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I. INTRODUCTION

Service is perhaps the most basic practice of law imaginable. All plaintiffs must serve, and all defendants must be served, for a case to proceed forward. Without service, there is no case to settle—no legal battle to wage.

According to the Fourteenth Amendment of the United States Constitution, no state shall "deprive any person of life, liberty, or property, without due process of law[.]"[1] Colloquially known as the Due Process Clause, this phrase has significant implications for the pendency of actions against defendants, and in particular, how those defendants are served.[2] While "traditional" service methods, such as personal service, assure that defendants are aware of the actions pending against them, so-called "alternative" service methods may not provide the same assurances. Some alternative service methods may, in fact, run afoul of the Supreme Court of the United States' interpretation of the Due Process Clause, thus abridging the constitutional rights of the parties involved.

This leads to a necessary inquiry: do alternative service methods, in particular, service by publication, meet the requirements of due process

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1. U.S. CONST. amend. XIV, § 1.

2. Kent Sinclair, *Service of Process: Rethinking the Theory and Procedure of Serving Process Under Federal Rule 4(c)*, 73 VA L. REV. 1183, 1184 (1987).

as laid out by the Constitution? If so, how are the requirements measured relative to more traditional service methods?

II. LEGAL BACKGROUND

A. Introduction to Service of Process in the United States of America

The Due Process Clause requires that state courts balance the state's interest against the individual's interest in deciding whether the notice provided under state law constitutes "reasonable" notice.[3] Of course, the Constitution provides a floor, not a ceiling, as to what is or is not constitutional in cases where notice is required. While state laws can therefore afford more protection for individuals, they cannot put in place any laws that deny the Constitution's basic protections.[4]

If a cause of action intends to deprive a person of life, liberty, or property, the defendant must be given notice of the pendency of the action.[5] This was set forth most clearly in *Mullane v. Central Hannover Bank and Trust Company*,[6] wherein the Supreme Court stated that:

> An elementary and fundamental requirement of due process in any proceeding which is to be accorded finality is notice reasonably calculated, under all the circumstances, to apprise interested parties of the pendency of the action and afford them an opportunity to present their objections. The notice must be of such nature as reasonably to convey the required information . . . and it must afford a reasonable time for those interested to make their appearance[.] But if with due regard for the practicalities and peculiarities of the case these conditions are reasonably met, the constitutional requirements are satisfied.[7]

In essence, the basic purpose of service of process is to ensure that defendants know of the existence of actions, such that they can defend

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3. U.S. CONST. amend. V; U.S. CONST. amend. XIV, § 1.

4. *See* Ilya Somin, *A Floor, Not a Ceiling: Federalism and Remedies for Violations of Constitutional Rights in Danforth v. Minnesota*, 102 NW. U. L. REV. COLLOQUY 365, 373 (2008).

5. U.S. CONST. amend. XIV, § 1.

6. 339 U.S. 306 (1950).

7. *Id.* at 314–15 (emphasis added) (citations omitted); *see* Milliken v. Meyer, 311 U.S. 457, 463 (1940) (citing McDonald v. Mabee, 243 U.S. 90 (1917)).

> Its adequacy so far as due process is concerned is dependent on whether or not the form of substituted service provided for such cases and employed is reasonably calculated to give him actual notice of the proceedings and an opportunity to be heard. If it is, the traditional notions of fair play and substantial justice [] implicit in due process are satisfied.

themselves from the claims made against them.[8] If a defendant is unaware of a claim, and a verdict is held against them, that would fail to comply with the basic protections of the Due Process Clause and would therefore be unconstitutional.[9]

State statutes discussing permissible service of process methods reflect this minimum standard of constitutional protection. In Georgia, for example, a defendant may be served by personal service, service upon a legal guardian,[10] conspicuous service,[11] or service at the "defendant's dwelling house or usual place of abode with some person of suitable age and discretion then residing therein."[12] These methods reflect the—constitutional—minimum standard, in that they have the highest chances of providing a defendant with notice of the action pending against him or her in a court of law.[13]

Despite this, and while service has been described as among the most basic procedures of litigation,[14] state and federal rules have long allowed different, arguably less reliable service methods. For example, Rule 4 of the Federal Rules of Civil Procedure (FRCP)[15] allows service upon "an agent authorized by appointment or by law to receive service of process" in addition to the state's rules regarding service.[16] While this may seem identical to Georgia's permissive service upon a legal guardian, this is not necessarily the case. Georgia allows service upon a legal guardian in the case of a legal minor or an individual who has been judicially declared of unsound mind.[17] By contrast, Rule 4's language is much broader and would, for example, allow service upon an individual's attorney so long as they have been declared their agent

8. *Milliken*, 311 U.S. at 463.

9. *Id.*

10. O.C.G.A. §§ 9-11-4(e)(3)–(4) (2013).

11. O.C.G.A. § 9-11-4(e)(6). Of course, other requirements must be met in accordance with O.C.G.A. § 9-11-4(e)(6), such as a principal sum of less than $200.00 and "reasonable efforts hav[ing] been made to obtain personal service . . . ."

12. O.C.G.A. § 9-11-4(e)(7). O.C.G.A. § 9-11-4(e)(1),(2), and (5) are excluded from this discussion, as they address service upon corporate and municipal entities. Relative to a discussion about the constitutionality of service by publication, these subsections only muddy the waters. Exploration of these topics are outside of the scope of this Article.

13. After all, what could possibly provide more assurances than providing potential defendants with copies of pleadings directly to their person or at their place of residence with someone who lives with them?

14. *See* Sinclair, *supra* note 2, at 1184.

15. FED. R. CIV. P. 4.

16. FED. R. CIV. P. 4(e)(2)(C). Of course, the "state's rules" refers only to the state where the action is pending.

17. O.C.G.A. §§ 9-11-4(e)(3)–(4).

for purposes of service.[18] This difference, though minor, is emblematic of the distinction between service methods permitted under a state's statutory service scheme and those permissible under the federal rules.

One would think that a basic procedure such as service would have distinct, reliable methods for service—for the most part, that holds true. For example, the service methods allowed under Rule 4 and O.C.G.A. § 9-11-4 allow many of the same service methods, all of which provide assurances that the summons and complaint will make it safely into the intended individual's hands.[19] After all, "[t]he fundamental requisite of due process of law is the opportunity to be heard."[20]

B. History of Alternative Service of Process & the Modern-Day Framework by Which Constitutional Sufficiency is Determined

However, what happens when an individual cannot be found, and therefore service cannot be perfected via "traditional" means? Serving every defendant is neither possible nor practical, and in some cases, defendants will conceal their location or evade service by traditional means.

To combat this, jurisdictions have established different methods by which a plaintiff can serve a defendant—so-called "alternative" methods of service, which allow service upon an individual by methods less likely to apprise a party of notice of the pendency of an action.[21]

The discussion regarding the validity of alternative service, in particular, service by publication, goes as far back as the eighteenth century.[22] In the seminal case of *Pennoyer v. Neff*,[23] attorney John Mitchell sued Marcus Neff in Oregon state court, attempting to recover for unpaid legal fees.[24] Mitchell served notice of the suit by publication,

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18. FED. R. CIV. P. 4(c).

19. *See* O.C.G.A. § 9-11-4 (2013); *see also* FED. R. CIV. P. 4(c).

20. Grannis v. Ordean, 234 U.S. 385, 394 (1914).

21. *See* O.C.G.A. § 9-11-4(f) (2013).

22. Arguably, service has its roots in a tradition dating back thousands of years. *See* Sinclair, *supra* note 2, at 1187 (discussing the four-thousand-year tradition of notice, which Sinclair relates to the Code of Eshnunna (requiring that they "shout" their action's beginnings) and medieval times (which used a sheriff to provide notice)).

23. 95 U.S. 714 (1878). Notably, *Pennoyer v. Neff* is not about service by publication. It is more often discussed in the context of first-year law courses relative to personal jurisdiction, whereby it serves as the primary example of a state's power to protect its citizens from actions initiated in another state and the competing interests implicated therein. It is herein discussed only to provide context about the centuries old discussion surrounding service by publication. *See* DAVID CHARLES HRICIK, MASTERING CIVIL PROCEDURE 58 (Carolina Acad. Press, 3rd ed. 2017).

24. *Pennoyer*, 95 U.S. at 719–20.

not by personal service, upon Defendant Neff, who did not live in Oregon. In that underlying suit, the Oregon state court entered a default judgment against Defendant Neff—Mitchell was, therefore, able to attach Neff's later-purchased Oregonian land to satisfy the outstanding judgment. Once completed, Mitchell sold the property to Pennoyer, and Neff sued to recover the same.[25]

The United States Supreme Court disagreed with the Oregon state court, affirming the court of appeals' decision, which overturned the judgment. The Supreme Court held that service by publication was improper in this matter because Neff did not reside in the state of Oregon.[26] For the judgment against Neff to be valid, there needed to be a sufficient nexus between the service and the notice apprised of the action by the service method used.[27] Therefore, while the Supreme Court determined that service by publication is proper for *in rem* proceedings, it was improper for *in personam* proceedings.[28] In the Court's opinion, personal service was the only valid method of service to provide the defendants the proper notice of the action pending against them for *in personam* proceedings.[29] Because the proceeding was against Neff personally, and not against the property that was later taken, service by publication was improper.[30]

Of course, *Pennoyer* serves as a foundational case in many first-year law students' civil procedure classes and is well recognized beyond its relatively brief discussion of service by publication. As such, the underlying importance today is largely lost due to subsequent cases overruling *Pennoyer*'s holding, whereby service by publication can now apply to both *in rem* and *in personam* matters.[31] Furthermore, *Pennoyer* merely discussed service by publication, but did not expound on its many uses.

The framework for the modern determination of whether service comports with the constitutional standards of the Due Process Clause of the Fourteenth Amendment comes from *Mullane vs. Central Hanover Bank and Trust Company*.[32] In *Mullane*, the Supreme Court:

> [R]ecognized that prior to an action which will affect an interest in life, liberty, or property protected by the Due Process Clause of the

25. *Id.* at 736 (Hunt, J., dissenting).
26. *Id.* at 727.
27. *Id.*
28. *Id.*
29. *Id.*
30. *Id.*
31. *See*, *e.g.*, International Shoe Co. v. Washington, 326 U.S. 310 (1945).
32. 339 U.S. at 314.

> Fourteenth Amendment, a State must provide "notice reasonably calculated, under all circumstances, to apprise interested parties of the pendency of the action and afford them an opportunity to present their objections."[33]

In *Mullane*, the notice given to the beneficiaries of the trust at issue was by "publication in a local newspaper in strict compliance with the minimum requirements" of New York's banking laws.[34] The local requirements for publication included filing a petition with the court and publishing at least once a week for four successive weeks the name and address of the trust company, a list of all participating trusts, and the name and the date of the establishment of the trust fund.[35] The appellant argued that the notice and the statutory notice provisions were "inadequate to afford due process under the Fourteenth Amendment."[36] It was not disputed that the only notice given to the beneficiaries of this trust was by publication in the local newspaper.[37]

"The fundamental requisite of due process of law is the opportunity to be heard."[38] The right to be heard is of little worth, however, unless one is informed of the matter pending against him, such that he or she can choose whether to appear or to default, to "acquiesce or contest."[39] Importantly, there is no formula by which the Court is beholden to in making this determination.[40]

In *Mullane*, the Court recognized that publication alone is not a reliable means of informing interested parties of the fact that their rights are pending before the court, even going so far as to state that:

> Chance alone brings to the attention of even a local resident an advertisement in small type inserted in the back pages of a newspaper, and if he makes his home outside the area of the newspaper's normal circulation the odds that the information will never reach him are large indeed.[41]

The likelihood of an interested party taking notice in the context of a trust, as in *Mullane*, wherein some of the beneficiaries are not and

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33. Mennonite Bd. of Missions v. Adams, 462 U.S. 791, 795 (1983) (quoting *Mullane*, 339 U.S. at 314).

34. *Mullane*, 339 U.S. at 309.

35. *Id.* at 309–10.

36. *Id.* at 311.

37. *Id.* at 309.

38. *Id.* at 314 (quoting *Grannis*, 234 U.S. at 394).

39. *Id.* at 314.

40. *Id.*

41. *Id.* at 315.

cannot be named, is even lower.[42] Nonetheless, service by publication is a "customary substitute in another class of cases where it is not reasonably possible or practicable to give more adequate warning."[43]

In *Mullane*, where potential parties cannot be named with due diligence, this customary substitute was widely accepted.[44] However, the Court went on to state that when an individual is known and their place of residence is a known place, notice by publication may not be adequate.[45] For service by publication to be used and constitutionally adequate, the facts of the case must be sufficient to determine that such service is "reasonably calculated to reach interested parties."[46]

In the case of *Mullane*, service by publication for known individuals—such as, beneficiaries whose names were known to the executor of the trust—was deemed to be inadequate.[47] While the Court recognized the possibility of different facts and circumstances, whereby service by publication would be adequate, they stated that while:

> Publication may theoretically be available for all the world to see . . . it is too much . . . to suppose that each or any individual beneficiary does or could examine all that is published to see if something may be tucked away in it that affects his property interests.[48]

After all, "[g]reat caution should be used not to let fiction deny the fair play that can be secured only by a pretty close adhesion to fact."[49]

The principles announced in *Mullane* were unwaveringly adhered to in the years to follow.[50] In 1983, the Court added a new dimension to the *Mullane* analysis. In *Mennonite Board of Missions v. Adams*, [51] a property owner, Alfred Moore, executed a mortgage in favor of the Mennonite Board of Missions. Unbeknownst to the Mennonite Board of Missions, Moore failed to pay property taxes on the property. Under Indiana law,[52] the property could be sold due to outstanding property

42. *Id.*

43. *Id.* at 317.

44. *Id.*

45. *Id.* at 318.

46. *Id.*

47. *Id.* at 319.

48. *Id.* at 320.

49. *Id.* (quoting *McDonald*, 243 U.S. at 91).

50. *See* Walker v. City of Hutchinson, 352 U.S. 112 (1956); Schroeder v. City of New York, 371 U.S. 208 (1962); Eisen v. Carlisle & Jacquelin, 417 U.S. 156 (1974); Memphis Light, Gas & Water Div. v. Craft, 436 U.S. 1 (1978); Greene v. Lindsey, 456 U.S. 444 (1982).

51. 462 U.S. 791 (1983).

52. Ind. Code Ann. §§ 6-1.1-24-1–6-1.1-24-17 (2015).

taxes for more than fifteen months.[53] However, before the sale, the county auditor must have posted a notice in the County Courthouse and published notice once a week for three consecutive weeks in the local newspaper. The owner of the property was also entitled to notice by certified mail to his last known address. However, there was no portion of the Indiana statute by which *mortgagees* were notified of the forthcoming sale. The County provided notice in precise compliance with the statute, and therefore, Mennonite Board of Missions, as a mortgagee, was not provided notice under the aforementioned statutory scheme.[54]

The Court held that, because the Mennonite Board of Missions had a legally protected property interest, they were entitled to "notice reasonably calculated to apprise [them] of a pending tax sale."[55] Here, because the Mennonite Board of Missions was identified in the mortgage documents, they were easily identifiable, and a more reliable form of notice was required.[56] After all, notice to the property owner, who was not in privity with the mortgagee/creditor and failed to protect his own property interests, could not be expected to apprise the mortgagee/creditor with actual notice of the action.[57] Accordingly, the County had an obligation to, at the very least, mail notice to the Mennonite Board of Missions when "'an inexpensive and efficient mechanism such as mail service is available.'"[58]

Mullane and *Mennonite Board of Missions* provide the framework by which the constitutional sufficiency of service by publication is today determined. In essence, while service by publication is permissible in limited circumstances, it should rarely be used in cases where the identity of the person to be served is known, and considerations of more reliable alternatives should be considered.

C. An Overview of Service by Publication in Georgia

Having described the analysis used to determine the constitutional sufficiency of service by publication from the vantage point of the federal floor, we now turn to Georgia law. As a general matter, whether service by publication provides "reasonable" notice has always been a

53. *Mennonite Board of Missions,* 462 U.S. at 792–93.
54. *Id.* at 793–94.
55. *Id.* at 798.
56. *Id.*
57. *Id.* at 799.
58. *Id.* (quoting *Greene*, 456 U.S. at 455).

concern of Georgia's courts, with cases discussing the same for nearly half a century.[59]

Georgia has four methods for alternative service: (1) service by publication, (2) personal service outside of the State, (3) service upon persons located in a foreign country, and (4) service of persons residing in gated and secured communities.[60] As mentioned before, for the purposes of this Article, only service by publication is discussed.[61] O.C.G.A. § 9-11-4(f)(1)(A) sets forth the requirements for service by publication, which requires the movant to file an affidavit with the court in support of service by publication when service is based on the absentee party's residence outside of the state and an unknown present address.[62] Service by publication, if the above conditions are met, allowed the serving party to perfect service by publishing in a newspaper four times within a sixty day period.[63]

In *Abba Gana v. Abba Gana*, the Georgia Supreme Court expressed its doubts about the effectiveness of service by publication, saying that "notice by publication is a notoriously unreliable means of actually informing interested parties about pending suits."[64]

> [W]hether a proceeding is in rem or in personam, due process requires that a chosen method of service be reasonably certain to give actual notice of the pendency of a proceeding to those parties whose liberty or property interests may be adversely affected by the proceeding . . . . Because notice by publication is a notoriously unreliable means of actually informing interested parties about pending suits, the constitutional prerequisite for allowing such service when the addresses of those parties are unknown is a

59. *See* Abba Gana v. Abba Gana, 251 Ga. 340, 304 S.E.2d 909 (1983).

60. O.C.G.A. § 9-11-4(f).

61. Personal service outside of the state and service upon persons in foreign countries, while important to preserve the constitutional rights of those served, ultimately have a consideration of foreign policy and international agreement. *See* O.C.G.A. § 9-11-4(f)(3)(A) ("By any internationally agreed means reasonably calculated to give notice, such as those means authorized by the Hague Convention on the Service Abroad of Judicial and Extrajudicial Documents[]."). Similarly, service upon a person in a gated community essentially provides a method by which personal service can affect private communities. As such, there is little to discuss relative to the constitutionality, or lack thereof, of the same (unless, of course, an individual in a gated community evades service to the extent where service by publication is the only method reasonably calculated to apprise them of pendency of the action).

62. O.C.G.A. § 9-11-4(f)(1)(A).

63. O.C.G.A. § 9-11-4(f)(1)(C). Service must also be separated by seven days.

64. 251 Ga. at 343, 304 S.E.2d at 912.

> showing that reasonable diligence has been exercised in attempting to ascertain their whereabouts.[65]

What, however, constitutes "reasonable diligence" to inform parties about pending suits? Most often, it means "due diligence."[66] "[I]t is the duty of the courts to determine whether the movant has exercised due diligence in pursuing every reasonably available channel of information."[67] If the movant does not exercise due diligence, there are constitutional concerns, given that service by publication is "a notoriously unreliable means of actually informing interested parties about pending suits."[68]

For example, in *Styles v. Spyke Ten, LLC*,[69] Spyke Ten failed to show that Styles could not be found in the state or that he concealed himself to avoid service. However, because Spyke Ten failed to pursue every reasonable "channel of information" in attempting service, the trial court abused its discretion by permitting service by publication.[70] The affidavit submitted by Spyke Ten showed that they had done the following to attempt service: that their attorney had personally searched for the defendant's address and that Spyke Ten had attempted service at the defendant's last known location, which was attempted by an unnamed skip tracer who had searched the Lexis-Nexis database to find Styles' address. An affidavit of the skip tracer was not filed.[71]

While this may seem like duly diligent effort, once a default judgment was entered against Styles, it became unclear whether more

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65. *Id.* (citations omitted).

66. *See* Styles v. Spyke Ten, LLC, 342 Ga. App. 122, 125, 802 S.E.2d 369, 371 (2017). Of course, one manner in which the meaning of language can be determined is through the use of extrinsic sources, such as dictionaries. Using a dictionary definition should come with considerations for the time period in which the case was decided. In the case of *Mullane*, a definition from the late 1960s and early-to-mid 1970s provides the best period for determining what "reasonable diligence" meant at the time of the case being decided. Black's Law Dictionary defines "reasonable" as "just; proper; ordinary or usual; fit and appropriate for the end in view." *Reasonable*, BLACK'S LAW DICTIONARY 1431 (4th ed. 1968). "Diligence" is defined as "prudence; vigilant activity; attentiveness; or care, of which there are infinite shades, from the slightest momentary thought to the most vigilant anxiety." *Diligence*, BLACK'S LAW DICTIONARY 544 (4th ed. 1968). Combining these two definitions creates a standard which requires attentiveness to the proper level, considering the end in view. That end, of course, is the assurance of due process as required by the United States Constitution.

67. *Abba Gana*, 251 Ga. at 343, 304 S.E.2d at 912.

68. *Id.*

69. 342 Ga. App. 122, 802 S.E.2d 369.

70. *Id.* at 127, 802 S.E.2d at 372 (quoting *Abba Gana*, 251 Ga. at 344, 304 S.E.2d at 912).

71. *Id.* at 123, 802 S.E.2d at 370.

could have been done to ensure that service was reasonably calculated, under the circumstances, to apprise Styles of notice of the pendency of the action.[72] For example, Styles contended that he lived at one of the addresses where a copy of the Summons and Complaint were left, and on cross-examination, Spyke Ten's process server averred that he was retained only "to post [on the] property," indicating that he had not attempted to determine whether Styles was present on the property at the time of posting.[73] In fact, the process server affirmed that while he "did not see cars, a garden, or a garbage bin on the property . . . . [H]e did not look on the Internet for any information about where Styles might live [and] that he was not hired to research where Styles might live."[74] When the process server was retained to conduct such research on the location of someone whom he was going to serve, he would perform searches on "investigative data bases" and conduct an "old-fashioned gum shoe checking out" of the location.[75] The process server did not conduct such minimal searches in the absence of being retained to do so, and did not do so relative to Styles.[76]

The denial of Styles' motion to set aside the default judgment was therefore reversed.[77] In so doing, the Georgia Court of Appeals enumerated Spyke Ten's seven due diligence failures: (1) Spyke Ten's attorney's affidavit regarding the skip tracer shows only one source was used in obtaining the correct address; (2) asserting that a skip tracer was used, without providing specific details or dates, is inadequate to show due diligence; (3) Spyke Ten provided limited instructions to serve Styles at the wrong location (and to merely tack at the correct location), as well as failing to instruct the processor where to investigate; (4) other additional channels for obtaining information about potential defendants were available, but not used, per the testimony of the process server; (5) the envelope submitted as evidence to prove that the Summons and Complaint that were mailed were not postmarked, posted, or dated and therefore provided little evidentiary value to prove that it was actually mailed; (6) the process server went to Styles' location only once, and made no further attempts to locate or serve him; and (7) "the process server offered no evidence to show that Styles was

72. *Id.* at 123–25, 802 S.E.2d at 370–71.
73. *Id.* at 123–24, 802 S.E.2d at 370–71.
74. *Id.*
75. *Id.*
76. *Id.* at 127, 802 S.E.2d at 372.
77. *Id.*

actually at [his address] at the time of the attempted service but avoided coming to the door."[78]

It can therefore be surmised that due diligence means exhausting *every* reasonably available means of obtaining the defendant's address to properly serve them, as was expressed in *Abba Gana*.[79]

In *Reynolds v. Reynolds*,[80] for example, the Georgia Supreme Court noted that there were "obvious channels of information available . . . for locating [the opposing party]."[81] The court mentions individuals, such as the wife's daughter, who had contact with or knew the whereabouts of the defendant/wife.[82] The plaintiff/husband's failure to ascertain the defendant/wife's address without making an "honest and well directed effort" to use the available channels of information constituted a failure to use reasonably diligent efforts to serve the wife.[83] As such, the Husband's use of "service by publication did not meet the constitutional requirements of due process."[84]

In Georgia, then, it is clear that notice by publication should be used only as a last resort. Service by publication has been described to be "the method of notice least calculated to bring to a potential defendant's attention the pendency of judicial proceedings,"[85] and the Supreme Court of the United States has gone so far as to say that notice by publication should not be used when an interested party's name and address are "readily ascertainable" in actions where mailed service could be alternatively used.[86] These concerns persist today, as reflected in the Georgia Supreme Court's close attention to whether service by publication meets the minimum standards. All of this is exacerbated by the significant decline of newspapers as a part of an American's daily life.[87]

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78. *Id.* at 126, 802 S.E.2d at 372.

79. *Abba Gana,* 251 Ga. at 340, 304 S.E.2d at 909.

80. 296 Ga. 461, 769 S.E.2d 511 (2015).

81. *Id.* at 463, 769 S.E.2d at 513.

82. *Id.*

83. *Id.* (quoting *Abba Gana*, 251 Ga. at 344, 304 S.E.2d at 913).

84. *Id.* at 463, 769 S.E.2d at 513.

85. Boddie v. Conn., 401 U.S. 371, 382 (1971).

86. *Mennonite Bd. of Missions*, 462 U.S. at 797 (citing *Schroeder*, 371 U.S. at 210)

87. In 1964, eighty-one percent of American adults read the newspaper at regular intervals; in 2018, less than sixteen percent reported doing the same. LEONARD DOWNIE JR. & ROBERT G. KAISER, THE NEWS ABOUT THE NEWS 95 (2002); Elisa Shearer, *Social Media Outpaces Print Newspapers in the U.S. as a News Source*, PEW RES. CTR. (Dec. 10, 2018), https://www.pewresearch.org/fact-tank/2018/12/10/social-media-outpaces-print-newspapers-in-the-u-s-as-a-news-source/.

III. ALTERNATIVES TO SERVICE BY PUBLICATION VIA NEWSPAPER MEANS

If service by publication provided a mere "chance" of providing notice of the pendency of an action in 1950, it provides nothing more than the slightest sliver of hope today.[88] Even when newspaper readership was at its highest, service by publication was deemed "the method [] least calculated" to provide notice to the defendant.[89] Discussions about the constitutionality of service by publication, and its potential abridgment of due process rights, have been a mainstay in cases concerning alternative service, and in particular, service by publication.[90] How, then, can it be said that service by publication meets the minimal constitutional safeguards described in *Mullane* and *Mennonite Board of Missions*, irrespective of state law's additional protective measures, provided the lessened likelihood of readership? How does newspaper service, as described by O.C.G.A. § 9-11-4(f), meet this standard provided the case law of *Abba Gana*, *Styles*, and *Reynolds*?

While it is true that O.C.G.A. § 9-11-4(f)(1)(A) requires that the petitioner aver to the defendant's unavailability and out-of-state location, this often is not enough to ensure that due diligence has been used in making that determination from the outset. According to *Reynolds*, parties may no longer need to exhaust "every reasonably avaliable channel of information" in finding the location of defendants.[91] Rather, they must make an "honest and well directed effort" to use the "obvious" channels available.[92] *Reynolds* and *Styles* show the deterioration of requirements for service by publication in contravention of *Abba Gana* and *Mullane*. What alternatives exist, then, which would afford notice in a manner more consistent with the standards of the Constitution?

A. Social Media is not a Method Reasonably Calculated Under the Circumstances to Provide Notice to a Party

As a preliminary matter, social media is not a method that should be considered for service. Some commentators have argued that social media is an appropriate means by which service can be effectuated.[93] In

88. *Mullane*, 339 U.S. at 315; *see also* O.C.G.A. § 9-11-4(f)(1)(C), discussing requirements for service by publication.

89. *Boddie*, 401 U.S. at 382.

90. *See supra* Section II.

91. *Abba Gana*, 251 Ga. at 343, 304 S.E.2d at 912.

92. *Reynolds*, 296 Ga. at 463, 769 S.E.2d at 513 (quoting *Abba Gana*, 251 Ga at 343, 304 S.E.2d at 909).

93. Emily Davis, *Social Media: A Good Alternative, for Alternative Service of Process*, 52 CASE W. RES. J. INT'L L. 573 (2020).

so arguing, proponents of the "service by social media" theory cite international court cases from the late 2000s and early 2010s where social media was considered an acceptable means of service under particular conditions.[94] These same proponents have noted that the New York Supreme Court has provided permission to serve a defendant with the Complaint and Summons using Facebook's private messaging system, which they cite to as proof that this is the way forward for service by publication and alternative service.[95]

Further, advocates for the service by social media theory argue that Twitter, Facebook, and Instagram are possibly harder to resist than drugs, and that, if the purpose of service is to provide the defendant with actual notice, then using a well-and-often-used social media site makes sense.[96] This is especially so when considering costs incurred for more traditionally recognized service methods.[97] In so arguing, proponents of the social-media-service-method push back against the use of alternative service by publication, which is described as more costly and less effective than the potential use of social media.[98]

Despite the attractive features of service by publication, potential issues abound, such as inauthentic or deceptive accounts.[99] Take, for example, the popular MTV show "Catfish," wherein individuals use another individual's name, image, or likeness (often times combining the name, image, and likeness of different individuals) to create a fake online persona.[100] At what point would an individual who has created an online account based on the identifying features of another individual be able to accept service for that person; is such a thing possible?

Despite this noted shortcoming, proponents of this theory fail to consider inequities in Internet accessibility, and additionally fail to account for the ever-changing nature of social media.[101] In November 2019, only 79.4% of persons aged three years or older in the United

94. Davis, *supra* note 93, at 588–89.

95. *Id.* at 589.

96. *Id.* at 589–90.

97. *Id.* at 590.

98. *Id.*

99. *Id.* at 595.

100. *Id.*; CATFISH: THE TV SHOW, https://www.mtv.com/shows/catfish-the-tv-show (last visited Nov. 7, 2021).

101. Joseph Johnson, *Internet Usage Penetration in the United States in November 2019, by State*, STATISTA (Jan. 27, 2021), https://www.statista.com/statistics/184691/internet-usage-in-the-us-by-state/.

States had access to the internet.[102] That same percentage reflects Georgia's citizenries' access to the internet.[103] This is notwithstanding the ever-changing nature of social media. For example, Facebook recently announced its transition from "Facebook" into "Meta," a company that has expressed visions of creating a "metaverse."[104] In addition to virtual reality (VR) integration, this new-and-improved platform will allow users to check other platforms as well, such as Slack or Instagram.[105]

As Meta integrates social media platforms in a singular, indistinguishable monolith, courts should be more cautious. If Facebook, Instagram, and WhatsApp are held under a single corporation's control, potential service by publication methods using these platforms, under the social-media-service model, may be restricted by a singular privatized group. Putting service into Facebook's hands does not bode well for our representative democracy.

There remain additional questions regarding circumstances where social media users have multiple accounts on the same platform. Take, for example, the use of so-called "finsta" (fake-Instagram) accounts, wherein people use fake names in order to post more personal content, such as partying, illicit drug use, or extramarital activities.[106] Would service on these accounts be sufficient to allow an individual to proceed in a case without abridging the Constitutional rights of the other party, or would a party with multiple accounts have to designate a single account as their "service" account? Presently, there is no way to

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102. Johnson, *supra* note 101. Access to internet ranged anywhere from 74.3% (North Carolina) to 88.2% (Colorado).

103. *Id.*

104. Lauren Goode, *Look Over Here, Kids, It's the Metaverse*, WIRED (Oct. 20, 2021, 4:28 PM), https://www.wired.com/story/facebook-connect-metaverse/.

105. Goode, *supra* note 104. Instagram was purchased by Meta (at the time, Facebook, Inc.) on April 9, 2012, for a purported $1,000,000,000. Thomas Houston, *Facebook to Buy Instagram for $1 Billion*, THE VERGE (Apr. 9, 2012, 1:06 PM), https://www.theverge.com/2012/4/9/2936375/facebook-buys-instagram.

106. Caroline Forsey, *What's a Finsta? We Explain This Confusing Instagram Trend*, HUBSPOT (Oct. 15, 2019, 5:38 PM), https://blog.hubspot.com/marketing/finsta. "Finsta" accounts recently made headlines during the Senate Commerce subcommittee on consumer protection when Senator Blumenthal asked whether Facebook was willing to "commit to ending Finsta." This prompted Facebook's Chief of Safety, Antigone Davis, to have to explain the concept to the seventy-five-year-old Senator. It's okay, Senator Blumenthal, we don't really get it either. *See What Sen. Blumenthal's 'finsta' Flub Says About Congress' Grasp of Big Tech*, NPR (Oct. 4, 2021, 5:52 PM), https://www.npr.org/2021/10/04/1043150167/sen-blumenthals-finsta-flub-renews-questions-about-congress-grasp-of-big-tech.

universally verify that an account is associated with a private individual.[107]

These shortcomings and potential issues have been recognized by the courts, despite not being recognized by proponents for the social-media-service-method. In *Joe Hand Promotions , Inc. v. Carrette,*[108] the United States District Court for the District of Kansas stated, "It is unclear . . . that allowing an unconventional method of service via Facebook would comport with traditional notions of due process, or would achieve the desired result of effectuating service on defendants."[109] This is but one example of a court denying service via the unconventional method of social media, wherein the lack of verification regarding the authenticity of an individual's Facebook page, the international nature of the action, or where alternatives and less costly and or more reasonable means were available, were cited as the underlying reasons for the denial.[110] These cases are emblematic of the issues with service by social media, and should be taken as examples of the cautionary method courts should employ.

B. Alternative Service Methods Must Synergize with Other Facets of Location Tracking

Alternative service methods, which are utilized to supplant or extend service by publication, must synergize with more reliable methods of location and address tracking. It is our contention that service by publication in Georgia should be effectuated via the tandem use of certified mail and a centralized system of addresses maintained by the state government.

State governments are in the best position to ensure that the protections of the Constitution are maintained, and the balance often discussed in Supreme Court of the United States cases—wherein the state has a vested interest in protecting the interests of its citizenry—has already employed. While no states require obtaining and carrying identification cards, such as a driver's license or an "ID card," the practical reality is that ID cards *are* required to open bank accounts, to purchase age-restricted items such as alcohol or tobacco, and board

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107. *How Do I Request a Verified Badge on Facebook?*, FACEBOOK, https://www.facebook.com/help/1288173394636262 (last visited Nov. 13, 2021). Note this verification badge is only available for businesses and notable individuals.

108. No. 12-2633-CM, 2013 U.S. Dist. LEXIS 109731, at *1 (D. Kan. July 9, 2013).

109. *Id.* at *3.

110. *See id.* at *1; Qaza v Alshalabi, No. 54308/2016, 2016 NYLJ LEXIS 4146, at *1 (N.Y. Sup. Ct. Dec. 5, 2016).

airplanes. ID cards are available for a nominal fee, making them available to nearly everyone regardless of socio-economic status.[111]

Using this system in conjunction with certified mail offers not only a cost-effective solution to assure that service by publication is affording notice to potential parties to a lawsuit, but also would provide individuals with more assurance that the opposing party received notice of the action than publishing in the local newspaper. Having the option to use certified mail when serving an individual, which is not presently allowed in Georgia, provides a reliable and cost-effective method of service when used in tandem with a centralized system. Certainly this is a more cost-effective solution than a skip trace or simply posting in a newspaper.

A centralized service system service would allow the state to have a compelling reason for which they maintain an up-to-date system of addresses. Individuals would also have a vested interest in ensuring that their address is up to date, or failing. Failing to keep your address up to date could result in a default judgment being held against you should an individual fail to maintain accurate records.

Further, there could (and should) be built-in protections for homeless individuals. For example, providing these individuals with subsidized post office boxes would not only allow those individuals to maintain a centralized location at which they can secure mail, but it also would allow them to receive that service at a discounted or free price where it doesn't otherwise already exist. Of note, there are currently numerous problems with homelessness relative to service, as service by publication is unlikely to apprise homeless individuals with notice of the pendency of the action. While the social media service model would

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111. *How to Apply for a New Identification Card*, DMV.COM, https://www.dmv.com/apply-id-card?tg1=DVA&utm_content=dmv.com&utm_medium=dmv_&tg7=dmv_&utm_source=dmv.com&tg9=dmv.com&utm_term=organic_dmv&utm_campaign=organic_dmv (last visited Nov. 14, 2021). Costs of ID cards can range from as low as $5 to as high as $32. *How to Apply for a New Identification Card in Arkansas*, DMV.COM, https://www.dmv.com/ar/arkansas/apply-id-card?tg1=DVA&utm_content=dmv.com&utm_medium=dmv_&tg7=dmv_&utm_source=dmv.com&tg9=dmv.com&utm_term=organic_dmv&utm_campaign=organic_dmv (last visited Nov. 14, 2021) ($5 ID card fee). *How to Apply for a New Identification Card in Georgia*, DMV.COM, https://www.dmv.com/ga/georgia/apply-id-card?tg1=DVA&utm_content=dmv.com&utm_medium=dmv_&tg7=dmv_&utm_source=dmv.com&tg9=dmv.com&utm_term=organic_dmv&utm_campaign=organic_dmv (last visited Nov. 14, 2021). Despite the range in cost, Voter ID cards remain free in many states, and require registration with an address. Should service be tied to the use of an ID, we would further propose a way to obtain the same for free, such that concerns surrounding socio-economic ability are mitigated.

mitigate these issues to some degree, homeless individuals who have consistent access to a physical mailing address would be afforded a more reliable way to receive notice of dependency of an action in conformity with the Due Process Clause.

Finally, individuals who move often, such as for military service or for other leisure purposes such as retirement, are well-served by any statutory scheme incorporating a centralized service system. They easily report their changed location, such that service is not delayed due to their relocation. Obviously, any mandatory reporting regarding relocation is more involved than the current system. However, such mandatory reporting would likely become as routine as mail-forwarding, while equally as straightforward. Any statutory scheme combining certified mail to a centralized location can, and should, incorporate a grace period for individuals to report their change of address.

IV. CONCLUSION

There is no perfect system. Service by publication, particularly via newspaper publication, is an antiquated practice, underscored by the lower readership of newspapers today. It is our contention that the practice of publishing four times in a "local" newspaper affords no greater certainty that an individual will be apprised of an action against him than they would be if the notice of the action were written in the sky above their city of residence. At the very least, "sky writing" would come with the likelihood that an individual is outside on any given day, provided that the likelihood of an individual looking up is greater than them picking up a newspaper.

One thing is for certain—a new system needs to be put in place to ensure that individuals constitutional rights are not abridged. This system needs to reflect modernity, not antiquity. Service by publication "is the method of notice least calculated to bring to a potential defendant's attention the pendency of judicial proceedings."[112] Practically, there is no guarantee that individuals can be found consistently for the purpose of service. The introduction of a centralized address system would increase the likelihood that individuals are served in accordance with their constitutional rights as provided by the Due Process Clause.

112. *Boddie*, 401 U.S. at 382.