Transfiguration of the Deadbeat Dad and the Greedy Octogenarian: An Intratextualist Critique of Tax Refund Seizures

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Article

TRANSFIGURATION OF THE DEADBEAT DAD AND THE GREEDY OCTOGENARIAN: AN INTRATEXTUALIST CRITIQUE OF TAX REFUND SEIZURES

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I. Introduction

Given the general, though imperfect, efficiency of regular federal income tax withholding from wages, most taxpayers never find themselves at odds with the Internal Revenue Service (IRS or Service) come tax time. [FN1] Indeed, many taxpayers look forward to tax season because, having overpaid their taxes for the preceding calendar year, they anxiously anticipate the receipt of a refund, especially if the individual or family unit qualifies for one or more of the various refundable tax credits introduced in recent years. [FN2] Vacations are planned, big-ticket items--both basic needs and lavish wants--are contemplated, [FN3] and families around the country find themselves temporarily relieved of the burden of ongoing financial anxiety. Those without pressing liquidity needs enjoy the luxury of scouting eagerly for ways to splurge.

And yet, collection of revenue due the United States of America is serious business. Those individuals who have underpaid their taxes and are unfortunate enough to have incurred the wrath of the U.S. revenue collectors may quickly find themselves struggling for release from some rather sharp federal talons. In addition to attaching a taxpayer's real and personal property by federal tax lien, [FN4] the government may seize and sell an individual's assets pursuant to its levy authority [FN5] or issue an administrative summons [FN6] to secure relevant information; taxpayers hoping to use the courts to restrain the assessment or collection of the tax will find themselves paralyzed, [FN7] at least temporarily. [FN8]

In light of the federal government's plenary collection powers, the states have, for several years, sought and, with the help of Congress, managed to secure the assistance of the United States in obtaining various forms of revenue. As early as 1975, Congress authorized the Department of the Treasury (Treasury) to collect past-due, child-support payments in the same manner in which it assessed and collected certain federal taxes under emergency or exigent circumstances (i.e., "jeopardy assessment/collection"). [FN9] Because such collection procedures were often considered cumbersome and costly, [FN10] however, Congress soon authorized the direct seizure of pending income tax refunds [FN11] as a more efficient means of reaching the assets of deadbeat dads (or the occasional deadbeat mom [FN12]). The result has been a smashing success. Child-support-related refund seizures have resulted in the collection of billions of dollars of revenue. In fiscal year 2004 alone, child-support offsets totaled $1.49 billion, [FN13] and in 2003, the Treasury offset almost 24 million advance child-tax-credit payments, resulting in the collection of $14.2 billion. [FN14] Given the success of this "approach" to revenue collection, [FN15] its rapid deployment to other areas should come as no surprise. In the Deficit Reduction Act of 1984 (DEFRA), [FN16] Congress authorized the seizure of amounts due to federal agencies [FN17] (e.g., student loan default amounts or...
overpayments of Old Age, Survivors, and Disability Insurance (OASDI or Social Security) [FN18]. And more recently, in 1998, Congress authorized federal refund seizures to pay outstanding state income tax liabilities. [FN19]

Perhaps the most disturbing development in this arena occurred early on, quite possibly as a response to court challenges to the mechanism used to intercept the refunds of those owing child support. In Marcello v. Regan, [FN20] a decision handed down in 1983, the court cogently pointed out that cases involving child-support-related refund seizures "do not present, in any meaningful sense, controversies about the amount of tax *646 owed." [FN21] Thus, the court reasoned, statutes legitimately directed at preventing judicial interference with the collection of federal taxes were not sufficient to deny it subject matter jurisdiction. [FN22] The court went on to hold that the program under examination, as then structured and executed at the federal and state levels, ultimately resulted in procedural due process violations. [FN23]

Per the enactment of DEFRA in 1984, Congress abruptly withdrew federal court jurisdiction with respect to cases brought to restrain or review the seizure of refunds via 26 U.S.C. § 6402. [FN24] Further, Congress prohibited review of such cases by the Treasury in administrative proceedings [FN25] and barred characterization of suits against the United States in this particular context as "refund" suits. [FN26] Affected taxpayers were not, however, explicitly prevented from proceeding against the state or federal agency responsible for the underlying refund seizure. [FN27]

Cases involving tax refund seizures under § 6402 have traditionally addressed issues of procedural due process. [FN28] Of particular, though partial, concern in this Article are the property rights of those filing joint returns [FN29] with obligated individuals. Innocent spouses--who often have no income tax liability and may have, in fact, generated as much as 100% of the refund seized--are at special risk of an erroneous property deprivation. Fortunately, federal statutes and regulations have, over time, managed to carve out procedural protections for both obligated and nonobligated spouses. [FN30] In this Article, I argue that despite these measures, procedural improvements are needed to minimize or eradicate erroneous refund-based property deprivations as an initial matter, especially with respect to nonobligated spouses. I proceed to argue, based largely on an intratextualist [FN31] reading of the Constitution's major tax provisions, that regardless of whatever procedural safeguards exist or happen to be put in place, refund seizures, as a class, are unjustified as a matter of substantive due process because both the Sixteenth Amendment and Article I, section 8 of the Constitution expressly limit Congress's income taxing powers. Federal courts have had no recent opportunity to address substantive due process issues because the governing statute itself serves as a bar to jurisdiction. [FN32] While some have argued that Congress has the virtually unfettered right to declare the United States immune from suit under the appropriate circumstances, [FN33] claims of federal sovereign immunity, however situationally valid, cannot be used to shield or advance unconstitutional conduct, especially when the interaction of federal-level and state-level sovereign immunities (or the potential res judicata effect of prior, state-level proceedings) threatens to effect a permanent property deprivation without adequate procedural safeguards for all parties involved.

Part II of this Article traces the development of the refund intercept program from its origins as a way to collect child support to its current form. In Part III, I critique the refund intercept program from both a procedural due process and a substantive due process perspective before assessing the validity of the federal sovereign immunity defenses presented in the case law and the threat of end-of-process, state-level sovereign immunity (or res judicata) claims. Part IV sets forth my conclusions.

*648 II. Development of the Refund Intercept Program

A. Overview

In its initial form, § 6402 authorized the Treasury to disburse tax refunds after ensuring that an individual had paid all federal taxes due for current and prior years. [FN34] While the current statute still authorizes the refund of tax overpayments, [FN35] additions to the statute have given the Treasury authority to offset pending refunds to pay various obligations at the behest of both states and federal agencies. [FN36] Initially, the federal government executed the seizure mechanism to collect past-due, child-support obligations with respect to children who had received Aid to Families with Dependent Children (AFDC). [FN37] At different times, the mechanism was later used to collect amounts owed with respect to non-AFDC children, [FN38] past-due amounts owed to federal agencies, [FN39] and past.*649 due state income tax obligations. [FN40] This Part traces the statutory and regulatory development of the
various refund-seizure mechanisms.

B. Child Support and the Entry of § 6402(c)

With the significant increase in out-of-wedlock births in recent decades [FN41] and the ever-present availability of easy, modern-day divorce, [FN42] the importance of effective child-support collection is manifest. Historically, state-level courts entered child-support orders and worked with state-level agencies to ensure compliance and, if needed, collection from the obligated parent, typically the father. [FN43] The federal government's involvement via the Treasury has been gradual but effective. In 1975, Congress added § 6305 to the Internal Revenue Code (Code) and essentially gave the IRS the ability to assess and collect a child-support obligation "as if such amount were a tax." [FN44] To enhance the efficiency of the process, Congress authorized the IRS to pursue and obtain the relevant revenue using the Service's more aggressive "jeopardy" collection powers. [FN45] Congress further prohibited both judicial interference with and review of the measures taken by declaring that all federal courts lacked jurisdiction to hear claims related to § 6305 collections. [FN46] Even so, the jeopardy collection mechanism was believed to have--or at least portrayed as having--shortcomings. [FN47] While *650 allowing the Service to pursue and collect past-due child support expeditiously, § 6305 points out that such amounts are to be collected in the same manner and "subject to the same limitations" as those imposed on the Service in collecting taxes. [FN48]

To circumvent the procedural requirements associated with jeopardy-type assessments and collections, Congress added § 6402(c) to title 26, which authorized the direct seizure of pending federal income tax refunds. [FN49] At least one court confirmed procedural efficiency as the root cause of the addition of § 6402(c) to the Code:

Because subsection 6305(a) creates cumbersome procedural requisites to the initiation of its jeopardy-assessment type collection procedures, it seems entirely reasonable to assume that Congress established the new [Omnibus Budget Reconciliation Act] offset procedures, containing no such time-consuming procedures, in order to minimize the risk that the states would lose the "bird in hand" while searching for the "bird in the bush." [FN50]

Not surprisingly, direct refund seizure worked well. The flip side, of course, is that even though the collecting states managed to avoid *651 cumbersome jeopardy collection procedures, they were not spared process altogether. The process works in much the same way today as it did initially, although there are minor differences with respect to how the state gets involved, depending on whether the relevant child previously received AFDC.

On application for AFDC benefits, potential recipients are required as a condition of receipt to assign any claims for child support to the state in which they are applying for benefits. [FN51] Assuming that the AFDC applicant is approved and that a child-support arrearage exists, the state forwards the name of the obligated parent and the amount to be collected to the Department of Health and Human Services, Office of Child Support Enforcement (HHS), which ultimately passes the information along to the Financial Management Service (FMS), a bureau of the Treasury. [FN52] On HHS authorization, the state may notify FMS directly. [FN53] Before certification of a given name to HHS or FMS, the state must notify the obligated parent, often the father, that his federal income tax refunds may be offset to satisfy his past-due, child-support obligations. [FN54] If the father fails to dispute the obligation, his name remains with HHS. Should the father dispute the existence or the amount of the past-due support, he is entitled to administrative review at the state level; [FN55] the outcome of that process determines whether the father's name remains with HHS. The state must report any deletions or net decreases, and it may report increases in the obligor's liability. [FN56] Though the Treasury effects the actual seizure, the provision of both notice and a hearing with respect to the potential refund seizure is left to the states; the Treasury merely waits for the filing of a return and stands ready to appropriate all or part of any overpayment per § 6402. [FN57]

As was noted earlier, § 6402(a) is the Treasury's basic authority to refund tax overpayments. Prior to the payment of any refund, however, the Treasury is directed to use any overpayment to offset existing internal revenue tax liabilities (e.g., taxes owed in prior years) and to *652 ensure that no amounts are due under, inter alia, § 6402(c) (governing child-support seizures). [FN58] When an obligated parent has overpaid, the Service reduces the overpayment by the amount of past-due support, pays the amount over to the state, and sends an explanation to the taxpayer. [FN59]

C. Enforcement Difficulties and the Withdrawal of Federal Court Jurisdiction

Taxpayers promptly reacted to the government's creative display of power, arguing that the federal government, in seizing their refunds, had deprived them of property without due process of law in violation of the Fifth and Fourteenth Amendments. [FN60] Before reaching the merits of the cases, however, federal judges had to grapple with assertions by the government that the Tax Injunction Act [FN61] and the Declaratory Judgment Act, [FN62] both of which serve to prevent or limit judicial interference with collection of revenue due the United States, deprived their courts of jurisdiction to hear the cases. At least one court took the hook, bait and all. Citing both acts, the court in Vidra v. Egger [FN63] concluded that the statutes prohibit declaratory judgments concerning what IRS should do with tax refunds, and injunctions directing the payment of tax refunds (or, more accurately, restraining IRS from failing to pay refunds due). Congress has exhibited an unmistakable purpose to protect "the government's need to assess and collect taxes as expeditiously as possible with a minimum of pre-enforcement interference" and "to require that the legal right to the disputed sums be determined in a suit for refund." [FN64]

In a decision handed down just two months later, however, the Service found a bench decidedly hotter than that encountered in Vidra. As it had in Vidra, the government argued in Marcello v. Regan [FN65] that *653 per the prohibitions of the Tax Injunction Act and the Declaratory Judgment Act, the federal district court lacked jurisdiction to hear the case. [FN66] Further, the government argued that § 6305(b)—banning federal court intervention in the aforementioned jeopardy collection of child support under § 6305(a)—similarly prohibited judicial review or restraint in the context of child-support-related refund seizures under § 6402(c). [FN67] At the time, however, § 6402 itself lacked the jurisdictional limitations found in § 6305. [FN68] In rejecting the government's assertion, the court noted that § 6305(b) explicitly limited its application to collection activity under § 6305(a) and emphasized that "[d]espite the family resemblance, §§ 6305(a) and [6402(c)] are not sisters under the skin." [FN69] The court acknowledged that the legislative history of § 6402(c) made brief mention of § 6305(a) [FN70] but concluded that "[t]his isolated and casual reference is manifestly insufficient to slide § 6402(c) in the face of the express [limiting] language of the latter statute." [FN71]

Regarding the government's assertion with respect to the jurisdictional prohibitions of the Tax Injunction Act, the court noted the following:

The defendants argue that the [Tax Injunction Act] bars this suit (a position which appears to spring full-blown from the brow [FN72] of their persistent confusion of the intercept program with the assessment program). The fly in this particular ointment is that the diversion of income tax refunds is not "the assessment or collection of [a] tax." . . . Cases arising under § 6402(c) do not present, in any meaningful sense, controversies about the amount of tax owed; persons such as the instant plaintiffs have, almost by definition, paid their income taxes--and more. [FN73] *654 The court used similar logic to dismiss the government's assertions with respect to the applicability of the Declaratory Judgment Act. [FN74] In turning to the due process claims, the court found that the conduct of the refund intercept program under examination derogated the due process rights of the plaintiffs under the Fifth and Fourteenth Amendments. [FN75]

In apparent response to the clear, jurisdiction-granting logic of cases such as Marcello, Congress promptly closed the courtroom door. In DEFRA, Congress added § 6402(f) to the Code, thereby ensuring that the federal government, in effecting § 6402(c) seizures, could enjoy the same "protection from intervention" it enjoyed in pursuing § 6305(a) jeopardy collections. [FN76]

The new law prohibited federal courts from hearing both legal and equitable claims relating to the refund reductions, and it prohibited administrative review by the Treasury. [FN77] To ensure that taxpayers could not pursue the matter as a straightforward claim for overpayment of taxes, regardless of the reasons asserted for the Service's reduction, Congress explicitly declared that no action related to the reduction could be considered a suit for refund of tax. [FN78] The statute did clarify, however, that it was not to be construed as a barrier to actions against the state to which the refund was paid. [FN79] Thus, given the ease of "collection" in the absence of the threat of judicial intervention and the richness of tax *655 refunds as a revenue source, the intercept program has expanded rapidly. And there can be no real assurance that Congress is finished.

D. Expansion of Refund Offset Mechanism to Other Areas

1. Past-Due, Legally Enforceable Federal Agency Debt

With the addition of §6402(d) to the Code and the passage of related enabling legislation, Congress authorized the IRS to seize the pending tax refund of any person owing money to a federal agency. [FN80] While the legislation authorizes "any federal agency" to appeal to the refund offset mechanism, most litigated cases involve seizures at the behest of the Department of Education and arise because student borrowers have defaulted on loans guaranteed by the federal government. [FN81] With respect to all amounts owed (regardless of agency), the debt must be both "past due" [FN82] and "legally enforceable." [FN83] The agency must notify the debtor that the agency proposes to notify the Treasury of the existence of the debt, give the person sixty days to present evidence challenging the *656 validity (or amount) of the debt, consider the evidence presented (and determine that a given amount is past due and legally enforceable), satisfy other conditions to ensure that the determination is accurate and that the agency has made reasonable efforts to obtain payment, and certify that the agency has made reasonable efforts to obtain payment. [FN84] On receiving notice from the relevant agency that a person owes a past-due, legally enforceable debt, the Treasury reduces the amount of any tax overpayment by the amount of the debt, pays the amount over to the federal agency, and notifies the taxpayer that his or her overpayment has been reduced by the amount necessary to satisfy the debt. [FN85]

2. Overpayments of Old Age, Survivors, & Disability Insurance

Several years after Congress added §6402(d) to the Code, that subsection was modified to include §6402(d)(3), a special provision addressing the seizing of refunds to recover OASDI overpayments. [FN86] Barring special circumstances, [FN87] the OASDI overpayment is collected in the same manner as other debts owed to a federal agency under §6402(d). Rather than forwarding the payment to the Commissioner of Social Security, the Service deposits the amount collected in either the Federal Old-Age and Survivors Insurance Trust Fund or the Federal Disability Insurance Trust Fund, whichever the Secretary of Health and Human Services certifies to the Treasury as appropriate. [FN88] And, per normal procedure, the taxpayer is notified that his or her tax refund has been reduced and paid over to satisfy the OASDI overpayment obligation. [FN89] Surprisingly, the statute sets forth clear procedures for the notification of spouses who may have filed a joint return with an OASDI overpayment obligor. [FN90] On receiving notice of the obligation and ascertaining that the relevant refund would be seized from a joint return, the Treasury must (1) notify each taxpayer on the joint return that the refund reduction is being made from a joint return and (2) describe the *657 procedures to be followed by the nonobligated spouse to protect his or her share of the refund. [FN91] The statute explains that if a nonobligated spouse takes appropriate action to secure his or her share of the refund, the Service is to pay the proper amount to that spouse. [FN92] Further, the Service must carve out the nonobligated spouse's share from future overpayments subject to seizure. [FN93]

3. Past-Due, Legally Enforceable State Income Tax Obligations

As part of the Internal Revenue Service Restructuring and Reform Act of 1998, [FN94] Congress added §6402(e) to the Code, which authorizes the seizure of federal income tax overpayments to satisfy past-due, legally enforceable state income tax obligations. The appropriation process tracks that found in other refund seizure categories. On receiving notice from the state of a past-due, legally enforceable state income tax obligation, the Service reduces the taxpayer's refund by the amount of the debt, pays that amount over to the state, and notifies the taxpayer that his pending refund has been reduced and that the funds have been paid over to satisfy the state income tax obligation. [FN95] The statute also directs the Service to notify the state of the obligor's name, taxpayer identification number, address, and the amount collected, and in the event of a joint return, the notice must also include the same information with respect to the obligor's spouse. [FN96] Payments will be made to a given state only if the taxpayer's federal return shows an address within the state seeking the refund offset, [FN97] and state income tax obligations are recovered only after a pending refund has been used to pay other federal tax liabilities, past-due support, and past-due, legally enforceable federal agency debt. [FN98] Given that the federal government does not actively evaluate the state's claim, the statute defines "past-due, legally enforceable State income tax obligation" [FN99] and thereby effectively requires that the state follow specific procedures before engaging the refund offset mechanism.

*658 First, the state must notify potentially affected taxpayers by certified mail with return receipt that the state proposes to effect a federal refund offset. [FN100] The state must then give the taxpayer sixty days to present contrary
evidence, consider the evidence, determine that the debt is in whole or in part past due and legally enforceable, and
satisfy any other Treasury-mandated conditions to ensure that the debt is valid and that the state has made reasonable
efforts to obtain payment. [FN101]

A debt may qualify as a "past-due, legally enforceable state income tax obligation" under either of two basic
scenarios. First, if a state income tax has been assessed but not collected, the time for redetermination has expired,
and the tax has not been delinquent for more than ten years, the tax fits within the definition. [FN102] The second defined
group includes tax liabilities that, as an initial matter, are no longer subject to judicial review. [FN103] In addition, the
tax debt must have resulted either (1) from "a judgment rendered by a court of competent jurisdiction which has
determined an amount of State income tax to be due" [FN104] or (2) from a determination made after an
administrative hearing in which an amount of state income tax was found to be due. [FN105] In all circumstances, the
statute clarifies that "state income tax" includes any local income tax administered by the state's chief tax
administration agency. [FN106]

E. Program Summary

Tax refund seizures found their way into the Code as a more expedient means of collecting past-due child support
on behalf of the states. Though originally intended as a means of collecting revenue due the states from the obligated
parents of children receiving AFDC, the program was later expanded to include states enforcing obligations with
respect to non-AFDC children; federal agencies presenting past-due, legally enforceable nontax debts; and states
presenting past-due, legally enforceable state income tax obligations. Taxpayers have challenged the programs on a
number of grounds. Despite what might be considered gaps in procedural due process guarantees, individuals have
limited *avenues of recourse. Federal courts lack jurisdiction to hear legal or equitable claims brought to restrain
or review the relevant collections, Treasury-level administrative review is prohibited, and suits against the United
States to recover amounts seized are deemed not to constitute "refund" actions. While impressive as a raw display of
federal power, the statutory framework openly employs fiat and opportunistic taking. Child support is collected "as if"
it were a tax under § 6305, and other amounts are simply appropriated under § 6402 in the immediate wake of an
admittedly legitimate exercise of the federal taxing power. Both the "deadbeat dad" and the "greedy octogenarian" are
forcibly transfigured into that which they simply are not: delinquent taxpayers. As deemed tax cheats, however, the
federal taxing power can snare them and force its own brand of fiscal absolution upon them. They are not-so-good,
not-so-innocent taxpayers caught up unwarily in the purifying rapture of refund seizure.

III. Critique and Assessment

A. Overview

As was noted earlier, most litigation challenges to the refund intercept program, regardless of the underlying
obligation, involve due process claims under the Fifth and Fourteenth Amendments. This Part presents certain basic
procedural due process rules and standards before critiquing the current refund intercept program from a procedural
due process perspective, giving specific attention to the individual obligors and the treatment of spouses who may be
affected by a refund seizure. Thereafter, it assesses the need for a substantive due process analytical framework before
presenting textual arguments from the face of the Constitution concerning the intended extent of the federal income
taxing power.

B. Procedural Due Process in the Refund Seizure Context

1. In General

Serving as an explicit limit on government actions, the Fifth Amendment to the Constitution provides, in pertinent
part, that "[n]o person shall . . . be deprived of life, liberty, or property, without due *660 process of law." [FN107]
The Fourteenth Amendment similarly prohibits such deprivations by states. [FN108] "Due process of law" may take
on different meanings in different contexts, but as a general rule, the constitutional provisions have been understood to
require that those at risk of deprivation be given clear notice and a meaningful hearing to present their position before
a neutral and detached party. [FN109]
Tax refund seizures are, at root, forced federal appropriations of taxpayer property. Yet, with the exception of past-due federal agency debt and overpayments of OASDI, both predeprivation notices and hearings and any available postdeprivation processes generally occur at the state level. [FN110] Arguably, the sovereign effecting the deprivation should bear full responsibility for providing the requisite due process. Courts have not, however, consistently adopted this posture. In Romero v. United States, [FN111] the court refused to decide whether the due process obligations fell on the certifying state or the federal government, [FN112] another court, in finding no fault with state-level processes, surmised the apparent congressional belief that in a child-support-arrearage context, "the IRS does not have the information and resources needed to adjudicate the validity [of the claim]." [FN113] Relying at least in part on mandates contained in federal regulations covering the various obligations subject to refund offset, the IRS apparently assumes that the implementation of accurate, fair, and effective processes precedes the certification of a taxpayer's debt for collection. As with any subset of due process jurisprudence, however, various issues have arisen over time in the refund offset context, including those relating to process timing (predeprivation versus postdeprivation), the form and content of notices, and the formality and extent of hearings.

Outside the "exigent circumstances" context, courts generally consider predeprivation notice and hearing to be the procedural due process gold standard. [FN114] Predeprivation notice with some opportunity to respond paired with a prompt postdeprivation hearing will often suffice, and minimal procedural thresholds, across the board, are not extremely high. Notices mailed to an obligated parent's last known address informing him or her of the pending seizure and the opportunity to contest the matter have been deemed to pass constitutional muster. [FN115] And while there are a number of circumstances in which an obligated parent may not be rightfully subject to refund seizure, courts disagree with respect to whether pending seizure notices must include a list of possible defenses. [FN116] In any event, apparent obligors challenging a given seizure, citing the inadequacies of either the notice, the hearing, or both, may face a steep uphill battle if they cannot successfully link the resulting financial injury and the asserted procedural defect. [FN117] Even when nonobligated spouses filing joint returns with obligated spouses are involved, courts have shown no inclination to find procedural defects when the nonobligated spouse received no notice of the imminent seizure, the apparent belief being that notice to the obligated spouse will serve to alert the nonobligated spouse. [FN118] The procedural battle is equally challenging with respect to the hearing phase.

A hearing must be both timely and meaningful to satisfy the requirements of procedural due process. [FN119] Where an imminent property deprivation is concerned, the hearing need not precede the initial deprivation. [FN120] Courts often reason that so long as an individual has a predeprivation opportunity to respond and the right to a more formal hearing before the deprivation becomes final, his due process rights have not been violated. [FN121] Indeed, in one case involving a dependent child moved to another state by the custodial parent, the court found that even if the predeprivation hearing offered to the obligated parent was not in his home state, such an opportunity to be heard was "meaningful" and, assuming proper notice, satisfied the requirements of procedural due process. [FN122]

2. Application of the Mathews v. Eldridge Standard

Regardless of the specific procedural due process context, courts traditionally assess a scheme's constitutionality by weighing the factors set forth in Mathews v. Eldridge. [FN123] In that decision, the Supreme Court emphasized that "[d]ue process, unlike some legal rules, is not a technical conception with a fixed content unrelated to time, place and circumstances" [FN124] but rather "is flexible and calls for such procedural protections as the particular situation demands." [FN125] The Court went on to state,

our prior decisions indicate that identification of the specific dictates of due process generally requires consideration of three distinct factors: First, the private interest that will be affected by the official action; second, the risk of an erroneous deprivation of such interest through the procedures used, and the probable value, if any, of additional or substitute procedural safeguards; and finally, the Government's interest, including the function involved and the fiscal and administrative burdens that the additional or substitute procedural requirement would entail. [FN126] Thus, the Court's initial inquiry addresses the "private interest" potentially affected. [FN127] The Mathews decision was itself handed down only a few years after Goldberg v. Kelly, [FN128] a landmark decision in which the Supreme Court held that welfare benefits could not be terminated until after the recipient received adequate notice [FN129] and a formal hearing. [FN130] Accordingly, in the substantive shadow of Goldberg, courts conducting a "private interest" assessment may conclude that constitutional standards do not require elaborate predeprivation processes unless a potentially affected party is, or will be put, on "the very margin of subsistence." [FN131] The second analytical prong, addressing the risk of error and the value of

additional procedural safeguards, requires close examination of the nature of the relevant inquiry and the mechanisms by which relevant questions are resolved. [FN132] Highly subjective inquiries or mechanisms presenting issues of credibility and veracity are viable from a constitutional perspective only when more formalized procedures are involved. Obviously, fairly objective inquiries where issues of credibility and veracity are minimal will likely meet constitutional standards without the need for elaborate evidentiary process. [FN133] And although the third Mathews factor, addressing the government's functional, fiscal, and administrative interests, purports not to be an "ad hoc weighing of fiscal and administrative burdens," [FN134] the Supreme Court has warned that the "benefit of an additional [procedural] safeguard . . . may be outweighed by the cost." [FN135] So, unless an individual can prove that he is in "jeopardy of serious loss," [FN136] a court may prove unwilling to second-guess those authorized to make initial determinations by imposing substitute or additional procedures; such deference is even more likely when the relevant decision makers act under congressional authority. [FN137]

Bearing the governing tripartite analysis in mind, what follows is a Mathews-based assessment of the various classes of taxpayers potentially affected by the § 6402 refund-seizure mechanism. Of course, not every obligor is similarly situated, but in some instances, the need for additional procedural safeguards is readily apparent.

a. Child-Support Obligor

Under § 6402(c), Congress authorizes the IRS to seize overpayments of federal income tax to satisfy outstanding child-support obligations. [FN138] Deadbeat dads generally do not inspire much sympathy, but it cannot be said that they have no legitimate interest in recovering property that is rightfully theirs, even when that property takes the form of an overpayment of federal income tax. Money is a family's basic lifeblood, without which neither food nor shelter can be assured. Families accustomed to receiving large, annual federal income tax refunds may look forward to receipt of the funds, plan to make important purchases with it, [FN139] and suffer temporary financial setback should the refund be seized or delayed. The strong likelihood, however, is that a child-support obligor's private interest in the refund will not, under Mathews, inspire the addition of procedural safeguards because the federal intercession does not appear to threaten grave financial hardship. Put differently, the amount seized is probably a small percentage of the individual's regular, presumably ongoing, income, and the federal government's forced appropriation will not likely place the obligor on the margin of subsistence.

Regarding risk of error, the strong likelihood is that state-level processes will withstand scrutiny. Modern, DNA-based technology establishes paternity with extraordinary accuracy, [FN140] and the state will likely report an accurate past-due amount. Modern technology and generally accurate procedures notwithstanding, mistakes do occur, and misunderstandings arise. In Eddy v. United States, [FN141] the Service intercepted the wrong tax refund because the obligated parent had the same name as the affected taxpayer. [FN142] A more interesting issue is presented in Laub v. Zaslavsky, [FN143] where the court was asked to decide whether child-support arrearages could arise from the retroactive application of a support order raising the amount of monthly support due. [FN144] Opposing the majority, Judge Johnson argued that tax refund intercepts should apply to arrearages created by the retroactive application of child-support orders because "the objective of the program is to ensure that a child who is entitled to financial support from his parent in fact receives that support." [FN145] The court ultimately held, however, that arrearages do not result from retroactive application of support orders. In doing so, the court amply demonstrated that certifications alleging past-due child support under § 6402(c) may not be wholly accurate and may thus result in an erroneous deprivation.

Cases such as Eddy and Laub, however, prove to be more of an exception than the rule. In many instances, the state will be able to present a valid court order founded on relevant evidence regarding the past-due support. Even in those instances where no order is presented, federal regulations require the provision of notice of the impending federal tax refund seizure and some predeprivation opportunity to respond. [FN146] Federal regulations further dictate that after the offset, the Treasury must provide affected taxpayers with information allowing them to pursue the matter at the state level (i.e., postdeprivation process). [FN147] So, the obligated parent has both predeprivation and postdeprivation opportunities to contest the matter before the deprivation becomes final. Under Mathews, due process will not likely require more.

Perhaps the most convincing argument an obligated parent can make is that under the third prong of the Mathews

analysis, the federal government--which effects the seizure--has no legitimate interest and acts solely as an agent for the states--which may, in fact, have legitimate interests. The problem of substituting federal interests for state interests *666 ultimately leads to the substantive due process concerns to be discussed in more detail below.

b. Federal Agency Debt Obligor

Section 6402(d) authorizes the Service to seize part or all of the tax refunds of those who have past-due, legally enforceable debts with respect to a federal agency. As mentioned earlier, cases indicate that this provision applies more to those who have defaulted on federally guaranteed student loans [FN148] than to others; the seizure is thus effected at the behest of the Department of Education. The Mathews analysis with respect to this group of taxpayers is similar to that of child-support obligors, with some intriguing differences.

Federal-debt obligors, like child-support obligors, have a clear interest in their federal income tax refunds. And like child-support obligors, federal-debt obligors do not rely on federal tax refunds to steer clear of the margin of subsistence, nor, for that matter, will a federal refund seizure, standing alone, result in severe financial hardship. Accordingly, the nature of the taxpayer's private interest in his property will not compel additional or substitute procedures under Mathews. Likewise, the risk of an erroneous deprivation is moderate if not low. Procedures executed or made available both before the debt is certified to the Treasury [FN149] and after the offset has occurred [FN150] are likely to ensure that the debt is objectively valid (i.e., past due and legally enforceable) and that the amount certified to the Treasury is accurate. [FN151] The relevant questions to be answered concerning the existence and amount of the debt do not ordinarily turn on assessments of credibility or veracity, and accordingly, additional procedural safeguards would offer limited enhancement in overall accuracy. It should be noted, however, that before certain changes in the law, the risk of "erroneous" deprivations was more pronounced, not because of issues concerning the existence or *667 amount of the debt, but because certain debts outside the governing statute of limitations were no longer "legally enforceable."

In Gerrard v. United States Office of Education, [FN152] the court held that the statute of limitations applicable to actions for damages (i.e., past-due student debt) did not apply to tax refund offsets. [FN153] Other courts have been more creative, though not necessarily convincing. The Roberts v. Bennett [FN154] court held that a student loan debt was still legally enforceable within the meaning of Treasury regulations because the "delinquency period" did not start until the government had obtained the right to collect the debt (i.e., approximately five years after the student defaulted). [FN155] Rejecting that logic, the Fifth Circuit reasoned in Grider v. Cavazos [FN156] that the meaning of "delinquent" in the context of tax refund offsets for defaulted student loans had its ordinary meaning, not a tortured meaning that allowed "delinquent" to be defined relative to the assignment of the debt to the federal government. [FN157] Legally, the sea is now calm. Congress changed the law governing collection of past-due student debt such that statute of limitations concerns no longer present concrete issues. [FN158] The old statute of limitations issue does, however, serve well as an analytical reminder. Assessing the "risk of erroneous deprivation" is not simply a matter of ensuring that the right individual is subject to seizure and that the amount to be ascertained is likely to be accurate based on credible and verifiable sources. Where a debt-sparked deprivation of property is imminent, actual deprivation will be erroneous if the debt does not actually exist in a legal sense. Thus, to the extent agencies or states pressing for tax refund offsets employ procedures that do not incorporate some measure of judicial scrutiny, legitimate issues of underlying legal enforceability may not be addressed properly. And accordingly, the risk of error is enhanced. In this context, of course, disposition of the primary statute of limitations issue has enhanced the likelihood that the federal agency will certify an accurate, legally enforceable debt. One cannot, however, dismiss the possible presence of *668 legal enforceability issues, regardless of whether a given claim is not time barred. Additional procedures, while unlikely in this context, would reduce to an absolute minimum those initial deprivations that are inappropriate as a matter of law and only later found to be so.

Looking to the last Mathews factor in this context, the federal government's interest is apparently high. Not only does the federal government have a compelling interest in collecting overdue revenue, it also has a substantially more compelling interest in collecting revenue owed to a federal agency than in collecting revenue owed by a delinquent third party to a given state. While additional safeguards promise some benefit, Mathews would likely dictate forgoing additional processes and preserving scarce government resources.

c. OASDI Overpayment Obligor

The collection of overpayments of OASDI via tax refund offset is essentially the collection of debt owed to a federal agency. The affected population segments are distinct, but their individual personal situations may vary substantially. By law, the refund offset program does not apply to those receiving monthly insurance benefits under Title II of the Social Security Act. [FN159] Thus, for a generalized Mathews analysis, I will consider an individual who received excess disability income, later returned to work, and now stands to receive a federal income tax refund.

As an employed individual receiving regular income from other sources, the taxpayer will not likely suffer financial hardship as a result of a federal income tax refund seizure. The taxpayer, of course, has a legitimate interest in his refund property, but the magnitude of that interest will not compel additional procedures under Mathews.

Likewise, as with general federal agency debt, the risk of erroneous deprivation is moderate to low. Federal regulations outline a reasonably detailed and accurate debt certification process, and the potentially affected taxpayer has both predeprivation and postdeprivation opportunities to contest the matter. [FN160] While federal regulations and the Code reference "past-due, legally enforceable" debt, [FN161] there exists no requirement that legal enforceability determinations be made by a court. In fact, it is the federal agency that "considers any evidence presented by such person and determines that an amount of such debt is past due and legally enforceable." [FN162] Thus, it remains possible that in some circumstances, a court would find that the apparent OASDI overpayment was not an overpayment in fact and that no legally enforceable federal agency debt existed on the eve of refund offset. There remains, then, the distinct possibility, regardless of how small, that an erroneous refund appropriation could occur. As was made clear in Mathews, however, the federal agents making disability determinations rely on medical reports from examining physicians; thus, the case for additional process is weak.

The third Mathews factor, government interest, is readily apparent. The federal government has a strong interest in collecting money owed to a federal agency, and as is the case with the collection of all federal agency debt, a federal tax refund offset would appear to be more justifiable than a similar offset for nonfederal debt. Burgeoning Social Security obligations threaten the future solvency of the system, [FN163] so it is truly incumbent on the government to ensure the accurate payment of disability benefits. Substantial federal process already exists, and given both the factual parity and the holding in Mathews, the case for additional procedural protection is virtually nonexistent.

d. State or Local Income Tax Obligor

One of the more recent and innovative refund offset provisions, § 6402(e), allows the federal government to seize a pending federal income tax refund to satisfy an outstanding state income tax obligation. Marginal state income tax brackets rarely reach or exceed ten percent, [FN164] so mathematically, the state rate structure minimizes the likelihood of a large federal refund offset. The individual's private interest in the refund, while legitimate, cannot be viewed as enabling the maintenance of subsistence. Given such a modest private interest, Mathews will not compel extraordinary procedural protections.

Like other obligors, those who owe past-due state income taxes may face refund seizure without judicial process. Such obligations must be "past-due" and "legally enforceable," [FN165] but those terms, by statutory definition, do not necessitate judicial participation in the initial determinations. [FN166] Liability may result from either a judgment or an administrative determination, so long as the judgment or determination is no longer subject to judicial review. [FN167] At the same time, however, liability may result regardless of whether the determination is, or has been, subject to judicial review. [FN168] Thus, current procedures do not guarantee strict legal enforceability in the traditional sense. State procedures, however, are not likely to result in an erroneous deprivation, especially in light of federal regulatory mandates concerning notice, the extent of precertification hearings, and the availability of postoffset process. [FN169]

An obligor's strongest argument in this context is that the federal government has no interest whatsoever in effecting a deprivation to secure funds owed to a given state. To the extent that policy-based justifications support federal intervention to force deadbeat dads and federal-debt obligors to pay up--at least from a procedural due process perspective--a state-initiated appeal to federal power solely to collect state revenue poses serious constitutional questions.
e. Nonobligated Spouses of Obligors

i. In General

From a purely procedural due process perspective, one could argue that, as a class, nonobligated spouses filing joint returns with obligated spouses present the most compelling case for additional protective measures. For purposes of analysis, "nonobligated spouse" refers to an individual who (1) generated at least part of the federal income tax refund subject to seizure and (2) filed a joint tax return with an obligated spouse. While § 6402 itself only contains limited provision for the protection of the interests of nonobligated spouses, in many instances, federal regulations dictate that both states and federal agencies take steps to ensure that the relevant nonobligated spouses receive notice of an impending tax refund seizure [FN170] and that postoffset notices provide instructions for nonobligated spouses seeking to secure their portion of a particular refund. [FN171] Even so, there are a number of concerns under a traditional Mathews analysis, particularly under the second and third prongs.

ii. Private Interest

Nonobligated spouses, like their obligated counterparts, do not necessarily occupy the margin of subsistence. So, while they certainly have a legitimate interest in their portion of a given refund, the nature of the refund does not, on its own, support additional or substitute procedures under Mathews.

iii. Risk of Erroneous Deprivation

Seizure of the federal income tax refund of a nonobligated spouse filing a joint return with an obligated spouse constitutes prima facie erroneous deprivation. The nonobligated spouse may have generated up to 100% of the refund (e.g., when the obligated spouse does not work), and yet, the deprivation would proceed on the filing of a joint return. At least one judge posits that "[t]he entire problem could be avoided if the nonobligated spouse filed a separate return," [FN172] but such a view fails to appreciate the extraordinary harshness with which the Code treats those who are married yet file separate returns. Further, a spouse may simply not be on notice that there exists a reason to file separately. Apparently those drafting current statutory and regulatory provisions assumed that notices to obligated spouses would be current enough to put potentially affected, though nonobligated, spouses on alert. Similarly, the court in Brown v. Eichler [FN173] brazenly reasoned that due process does not require that the nonobligated spouse receive a separate notice because the notice to the obligated spouse "will inform the non-obligated spouse." [FN174] The flaw of such logic derives from the possibility that an individual's child-support, federal agency, or state income tax debts and all potential *672 notices and hearings occurred prior to marriage. To worsen matters, even when the requisite notices to obligated spouses are current (i.e., sent postmarriage), a given state or federal agency may not be required to send notice of an impending federal refund offset to the nonobligated spouse. [FN175] Rather, the regulations themselves frequently authorize postoffset notification and, thus, dictate that the notice explain the steps the nonobligated spouse must take to secure her share of the refund. [FN176]

In accord with this approach, at least one court has held that a nonobligated spouse who received neither predeprivation notice nor a predeprivation hearing was not denied procedural due process because she could follow simple procedures and thereby recover her share of the refund due. [FN177] Seeking to minimize the gravity of the problem, the court reasoned that the issue "is not [so much] deprivation but delay." [FN178] Objective fact, however, establishes that the erroneous deprivations occurring in this context do not self correct, and sound governing precedent warns that even "temporary or partial impairments to property rights . . . are sufficient to merit due process protection." [FN179] The importance of prompt correction is manifest, especially because "temporary" impairments may extend up to six months in some circumstances. [FN180] And whatever the temporal delay, most would agree that having taxpayers secure their property by forcing them to undertake aggressive postdeprivation pursuit is burdensome, not to mention irritating. [FN181] The Supreme Court has candidly taught that "no later hearing . . . can undo the fact that [an arbitrary taking] subject to the right of procedural due process has already occurred. This Court has not . . . *673 embraced the general proposition that a wrong may be done if it can be undone." [FN182]

It should also be noted that notice to a given obligor of a potential seizure--especially when nonobligated spouses are not mentioned--may not put a nonobligated spouse on notice that her share of a given refund is subject to seizure. She might assume that the federal government will sort things out and automatically ensure the protection of her
refund share. With respect to state income tax obligations in particular, she may logically assume that in light of the existence of two very distinct sovereigns, her joint federal income tax return and her joint state income tax return and delinquent liabilities with respect to either regime have absolutely nothing to do with each other. Nor can we forget basic fear factors. Given the Service's plenary and apparently almighty powers, many individuals actively avoid conflict with the IRS, [FN183] even when they appreciate the apparent injustice of what is happening to them. Wrongful deprivations, which should never occur in the first place, stand ready to execute, and with the help of a little taxpayer inertia, the harm will persist.

What possible benefit could arise from additional procedural protections? For one, enhanced procedural safeguards at the federal level would augment system fairness, and secondly, those who have no liability under the statute and who have, in fact, overpaid their federal income taxes would be spared the burden of beating Uncle Sam down. The federal government enjoys a superior informational position relative to the states because, as an initial matter, only the federal government knows whether a given obligor has filed a joint federal income tax return. Further, to the extent that the joint return reflects income from wages, only the federal government receives detailed information regarding federal withholdings from wages with respect to each individual filing the return. A proactive federal posture would go a long way in reducing to an absolute minimum erroneous property deprivations, and the reality of electronic filing (and the necessary coding of basic return information such as filing status) promise a streamlined procedural enhancement. Steadfast adherence to a purely reactive mindset, in light of the Service's superior informational position, sends the wrong message: the protection *674 of individual property rights clearly sits second chair to the collection of the sovereign's revenue.

iv. Government Interest

Even in the context of past-due federal agency debt, the federal government has no interest in recovering such amounts from the wrong person; the interest is even weaker with respect to funds collected on behalf of the states. Regardless of the specific obligation sparking the tax refund seizure, postoffset compensation of nonobligated spouses invariably entangles the federal government because nonobligated spouses pursuing their portion of a seized refund must first file an amended tax return. The processing of amended tax returns presents no new administrative challenge to the Service, so there exists the strong likelihood that the federal government would incur no substantial additional cost in accelerating corrective processes in pursuit of a constitutional ideal.

f. Affected Taxpayers in General

Speaking broadly with respect to the various affected parties, obligors present the weaker case for additional procedural protections under Mathews. Predeprivation and postdeprivation procedures are not likely to produce an erroneous result, and the private interest fails to even approach Goldberg-level significance. Neither the lack of a true federal government interest nor a highly derivative hypothetical interest has yet to save the day on the assertion of procedural due process challenges. Nonobligated spouses offer a far more compelling case given that the risk of erroneous deprivation is virtually assured. True, the private interest is small, but the government's interest in clearly erroneous collection is nil. The burden of correction? Light.

Perhaps we should be asking the larger questions. Mathews, and quite possibly other decisions in the procedural due process context, apparently assumes that the sovereign effecting the deprivation will be the same sovereign responsible for providing due process. Should we ever allow one powerful sovereign to deprive a person of property (or liberty or life) on the belief that a separate, but weaker, sovereign has provided the requisite constitutional protections? In assessing the constitutionality of the relevant procedural protections, should we permit the governmental interest of one sovereign to serve as a substitute for the governmental interest of another? The multiple substitutions employed here ultimately give rise to the question whether the federal government *675 has constitutional authority to effect the refund seizures regardless of the procedures involved. Courts have not had ample opportunity to directly address substantive due process concerns because of (1) the procedural due process concerns of those litigating the early cases and (2) the subject matter jurisdiction ban in effect under § 6402(f). The substantive due process analysis that follows reveals a rather disturbing trend in the use and abuse of the federal taxing power.

C. Substantive Due Process: The Intratextualist Critique

1. In General

Substantive due process in the property-deprivation context dictates that even when constitutionally adequate procedural safeguards exist, no deprivation of property will occur without sufficient justification. [FN184] The Constitution explicitly sets forth Congress's power "[t]o lay and collect Taxes" from the citizens of the United States. [FN185] Yet, given that the taxing power is formidable--indeed, it allows the government to get to a taxpayer's check before he does--the Constitution's grant of authority has to be understood equally as a severe limit on federal power [FN186] relative to an individual's income (i.e., his ability to secure subsistence). Arguably, the seizure of federal income tax refunds to satisfy debts or obligations falling outside the ambit of federal "tax," as constitutionally defined, violates an individual's fundamental property rights with respect to his income. Whatever purported federal justifications might be present, the statutory means adopted by Congress represent a pursuit of expediency more than anything else. Accordingly, the intercept program falls far short of constituting the least restrictive means of advancing any tangential federal government interest.

2. Income Taxation as Fundamental Right

The Sixteenth Amendment provides that "Congress shall have power to lay and collect taxes on incomes, from whatever source derived, *676 without apportionment among the several States, and without regard to any census or enumeration." [FN187] Thus, Congress has the power to tax salaries, realized capital gains, game-show winnings, and other amounts. [FN188] Moreover, for United States citizens and lawful permanent residents, this constitutional grant of authority allows Congress to tax income earned anywhere in the world. [FN189] Although phrased as an affirmative power, the language of the Sixteenth Amendment should also be read restrictively. Thus, with respect to an individual's income, Congress may lay and collect only that which constitutes a "tax." Undeniably, Congress holds the power to collect nonincome taxes (e.g., duties, imposts, and various excises). [FN190] Yet arguably, and especially given the explicit constitutional provision, the right of the people to be free of federal governmental income appropriation, excepting "taxes," is fundamental. Any statute to the contrary merits strict judicial scrutiny.

The Sixteenth Amendment does not, itself, set forth a definition of "tax" or "taxes." But there are certainly ways to get at the meaning. Professor Amar reasons that an intratextual reading of the Constitution often yields a more thorough constitutional understanding and, quite possibly, a better appreciation of the Framers' intent. [FN191] Using intratextualism, "the interpreter tries to read a contested word or phrase that appears in the Constitution in light of another passage in the Constitution featuring the same, or a very similar, word or phrase." [FN192] The intratextualist approach is particularly useful in this context. While the founding fathers did not contemplate the type of income tax we have today, they did authorize the laying and collecting of various taxes. [FN193]

**Article I, Section 8 of the Constitution** sets forth Congress's basic taxing power. That section provides, in pertinent part, as follows: "The Congress shall have Power To lay and collect Taxes, Duties, Imposts and Excises, to pay the Debts and provide for the Common Defence [sic] and general Welfare of the United States; but all Duties, Imposts and Excises *677 shall be uniform throughout the United States." [FN194] Definitionally, then, a tax collected by the federal government is an amount to be used to pay the debts of the United States, to provide for the common defense of the United States, or to provide for the general welfare [FN195] of the United States. The Constitution makes frequent reference to "the several States," but in provisions concerning the taxing power, no mention is made of collecting revenue on behalf of a state or the several states. In fact, other notable references to the word "tax" clarify that the revenue contemplated would originate in the state and be paid over to the federal government. No income tax existed at the time of the ratification of the Constitution, [FN196] but the Framers did provide for taxation of the colonies to support the federal government. To ensure that no one state would bear an unfair tax burden, the Framers dictated that any tax imposed on the several states would be based on the number of citizens living in that state. Thus, under **Article I, Section 9**, the Framers clarified that "[n]o Capitation, or other direct, Tax shall be laid, unless in Proportion to the Census or Enumeration herein before directed to be taken." [FN197] Today, per the Sixteenth Amendment, we have direct taxation of individual income, and per the final clauses of that Amendment, such taxation proceeds without apportionment and without regard to the findings of the census with respect to the number of individuals in a given state. [FN198] One thing is abundantly clear: the system assures that revenue flows into the federal coffers. Viewed in light of various constitutional indicators, the payment of revenue collected under the federal taxing power to the several states for past-due child support or state income taxes

represents an uncomfortable deviation from the original plan. The perversion persists even with respect to refund seizures to recover federal agency debt, because the federal taxing power's core justification derives from the legitimate need to secure taxpayer revenue in the first instance for support of the central government, not from the federal government's need to reimburse itself expeditiously with respect to prior expenditures.

*678 3. Refund Seizure as Infringement of Income Taxation Right

The court in Coughlin v. Regan, [FN199] one of the earlier cases involving a § 6402 seizure, bluntly stated that "[t]he collection of a child support obligation is not a tax collection, since child support obligations are not taxes." [FN200] Further chastising the government, the court emphasized that "the Code contains numerous provisions which demonstrate that when Congress intends to impose a 'tax' it does so expressly . . . . Neither section 6305 nor subsection 6402(c) provides for the collection of a 'tax' . . . . Accordingly, neither the [Tax] Anti-Injunction Act nor the Declaratory Judgment Act bars the present action." [FN201] Not far behind, the court in Presley v. Regan [FN202] discounted the existence of even a tangential federal interest, reasoning that "[a]lthough the federal government has an indirect interest in maintaining the fiscal health of the AFDC program, it has little or no interest in the . . . tax refunds or the interpret program itself. The federal government's role . . . is merely to act as the states' bill collector." [FN203]

The logic of both Coughlin and Presley rings true today. Even if § 6402 fails to state that refund amounts can be seized "as if" they are taxes, the amounts seized do not constitute taxes in the constitutional sense. At the federal level, Congress still imposes taxes overtly. [FN204] Also, even though a particular refund seizure may represent overdue state income taxes, clearly levied by the states as such, the refund, once again, is not a "tax" in the constitutional sense because that term only refers to federal taxes collected for specific purposes. Refunds seized with respect to past-due, legally enforceable state income tax obligations are not ultimately used to pay the debts or provide for the common defense and general welfare of the United States. Congress may certainly act to promote the general welfare of the United States, but it may not do so in a manner that results in a constitutional violation [FN205] or takes liberties with *679 enumerated powers. As we have it, legitimate federal tax collection has managed to bedfellow itself with the illegitimate--repeatedly, and not without considerable gusto.

Congress circumvents and violates the letter of the Constitution when it authorizes the collection of revenue "as if" it were a tax under § 6305(a), unless the revenue links to and has its roots in the need to address legitimate federal-tax-funded expenditures. Even under the guise of collecting a "deemed tax," the Service, in effecting a jeopardy-type tax collection, violates the very spirit of Article I, Section 8 when such a tax is not laid and collected "to pay the Debts and provide for the Common Defence [sic] and general Welfare of the United States." [FN206] Money seized and paid over to Connecticut does not benefit Massachusetts or any other state. Indeed, if the taxpayer resides in one jurisdiction and the money is paid over to another (because, for example, spouses have separated after divorce), one could argue that the economy of the taxpayer's home state suffers. The same logic applies to the collection of nontax revenue from income under § 6402.

There is some degree of validity to the argument that the collection of a "deemed tax" or "deemed income tax" with respect to a federal agency violates neither the letter nor the spirit of Article I, Section 8 because the monies are paid over to the federal government (and presumably benefit the United States). However, the ends do not justify the means. Congress should not be permitted to transfigure any "easy access" revenue into a "tax," because such linguistic legerdemain threatens to allow the sweeping of almost anything into Congress's rather formidable taxing power. And the news is already bad enough. Section 6402 forgoes collection and authorizes direct seizure. What started out in 1981 as an aggressive means of collecting past-due, child-support obligations metastasized to include offsets for past-due federal agency debt (1984), overpayment of OASDI (1990), and past-due state income tax obligations (1998); the Service may even go so far as to seize refundable earned income credits as "overpayments" of tax under § 6402. [FN207]

Despite the apparent mix of federal- and state-level beneficiaries, deadbeat dads and state income tax obligors will far outnumber those who owe money to a federal agency. The several states, then, will remain as the principal beneficiaries of what arguably constitutes an active abuse of the federal taxing power. Egalitarian as forced collection *680 of child support may seem, the ultimate beneficiary of the seized refund may not be the relevant child. Sadly, for children who have received AFDC, the state's interest in the refund supersedes theirs. Opposing the diversion of earned income credit amounts from AFDC families, Justice Stevens noted in Sorenson v. Secretary of the Treasury

that

[t]he principal beneficiaries of the Intercept Program enacted by Congress . . . were state governments which had claims for recoupment of welfare payments made to families that were unable to enforce a departed parent's child-support obligations. Thus, the real adversaries in this case are the Sorensons--a low-income family--on the one hand, and the State of Washington, on the other, which will ultimately receive the intercepted "refund" under the Court's holding. [FN208]

In light of § 6402(f) banning federal court jurisdiction with respect to certain § 6402 claims, Congress's ongoing augmentation of state coffers at the expense of select taxpayers promises to proceed unchecked. And there is certainly no guarantee that other barriers to adjudication, such as mootness and standing, [FN209] will not arise.

Because the intercept program feeds on overpayments of federal income taxes, low-income earners whose total wages are low enough to trigger a refund in the ordinary course of withholding may ultimately bear the brunt of the impact. Given the progressivity of income tax rates and the stripping, or limiting, of certain deductions at higher income levels, the wealthy are more likely to find themselves in a payment *681 posture; obviously, the refund intercept program cannot reach them. Similarly, those who are self-employed (e.g., law firm partners) and not subject to federal income tax withholding can avoid the intercept program altogether by paying their exact federal income tax liability in the form of quarterly estimated taxes. Thus, in many instances, the refund intercept program will ensnare the low-income deadbeat while the wealthy deadbeat, who may have underpaid his federal income taxes by a substantial margin, effectively avoids forced federal appropriation. Sophisticated taxpayers may also have a better understanding of their tax options. Thus, they will actively manipulate their withholdings to prevent any overpayment of federal income taxes.

4. Absence of Justification and the Presence of Less-Restrictive Means

Clear constitutional provisions establish that the federal taxing power, though plenary, has its limits. Those limits, I have argued, rise to the level of a fundamental enumerated right and prevent the government from using its constitutionally authorized ability to tax income to seize refunds for purposes unrelated to legitimated tax-funded expenditures of the United States. Contrary statutes in the form of §§ 6305(a) and 6402(c), (d), and (e) merit strict judicial scrutiny and can stand, if at all, only as measures (1) deemed necessary to achieve a compelling governmental interest and (2) constituting the least restrictive means of accomplishing the government's necessary objective. Neither tax provision can survive the test because neither is truly necessary. They both exist as simple expedients. Further, the federal government would, in many instances, have difficulty establishing even a legitimate interest in collecting revenue slated for delivery to the states, not to mention an interest that is compelling. Finally, the state- and federal-level agencies to which offset victims are directed (in light of the closure of federal courtroom doors) can accomplish their ultimate goals without federal intercession. Surely resort to those mechanisms, without aggressive federal intervention, would impose less onerous burdens on individual property rights.

5. Potential Tenth Amendment Danger

The role played by the federal government under §§ 6305 and 6402(c), (d), and (e) presents an issue under the Tenth Amendment. Under the Tenth Amendment, "powers not delegated to the United States *682 by the Constitution, nor prohibited by [the Constitution] to the States, are reserved to the States respectively, or to the people." [FN210] The power to collect past-due child support and past-due state income tax is not granted by the Constitution to the United States. By default and logic, such collection powers are reserved to the states which, in any event, have no authority to call on the federal taxing power explicitly reserved to the United States to capitalize on the occasional systemic glitch. If the federal government collects revenue from taxpayers at the behest of the states here, the government may pursue state interests under a federal banner in other arenas; indeed, such an arrangement sets the stage for federal action even when the state itself may desire more autonomy. And if we accept the mixing of federal powers and state powers, we may, on occasion, lose sight of those powers supposedly left to the people. Inasmuch as the Tenth Amendment protects the states from aggressive federal powers, one can easily argue that the Amendment should protect both the powers and the rights of the people from aggressive federal-state alliances.

D. Sovereign Immunity and Res Judicata
Whatever injustices are afoot under § 6305 and 6402, they will continue without judicial intervention. Ordinarily, an individual who has overpaid taxes but has not received his check from the Treasury may file a refund claim so long as the taxpayer has satisfied certain preliminary requirements. \[FN211\] Per order of § 6402(f), however, "[n]o action brought against the United States to recover the amount of [a § 6402 seizure] shall be considered to be a suit for refund of tax." \[FN212\] Courts thus consider § 6402(f) to be a straightforward congressional assertion of sovereign immunity. \[FN213\] Such withdrawals, though undesirable, often *683 withstand challenge, as was the case in Weinberger v. Salfi, \[FN214\] because the claimant can seek judicial review after seeking and obtaining a final decision at an administrative hearing. \[FN215\] Relying on Weinberger, the court in Richardson v. Baker \[FN216\] held that Congress's withdrawal of federal court jurisdiction to hear actions to review or restrain refund seizures was not unconstitutional because the plaintiffs had alternative means of challenging the constitutionality of the government's actions (i.e., suits against the relevant state, federal agency, or the Commissioner of Social Security). \[FN217\] Fortunately, other courts do not see general jurisdiction withdrawals as fatal to constitutionality challenges.

In Johnson v. Robison, \[FN218\] the Court held that Congress, in withdrawing jurisdiction with respect to certain claims against the Veterans' Administration, did not mean to bar subject matter jurisdiction over constitutional claims. \[FN219\] Such an approach is particularly apt in a context where both substantive and procedural due process issues have not enjoyed a thoroughly satisfactory resolution. Murray's Lessee v. Hoboken Land & Improvement Co. \[FN220\] teaches that due process "is a restraint on the legislative as well as on the executive and judicial powers of the government, and cannot be so construed as to leave Congress free to make any 'due process of law,' by its mere will." \[FN221\] At present, however, courts unwilling to intervene have a ready statutory excuse to cry wolf. \[FN222\] no matter how egregious the deprivation. \[FN223\] Section 6402(f), however, cannot defeat a jurisdictional challenge to its constitutionality:

*684 [T]he federal courts undoubtedly . . . have jurisdiction to decide the constitutionality of statutes denying federal courts the authority to hear particular types of cases. Marbury v. Madison long ago established the power of the federal judiciary to rule on the constitutionality of federal statutes. This would include the authority to determine the constitutionality of statutes restricting jurisdiction. More subtly, courts always have been accorded jurisdiction to determine whether they have jurisdiction. Marbury establishes that federal courts may not apply an unconstitutional law to decide a case. Hence, the federal courts must decide whether a statute restricting jurisdiction is constitutional before it can be applied to deny review in a particular case. \[FN224\]

The need to collect federal "taxes" (in the true constitutional sense) may justify some temporary halting of judicial interference. Refund offsets, however, should not piggyback on the train of judicial abeyance because offsets occur, per repeated statutory mandate, \[FN225\] only after all internal revenue taxes have been collected. \[FN226\] The case is especially pressing with respect to nonobligated spouses. The court in Satorius v. Internal Revenue Service \[FN227\] has already warned that "the Supreme Court . . . might hold that § 6402(f) also applies to bar suits by non-obligated spouses to recover their portion of an intercepted refund," \[FN228\] and IRS agents cannot be counted on to behave rationally. \[FN229\] Nonobligated spouses have had to suffer active attempts to reach their share of an intercepted tax refund, despite the provisions of federal law. In Oatman v. Department of Treasury-IRS, \[FN230\] the Service attempted to apply Idaho's community property statute to allow the use of the nonobligated spouse's share of an intercepted refund to satisfy the obligated spouse's debt. \[FN231\] The Ninth Circuit discarded the approach as *685 counter to federal law allowing recovery. \[FN232\] The storm is not yet over. A new problem may present by virtue of the Eleventh Amendment.

The Eleventh Amendment provides that "[t]he Judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by Citizens of another State, or by Citizens or Subjects of any Foreign State." \[FN233\] By its terms, the amendment only serves to limit federal court jurisdiction. Over time, however, the amendment has been interpreted to disallow suits by citizens of a given state against the state sovereign without the sovereign's express consent. \[FN234\] So, even if § 6402(f) graciously announces that it does not prevent suit against the states, there is no guarantee that the states will have consented to suit with respect to the tax refunds seized and paid over to them. Under Alden v. Maine, the federal government lacks the power to force the states to subject themselves to suit in state court. \[FN235\] So the statutory language may enhance the possibility that a state will attempt to hide behind its own immunity. \[FN236\] The harm is exacerbated by the fact that the federal government jeopardizes property recovery, and would thus appear to have some postdeprivation responsibility, \[FN237\] yet can take no affirmative steps to guarantee protection of the taxpayer's property rights.
Layer that fact with the following. Many of the potential postoffset disputes at the state level will present with relevant state-level precedent. A court appreciating the broader factual and procedural backdrop may well decide that prior adjudication has settled the matter in favor of the state. Accordingly, a court may conclude that actions to contest the refund seizure are res judicata. Ultimately, then, the intercept program, which already stands on shaky substantive due process grounds, may manage to effect a permanent deprivation of property without proper procedural due process.

IV. Conclusion

More than fifty years ago, Supreme Court Justice Reed reasoned that "[u]nless there are provisions extraneous to any tax need, courts are without authority to limit the exercise of the taxing power." [FN238] Federal appropriation of taxpayer property for purposes unrelated to paying the debts, providing for the common defense, or providing for the general welfare of the United States fall far clear of any legitimate federal "tax need" in a strict constructionist sense. States assuredly have valid interests in ensuring the welfare of children and collecting their own revenue. They should, however, work within legitimate legal parameters and forgo efforts to skirt limits and measures meant to protect the broader population, including noncustodial parents who have avoided or fallen behind in their support obligations. Similar reasoning applies with respect to federal agencies. No one doubts the gravity and necessity of collecting revenue due the United States. At the same time, protecting the full panoply of individual rights is a task that is equally grave and serious, especially when the existing statutory and regulatory framework virtually assures regular infringement on the rights of nonobligated spouses.

It is far too optimistic to hope that the federal government will stay its hand and forgo seizure of nontax items from taxpayer income. We all have reason to fear. If the federal government now collects delinquent state income taxes, can property taxes and parking ticket fines be far behind?

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[FN3]. See Regina Austin, Nest Eggs and Stormy Weather: Law, Culture, and Black Women's Lack of Wealth, 65 U. Cin. L. Rev. 767, 779 (1997) (indicating that for some black women, an income tax refund is used to finance a special purchase).


(discussing the tension between legitimate privacy concerns and the need to allow proper tax collection).

[FN7]. 26 U.S.C. § 7421 (2000). Section 7421, referred to as the Tax Injunction Act, provides, in pertinent part:
Except as provided in sections 6015(e), 6212(a) and (c), 6213(a), 6225(b), 6246(b), 6330(e)(1), 6331(i), 6672(c), 6694(c), and 7426(a) and (b)(1), 7429(b), and 7436,... no suit for the purpose of restraining the assessment or collection of any tax shall be maintained in any court by any person, whether or not such person is the person against whom such tax was assessed.

A separate provision, the Declaratory Judgment Act, prevents federal courts from issuing declaratory judgments with respect to controversies involving federal taxes. 28 U.S.C. § 2201(a) (2000).


States have not relied solely on federal help in collecting past-due child support. To the contrary, states are getting more aggressive and more creative in finding ways to collect past-due child support. See Wendy Koch, Creative Efforts Ensure Parents Pay, USA Today, Mar. 15, 2006, at 1A (indicating that states are, in some instances, acquiring cell phone records to locate those owing child support and threatening to withhold (or, in fact, withholding) hunting and fishing licenses to obtain child-support payments).

[FN10]. See Coughlin v. Regan, 584 F. Supp. 697, 704 (D. Me. 1984) ("Section 664 of the Act and subsection 6402(c) of the Code were designed to eliminate unnecessary recourse to the more cumbersome and costly jeopardy-type assessment procedures previously established.").


[FN12]. See Rivera v. Comm'r, 89 T.C.M. (CCH) 33 (2005) (demonstrating that women are, on occasion, subjected to tax refund intercepts to satisfy delinquent child-support obligations).


[FN14]. Id.

[FN15]. Treasury Department reports indicate that in fiscal year 2004, child-support collections totaled $1.49 billion. Id. The total for child-support debts, federal nontax debts, and state income tax debts totaled $2.7 billion. Id.


[FN18]. § 6402(d)(3).

[FN19]. § 6402(e).


[FN21]. Id. at 594.

[FN22]. Id. at 593-95.
[FN23]. Id. at 598.

[FN24]. § 6402(f).

[FN25]. Id.

[FN26]. Id.

[FN27]. Id.


[FN30]. See, e.g., § 6402(d)(3)(B) (requiring notice to each taxpayer and protecting the nonobligated spouse's share); § 6402(e)(1) (flush language); see also 31 C.F.R. §§ 285.1-285.8 (2004) (setting forth various rules governing tax refund offsets and other collection measures).

[FN31]. See generally Akhil R. Amar, Intratextualism, 112 Harv. L. Rev. 747, 748 (1999) (indicating that the recurrence of various words and phrases in the Constitution "gives interpreters yet another set of clues as they search for constitutional meaning and gives rise to yet another rich technique of constitutional interpretation").

[FN32]. § 6402(f).

[FN33]. See United States v. Sherwood, 312 U.S. 584, 586 (1941) ("The United States, as sovereign, is immune from suit save as it consents to be sued, and the terms of its consent to be sued in any court define that court's jurisdiction to entertain the suit."

[FN34]. See, e.g., § 6402(c), (d), and (e) (limiting a person's ability to receive a tax overpayment refund).

any past-due support" of which the Treasury has been notified); H.R. Rep. No. 97-208, at 985 (1981) (Conf. Rep.), as reprinted in 1981 U.S.C.C.A.N. 1010, 1347 (explaining that the amendment would enable the IRS to collect "past-due support which has been assigned to the state as a condition of AFDC eligibility").


[FN42]. See Elizabeth S. Scott, Social Norms and the Legal Regulation of Marriage, 86 Va. L. Rev. 1901, 1942 (2000) (noting that "state coercion of marital commitment" has been replaced by state neutrality, that personal "freedom to terminate marriage at will" is apparent, and that the legal norm in most states is quick, easy divorce).

[FN43]. While courts issue child-support orders to mothers, the majority of parents under support orders are fathers. Timothy S. Grall, Support Providers: 2002, U.S. Census Bureau 4 (2005), http://www.census.gov/prod/2005pubs/p70- 99.pdf (indicating that the vast majority of support providers are men and that most support providers act under court order). Thus, for purposes of this Article, I will adopt a father-as-obligor paradigm.


[FN45]. See id. (stating that collection of certified amount "would be jeopardized by delay").

[FN46]. See § 6305(b) ("No court of the United States... shall have jurisdiction.").

[FN47]. While jeopardy assessment of taxes governed by deficiency procedures involves administrative delay and judicial process, the jeopardy assessment authorized by § 6305 (i.e., procedures akin to an assessment of employment taxes under subsection (c)) avoids deficiency procedures and does not require pre-assessment judicial review. See Mather & Weisman, supra note 9, at A-11 (stating that the imposition of deficiency taxes via jeopardy assessment is subject to lengthy process whereas the imposition of certain other penalties is not).

[FN48]. § 6305(a).

[FN49]. Section 6402(c) provides, in pertinent part:
The amount of any overpayment to be refunded to the person making the overpayment shall be reduced by the amount of any past-due support (as defined in section [664(c)] of the Social Security Act) owed by that person of which the Secretary has been notified by a State in accordance with section [664] of the Social Security Act. The Secretary shall remit the amount by which the overpayment is so reduced to the State collecting such support and notify the person making the overpayment that so much of the overpayment as was necessary to satisfy his obligation for past-due support has been paid to the State. A reduction under this subsection shall be applied first to satisfy any past-due support which has been assigned to the State under section [610(a)(3)] of the Social Security Act, and shall be applied to satisfy any other past-due support after any other reductions allowed by law (but before a credit against future liability for an internal revenue tax) have been made. This subsection shall be applied to an overpayment prior to its being credited to a person’s future liability for an internal revenue tax.


[FN50]. Coughlin v. Regan, 584 F. Supp. 697, 704 (D. Me. 1984). The court further noted that "[s]ection 664 of the [Social Security] Act and subsection 6402(c) of the Code were designed to eliminate unnecessary recourse to the more cumbersome and costly jeopardy-type assessment procedures previously established." Id. at 704 n.13. The court also highlighted the government's concession that "Code subsections 6305(a) and 6402(c) relate to the same legislative program—the recovery of delinquent child-support obligations—and that subsection 6402(c) was enacted as a more efficient collection procedure than that previously established by subsection 6305(a)." Id. at 703.

[FN51]. 42 U.S.C. § 608(a)(3) (2000). In the non-AFDC context, individuals with support orders may request that the state take steps to collect the past-due amounts. See 42 U.S.C. § 654(4)(A)(ii) (2000) (enumerating actions states must take). While the AFDC context involves minor differences, the state-level notice and hearing components are the same in both the AFDC and non-AFDC context. See 31 C.F.R. § 285.3(c)(1)(i)(A) & (B), 285.3(c)(4) (2004) (delineating requirements for federal and state child-support plans).

[FN52]. § 285.3(c)(2).

[FN53]. § 285.3(c)(3).

[FN54]. § 285.3(c)(2)-(c)(4).

[FN55]. § 285.3(c)(4)(i).

[FN56]. § 285.3(c)(5).

[FN57]. § 285.3(b).


[FN59]. § 6402(c). Any reduction authorized by § 6402(c) is used first to cover past-due support assigned to the state. Thereafter, reductions can be used to satisfy other reductions allowed by law and then other past-due support. Id.

[FN60]. See, e.g., Marcella v. Regan, 574 F. Supp. 586 (D.R.I. 1983) (involving a due process challenge to the tax refund intercept mechanism authorizing the federal government to transfer a delinquent AFDC obligor's tax overpayments to the state).


[FN64]. Id. at 1307 (citations omitted).

[FN66]. Id. at 594-95.

[FN67]. Id. at 592-93.

[FN68]. What is currently § 6402(f) was added to the Code one year after the Marcello decision. See generally Deficit Reduction Act of 1984, Pub. L. No. 98-369, 98 Stat. 494.

[FN69]. Marcello, 574 F. Supp. at 593.

[FN70]. Id. at 594 n.15.

[FN71]. Id. See also Coughlin v. Regan, 584 F. Supp. 697, 705 (D. Me. 1984) (noting in a statutory environment preceding the enactment of what is now § 6402(f) that the court could not "engraft onto one [child-support-collection scheme] a jurisdictional rule which by its terms applies only to the other scheme").


[FN73]. Marcello, 574 F. Supp. at 594.

[FN74]. Id. at 594-95.

[FN75]. Id. at 598. The court noted, in discussing the relevant facts, that obligated individuals pursuing the matter after receiving initial notice would either be removed from the intercept census or told that their name would remain on the list "because the Bureau, in its infinite wisdom, had determined that the amount claimed was correct." Id. at 589-90. Regarding nonobligated spouses filing a joint return, "the state took the course of least resistance and routinely referred questions and complaints... to the Service." Id. at 590-91.

[FN76]. Section 6402(f) provides as follows:

No court of the United States shall have jurisdiction to hear any action, whether legal or equitable, brought to restrain or review a reduction authorized by subsection (c), (d), or (e). No such reduction shall be subject to review by the Secretary in an administrative proceeding. No action brought against the United States to recover the amount of any such reduction shall be considered to be a suit for refund of tax. This subsection does not preclude any legal, equitable, or administrative action against the Federal agency or State to which the amount of such reduction was paid or any such action against the Commissioner of Social Security which is otherwise available with respect to recoveries of overpayments of benefits under section 204 of the Social Security Act. 26 U.S.C. § 6402(f) (2000).

[FN77]. Id.

[FN78]. Id.

[FN79]. Id. The statute, in its current form, also clarifies that it does not bar actions against federal agencies responsible for refund reductions or against the Commissioner of Social Security. These additions were necessitated by the expansion of the refund intercept program to other areas (i.e., outside the child-support-collection context).

[FN80]. Id. Under 31 U.S.C. § 3720A (2000), federal agencies owed a past-due, legally enforceable debt are directed to notify the Secretary of the Treasury of the amount due at least once each year.

[FN81]. See, e.g., Roberts v. Bennett, 709 F. Supp. 222, 225 (N.D. Ga. 1989) (holding that a student loan debt was still legally enforceable within the meaning of the Treasury regulations because the "delinquency period" did not start until the government had obtained the right to collect the debt (i.e., approximately five years after the student defaulted)).

The United States Supreme Court recently held that the federal government may offset Social Security payments to cover past-due student loan obligations. *Lockhart v. United States*, 126 S. Ct. 699, 702 (2005).

[FN82]. Under 31 C.F.R. § 285.5(b) (2004), "delinquent" and "past due" refer to the status of a debt and mean[] a debt has not been paid by the date specified in the agency’s initial written demand for payment, or applicable agreement or instrument (including a post-delinquency payment agreement), unless other payment arrangements satisfactory to the creditor agency have been made. Nothing in this section [of the regulations] is intended to define whether a debt is delinquent or past-due for purposes other than offset....

[FN83]. Legally enforceable refers to a characteristic of a debt and means there has been a final agency determination that the debt, in the amount stated, is due, and there are no legal bars to collection by offset. Debts that are not legally enforceable for purposes of this section include, but are not limited to, debts subject to the automatic stay in bankruptcy proceedings or debts covered by a statute that prohibits collection of such debt by offset. For example, if a delinquent debt is the subject of a pending administrative review process required by statute or regulation, and if collection action during the review process is prohibited, the debt is not considered legally enforceable for purposes of this section. Nothing in this section is intended to define whether a debt is legally enforceable for purposes other than offset under this section. § 285.5(b) (emphasis added). It should be noted that the definition here does not define "legally enforceable" in an absolute sense. Rather, the definition only refers to the right to satisfy a debt by offset.


[FN85]. 26 U.S.C. § 6402(d)(1)(A)-(C) (2000). When several federal agencies are owed, payments of seized amounts are applied in the order in which the debts accrued. § 6402(d)(2). For rules on ordering when various obligations subject to seizure are involved (e.g., past-due child support and past-due, legally enforceable federal agency debt), see § 6402(d)(2).

[FN86]. Under § 6402(d)(3)(D), "OASDI overpayment" is defined as "any overpayment of benefits made to an individual under title II of the Social Security Act."


[FN88]. § 6402(d)(3)(C).

[FN89]. § 6402(d)(1)(C).


[FN93]. Id.


[FN95]. § 6402(e)(1).

[FN96]. Id.

[FN97]. § 6402(e)(2).

[FN98]. § 6402(e)(3).
[FN99] § 6402(e)(5).

[FN100] § 6402(e)(4)(A).


[FN102] § 6402(e)(5)(B).


[FN106] § 6402(e)(5).

[FN107] U.S. Const. amend. V.

[FN108] See U.S. Const. amend. XIV, § 1 (providing, in pertinent part, that "[n]o State shall... deprive any person of life, liberty, or property, without due process of law").

[FN109] See Fuentes v. Shevin, 407 U.S. 67, 81 (1972) ("If the right to notice and a hearing is to serve its full purpose, then, it is clear that it must be granted at a time when the deprivation can still be prevented.").


[FN111] 784 F.2d 1322 (5th Cir. 1986).

[FN112] Id. at 1324-25.


[FN115] See Glover v. Brady, No. 92-CIV-7686, 1994 WL 509918, at *4 (S.D.N.Y. Sept. 16, 1994) (holding that notice to the taxpayer was proper and in accord with due process because such notice was mailed to his last known address).


[FN117] See, e.g., Jones v. Cavazos, 889 F.2d 1043, 1047 (11th Cir. 1989) (holding that the woman allegedly in default on her student loans lacked standing to pursue her claim because asserted deficiencies with respect to the notice given, and the hearing made available, were not "the causes of injury" or "fairly traceable cause[s] of injury").
[FN118]. See Brown, 664 F. Supp. at 880 (concluding that due process does not require that the nonobligated spouse receive a separate notice because the notice to the obligated spouse, which explains procedures for protecting the refund share of the nonobligated spouse, "will inform the non-obligated spouse").

[FN119]. See Anderson v. White, 888 F.2d 985, 993 (3d Cir. 1989) (stating "[t]hat hearing must be 'timely and meaningful' to be constitutionally sufficient").

[FN120]. See Brown, 664 F. Supp. at 880 (explaining that the "full hearing need not occur before the initial deprivation" (citing Mathews v. Eldridge, 424 U.S. 319, 349 (1976))).

[FN121]. See, e.g., id. (noting that "some kind of opportunity is generally required" (citing Cleveland Bd. of Educ. v. Loudermill, 470 U.S. 532, 545 (1984))).


[FN125]. Id. (quoting Morrissey v. Brewer, 408 U.S. 471, 481 (1972)).


[FN127]. See id. at 341 (noting that "the possible length of wrongful deprivation of... benefits... is an important factor in assessing the impact of official action on the private interest" (quoting Fusari v. Steinberg, 419 U.S. 379, 389 (1975))).


[FN129]. See id. at 267 (explaining that due process requires that a recipient have "timely and adequate notice").

[FN130]. See id. at 264 (holding that "when welfare is discontinued, only a pre-termination evidentiary hearing provides the recipient with procedural due process").


[FN132]. See id. at 343-44 (applying the second prong of the test laid out by the Court).

[FN133]. See id. (concluding that issues of credibility and veracity are not likely to be present in a determination as to whether an individual is "disabled" because final professional decisions will turn on "routine, standard, and unbiased medical reports by physician specialists... concerning a subject whom they have personally examined").

[FN134]. Id. at 348.

[FN135]. Id.

[FN136]. Id. (quoting Joint Anti-Fascist Comm. v. McGrath, 341 U.S. 134, 143 (1940)).

[FN137]. Id. at 349 (urging the need for judicial confidence in the "good-faith" judgments of those charged by Congress with administering the social welfare program under discussion).

[FN139]. See supra note 3 and accompanying text (noting that taxpayers may rely on tax refunds to make special purchases).

[FN140]. See Theresa Glennon, Somebody's Child: Evaluating the Erosion of the Marital Presumption of Paternity, 102 W. Va. L. Rev. 547, 556 (2000) (stating that "genetic marker" (i.e., DNA) testing establishes paternity at probabilities higher than ninety-nine percent).


[FN142]. Id. at *1.


[FN144]. Id. at 1091. See also Mushero v. Ives, 949 F.2d 513, 522 (1st Cir. 1991) (holding that the mother's right to support prior to her filing of a support claim was a right she assigned to the state on application for AFDC and, thus, the state could secure amounts intercepted from the father's income tax refund).

[FN145]. Laub, 534 A.2d at 1095 (Johnson, J., dissenting).


[FN147]. § 285.3(e)(1).

[FN148]. See, e.g., United States v. Cheng, 840 F. Supp. 93, 95 (N.D. Cal. 1993) (holding that tax refund intercepts were appropriate with respect to the recipient of a federal educational award for failure to perform according to the terms of the award).


[FN150]. See § 285.2(f) (discussing the requirement of postoffset notice to the debtor, the credit agency, and the IRS).


[FN153]. Id. at 573-74. The court also held that reasonable steps to provide notice of the debt satisfied due process, regardless of whether notice was actually received. Id. at 575.


[FN155]. Id. at 225.

[FN156]. 911 F.2d 1158 (5th Cir. 1990).

[FN157]. Id. at 1163.


[FN160]. § 3720A(b), (h)(1).


[FN162]. § 3720A(b)(3).


[FN165]. § 6402(e)(5).

[FN166]. See § 6402(e)(5)(B) (defining "past-due, legally enforceable state income tax obligation" as a debt "which resulted from a State income tax which has been assessed but not collected").

[FN167]. § 6402(e)(5)(A).

[FN168]. See § 6402(e)(5)(B) (stating that a "past-due, legally enforceable State income tax obligation" may result from a state income tax which (1) has been assessed but not collected, (2) cannot be redetermined, and (3) has been delinquent for no more than ten years).

[FN169]. See § 6402(e) (stating the restrictions on offset provisions).

[FN170]. See, e.g., 31 C.F.R. § 285.3(c)(4)(ii) (2004) (requiring provision under federal regulations for precertification notification of a spouse filing a joint return with a child-support obligor subject to refund seizure). Such precertification notice to spouses is lacking in contexts involving federal agency debt, see § 285.2(d), or state income tax debt, see § 285.8(e)(3)(i); in those contexts, only postoffset notification is provided. See also § 285.2(f)(1)(ii), (g) (involving federal debt); § 285.8(e)(1)-(2) (involving state income tax debt).

[FN171]. See, e.g., § 285.2(f)(1)(ii), (g) (involving federal debt); § 285.3(e)(1)(ii), (f) (involving child support); § 285.8(e)(1)-(2) (involving state income tax debt).


[FN174]. Id. at 880.

[FN175]. See, e.g., § 285.2(d) (failing to provide for pre-offset notice to nonobligated spouses with respect to a federal-debt obligor with whom she is filing a joint return); § 285.8(e)(3)(i) (failing to provide for pre-offset notice to nonobligated spouses with respect to a state income tax obligor with whom she is filing a joint return). But see § 285.3(c)(4)(ii) (providing for pre-offset notice to nonobligated spouses with respect to a child-support obligor with whom she is filing a joint return).

[FN176]. See, e.g., § 285.2(f)(1)(ii), (g) (federal debt context); § 285.3(e)(1)(ii), (f) (child support context); § 285.8(e)(1)-(2) (state income tax context).


[FN178]. Id. at 602.

[FN180]. See 42 U.S.C. § 664(3)(B) (2000) (indicating that refunds seized from a joint return in which an amount is ultimately payable to the nonobligated spouse may be held by the state, under certain conditions, for up to six months); see also Rogers v. Bucks County Domestic Relations Section, 959 F.2d 1268, 1274 (3d Cir. 1992) (holding there is no constitutional or common law right requiring that intercepted tax refunds that may ultimately be paid over to a family should be held in an interest-bearing account where the interest ultimately would be paid over to the family as part of the refund rather than being retained by the state).

[FN181]. See Fuentes v. Shevin, 407 U.S. 67, 80 (1972) (indicating that a state allowed a postseizure hearing "if the aggrieved party shoulder[ed] the burden of initiating one").

[FN182]. Id. at 82 (internal quotation marks and citations omitted).

[FN183]. See generally WorldWideWeb Tax, How to Avoid an IRS Audit?, http://www.wwwebtax.com/audits/audit_avoiding.htm (last visited Aug. 23, 2005) (indicating that "[m]any taxpayers fear an IRS audit" and providing information meant to be used to minimize the likelihood of being audited).


[FN186]. But see Susan Bandes, The Negative Constitution: A Critique, 88 Mich. L. Rev. 2271, 2273, 2278-85 (1990) (noting that "[t]raditionally, the protections of the Constitution have been viewed largely as prohibitory constraints on the power of government, rather than affirmative duties with which government must comply" before arguing that this traditional view (i.e., the conventional wisdom) is flawed).

[FN187]. U.S. Const. amend. XVI.


[FN191]. See Amar, supra note 31, at 788-802 (discussing the theory, strengths, and weaknesses of intratextualism).

[FN192]. Id. at 748.

[FN193]. See, e.g., U.S. Const. art. I, § 2, cl. 3 (direct taxes); U.S. Const. art. I, § 9, cl. 1 (slave tax); U.S. Const. amend. XVI (income taxes).


[FN195]. For an excellent discussion of the meaning and intended limits of the general welfare clause, see John C. Eastman, Restoring the "General" to the General Welfare Clause, 4 Chap. L. Rev. 63 (2001).

[FN196]. The Constitution of the United States was approved September 17, 1787, by attendees of the Constitutional Convention. Chemerinsky, supra note 184, § 1.3, at 10. Ratification by the requisite number of states followed in 1788. Id. at 11. Income taxation formally originated with the ratification of the Sixteenth Amendment to the United States Constitution on February 3, 1913. Id. § 3.4.2, at 270.

[FN197]. U.S. Const. art. I, § 9, cl. 4.

The Sixteenth Amendment effectively trumps the prohibitions of Article I, Section 9, clause 4 of the Constitution.


Id. at 705-06.

See also Jahn v. Regan, 584 F. Supp. 399, 408 (E.D. Mich. 1984) (emphasizing that the amounts being collected were not, in fact, a tax and pointing out that after the collection of taxes, the government had no interest in the funds).


Id. at 614.

In Title 26 of the United States Code, we have § 1 (taxing the income of individuals), § 11 (taxing the income of corporations), § 511(a) (taxing the unrelated business income of charitable organizations), § 801 (taxing the income of life insurance companies), § 2001 (taxing the estate of a decedent), and § 3101(a) (taxing the income of employees for OASDI).

See, e.g., Saenz v. Roe, 526 U.S. 489, 508 (1999) (noting that "the taxing power, broad as it is, may not be invoked in such a way as to violate the privilege against self-incrimination").

U. Const. art. 1, § 8, cl. 1.


Id. at 866 (Stevens, J., dissenting). See also Div. of Child Support Enforcement v. Arrington, 29 Va. Cir. 273, 275 (Cir. Ct. 1992) (providing an example of the application of the ordering rules which require that (in AFDC cases) the State be reimbursed before any monies are paid over to the AFDC recipient); Plourde v. Plourde, 535 A.2d 966, 966 (N.H. 1987) (demonstrating that the goal of the tax refund intercept program (with respect to children receiving AFDC) is to ensure that states are reimbursed for prior AFDC payments, not to ensure that monies flow through to the minor child, even where direct child-support arrearages exist at the time of the intercept). But see Doucette v. Ives, 947 F.2d 21, 21 (1st Cir. 1991) (holding that in states where the AFDC payments fall short of the family standard of need (i.e., gap states), tax refund intercepts are to be used to "fill the gap" before being used to reimburse the state for prior AFDC payments).

See, e.g., McClelland v. Massinga, 786 F.2d 1205, 1214 (4th Cir. 1986) (holding that nonobligated spouses who made no contribution to the generation of a state income tax refund lacked standing to assert violation of their procedural due process rights when such refunds were intercepted to satisfy child-support obligations and further holding, with respect to the obligated spouses, that the statute authorizing the refund interception complied with due process even though the law did not require a full predeprivation evidentiary hearing because there were informal procedures provided predeprivation, and a full hearing was available postdeprivation); Jahn v. Regan, 610 F. Supp. 1269, 1272 (E.D. Mich. 1985) (holding that the spouse of the obligated parent could not assert a refund claim without following code-based procedural mandates and that intervening legal events rendered her procedural due process complaints moot); Eddy v. United States, No. 5:93-CV-0690, 1994 WL 369913, at *4-5 (N.D. Ohio Mar. 9, 1994) (concluding that the correction of the state's error rendered the taxpayer's claim moot).

U. Const. amend. X.

See 28 U.S.C. § 1346(a)(1) (2000) (granting federal courts jurisdiction to hear refund claims); see also 26 U.S.C. § 7422(a) (2000) (prohibiting the filing of a suit for refund until after a claim for refund or credit has been filed with the Service).

(FN213). See, e.g., Darby v. IRS, No. 95-1671, 1996 WL 172192, at *3 (D. Colo. Jan. 16, 1996) (citing the prohibitions of what was then § 6402(e) (but is now § 6402(f)) and refusing to acknowledge subject matter jurisdiction); Setlech v. United States, 816 F. Supp. 161, 165-66 (E.D.N.Y. 1993) (asserting the absence of subject matter jurisdiction because of what was then § 6402(e) (but is now § 6402(f)) and emphasizing that "[u]nder the doctrine of sovereign immunity, the United States of America, as a sovereign, possesses general immunity from suit unless the government expressly consents to suit" (citing United States v. Mitchell, 445 U.S. 535, 538 (1980)); Ygnatowiz v. United States, No. 96-345T, 1997 WL 625502, at *6 (Fed. Cl. Aug. 5, 1997) (citing the prohibitions of what was then § 6402(e) (but is now § 6402(f)) and refusing to acknowledge subject matter jurisdiction).


(FN215). Id. at 763. At least one court addressing § 6402 points to the withdrawal of federal court jurisdiction as a reflection of sound public policy. See Larsen v. Larsen, 671 F. Supp. 718, 719-20 (D. Utah 1987) (noting the "limited and purely ministerial role that the IRS plays in the [child-support-collection] scheme" and describing the jurisdictional protections of what was then § 6402(e) (now § 6402(f)) as further establishing an essential policy of removing the IRS from the fray).


(FN217). Id. at 654-55.


(FN219). Id. at 367.


(FN221). Id. at 276 (emphasis added).

(FN222). See, e.g., Downs v. McPherson, No. R-88-2662, 1988 WL 159128, at *1-2 (D. Md. Dec. 20, 1988) (concluding that the court did not have jurisdiction to hear the case because of § 6402(e) (now § 6402(f)) and concluding that the Declaratory Judgment Act could not be relied upon because, in the court's view, the suit involved "federal taxes").

(FN223). See Neal v. IRS, No. 93-291-PHX-RGS, 1993 WL 618256, at *1 (D. Ariz. Nov. 17, 1993) (vacated pursuant to settlement) (asserting that under § 6402(e) (now § 6402(f)), the court lacked subject matter jurisdiction to hear a case brought by a nonobligated spouse to recover a portion of a tax refund intercepted to pay her husband's child-support obligations).

(FN224). Chemerinsky, supra note 184, § 2.9.1, at 152 (citation omitted). See also Romero v. United States, 784 F.2d 1322, 1325 (5th Cir. 1986) (holding that the plaintiff was permitted to proceed against the United States (in the absence of the state certifying his child-support obligation) given that he complained of the constitutionality of a federal statute).


(FN226). § 6402(a).


(FN228). Id. at 594.

unjustified" conduct on the part of the IRS in refusing to pay over the nonobligated spouse's portion of an income tax refund and thereby allowing her to recover attorneys' fees and other reasonable litigation costs).

[FN230]. 34 F.3d 787 (9th Cir. 1994).

[FN231]. Id. at 788.

[FN232]. Id. at 789.

[FN233]. U.S. Const. amend. XI.

[FN234]. See Alden v. Maine, 527 U.S. 706, 712 (1999) (holding that "the powers delegated to Congress under Article I of the United States Constitution do not include the power to subject nonconsenting States to private suits for damages in state courts"); Jacobs v. United States, No. CV00-HGD-1053-S, 2001 WL 350214, at *2, (N.D. Ala. Feb. 22, 2001) ("[A]s a general rule, the Eleventh Amendment prohibits actions seeking a monetary award from a state, state agency or state employee sued in his or her official capacity. An individual may, however, bring suit if the state unequivocally has waived its immunity or if congressional legislation under § 5 of the Fourteenth Amendment operates as a waiver of the Eleventh Amendment's protection." (citations omitted)); see also Matthew Mustokoff, Sovereign Immunity and the Crisis of Constitutional Absolutism: Interpreting the Eleventh Amendment after Alden v. Maine, 53 Me. L. Rev. 81, 83-84 (2001) (arguing that the Alden Court adopted an excessively broad reading of the Eleventh Amendment).

[FN235]. 527 U.S. at 712.

[FN236]. See Moody v. Comm'r, 661 A.2d 156, 158 (Me. 1995) (holding that sovereign immunity protected the state from being forced to tender "gap payments" retroactively (i.e., to time periods preceding the handing down of Doucette v. Ives, 947 F.2d 21 (1st Cir. 1991))).

[FN237]. See Bandes, supra note 186, at 2278 (implying that if the government places a person in danger or otherwise restrains his liberty, then it is obligated to protect that person as its custodian).


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