS_FY09_FINAL_web.pdf.

[136] *See id.* (providing historical trend of advertising spending for multiple media).

[137] *See* pp. 1103–05 for a discussion of *Mullane*'s desire-to-inform standard.

[138] *See* Aaron R. Chacker, Note, *E-ffectuating Notice:* Rio Properties v. Rio International Interlink, 48 VILL. L. REV. 597, 604–14 (2003) (describing technologies like fax, television, and e-mail which have been approved by the courts to provide notice of a pending action pursuant to *Mullane*'s constitutional framework); Jeremy A. Colby, *You've Got Mail: The Modern Trend Towards Universal Electronic Service of Process*, 51 BUFF. L. REV. 337, 354 (2003) ("[S]everal courts have recently permitted service of process by, *inter alia*, email and/or facsimile . . . .").

publication provides virtually no notice at all, it has traditionally been disfavored by the Court.[139]

That service by publication was disfavored at the peak of newspaper readership should give pause to those who continue to say that notice by publication remains a constitutionally acceptable method for providing notice. Since *Mullane* was decided, newspaper penetration has dropped by one-half.[140] Newspaper readership has also declined—with less than 50% of Americans now reading a weekday paper.[141]

In short, only one-half of U.S. households have newspapers and only one-half of American adults are reading the newspaper. Furthermore, consistent, downward trends led to these low penetration and readership levels, and there is no indication that these trends are abating.[142]

The *Mullane* Court articulated the tension between protecting the constitutional right to due process and allowing service by publication when it stated: "Chance alone brings to the attention of even a local resident an advertisement in small type inserted in the back pages of a newspaper . . . ."[143] If service by publication was dubious in 1950, when the average American household received at least one newspaper,[144] now that we are in an era where only one-half of U.S. households have a newspaper[145] it is surely past time to retire this method of service and find a more appropriate alternative.

Modern technology may provide the solution. With the rapid increase of Internet availability and use coupled with the constant mobility of the American populace,[146] people currently, or soon will, likely have a more consistent online address than they do a

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[139] *See* Mullane v. Cent. Hanover Bank & Trust Co., 339 U.S 306, 315 (1950) ("[T]he odds that the information [contained in small type in the back pages of a newspaper] will never reach [the party to be notified] are large indeed.").

[140] *See supra* p. 1113 and Figure 2.

[141] *See supra* p. 1113 and Figure 3.

[142] *See supra* Figures 2, 3.

[143] *Mullane*, 339 U.S. at 315.

[144] *See supra* Figure 2.

[145] *See supra* Figure 2.

[146] *See* discussion *supra* Part III.A.*1*.

physical address.[147] Therefore, it is an increasingly errant assumption that an average person is more likely to be at home reading her local paper than she is to be anywhere in the country getting her information from the Internet.

As readers move away from newspapers and towards the Internet, so do businesses. Business advertisers put their precious dollars where they are most likely to grab the attention of their audience. Motivated by a desire to actually inform their intended audiences, advertisers create "marketing campaigns that are designed to grab attention, be understood, and acted upon. They do not run small ads in the back of newspapers . . . ."[148] As a corollary, newspaper industry advertisement spending has dropped remarkably in recent history.[149] By contrast, Internet advertisements have largely increased during the same time period.[150] These trends show that businesses believe that people are more likely to be influenced by advertisements on the Internet.

The American public is increasingly turning away from newspapers and towards the Internet. Businesses are shifting their advertisement expenditures from newspapers and putting those dollars into Internet advertisements. With this mass exodus of readership and advertisement from newspapers, the constitutional standard articulated in *Mullane* is no longer satisfied by newspaper publication because newspaper notification is not the method to be used if one "desires-to-inform" the party of the action.

C. PROPOSED APPROACH: CENTRALIZED, ONLINE NOTIFICATION SYSTEM

Since notice by newspaper publication is no longer sufficient to serve as the "floor" in constitutional service of process, a new

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[147] This is already true for many businesses. *See, e.g.*, Rio Props., Inc. v. Rio Int'l Interlink, 284 F.3d 1007, 1018 (9th Cir. 2002) (allowing service by e-mail where the business defendant had "no easily discoverable street address . . . only a computer terminal").

[148] Hilsee et al., *supra* note 102, at 1783.

[149] *See* discussion *supra* Part III.A.*3* and Table 1.

[150] *See* discussion *supra* Part III.A.*3* and Table 1.

bottom is needed. Many have argued that the Supreme Court[151] should embrace modern technological advancements and allow for service by e-mail[152] and social networking sites.[153] However, these methods of notification are generally useful where the party to be notified is identifiable.[154] Thus, even if changes are made to the Federal Rules to allow for electronic service of process on known domestic parties, the ultimate fallback of service by newspaper publication for unknown parties would remain. Because newspapers can no longer be said to be reasonably calculated to provide notice to unknown parties, the Supreme Court should determine how to effectuate "publication notice" based on the "practicalities and peculiarities"[155] of our twenty-first century society.

People routinely use the Internet to find a wide variety of needed information.[156] Moreover, government use of the Internet is fast becoming ubiquitous.[157] As a result of an intentional

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[151] The U.S. Supreme Court promulgates the Federal Rules of Civil Procedure pursuant to the Rules Enabling Act. *See* 28 U.S.C. § 2072 (2009) ("The Supreme Court shall have the power to prescribe general rules of practice and procedure . . . for cases in the United States district courts . . . and courts of appeals.").

[152] *See, e.g.*, Ronald J. Hedges et al., *Electronic Service of Process at Home and Abroad: Allowing Electronic Service of Process in the Federal Courts*, 4 FED. CTS. L. REV. 55, 74 (2010) ("Technology has evolved to the point that electronic service is superior to many forms of traditional service."); Stewart & Conley, *supra* note 23, at 802 (arguing that, given the increase in e-mail and Internet use, courts "need to adapt to the changing circumstances of transnational legal practice").

[153] *See, e.g.*, Jessica Klander, Note, *Civil Procedure: Facebook Friend or Foe?: The Impact of Modern Communication on Historical Standards for Service of Process*—Shamrock Development v. Smith, 36 WM. MITCHELL L. REV. 241, 265 (2009) (suggesting that publication via online social networking websites may be a viable method of providing notice); Andriana L. Shultz, Comment, *Superpoked and Served: Service of Process via Social Networking Sites*, 43 U. RICH. L. REV. 1497, 1528 (2009) (suggesting that a logical progression in service of process should include service via social networking websites).

[154] In general, e-mail addresses, like physical addresses, are specific to a person. Thus, only where a person can be linked to a particular e-mail address is there a reasonable likelihood that service via that particular e-mail address will reach the intended party. A similar link often exists between the individual and her address on a social networking site.

[155] Mullane v. Cent. Hanover Bank & Trust Co., 339 U.S. 306, 314 (1950).

[156] *See* Bargh & McKenna, *supra* note 118, at 574 (describing use of the Internet to research assorted things "such as health conditions and remedies, . . . weather forecasts, sports scores, and stock prices").

[157] Andrew Chadwick & Christopher May, *Interaction Between States and Citizens in the Age of the Internet: "E-Government" in the United States, Britain, and the European Union*,

effort—which began in the 1990s—people can now access large amounts of government information and many government services online.[158] For example, users can download tax forms, apply for government-assisted financial aid, search the Library of Congress catalog, and read bills being debated by Congress.[159] Additionally, the federal courts have embraced technology for many aspects of civil procedure and litigation.[160]

The Supreme Court should embrace this growing trend of online government services and establish a central repository of all federal notices which are not able to be personally served.[161] Specifically, the Court should create an online database that includes information retrievable by key attributes such as name (if known), address, property description, location and date of incident, and jurisdiction. This database should be free to all and easily searchable. Furthermore, the database should allow users to customize the information to suit their needs so that they only see information which may pertain to them. Such customization might include filtering information by zip code, last name, or property type.

Additionally, patrons of the site should be allowed to subscribe to e-mail alerts or RSS feeds to their computers or cell phones that provide complaints matching the subset of information most likely

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16 GOVERNANCE 271, 271 (2003) (noting that governments throughout the developed world "have recently embarked upon a wave of 'e-government' initiatives that make use of information and communication technologies").

[158] *See id.* at 282–83 (noting executive branch appeals to the "transformative power of information technology" and the intentional effort to use the Internet to " 're-engineer' the relationship between government and citizens"). *See generally* BRUCE MAXWELL, HOW TO ACCESS THE FEDERAL GOVERNMENT ON THE INTERNET (4th ed. 1999) (describing hundreds of federal government Internet sites).

[159] *See* MAXWELL, *supra* note 158, at 2 (listing a wide range of uses of government Internet services, including viewing NASA videos, reading pending legislation, finding jobs, downloading tax forms, applying for student financial aid, perusing previously secret FBI files, and searching the Library of Congress catalog).

[160] *See* Hedges et al., *supra* note 152, at 58 (describing court websites with court rules, dockets, text-searchable opinions, and filed documents as well as use of electronic filing).

[161] A more advantageous solution would be to create one repository for federal and state notices; however, America's divided system of government makes a combined database less practicable.

to be relevant to them.[162] This would allow people to proactively monitor for court filings which may affect them, their families, or their communities by having possibly relevant complaints sent directly to them via electronic media. Finally, users should be allowed to input contact information to be used if they are ever served with process. Relevant contact information might include an e-mail address or cell phone number which will likely effectuate notice regardless of the party's location.

An online publication website is more likely to inform pertinent parties of pending actions than is the current newspaper publication standard. Having a single location for people to search for potential challenges to their property interests streamlines the process and increases the likelihood that a person can actually monitor for such challenges. A person will not need to be physically within a geographical area on the few days that notice is posted in a local newspaper and will not miss his opportunity to learn about notice just because he recycled his day-old paper. Instead, a person will have a reasonable opportunity to learn of actions pending against him or his property simply by taking the proactive step of creating a individualized notification system that is specific to him and his property. No longer will chance dominate the notification process when a party's name or location is unknown.

Such an online database and subscription system is unlikely to burden initiating parties any more than the current notice by publication standard. In lieu of providing a newspaper with the appropriate legal announcement, initiating parties would access a single, online source and input information relevant to the property and the nature of their complaint. Furthermore, the proposed system would save initiating parties the burden of searching for a local paper (or papers) in which to place their legal publication.

When it is significantly more likely that a defendant will receive notice through an online website, which can be customized to send notice to the defendant through her e-mail account or cell

[162] This subset of relevant information might include references to specific names, properties, or geographical areas.

phone, than by publication of notice in a newspaper, it is likely unconstitutional to continue to allow newspaper notification.[163] Furthermore, online publication on a central website—the existence of which is made known to the public—is likely a more reliable and effective means for reaching a defendant whose location is unknown.

An online notification database is reasonably calculated to reach parties because it provides a single location from which proactive persons can gather information and determine whether there are any legal challenges to their property interests. Furthermore, a single online publication website would streamline the publication notice process, and its efficiency might save the resources of the notifying party and the courts. It is, of course, true that an online notification system would not provide actual notice in all instances. But, it would provide more adequate notice than the current newspaper publication standard because it would be accessible from nearly all geographic locations, remain accessible for a long time, and be searchable and customizable to suit the individual citizen. Additionally, if the user creates e-mail alerts or RSS feeds, relevant summonses could reach those who actually have an interest in the contested property.

IV. CONCLUSION

The Constitution does not require a particular means of service.[164] It only requires that the method selected 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."[165] In *Mullane*, the Supreme Court underscored this by stating, "there can be no doubt that at a minimum [the Due Process Clause] require[s] that deprivation of life, liberty or property by adjudication be preceded by notice."[166]

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[163] *See* discussion *supra* Part III.B.

[164] Rio Props., Inc. v. Rio Int'l Interlink, 284 F.3d 1007, 1017 (9th Cir. 2002).

[165] Mullane v. Cent. Hanover Bank & Trust Co., 339 U.S. 306, 314 (1950).

[166] *Id.* at 313.

For more than sixty years, *Mullane* has provided the standard under which constructive service has been permitted. And, it should continue to do so now. Applying *Mullane*, the Court should disallow notification by newspaper publication because the citizenry's constant mobility combined with the change in their newspaper readership habits prevents newspaper publication from meeting *Mullane*'s desire-to-inform standard. With readership and circulation in rapid decline, newspapers—which left notice to chance when they had their strongest penetration—are not reasonably calculated to provide any notice, much less adequate notice, in our twenty-first century world.

The farther technology takes us from a world where people communicate via printed media, the less likely it is that service through newspaper publication meets constitutional due process requirements. If notice by newspaper publication was dubious in 1950,[167] it is time to retire it now. There is no reason to keep a precedent that requires paper-based service if the newspaper is no longer reasonably calculated to reach many parties.

Increasingly, technology has permeated many aspects of civil procedure and modern litigation; however, it has yet to influence the standards for service by publication. As the Internet fast becomes a necessary and integral part of American life, standards for notification should adapt. Yesterday's acceptable means of notification should yield to today's more effective notification methods. Therefore, the Supreme Court should utilize society's technological advancements to create an online notification system that is more reasonably calculated to notify parties of challenges to their property interests and, thus, better able to protect that party's constitutional right to due process.

Mullane's rule ensured flexibility in the notification process. In a world where business and news gathering is accomplished via the Internet, service by newspaper publication does not meet the constitutional standard articulated in *Mullane*. The Court should not hold on to an antiquated and ineffective method of notification when a better and more reasonable alternative exists. Given the

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[167] *See id.* at 315–16 (describing ways in which newspaper publication is inadequate).

efficacy of modern-day technology in reaching people, the Court should be amenable to modifying the Federal Rules to embrace and leverage modern advancements and protect each citizen's constitutional right to notification and an opportunity to be heard.

Jennifer Lee Case