

1996

Estate Creditors, the Constitution, and the Uniform Probate Code

Sarajane Love

Follow this and additional works at: <http://scholarship.richmond.edu/lawreview>



Part of the [Estates and Trusts Commons](#)

Recommended Citation

Sarajane Love, *Estate Creditors, the Constitution, and the Uniform Probate Code*, 30 U. Rich. L. Rev. 411 (1996).

Available at: <http://scholarship.richmond.edu/lawreview/vol30/iss2/4>

This Article is brought to you for free and open access by the Law School Journals at UR Scholarship Repository. It has been accepted for inclusion in University of Richmond Law Review by an authorized editor of UR Scholarship Repository. For more information, please contact scholarshiprepository@richmond.edu.

ESTATE CREDITORS, THE CONSTITUTION, AND THE UNIFORM PROBATE CODE

*Sarajane Love**

I. INTRODUCTION

The United States Supreme Court's decision in *Tulsa Professional Collection Services, Inc. v. Pope*¹ caused the usually staid legal enclave of estate administration to sit alert. The Court declared unconstitutional an Oklahoma statute that barred creditors of decedents from filing claims against the decedents' estates two months after published notice of the commencement of probate proceedings.² The statute violated the due process rights of known and reasonably ascertainable creditors because it did not require a better form of notice to them.³ In failing to require actual notice to known creditors, the statute was not drastically atypical of other statutes regulating creditors' claims against the estates of deceased debtors. Therefore, it was not surprising that many legislatures, bar association committees, and scholars attempted to assess the effect of *Pope* on statutes in states other than Oklahoma. This article is a continuation of the dialogue on the impact of *Pope*,⁴ but it sounds a contrary

* Associate Professor, University of Georgia School of Law. B.A., Emory University; J.D., University of Georgia School of Law. I owe a debt of gratitude to my colleague, Richard V. Wellman, for sharing many conversations about this article as it was in progress, and to Elizabeth A. Horkey, my research assistant, for her very able, careful and timely assistance. Any errors or omissions are my sole responsibility.

1. 485 U.S. 478 (1988).

2. *Id.* at 479 (referring to OKLA. STAT. ANN. tit. 58, § 333 (West 1981)).

3. *Id.* at 491.

4. See, e.g., Thomas E. Allison, *Due Process Requirements in Estate Administration: More than the Law Allows?*, 10 PROB. L.J. 1 (1990); Kristin G. Fruehwald, *Notice to Creditors—Publication is No Longer Enough*, 24 IND. L. REV. 1045 (1991); Dean J. Konrardy, *Pope and Iowa Probate*, 39 DRAKE L. REV. 575 (1989-90); Mark Reutlinger, *State Action, Due Process, and the New Nonclaim Statutes: Can No Notice Be Good Notice If Some Notice Is Not?*, 24 REAL PROP., PROB. TR. J. 433 (1990); Patti S. Spencer, *The Plight of the Personal Representative After Pope: A Response to Professor Allison*, 10 PROB. L.J. 55 (1990); Thomas L. Waterbury, *Notice to Decedents'*

note by arguing, first (and rather modestly), that the decision does not necessarily apply across the board because a number of statutory regimes, illustrated most prominently by the Uniform Probate Code, do not have the degree of "state action" that marked the Oklahoma statutory regime in *Pope*. Second (and more boldly), the article argues that the majority opinion in *Pope* erred in its application of constitutional due process principles to nonclaim statutes that cut off the creditors of decedents' estates.

II. THE POPE CASE

H. Everett Pope, Jr. died at the St. John Medical Center in Tulsa, Oklahoma, on April 2, 1979.⁵ He had been a patient at the Medical Center for over four months,⁶ incurring expenses in excess of \$142,000. Mr. Pope's insurer paid for most of his expenses, but the Medical Center claimed a balance due of over \$14,000.⁷ More than three months after Mr. Pope's death, his will was admitted to probate and his widow was appointed his personal representative.⁸ Pursuant to an Oklahoma probate statute,⁹ Mrs. Pope immediately published notice in a newspaper for two weeks that creditors of the decedent should come forward and present their claims.¹⁰ Another statute barred any claims that were not presented within two months of the first publication of notice.¹¹ No claim for the hospital expenses was filed.¹² Four years later, Tulsa Professional Collection Services, Inc., a subsidiary of the Medical Center and the assignee of its

Creditors, 73 MINN. L. REV. 763 (1989); Brian J. Doherty, Comment, *Notice and the Missouri Probate Nonclaim Statutes: The Lingering Effects of Pope*, 59 MO. L. REV. 187 (1994); Stephanie G. Sarcone, Note, *Tulsa Professional Collection Services v. Pope: Analysis and Application by the Courts*, 39 DRAKE L. REV. 179 (1989-90).

5. Estate of Pope, 733 P.2d 396, 397 (Okla. 1986), *rev'd sub nom.* Tulsa Professional Collection Serv., Inc. v. Pope, 485 U.S. 478 (1988).

6. Pope was admitted on November 23, 1978. *Id.* at 397.

7. *Id.*

8. *Id.*

9. OKLA. STAT. tit. 58, § 331 (1991).

10. 733 P.2d at 397.

11. OKLA. STAT. tit. 58, § 333 (1991). A preliminary issue argued to the Oklahoma Supreme Court was whether expenses of the last illness were subject to the time bar. 733 P.2d at 398-99.

12. 733 P.2d at 397.

claim against the decedent, commenced suit for the balance allegedly due.¹³

Mrs. Pope prevailed in the state courts of Oklahoma. She successfully defended Collection Services' claim that it had been denied due process of law.¹⁴ The Oklahoma Supreme Court joined most other courts that had considered whether the constitutional notice requirement mandated by *Mullane v. Central Hanover Bank & Trust Co.*¹⁵ applied to probate proceedings that involve a nonclaim bar. The court held that nonclaim statutes are distinguishable and that publication by notice is sufficient.¹⁶ Relying extensively on earlier court opinions from other states, the court emphasized that cutting off creditors through the operation of a nonclaim statute is a different procedure than adjudicating someone's rights or interests in a judicial proceeding.¹⁷ The different nature of the proceedings means that notice serves a different function. In the case of adjudication, notice makes the person served a party to the case; in the case of a nonclaim statute, notice merely allows the person to whom it is addressed to become a party if he or she wishes.¹⁸

The Oklahoma court captured the difference in *Mullane*-type situations and the one at hand by characterizing the probate nonclaim statute as a "self-executing statute of limitations,"¹⁹ a phrase that would reverberate in the United States Supreme Court opinions. Emphasis on the self-executing nature of the statute's operation shifts the focus of analysis away from the issue of notice in the early stages of probate and toward the comprehensive, automatic time bar that takes place later.

In the half dozen or so cases questioning the constitutionality of nonclaim statutes, the issue of state action had never appeared as a barrier to consideration of the creditors' arguments,

13. *Id.*

14. In fact, the due process argument was an afterthought, having been asserted for the first time on a petition for rehearing in the Oklahoma Court of Appeals. *Id.* at 399.

15. 339 U.S. 306 (1950).

16. 733 P.2d at 400-01.

17. *Id.* at 401.

18. *Id.* at 400.

19. *Id.* at 401 (citing *Estate of Busch v. Ferrell Duncan Clinic, Inc.*, 700 S.W.2d 86, 88-89 (Mo. 1985)).

nor had the state courts ever relied on the absence of state action as grounds for upholding the statutes. In the Supreme Court of the United States, however, the preliminary issue of whether there was any state action that would invoke due process protection became overt for the first time in the *Pope* case. Writing for the majority, Justice O'Connor deemed it necessary to explain why there was sufficient state action to require compliance with due process standards.²⁰ State action existed as a result of the extensive involvement of the Oklahoma probate court. It was "intimately involved throughout, and without that involvement the time bar is never activated."²¹ Having found that the Due Process Clause was thereby implicated, the Court found that the state's legitimate interest in handling probate proceedings expeditiously did not justify dispensing with the burden of giving actual notice to "known or reasonably ascertainable creditors."²²

III. THE STATE ACTION ISSUE

The proposition that the constitutional restraints of the Fourteenth Amendment apply only when there is state action sounds straightforward enough, but the detours, dead ends, ruts, and roadblocks of the state action doctrine have become familiar obstacles to those who must travel through its territory. Its lack of predictability is notorious, summed up neatly by Professor's Black's exasperated conclusion that it is "a conceptual disaster area."²³ While the outcome of the state action test may always be in some doubt, there is a consensus that the starting point can be identified; the Supreme Court has indicated that making the determination involves "sifting facts and weighing circumstances."²⁴ At a minimum, then, it is always imperative to understand and then continuously to keep in

20. *Tulsa Professional Collection Serv., Inc. v. Pope*, 485 U.S. 478, 492 (1988) Chief Justice Rehnquist dissented.

21. *Id.* at 487.

22. *Id.* at 489.

23. Charles L. Black, Jr., *The Supreme Court, 1966 Term—Foreword: "State Action," Equal Protection, and California's Proposition 14*, 81 HARV. L. REV. 69, 95 (1967).

24. *Burton v. Wilmington Parking Auth.*, 365 U.S. 715, 722 (1961), *quoted in* *Lugar v. Edmondson Oil Co.*, 457 U.S. 922, 939 (1982).

mind the context in which the action occurs. For this reason, it is necessary to sketch briefly the development of the probate system. It is especially important as a predicate for understanding the forces that the Uniform Probate Code reacted against and the lengths to which it went to downplay state-mandated judicial involvement in the process of winding up the affairs of decedents.

A. *A Brief History of Estate Administration*

The American system of probate is patterned generally on the unwieldy English system that eventually involved three different court systems: the ecclesiastical or spiritual courts, the common law courts, and chancery.²⁵ These three courts each asserted authority over different aspects of distributing the goods of decedents.²⁶ Because of inadequacies in the common law actions available to creditors of decedents, creditors' claims were often brought in equity, thereby plunging estates into the morass of delay and expense that became the hallmark of chancery.²⁷ This trifurcated system, particularly with respect to the payment of debts, "became highly intricate, costly, and fraught with hazard to even the most prudent and well-meaning executor or administrator."²⁸ Parliament finally reformed the English system in the middle of the nineteenth century by eliminating the church's participation and treating land and person-

25. Lewis M. Simes & Paul E. Basye, *The Organization of the Probate Court in America*, 42 MICH. L. REV. 965, 967-74 (1944).

26. 2 SIR FREDERICK POLLOCK AND FREDERIC W. MAITLAND, *THE HISTORY OF ENGLISH LAW* 348 (2d ed. 1968); LEWIS M. SIMES & PAUL E. BASYE, *PROBLEMS IN PROBATE LAW* 387 (1946) [hereinafter *PROBLEMS*]; 1 J.G. WOERNER & WILLIAM F. WOERNER, *A TREATISE ON THE AMERICAN LAW OF ADMINISTRATION* 472-79 (3d ed. 1923); Professor Helmholz has found evidence in the rolls of the church courts that casts doubt on the accepted wisdom that debt issues were outside the jurisdiction of the church courts. This jurisdiction appears to have ended during the late fifteenth and early sixteenth centuries. R.H. Helmholz, *Debt Claims and Probate Jurisdiction in Historical Perspective*, 23 AM. J. LEGAL HIST. 68, 69 (1979); see also Thomas E. Atkinson, *Brief History of English Testamentary Jurisdiction*, 8 MO. L. REV. 107, 112-13 (1943) who likewise acknowledges some early jurisdiction over debts in the spiritual courts.

27. THOMAS E. ATKINSON, *HANDBOOK OF THE LAW OF WILLS* 688 (2d ed. 1953) [hereinafter *HANDBOOK*].

28. 2 WOERNER & WOERNER, *supra* note 26, at 1179.

alty alike.²⁹ The English reform came long after the American states had settled into a variety of patterns for handling decedents' affairs.

It was impossible for the American colonies to mimic the English system, because the colonies lacked an institution resembling the ecclesiastical courts. Nevertheless, it is generally thought that the ecclesiastical courts are, at least in spirit, the forerunner of American probate courts because the concept of a personal representative to preside over the proper disposition of the decedent's personal estate developed under their aegis.³⁰ The personal representative was either an executor named in the decedent's will, or an administrator appointed by the ordinary.³¹ A system revolving around a personal representative whose duties and powers derived from appointment contrasted with the continental system of universal succession that recognized the heir as a sort of natural continuation of the decedent, even to the point that liability for all of the decedent's debts was as much a part of the succession as the decedent's assets.³²

The personal representative was at the center of the systems adopted in America (with the exception of Louisiana, whose civil law heritage retains universal succession), but there was, and still is, a great variety in the superstructure that surrounds the personal representative. The judicial figure involved has ranged from an official without legal training presiding over an inferior court to a judge of a court of general jurisdiction.³³ The court may or may not be a court of record; the appeal from its decisions may be a *de novo* review by a court of

29. PROBLEMS, *supra* note 26, at 395.

30. PROBLEMS, *supra* note 26, at 412-13; Atkinson, *supra* note 26, at 107.

31. 2 POLLOCK & MAITLAND, *supra* note 26, at 336, 361; Atkinson, *supra* note 26, at 107.

32. See Max Rheinstein, *European Methods for the Liquidation of the Debts of Deceased Persons*, 20 IOWA L. REV. 431, 434-435 (1975). In England, the advent of primogeniture in the descent of land forestalled any acceptance of the Roman concept of universal succession. 2 POLLOCK & MAITLAND, *supra* note 26, at 331-32. Therefore, even though the descent of land in England was outside the church's system of supervised administration, it was not based on the notion of universal succession.

33. See generally, PROBLEMS, *supra* note 26, at 399-405 (discussing the evolution of the probate court system in America).

general jurisdiction, or it may be an appeal through regular channels to an appellate court.³⁴

Amidst this diversity, however, there has been a common pattern of gradually increasing the involvement of a court official in the process of administering the estate.³⁵ In comparison, the English ordinary's primary responsibility was to admit wills to probate and grant letters of administration to the personal representative; he put the process in motion, but thereafter it proceeded without ongoing, routine supervision.³⁶ Professors Simes and Basye described the extension of judicial oversight as "needed," but they did not elaborate on the basis for the need.³⁷ Professor Rheinstein, on the other hand, painted a more jaded picture of the growth of judicial control when he attributed it "in no slight degree" to "the welcome opportunity to exact fees, or to secure the intervening authority's own interests in some other way as by levy of inheritance taxes."³⁸

Until the twentieth century, adding red tape to increase the degree of court supervision of the administration of estates may have been largely meaningless as a practical matter. Informal administration was common in the United States until the early 1900s. Until then, the heirs or will beneficiaries seem to have satisfied creditors and to have agreed amicably about division of property among themselves without need of court oversight.³⁹ In Texas, the statutes encouraged such extrajudicial settlements by providing that administration of an estate should take place only when it was necessary.⁴⁰ Around the turn of the century, one respected observer expressed smug satisfaction with the American system, whatever its variations:

34. *Id.* at 416-17.

35. *Id.* at 401.

36. *Id.*

37. *Id.* Cf. John H. Langbein, *The Nonprobate Revolution and the Future of the Law of Succession*, 97 HARV. L. REV. 1108, 1120 (1984) (attributing the structure and procedure of the probate system to the need to pay creditors).

38. Rheinstein, *supra* note 32 at 438.

39. Eugene F. Scoles, *Succession Without Administration: Past and Future*, 48 MO. L. REV. 371, 374 (1983).

40. TEX. PROB. CODE ANN. art. 178(b) (West 1980). This provision has been essentially the same since 1876. Scoles, *supra* note 39, at 384 n.48.

The American courts of probate, with their extensive powers, their simple and efficient procedure, their happy adaptation to the wants of the people in the safe, speedy, and inexpensive settlement of the estates of deceased persons attest the marvelously clear insight of the people of the Colonies and young States into the principles involved, and the genuine instinct which guided them in their realization.⁴¹

It was only about sixty years later that another respected observer bemoaned the state of probate law in America and warned that “[s]omething—and perhaps something quite extreme—must be done if the law is to keep pace with popular demand, unorganized as this demand might be.”⁴²

It is not the purpose of this article to document changes in statutes or the habits of the people during the intervening sixty years. The significant fact is that the dissatisfaction with the probate system had spread beyond scholars and authors whose main business was the law of wills and probate. The average person on the street also had come to perceive probate as a rapacious beast and lawyers as its masters, if not its creators. Norman Dacey, the most outspoken of probate’s critics, wrote, “[i]n most areas of this country the probate procedure is a scandal, a form of tribute levied by the legal profession upon the estates of its victims, both living and dead.”⁴³ Additional articles about the probate “mess” were written by Murray Bloom and stirred up the readership of *The Reader’s Digest*.⁴⁴

Unfortunately, some of the problems identified with probate were caused by the unsavory influences of corruption and political patronage,⁴⁵ but the layers of routine and seemingly unnecessary procedures were also insidious contributing factors.

41. 1 J.G. WOERNER, A TREATISE ON THE AMERICAN LAW OF ADMINISTRATION 322 (2d ed. 1889).

42. HANDBOOK, *supra* note 27, at 574-75.

43. NORMAN F. DACEY, HOW TO AVOID PROBATE 7 (1st ed. 1965).

44. Murray Teigh Bloom, *Do-It-Yourself Probate—It’s Here*, READER’S DIG., July 1975, at 109 [hereinafter *Do-in-It-Yourself*]; Murray Teigh Bloom, *The Mess in Our Probate Courts*, READER’S DIG., Oct. 1966, at 102. In the first article cited, Bloom used recent probate reforms in Wisconsin as a springboard to continue the attack on the unreformed systems in other states. *Do-It-Yourself* at 112; see also MURRAY TEIGH BLOOM, THE TROUBLE WITH LAWYERS 203-16 (1968) [hereinafter TROUBLE].

45. See TROUBLE, *supra* note 44, at 233-63.

Bloom condemned a system of "checks and double checks" required by law, for which lawyers charged percentage fees based on the size of the estate.⁴⁶ One practicing attorney noted the plethora of statutes governing administration of estates and opined that it "encourages the average practitioner to think of probate practice as an opportunity to shoot fish in a barrel, and get well paid for doing it."⁴⁷ The simplicity of so many routine probate tasks⁴⁸ raised a number of questions. If the tasks were so simple, could nonlawyers, even the surviving family members, perform tasks themselves? Were the tasks really necessary in the first place? Alternatively, were there ways of transferring property to survivors without having to use the ponderously slow and expensive probate procedure? It is only natural that laypeople, left to their own devices, turned to a remedy that they could execute by themselves. They bypassed the lawyers by bypassing the system that the lawyers had commandeered. Several legal devices existed for passing title outside probate, such as holding property in joint tenancy form with the right of survivorship, or creating a living trust. With alacrity, the public seized on these devices, and a probate avoidance movement was begun. The movement was epitomized by Norman Dacey, who capitalized on the public sentiment by authoring a best-selling book, *How to Avoid Probate!*, which offered do-it-yourself forms for use by the book's purchasers, enveloped between pithy attacks on lawyers and the probate courts.⁴⁹

A few short years before the storm of probate avoidance erupted, work on the Uniform Probate Code had begun in

46. *Id.* at 208.

47. Daniel F. Carmack, *Common Problems in Administration of Decedents' Estates*, 14 CLEV. MARSHALL L. REV. 179, 179 (1965).

48. Judith N. Cates, coauthor with Marvin B. Sussman and David T. Smith of the classic study, *THE FAMILY AND INHERITANCE* (1970), reported,

We also interviewed 78 of the lawyers who were involved in these estates. Oh, they liked probate work all right. They said it's pretty simple, almost always just a matter of filling in forms at the proper time, and a lot of it was so routine their secretaries did the actual form-filling. Most of them admitted they were handsomely paid for probate work.

TROUBLE, *supra* note 44, at 213.

49. DACEY, *supra* note 43. Purchasers of Dacey's book were informed in large block letters on the Table of Contents page that "all will and trust forms are on pages which are perforated for easy removal from the book." See also Richard V. Wellman, *The Uniform Probate Code: A Possible Answer to Probate Avoidance*, 44 IND. L.J. 191, 192 (1969) [hereinafter *Answer*].

1962.⁵⁰ The project was brought to fruition in 1969 as the public outcry reached a crescendo. The U.P.C. project was not initially the result of public pressure, but was largely a continuation of the reform spirit that had produced the Model Probate Code⁵¹ in the 1940s. However, the increased use of probate avoiding devices clearly became a concern, as well as ammunition to persuade lawyers to give the U.P.C. a warmer reception than that accorded the MPC.⁵² The public hue and cry over the expense of probate and the growing tendency to spurn probate by using alternative devices to dispose of property may have been the inspiration behind the decision to take a more aggressive approach to reform than the Model Code.⁵³ It was not enough to streamline court procedures; the overarching theme of the Uniform Probate Code would be to remove the courts from the process of probate and administration to the greatest extent feasible.

At the time of the U.P.C.'s adoption by the National Conference of Commissioners on Uniform State Laws and the American Bar Association, numerous published articles appeared; most of them were aimed at explaining the operation of the U.P.C. and urging its adoption.⁵⁴ To those in the academic

50. The project was a joint undertaking of the American Bar Association Real Property, Probate and Trust Law Section and the Uniform Law Commissioners. Nine law professors served as reporters and were advised by a committee of about 25 lawyers. Richard V. Wellman, *Lawyers and the Uniform Probate Code*, 26 OKLA. L. REV. 548, 550-51 (1973) [hereinafter *Lawyers and the U.P.C.*].

51. The Model Probate Code was a project of a committee of the Probate Law Division of the Section of Real Property and the Probate and Trust Law of the American Bar Association, in conjunction with a research project of the Michigan Law School. Professors R.G. Patton, Lewis M. Simes and Thomas E. Atkinson were prominently involved, assisted by Paul E. Basye. The Code was presented in 1945, after five years of research and drafting. In its presentation, the drafting committee traces the seeds of reform to several articles by Professor Atkinson that appeared in the *Journal of the American Judicature Society* in 1939 and 1940. PROBLEMS, *supra* note 26, at 5.

52. "Perhaps you think that probate avoidance is good for law business. If so, I'd like to hear about it. Elsewhere around the country, lawyers tend to agree that revocable trusts and joint tenancies are hard on fees." *Lawyers and the U.P.C.*, *supra* note 50, at 549; see also *Answer*, *supra* note 49, at 191.

53. The Model Code was "cut along very conservative lines," but nevertheless served as an important wedge for the ideal of probate reform. Richard V. Wellman, *The Uniform Probate Code: Blueprint for Reform in the 70's*, 2 CONN. L. REV. 453, 466 n.51 (1969) [hereinafter *Blueprint*].

54. Professor Richard V. Wellman, the Chief Reporter for the Uniform Probate Code, authored most of these publications, writing eloquently, and at times passion-

world and in jurisdictions that have enacted the U.P.C., the contours of its procedural reformations are, or should be, familiar. However, the memories of those who do not work in the pedagogical front lines may well have faded since the first massive wave of writings about the U.P.C.⁵⁵ A brief refresher course is therefore in order.

To achieve its goal of minimizing judicial involvement in the probate and administration process, the drafters of the U.P.C. created the Flexible System designed to respond both to the routine estate needing minimal administration and to larger, more complex, or more controversial estates where judicial oversight might be welcomed by those involved.⁵⁶ Central to the operation of the Flexible System is the existence of an official within the probate court, denominated a "registrar" by the U.P.C., who handles informal proceedings on a nonadjudicative basis.⁵⁷ A "key concept" in creating the Flexible System was "that the court or Registrar, though inevitably involved in the creation of the status of the personal representative, does not exercise supervisory jurisdiction over its appointee."⁵⁸ Under

ately, about the need for probate reform. *See, e.g., id.; Lawyers and the U.P.C., supra* note 50, at 548; *Answer, supra* note 49, at 191.

Other publications were written primarily for state audiences in hopes of influencing particular state legislatures and the members of the probate bar. One thorough and extensive analysis obviously fell on deaf ears; the Oklahoma bar and legislature left largely intact the probate regime that later became the subject of *Pope*. *See* Orley R. Lilly, Jr., *The Uniform Probate Code and Oklahoma Law: A Comparison, Part I*, 8 TULSA L.J. 159 (1972) [hereinafter Lilly I]; Orley R. Lilly, Jr., *The Uniform Probate Code and Oklahoma Law: A Comparison, Part II*, 9 TULSA L.J. 1 (1973) [hereinafter Lilly II].

55. It might be appropriate to observe also that sitting judges who graduated from law school before the mid-sixties are unlikely to have any feel for the structure and purposes of the U.P.C., whether or not they sit in a jurisdiction that has adopted it, because appointments to the bench tend to come from more politically connected segments of the bar such as trial or corporate lawyers. This observation assumes that many law professors who teach courses in wills and estates have used the U.P.C. as a pedagogical tool in both U.P.C. and non-U.P.C. states ever since its introduction. But, alas, even classroom exposure (indoctrination?) may be a fleeting thing; query how much understanding of probate procedure is retained by a trial or corporate lawyer whose wills and estate professor taught the U.P.C. to her or him in the 1960s or 1970s.

56. 1 UNIFORM PROBATE CODE PRACTICE MANUAL 5 (Richard V. Wellman, ed., 2d ed. 1977) [hereinafter PRACTICE MANUAL].

57. U.P.C. § 1-201(19) (1993). Informal proceedings can be used to probate a will or appoint a personal representative.

58. *Id.*

the auspices of the registrar, a will can be offered for "informal" probate, and the administration of the estate (testate or intestate) can be carried out on an unsupervised basis.⁵⁹ Informal probate of a will entails a "statement" of informal probate,⁶⁰ rather than an adjudication of validity, and the statement is issued following a finding of routine facts, such as the application's completeness and the propriety of venue.⁶¹ An unsupervised administration can take place after a will is probated or after the decedent is declared intestate and a personal representative is named.⁶² The U.P.C. grants the personal representative adequate powers to carry out the administration of the estate without further contact with the court.⁶³

In the drafting process, the committee considered the issue of giving notice to interested parties. Its primary concern was not about creditors, however, but about notice of initial stages, particularly the probate of a will or the opening of an intestate administration.⁶⁴ Notice was debated both from a pragmatic and from a constitutional point of view. As a practical matter, it was hard to escape the conclusion that excessive notice requirements, whether personal or by publication, were not effective protective devices and would seriously undermine the drive for simplification, rendering it all but futile.⁶⁵ Nor did the committee believe that *Mullane* dictated notice because under the informal, unsupervised system devised by the U.P.C., there

59. *Id.*

60. U.P.C. § 3-302 (1993).

61. U.P.C. § 3-303(a) (1993). However, a safety valve backstop gives the registrar some discretion to deny the application for informal probate for failure to satisfy statutory requirements, but it is stipulated that such a denial "is not an adjudication." U.P.C. § 3-305 (1993). Recourse for the proponent who believes the denial is in error is to apply for formal probate. U.P.C. § 3-305 cmt. (1993).

62. Informal probate need not be followed by any administration whatsoever. See PRACTICE MANUAL, *supra* note 58, at 203-05.

63. See generally U.P.C. art. III, pt. 7. The personal representative's detachment from the court is emphasized by § 3-704, which directs the personal representative to proceed expeditiously with the settlement and distribution of a decedent's estate and, except as otherwise specified or ordered in regard to a supervised personal representative, do so without adjudication, order, or direction of the Court, but he may invoke the jurisdiction of the Court, in proceedings authorized by this Code, to resolve questions concerning the estate or its administration.

U.P.C. § 3-704 (1993).

64. See *Blueprint*, *supra* note 53, at 463-67, 496-500.

65. *Id.* at 469, 499.

were no "adjudications" handed down by a court and, therefore, no proceedings to which the *Mullane* notice requirements applied.⁶⁶

Informal probate and unsupervised administration are not, of course, the exclusive means of handling estates under the U.P.C., but they are the default procedures that operate unless affirmative action is taken to opt for formal probate or supervised administration.⁶⁷ The U.P.C. recognizes that formal probate and some court proceedings under supervised administration are adjudications and therefore require actual notice.⁶⁸ The flexibility of the system is maximized by the ability of the participants in each case to determine how little or how much court involvement is desirable. For example, a formal proceeding to probate a will can be combined with an informal appointment of the personal representative,⁶⁹ or a personal representative conducting an unsupervised administration can initiate court proceedings for particular problems as needed.⁷⁰ In the final analysis, then, the amount of judicial intrusion in any given estate administration under the U.P.C. is determined by the choices of private individuals and not by a statutory scheme legislated by the state.

Simplicity and efficiency are also hallmarks of the U.P.C.'s treatment of creditors, which is basically the same whether the administration of the estate is supervised or unsupervised. In the original version of the U.P.C., the personal representative was required to publish a notice for three weeks notifying credi-

66. *Id.* at 496-500 (citing *Mullane v. Central Hanover Bank and Trust Co.*, 339 U.S. 306 (1956)). In hindsight, it seems ironic that the possible constitutional infirmity of notice by publication to creditors was ignored.

No-notice probate has been criticized as violative of procedural due process. Note, *The Constitutionality of the No-Notice Provisions of the Uniform Probate Code*, 60 MINN. L. REV. 317 (1976).

67. The affirmative action necessary to trigger formal probate is a petition by an interested party. U.P.C. § 3-401 (1993). Supervised administration may be requested by an interested party or the personal representative. U.P.C. § 3-502 (1993). If the decedent's will directs a supervised administration, the court must order one unless a change of circumstances since the will's execution alleviates the need for supervised administration. In the absence of a testamentary direction, the court may order supervised administration only if it finds it necessary under the circumstances. *Id.*

68. U.P.C. §§ 3-403(a), 3-502, 7-206 (1993).

69. U.P.C. § 3-401 (1993); see also U.P.C. art. III general cmt. (1993).

70. U.P.C. § 3-704 (1993); see also U.P.C. art. III general cmt. (1993).

tors to present their claims within four months of the first publication of notice, or be forever barred.⁷¹ As a back-up to the four-month bar running from the publication of notice, the drafters also included a statute of limitations period of three years, measured from the death of the decedent, which would operate in cases where notice was not published.⁷²

The four-month, or "short-term,"⁷³ nonclaim bar, which is the U.P.C.'s analogue of the nonclaim bar declared unconstitutional in *Pope*, was clearly adopted for the benefit of the estate beneficiaries other than creditors. As the comments state, "This should expedite settlement and distribution of estates."⁷⁴ However, creditors' interests were not overlooked, as the U.P.C. simplified the process of presenting and allowing claims. Furthermore, it was thought that the period allowed was reasonable for commercial, personal, and family creditors to learn of the death and respond to it.⁷⁵ Tort creditors were recognized as a special case, and neither the four-month nor the three-year limits applied to them, to the extent that their claims were covered by liability insurance.⁷⁶

The *Pope* decision unleashed a debate within the Joint Editorial Board of the U.P.C. over whether amendments to comply with *Pope* should be proposed. The pivotal issue was that of "state action," to be discussed below. Ultimately, a majority of the Board took the cautious position that it should propose amendments that would satisfy *Pope* for the benefit of those

71. U.P.C. §§ 3-801(a), 3-803(a)(1) (1969).

72. U.P.C. § 3-803(a)(2) (1969).

73. Professor Falender, in an academic precursor to *Pope*, distinguished between so-called "short-term" nonclaim periods triggered by a particular probate activity such as issuance of letters or publication of notice and "long-term" periods typically keyed by the decedent's death, and, as the terminology suggests, of longer duration. Debra A. Falender, *Notice to Creditors in Estate Proceedings: What Process is Due?*, 63 N.C. L. REV. 659, 667 (1985). In her scheme of things, the distinction is crucial because she concludes that long-term nonclaim statutes do not entail sufficient state action to warrant constitutional review. *Id.* at 674. The *Pope* decision made clear that it did not apply to "nonclaim statutes that run from the date of death, and which generally provide for longer time periods. . . ." *Tulsa Professional Collection Servs. v. Pope*, 485 U.S. 478, 488 (1988). This limitation on the scope of the holding in *Pope* cleared the way for the U.P.C.'s 1989 amendments in response to *Pope*.

74. U.P.C. art. III, pt. 8, general cmt. (1993).

75. PRACTICE MANUAL, *supra* note 58, at 337.

76. U.P.C. § 3-803(d)(2) (1993).

jurisdictions where concerns existed, but without altering the Code's basic framework.⁷⁷ The revamped notice provisions give the personal representative the option of giving notice by publication, personal notice by mail, or no notice at all.⁷⁸ If notice is by publication, there is a four-month nonclaim bar just as under the original U.P.C.⁷⁹ If the personal representative chooses to give notice by mail, the creditor has at least sixty days after the mailing or other delivery of the notice to present a claim before being barred.⁸⁰ The long-term limitation was shortened from three years to one year.⁸¹ Because the one-year limitation period begins to run at death (like the three-year limitation that it replaced⁸²), there is no longer any nexus between the termination of creditors' claims and any court proceedings, and therefore, it can be argued that the state action that tainted the Oklahoma nonclaim bar has been avoided.⁸³

77. U.P.C. app. IV, at 511 (1991).

78. U.P.C. § 3-801 (1993).

79. U.P.C. §§ 3-801(a), 3-803(a)(2) (1993).

80. U.P.C. §§ 3-801(b), 3-803(a)(2) (1993).

81. U.P.C. § 3-803(a)(1) (1993).

82. U.P.C. § 3-803(a)(2) (1969).

83. See U.P.C. app. IV (1991); see also *supra* note 73.

Professor Reutlinger has responded to the U.P.C. amendments with sharp skepticism, inquiring cleverly, "Can no notice be good notice if some notice is not?" Mark Reutlinger, *supra* note 4, at 433. Reutlinger's argument that the 1989 U.P.C. amendments still fail constitutional muster is based on an extremely generous view of the state action doctrine as it applies to procedural due process. In his view, the "Grimpin Mire," *id.* at 442, of state action is all-pervasive and unavoidable with respect to all varieties of statutes that shorten the statute of limitations on decedents' creditors, both short-term nonclaim statutes and long-term nonclaim statutes, which he denominates as "probate statutes of repose." *Id.* at 435. The flaw in Professor Reutlinger's analysis is his failure to distinguish the state action question for purposes of due process requirements of notice and/or a hearing from the state action question for purposes of challenging legislation on other constitutional grounds, such as equal protection. See *infra* note 83 and accompanying text.

This oversight leads to the astonishing proposition that all statutes of limitation are subject to review on procedural due process grounds. See, e.g., Reutlinger, *supra* note 4, at 451, 455. Furthermore, Reutlinger asserts that a "garden variety" statute of limitation escapes a notice requirement because the event which causes it to commence "is operatively known or knowable by the plaintiff or claimant." *Id.* at 456. Query: whether a victim of intentional fraudulent concealment would agree with Professor Reutlinger's assertion and whether any legislature would seriously consider an act requiring those guilty of concealment to give notice to their victims that a statute of limitations has commenced to run on their cause of action.

Professor Reutlinger is forced into making these questionable conclusions by yet another dubious distinction that he derives from what the Supreme Court did not say in *Texaco Inc. v. Short*, 454 U.S. 516 (1982): the distinction between giving notice of

B. *State Action and the U.P.C.*

Having considered the historical context of estate administration, and before focusing on the state action issue in *Pope*, some consideration must be given to the legal context. Three separate threads form the analytical core of discussions regarding the constitutionality of probate nonclaim statutes: the Due Process Clause of the Fourteenth Amendment, state action, and so-called self-executing statutes of limitation. All of these elements are crucial parts of recent discussions of the matter, but unfortunately, the relationship between them is not always clear. Upon reflection, this state of affairs is probably inevitable given the maddening refusal of "state action" to take a definite form. Nevertheless, for one who wishes to address the "state action" issue in *Pope*, some attempt to delineate the relationship of the three elements is a necessary step, even though the result may be a picture whose pieces do not fit precisely.

First, what is the relationship between the concept of "state action" and the underlying constitutional right being invoked (in this case, the Due Process Clause)? Second, does a "self-executing statute of limitation" escape constitutional invalidity because it negates state action, or because of the way the Due Process Clause applies (or does not apply) to it?

Most simply understood, state action is a necessary prerequisite for application of the constitutional limitations of the Fourteenth Amendment. The amendment restricts the actions of states, not the actions of private individuals.⁸⁴ Viewed thusly, the state action concept serves as a threshold issue, separate and apart from the merits of the underlying constitutional argument. Professors Nowak and Rotunda have characterized this as a "unitary concept" of state action.⁸⁵ The concept of state

the expiration of a statute of limitations and giving notice of the commencement of the running of the limitations period. *Id.* at 454. This distinction is factually specious in that the purpose of a notice requirement is to inform the recipient of the potential deprivation of a property right; notice of the commencement of the limitations period and notice of its pending expiration are indistinguishable in that regard. If one is notified that the statute of limitations is about to expire, isn't one also on notice that the period of limitations has commenced?

84. "[N]or shall any State deprive any person of life, liberty, or property, without due process of law." U.S. CONST. amend. XIV, § 1.

85. JOHN E. NOWAK & RONALD D. ROTUNDA, CONSTITUTIONAL LAW § 12.5, at 493

action as a self-contained entity would seem to lead naturally to tests or formulas that would measure the sufficiency of state action with mechanical or quantifiable standards. However, the refusal of the state action question to allow itself to be reduced to any clear-cut, formalistic, or mechanical tests is well known and beyond debate.

Professor Tribe distills the case law of state action with his characterization of it, not as doctrine, but as "anti-doctrine."⁸⁶ Although the unitary understanding of state action is said to be widespread,⁸⁷ and certainly is appealing because of its straightforwardness, the cases indicate that at times the merits of the underlying constitutional issue exert a force on the determination of the state action question.⁸⁸ Therefore, one must begin any attempt to deal analytically with the state action issue by recognizing that there is no single truth, or even a set of truths, that will serve to narrow the path and define its destination. State action is unitary, and it is not unitary; it is doctrine, and it is anti-doctrine.

Likewise, the precise analytical role of the much-bruited phrase "self-executing statutes of limitation" is ambiguous. The concept of nonclaim bars as statutes of limitation, with or without the qualifying description of them as "self-executing," was the basis for a number of the pre-*Pope* state court opinions that upheld such statutes against attacks based on *Mullane*.⁸⁹ The United States Supreme Court also used the phrase "self-execut-

(4th ed. 1991).

86. LAURENCE H. TRIBE, *AMERICAN CONSTITUTIONAL LAW* § 18-1, at 1691 (2d ed. 1988).

87. NOWAK & ROTUNDA, *supra* note 85, at 483.

88. Professor Tribe notes that the state action determination is influenced by the substantive constitutional right that is at stake. Tribe, *supra* note 85, § 18-3, at 1699-1700. Nowak and Rotunda note the exceedingly high correlation between the Court's findings of constitutional violations and state action; the one "minor exception" is *Public Utilities Comm'n v. Pollak*, 343 U.S. 451 (1952), where the court found state action, but upheld the challenged action. NOWAK & ROTUNDA, *supra* note 85 § 12.5, at 485 n.5.

89. *Estate of Busch v. Ferrell-Duncan Clinic, Inc.*, 700 S.W.2d 86 (Mo. 1985) (en banc) (holding that notice by publication fulfills due process requirements for purpose of notice to creditor); *In Re Estate of Fessler*, 302 N.W.2d 414 (Wis. 1981) (contending that creditor's probate claim was cut off by statute of limitations, thus *Mullane's* notice requirements did not apply); *Gano Farms, Inc. v. Estate of Kleweno*, 582 P.2d 742 (Kan. Ct. App. 1978) (holding that publication notice of appointment of decedent's personal representative was sufficient to put creditor on notice).

ing” to describe the Indiana Mineral Lapse Act, which was upheld in *Texaco, Inc. v. Short*.⁹⁰ The point being made was that the respective statutes’ operations did not present procedural due process problems because they were not proceedings or adjudications, as in *Mullane*.⁹¹ In these cases, the courts seem to address the merits of the due process argument by defining the scope of the *Mullane* holding; to have separately addressed the question of the existence of state action would not have affected the outcome because in any event, the nonclaim statutes did not offend the due process notice requirement embodied in *Mullane*.

The first comprehensive academic treatment of notice to decedents’ creditors⁹² was published prior to the *Pope* decision and, if one may judge from the Court’s citations, was influential in the decision.⁹³ Its author, Professor Falender, echoed the more traditional and settled attitudes reflected above. She tilts toward the unitary concept of state action because she views it as a “trigger” for the application of the Fourteenth Amendment and finds it exists in the probate court’s order appointing the personal representative, which is “a [p]rerequisite to invocation of the short-term nonclaim period.”⁹⁴ The fact that there is

90. 454 U.S. 516, 535-36 (1982).

91. “The reasoning in *Mullane* is applicable to a judicial proceeding brought to determine whether a lapse of a mineral estate did or did not occur, but not to the self-executing feature of the Mineral Lapse Act.” *Id.* at 535.

92. Falender, *supra* note 73, at 659.

93. Professor Falender’s article is cited four times in the court’s opinion. *Tulsa Professional Collection Serv., Inc. v. Pope*, 485 U.S. 478, 479, 480 (two citations), and 489 (1988). These citations are to the background material gathered by Professor Falender on nonclaim statutes. Professor Falender, of course, was not writing with reference to the facts of the *Pope* case or the Oklahoma probate scheme. She was reacting to the decision of the Nevada Supreme Court in *Continental Ins. Co. v. Moseley*, 683 P.2d 20 (Nev. 1984), which cursorily struck down the Nevada nonclaim statute after remand by the United States Supreme Court. Falender, *supra* note 73, at 663-64. When academics write for a (hopefully) national audience, one can hardly expect that they restrict their attention to a single state’s statute or probate scheme. Professor Falender’s article is certainly typical in that sense. However, her unquestioning assumption that all nonclaim statutes are fungible for due process purposes is too broad. Even she admits that “state statutes vary enough to make precise delineation of a single, typical estate proceeding impossible.” *Id.* at 664 n.24. Nevertheless, the Supreme Court in *Pope* continued Professor’s Falender’s generalizations about the setting of nonclaim statutes and wrote an opinion that was far too broad for the facts before it. It is much easier to forgive Professor Falender for writing an overly comprehensive law review article than it is to forgive the Supreme Court for purporting to decide the constitutionality of statutes that were not before the Court.

94. Falender, *supra* note 73, at 675. Although Professor Falender is careful to

some clearly identifiable "state" action in the form of a single routine court order, and that there is some nexus between that court order and the running of a nonclaim bar, is sufficient to satisfy a mechanical notion of state action. Professor Falender does not explore in any meaningful way the relationship between the court and the personal representative, nor does she explore the court's involvement in the process of administering the estate of a decedent.⁹⁵ She isolates the nonclaim statute, disregarding the milieu in which it exists.⁹⁶ She even gives the impression that the U.P.C.'s nonclaim statute is the grandparent of them all by using it in a footnote as the leadoff example of "prevailing wisdom . . . expressed almost universally in statutes."⁹⁷

Professor Falender also reflects the pre-*Pope* understanding of the significance of the analogy between nonclaim statutes and statutes of limitation: it is relevant to the consideration of the Due Process issue, not to the preliminary question of whether state action exists.⁹⁸ Either *Mullane* applies and adequate notice is required, or nonclaim statutes are statutes of limitation that escape *Mullane*'s strictures.⁹⁹

The analytical structure of the majority opinion in *Pope* is not as easy to fathom as Professor Falender's article. Although

link the state action to the alleged constitutional deprivation, the termination of the creditor's claim by operation of a time bar, Professor Reutlinger takes the unitary view of state action to its extreme by suggesting that state action in the form of the state's initial enactment of a statute imposing a time bar is sufficient to call forth due process notice obligations regardless of what causes the time bar to begin running. See Reutlinger, *supra* notes 4 & 83, at 449. The "unitariness" of his view of state action is heightened by his assertion that a death-triggered time bar is an even *stronger* case of state action than a time bar triggered by the personal representative's publication of notice under court supervision. *Id.* at 458-59. The involvement of the personal representative somehow acts to reduce the amount of state involvement that perpetually emanates from the act of legislation. *Id.* at 451. This reflects a unitary approach to state action in that Reutlinger is measuring or quantifying the "amount" of state action in each case. *Id.* at 451.

95. See Falender, *supra* note 73, at 674-75.

96. See *id.*

97. *Id.* at 660.

98. *Id.* at 666-67.

99. *Id.* at 675-77, 685. Professor Falender concludes that short nonclaim statutes are not solely statutes of limitation and that *Mullane* and its progeny can be stretched to extend to them. The merits of this debate are the subject of Part III, *infra*.

the Court made multiple references to the article and accepted its sweeping generalization that all probate regimes are alike,¹⁰⁰ Justice O'Connor's opinion contains some new analytical twists. To the Justice's credit, she did not rely on a single order of the probate court to satisfy state action.¹⁰¹ The opinion stresses that the probate court is "intimately involved throughout," and notes the court order appointing the personal representative, the statutory requirement that notice be published immediately after appointment, court orders routinely issued commanding the publication of notice, and the filing of an affidavit of publication with the court.¹⁰² Because the nonclaim bar would not run without all of these acts, their cumulative effect was "pervasive and substantial" state action.¹⁰³ Then, in a perplexing leap, the opinion appears to merge the state action question and the due process issue; the very same state action that triggers constitutional review simultaneously guts the "self-executing" feature that "remove[s] any due process problem."¹⁰⁴ Although the majority opinion goes on to discuss traditional elements of due process analysis, such as the adverse impact on protected property interests and the state's interest in the operation of a nonclaim statute, the nonclaim bar's fate is essentially sealed when the Court divorces it from *Texaco's* protective "self-executing" characterization.¹⁰⁵

In arguing that the Uniform Probate Code is distinguishable from the Oklahoma statutes and others like it, the debate about whether there is a "self-executing" feature will be put aside. Whether Justice O'Connor was right or wrong (although I will argue in Part III that she was wrong), no claim is being made here that the U.P.C. nonclaim statute, viewed in isolation, is materially different in that regard, even though under the U.P.C. there are fewer contacts between the state and the

100. See *Tulsa Professional Collection Serv., Inc. v. Pope*, 485 U.S. 478, 479-80, 489 (1988).

101. *Id.* at 487.

102. *Id.*

103. *Id.*

104. *Id.*

105. As Chief Justice Rehnquist pointed out in his dissent, "Why there is 'state action' in [*Pope*], but not in [*Texaco*], remains a mystery which is in no way elucidated by the Court's opinion." *Id.* at 493 (quoting *Texaco, Inc. v. Short*, 454 U.S. 516 (1982)).

triggering of the four-month nonclaim bar.¹⁰⁶ Rather, the argument that the U.P.C. is distinguishable is based on the view that, in assessing whether there is a constitutional level of state action, it is not sufficient merely to point to some mechanical presence of an agent of the state, or a mechanical connection with some state procedure. A purposive application of the state action requirement should take into account the setting in which the nonclaim bar operates. Winding up the affairs of a dead person is very much a private matter, and the extent to which the state is intruding into the private arena is clearly a relevant factor in the state action equation.¹⁰⁷ In examining the operation of the probate system, it is fair to assume that the principal actor in administering an estate, the decedent's personal representative, does not become a state actor for all constitutional purposes merely because he or she is appointed by a probate court.¹⁰⁸ The state action inquiry must widen its focus and examine the relationship between the probate court and the personal representative. Justice O'Connor suggested the need for a broad focus when she purported to look at the "context of Oklahoma probate proceedings as a whole,"¹⁰⁹ but her inquiry into that "context" was superficial at best and gave no intimation that the context in other states may vary from Oklahoma's.

106. It has been noted that the U.P.C. imposed no sanctions on a personal representative's failure to publish the mandated notice under the pre-1989 U.P.C. . It is arguable that this removes the statute from the taint of state action because the personal representative, not the state, determines whether the four-month period would begin to run. LAWRENCE W. WAGGONER ET AL., FAMILY PROPERTY LAW 1107-08 (1991).

107. The importance of the "public function" strand of analysis in the state action doctrine is well-documented. *See, e.g.*, GERALD GUNTHER, CONSTITUTIONAL LAW—CASES AND MATERIALS 987 (10th ed. 1980); TRIBE, *supra* note 85, at § 18-5. For a discussion of *Polk Co. v. Dodson*, 454 U.S. 312 (1981), see *infra* notes 118-19 and accompanying text.

108. Professor Falender's position, *supra* notes 73, 93-99 and accompanying text, comes close, but stops short of embracing such an expansive view. She is primarily concerned with justifying a conclusion that the statute itself entails state action, not with painting the personal representative as a state actor. Falender, *supra* note 73, at 675.

Nor does Professor Reutlinger, who purports to puzzle that anyone could question the existence of state action, rely on the appointment of the personal representative by the court as the basis for state action. Reutlinger, *supra* note 4, at 449 (characterizing the action of the personal representative as "private" action).

109. *Pope*, 485 U.S. at 480.

Justice O'Connor examined the context of Oklahoma probate in the fast-forward mode. One short paragraph of the opinion recites the steps leading up to the probate of a will and the appointment of an executor or executrix,¹¹⁰ ignoring the fact that intestate decedents (statistically more common than testate ones)¹¹¹ may also require administration of their estates.¹¹² A slightly longer paragraph reels off the statutory highlights of Oklahoma's provisions for notice to creditors.¹¹³ Thus, in Justice O'Connor's view, probate consists of establishing a will and paying creditors, nothing more. Where is mention of the personal representative's duty to make bond¹¹⁴ and inventory,¹¹⁵ and to file accounts of the estate's condition with the court any time the court requires it?¹¹⁶ Where is mention of the entitlement of the decedent's family to homestead and family allowances?¹¹⁷ Where is recognition of the extensive control over the personal representative's ability to sell estate assets?¹¹⁸ In

110. *Id.* at 480-81 (citing OKLA. STAT. tit. 58, §§ 22, 25, 26, 30, 101 (1981) (current version in OKLA. STAT. tit. 58, §§ 331, 331.1, 331.2, 332, 333 (1991))).

111. Allison Dunham, *The Method, Process and Frequency of Wealth Transmission at Death*, 30 U. CHI. L. REV. 241 (1963).

112. *See* OKLA. STAT. tit. 58, §§ 121-130 (1991 & Supp. 1994).

113. *Pope*, 485 U.S. at 481 (citing OKLA. STAT. tit. 58, §§ 331, 332, 333 (1981) (current version in OKLA. STAT. tit. 58, §§ 331, 331.1, 331.2, 332, 333 (1991))).

114. OKLA. STAT. tit. 58, § 171 (1991) (bond is required in all cases, unless the court "in its judgment make[s] an order that no bond shall be required if the circumstances indicate none is necessary.").

Not coincidentally, a survey conducted by the Committee on Administration and Distribution of Decedents' Estates of the Real Property, Probate and Trust Law Section of the ABA shows that Oklahoma is the most expensive state surveyed in which to purchase a fiduciary bond. At \$100, it is far ahead of the next most expensive state, Kansas, at \$72.50. *Blueprint*, *supra* note 53, app. at 508.

115. *See* OKLA. STAT. tit. 58, § 281 (1981) (all personal representatives must make inventory and appraisal within two months of appointment "unless ordered otherwise by the court.").

116. OKLA. STAT. tit. 58, §541 (1991 & Supp. 1994).

117. In addition to the homestead interest in realty, the spouse and children of a decedent are "immediately" entitled to, inter alia, family pictures, church pews, the family Bible, clothing, furniture, and provisions necessary for one year's supply. OKLA. STAT. tit. 58, § 311 (1991 & Supp. 1994). Homestead property is not liable for prior debts and claims unless secured by a lien. *Id.* §§ 311, 313. An additional category of exempt property also takes priority over estate debts, except as needed for expenses of the last illness, funeral expenses, and expenses of administration. *Id.* § 312.

118. OKLA. STAT. tit. 58, §§ 381-499 (1991 & Supp. 1994). "That an Oklahoma personal representative lacks the power freely to transfer title to estate assets without the concurrence of the court requires no citation of authority." Lilly II, *supra* note 54, at 35.

fact, the title of the Oklahoma Code that covers probate procedure consists of nineteen chapters containing 406 sections of statutory law,¹¹⁹ a "context" that to Justice O'Connor is represented by just eight sections.¹²⁰

What cannot be gleaned from Justice O'Connor's opinion in *Pope* is that Oklahoma's probate code epitomizes just the sort of cumbersome and costly regulation that Norman Dacey and Murray Bloom revolted against¹²¹ and that the Uniform Probate Code tried to reform.¹²² It is based on the older prototypical regime that imposed "close and detailed supervision" on the administration of estates.¹²³ There is no option to probate a will using informal procedures like those available under the U.P.C.,¹²⁴ and the evidentiary requirements for formal probate are more onerous than the U.P.C.'s. At least one of the will's witnesses ordinarily must testify personally or by affidavit, even if probate is uncontested,¹²⁵ if there is opposition, all available witnesses must testify.¹²⁶

The administration of an Oklahoma estate takes place under the watchful eye of the probate court, whether or not the decedent and estate beneficiaries wish to have the oversight; there is no option for the kind of unsupervised administration that the U.P.C. mandates.¹²⁷ The Oklahoma procedure entails more court hearings and more notices of hearings to all concerned, than would be the case under the U.P.C.¹²⁸ The precaution of

119. OKLA. STAT. tit. 58 (1991).

120. See *supra* notes 43-49 and accompanying text.

121. See *supra* notes 43, 44 and accompanying text.

122. See *supra* notes 50-76 and accompanying text.

123. Lilly II, *supra* note 54, at 2.

124. See *id.* at 15.

125. OKLA. STAT. tit. 58, § 30 (1991); cf. U.P.C. § 3-405 (1993) (court may order probate on the strength of the pleadings). Oklahoma does, however, recognize self-proved wills, and they can be admitted without affidavit or testimony from the attesting witnesses. OKLA. STAT. tit. 84, § 55, tit. 58, § 30 (1991).

126. OKLA. STAT. tit. 58, § 43 (1991); cf. U.P.C. § 3-406(a) (1993) (the testimony of one available witness is sufficient).

127. See generally OKLA. STAT. tit. 58 §§ 21-93 (1991).

128. See generally OKLA. STAT. tit. 58, §§ 385(c) (notice of hearing on petition to mortgage real estate to borrow money), 386 (publication notice of hearing on petition to mortgage real estate), 391.1 (notice of sale of personalty at public auction), 391.2 (notice of sale of personalty at private sale), 414 (notice of order to show cause for sale of estate realty), 421 (notice of sale of realty at public auction), 423 (notice of private sale of realty), 502 (notice of hearing regarding decedent's contract to convey

having the personal representative file a bond is mandated unless the court waives it,¹²⁹ while under the U.P.C. no bond is filed by a personal representative unless the circumstances justify an order requiring it.¹³⁰ Like bonds, inventories and appraisements of estates are presumptively required by Oklahoma law¹³¹ and involve excessive use of judicial power by requiring that the court appoint three appraisers.¹³² The U.P.C., on the other hand, does not require that an inventory be filed with the court and eliminates the involvement of the probate court in selecting appraisers.¹³³ Oklahoma requires the personal representative to "render a final account, and pray a settlement of his administration" when the estate is ready to be closed.¹³⁴ Further, upon final settlement, "*the court* must proceed to distribute the residue of the estate" to those entitled.¹³⁵ No formal closing procedures are required by the U.P.C., although they are available if the personal representative wants protection from future claims for unauthorized conduct or breach of fiduciary duty.¹³⁶

For those who are content to view the state action test as an exercise in identifying the presence of the state lurking some-

reality), 552 ("proper" notice of nonfinal account, subject to waiver by court), 553 (notice of final settlement), 622 (notice of beneficiary's petition for payment of legacy), 634 (notice of petition for decree of distribution) (1991 & Supp. 1994).

129. OKLA. STAT. tit. 58, § 171 (1991). Since 1963, the courts have had the power to excuse bond "if the circumstances indicate none is necessary." *Id.* However, the power does not appear to have been exercised liberally; only an express waiver of the bond requirement by will is effective to excuse this added expense of administration. Lilly II, *supra* note 54, at 25.

130. Circumstances that justify an order requiring bond in informal proceedings include the appointment of a special administrator, an express will provision requiring bond, and a written demand by an interested person that the personal representative give bond. U.P.C. §§ 3-603, 3-605 (1993). In formal proceedings, bond may be required unless the will excuses it, U.P.C. § 3-603, but the U.P.C. Comments make it clear that "[t]he purpose of these provisions is to move away from the idea that bond always should be required of a probate fiduciary, or required unless a will excuses it." U.P.C. § 3-603 cmt. (1993).

131. OKLA. STAT. tit. 58, § 281 (1991).

132. OKLA. STAT. tit. 58, § 282 (1991).

133. U.P.C. § 3-706 & cmt. (1993). The personal representative may either mail a copy of the inventory to interested persons who request it or file an inventory with the court; if she or he elects to file with the court, the Comments to § 3-706 clarify that the court's role is "simply to receive and file the inventory." *Id.*

134. OKLA. STAT. tit. 58, § 612 (1991).

135. OKLA. STAT. tit. 58, § 631 (1991) (emphasis added).

136. U.P.C. § 3-1003 cmt. (1993).

where in the vicinity of the action being reviewed, or for those who take the view that there is always state action,¹³⁷ it may not be sufficient to point out that there is a vast difference between the "context" of Oklahoma probate and the Uniform Probate Code. However, the difference is neither coincidental nor incidental. The U.P.C. was conceived and created as the antithesis of the heavy handed regulation of decedents' affairs like that imposed by Oklahoma's probate laws. Surely there is room in the jurisprudence of state action, the doctrine that has given us *Shelley v. Kraemer*¹³⁸ and *Flagg Brothers, Inc. v. Brooks*¹³⁹ to puzzle over endlessly¹⁴⁰ for an acknowledgement of such a difference. The state action analysis attempted here recognizes that the deprivation of a creditor's claim is by no means the central purpose of the proceeding of which it is a part, but is rather one of many details that are necessarily addressed in the overall process of administering an estate. For that reason, it is appropriate, and indeed necessary, to review the whole proceeding and weigh the amount and nature of state involvement in the totality of probate and administration; to focus narrowly and exclusively on the nonclaim bar and its mechanical trigger is a clear example of removing a thread from the fabric into which it is woven.

Unfortunately, the state action case law does not provide close analogies to the fact situation in *Pope*, but there are cases that reflect the spirit of the approach that is being suggested here. For example, in *Polk County v. Dodson*,¹⁴¹ no state ac-

137. *E.g.*, Harold W. Horowitz, *The Misleading Search for "State Action" Under the Fourteenth Amendment*, 30 S. CAL. L. REV. 208 (1957); Thomas D. Rowe, Jr., *The Emerging Threshold Approach to State Action Determinations: Trying to Make Sense of Flagg Brothers, Inc. v. Brooks*, 69 GEO. L.J. 745 (1981); William W. Van Alstyne, *Mr. Justice Black, Constitutional Review, and the Talisman of State Action*, 1965 DUKE L.J. 219 (1965).

138. 334 U.S. 1 (1948) (attempted judicial enforcement of racially restrictive covenant created by private landowners is state action).

139. 436 U.S. 149 (1978) (no state action in warehouseman's self-help repossession of tenant's goods without opportunity to be heard, as authorized by section 9-503 of the Uniform Commercial Code).

140. *See, e.g.*, TRIBE, *supra* note 86, § 18-6; Paul Brest, *State Action and Liberal Theory: A Casenote on Flagg Brothers v. Brooks*, Louis Henkin, *Shelley v. Kraemer: Notes for a Revised Opinion*, 110 U. PA. L. REV. 473 (1962); Rowe, *supra* note 137; 130 U. PA. L. REV. 1296 (1982); Herbert Wechsler, *Toward Neutral Principles of Constitutional Law*, 73 HARV. L. REV. 1 (1959).

141. 454 U.S. 312 (1981).

tion was found even though the actor whose decision was being challenged was an employee of the state, a public defender, who had decided not to pursue an appeal that she believed was frivolous. The court overlooked the direct connection between the state and the public defender and focused instead on the underlying context of the action; the public defender was more aptly seen as an agent of her client, the criminal defendant, than an agent of the state.¹⁴² Thus, she was performing "a private function, traditionally filled by retained counsel, for which state office and authority are not needed."¹⁴³ It may be tempting to respond that, unlike *Polk County's* public defender, a decedent's personal representative does not have a private counterpart and that "state office and authority" in fact are needed, or at least customarily bestowed, to carry out the personal representative's mission. However, as noted earlier,¹⁴⁴ personal representatives have never heretofore been viewed as state actors for constitutional purposes; and in any event, in the specific context of nonclaim statutes, the personal representative is not the force that deprives a creditor of property. Rather, a fruitful comparison with *Polk County* is found both in the court's willingness to look at the overall context of the challenged act and in the importance attributed to the "private" nature of that context. The probate and administration of decedents' estates are even less imbued with public functions than the criminal prosecution that gave rise to *Polk County*.

The absence of clearly analogous case precedent also limits the force of *Lugar v. Edmondson Oil Co.*,¹⁴⁵ the case most

142. *Id.* at 319-325.

143. *Id.* at 319. The difficulty of harmonizing state action cases is illustrated by the Supreme Court's later decision in *Edmonson v. Leesville Concrete Co.*, 500 U.S. 614 (1991), in which the Court, relying partly on *Pope*, held that state action was present when a private litigant in a civil action used peremptory challenges to strike potential jurors because of their race. *Polk County* was distinguished on the grounds that it was a criminal case in which the relationship between the government and the public defender was adversarial. 454 U.S. at 626. However, that distinction was rejected as controlling in *Georgia v. McCollum*, 505 U.S. 42 (1992), in which the Court held that criminal defendants were also state actors when making racially discriminatory peremptory strikes. Despite the *Edmonson* Court's reliance on the *Pope* opinion that she crafted, Justice O'Connor dissented in the finding of state action in both of the preemptory jury strike cases. Recently, she has characterized both *Edmonson* and *McCollum* as "mistake[s]." *J.E.B. v. Alabama ex rel. T.B.*, 114 S. Ct. 1419, 1432 (1994) (O'Connor, J., concurring).

144. See *supra* note 108 and accompanying text.

145. 457 U.S. 922 (1982). Like several other state action cases discussed in this

heavily relied on to justify the conclusion that nonclaim statutes involve state action. Justice O'Connor and Professor Falender both cite *Lugar* to support their state action analyses.¹⁴⁶ But *Lugar*, like *Polk County*, involved a state action question that is structurally different from *Pope's* and therefore instructive only for painting in broad strokes. *Lugar* is one of several cases in which debtors challenged their creditors' use of state proceedings to seize the debtors' property.¹⁴⁷ The problem, therefore, was the quintessential state action question in due process cases—had state agents sufficiently aided the creditor in securing the property in dispute?¹⁴⁸ In holding that the prejudgment attachment of the debtor's property in that case was the result of state action, the majority articulated a two-part approach to the resolution of the issue.¹⁴⁹ The second prong was "the party charged with the deprivation must be a person who may fairly be said to be a state actor."¹⁵⁰ Clearly, the relevance of this second prong is missing in *Pope's* state action inquiry, where the question is not the relationship between the state and a private actor, but, as Justice O'Connor states, "whether the State's involvement with *the nonclaim statute* is substantial enough to implicate the Due Process Clause."¹⁵¹ A complete and penetrating answer to the question posed by Justice O'Connor recognizes that the state's "involvement" with the nonclaim statute is a subset of its involvement with the probate and administration process as a whole. That involvement should not be measured by looking solely at the point or points where the nonclaim statute happens to intersect probate court procedures—something that the nonclaim bar must do if it is to have its intended effect. *Lugar's* decision to

article, *Lugar* was a 5-4 decision of the Supreme Court; Chief Justice Burger filed a dissenting opinion and Justice Powell filed a dissenting opinion, in which Justices Rehnquist and O'Connor joined.

146. *Tulsa Professional Collection Serv., Inc. v. Pope*, 485 U.S. 478, 486 (1988); Falender, *supra* note 73, at 675 n.73.

147. 457 U.S. 922 (1982).

148. *Id.* at 933. The debtor also claimed under 42 U.S.C. § 1983, and a major issue in the case was the relationship between § 1983's requirement of acting "under color of state law" and the Fourteenth Amendment's requirement of state action. The Court held that the two concepts were coextensive. *Id.* at 927-36.

149. *Id.* at 937.

150. *Id.*

151. *Pope*, 485 U.S. at 486 (emphasis added).

transform an otherwise "private" creditor into a state actor presented an issue sufficiently different that, if it supports the result in *Pope* at all, it does so only tangentially and not directly.

Finally, the conclusion that the U.P.C.'s four-month nonclaim bar should be viewed as lacking a constitutional level of state action from its inception (i.e., even before the 1989 post-*Pope* amendments) does not entail an argument that the U.P.C., where enacted into law, is totally immune from constitutional review. The state legislature acts when it adopts any law, and such enactment does constitute state action for purposes of some constitutional review. For example, substantive due process principles require a rational relationship between legislative means and legitimate state interests; a nonclaim statute that is unjustifiably short might be subject to challenge for being arbitrary and unreasonable.¹⁵² Alternatively, the Fourteenth Amendment's Equal Protection Clause might be invoked if the U.P.C. or any other nonclaim statute singled out a protected class of creditors for discriminatory treatment.¹⁵³ Constitutional challenges such as these single out choices made by the state legislature for constitutional scrutiny, and it is therefore appropriate to regard the passage of the legislation as the relevant action of the state.

In contrast, the constitutional right to personal notice that creditors have asserted when challenging nonclaim statutes is based on procedural due process. The Supreme Court has recognized that a state legislature's enactment of broad legislation that does not single out any entity or individual does not lend itself to a constitutional requirement of individual notice.¹⁵⁴

152. Falender, *supra* note 73, at 677 n.85. In fact, such an argument was made in *Pope*, but the Court chose to decide the case on procedural due process grounds instead. *Pope*, 485 U.S. at 488.

153. *E.g.*, *Ex parte Estate of Evans*, 384 S.E.2d 748 (1989), *cert. denied*, 493 U.S. 1081 (1990) (equal protection challenge to U.P.C. § 3-803, which treats estates that have liability insurance differently from estates that do not; statute upheld). The Supreme Court has considered equal protection challenges to statutes of limitation on several occasions. *See, e.g.*, *Paulussen v. Herion*, 475 U.S. 557 (1986); *Pickett v. Brown*, 462 U.S. 1 (1983); *Mills v. Habluetzel*, 456 U.S. 91 (1982).

154. *Texaco, Inc. v. Short*, 454 U.S. 516, 531-32 (1982); *see also* *TRIBE*, *supra* note 85 § 10-7, at 664 ("The element of due process analysis characterized as 'procedural due process' delineates the constitutional limits on judicial, executive, and administrative enforcement of legislative or other governmental dictates or decisions."). *See gen-*

Justice O'Connor acknowledged in *Pope* that where the state "has no role to play beyond enactment of the limitations period," the Due Process Clause is not implicated.¹⁵⁵ Therefore, to impose a requirement of notice to individual creditors requires some state action beyond legislative enactment. Justice O'Connor cited additional state action in some rather perfunctory activities of the probate court, that supposedly represented the "context" of Oklahoma probate.¹⁵⁶ The foregoing discussion has illustrated that Oklahoma's probate context is not universal in this country. Some state legislatures, particularly those that have embraced the Uniform Probate Code, made a deliberate choice to reject the model that Oklahoma represents and to adopt a system that removes the state and its judicial machinery from the business of administering decedents' estates. Surely a meaningful weighing of the state action issue requires recognition of this fundamental difference in the "context" of probate. Consequently, it is wrong to assume that *Pope* applies to all short-term nonclaim bars that are triggered by some

erally id. §§ 10.7-10.19; NOWAK & ROTUNDA, *supra* note 85, at ch. 13.

155. *Pope*, 485 U.S. at 486-87. Although the opinion in *Pope* goes on to distinguish nonclaim bars from "self-executing statutes of limitations," Justice O'Connor never identifies enactment of the statute as a factor in the state action that provokes the Court's due process review of Oklahoma's nonclaim statute. *Id.* at 486-488.

Attacking the U.P.C.'s 1989 response to *Pope* and arguing that the U.P.C. had not avoided state action, Professor Reutlinger seized on the Court's "concession" that enactment is state action, and then tried to wiggle out from under what he acknowledged was an implication that "enactment alone generally is insufficient to implicate due process." Reutlinger, *supra* note 86, at 448. Rather than analyzing the text of *Pope*, he changed the subject to *Flagg Brothers* and attempted to explain why enactment of a statute (the UCC) did not implicate due process in that case, but would in the case of nonclaim statutes. *Id.* He observed that "the state in enacting a probate statute of repose has not offered private parties a choice whether to cut off claims at the end of one year; it has mandated that all claims be cut off, regardless of any action or inaction by any private party." *Id.* First of all, his observation ignores that ordinary statutes of limitation "mandate that all claims be cut off;" therefore, it seems to directly contradict Justice O'Connor's exemption of those claims from procedural due process review. *Id.* Second, the state action issue in *Flagg Brothers* was not whether the statute's enactment was state action, but whether the private party who acted pursuant to the statute's authorization was, under the circumstances, a state actor. *Flagg Brothers*, 436 U.S. at 149-51. The court never directly considered the role that enactment had played in creating state action; the primary thrust of the majority opinion in *Flagg Brothers* was that the power delegated by the state to the private party did not involve a function reserved exclusively to the State. *Id.* at 157-64.

156. These activities were characterized as "administrative" by Chief Justice Rehnquist in his dissent. *Pope*, 485 U.S. at 494 (Rehnquist, C.J., dissenting).

court-related activity, such as appointment of a personal representative or publication of notice to creditors.

IV. THE DUE PROCESS ISSUE

The state action morass that *Pope* plunged into¹⁵⁷ could have been avoided with a more careful review of the *Mullane* principle as the Supreme Court has applied it in cases before *Pope*. These cases do not lead inexorably to *Pope's* conclusion that publication notice in nonclaim statutes violates due process. Careful dissection of the facts and circumstances of *Mullane's* progeny reveals that *Pope* was an awkward and unnecessary extension of the *Mullane* principle in the first place. Of course, the fact that it is an extension does not necessarily mean that it is erroneous, but it does suggest that the issue deserved a degree of reflection and deliberation that appears to have been lacking.

Notice and the right to be heard are central elements of the rights guaranteed by the Due Process Clause.¹⁵⁸ *Mullane's* elaboration of what satisfies the "notice" prong has proved to be powerful and enduring: "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."¹⁵⁹

Because notice is a procedural due process issue, the issue normally arises only when there is some sort of procedure of which someone should be notified. A hasty analysis might lead to the conclusion that administering the estate of a decedent with any degree of probate court involvement is a "procedure,"

157. It is hard to avoid the speculation that the Court first decided that there was a constitutional violation and that, in turn, forced it to address the state action issue.

158. As definitively stated by Justice Jackson in *Mullane*, "at a minimum [the Due Process Clause] require[s] that deprivation of life, liberty or property by adjudication be preceded by notice . . ." *Mullane v. Central Hanover Bank and Trust Co.*, 339 U.S. 306, 313 (1950). Professor Tribe has described the duty to give notice and an opportunity to be heard as "the core content of procedural due process placed upon the government." *Tribe, supra* note 86, at 683.

159. *Mullane*, 339 U.S. at 314.

and therefore, *Mullane's* standard of notice applies to all aspects of the procedure, at least when the procedure is accorded finality. However, as will be developed below, such a conclusion both misinterprets the relationship between nonclaim statutes and probate proceedings and also reflects a far too rigid view of *Mullane's* due process mandate.

A. "Self-executing" Statutes of Limitation

The most critical assertion in the majority opinion in *Pope* is the cryptic conclusion that a nonclaim time bar "lacks the self-executing feature" that is "necessary to remove any due process problem" because "the legal proceedings themselves trigger the time bar."¹⁶⁰ In one astonishing sentence, the Court manages both to confound the issues of state action and the substantive constitutional right of procedural due process, and to contort earlier courts' understandings of statutes of limitations as "self-executing."

Courts that have characterized nonclaim statutes as statutes of limitation, whether using the term "self-executing" or not, have shared the realization that a creditor who is denied the ability to pursue a claim against a decedent by operation of a nonclaim statute is not deprived of that property interest by any administrative or judicial action that takes place within the confines of the probate proceeding itself.¹⁶¹ The loss of the interest is caused instead by the legislative dictate contained in the nonclaim statute. After the time allotted by the statute has run, the creditor is automatically disabled from presenting a claim. There is no adjudication that the claim has no merit; the

160. *Pope*, 485 U.S. at 487.

161. See *Estate of Busch v. Ferrell-Duncan Clinic, Inc.*, 700 S.W.2d 86, 89 (Mo. 1985) (en banc) (describing the Missouri non-claim statute as self-executing); *Gano Farms, Inc. v. Estate of Kleweno*, 582 P.2d 742, 744 (Kan. Ct. App. 1978) (notice under the nonclaim statute "does no more than put into operation a special statute of limitations"); see also *In re Estate of Fessler*, 302 N.W.2d 414, 420 (Wis. 1981).

The bar created by operation of a statute of limitations is established independently of any adjudicatory process. It is legislative expression of policy that prohibits litigants from raising claims—whether or not they are meritorious—after the expiration of a given period of time. . . . The passage of time itself destroys the right and remedy of the injured party. *Id.* (citations omitted).

probate court and the probate process is no more involved in the demise of the property right than it was involved in its creation. The statute is self-executing in that it is not dependent on any further judicial or administrative imprimatur to render its operation effective.¹⁶²

The *Pope* majority, however, contorted the meaning of the self-executing concept by applying it to the other end of the time bar, the point when it begins to run.¹⁶³ Such a reorientation was necessary if the Court were to succeed in distinguishing nonclaim statutes from typical statutes of limitation. By focusing on how the time bar was triggered (and the state's involvement in that process), rather than on the deprivation of the property by the running of the nonclaim bar, the Court persuaded itself that the statute was no longer "self-executing."¹⁶⁴

There are a number of problems with the Court's treatment of the concept of "self-executing," apart from the fact that it is articulated with a vagueness so terse that the term's meaning is almost impossible to fathom.¹⁶⁵ It is not difficult to think of other quite ordinary causes of action that may be triggered by, or intimately involved with, a legal proceeding. For example, a malicious prosecution may be remedied by a civil cause of action.¹⁶⁶ When a former plaintiff is sued for having initiated a legal proceeding, it would seem that we have another case where "the legal proceedings themselves trigger the time bar."¹⁶⁷ If so, is the statute of limitations on the malicious prosecution action no longer "self-executing"? According to *Pope*, the self-executing feature is "necessary" to remove due process problems.¹⁶⁸ If the statute of limitation in this case is not self-executing, what is the "due process problem" that is created? Does the statute of limitations not run on a potential plaintiff

162. See *Pope*, 485 U.S. at 494 (Rehnquist, C.J., dissenting) ("That term ['self-executing'] refers only to the absence of a judicial or other determination that *itself* extinguishes the claimant's rights.").

163. *Id.* at 487.

164. *Id.* at 486-87.

165. In dissent, Justice Rehnquist called the majority's treatment of the term "out of context and contrary to common sense." *Id.* at 494 (Rehnquist, C.J., dissenting).

166. See RESTATEMENT (SECOND) OF TORTS § 653 (Wrongful Prosecution of Criminal Proceedings), § 674 (Wrongful Use of Civil Proceedings) (1977).

167. *Pope*, 485 U.S. at 487.

168. *Id.*

unless the potential defendant gives some sort of notice that the statute is running?¹⁶⁹

Assuming that the majority used the term "self-executing" to mean that something is capable of giving itself effect, then taken to its logical conclusion, the Court's focus on the triggering aspect to distinguish nonclaim bars from other statutes of limitations is unsatisfactory and unsuccessful. The majority's explanation that the nonclaim statutes lose their *self-executing* character because legal proceedings trigger them could even be taken to mean that *any* external triggering event causes the loss of self-executing capacity. Clearly, such a vision of what deprives statutes of limitation of their self-executing feature would deprive virtually all statutes of limitation of their "self-executing" powers because none of them internally generate their own triggering event. If the majority had a more restrictive view and meant to confine its statement only to legal proceedings, the court found new meaning in the word "self" in self-execution, but did not explain what that meaning is.

B. *Mullane and Its Progeny*

To understand more fully the extent to which *Pope* is an aberration, it is necessary to reexamine the cases upon which the opinion stands, ultimately tracing back to *Mullane*. As noted earlier, the fact that *Pope* is not "on all fours" with *Mullane* does not prove that it was wrongly decided. But if it is palpably different from all the cases where personal notice has been found necessary, and strongly similar to the principal case, *Texaco, Inc. v. Short*,¹⁷⁰ in which personal notice was not required, a serious question is raised.

Mullane, the fountainhead of the notice requirement, involved a court action to settle the accounts of a trustee holding assets in a common trust fund.¹⁷¹ Under New York state law, the action was binding and conclusive on everyone having an interest in the common fund.¹⁷² As the Court noted, the proceeding

169. See *supra* note 83 and accompanying text.

170. 454 U.S. 516 (1982).

171. *Mullane v. Central Hanover Bank and Trust Co.*, 339 U.S. 306 (1956).

172. *Id.* at 309.

could have had the effect of cutting off the rights of the beneficiaries to sue the trustee for breach of its obligations, or otherwise diminishing their interest through the allowance of fees and expenses.¹⁷³ Even though the trustee had available the names and addresses of the income beneficiaries, all of the beneficiaries of the fund were notified of the action only by publication, as the governing state statute allowed.¹⁷⁴ The Supreme Court held that publication by notice "to known present beneficiaries of known place of residence" would not suffice.¹⁷⁵ Significantly, however, the Court found that publication notice was constitutional for beneficiaries "whose interests or whereabouts could not with due diligence be ascertained," and "beneficiaries whose interests are either conjectural or future or, although they could be discovered upon investigation, do not in due course of business come to knowledge of the common trustee."¹⁷⁶ The Court was swayed in its deliberations by the practical difficulties and the expense involved in requiring personal notice, acknowledging that the imposition of overly severe burdens on the trustee could dissipate the advantages sought to be achieved by establishing common trust funds.¹⁷⁷ The Court also thought it appropriate, in weighing the relative burdens and benefits of the practical considerations, to defer to the judgment of the state authorities.¹⁷⁸

A trio of cases in the 1950s and 1960s solidified *Mullane* and extended its requirement of personal notice to bankruptcy and condemnation proceedings. These cases, *City of New York v. New York, New Haven & Hartford Railroad Co.*,¹⁷⁹ *Walker v. City of Hutchinson*,¹⁸⁰ and *Schroeder v. City of New York*,¹⁸¹ support the proposition that *Mullane* is not limited to a proceeding that is an "adjudication" in its narrow sense.¹⁸² But, as discussed below, close scrutiny reveals that they are distin-

173. *Id.* at 313.

174. *Id.* at 309-310.

175. *Id.* at 318.

176. *Id.* at 317.

177. *Id.* at 317-18.

178. *Id.* at 318.

179. 344 U.S. 293 (1953).

180. 352 U.S. 112 (1956).

181. 371 U.S. 208 (1962).

182. *See, e.g., Tulsa Professional Collection Serv., Inc. v. Pope*, 485 U.S. 478, 488 (1988); Falender, *supra* note 73, at 684.

guishable from *Pope* in that each of them involved a judicial or administrative process of some sort that was aimed quite specifically at the aggrieved party and was the direct cause of the deprivation of the property interest. They fit precisely the situation, described by Professor Tribe, which invokes due process—the government’s singling out of a particular person for deprivation.¹⁸³ Probate nonclaim bars do not.

The bankruptcy proceeding involved in *New York* is perhaps the closest parallel to an estate administration. In both bankruptcy and probate proceedings, assets are marshalled by a fiduciary; those entitled to payment are determined; and assets are distributed. Both processes are governed by statute and require some court involvement. *New York* held that a lien creditor of the bankrupt railroad should have received actual notice instead of publication notice of the period for filing claims in the bankruptcy proceeding.¹⁸⁴ Technically, the case was not decided on due process grounds because the Bankruptcy Act itself required “reasonable notice”,¹⁸⁵ and the Court was merely interpreting the statutory language. But the Court noted *Mullane’s* criticism of notice by publication,¹⁸⁶ and it seems fair to assume that what is “reasonable notice” is governed at least in part by due process principles.¹⁸⁷

What is particularly instructive about *New York* is that, like *Mullane*, the decision as to what was “reasonable notice” was based on the totality of the circumstances, and there are striking differences between the totality of the circumstances of bankruptcy compared to probate. First, the Court perceived a

183. TRIBE, *supra* note 86, at 714.

184. *City of New York v. New York, New Haven & Hartford R.R.*, 344 U.S. 293 (1953).

185. *Id.* at 296 (citing 11 U.S.C. § 205(c)(8) (1952) (current version at 11 U.S.C. § 342 (1988))).

186. *Id.*

187. At any rate, *New York* is cited with regularity in due process cases. *See also*, *Menonite Bd. of Missions v. Adams*, 462 U.S. 791, 797 (1983); *Walker v. Hutchinson*, 352 U.S. 112, 115 n.4 (1956); *cf.* *Tulsa Professional Collection Serv. Inc. v. Pope*, 485 U.S. 478, 487 (1988). Interestingly, recent commentary from the bankruptcy perspective bemoans the need for more due process. *See* Russell A. Eisenberg and Frances Gecker, *Due Process and Bankruptcy: A Contradiction in Terms?*, 10 BANK. DEV. J. 47 (1993); Robert M. Lawless, *Realigning the Theory and Practice of Notice in Bankruptcy Cases*, 29 WAKE FOREST L. REV. 1215 (1994).

statutory purpose of facilitating personal notice to creditors.¹⁸⁸ Probate nonclaim statutes, of course, do not exist in such a statutory milieu because for decades they have expressly required no more than notice by publication. Furthermore, some *New York* creditors had been given actual notice by mail of the bankruptcy proceedings, and those creditors' claims were actually subordinate to the claim of the creditor who was not given notice.¹⁸⁹ Probate nonclaim statutes do not discriminate between classes of creditors; all receive the same notice by publication. Finally, the Court noted that the trustees "knew about" the lien creditor involved.¹⁹⁰ The duty to give actual notice, therefore, did not impose any initial duty to search for creditors, as it does in the probate context.

Despite some surface similarities between the proceedings of bankruptcy and probate,¹⁹¹ the mechanism by which each bars creditors is fundamentally different. A bankruptcy petition is initiated by a debtor for the primary purpose of rearranging debts. The entire thrust of the proceeding is to produce a judicially sanctioned alteration of the property rights of the bankrupt's creditors. Such a judicial determination of property interests is entirely harmonious with the situation addressed by *Mullane* and was also the focal point of the Court's concern about notice in *New York*. "The statutory command for notice embodies a basic principle of justice—that a reasonable opportunity to be heard must precede *judicial* denial of a party's claimed rights."¹⁹² In contrast, the administration of a decedent's estate is a multi-faceted task involving collecting a decedent's assets and reallocating them among the appropriate successors, which may include many categories of creditors and claimants, as well as the decedent's intended beneficiaries. The very existence of probate machinery recognizes the legitimacy of creditors' claims, but other interests must be balanced against them. As will be discussed below, it is reasonable to subject

188. *New York*, 344 U.S. at 296.

189. *Id.*

190. *Id.*

191. Falender observes that "similarities abound" between probate and bankruptcy procedures. Falender, *supra* note 73, at 685 n.135. But she compares very mechanical aspects of the respective procedures, not the procedure by which they deprive creditors of their claims. See also Reutlinger, *supra* note 4, at 457 n.132.

192. *New York*, 344 U.S. at 297 (emphasis added).

some creditors to the risk of loss in the interest of efficient administration of estates as a whole.¹⁹³

Condemnation proceedings are another instance for the application of *Mullane's* notice standards. In *Walker v. City of Hutchinson*, the city condemned an owner's property in order to widen streets,¹⁹⁴ and in *Schroeder v. City of New York*, the city diverted river water, which deprived downstream owners of riparian rights.¹⁹⁵ In both cases, the affected owners were given notice only by publication or posting. In *Walker*, *Mullane* was construed to apply to "proceedings which may *directly* and adversely affect their legally protected interests."¹⁹⁶ *Schroeder* repeated the notion that the proceedings must *directly* affect the protected interests.¹⁹⁷ Furthermore, the fact that the government benefitted from the taking in both cases perhaps justifies the application of a demanding standard of notice.¹⁹⁸

A case of relatively recent vintage, however, set in motion the legal developments that culminated in the *Pope* case and provided the strongest support for the majority opinion. In *Mennonite Board of Missions v. Adams*, a mortgagee's interest in certain real property was terminated by a tax sale and the subsequent running of a two-year period of redemption.¹⁹⁹ Although the owner of the property was personally notified by mail of the pending tax sale, the only notice to the mortgagee was by posting and publication.²⁰⁰ The Court noted that it had "unwaveringly" adhered to *Mullane* and applied it to the tax

193. See *infra* Part III.

194. 352 U.S. 112 (1956).

195. 371 U.S. 208 (1962).

196. *Walker*, 352 U.S. at 115 (emphasis added).

197. *Schroeder*, 371 U.S. at 212-13.

198. *Walker* hints at this, stating, "It [the taking without notice] may leave government authorities free to fix one-sidedly the amount that must be paid owners for their property taken for public use." *Walker*, 352 U.S. at 117.

199. 462 U.S. 791 (1983). One week after issuing its ruling in *Mennonite*, the Supreme Court breathed new life into attacks on nonclaim statutes by remanding a challenge to the Nevada statute for reconsideration in light of *Mennonite*. See *Continental Ins. Co. v. Moseley*, 653 P.2d 158 (Nev. 1982), *vacated and remanded* 463 U.S. 1202 (1983). Based on the opinion that the Nevada Supreme Court subsequently entered, it seemed not to "reconsider," but slavishly followed what it took to be a signal from the United States Supreme Court that the Nevada nonclaim statute was constitutionally flawed. *Continental Ins. Co. v. Moseley*, 683 P.2d 20 (Nev. 1984).

200. *Mennonite*, 462 U.S. at 794.

sale.²⁰¹ The Court had little difficulty in finding that the mortgagee's security interest in the real property was constitutionally protected and had been adversely affected by the sale.²⁰² While not expressly limiting its opinion, the Court particularly condemned constructive notice when the interested party (in this case, a mortgagee) is identified in an instrument (a mortgage) that is publicly recorded.²⁰³

The tax sale in *Mennonite* bears little resemblance to the nonclaim bar in *Pope*. The tax sale was a statutorily created proceeding that operated directly on the specific property of the affected mortgagee. The sole purpose of the sale procedure was to create new interests and terminate old ones for the good of the public fisc. The fact that the statute already required personal notice to at least some of the affected parties was an indication that the *Mullane* principle was appropriately applied in this context. The only real question was how far down the hierarchy of property owners one must go to identify those entitled to personal notice. Stating the issue thusly, it is telling that the majority, by noting the fact that the complaining party was identified in the public record,²⁰⁴ had identified a class of owners who could be located by a search of finite scope.

Overlooking the fundamental difference between a tax sale and probate proceedings, the *Pope* majority seized on an imaginary similarity: the probate nonclaim bar was likened to the two-year grace period running after the tax sale during which the property could be redeemed.²⁰⁵ The condemnation scheme in *Schroeder* has likewise been compared to nonclaim statutes because it featured a three-year grace period after the condemnation for downstream owners to file claims for damages.²⁰⁶ The difference between the running of the time periods in those two cases and *Pope* is glaring. In *Mennonite* and *Schroeder*, the deprivations were inflicted by the earlier proceedings, the condemnation and the tax sale, respectively. In both cases, the

201. *Id.* at 797.

202. *Id.* at 798.

203. *Id.* at 798 n.4.

204. *Id.* at 798.

205. See *Tulsa Professional Collection Serv., Inc. v. Pope*, 485 U.S. 478, 484-85, 487 (1988).

206. Falender, *supra* note 73, at 682.

time period existed in order for the property owner to recoup what had been previously lost. Although the loss was not final until the time period ran, the constitutional flaw was the absence of notice of the initial proceeding that worked the deprivation. Therefore, the grace periods in *Mennonite* and *Schroeder* were insignificant aspects of the denial of due process; in *Mennonite*, the Court expressly refrained from ruling on the issue of notice of the right to redeem.²⁰⁷ The condemnation without notice and the tax sale without notice would have violated due process whether or not the proceedings triggered the running of a time bar to reverse the deprivation of property. Indeed, a time bar for reversing the loss would have been irrelevant as a separate consideration for the finding of a due process violation. Functionally, the time bars in those cases were no different from a time limit for appealing a trial court decision to an appellate court; any deprivation at the trial court level is not final until the time for appeal has run. Therefore, the unconstitutionality of property deprivations that extend grace periods for redemption does not provide support for the result in *Pope*.

The operation of a probate nonclaim bar is in fact far more comparable to the Indiana Mineral Lapse Act upheld by the Supreme Court in *Texaco, Inc. v. Short*.²⁰⁸ The Act provided that severed mineral interests that were not used for twenty years would revert to the surface owner, unless a statement of claim was filed in the county recorder's office.²⁰⁹ Mineral owners whose interests had been severed prior to the statute's enactment and were subject to lapse were given a two-year grace period to file a statement of claim.²¹⁰ The statute's validity was challenged on several fronts by mineral owners whose interests ostensibly had been terminated by operation of the statute,²¹¹ but the primary argument, and the only one that is relevant here, was the claim that due process required that the mineral owners be notified prior to the termination of their interests.²¹²

207. *Mennonite Bd. of Missions v. Adams*, 462 U.S. 791, 800 n.6 (1983).

208. 454 U.S. 516 (1982).

209. *Id.* at 518.

210. *Id.* at 518-19.

211. One group of challengers was barred by the running of the two year grace period after the statute's enactment in 1971. Another group that had acquired an interest in 1954 was barred in 1974 by the base 20 year period. *Id.* at 521-22.

212. The allegation of inadequate notice included the claim that the state of Indi-

The majority decision to uphold the Indiana Mineral Lapse Act was expressly grounded on the distinction between a self-executing²¹³ statute that "uniformly affect[s] all citizens"²¹⁴ and a judicial determination that is directed at a particular person or property interest to which *Mullane* applies.²¹⁵ The Court recognized that there might be judicial proceedings based on the Act to confirm that a specific property interest had in fact lapsed, and that such a proceeding would not be constitutional unless it required notice to the mineral owner affected.²¹⁶ However, the initial lapse itself caused by the passage of twenty years of non-use is an automatic general rule of law, and not a "procedure" or adjudication that requires the protection of prior notice. Once the state has given owners a reasonable opportunity to know of the statute's existence and what it requires, owners have the means of protecting themselves from loss of their interests by using one of the avenues provided in the Act.²¹⁷

ana did not sufficiently notify mineral owners of the statute's 1971 enactment. The majority easily disposed of this argument with the observation that property owners are charged with knowledge of statutes affecting their property, and that the State had provided ample opportunity to learn of the new obligations imposed through the two-year grace period. *Id.* at 532-33; see *infra* note 217.

The appellants also argued that the failure to notify them of the lapse constituted a taking without just compensation in violation of the Fourteenth Amendment. *Id.* at 530. The Court summarily rejected this argument because the lapse of the property interest occurred as a result of the owner's neglect. *Id.* at 530.

The third ground for challenge was that the lapse provision violated the Contract Clause. The Court rejected this challenge both on the facts and because any burden on contractual obligations was "minimal" since the owner could safeguard his or her interest by filing a statement of claim. *Id.* at 531.

Because the statute contained an exemption for those persons who owned multiple interests, the appellants challenged the statute on equal protection grounds. *Id.* at 530. The Court, however, found that the exception furthered the legitimate state interest in encouraging the actual production of mineral resources. *Id.* at 538-41.

213. *Id.* at 533, 535.

214. *Id.* at 537.

215. *Id.* at 535.

216. *Id.* at 536.

217. The majority and dissenters in *Texaco* disagreed about the State's obligation to give notice of the statute's 1971 enactment, insofar as it affected mineral owners who had only the two-year grace period within which to file suit. *Id.* at 531-533, 549. The majority simply relied on the proposition that property owners are charged with knowledge of statutes affecting their property, and that the State provided ample opportunity to learn of the new obligations with the two-year grace period. *Id.* at 532. The dissent would have required notice to owners whose preexisting mineral interests were cut off by the statute's enactment, subject to the grace period; interestingly, the

Although *Pope* labored valiantly to distinguish *Texaco*, the probate nonclaim bar is far more analogous to the Lapse Act in *Texaco* than it is to *Mullane* and its progeny. *Texaco* recognized that there is a difference between termination of an interest by a time bar statute and court proceedings that relate to that termination.²¹⁸ Although some facet of probate proceedings may trigger the running of a nonclaim bar at the outset, the proceedings are not instrumental in the ultimate termination of the claim by the operation of the nonclaim statute. Once set in motion, the nonclaim bar is independent of the probate proceedings and every bit as self-executing as the Lapse Act and statutes of limitations. It can even be argued that nonclaim statutes more closely resemble concededly valid traditional statutes of limitations than does the Mineral Lapse Act. The nonclaim bar is designed to preclude the assertion and adjudication of claims, regardless of the facts, while the Mineral Lapse Act as a practical matter is likely to involve frequent individualized adjudications of specific facts in order to determine that a lapse has occurred.

In sum, prior to *Pope*, all of the cases that have imposed a duty to give personal notice descend in a straight line from *Mullane* and share with it the central fact that a legal proceeding was initiated for the specific purpose of affecting certain persons' property interests. The culmination of the legal proceeding itself was the mechanism for altering property interests. No matter how one attempts to explain or redefine probate nonclaim statutes, the statutes are not legal procedures, and they, themselves, do not single out individual creditors for deprivation of property. Nor does the related probate process exist for the purpose of depriving creditors of their lawful claims.

dissent conceded that the notice to such owners could be accomplished by publication. *Id.* at 543 n.2. The strong dissenting opinion by four Justices in *Texaco* in no way strengthens *Pope*, even though three of *Texaco's* dissenters joined the *Pope* majority. The dissent in *Texaco* is expressly limited to the retroactive application of the Lapse Act to preexisting mineral interests. *Id.* at 540. Voluntary creditors who are cut off by nonclaim bars are not similarly situated; they entered into a transaction with the decedent with knowledge, or imputed knowledge, of the existing nonclaim bar.

218. *See id.* at 533.

Like statutes of limitation, nonclaim statutes simply set a time period beyond which creditors' claims are unenforceable. To maintain that they are not "self-executing" because they are triggered by some facet of a legal process reduces the grand constitutional principle of due process to a game of fixing labels on challenged actions. The label "self-executing" should not become a constitutional talisman. Unfortunately, its use by the Court disguises the fact that *Pope* is a great and unexplained leap in the evolution of the Due Process Clause. Apart from its questionable use of technical labels to force the statute into a certain mold, the Court also committed the more egregious error of total insensitivity to the circumstances surrounding the nonclaim bar, as will be discussed below.

C. Mullane's *Balancing Test*

The constitutional imperative of procedural due process is grounded in the concept of fairness. The Supreme Court has recognized that fairness must be determined by the context in which the due process issue arises. "The very nature of due process negates any concept of inflexible procedures universally applicable to every imaginable situation."²¹⁹ Thus the Supreme Court has consistently approached the question of due process as a matter of balancing the competing interests at stake.²²⁰

219. *Cafeteria & Restaurant Workers Union, Local 473 v. McElroy*, 367 U.S. 886, 895 (1961) (construing *FCC v. WJR, The Goodwill Station, Inc.*, 337 U.S. 265, 275-76 (1949)); see also *Schroeder v. City of New York*, 371 U.S. 208, 212 (1962) (noting that "practical considerations" exist "which make it impossible to draw a standard set of specifications as to what is constitutionally adequate notice, to be mechanically applied in every situation.").

220. See *Matthews v. Eldridge*, 424 U.S. 319, 348 (1976) ("The ultimate balance involves a determination as to when, under our constitutional system, judicial-type procedures must be imposed upon administrative action to assure fairness."); *TRIBE*, *supra* note 86, §§ 10-13, at 715-16.

Courts often speak of balancing the interest of the state and that of the party seeking notice. See, e.g., *Mullane v. Central Hanover Bank and Trust Co.*, 339 U.S. 306, 313-14 (1950). When performing the balancing test for a non-claim statute, however, it is appropriate to weigh the interests of the decedent's estate, as well as those of the state itself. The state's interest is paramount in cases where the state is a party to the proceedings, such as condemnations or tax sales. See, e.g., *Mennonite Bd. of Missions v. Adams*, 462 U.S. 791 (1983) (tax sale); *Schroeder v. City of New York*, 371 U.S. 208 (1962) (condemnation). A state's enactment of a nonclaim statute, however, embodies the interests of the estate and family survivors as well as those of the state itself.

To properly engage in the balancing exercise, an understanding of the circumstances is necessary, just as it is necessary to properly apply the concept of state action. And once again, at this critical first point in the balancing process, the Court's opinion in *Pope* shows absolutely no sensitivity to or understanding of the probate process.

Probate differs from most other civil court proceedings because its initiation is less voluntary. In the typical court process, the state makes available a procedure that, if pursued successfully, will culminate in a result desired by the initiating party. A child may be adopted; a divorce may be obtained; damages may be granted; and so on. In some cases (adoption, for example), the court proceeding is a means, and perhaps the only means, of facilitating a choice made by the initiating party. In other cases, such as a personal injury action, the law suit is a voluntarily chosen response to redress an injury suffered involuntarily.

The initiation of probate and administration, in contrast, is a necessary aftermath to death—an event that itself is hardly a matter of choice. Neither the event that gives rise to the occasion to utilize the courts nor the initiation of the proceeding itself is truly choice driven. Occasionally survivors may be able to totally ignore the probate process because of the size and composition of the decedent's estate, and some decedents may opt to use significant amounts of nonprobate devices. When property is left behind, however, survivors usually must utilize the process because there is no choice but to wind up the decedent's affairs through the court process made available by the state.

The involuntary nature of the triggering event, death, is only part of the picture. Just as important is the fact that death inherently inflicts a measure of pain and deprivation on the survivors, even those survivors who gain financially through the wealth transfer process upon death. Although there is no dearth of tales of ancestors murdered by greedy heirs or of testators slain by scheming will beneficiaries, more often the survivors' dominant emotions are grief and mourning. There is every reason, therefore, for the rules that govern this procedure to be crafted with compassion and sympathy for the surviving loved ones who must attend to the mundane business and legal

affairs involved in winding up the decedent's estate, while their hearts and minds are grappling with the spiritual and emotional process of grieving.

Certainly, a creditor brings some weight to the balancing scale, and even those most profoundly saddened must deal with the reality that life for the survivors goes on. Nevertheless, what seems to be overlooked in the haste to be fair to creditors is that a requirement to send notice to "reasonably ascertainable" creditors affects every probate estate, whether or not there are actually any creditors. The onus of conducting a search to determine whether any creditors are "reasonably ascertainable" is imposed across the board on every family of every decedent, whether the estate is large or small, simple or complicated. The requirement, therefore, will result in the waste of untold dollars and human energy, spent in many cases merely to document that the creditors indeed were the phantoms that the family believed to be nonexistent in the first place.²²¹ In the context of probate, then, the notice requirement imposes a needless search burden on many persons who are involuntary users of the court process and who are likely to be overwhelmed already with new burdens.

Furthermore, the search burden that emanates from *Pope* is clearly more onerous than the burden imposed by *Pope's* predecessors. In those cases, as discussed above, the party upon whom the duty to give notice was imposed was in a position to have first-hand knowledge of the identity of the party or parties to whom notice had to be given. The *Mullane* decision required the defendant trustee to give personal notice by mail to known beneficiaries of common trust funds whose names and post office addresses were "at hand."²²² In *New York*, the bankrupt-

221. Professor Waterbury has noted that, if statutes do not elaborate on the Supreme Court's pronouncement, "[I]t is likely that . . . personal representatives will tend to respond by conducting rather extensive searches, impairing the prompt and economical administration of estates while infrequently revealing additional creditors." Waterbury, *supra* note 4, at 782.

See Fruehwald, *supra* note 4, at 1058 ("The personal representative would be well advised to keep good records of the 'diligent' search" because "[a] diligent search . . . raises the presumption that the creditor was not 'reasonably ascertainable'" under Indiana law.).

222. *Mullane*, 339 U.S. at 318. Those beneficiaries of the *Mullane* trust "whose interests [were] either conjectural or future" were not entitled to such notice because

cy statute required the filing of a list of all known creditors, apparently as a basis for identifying the parties to whom reasonable notice had to be given.²²³ In *Walker* (condemnation), *Schroeder* (condemnation), and *Mennonite* (tax sale), the party upon whom the notice burden rested knew the specific real property against which action was being taken, and in each case, the Court observed that the identity of the owner of the affected interest was also easily accessible through the public records.²²⁴ Thus, in each case, the scope of the burden to search for parties to be given personal notice was considerably circumscribed.

The personal representative of a decedent is in a vastly different posture. First of all, there is the handicap of not having personal knowledge of all of the decedent's affairs, whether business or personal, which may have led to obligations or debts still outstanding at death.²²⁵ Secondly, there is no limit on the types or sources of claims that may be asserted.²²⁶ Both of these factors make the personal representative's task more complicated and treacherous as unanswered questions about duty and liability abound.

the practical costs of conducting a search for them would destroy the advantages of the trust. *Id.*

223. *City of New York v. New York, New Haven, & Hartford R.R.*, 344 U.S. 293, 296 (1952). Although this requirement was not complied with in the case, both the bankrupt railroad and its bankruptcy trustee knew of the claim of the City of New York but failed to send it personal notice by mail of the period for filing claims. *Id.*

224. *Walker v. Hutchinson*, 352 U.S. 112, 116 (1956); *Schroeder v. City of New York*, 371 U.S. 208, 210 (1962); *Mennonite Bd. of Missions v. Adams*, 462 U.S. 791, 798 n.4 (1983). In *Mennonite*, the public records did not provide a street or post office box address for the mortgagee; it only identified the county in which the corporation was incorporated. 462 U.S. at 798 n.4. However, the Court assumed "that the mortgagee's address could have been ascertained by reasonably diligent effort." *Id.* It also conceded that a letter addressed only to the corporation by county and state was likely to be properly delivered by the post office and thus provide actual notice. *Id.* Taking a position that is strikingly at odds with her *Pope* opinion, Justice O'Connor expressed concern about the uncertainty of the search burden being imposed, prophetically characterizing it as "ominous." *Id.* at 805.

225. Falender concedes that the range of knowledge of personal representative is wide, from no knowledge to intimate knowledge. Falender, *supra* note 73, at 695.

226. Such types may include "joint obligors, partners, landlords, bailees, credit card issuers, charge account creditors, professional advisors, ex-spouses with alimony or child support claims, tort claimants, and any other known or knowable person who might have a claim against the decedent's estate." *Id.* at 694 (footnote omitted).

For those of us who lead organizationally-challenged lives, having to pore through our piles of unfiled or wrongly filed receipts, statements, invoices, and memos to determine the present state of our affairs is a chilling thought. The task would be near impossible to an outsider. Even if we manage to impose some order and some methodical record-keeping on the conduct of our day-to-day lives, an outsider charged with locating our "reasonably ascertainable" creditors must have some trepidations. Observers who have considered the scope of the personal representative's duty to search for "reasonably ascertainable" creditors have not offered much reassurance to the fiduciary. Attempting to lay the groundwork for the rule of notice later adopted in *Pope*, Professor Falender broadly pronounced that the duty should include searching the decedent's home, office and safe deposit box, and books and records found there.²²⁷ Furthermore, inquiry should be made of "decedent's relatives, acquaintances, business associates, and professional advisers whom the representative believes to be fertile sources of information."²²⁸ It has even been suggested that it is not enough just to make inquiry; if the reply to an inquiry is incomplete or erroneous, the personal representative should be charged with the actual knowledge of heirs, devisees, and acquaintances.²²⁹ The *Pope* opinion itself, however, suggests a less rigorous interpretation of who is a "reasonably ascertainable" creditor by refusing to assume that Mrs. Pope's awareness of her husband's long stay at the Medical Center translated into knowledge of the Collection Services's claim.²³⁰

In contrast to *Mullane*, which excluded "conjectural" or "future" claimants, and those who did not "in the due course of business come to knowledge" of the trustee,²³¹ *Pope* announced no limit on the type of claimant who is entitled to notice of the nonclaim bar.²³² If a nonclaim statute purports to cut off contingent claims, *Pope* logically applies to such contingent claims, as well as matured ones.²³³ In making the search of the

227. *Id.* at 695.

228. *Id.*

229. *Id.*

230. *Tulsa Professional Collection Servs., Inc. v. Pope*, 485 U.S. 478, 491 (1988)

231. 339 U.S. at 317.

232. *Pope*, 485 U.S. at 491.

233. See Falender, *supra* note 73, at 670, 694.

decedent's environs, therefore, the personal representative must be alert to findings that perhaps only indirectly suggest claims of an unusual nature. The most intimate details—even secrets—of a decedent's life could in hindsight be found sufficient to have raised a "reasonable" inference of a potential claim. Do the ministrations of a neighbor or acquaintance signal a possible claim for services rendered?²³⁴ Must every patient or client of a professional be considered a potential malpractice claimant?²³⁵ If the decedent died of AIDS, should the representative make "reasonable" efforts to ascertain and notify sexual partners who may have a tort claim due to the decedent's failure to disclose?

It is true that carefully drafted legislation defining the scope of the personal representative's duty may alleviate the burden somewhat,²³⁶ but the fact remains that the Supreme Court apparently failed to take into account the different milieu in which the constitutional mandate of notice would be operative. Under a balancing approach to due process requirements, a more penetrating analysis of the nature of the burden being imposed would have been attempted and would have revealed significant distinctions between *Pope's* facts and the constitutional precedents that were found applicable.

The closest similarity can be found in the bankruptcy proceedings of *New York* in that the range of claims that can be filed and the type of creditor that must be notified is not limited.²³⁷ However, the trustee in bankruptcy has a considerable advantage over a decedent's personal representative. The trustee ordinarily is not hindered by the impossibility of acquiring personal knowledge; the petitioning bankrupt is alive and available as a source of information, and is required to file a schedule of creditors.²³⁸

234. See Fruehwald, *supra* note 4, at 1057.

235. Spencer, *supra* note 4, at 57.

236. See Fruehwald, *supra* note 4, at 1056-57 (describing how Indiana's statutory requirements respond to such concerns).

237. Under the Bankruptcy Code, "claim" includes a "right to payment, whether or not such right is reduced to judgment, liquidated, unliquidated, fixed, contingent, matured, unmatured, disputed, undisputed, legal, equitable, secured or unsecured." 11 U.S.C. § 101(5)(A) (1988 & Supp. 1993).

238. 11 U.S.C. § 521 (1988); see 3 COLLIER ON BANKRUPTCY § 521.03[1], at 521-12 (Lawrence P. King ed., 15th ed. 1995). Collier notes that the preparation of the

Just as the foregoing discussion suggests that the Supreme Court undervalued the interests of the estate and of the state in promoting efficiency in the administration of decedent's estates, at the other end of the scales, the Court seems to have attributed too much weight to the creditors' interests. In the first place, the risk that payment of a debt will be jeopardized by the debtor's death is foreseeable and assumed by the creditor. Second, creditors as a class have given no indication that the probate process is a valuable means of collecting unpaid obligations.

In deciding whether a constitutional duty exists, the Supreme Court has considered which party can better shoulder the burden.²³⁹ The notice cases have not been an exception, and the Court has at times remarked on the ability of parties to protect themselves.²⁴⁰ Ironically, one of the most forceful recent statements comes from Justice O'Connor herself in her dissent in *Mennonite*, the case that her *Pope* opinion relies on so heavily. Her *Mennonite* dissent defended notice by publication to mortgagees because loss of their interest through a tax sale was not completely unexpected.²⁴¹ Since "the assessment of taxes occurs with regularity and predictability," a tax sale cannot be characterized as unexpected.²⁴² She also thought it relevant that most of the holders of mortgages are private institutional lenders or federally supported agencies who are well aware of the consequences of the borrower's nonpayment of taxes.²⁴³ In other words, mortgage holders are powerful and sophisticated in

schedule is "one of the most important duties of the debtor's attorney. . . . This is particularly true with regard to setting forth the names and the addresses of the creditors." *Id.* § 521.03[3], at 521-14.

239. See, e.g., *Trimble v. Gordon*, 430 U.S. 762 (1977). Considering the constitutionality of an intestacy statute that denied inheritance between children born out of wedlock and their fathers, the Court addressed where the "burden of inertia in writing a will" falls. "At least when the disadvantaged group has been a frequent target of discrimination, as illegitimates have, we doubt that a State constitutionally may place the burden on that group by invoking the theory of 'presumed intent.'" *Id.* at 775 n.16.

240. See, e.g., *Texaco, Inc. v. Short*, 454 U.S. 516, 535 n.28 (1982).

241. *Mennonite Bd. of Missions v. Adams*, 462 U.S. 791, 808 (O'Connor, J., dissenting).

242. *Id.* at 808.

243. *Id.*

the ways of the world. They also have the means to protect themselves, including checking the public tax records.²⁴⁴

These observations can be superimposed on the vast majority of estate creditors with very little alteration. A debtor's death is not a completely unexpected event; it may not happen at regular and predictable intervals, but neither does a tax sale. Nonpayment of taxes, not their regular and predictable assessment, precipitates a tax sale, and nonpayment is neither certain to occur nor regular in timing. In that sense, loss by death is even more to be expected than loss by a tax sale; death is certain to occur and only its timing is in question. Many estate creditors are large corporations that regularly extend consumer debt to a high volume of customers. As Justice O'Connor observed in *Mennonite*, such creditors know or should know of the consequences of a customer's death, namely, the possibility of nonpayment and the existence of a nonclaim bar triggered by probate proceedings after death.²⁴⁵ Actual knowledge of the debtor's death is likely to come their way within a reasonably short time of death,²⁴⁶ and for those cases where that is not so, a regular check of the legal notices would provide such knowledge. Unlike a party who is completely unaware of an action which threatens loss, creditors should reasonably anticipate death and are in a position to protect themselves from loss by their vigilance.

Furthermore, the behavior of creditors as a class and the opinions they have expressed, to the extent that evidence exists, strongly suggest that they will not greatly benefit from the burden being imposed on estates to give actual notice. As just noted, it is probable in most cases of outstanding debt (as opposed to contingent claims) that the creditor is likely to acquire actual knowledge, or to be put on some sort of inquiry notice, within a fairly short time of the decedent's death, without any

244. *Id.* at 809.

245. *Id.* at 808.

246. In *Pope*, for example, the creditor was the assignee of the hospital where the debtor died. *Tulsa Professional Collection Serv., Inc. v. Pope*, 485 U.S. 478, 482 (1988). See also *Estate of Busch v. Ferrell-Duncan Clinic, Inc.*, 700 S.W.2d 86, 87 (Mo. 1985) (en banc), where the complaining creditor provided medical services to the decedent prior to death and thus probably had knowledge of the likelihood that death was imminent, if not of its exact timing.

separate formal notice arriving in the mail.²⁴⁷ Nor does it appear that creditors have ever perceived themselves as seriously disadvantaged by publication notice of a nonclaim bar. During the drafting of the original Uniform Probate Code in the 1960s, the voices of creditors and their organizations were largely silent.²⁴⁸ Professor Langbein has attributed the enormous growth in nonprobate transfers of wealth at death in large part to the declining need of creditors for the protection offered by the probate system.²⁴⁹ More recently, the decision in *Pope* does

247. Of course, actual knowledge of death is not in itself knowledge of the nonclaim bar, and for that reason, it has been suggested that such actual knowledge is not sufficient notice under *Pope*. Fruehwald, *supra* note 4, at 1053. However, death of the debtor is an absolutely necessary prerequisite to triggering the time bar (even if it is not the triggering event itself), and creditors should be presumed to know the law governing the transactions they enter into, including the nonclaim bar with its provision for notice by publication. Therefore it is reasonable to expect creditors who learn of a debtor's death to take action to protect their claims from becoming time barred.

Although the Supreme Court held in *City of New York v. New York, New Haven, and Hartford R.R.*, 344 U.S. 293, 297 (1953) that the creditor's actual knowledge of the railroad's reorganization did not mitigate the duty to give the creditor mailed notice, the knowledge imputed to the creditor because of its presumed familiarity with the law was starkly different from what a decedent's creditors might have been presumed to know in *Pope*. The Court assumed that the creditor knew of the Bankruptcy Statute's requirement of reasonable notice and could reasonably assume that it would receive such notice before its claims would be barred. *Id.* at 297. "When the judge ordered notice by mail to be given [to] the appearing creditors, New York City acted reasonably in waiting to receive the same treatment." *Id.*

248. Richard W. Effland, *Rights of Creditors in Nonprobate Assets*, 48 MO. L. REV. 431 (1983). An exception to the silence was the American Association of Trial Lawyers, who spoke out ostensibly on behalf of tort creditors, but whose members' means of livelihood would also be curtailed by broad nonclaim statutes. Concerns of the trial lawyers are reflected in U.P.C. § 3-803(c) (1982), which excepts from the nonclaim bar, to the extent of insurance protection, "any proceeding to establish liability of the decedent . . . for which he is protected by liability insurance."

249. Langbein, *supra* note 37, at 1120-25. In the vast majority of cases, creditors rely on voluntary payment of outstanding balances by the decedent's survivors. Medical insurance, life insurance, credit life insurance, and security interests also help to create a "formidable battery" of payment and collection options. Langbein concludes, "If modern creditors had needed to use probate very much, they would have applied their considerable political muscle to suppress the nonprobate system." *Id.* at 1125; see also WILLIAM M. MCGOVERN, JR. ET AL., *WILLS, TRUSTS, AND ESTATES* 593 (1988) ("[T]he protection administration affords to creditors is illusory because it can be avoided by keeping property out of probate."); Effland, *supra* note 248, at 431. But see Helen B. Jenkins, *Rights of Unsecured Estate Creditors Under the Uniform Fraudulent Transfer Act in Property Transferred Prior to Death*, 45 OKLA. L. REV. 275 (1992).

not seem to have inspired creditors' lawyers to push for legislation embodying their clients' newly recognized rights.²⁵⁰

A final point harks back to the unique interplay between the state action issue and the merits of the due process issue in *Pope*. Most assessments of *Pope* agree that a time bar running for a reasonable length of time from the date of death is valid because it escapes constitutional scrutiny; invalidity results only when there is a significant linkage between the time bar's trigger and probate court proceedings. What the majority failed to realize in *Pope* is that the legislative decision to tie the nonclaim bar's trigger to some facet of the probate proceedings does not reflect an intimate wedding of the state "procedure" and the operation of the nonclaim bar. The decision is entirely rational and may well inure to the benefit of creditors.

Having determined that a short nonclaim bar was desirable, the legislature surely realized that the time interval between a debtor's death and the initiation of probate proceedings will vary from case to case. A short time bar tied to the date of death might run before the official mechanism for the payment of debts was initiated. Either designation of appointment of the personal representative or published notice to creditors suggests a logical choice. Both are flexible and automatically adjust to provide an appropriate amount of time in each individual case. The Supreme Court's unfortunate oversight of the dynamics and realities of estate administration have thus produced an irrational disparity in the treatment of "long" death-triggered time bars and "short" nonclaim bars that may stand as yet another monument to the vagaries of the state action issue.

Although the decision in *Pope* appears to have been accepted without great clamor, the absence of criticism is surely accounted for by the fact that probate law is not exactly a glamour industry within legal circles. However, this article has attempted to reveal that *Pope* does not have a solid and respectable constitutional pedigree, nor is it supported by a clear and accurate assessment of the milieu that it affects. That being the case, it would be wise for courts in the future to limit its application, as some have already done.²⁵¹ One cannot but wonder

250. Spencer, *supra* note 4, at 59 n.12.

251. *See, e.g.*, *Wishbone, Inc. v. Eppinger*, 829 P.2d 434, 437 (Colo. Ct. App. 1991),

whether, in a decade or so, *Pope* will be seen to have suffered the same fate as *Labine v. Vincent*,²⁵² in which the Supreme Court upheld Louisiana inheritance laws that discriminated against children born out-of-wedlock.²⁵³ Though never overruled, *Labine* has been distinguished out of meaningful existence.²⁵⁴ Preliminary indications from the Supreme Court point precisely in that direction, as the Court on several occasions has declined opportunities to extend *Pope*.²⁵⁵

V. CONCLUSION

Inevitably, death inflicts loss. This fact is not subtle to grasp, and most people do understand it and also understand the desirability of anticipating the event by planning. Surely, creditors transacting business with individuals are no exception. When the event happens, the losses vary, just as we as individuals vary in our personalities, values, and accomplishments. So also each survivor experiences the loss differently, depending upon his or her own makeup and relationship with the decedent. It is not possible for the state to prevent the survivors' personal sense of loss, or to restore a breadwinner's earnings or

cert. denied, 506 U.S. 869 (1992) (declining to apply *Pope*'s state action analysis to Colorado's "self-executing" nonclaim statute requiring claim to be filed within four months after performance by personal representative was due).

252. 401 U.S. 532 (1971).

253. *Id.* at 539-40. After *Labine*, the Louisiana Supreme Court declared that the Louisiana Civil Code article that was upheld in *Labine* violated Louisiana's own Constitution. Succession of Brown, 388 So.2d 1151, 1154 (La. 1980), *cert. denied*, 450 U.S. 998 (1981).

254. In *Trimble v. Gordon*, 430 U.S. 762 (1977), while striking down Illinois' treatment of children in its inheritance scheme, the Court attempted to explain why Louisiana's statutory scheme of family regulation justified the discrimination in *Labine*, 430 U.S. at 768 n.13, but at the same time the Court admitted that *Labine* was "difficult to place in the pattern of this Court's equal protection decisions and subsequent cases have limited its force as precedent." 430 U.S. at 767 n.12.

255. *Wishbone, Inc. v. Eppinger*, 829 P.2d 434 (Colo. Ct. App. 1991), *cert. denied*, 506 U.S. 869 (1992); *In re Estate of Gleason (Raince v. Gleason)*, 631 So. 2d 321 (Fla. Ct. App. 1994), *cert. denied*, 115 S. Ct. 726 (1995); *In re Estate of Danesc*, 641 So. 2d 423 (Fla. Ct. App. 1994), *reh'g denied*, 651 So.2d 1193 (Fla.), *cert. denied*, 115 S. Ct. 2556 (1995); *In re Estate of Wilson (Phipps v. Wilson)*, 610 N.E.2d 851 (Ind. Ct. App. 1993), *cert. denied*, 114 S. Ct. 879 (1994); *Warfel v. Brady*, 619 A.2d 171 (Md. Ct. App.), *cert. denied*, 62 U.S.L.W. 3348 (U.S. Nov. 16, 1993) (No. 94-483); *In re Estate of Gumbreck (Blaschve v. Causey)*, 63 OKLA. B.J. 49 (Okla. Ct. App. 1991), *cert. denied*, 506 U.S. 1035 (1992).

a nurturer's daily ministrations. However, it is reasonable, and it should not be unconstitutional, for the state to alleviate the burden by fostering simplicity and efficiency in the administration of decedents estates, as the Uniform Probate Code has sought to do by minimizing court involvement in what is essentially a private matter. The Constitution's Due Process Clause should not be used as a blunt instrument to impose on a surviving family the burden of soliciting creditors to come forward and present their claims when those same creditors chose not to exercise precautions to protect their interests from such a loss.

