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Third Party Assignment, Statutes of Limitation, and the Tax Refund Offset Program: Breathe a Little Easier Student Deadbeats, the Fifth Circuit Is on Your Side

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NOTES

Third Party Assignment, Statutes of Limitation, and the Tax Refund Offset Program: Breathe a Little Easier Student Deadbeats, the Fifth Circuit Is on Your Side

I. INTRODUCTION

The economic downturn of the early 1990s has brought with it a dramatic increase in the number of defaults on student loans.[1] Legislators have thrashed about trying to plug the collection leaks with a myriad of legislative proposals.[2] Despite this congressional movement, the United States Court of Appeals for the Fifth Circuit recently removed another rock from the dike of federal regulations that prevents the student loan program from completely drowning in unpaid debt. In *Grider v. Cavazos*,[3] the Fifth Circuit held that Department of the Treasury (Treasury Department) regulations prohibit the Internal Revenue Service (IRS) from offsetting a delinquent debtor's tax refund in order to collect an assigned student loan if ten years have passed since the debt became delinquent in the hands of the school that originally issued the loan.[4] In so doing, the *Grider* court rejected the reasoning of an earlier holding by the Eleventh Circuit. In *Jones v. Cavazos*,[5] the Eleventh Circuit had held that the IRS can offset a debtor's tax refund until the Department of Education has held the note for ten years, irrespective of when the debtor originally defaulted on her payments.[6]

The source of this circuit split is the two courts' differing interpretations of the word "delinquent" in the context of the relevant Treasury Department regulations.[7] Their conflicting views on the nature of statutory interpretation and on the importance of precedent account for the two courts' different determinations of when a student loan becomes delinquent for purposes of the tax refund offset program. The differences in the two courts' reasoning and results creates an interesting anomaly. The *Grider* court's blind adherence to the "plain meaning rule" leads them to the same conclusion as a more deliberative inquiry that considers other factors such as policy and precedent. The *Jones* court's more insightful recognition of the statute's ambiguity and more credible use of precedent actually brings it to the opposite conclusion than that which those insights should bring. A careful consideration of

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1. Over a five year period, defaults on federal loans have more than doubled. The net default rate has climbed to 10.3%. The cost to the government of these defaults is a whopping $3.8 billion. Art Pine, *Student Loans: Many Flunk Repayment*, L.A. Times A5 (Dec. 4, 1991) (relying on Department of Education statistics).

2. See Thomas J. DeLoughry, *Congress Preparing "Get Tough" Rules on Aid to Students*, 38 Chronicle of Higher Educ. 17A1, A28 (Dec. 18, 1991) (listing over 50 proposals that would decrease default rates currently being considered on the floor of the United States House of Representatives and of the Senate).

3. 911 F.2d 1158 (5th Cir. 1990).

4. Id. at 1165.

5. 889 F.2d 1043 (11th Cir. 1989).

6. Id. at 1049.

7. See 26 C.F.R. § 301.6402-6T (1992).

the policy and precedent behind the tax refund offset program mitigates in favor of future courts holding that student loans become "delinquent" when the student defaults on her payments to the original lending institution.

Part II of this Note describes the National Direct Student Loan program and the Treasury Department regulation. Part III traces the precedential history leading to the *Jones* and *Grider* decisions, discusses the factual and legal issues that the two courts confronted, and outlines the reasoning behind their conclusions. Part IV addresses the merits and inadequacies of each court's factual interpretation and legal reasoning. It also argues that neither decision provides a satisfactory answer to the question of when the ten-year limitation on tax offset begins to toll for a government agency that is the subsequent assignee of an unpaid loan.[8] Part V recommends that the courts decide the time of delinquency issue using a more reasoned policy analysis and a more careful examination of precedent than the courts applied in *Jones* or *Grider*. This Note concludes that such an analysis requires future courts to hold that a student loan is delinquent for tax offset purposes at the time of original default. This interpretation bars the Treasury Department from offsetting income tax returns after a loan is delinquent for ten years.

II. The Tax Refund Offset Program and the Time of Delinquency Issue

The Deficit Reduction Act of 1984 (the Act), when other collection efforts have failed, authorizes the Secretary of the Treasury to collect a delinquent debt owed to any Federal Agency by offsetting the tax refund of the debtor party.[9] The purpose of the Act is to improve the ability of the government to collect revenues while adding notice requirements and other debtor protections.[10] The Act allows the Secretary of any federal agency to notify the Secretary of the Treasury of a past due legally enforceable debt and the Secretary of the Treasury in turn is to notify the IRS.[11] The IRS then offsets the debtor's income tax refund for that year and all subsequent years until it collects enough money to satisfy the debt or until the collection procedure becomes

8. Hereinafter, this question is referred to as the "time of delinquency issue."

9. Pub. L. No. 98-369, § 2653, codified at 26 U.S.C. § 6402(d) (Supp. 1992) and 31 U.S.C. § 3720A (Supp. 1992).

10. See Department of Justice, Debt Collection; Tax Refund Offsets, 56 Fed. Reg. 8734 (1991) (amending 28 C.F.R. § 31).

11. Department of the Treasury, Debt Collection; Tax Refund Offset, 52 Fed. Reg. 49 (1987) (amending 31 C.F.R. § 5).

time barred.[12] Courts, agencies, and commentators generally refer to this process as the Tax Refund Offset Program.[13] A variety of federal agencies find that the refund offset program is an effective method of recovering debts.[14]

Congress has limited the Department of Education's right to pursue delinquent loans. A statute of limitation bars the Department of Education from seeking judicial enforcement of a past due debt. A debt becomes past due if the Department of Education holds the note for six years;[15] however, the Department of Education can legally enforce a debt by other means after the right to judicial remedy has expired.[16] One such alternative method is through the refund offset program.[17]

Congress has authorized the Secretary of the Treasury to promulgate regulations necessary for operating the refund offset program.[18] In one such regulation, the Secretary of the Treasury defined a past due enforceable debt as one "[w]hich, except in the case of a judgment debt, has been delinquent for at least three months but has not been delinquent for more than ten years at the time the offset is made."[19]

Courts have had difficulty interpreting this definition in the context of student debt. Neither Congress nor the Secretary of the Treasury has defined the term "delinquent." This omission is understandable since the Treasury Department intended the Regulation to cover a general interagency program.[20] Since specific agencies apply this general regulation to a wide variety of different programs, one would expect to see gaps in legislative and administrative intent. The Regulation's drafters could not have forseen all the contingencies that would arise when the general regulation was applied to specific cases.

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12. See id.

13. Occasionally they use other names for the program, such as the Tax Refund Intercept Program, or the Offset Program. See Lynn C. Jones, Comment, *Effective Child Support Enforcement In Kentucky: The Tax Refund Intercept Program*, 74 Ky. L. J. 667 n.2 (1985).

14. The Department of Agriculture uses the refund offset program to collect overissued benefits from food stamp recipients; Health and Human Services uses the program to collect delinquent child support; and the Department of Education uses the program to collect overdue student loans. See Department of Agriculture: Food and Nutrition Services, USDA, 56 Fed. Reg. 41325 (1991).

15. Higher Education Act of 1965, 20 U.S.C. § 1091a (a)(4)(C) (1988).

16. *Grider*, 911 F.2d at 1161. See also *Jones*, 889 F.2d at 1048; *Roberts v. Bennett*, 709 F. Supp. 222 (N.D. Ga. 1989); *Thomas v. Bennett*, 856 F.2d 1165 (8th Cir. 1988); *Hurst v. United States Dep't of Educ.*, 695 F. Supp. 1137 (D. Kan. 1988), aff'd, 901 F.2d 836 (10th Cir. 1990).

17. See *Grider*, 911 F.2d at 1161.

18. 31 U.S.C. § 3720A(d) (Supp. 1992). See *Grider*, 911 F.2d at 1161.

19. 26 C.F.R. § 301.6402-6T (b)(2) (1992) (hereinafter "the Regulation").

20. Note that the Treasury Department drafted the regulation in 26 C.F.R. § 302.6402-6T(a) with reference to any federal agency.

In the case of most debts, the government is the original creditor, not a subsequent assignee.[21] As such, no gap in time exists between when the loan goes into default and when the right to collect vests in the government. However, under the National Direct Student Loan program (NDSL),[22] the educational institution that first issued the loan is the original lender.[23] The Department of Education is a subsequent assignee who only gains an interest once the school assigns the note to the government.[24] As a result, a loan may go into default with regard to the educational institution long before the Department of Education can independently collect on the loan.

With this situation in mind, the failure of the regulation to define when a loan becomes "delinquent" creates uncertainty as to the point at which the Treasury Department's regulation comes into effect. This ambiguity leaves the courts to ponder whether delinquency, for purposes of the ten-year limitation on the collection of defaulted student loans through the refund offset program, is viewed from the debtor's or the Treasury Department's perspective.

If delinquency is viewed from the debtor's perspective, the day of original default from the creditor institution tolls the beginning of the limitation period. Under this scenario, even though the debtor would not know the point at which the school assigned a loan to the Department of Education, the debtor would have the security of knowing when she is free of her obligations because she would know the day on which she defaulted against the school. Further, viewing delinquency from the debtor's perspective ensures that litigants present the court with a timely claim.

If a court defines delinquency from the government's perspective, however, the limitation period should begin on the day of assignment. This interpretation ensures that the Department of Education will have a full ten years to exercise its right to offset the taxpayer's refund and thereby protects the right of the government to collect on its claims.

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21. See *Grider*, 911 F.2d at 1162.

22. In the Higher Education Amendments of 1986, 20 U.S.C. § 1087aa (Supp. 1989), Congress revamped the NDSL and renamed the program the "Perkins Loan Program" after Rep. Carl Perkins of Kentucky. Dicta in the *Jones* opinion implied that the *Jones* court's holding only binds the NDSL program and not the new "Perkins Loans." 889 F.2d at 1049 n.7. However, legislative changes in the Perkins Loan program that encourage the Secretary of Education to continue collection efforts for an unlimited time cannot affect the Treasury Department's regulations governing the limitation period on tax refund offset because the Department of Education amendments do not discuss Treasury Department regulations. 20 U.S.C. § 1087aa (Supp. 1990). Therefore, the *Jones* and *Grider* holdings are equally relevant to Perkins Loan collection.

23. See Higher Education Assistance Act of 1965, 20 U.S.C. § 1087(5) (1988).

24. Id.

The legislative interpretation and administrative history behind the refund offset program provide no conclusive answer to the time of delinquency issue. The only clear statement of purpose for the Treasury regulations is that they are "intended to strengthen the ability of the Secretary [of the Treasury] to collect outstanding debts,"[25] while at the same time "adding certain notice requirements and other protections for the debtor."[26] The ten-year statute of limitation appears to compromise the interests of the debtor and those of the government. However, when applied to the collection of defaulted student loans by the Department of Education, that compromise breaks down. Limiting the offset to ten years from the original default will completely preclude the government from offseting the loan if the assignor school waits ten years to assign the loan. On the other hand, defining delinquency as beginning at the time of assignment exposes the debtor to nearly timeless liability. This apparent conflict has thrown the courts into a quandary.

III. THE LAY OF THE LEGAL LANDSCAPE BEFORE *JONES* AND *GRIDER*

A. Early Cases and the Time of Delinquency Issue

A court first addressed the ambiguous nature of the regulation's "delinquency" term in *Thomas v. Bennett*.[27] In *Thomas*, the Eighth Circuit stated in dicta that should the issue come before it, the court might interpret delinquency as beginning at the time of the original default.[28] The Eighth Circuit viewed the limitation as a prudent protection for the debtor.[29] Even so, the fact that the debt in *Thomas* was less than ten-years old limits the opinion's precedential value regarding the time of delinquency issue; therefore, the *Thomas* court's actual holding merely stands for the proposition that the Treasury Department can legally enforce a debt by offset even after the six-year statute of limitation on judicial action has expired.[30]

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25. Department of Education, What Procedures Does the Secretary Follow for I.R.S. Tax Refund Offsets, 51 Fed. Reg. 24905 (1986).

26. Department of Justice, Debt Collection; Tax Refund Offsets, 56 Fed. Reg. 8734 (1989).

27. 856 F.2d 1165 (8th Cir. 1988).

28. Id. at 1169 n.4. The court stated:

> We note that the Secretary of the Treasury has promulgated a regulation which, as a matter of policy, states that the setoff procedure will not be used to satisfy an obligation which has been delinquent for more than ten years at the time the offset is made. This does, we think prudently, place limits upon use of the offset procedure for obligations older than ten years.

Id. (citation omitted).

29. Id.

30. See *Grider*, 911 F.2d at 1163.

Seven days after *Thomas*, in *Hurst v. United States Department of Education*,[31] a United States District Court in Kansas faced a situation in which the Treasury Department offset a taxpayer's refund to collect a student loan thirteen years after default and just under six-years from the time the school assigned the loan to the Department of Education.[32] Without referring to *Thomas*,[33] the *Hurst* court questioned whether delinquency with regard to the regulation begins at the time of the original default. The debtor failed to convince the *Hurst* court that it should interpret the regulation so restrictively. The court noted that the debt arguably did not become delinquent for purposes of the regulation until "the government obtained [the] right [to offset]."[34] The district court conceded that the issue was unresolved and that the regulation is ambiguous and of little help in the case of a private debt later assigned to the government.[35] The *Hurst* court ultimately ruled that the government has six years from the date of assignment to bring suit and, therefore, that this debt still was enforceable through litigation.[36] Thus, an alternative statute provided standing for the Treasury Department, which made the time of delinquency issue moot.[37]

In November of 1988, a third court, from the Middle District of Florida, addressed the time of delinquency issue. In *United States v. Hunter*,[38] the district court held that the statute of limitation for judicial collection of a defaulted student loan begins to run at the time the school assigns a loan to the Department of Education.[39] The *Hunter* case, however, dealt with a different portion of the student loan program,[40] and, therefore, its relevance to the time of delinquency issue is not clear.

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31. 695 F. Supp. 1137, 1138 (D. Kan. 1988), aff'd, 901 F.2d 836 (10th Cir. 1990). The Court of Appeals in *Hurst* did not address the delinquency issue, but affirmed on other grounds. 901 F.2d at 837-38.

32. *Hurst*, 695 F. Supp. at 1138.

33. See 856 F.2d at 1169 n.4. The *Hurst* court may have written its opinion before the Eighth Circuit released the *Thomas* opinion. Therefore, the *Hurst* court probably failed to recognize the conflict, and it probably did not intend to start a line of precedent diverging from the *Hurst* dicta.

34. *Hurst*, 695 F. Supp. at 1139.

35. Id.

36. Id.

37. Id. See 20 U.S.C. § 1091a(a)(4)(C) (1988). See also *Grider*, 911 F.2d at 1164.

38. 700 F. Supp. 26 (M.D. Fla. 1988).

39. Id. at 27.

40. See Higher Education Assistance Act of 1965, 20 U.S.C. § 484A (1990), enacted by Section 16033 of the Consolidated Omnibus Budget Reconciliation Act of 1985, Pub. L. No. 19-27.

B. The Courts Squarely Face the Time of Delinquency Issue

Finally, in *Roberts v. Bennett*,[41] a United States District Court in Georgia addressed the time of delinquency issue head on. In *Roberts*, the plaintiff-taxpayer failed in 1975 to meet her payment obligation on a student loan.[42] In 1980, after minimal collection efforts,[43] Bryman School for Secretarial Training, the creditor, assigned the loan to the Department of Education. In 1987, the Department of Education referred the debt to the IRS, and the IRS deducted the loan's deficiency from her income tax refund for that year.[44]

The *Roberts* court held that a loan becomes delinquent on the day the assignor school assigns the right to collect to the Department of Education.[45] The district court allowed the Department of Education to collect on the loan through the refund offset program even though a statute of limitation barred them from collecting through a suit for a money judgment.[46]

The *Roberts* court based its holding on three grounds. First, it determined that the purpose of the offset program is to collect past due debts owed to a federal agency.[47] Without further explanation, the court concluded that it would only be logical to interpret the word "delinquent" as describing the period when the student owes the agency.[48]

The second basis for the *Roberts* court's holding rests on the district court's observation that the regulation establishing the ten-year limitation on refund offset also requires a three-month holding period before the Treasury offsets anyone's return. Without stating the logical or factual basis for its finding, the *Roberts* court determined that the purpose for the three-month waiting period is to ensure that the agency tries to collect the debt by means other than offsetting tax refunds for at least three months after assignment.[49] Again without explanation, the *Roberts* court made the conclusory statement that the existence of the three-month waiting period makes it only logical that the delinquency period, for purposes of the ten-year limitation, begins after the debt is in the hands of the agency.[50]

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41. 709 F. Supp. 222 (N.D. Ga. 1989).
42. Id. at 223.
43. See id. at 223 n.1.
44. Id. at 223.
45. Id. at 225.
46. Id.
47. Id. (citing 26 U.S.C § 6402(d) (1988)).
48. Id. at 225.
49. Id. See 26 C.F.R. § 301.6402-6T(b)(2) (1992).
50. *Roberts*, 709 F. Supp. at 225.

Finally, the *Roberts* court relied on the *Hurst*[51] dicta and questioned the wisdom of restrictively interpreting the regulation to prevent the pursuit of a claim that the government has held for less than ten years.[52] The *Roberts* court deemed this dicta to be the holding of *Hurst*[53] and did not address the fact that the actual holding of *Hurst* rested on other grounds.[54]

At best, the *Roberts* opinion rests on shaky legal reasoning. The *Roberts* court stated that the purpose of the offset program is to allow collection of past due debts owed to a federal agency; however, it failed to consider the concomitant purpose of the offset program, to increase the debtor's protections.[55] The ten-year limitation on collection through the offset procedure could constitute one such debtor protection. Consideration of this purpose erodes the *Roberts* court's already weak inference that the purpose of the statute requires a holding period beginning on the date of assignment.

The second justification proposed by the *Roberts* court is equally unsupported by fact or logic. One of the reasons for the Treasury Department's requirement of a three-month waiting period may be to ensure that the agency pursues other means of collection.[56] However, ensuring that the debtor has the opportunity to rectify errors and providing the agency with the time necessary to make a conclusive determination of the amount owed could be equally legitimate purposes for the three-month delay.[57] The *Roberts* court's factually questionable—or at least incomplete—conclusion of purpose further discredits its already unsatisfactory conclusion that the purpose of the three-month requirement logically mandates that the government has a ten-year right to collect through the refund offset program. Thus, the district court's conclusion that the three-month requirement and the ten-year limitation are not independent protections of the debtor implemented to achieve different objectives is not necessarily true. One could interpret

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51. *Hurst*, 695 F. Supp. at 1138.

52. *Roberts*, 709 F. Supp. at 225.

53. Id.

54. See notes 36-37 and accompanying text (noting that the *Hurst* court grounded its decision in the right of the government to bring a judicial claim within six years of assignment, not on the regulation at issue).

55. See Department of Health and Human Services, Referral of Debts to I.R.S. for Tax Refund Offset; Implementing the Deficit Reduction Act, 51 Fed. Reg. 45117 (1986).

56. See Department of the Treasury, Internal Revenue Service, Reduction of Tax Overpayments by Amount of Past-due Legally Enforceable Debt Owed to Federal Agency, 50 Fed. Reg. 39661, 39662 (1985) (noting that offset debts must first be referred to a consumer reporting agency).

57. See id. at 39662 (noting that the delay period must also he used to allow the debtor to present evidence that no debt is due and for the agency to determine that the debt is past due and legally enforceable).

the three-month requirement as beginning the day of assignment and the ten-year limitation as beginning the day of default and in doing so not create an inconsistency.

The final argument posed by the *Roberts* court, that the *Hurst* precedent dictated an interpretation of delinquency beginning with assignment,[58] is as unpersuasive as are the first two justifications. As previously pointed out,[59] the *Hurst* "holding" is only dicta. The *Hurst* court only said that "[i]t could . . . be reasonably argued" that the debt became delinquent at the time of assignment.[60] This language is far from a reliable, well-considered, precedential holding.

Such was the lay of the legal land regarding the Treasury Department regulation when the issue came to the Fifth and Eleventh Circuits. From the wording of the regulation, a broad statement of legislative purpose, the dicta of three quasi-relevant cases and the questionable holding of a district court in *Roberts*,[61] the *Grider* and *Jones* courts were to construct their opinions.

IV. Conflicting Views of the Regulation: the *Jones* and *Grider* Decisions

A. Jones v. Cavazos: *Adherence to Misguided "Precedent"*

The *Jones* court, apparently without much consideration or reflection, relied on *Roberts*, *Hurst*, and *Thomas* to construct its opinion. The *Jones* court found that these cases were controlling and held that, for purposes of the regulation's ten-year limitation, delinquency begins when the Department of Education obtains its right to collect on defaulted student loans.[62]

In *Jones*, Adeline Jones had borrowed money under the NDSL in the early 1970s to attend Coahoma Junior College in Clarksdale, Mississippi (Coahoma).[63] In 1974, Coahoma deemed the loan in default.[64] Twelve years later, Coahoma assigned the loan to the Secretary of Education.[65] In 1987, the IRS proposed to offset Jones's income tax refund, and in response, she brought suit seeking injunctive and declaratory re-

58. *Hurst*, 695 F. Supp. at 1139.

59. See notes 36-37 and accompanying text.

60. See *Hurst*, 695 F. Supp. at 1139.

61. The United States District Court for the Northern District of Alabama granted summary judgment in favor of the Department of Education after plenary review. The opinion is unpublished. See *Jones*, 889 F.2d at 1043.

62. See id. at 1049.

63. Id. at 1044.

64. Id.

65. Id.

lief from the Department of Education's collection efforts.[66] The District Court granted summary judgment in favor of the government, and Jones appealed.[67]

On appeal, the Eleventh Circuit rested its opinion on what it concluded to be persuasive precedent: the *Roberts*, *Hurst*, and *Thomas* decisions.[68] The Eleventh Circuit accepted the holding of *Roberts* that a debt cannot become delinquent until it is in the hands of the agency requesting offset.[69] The *Jones* court did not attempt to explore the logic of the *Roberts* holding, but rather appears to have adopted in blind faith the conclusion that delinquency begins at the time of assignment.[70] The *Jones* court cited the *Thomas* opinion[71] for the proposition that a debt older than ten years may still be legally enforceable. However, the Eleventh Circuit did not mention that the *Thomas* court restricted its holding to suits for judicial remedy.[72] Furthermore, the court ignored the *Thomas* dicta that criticized extending the scope of the offset remedy beyond ten years from the time of default.[73] The *Jones* court concluded its opinion by referring to the dicta in *Hurst*[74] as holding that the limitation period commences only after the government receives the right to payment following the assignment. Relying on these "precedents," the *Jones* court held that the government's right to offset Jones's tax returns had not expired because the limitation period had not yet run.[75] Therefore, the Eleventh Circuit allowed the IRS to offset Jones' tax refund.

B. Grider v. Cavazos: *Adherence to Ambiguous "Plain Meaning"*

Less than a year later, the Fifth Circuit considered the time of delinquency issue in *Grider v. Cavazos*.[76] In *Grider*, the appellants, David Grider and Leon Gladecki, appealed a district court's decision granting summary judgment in favor of the Secretary of Education on the time

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66. Id.

67. Id.

68. The *Jones* court also cited *Gerrard v. United States Office of Educ.*, 656 F. Supp. 570 (N.D. Cal. 1987), and *United States v. Hunter*, 700 F. Supp. 26 (M.D. Fla. 1988). However, these cases concerned different statutes and are only relevant to the time of delinquency issue by some vague or misguided inference. See *Jones*, 889 F.2d at 1048, 1049.

69. *Jones*, 889 F.2d. at 1048. See *Roberts*, 709 F. Supp. at 225.

70. See *Jones*, 889 F.2d at 1049.

71. *Thomas*, 856 F.2d at 1165. See notes 27-30 and accompanying text.

72. See *Thomas*, 856 F.2d at 1169.

73. See *Jones*, 889 F.2d at 1048. See also *Thomas*, 856 F.2d at 1169 n.4; *Grider*, 911 F.2d at 1164.

74. *Hurst*, 695 F. Supp. at 1139.

75. *Jones*, 889 F.2d at 1049.

76. 911 F.2d at 1158.

of delinquency issue.[77] In 1974, Grider had borrowed money under the NDSL program to attend Sinclair Community College.[78] He defaulted on the promissory note in 1975, and the school assigned the note to the Department of Education in 1979.[79] Similarly, Gladecki, in 1968, executed promissory notes under the NDSL program to attend Yale University. He had defaulted on the loan in 1971, and Yale assigned the note to the Department of Education in 1979.[80] The IRS offset both taxpayers' returns between 1986 and 1988, more than ten years after the original default, but within ten years of assignment to the government.[81]

The Fifth Circuit, in *Grider*, held that delinquency begins at the time of original default, not when the school assigns the loan to the government.[82] This holding barred the government from offsetting either the Gladecki or Grider debts.

While the *Grider* court regretted creating a split in the circuits, it could neither accept the *Jones* court's conclusory statement about the meaning of delinquent in the regulation, nor its reading of the cases from which it had constructed a foundation for its opinion.[83] The *Grider* court opposed the *Jones* opinion on two grounds: its misguided statutory interpretation[84] and its misused jurisprudence.[85]

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77. Id. at 1159.
78. Id.
79. Id.
80. Id.
81. Id. at 1160.
82. Id. at 1164-65.
83. See id. at 1162.
84. While this Note is primarily concerned with the Regulation, the discussion of the Regulation is intimately tied to one's assumptions about statutory construction. For articles on statutory interpretation, see Daniel A. Farber, *The Inevitability of Practical Reason: Statutes, Formalism, and the Rule of Law*, 45 Vand. L. Rev. 533 (1992); Stephen F. Ross, *Where Have You Gone, Karl Llewellyn? Should Congress Turn its Lonely Eyes to You?*, 45 Vand. L. Rev. 561 (1992); Edward L. Rubin, *Modern Statutes, Loose Canons, and the Limits of Practical Reason: A Response to Farber and Ross*, 45 Vand. L. Rev. 579 (1992); William N. Eskridge, Jr. and Philip P. Frickey, *Quasi-Constitutional Law: Clear Statement Rules as Constitutional Lawmaking*, 45 Vand. L. Rev. 593 (1992); Jonathan R. Macey and Geoffrey P. Miller, *The Canons of Statutory Construction and Judicial Preferences*, 45 Vand. L. Rev. 647 (1992); Lawrence C. Marshall, *The Canons of Statutory Construction and Judicial Constraints: A Response to Macey and Miller*, 45 Vand. L. Rev. 673 (1992); T. Alexander Aleinikoff and Theodore M. Shaw, *The Costs of Incoherence: A Comment on Plain Meaning*, West Virginia University Hospitals, Inc. v. Casey, *and Due Process of Statutory Interpretation*, 45 Vand. L. Rev. 687 (1992); Frederick Schauer, *The Practice and Problems of Plain Meaning: A Response to Aleinikoff and Shaw*, 45 Vand. L. Rev. 715 (1992); Daniel B. Rodriguez, *The Presumption of Reviewability: A Study in Canonical Construction and its Consequences*, 45 Vand. L. Rev. 743 (1992); Robert K. Rasmussen, *Coalition Formation and the Presumption of Reviewability: A Response to Rodriguez*, 45 Vand. L. Rev. 779 (1992); Richard A. Posner, *Statutory Interpretation—in the Classroom and in the Courtroom*, 50 U. Chi. L. Rev. 800 (1983); Daniel A. Farber, *Statutory Interpretation and Legislative Supremacy*, 78 Georgetown L. J. 281 (1989); Cynthia R. Farina, *Statutory Interpretation and the Balance of Power*

The *Grider* court based its statutory interpretation argument on the "plain meaning" doctrine.[86] The plain meaning rule is a judge-made method of statutory construction forbidding the courts from tampering with the plain meaning of words employed in a statute unless they are clearly ambiguous or nonsensical.[87] "The concomitant rule of interpretation is that courts may not re-write inartfully but unambiguously drafted legislation in order to accomplish results perceived by the court to be the goals of such flawed legislation."[88]

The *Grider* court argued that the *Jones* opinion, and those it cited, failed to consider that the refund offset program is a general method by which the government collects many types of debt.[89] Although it recognized that the drafters of the regulation probably did not consider the regulation's effect on loans assigned to the government by third parties, the *Grider* court rejected the *Jones* court's "logical" conclusion that the limitation period must begin to run from the date of assignment. Instead, it reasoned that if the Treasury Department had considered the way the time of delinquency issue relates to loans assigned to the government by third parties, it might have enacted special provisions setting delinquency at the time of default or at the time of assignment.[90] However, because the Treasury Department apparently made no such consideration, the *Grider* court found that it had no reason to assume that the Treasury Department intended either result.[91]

The *Grider* court questioned the *Jones* court's reliance on the fact that the six-year statute of limitation on suits for judicial remedy be-

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in the Administrative State, 89 Colum. L. Rev. 452 (1989); T. Alexander Aleinikoff, *Updating Statutory Interpretation*, 87 Mich. L. Rev. 20 (1988); Frank H. Easterbrook, *Statutes' Domains*, 50 U. Chi. L. Rev. 533 (1983); William N. Eskridge, Jr., *Dynamic Statutory Interpretation*, 135 U. Pa. L. Rev. 1479 (1987); Jonathan R. Macey, *Promoting Public-Regarding Legislation Through Statutory Interpretation: An Interest Group Model*, 86 Colum. L. Rev. 223 (1986); Larry Kramer, *Rethinking Choice of Law*, 90 Colum. L. Rev. 277 (1990).

85. *Grider*, 911 F.2d at 1164.

86. See id. at 1162.

87. See id. The plain meaning rule undoubtedly has experienced a surge in popularity among scholars and the judiciary. For articles exploring the merits of the plain meaning rule see William N. Eskridge, Jr., *The New Textualism*, 37 UCLA L. Rev. 621 (1990); Frederick Schauer, *Statutory Construction and the Coordinating Function of Plain Meaning*, 1990 S. Ct. Rev. 231; Nicholas S. Zeppos, *Justice Scalia's Textualism: The "New" New Legal Process*, 12 Cardozo L. Rev. 1597 (1991); Easterbrook, 50 U. Chi. L. Rev. 533 (cited in note 84); Kenneth W. Starr, *Observations About the Use of Legislative History*, 1987 Duke L. J. 371; Note, *Intent, Clear Statements, and the Common Law: Statutory Interpretation in the Supreme Court*, 95 Harv. L. Rev. 892 (1982). Compare Aleinikoff and Shaw, 45 Vand. L. Rev. at 687 (cited in note 84); John M. Kernochan, *Statutory Interpretation: An Outline of Method*, 3 Dalhousie L. J. 333 (1976); Julius Cohen, *Judicial "Legisputation" and the Dimensions of Legislative Meaning*, 36 Ind. L. J. 414 (1961).

88. *Grider*, 911 F.2d at 1162.

89. See id.

90. See id.

91. Id. at 1163.

gins to run at the time of assignment.[92] The *Grider* court noted that the six-year limitation on judicial action and the ten-year limitation on return offset act independently of each other and that, logically speaking, the provisions of one could have little to do with the provisions of the other. Therefore, the Fifth Circuit argued, the inconsistency proposed by the *Jones* Court did not exist and was indeterminative of the time of delinquency issue.

The *Grider* Court concluded its statutory interpretation analysis by referring to the "plain meaning" rule to propose an alternative definition of delinquency. The Fifth Circuit judges could not, or would not, recognize that the regulation was ambiguous. They referred to the layman's understanding of the word "delinquent" as dispositive of the issue and noted that for a court to interpret the statute otherwise would be a usurpation of the legislative function.[93]

The *Grider* court also attacked the jurisprudence that the *Jones* court had cited as persuasive authority. Beginning with the *Roberts* decision,[94] the Fifth Circuit questioned the lower court's reliance on legislative history in the face of what the *Grider* court deemed unambiguous legislation. The *Grider* court found that the *Roberts* court's conclusory statement that delinquency begins upon assignment was without statutory or jurisprudential support and was woefully insufficient to overcome the plain meaning of "delinquent."[95] Hence, the Fifth Circuit judges found the Eleventh Circuit's heavy reliance on *Roberts* to be unpersuasive.

The *Grider* court further observed that *Thomas v. Bennett*[96] and *Gerrard v. United States Office of Education*[97] concerned IRS offsets that occurred less than ten years after the students originally defaulted on their loans, not offsets that were older than ten years.[98] The *Grider* court correctly reasoned that these cases are inapplicable to the ten-year delinquency issue.[99]

Similarly, the *Grider* court distinguished *Hurst v. United States Department of Education.*[100] While the *Jones* court recognized that *Hurst* dealt with a loan offset that occurred ten years after the original

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92. See *Jones*, 889 F.2d at 1049 (citing *United States v. Hunter*, 700 F. Supp. 26 (M.D. Fla. 1988)).

93. *Grider*, 911 F.2d at 1163 (noting that "[t]he highest form of judicial restraint is resistance of the temptation to cure inartfully drafted legislation by indulging in 'judicial legislation' ").

94. *Roberts*, 709 F. Supp. at 222.

95. *Grider*, 911 F.2d at 1163.

96. 856 F.2d 1165 (8th Cir. 1988).

97. 656 F. Supp. 570 (N.D. Cal. 1987).

98. *Grider*, 911 F.2d at 1163. See also *Thomas*, 856 F.2d at 1169.

99. *Grider*, 911 F.2d at 1163.

100. 695 F. Supp. 1137 (D. Kan. 1988).

default,[101] the *Grider* court pointed out that the school had assigned the loan to the government within six years of the time that the government offset the taxpayer's refund and that it therefore was legally enforceable under the six-year judicial statute. Therefore, the Fifth Circuit argued, the *Hurst* court had not relied on the regulation to reach its decision.[102] The *Grider* court rejected the *Hurst* court's suggestion that the statute is ambiguous and that delinquency arguably begins at assignment, noting that such logic is flawed by the *Hurst* court's conversion of the regulation's silence into ambiguity.[103]

Finally, the *Grider* court attacked the *Jones* court's reliance on *United States v. Hunter*[104] as being irrelevant to the time of delinquency issue. The Fifth Circuit noted that *Hunter* stood for the proposition that federal statutes of limitation trump state legislation[105] and that this issue was never in dispute in *Jones*.

In the midst of criticizing the jurisprudence cited by the *Jones* Court,[106] the *Grider* court found the only jurisprudential support for its own holding in the *Thomas* decision's dicta. The *Grider* court inferred that this dicta supported its conclusion, though in actuality, the *Thomas* court's consideration of the time of delinquency issue was merely an incidental consideration to the *Thomas* holding.[107] Relying on the *Thomas* dicta, rejecting the *Jones* court's reasoning, invoking the plain meaning doctrine, and refusing to recognize any ambiguity in the statute, the *Grider* court concluded that the statute of limitation on the refund offset program begins to run from the time of the debtor's original default.

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101. See *Jones*, 889 F.2d at 1048.

102. *Grider*, 911 F.2d at 1164.

103. Id. at 1164 n.4.

104. 700 F. Supp. 26 (M.D. Fla. 1988).

105. *Grider*, 911 F.2d at 1164.

106. The extent of the Fifth Circuit's condemnation resonates in its biblical rebuke: "A foolish man, which built his house upon the sand: And . . . it fell: and great was the fall of it." *Grider*, 911 F.2d at 1163 n.3 (quoting Matthew 7:26-27).

107. Id. at 1164. See *Thomas*, 856 F.2d at 1169 n.4. The *Thomas* court stated:

> We note that the Secretary of the Treasury has promulgated a regulation which, as a matter of policy, states that the offset procedure will not be used to satisfy an obligation which has been delinquent for more than ten years at the time the offset is made. 26 C. F. R. § 301.6402-6T(b)(2) (1992). This does, we think prudently, place limits upon use of the offset procedure for obligations older than ten years.

V. BUILDING A CASTLE ON THE SAND: CRITICISM OF THE *GRIDER* COURT'S HOLDING[108]

A. The Lesson That the Fifth Circuit Could Have Learned From Justice Stevens: Consistency as a Form of Judicial Restraint

While the *Grider* court properly rejected the *Jones* court's reasoning, it used an even weaker legal foundation to support its own conclusions. Justice Stevens recognized in his dissent in *Commissioner v. Fink*[109] that courts often underestimate the value of certain and predictable rules of law. He asserted that stability in the law is particularly necessary in the field of taxation, since there is a strong interest in enabling taxpayers to predict the legal consequences of their proposed actions, and that an even stronger general interest exists in courts leaving to Congress the responsibility for making changes in settled law.[110]

In *Fink*, Justice Stevens rejected Justice Powell's opinion overturning a long-standing interpretation of a regulation that allowed shareholders, who voluntarily surrendered a portion of their corporate stock without sacrificing control, to immediately deduct the loss.[111] Justice Stevens recognized that in some situations past court error is sufficiently blatant to overcome the strong presumption of continued validity of a judicial interpretation.[112] However, absent compelling statutory language to the contrary, Justice Stevens argued that later courts should defer to Congress' ability to rectify imprudently interpreted statutes because the institutional and reliance values of a legislative rule of law are often more important than the initial goal of accurate interpretation.[113]

If the *Grider* court was unwilling to adopt a line of reasoning more persuasive than the "plain meaning" of the statute, it would have done well to have heeded Justice Stevens' perception in *Fink* and avoided overturning a settled area of law. At the time the *Grider* court addressed the time of delinquency issue, the Eleventh Circuit, a court of equal stature, already had decided that the regnlation was ambiguous,

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108. See note 106. For a summary of the *Grider* opinion, see IV. B.

109. 483 U.S. 89, 101 (1987) (Stevens dissenting).

110. Id. at 101 (Stevens dissenting).

111. See id. at 102 (Stevens dissenting).

112. See id. at 103 (Stevens dissenting).

113. Id. at 104 (Stevens dissenting). Few would dispute that our system of hicameralism and presentment makes legislation difficult to pass. Congress' inability to correct misinterpretations swiftly arguably limits the deference that a later judge should give to previous judicial interpretation of an ambiguous statute. However, this Note is concerned with an administrative regulation. The Secretary of the Treasury has the power to amend the Regulation. He is not subject to the same procedural obstacles that Congress faces when it attempts to amend laws. Therefore, Justice Stevens' argument for deference to judicial decisions in the tax field is even more persuasive when those decisions are interpretations of administrative regulations.

and had resolved that ambiguity. In *Roberts*, a district court also had ruled squarely in favor of delinquency beginning at the time of assignment. As was the case before the *Fink* decision, the taxpayers and the courts had a clear and workable rule on which to rely and thereby plan their actions. Absent a compelling interest, the Fifth Circuit should not have added confusion to an apparently resolved area of tax law by splitting from the Eleventh Circuit.[114] It could have criticized the earlier decisions, yet, in the interest of consistency, deferred to the Treasury Department to redraft the law and clarify any ambignity in the regulation.

While the Fifth Circuit should have overturned the *Jones* and *Roberts* opinions for other reasons, the *Grider* court's reasoning is not sufficiently compelling to justify the circuit split. The first and most adamantly defended reason submitted by the *Grider* court is that the "plain meaning" of the statute compelled interpretation of the term "delinquent" to mean the time of original default.[115] The *Grider* court refused to recognize that it could interpret the term "delinquent" in any way other than one supplied by the dictionary, and instead deferred to the lay meaning of the term.[116]

Citing "plain meaning" in the tax field is nonsensical. A tax attorney needs to understand more than just plain meaning when interpreting "unambiguous" statutory terms. Even the beginning tax student knows that she does not read the tax code like a novel.[117] For example, a dictionary would mislead an interpreter in attempting to understand the most important term of the tax deduction area: "ordinary and necessary business expenditures" under Section 162(a) of the Internal Revenue Code. Justice Cardozo in *Welch v. Helvering*[118] interpreted "ordinary" to mean a noncapital expense and "necessary" to mean a

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114. A court could distinguish the *Fink* decision from the cases at issue. The rule in *Fink*, allowing stockholders to deduct losses on redeemed portions of controlling stock, had been in place for over forty years. That decision concerned a problem of proper tax planning and not simply delinquent tax avoidance. However, the issue is fundamentally the same. Mr. Grider, Mr. Gladecki, and the Department of Education should be able to rely on the *Jones* and *Roberts* holdings when determining their liability to tax offset in much the same way shareholders should be able to rely on prior holdings to determine the tax consequences of their sale of stock. The regulation contains notice provisions expressly designed to inform the Taxpayer of her tax liabilities. 26 C.F.R. § 301.6402-6T (1992). Surprise never was intended to be one of the program's attributes.

115. See *Grider*, 911 F.2d at 1163.

116. See note 93 (although, as discussed later, it never mentioned that laymen might have interpreted the statute differently than the Fifth Circuit judges).

117. James J. Freeland, Stephen A. Lind, and Richard B. Stephens, *Fundamentals of Federal Income Taxation* 345 (Foundation, 7th ed. 1991).

118. 290 U.S. 111, 113-15 (1933).

nonpersonal expense.[119] This proper interpretation differs from that which the layman would infer.[120] For example, the layman might consider the cost of repairing fire damage to a business person's offices to be an ordinary business expense and the cost of sending an executive and his family on an African safari to be both an abnormal and unnecessary business expense. But the layman would be wrong.[121] To rely on the plain meaning rule to interpret the terms "ordinary and necessary" without consideration of the jurisprudence defining them would be a gross judicial error and would defeat the interpretation long accepted by the courts and the IRS.[122] The Fifth Circuit loses credibility for making this very error when interpreting the term "delinquent" in the *Grider* opinion.[123]

To cite plain meaning without further justification exposes the *Grider* opinion to the litany of criticism often directed at such a mode of interpretation.[124] If a statute is to be sensible, a court must read it in light of some purpose.[125] As noted by Professor Llewyllyn, a statute merely declaring a rule, with no purpose or objective, is nonsense.[126] The *Grider* court's reasoning is just such nonsense. The Fifth Circuit admitted that it was ignorant as to what the drafters of the regulation would have done had they considered the effect that third party assignment would have on the ability of the Treasury Department to collect under the refund offset program.[127] Yet without stating any purpose, the *Grider* opinion rests on "a rule is a rule" type of judicial philoso-

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119. While some discussion persists as to whether Justice Cardozo indeed proffered these interpretations, most scholars and judges support the popular interpretation of the Cardozo opinion. See Marvin A. Chirelstein, *Federal Income Taxation* (Foundation, 6th ed. 1991).

120. *Webster's New Twentieth Century Dictionary* 1200, 1259 (World, 2d ed. 1964) (defining "ordinary" as "regular; customary; usual; normal," and "necessary" as "that cannot he dispensed with; essential").

121. See *Hubinger v. Commissioner*, 36 F.2d 724, 726 (2d Cir. 1929) (stating that payment for repairs of fire damage is not an ordinary expense because it is a capital expenditure, such payments being distinguished from non-capital ordinary wear and tear); *Sanitary Farms Dairy, Inc. v. Commissioner*, 25 T.C. 463, 467 (1955) (finding that safari expenses of an executive and his family were ordinary because photos from the safari were used for advertising purposes and necessary because they were incurred for valid business as opposed to personal reasons).

122. For an excellent yet simple discussion of "ordinary and necessary" business expenses, see Chirelstein, *Federal Income Taxation* at 90-150 (cited in note 119).

123. The "time of delinquency" interpretation does not bave the long history of the "ordinary and necessary" interpretation. This may have made a difference to Justice Stevens. However, the logic of the argument in his *Fink* dissent is useful when examining the *Grider* decision.

124. See Robert S. Summers, *Judge Richard Posner's Jurisprudence*, 89 Mich. L. Rev. 1302, 1317 (1991) (noting that, along with Judge Posner, the majority of American academics and many judges vigorously reject tbe linguistic "plain meaning" argument).

125. Karl N. Llewellyn, *Remarks on the Theory of Appellate Decision and the Rules or Canons About How Statutes are to be Construed*, 3 Vand. L. Rev. 395, 401 (1950).

126. Id.

127. *Grider*, 911 F.2d at 1162.

phy. Just as this rationale is unpersuasive to a teenager told that he must be home before midnight, it is equally uncompelling to a reader of the *Grider* opinion.

The *Grider* court apparently adopted its plain meaning interpretation for much the same reasons as a parent who simply lays down the law without explanation. By holding that the term "delinquent" means delinquent and nothing more, the *Grider* court avoided involving itself in a "boring" issue of statutory construction in which it had little interest or expertise.[128] The Fifth Circuit also avoided having to immerse itself in complex, technical areas of the law where the probability of error is particularly high.[129] This is not to say that the *Grider* opinion is credible, but rather that it is understandable.

B. Judicial Restraint is Not as Plain as Plain Meaning

Professors Macey and Miller predicted that a court confronted with a factual situation similar to that in *Grider* would be particularly likely to rely on the plain meaning rule.[130] These scholars explained that when a court assembles relevant precedent on an issue, and when the available precedential authority is unconvincing in that the substantive arguments that it contains do not meaningfully support the conclusions reached by earlier judges, the non-expert judge typically adopts the plain meaning rule.[131] According to Macey and Miller, the invocation of the plain meaning rule allows the judge to reach results in particular cases without running the risk of being proven substantially foolish in the future.[132] While the *Grider* court adopted this method, the plain meaning of the regulation did little to increase the credibility of its holding or to clarify this area of the law.

The *Grider* court perceptively recognized the weakness of the legal precedent supporting the *Jones* decision. As noted earlier, the *Jones* opinion illustrates the dangers posed by pursuing a line of jurisprudence without carefully considering the substantive underpinnings of

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128. See Macey and Miller, 45 Vand. L. Rev. at 657 (cited in note 84) (criticizing Fred Schauer, *Statutory Construction and the Coordinating Function of Plain Meaning*, 1990 S. Ct. Rev. 231, 247, for basing his conclusion on a subjective belief that statutory construction is boring and a "real dog").

129. See Macey and Miller, 45 Vand. L. Rev. at 658 (cited in note 84). Having rejected the subjective conclusion that statutory coustruction is boring, Macey and Miller instead accept the categorization of such interpretation as highly complicated and technical. Id. at 58. Both arguments, that judges use the plain meaning rule to avoid technical areas of the law and those areas of law they find as boring, seem intuitively weighty. Instead of contrasting them, as did Macey and Miller, this author has combined them.

130. Id. at 654.

131. Id. at 662-63.

132. See id. at 663.

the precedent relied upon.[133] Nonetheless, the *Grider* court made the same error as the *Jones* court in that it did not explore the substantive effects or reasoning behind its holding. The *Jones* court relied on precedent unsupported by meaningful analysis, while the *Grider* court relied on a canon of statutory construction unsupported by meaningful purpose.

Supporters of the *Grider* method of analysis may argue, as did the *Grider* court, that the plain meaning rule is purposeful in that it avoids judicial legislation by encouraging judicial restraint and prohibiting the judiciary from amending inartfully drafted but unambiguous regulations.[134] This purpose crumbles when one considers that words are dependent on their context. Even the *Grider* court was unable to avoid manipulating the plain meaning of the word "ambiguous" when that meaning did not comport with the conclusion that it desired to reach. It criticized the *Hurst* court for converting the regulation's silence into ambiguity.[135] However, by admitting (1) that the statute is silent on the time of delinquency issue, (2) that the drafters could have provided for delinquency to run from the date of assignment or the date of default, and (3) that the courts have interpreted the regulation both ways, the *Grider* court described a statute that was, by any plain meaning interpretation, "ambiguous."[136] Yet by labeling the statute unambiguous, the *Grider* court ignored the fact that preceding courts, and the *Grider* court itself, had struggled with the interpretation. Plain meaning ignores the fact that language by itself lacks meaning and that gaps and ambiguities in statutes are inevitable. Interpretation cannot occur without background principles to fill in legislative silence and to provide a backdrop against which to read legislative commands.[137]

The plain meaning rule is enormously valuable when interpreting most statutes, not because a court must make such a presumption in order to preserve legislative supremacy, but because rational people interested in conveying thoughts and commands are likely to choose language that has a high likelihood of being understood.[138] Had the *Grider* court determined that some intent or rationale behind the words justi-

133. "[W]hich, like Topsy, 'just grew' as the result of stacking one inapposite citation upon another until, in the aggregate, they take on the appearance of valid precedent." *Grider*, 911 F.2d at 1164.

134. See id. at 1163.

135. *Grider*, 911 F.2d at 1164 n.4.

136. See Webster's *New Twentieth Century Dictionary* at 56 (World, 2d ed. 1964) (defining "ambiguious" as "being of uncertain signification; susceptible of different interpretations").

137. See Ross, 45 Vand. L. Rev. at 665 (cited in note 84). See also Cass R. Sunstein, *Interpreting Statutes in the Regulatory State*, 103 Harv. L. Rev. 407, 504-05 (1989).

138. See Aleinikoff and Shaw, 45 Vand. L. Rev. at 679-700 (cited in note 84). See also Posner, 50 U. Chi. L. Rev. at 809 (cited in note 84).

fied their interpretation, it would have had no option but to defer to their plain meaning. However, the *Grider* court offered no rational basis for such an interpretation. As a result, the *Grider* court is guilty of using a canon of statutory construction to avoid a substantive inquiry in the same manner that the *Jones* court avoided the same substantive inquiry by using independently unsupportive precedent.

Apparently, the Fifth Circuit applied the plain meaning rule against the personal policy preferences of its judges.[139] However, the mere use of the plain meaning rule to decide the time of delinquency issue does not give the opinion any greater credibility for having avoided judicial activism. As Professors Macey and Miller have observed, the mere adoption of a particular canon can disguise judicial activism on two levels.[140] The first way it can do this is by allowing the *Grider* judges to decide the case on statutory construction grounds when it could have chosen some other method to decide the case such as precedent,[141] efficiency, or fairness, and reach a different result.[142] Each alternative would be as legitimate as the plain meaning rule, if not more so.

The common defense of the plain meaning rule is that it prevents courts from acting as legislators.[143] However, allowing courts to choose when they will use the plain meaning rule places them in the role of a legislator. In *Grider*, the Fifth Circuit's choice of the plain meaning rule as the method of interpretation disposed of the case. If the *Grider* court did not like the result, it could have peeked behind the curtain and selected another method to produce the "legislative interpretation" that best suited the court's preferences.[144]

Even if the Fifth Circuit always relies on the plain meaning rule in such "boring" cases as the one at issue, its judicial restraint justification is weak on a second level.[145] As Professor Llewellyn pointed out in his criticism of reliance on canons, the argument that "[a] statute cannot

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139. See *Grider*, 911 F.2d at 1164 (stating that "[w]e thereby regrettably but unavoidably create a conflict between our two circuits," and that "we also take no pleasure in giving aid or comfort to those former students who shirk their loan repayment obligations by hiding behind statutes of limitation").

140. See Macey and Miller, 45 Vand. L. Rev. at 650 (cited in note 84).

141. The Eleventh Circuit chose to use precedent to reach its holding in *Jones*.

142. Macey and Miller, 45 Vand. L. Rev. at 651 (cited in note 84).

143. William A. Popkin, *An "Internal" Critique of Justice Scalia's Theory of Statutory Interpretation*, 76 Minn. L. Rev. 1133 (1992) (noting Justice Scalia's aversion to judicial lawmaking and his belief that clean rules of statutory interpretation will avoid this result); Antonin Scalia, *The Rule of Law as a Law of Rules*, 56 U. Chi. L. Rev. 1174, 1185 (1989).

144. See Macey and Miller, 45 Vand. L. Rev. at 650 (cited in note 84).

145. Boring does not mean unimportant. Our citizenry is as affected by the everyday interplay of mundane issues of regulatory interpretation as it is by the some of the more juicy tangents of legal thought so often the fancy of law review editors. Professor Schauer supports this assertion.

go beyond its text" can be parried by the equally legitimate canon that says, "[t]o effect its purpose a statute may be implemented beyond its text."[146] A court can make both arguments within the context of the plain meaning rule. The *Grider* court made just such a selection by referring to the layman's understanding of the term delinquency while alternatively extending the regulation beyond its wording by holding that it reaches back in time to govern a contractual relationship of two parties who were not yet under the scope of the regulation.[147]

In addition to attacking the *Jones* court's method of statutory construction, the *Grider* court's second argument rests on its differing view of the relevant precedent. The Fifth Circuit accurately and precisely dissects and undermines the jurisprudential support behind the argument that delinquency should begin on the date of assignment. However, the *Grider* court provides no contrary jurisprudence to support its own position.[148] Rather, the *Grider* logic is as follows: the *Jones* court interpreted a regulation based on precedent; we have demonstrated the inadequacy of that precedent, therefore the *Jones* court should have reached a different result. The conclusion that the *Jones* court based its holding on insufficient precedent provides insufficient justification for the *Grider* court to reach an opposite result. Such a showing should call for a re-examination of the prior court's holding, but not necessarily a reversal of that holding.[149]

When a statute is clearly ambiguous, a holding based on irrelevant precedent is just as reliable as one based on the plain meaning rule or a coin flip.[150] All three methods attempt to prevent the judiciary from legislating. If the *Grider* court indeed had no purpose for its holding other than its interpretation of the plain meaning of the statute, the Fifth Circuit is guilty of a most reckless form of judicial legislation. The Fifth Circuit's holding in fact made law because the law was different before the *Grider* opinion.

See Fredrick Schauer, *Statutory Construction and the Coordinating Function of Plain Meaning*, 1990 S. Ct. Rev. 231, 247.

146. See Llewelyn, 3 Vand. L. Rev. at 401 (cited in note 125).

147. See *Grider*, 911 F.2d at 1163. Notice that Treasury Regulation 26 C.F.R. § 301.6402-6T(a) only governs past due legally enforceable debts owed to the agency. Yet at the time of the original default, the loan was in the hands of two private parties, not the Treasury or Education Department.

148. While the *Grider* court noted the *Thomas* court dicta indicating the Eighth Circuit's support for delinquency beginning with the original default, the *Thomas* opinion influenced the *Grider* holding but was not determinative. See notes 106-07 and accompanying text.

149. The only re-examination made by the *Grider* court was whether the *Jones* interpretation of the regulation fit within the plain meaning rule. As discussed in notes 117-22 and accompanying text, the plain meaning rule is of little value when interpreting a tax regulation.

150. See Macey and Miller, 45 Vand. L. Rev. at 651 (cited in note 84).

Mindlessly applying a rule to situations that the drafters never intended it to address is probably more likely to produce a negative effect than a positive or neutral one, given that utility maximizing or just results are difficult to achieve even through purposeful legislation. Given this obversation, the *Grider* court could not have expected to preserve the legislative intent or the effect of legislative compromise for several reasons. First, it admitted that no one had considered the issue, and second, the Treasury Department drafted the regulation and could easily amend any improper interpretation. The *Grider* court correctly recognized that the plain meaning rule prevents the judiciary from becoming purposeful judicial legislators. However, since the *Grider* court erred in failing to recognize that the plain meaning rule is as ineffective at preventing the judiciary from legislating as is decision-making by the toss of a coin, the Fifth Circuit was in error.

VI. ALTERNATIVE JUSTIFICATIONS FOR THE *GRIDER* RESULT

The next court to address the time of delinquency issue should accept the responsibility of its inevitable law-making role and its duty to make sense, under and within the law.[151] Such an inquiry should lead to the same conclusion as the *Grider* court reached, that delinquency begins at default and not assignment; however, something more than a mere statutory canon should support the conclusion.

Professors Macey and Miller propose that courts adopt a hierarchy of decisionmaking principles.[152] Under their theory, courts facing a statutory gap should first attempt to justify their decisions on the basis of public policy, then stare decisis, and, if the first two methods fail, upon the plain meaning rule.[153] Macey and Miller assume that it only makes sense for a judge to prefer an interpretation based on the promotion of societal well being over one based on a mere statutory canon.[154] Hence, they conclude that a judge should prefer public policy as a method of deciding cases. They argue that a judge only should defer to cases and canons when she has neither the time nor the conviction to gain the necessary expertise that a "public policy" interpretation requires.[155]

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151. See Aleinikoff and Shaw, 45 Vand. L. Rev. at 712 (cited in note 84) (citing Llewellyn, 3 Vand. L. Rev. at 399 (cited in note 125)). See also Posner, 50 U. Chi. L. Rev. at 820 (cited in note 84). As a newly converted proponent of judicial activism, Judge Posner has come to recognize that judges are inevitably compelled to be actors within the legal framework of a statute. Id.

152. See Macey and Miller, 45 Vand. L. Rev. at 659 (cited in note 84).

153. See id. at 661.

154. Id. at 656.

155. Macey and Miller include within the term "public policy" justifications derived from sources exogenous to the legal system such as morality and economic analysis as well as such concepts as respect for the separation of powers and for the legislature's lawmaking pre-eminence. Id. at 651.

The reason that Macey and Miller place stare decisis above canonical methods of interpretation is that precedent reflects other courts' substantive considerations of the consequences that an interpretation will have on a similar factual situation.[156]

When considering the gap in the regulation from the Macey-Miller perspective, the future judge deciding the delinquency issue confronts conflicting public policy interests. One of the purposes of the regulation is to promote the collection of unpaid debts.[157] The public outcry regarding student deadbeats who default on their obligations amplifies the importance of this purpose.[158] But this is only a general policy of the entire Act. Logically speaking, a court should consider more strongly the specific policy objectives behind the specific provision when interpreting the effect of the provision on the Act.

The regulation limiting the government's right to judicial offset to ten years is apparently a statute of limitation on the pursuit of overdue claims through refund offset. Relying on the general policy behind setting a statute of limitation, a court can conclude that the regulation constitutes a compromise between the competing interests of ensuring that the government has adequate time to bring its claim and in preserving a well-ordered legal system by barring stale claims and exacting diligence on the part of the one seeking payment.[159] Viewed in this light, the court should interpret the regulation in a manner that best effectuates these ends.

A policy that allows the IRS to offset income tax returns ten years after the school assigns the loan to the Department of Education is in conflict with any goal of barring stale claims or exacting due diligence from the Secretary of Education. The facts of *Grider* and *Jones* serve as evidence to that effect. At the time of the offset, Gladecki had been in default on his loan for more than fifteen years,[160] and Jones had been in default for thirteen years.[161] If delinquency begins when the school assigned the loan to the government, the IRS could have offset Jones's income tax returns for over twenty years after her original default.[162] Depending upon the time when the school chooses to assign the loan, the IRS theoretically could offset the taxpayer's return for an infinite

156. For purposes of this Note, the author accepts the Macey-Miller proposition as correct and applies it to interpret the time of delinquency issue.

157. See 56 Fed. Reg. 8734 (cited in note 26).

158. See, for example, Kenneth Cooper, *Student Loan Default Souring, Revised Estimate of 3.6 Billion Reflects Increase of Nearly 50%*, Wash. Post A17 (Sept. 4, 1991).

159. See 54 C.J.S. *Limitations of Actions* § 3.4 (1987) (outlining the traditional justifications for statutes of limitation).

160. See notes 79-81 and accompanying text.

161. See notes 64-66 and accompanying text.

162. The loan was not assigned to the government for ten years after the original default.

number of years after the original default. Such an interpretation frustrates the goal of barring stale claims and protecting the debtor from extended liability. Considering the other general purpose of the Act,[163] to add additional notice requirements and other protections applicable to the government's relationship to the debtor, it makes sense to interpret the ten-year limitation requirement in a way that will provide some protection to the debtor. Otherwise, the regulation places no real time constraint on the government's right to offset.[164]

A possible justification for using the time of assignment as the time of delinquency could be that, by enforcing a time limit running from the date of assignment, the Treasury Department is placing a rule on itself intended to force the agency to pursue claims.[165] A proponent of delinquency beginning with assignment could argue that such an interpretation serves the purpose of exacting diligence from the IRS, while at the same time providing the government with an adequate amount of time to collect. Proponents could argue further that the Treasury Department would not subject itself to a regulation that might preclude the Treasury Department from ever having the opportunity to collect a debt through refund offset.[166] These arguments, however, are misguided.

The Department of Education has procedures that provide for continuing delinquent student loan collection beginning the day of default. The refund offset program is only one of such programs. To view the government as having no right to collect on a note until assignment is a misconception. The due diligence requirement of the Perkins Loan program[167] effectively makes the school that issued the loan the government's first agent to collect the loan. Failure of the school to initiate collection results in penalties to the school's Perkins Loan eligibility for the next year.[168] During the period when the loan is in default, the school must continue to notify the government of the default.[169] The government allows the school to decide when its collection efforts are ineffective and to choose when to assign the loan to the Department of

163. 31 U.S.C. § 3720A (Supp. 1992).

164. While the six-year statute of limitation on judicial action does not begin to run until assignment, the Treasury Department has not explained when tbe 10-year limitation tolls. Assuming that the Treasury Department is attempting to propose rational regulations, the court should interpret this omission in the most reasonable manner.

165. This logic seems consistent with the congressional mandate allowing the Treasury Department to promulgate those regulations necessary for effectuating the offset program.

166. The *Roberts* court used this rationale. 709 F. Supp. at 225.

167. 34 C.F.R. §§ 674.41-674.50 (1992).

168. Id. § 674.50.

169. Id. § 674.8(c) (interpreting 20 U.S.C. § 1087cc(4)).

Education.[170] Thus, the Department of Education drafts the regulations governing the Perkins Loan program and is in control of the time when a school assigns an overdue loan. The mere fact that an interpretation of delinquency as beginning at default would bar the Department of Education in *Jones*, *Grider* and *Roberts* from collecting through the refund offset program does not mean that it did not have ten years to exercise the refund offset option. The Department of Education simply chose to allow the school to shoulder the collection effort while its offset right expired. To interpret the statute in any other way defeats any ability of the regulation to force the Department of Education to exercise diligence in its collection efforts. Under the delinquency as time of assignment interpretation, the Department could use the school to pursue collection until all the school's options were time-barred and then receive ten more years to procrastinate before exercising its offset right.[171] Looking solely at the policy of encouraging diligence, a court should conclude that delinquency begins at the time of the original default.

If these policy arguments seem unpersuasive, the Macey-Miller approach refers the courts to precedent. A cursory look might lead a court, such as the one in *Grider*, to review the cases with similar facts and conclude that they are inconclusive. Unfortunately, the *Grider* court failed to delve deep enough. Legitimate precedent supports delinquency beginning at the time of original default.

One such line of cases are those that concern assignment. If a court chooses to reject the characterization of the school as an agent of the government, it must at least accept the role of the Department of Education as the assignee of a debt owed to the school. The common law defines an assignment for the benefit of creditors as a voluntary transfer by a debtor of her property to an assignee in trust to apply the property or proceeds thereof to the payment of her debts and to return the surplus, if any, to her.[172] This is effectively the school's role when it transfers defaulted loan obligations to the Department of Education.[173] The *Grider* and *Jones* courts used the term "assignment" when referring to the government's acceptance of the right to collect; they confirmed that under the Perkins Loan program the school is in the role of

170. Id. § 674.50(a)(1).

171. This assertion assumes that the refund due in the tenth year following assignment is sufficient to cover the debt. If not, the time period might be even longer.

172. 6A C.J.S. *Assignment for the Benefit of Creditors* § 1-2 (1975).

173. See 20 U.S.C. §§ 1987bb-1087cc (Supp. 1990). The government loans the money to schools who then distribute and collect it. Failure to collect requires the schools to assign the unpaid debt to the government in satisfaction of their obligations.

assignee. The courts should treat the Department of Education as an assignee to whom common law assignment rights attach.

The courts, therefore, should limit the Department of Education's rights to those of a typical assignee. In *United States v. Frisk*,[174] the Ninth Circuit refused to interpret the Federal Insured Student Loan (FISL) program[175] as limiting the right of the government to the role of an assignee because of its dual role as a guarantor. Had the *Frisk* court held that the government is a mere assignee, it would have conceded that the the law of assignment would dictate that a cause of action would accrue upon original default.[176] The *Frisk* court noted that the statute of limitation would begin to run from that date.[177] This conclusion conforms with common-law assignment principles regarding the rights of an assignee.[178] Therefore, the common law and precedent would dictate that a cause of action for judicial remedy accrues at the time of original default, absent express legislative intent to the contrary.

The NDSL contains no express legislative intent to the contrary. Unlike the FISL, the NDSL program does not place the government in the role of guarantor or a surety. Thus, under the NDSL, the government does not receive the same entitlement to a later default date that it received under the FISL in *Frisk*. While not directly on point, *Frisk*, its progeny, and the common-law rights of an assignee, provide a precedential foundation for holding that the statute of limitation on the offset program should begin to run at the time of the original default and for the principle that the courts should treat the Department of Education like any other assignee.

In *Jones*, *Grider*, and *Roberts*, therefore, the government was the assignee of loans on which the statute of limitation for legislative offset had run. In the absence of a better policy reason, the courts should not have abandoned the common law rule that the assignee inherits subject to the defenses of the debtor against the assignor.[179]

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174. 675 F.2d 1079, 1083 (9th Cir. 1982). See also *United States v. Bellard*, 674 F.2d 330, 336 (5th Cir. 1982); *United States v. Whitesell*, 563 F. Supp. 1355, 1357 (D.S.D. 1983); *United States v. Kendrick*, 554 F. Supp. 121, 122 (E.D. Ark. 1982).

175. Title IV-B of the Higher Education Act of 1965, 20 U.S.C. § 1071 (Supp. 1990) (commonly known as the Stafford Loan Program).

176. *Frisk*, 675 F.2d at 1082.

177. Id.

178. See 6A C.J.S. *Assignment for the Benefit of Creditors: Equities and Defenses* § 73 (1975).

179. Compare *United States v. American Nat'l Bank and Trust Co.*, 443 F. Supp. 167, 174 (1977) (noting that because "[t]he assignee stands in the shoes of its assignor, . . [a]n assignee cannot sue if the assignor cannot maintain an action") (citation omitted).

Some may argue that filling a statutory gap with common-law precedent is no better than doing so with the plain meaning rule. This argument is misguided. The common law embraces general custom, usage, or common consent, and is based upon justice and natural reason.[180] The common law is a more solid basis for filling a statutory gap than is a plain meaning interpretation of an obviously ambiguous statute. The *Grider* Court's application of plain meaning ignores the fact that statutes are "instruments of governance, not linguistic puzzles."[181]

VII. CONCLUSION

Justice Holmes eloquently warned against the *Grider* court's method of interpretation. In *The Common Law*, he observes:

> The felt necessities of the time, the prevalent moral and political theories, [and the] intuitions of public policy . . . have had a good deal more to do than the syllogism in determining the rules by which men should be governed. The law embodies the story of the nation's development through many centuries and it cannot be dealt with as if it contained only the axioms and corollaries of a book of mathematics. In order to know what it is, we must know what it has been, and what it tends to become.[182]

Failing to recognize this insight led the *Grider* court astray. While it arrived at the correct answer, that the limitation period should begin at the time of default, it did so for no better reason than the fact that a coin has only two sides, only one of which will come up on a toss.

The *Grider* Court perceptively recognized and lay blame on the true cause of the court's confusion—the government's carelessness in failing to amend the statute and thereby provide clarity. The author joins the *Grider* court and asks in rhetorical wonderment why the Secretary of Education continues quixotically to pursue judicial construction of the regulation instead of simply asking his counterpart in the Department of the Treasury to close the loophole in the regulation with

180. 15A Am. Jur. 2d *Common Law* § 1 (1976).
181. Rubin, 45 Vand. L. Rev. at 586-87 (cited in note 84).
182. Oliver Wendell Holmes Jr., *The Common Law* 1 (Little, Brown, 1946).

a proverbial stroke of his pen.[183] Until that day, the ex-student, and her tax planner, can breathe a little easier around April fifteenth.[184]

Michael Sawyer Smith

183. *Grider*, 911 F.2d at 1164.

184. For those outraged at the thought of students shirking their loan obligations without consequence, Section 61(a)(12) of the Internal Revenue Code and its implementing regulations at 26 C.F.R. § 1.62-1T provide that income arising from the discharge in whole or in part of a debt is to be included in the debtor's gross income for the year in which the debt is discharged. The Department of Education reports such income to the IRS under Departmental Claims Collection regulations. 45 C.F.R. § 30.31(b) (1991). Therefore, after the claim becomes unenforceable, the debtor remains liable for up to 31% (assuming this continues to be the maximum tax rate) of all outstanding and accrued interest at the time the offset remedy is no longer available. See I.R.C. § 1(a)-(e) (Supp. 1992). See also Department of Health and Human Services, Referral of Debts to the Internal Revenue Service for Tax Refund Offset; Implementing the Deficit Reduction Act, 53 Fed. Reg. 25592 (1988).