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# The Problem of Appropriations Riders: The Bipartisan Budget Bill of 2013 as a Case Study

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# THE PROBLEM OF APPROPRIATIONS RIDERS: THE BIPARTISAN BUDGET BILL OF 2013 AS A CASE STUDY

Irene Scharf<sup>†</sup>

I.	INTRODUCTION.....	792
II.	CONTEXTUALIZING THE DEATH MASTER FILE .....	796
	A. <i>History, Purposes, Uses, and Abuses</i> .....	796
	B. <i>The DMF and Tax Fraud</i> .....	801
	1. <i>The IRS Ignored Persistent Warnings of PII Theft and         DMF Abuse</i> .....	806
	2. <i>Tax Return Identity Theft Caused by Sources Beyond         the DMF</i> .....	814
	a. <i>Misuse of State Databases</i> .....	814
	b. <i>Theft of Credit Card Information</i> .....	815
	c. <i>Public Access to Electronic Court Records (PACER)</i> . ..	816
	d. <i>Common Sloppiness (and Theft)</i> .....	816
	e. <i>Tax Refund Fraud against the Living</i> .....	816
III.	FORMULATING SECTION 203.....	817
	A. <i>Key Aspects of Section 203</i> .....	824
	B. <i>Concerns Raised about Section 203</i> .....	824
	1. <i>Legislators' Concerns</i> .....	825
	2. <i>Adverse Consequences</i> .....	831
	a. <i>To the Public DMF</i> .....	831
	b. <i>To Long-Term Users of the Public DMF</i> .....	832
IV.	CHALLENGING "BUSINESS AS USUAL" IN LEGISLATING.....	834
	A. <i>Section 203 Represents Creeping Congressional Constraint         of Core Democratic Principles</i> .....	836
	B. <i>Judicial Solutions to Issues Raised by Section 203's         Enactment—Legisprudence</i> .....	845
	1. <i>The Separation of Powers Doctrine Supports Scrutiny of         the Legislative Process</i> .....	845

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2.	<i>Rationality and Due Process Principles Restrain the Legislative Process</i> .....	847
a.	<i>Rational Legislating and the Legislative Process</i> .....	847
b.	<i>Due Process and the Legislative Process</i> .....	852
c.	<i>Theories of Legislating Support the Foregoing Suggestions</i> .....	855
C.	<i>Equitable Estoppel Principles Can Forestall Threats to Core Democratic Principles</i> .....	856
V.	CONCLUSION .....	862

## I. INTRODUCTION

The Bipartisan Budget Bill of 2013 contains an obscure provision—Section 203<sup>1</sup>—titled *Restriction on Access to the Death Master File*,<sup>2</sup> which was promoted as a safeguard against identity theft.<sup>3</sup> The legislation, which blocks access for a number of years to vital records that have been publically available for decades, does little to achieve its goal. It does, however, threaten to undermine trust in the U.S. Congress because of the process through which it was enacted. While identity theft is a serious problem, it is curious why such a harsh measure as the enactment of Section 203 was taken because only a small portion of it is traceable to the Death Master File (DMF).<sup>4</sup> Especially given that the 113th Congress was

1. Act of Dec. 26, 2013, Pub. L. No.113-67, 127 Stat. 1165, 1177 (2013) (codified at 42 U.S.C. § 1306c (2014)). Author's references to Section 203 will be cited to the enacted code section. *Restriction on Access to the Death Master File*, 42 U.S.C. § 1306 (2014).

2. Resolution Making Continuing Appropriations, H.R.J. Res. 59, 113th Cong. (2013 enacted). Most provisions were effective on March 26, 2014.

3. See *infra* text accompanying notes 153–69 (discussing the motivating factors, including instances of identity theft, that prompted the 113th Congress to pass Section 203).

4. See *infra* Section II.B.2. Most IRS fraud cases have little connection with the DMF. In one example, in January 2014, a Floridian was sentenced for buying eight hundred identities from a hospital and then requesting \$11,000,000 in fraudulent tax refunds. Curt Anderson, *Prosecutor: Florida Tops U.S. in Identity Theft, Tax Fraud*, NAPLES DAILY NEWS LEDGER, <http://www.theledger.com/article/20140115/news/140119423?p=1&tc=pg> (Jan. 15, 2014). Identity theft costs up to \$100,000,000 a year. See Kurt M. Saunders & Bruce Zucker, *Counteracting Identity Fraud in the Information Age: The Identity Theft and Assumption Deterrence Act*, 8 CORNELL J. L. & PUB. POL'Y 661, 663 (1999) (citing Mark Grossman, *The Other You: The Misery of Identity Theft*, BROWARD DAILY BUS. REV., Sept. 4, 1998, at B1). During

infamous for its inaction,<sup>5</sup> one can only wonder whether, trying to project competence, the 113th Congress ignored legitimate efforts to address identity theft by blaming tax return fraud not on the thieves but on the DMF.<sup>6</sup> The prevention of public access to the DMF, long a legitimate source of research,<sup>7</sup> is a hardship to many.

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the 1990s, these losses doubled and cases reported to the Social Security Administration (SSA) tripled. *Id.* Credit reporting firms indicated that fraud reports jumped from fewer than twelve thousand in 1992 to over fifty thousand by 1998. Kathy M. Kristof, *New Law to Assist Victims in Fight against Identity Fraud*, L.A. TIMES (Oct. 31, 1998), <http://articles.latimes.com/1998/oct/31/business/fi-37782>; see Saunders & Zucker, *supra* at 4; see also Kristen M. Blankley, Note, *Are Public Records Too Public? Why Personally Identifying Information Should be Removed from Both Online and Print Versions of Court Documents*, 65 OHIO ST. L.J. 413, 418 n.18 (2004); Stephanie Byers, Note, *The Internet: Privacy Lost, Identities Stolen*, 40 BRANDEIS L.J. 141, 148–62 (2001) (comparing federal, state, and multinational solutions). The Death Master File (DMF) was created as a result of a 1980 consent judgment in a Freedom of Information Act (FOIA) case, *Perholz v. Ross*, which required that deceased persons' identifying information, including social security numbers (SSNs), be made public. See *Strengthen the Integrity and Protection of the Social Security Number: Hearing on Social Security's Death Records before Subcomm. on Soc. Sec. & Comm. on Ways and Means*, 112th Cong. 3 (2012) [hereinafter *Hearing on Social Security's Death Records*], <http://oig.ssa.gov/sites/default/files/testimony/Death%20Master%20File%20Written%20Statement%20FINAL.pdf> (statement for the record by the Hon. Patrick P. O'Carroll, Jr.). Vital records relate to births, marriages, deaths, diseases, etc. that are required to be kept by the government. *Vital Statistics*, BLACK'S LAW DICTIONARY (10th ed. 2014). Divorces are also presumably included in this list.

5. See Ezra Klein & Evan Soltas, *Wonkbook: Is This the Laziest Congress Ever?*, WASH. POST (July 2, 2013), <http://www.washingtonpost.com/blogs/wonkblog/wp/2013/07/02/wonkbook-is-this-the-laziest-congress-ever/>; see also Derek Willis, *A Do-Nothing Congress? Well, Pretty Close*, N.Y. TIMES (May 28, 2014), [http://www.nytimes.com/2014/05/28/upshot/a-do-nothing-congress-well-pretty-close.html?\\_r=0&abt=0002&abg=0](http://www.nytimes.com/2014/05/28/upshot/a-do-nothing-congress-well-pretty-close.html?_r=0&abt=0002&abg=0); Frank James, *5 Achievements of the 113th Congress (So Far)*, NPR (Dec. 27, 2013, 3:06 PM), <http://www.npr.org/blogs/itsallpolitics/2013/12/27/256621840/five-achievements-of-the-113th-congress-s-first-year>.

6. See *infra* Section II.B.1 (discussing how the IRS ignored sources of identity theft). DMF theft was involved in the 2013 case of Tania Henderson, who was sentenced to 144 months in prison and \$835,883 restitution, for theft of identity and government funds in stealing identities of more than four hundred people, many deceased, filing returns under their names and SSNs. INTERNAL REVENUE SERV., *IRS Criminal Investigation Combats Identity Theft Refund Fraud* (2014), <https://www.irs.gov/uac/Newsroom/IRS-Criminal-Investigation-Combats-Identity-Theft-Refund-Fraud>. However, the IRS took no responsibility for issuing these payments, even though it would have learned of the fraud had it compared the SSNs with the DMF. *Id.*

7. The DMF has been publically accessible electronically since the 1960s.

Undoubtedly, in these times, privacy is imperiled. Regrettably, public confidence in the government's appreciation for privacy was shattered with Edward Snowden's 2013 exposures (which still continue)<sup>8</sup> revealing the extent to which the government, through the National Security Agency (NSA), has been spying on us for years.<sup>9</sup> This extralegal conduct<sup>10</sup> extended to both private e-mails and phone calls.<sup>11</sup>

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Leah McGrath Goodman, *Returns of the Living Dead*, NEWSWEEK (Dec. 18, 2013, 7:43 PM), <http://www.newsweek.com/2013/12/20/returns-living-dead-244944.html>.

8. In October 2014, the extent of mail monitoring since September 11, 2011 became evident. See Ron Nixon, *Report Reveals Wider Tracking of Mail in U.S.*, N.Y. TIMES (Oct. 27, 2014), <http://www.nytimes.com/2014/10/28/us/us-secretly-monitoring-mail-of-thousands.html>. The report, available after a FOIA request by the *New York Times* (NYT), exposed that "the surveillance program was used by a county attorney and sheriff" in Arizona "to investigate a political opponent [of notorious Maricopa County sheriff, Joe Arpaio] and to monitor privileged communications between lawyers and their clients," in violation of postal regulations. *Id.*; see also CITIZENFOUR, (HBO Films 2014).

9. The "N.S.A. program was disclosed and then declassified . . . following leaks by Edward J. Snowden, the former N.S.A. contractor;" a review group determined that "the bulk collection is illegal, rejecting the government's Patriot Act interpretation." Charlie Savage, *Obama to Call for End to N.S.A.'s Bulk Data Collection*, N.Y. TIMES (Mar. 24, 2014), <http://www.nytimes.com/2014/03/25/us/obama-to-seek-nsa-curb-on-call-data.html> [hereinafter Savage, Mar. 24, 2014]. The program "was part of the secret surveillance program that President George W. Bush . . . put in place after the . . . attacks of Sept. 11, 2001, outside of any legal framework . . . . In 2006, . . . the Justice Department persuaded the surveillance court to begin authorizing [it]." *Id.* Acknowledgement of government spying was confirmed by President Obama's order "to curtail government surveillance" by increasing "limits on access to bulk telephone data" and implementing "privacy safeguards for foreigners." Peter Baker & Charlie Savage, *Obama to Place Some Restraints on Surveillance*, N.Y. TIMES, Jan. 15, 2014, at A1. In March 2014, the Obama administration issued a plan to overhaul the National Security Agency's (NSA) bulk phone records program. See Savage, Mar. 24 2014, *supra*. The proposal ended the NSA's "systematic collection of data about Americans' 'calling habits,'" requiring NSA to "obtain specific records only with" judicial permission. *Id.*; see also Charles Savage, *N.S.A. Program Gathers Data on a Third of Nation's Calls, Officials Say*, N.Y. TIMES, Feb. 8, 2014, at A11; Charles Savage, *Obama Says N.S.A. Curbs Would Address Worries*, N.Y. TIMES, Mar. 26, 2014, at A16.

10. Jill Kelley sued the government in 2014 for accessing her e-mail and releasing her name in connection with a scandal causing General David Petraeus, then CIA director, to resign. Jennifer Steinhauer, *From Petraeus Scandal, an Apostle for Privacy*, N.Y. TIMES, Jan. 6, 2014, at A1, A11.

11. See James Ball & Spencer Ackerman, *NSA Loophole Allows Warrantless Search for US Citizens' E-mails and Phone Calls*, THE GUARDIAN (Aug. 9, 2013),

Even apart from Snowden's dramatic exposures, privacy was already in jeopardy. Loss of an expectation of privacy in Social Security Numbers (SSNs), for instance, is so assumed that many courts have long held that the tort standard of "reasonable expectation of privacy" no longer applies to these numbers.<sup>12</sup>

This article tells the story of the enactment of the bill containing Section 203.<sup>13</sup> It also provides context for Congress's widespread practice of inserting substantive provisions into appropriations bills, and argues that this practice is inappropriate and counterproductive.<sup>14</sup> Enacted in haste, at the end of a lengthy and historically contentious legislative session plagued by threats of an unfunded government,<sup>15</sup> Section 203 was slipped into a bill about a wholly different topic—"keeping the government open and functioning"<sup>16</sup>—without input from key legislators or stakeholders. Hence, its difficulties were foreseeable.

Part II of this piece offers background about the DMF and its uses, early warnings regarding security problems, and sources of identity theft other than the DMF. Part III uncovers the process of enacting Section 203, the congressional opposition to it, and the adverse consequences of Section 203's enactment. The article concludes that Section 203's enactment, as accomplished by bypassing congressional rules, was both misguided and a diversion

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<http://www.theguardian.com/world/2013/aug/09/nsa-loop-hole-warrantless-searches-email-calls>; see also Ellen Nakashima & Greg Miller, *Obama Calls for Significant Changes in Collection of Phone Records of U.S. Citizens*, WASH. POST (Jan. 17, 2014), [http://www.washingtonpost.com/politics/in-speech-obama-to-call-for-restructuring-of-nsas-surveillance-program/2014/01/17/e9d5a8ba-7ffe-11e3-95c6-0a7aa80874bc\\_story.html](http://www.washingtonpost.com/politics/in-speech-obama-to-call-for-restructuring-of-nsas-surveillance-program/2014/01/17/e9d5a8ba-7ffe-11e3-95c6-0a7aa80874bc_story.html).

12. Katharine Madison Burnett, *Illegal Immigration, Social Security Numbers, and the Federal Privacy Act: A Suggested Avenue of Litigation*, 25 GA. ST. U. L. REV. 503, 510 (2008).

13. See *infra* Section II.A.

14. See *infra* Section II.A and text accompanying notes 209–53.

15. See Tom Cohen, *House GOP Launches Shutdown Battle by Voting to Defund Obamacare*, CNN (Sept. 20, 2013), <http://www.cnn.com/2013/09/20/politics/congress-spending-showdown/index.html>.

16. See Lori Montgomery, *Senate Passes Bipartisan Budget Agreement*, WASH. POST (Dec. 18, 2013), [http://www.washingtonpost.com/politics/senate-poised-to-pass-bipartisan-budget-agreement/2013/12/18/54fd3a1a-6807-11e3-a0b9-249bbb34602c\\_story.html](http://www.washingtonpost.com/politics/senate-poised-to-pass-bipartisan-budget-agreement/2013/12/18/54fd3a1a-6807-11e3-a0b9-249bbb34602c_story.html) ("The agreement draws to a close nearly three years of fighting over . . . budgets . . . that repeatedly risked shutting down the government and actually did close parks, museums and federal offices . . . in October."); see also *infra* Part II.

from correcting profound governmental failures involving long-term fraudulent use of personal information. This enactment process threatens to exacerbate the public's profound lack of confidence in Congress<sup>17</sup>—the only branch created to be democratic<sup>18</sup>—and to erode core democratic principles. Part VI offers theories, based in both law and equity, that challenge the current process to revive some confidence in government.

## II. CONTEXTUALIZING THE DEATH MASTER FILE

### A. *History, Purposes, Uses, and Abuses*

The DMF, the commercial and publicly available version of which is commonly known as the Social Security Death Index (SSDI),<sup>19</sup> is a computer database file created to prevent fraud and theft,<sup>20</sup> made widely available in 1980 by the Social Security

17. John Martinez, *Rational Legislating*, 34 STETSON L. REV. 547, 555 n.22 (2005) (citing WILLIAM J. KEEFE & MORRIS S. OGUL, *THE AMERICAN LEGISLATIVE PROCESS: CONGRESS AND THE STATES* 3–18 (9th ed. 1997) (discussing discontent over Congress)); see KEEFE & OGUL at 7 (“[I]nstitutional arrangements in the legislature obscure the public’s view of the decision-making process and . . . make it difficult to fix responsibility for actions . . .”). “[I]n seventeen Gallup surveys between 1973 and 1995 . . . the confidence level [in Congress] averaged . . . 30 percent. In 1994, . . . [it] slipped to 18 percent . . . . By 1995, confidence was . . . 21 percent . . . . In 1994, ‘(e)ight out of ten voters’ surveyed believed ‘members care more about keeping power than . . . the best interests of the nation, . . . more about special interests . . . than . . . the average person . . . ,’ and that three-quarters of voters believe Congressional candidates ‘make campaign promises they have no intention of fulfilling;’ and ‘fewer than a third believe most members have a high personal moral code.’” *Id.* at 15.

18. U.S. CONST. art. I; see also *Democracy*, MERRIAM-WEBSTER, <http://www.merriam-webster.com/dictionary/democracy> (last visited Oct. 23, 2015) (defining democracy as, “a: government by the people; *especially*: rule of the majority . . . b: a government in which the supreme power is vested in the people and exercised by them directly or indirectly through a system of representation . . .”).

19. I sometimes refer to the publicly available information in the DMF as “Public DMF.”

20. TREASURY INSPECTOR GENERAL FOR TAX ADMINISTRATION (TIGTA), *Detection Has Improved; However, Identity Theft Continues to Result in Billions of Dollars in Potentially Fraudulent Tax Refunds*, No. 2013-40-122 n. 16 (Sept. 20, 2013), [http://www.treasury.gov/tigta/auditreports/2013reports/201340122fr.html#\\_](http://www.treasury.gov/tigta/auditreports/2013reports/201340122fr.html#_) [hereinafter TIGTA Report Sept. 20, 2013]. For overview, see *Limited Access DMF Overview and Usage*, SOCIAL SECURITY DEATH MASTER FILE, [www.ssdmf.com](http://www.ssdmf.com) (follow “About Us” hyperlink; then click on “Overview” hyperlink) (last visited Feb. 2,

Administration (SSA) after a consent decree in a Freedom of Information Act (FOIA) case.<sup>21</sup> The SSA provides the DMF to the Department of Commerce's (DOC) National Technical Information Service (NTIS), which sells the data to public and private organizations.<sup>22</sup> The files contain information about deaths that have been reported to the SSA since 1936.<sup>23</sup> Until late 2011,<sup>24</sup> DMF data contained the deceased's full name, SSN, dates of birth and death, state, county, zip code of the last known address, and zip code where lump sum death benefit payments were sent.<sup>25</sup> Other federal agencies use this information,<sup>26</sup> as do states and localities, life insurance and pension providers, genealogists, scientists, and social scientists. Until President Obama signed the

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2016); see also Claudia Hill, *Death & Taxes & Identity Theft*, FORBES at para. 4 (Aug. 1, 2011, 7:14 PM), <http://www.forbes.com/sites/irswatch/2011/08/01/death-taxes-identity-theft/#5f8f9963472c> ("The DMF has been . . . one of the government's most effective weapons against financial fraud, since assuming the identity of a dead person has . . . been a favorite ploy of criminals.").

21. FOIA provides access to federal agency records. 5 U.S.C. § 552 (2014). See also *National Taxpayer Advocate Annual Report to Congress*, TAXPAYER ADVOCATE SERVICE (Dec. 31, 2012) [hereinafter *National Taxpayer Advocate*], <http://www.taxpayeradvocate.irs.gov/2012-Annual-Report/downloads/2012-Annual-Report-to-Congress-Executive-Summary.pdf>.

22. See *Hearing on Social Security's Death Records*, supra note 4, at 1. (statement for the record by Honorable Patrick P. O'Carroll, Jr. before the 112th Congress).

23. Goodman, *Returns of the Living Dead*, supra note 7. Until Section 203, the DMF was considered a public document under FOIA. *Id.*

24. In November 2011, citing a federal rule prohibiting it from disclosing death information received through state contracts, the SSA quietly reduced the Public DMF records it provided to NTIS by about 4.2 million to include only name, SSN, birth and death dates. See *Hearing on Social Security's Death Records*, supra note 4, at 1. This resulted in a thirty-six percent reduction of deaths reported in the DMF. Earl F. Glynn, *Research Limitations with "New" Death Master File*, WATCHDOGLABS (Aug. 9, 2012, 3:43 AM), <https://web.archive.org/web/20140412224630/http://watchdoglabs.org/blog/2012/08/09/research-limitations-with-new-death-master-file/>. The SSA still provides NTIS information it receives from funeral homes, hospitals, postal authorities, financial institutions, families, etc.

25. *Hearing Before the Ways and Means Soc. Sec. Subcomm., Comm. on Fin. Servs. Subcomm. on Oversight and Investigations*, 114th Cong. (2001), [https://ssa.gov/legislation/testimony\\_110801.html](https://ssa.gov/legislation/testimony_110801.html).

26. These agencies include the State Department of Education, the National Institution for Occupational Safety and Health, the IRS, the Brooks Air Force Base, the Department of the Treasury, and the Department of Commerce.



bill that contained Section 203, the DMF was free, open to the public, and updated regularly.<sup>27</sup>

The DMF is useful to a wide variety of researchers, genealogists included.<sup>28</sup> While some characterize genealogy as a trivial hobby,<sup>29</sup> many disagree:

[R]esearching one's family history often is more than merely a hobby. It may be critically important in tracing inherited medical diseases as well as in the reunification of family members long thought lost or never known to have existed. Records access does not simply satisfy intellectual curiosity . . . [I]t may save lives. . . [A]ccess to vital records not only is critical for genealogical research, but actually prevents identity theft. . . [S]ince use of a death record proves that a person actually is deceased, the decedent's information could not be used fraudulently by others.<sup>30</sup>

Professional genealogists often use the DMF as a tool to assist the work of courts and of agencies. Board certification<sup>31</sup> allows

27. Brian Naylor, *Tighter Access to "Death Master File" Has Researchers Worried*, NPR (Jan. 6, 2014, 5:37 PM), <http://www.npr.org/2014/01/06/260188571/tighter-access-to-us-deaths-list-has-researchers-grim>.

28. See generally Goodman, *Returns of the Living Dead*, *supra* note 7.

29. *Tax Admin. Reform Discussion Draft: Hearing Before the Comm. of Fin.*, at 2 (2014), <http://www.fgs.org/rpac/wp-content/uploads/2014/01/RPAC-Feedback-to-SFC-Discussion-Draft-20-Jan-2013-Final2.pdf> [hereinafter Moss Testimony] (statement of Frederick E. Moss, Member, Rec. Preservation & Access Comm.); see also Jan Meisels Allen, *Letter to Hearing before U.S. S. Fin. Comm., Subcomm. on Fiscal Resp. and Econ. Growth*, at 2 (2012), <http://www.fgs.org/rpac/wp-content/uploads/2012/04/iajgs-statement-for-the-record-senate-sub-cmte-on-fiscal-responsibility-final-2.pdf> [hereinafter Allen Statement Mar. 2012] ("Millions of Americans are interested in their family history; . . . 73% . . . believe it is important to pass along their family's lineage . . . ."); see Russell Bangerter, *Researching Family History: Genealogy is More Than Just a Hobby*, DESERET NEWS (Mar. 13, 2012, 5:00 AM), <http://www.deseretnews.com/article/865552024/Genealogy-is-more-than-just-a-hobby.html?pg=all>.

30. Jan Meisels Allen, *Restriction of Access to Records is Increasing Threat to Genealogical Research*, 29 AVOTAYNU 3 (2013), <http://www.iajgs.org/pramc/2013FallPage03AllenPart1.rlm.pdf> [hereinafter Allen, AVOTAYNU]. For medical risk aggravation from delays tracking inheritable conditions, see MASS. GENEALOGICAL COUNCIL, *Framing a Discussion on Vital Records Access*, 2, 13 (2009), [http://www.fgs.org/rpac/wp-content/uploads/2011/10/mgc\\_white\\_paper.pdf](http://www.fgs.org/rpac/wp-content/uploads/2011/10/mgc_white_paper.pdf) (citing E-mail from Melinde Lutz Sanborn, Vice President of MGC, to Jan Alpert, President of the National Genealogical Society (May 2, 2009) (on file with author)).

31. *Board for Certification of Genealogists*, BOARD FOR CERTIFICATION OF

courts to recognize genealogists as experts “in kinship determination and identity. A significant number . . . work for probate courts, lawyers, coroners, police departments, Native American tribal councils, the U.S. Bureau of Indian Affairs, and the U.S. Department of Defense.”<sup>32</sup>

Forensic genealogists determine issues of lineage and genetics-associated diseases, repatriate stolen art, assist military repatriations, prove Indian tribal membership for various benefits, locate heirs in estate cases, determine real estate, oil, gas, and mineral rights, as well as quiet title actions, resolve immigration issues, prove claims in coroners’ and unclaimed kin cases, and assist in adoption cases.<sup>33</sup>

Other researchers also rely on the DMF. For example, economists use it to research “the effects of government policies, economic conditions, and other factors on mortality.”<sup>34</sup> DMF-based information impacts research that “generate[s] important information for policymakers.”<sup>35</sup> For example, projects such as Health and Retirement Study, the Panel Study on Dynamics, and the National Longitudinal Survey, use data from the DMF to “identify decedents in a timely manner and at low cost.”<sup>36</sup> This data is also used by researchers who are studying “savings and wealth accumulation, retirement, health care, disability, biomarkers, and cognition in the U.S. population.”<sup>37</sup> The DMF is also used to “examine the links between early life circumstances such as birth weight and longevity, and the intergenerational effects of parents

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GENEALOGISTS, Bcgcertification.org (last visited Jan. 14, 2016).

32. Barbara J. Mathews, *Answers to Questions from the School of Government at the University of North Carolina*, BOARD FOR CERTIFICATION OF GENEALOGISTS, at 2 (Mar. 4, 2013), <http://bcgcertification.org/blog/wp-content/uploads/2013/03/BCGresponseUNCquestions4Mar2013.pdf>

33. See *Hearing before the H. Comm. on Ways and Means, Subcomm. on Soc. Sec., Written Comments on Provisions Relating to Social Security Administration’s Death Master File*, 112th Cong. 179 (2012), <http://www.gpo.gov/fdsys/pkg/CHRG-112hhr78179/pdf/CHRG-112hhr78179.pdf> [hereinafter Ryesky Statement Feb. 5, 2012] (citing 12 U.S.C. § 1715z-13b(a)(6)(B)(i)) (statement of Kenneth. H. Ryesky); see also Moss Testimony, *supra* note 29, at Exhibit A.

34. Jonathan S. Skinner, Comment Letter on Proposed Rule for Certification Program for Access to the Death Master File (Mar. 30, 2015), <http://www.regulations.gov/#!documentDetail;D=DOC-2014-0001-0078>.

35. *Id.*

36. *Id.*

37. *Id.*

socioeconomic status and their childrens [sic] longevity,”<sup>38</sup> as “[u]nderstanding . . . health and longevity in the elderly . . . is essential for forecasting . . . Social Security, Medicare, and Medicaid liabilities.”<sup>39</sup> Additionally, the DMF allows researchers to analyze how economic changes, as well as changes in health policy and other programs, impact population health over time.<sup>40</sup> Other methods of data collection, such as smaller surveys and “incomplete samples,” do not allow researchers this opportunity.<sup>41</sup>

Another example are medical researchers, who refer to the DMF to study the “federal assessments of hospital safety,” as well as “efforts by the financial industry to spot consumer fraud,”<sup>42</sup> and to conduct studies such as the Nurses’ Health Study, a longitudinal cancer study of two hundred thousand women.<sup>43</sup>

The DMF also supports statistical work, such as that completed by the Nationwide Professional Statisticians’ Association and the Council of Professional Associations on Federal Statistics, which represents over three hundred thousand people, all of whom “rely on timely and accessible federal statistics to inform program decisions or to conduct research and . . . program evaluation.”<sup>44</sup> Timely information on death is critical for program and policy evaluation. Indeed, it is impossible to assess the mortality impacts of various factors beyond health insurance, including education, federal program enrollment, or healthcare quality, without access to an updated DMF.<sup>45</sup> Moreover, two influential longitudinal surveys, the Health and Retirement Study and the Panel Study of Income Dynamics, both of which are used by social and health scientists, rely on DMF data to confirm participants’ deaths.<sup>46</sup>

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38. *Id.*

39. *Id.*

40. *Id.*

41. *Id.*

42. Kevin Sack, *Researchers Wring Hands as U.S. Clamps Down on Death Record Access*, N.Y. TIMES, Oct. 9, 2012, at A17. The Centers for Disease Control maintains a database, but it charges fees. *Id.*

43. *Id.* (noting that this study is hindered by Section 203).

44. Letter from Katherine R. Smith, Executive Director, Council of Professional Associations on Federal Statistics, to National Technical Information Service (Mar. 23, 2015) (on file with author).

45. *Id.*

46. *Id.*

Currently, there is no good alternative source for researchers to get this mortality information.<sup>47</sup>

Section 203 has jeopardized this research by terminating those without prior certification from access to recent DMF entries, which is a difficult, expensive, and cumbersome process.<sup>48</sup> While Section 203 impedes these researchers' work, in enacting Section 203, Congress also failed to hold accountable either the Internal Revenue Service (IRS) or the Treasury Department (Treasury), key departments responsible for both causing and exacerbating the lapses in privacy protection.<sup>49</sup> Closing off the DMF will likely exacerbate fraud.<sup>50</sup> The DMF is "not the source of the fraud," and is actually a mechanism to stop fraud, therefore denying access to the DMF will not end the fraud.<sup>51</sup> In fact, "[n]ow that the SSDI is behind a pay wall which can track who accesses which record, the identity thieves are migrating . . . to living people . . . whose SSNs are available from a plethora of sources . . . ."<sup>52</sup>

### B. *The DMF and Tax Fraud*

While identity theft has been documented for nearly two decades,<sup>53</sup> it was in the aftermath of the September 11, 2001 attacks that privacy protections and fraudulent misuse of SSNs began to

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47. *Id.*

48. See Moss Testimony, *supra* note 29, at 4. Anecdotal information indicates that universities are refusing their researchers permission to apply for certification because of objections to the affirmations. For Section 203 details and interim regulations, see *infra* Section II.A.

49. Kenneth H. Ryesky, Comments to *Into the Sunset for SSDI*, LEGAL GENEALOGIST BLOG (July 23, 2013, 3:43 PM), <http://www.legalgenealogist.com/blog/2013/07/23/johnson-into-the-sunset-for-ssdi/> [hereinafter Ryesky Blog Comments July 23, 2013].

50. Goodman, *Returns of the Living Dead*, *supra* note 7.

51. Leah McGrath Goodman, *The Deathly Flaw Buried in the Budget Deal*, NEWSWEEK (Dec. 13, 2013), <http://www.newsweek.com/deathly-flaw-buried-deep-budget-deal-224764> [hereinafter Goodman, *The Deathly Flaw*].

52. Ryesky Blog Comments July 23, 2013, *supra* note 49. Following complaints that thieves were exploiting the DMF, many genealogy websites withheld SSN access; Ancestry.com did so in November 2011. See Kerry Kavanaugh, *Police: ID Fraud Victims Tied to Ancestry.com*, WSBTV (Mar. 2, 2012, 6:20 PM), <http://www.wsbtv.com/news/news/local/police-id-fraud-victims-tied-ancestrycom/nLKQ3/>.

53. Documentation exists from 1997. See Jonathan J. Darrow & Stephen D. Lichtenstein, "Do You Really Need My Social Security Number?" *Data Collection Practices in the Digital Age*, 10 N.C. J. L. & TECH. 1, 8 (2008).

receive attention from Congress.<sup>54</sup> Legislative activity was scant before 2011. In September 2011, identical identity theft bills were introduced in the Senate and in the House of Representatives (House).<sup>55</sup> Each of these bills would have restricted DMF access to a decedent's records for one year following their death and implemented a certification program to exempt some researchers from that delay.<sup>56</sup>

Ironically, IRS actions triggered the significant tax fraud issues. The administration of George W. Bush, implementing the *Economic Growth and Tax Relief Reconciliation Act of 2001*, sought to distribute stimulus payments to taxpayers quickly,<sup>57</sup> expediting refunds by suspending DMF cross-checking,<sup>58</sup> thus enabling the fraudsters.<sup>59</sup>

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54. See *How SSA Gathers and Distributes Death Information, Hearing on the Social Security Number Privacy and Identity Theft Prevention Act of 2001, H.R. 2036, Before the Comm. on Fin. Serus. Subcomm. on Oversight and Investigations*, 107th Cong. (2001), [https://ssa.gov/legislation/testimony\\_110801.html](https://ssa.gov/legislation/testimony_110801.html) (statement of Frederick Streckewald, Acting Assistant Deputy Comm'r for Disability and Income Security Programs). In 1976, the Federal Advisory Committee on False Identification reported criminal use of false identification as "a multibillion dollar . . . problem." U.S. Dep't. of Justice, *THE REPORT OF THE FEDERAL ADVISORY COMMITTEE ON FALSE IDENTIFICATION* xi (1976), <http://babel.hathitrust.org/cgi/pt?id=uc1.b4178088;view=1up;seq=17> (last visited Oct. 30, 2015).

55. See S. 1534, 112th Cong. § 9 (2011) (Sen. Nelson, Fla., proposing); H.R. Res. 3215, 112th Cong. § 9 (2011) (Rep. Castor, Fla., proposing). This short-lived embargo contrasts with the three/four-year embargo in Section 203. 42 U.S.C.A. § 1306c(a).

56. S. 1534; H.R. Res. 3215.

57. EGTRRA, Pub. L. No. 107-16, 115 Stat. 38 (2001). See Press Release, U.S. S. Comm. on Fin., Baucus Presses IRS Nominee for Quick Action on Stimulus Checks (Jan. 29, 2008), <http://www.finance.senate.gov/newsroom/chairman/release/?id=64ecc461-7f5b-4b82-b5bb-22a3bb1d0fd2> ("We need to be certain of the ability of the IRS to respond quickly in getting much-needed tax rebates into the hands of millions of Americans," [Senator Max] Baucus said.).

58. Because refunds are often distributed before employers submit wage information, the IRS has no time to verify the information. U.S. GOV'T ACCOUNTABILITY OFFICE, *IDENTITY THEFT: ADDITIONAL ACTIONS COULD HELP IRS COMBAT THE LARGE, EVOLVING THREAT OF REFUND FRAUD* (2014), <http://www.gao.gov/assets/670/665368.pdf>. Moreover, the IRS processed returns without using all data available to validate that only qualifying children were claimed, or to identify returns that might be fraudulently using SSNs of the deceased. TREASURY INSPECTOR GENERAL FOR TAX ADMIN., *SEMIANNUAL REPORT TO CONGRESS* (2004), [http://www.treasury.gov/tigta/semiannual/semiannual\\_sept2004.htm](http://www.treasury.gov/tigta/semiannual/semiannual_sept2004.htm).

59. Treasury audits found "that the IRS frequently issues refunds before checking to see whether the recipient has died." Gregory Korte, *'Death Master File' Remains Fodder for Scams*, USA TODAY (Feb. 6, 2014, 5:35 PM),

Though it is unclear how the fraudsters learned of this lax oversight, most likely they had already filed false claims, so, when some were approved, the verification weaknesses became evident, prompting more fraud.<sup>60</sup> Undoubtedly, had hospitals, insurance companies, or other private entities holding this information operated in a similar fashion, public outcry and litigation would have ensued.<sup>61</sup>

There have been only a few successful criminal prosecutions<sup>62</sup> of cases in which the SSNs of deceased persons were stolen from

<http://www.usatoday.com/story/news/politics/2014/02/06/anti-fraud-efforts-stalled-as-death-master-file-lives-on/5231223>. In 2011, there were nineteen thousand such returns. *Id.*

60. Michael Kranish, *IRS Is Overwhelmed by Identity Theft Fraud*, BOS. GLOBE (Feb. 16, 2014), <http://www.bostonglobe.com/news/nation/2014/02/16/identity-theft-taxpayer-information-major-problem-for-irs/7SC0BarZMDvy07bbhDXwvN/story.html> (“When the IRS gets a return that claims a refund, [it] does not have the ability to check that the taxpayer is entitled to’ it, former IRS commissioner Gibbs explained. ‘They just send the check. The crooks found out it was nirvana, and . . . you have seen a massive influx of fraud.’”).

61. Likely common law causes of actions could have included negligence, invasion of privacy, and intentional or reckless infliction of emotional distress.

62. In one prosecution, the government alleged that defendant Ivory Bolen used DMF data from online genealogy sites and prison records. Ms. Bolen admitted obtaining SSNs and other personal identifying information (PII), even concerning children, thereupon filing tax returns. *See Zaneta Lowe, Woman Pleads Guilty to Tax Fraud, Admits She Stole IDs from Dead People*, WREG MEMPHIS (Apr. 22, 2014 2:39 PM), <http://wreg.com/2014/04/22/women-pleads-guilty-to-tax-fraud-admits-she-stole-ids-from-dead-people>. Her plea indicated that she “filed approximately eighty-seven false federal tax returns in 2012, claiming \$696,435 in refunds. The IRS . . . was defrauded into paying approximately \$161,154. [She] filed approximately thirty-nine false federal tax returns in 2013, claiming \$168,969. . . . The IRS paid . . . about \$209,243. . . .” *See Bolen Plea Agreement* at 8, *United States v. Bolen*, Case No. 1:14-cr-08-WKW-SRW (M.D. Ala. Jan. 27, 2014). Whether these admissions are true is unclear. The IRS Report, fails to mention one DMF-related case. Internal Revenue Serv., *IRS Criminal Investigation Combats Identity Theft Refund Fraud* (2014), <https://www.irs.gov/uac/Newsroom/IRS-Criminal-Investigation-Combats-Identity-Theft-Refund-Fraud>; Press Release, Office of Pub. Affairs, U.S. Dep’t of Justice, *Alabama Woman Sentenced for Stolen Identity Refund Fraud* (Apr. 24, 2014), <http://www.justice.gov/opa/pr/2014/April/14-tax-432.html>. For additional cases, see Press Release, U.S. Attorney’s Office for the N. Dist. of Texas, U.S. Dep’t of Justice, *Kaufman County Man Admits Using Identities of Deceased Persons to Claim Federal Income Tax Refunds* (Jan. 8, 2013), [http://www.justice.gov/usao/txn/PressRelease/2013/JAN2013/jan8cano\\_jason\\_tax\\_fraud\\_plea.html](http://www.justice.gov/usao/txn/PressRelease/2013/JAN2013/jan8cano_jason_tax_fraud_plea.html) (included deceased 16-year-olds’ information

the DMF.<sup>63</sup> One of these involved Kaitlyn McClung, a five-month old who died in May 2009,<sup>64</sup> and another involved Alexis Agin, a child who died in January 2011, just before her fifth birthday.<sup>65</sup> These cases are similar in key aspects. The IRS rejected the McClungs' income tax return because Kaitlyn had already been claimed on another return,<sup>66</sup> presumably the fraudster's, who apparently filed a tax return claiming Kaitlyn and using a SSN other than Mr. McClung's or his wife's.<sup>67</sup> The IRS's failure to "red-flag" the fraudulent return constitutes a "processing failure."<sup>68</sup>

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garnered from the DMF); *see also* Press Release, U.S. Attorney's Office for the W. Dist. of Tenn., U.S. Dep't of Justice, Memphis Resident Sentenced to 14 Years in Federal Prison For Tax and Identity Theft Scheme (May 16, 2012), <http://web.archive.org/web/20130603203910/http://www.justice.gov/usao/tnw/news/2012/MAY16Mayweather.html>. In 2009 data, the GAO reported about ninety thousand false claims made based on DMF-originated data. U.S. GOV'T ACCOUNTABILITY OFFICE, MEDICAID: FRAUD AND ABUSE RELATED TO CONTROLLED SUBSTANCES IDENTIFIED IN SELECTED STATES (2009), <http://www.gao.gov/assets/300/294710.pdf>.

63. On December 17, 2013, Senator Nelson cited cases involving child victims of identity theft following death, but theft was not proved to have originated in the DMF. Richard Rubin, *Death List Limits to Curb Tax Fraud by Identity Thieves*, BLOOMBERG (Dec. 18, 2013), <http://www.bloomberg.com/news/articles/2013-12-18/death-list-limits-to-curb-tax-fraud-by-identity-thieves> [hereinafter Rubin, *Death List Limits*]. Nor is there evidence of a genealogist using these records improperly (though others have: in 2014, a former bank branch manager pled to participating in an identity theft scheme using customers' SSNs.) Press Release, U.S. Attorney's Office for the S. Dist. of N.Y., U.S. Dep't of Justice, Former Branch Manager of Bank Pleads Guilty in Manhattan Federal Court to Cashing over \$400,000 in Fraudulently Obtained Tax Refund Checks (Dec. 1, 2014), <http://www.justice.gov/usao/nys/pressreleases/December14/MejiaEdwinPleaPR.php>.

64. *The Spread of Tax Fraud by Identity Theft: A Threat to Taxpayers, A Drain on the Public Treasury Before United States S. Comm. on Fin. Subcomm. on Fiscal Resp. and Econ. Growth*, 113th Cong. (May 25, 2011), <http://www.finance.senate.gov/imo/media/doc/Testimony%20of%20Terry%20McClung.pdf> [hereinafter McClung Statement May 25, 2011] (statement of Terry D. McClung, Jr.).

65. *Hearing on the Accuracy and Uses of the Social Security Administration's Death Master File Before the House Comm. on Ways and Means Subcomm. on Soc. Sec.*, 113th Cong. 61 (Feb. 2, 2012), [http://waysandmeans.house.gov/UploadedFiles/Agin\\_Testimony202ss.pdf](http://waysandmeans.house.gov/UploadedFiles/Agin_Testimony202ss.pdf) [hereinafter Agin Testimony Feb. 2, 2012] (statement of Jonathan Eric Agin). Both McClung and Agin knew of other bereaved parents in similar circumstances. *Id.*

66. McClung Statement May 25, 2011, *supra* note 64, at 1.

67. *Id.*

68. Ryesky Statement Feb. 5, 2012, *supra* note 33, at 201.

Similarly, apparently someone retrieved Alexis Agin's SSN, presumably from the DMF, before her parents filed their return, and submitted one listing Alexis as a dependent.<sup>69</sup> Subsequently, the parents' legitimate claim was denied, beginning a trying time during which the Agins had to prove Alexis was their daughter in order to complete their filing.<sup>70</sup> Alexis' father, a lawyer and lobbyist, took his story to Texas Representative Sam Johnson.<sup>71</sup>

Both sets of parents suffered further following this thievery, as the IRS assumed the legitimacy of initial filers, while the parents, the subsequent filers, were doubted.<sup>72</sup> The government, after making the DMF vulnerable to fraudsters, enabled fraudulent payments and then exacerbated its transgression by failing to expeditiously address the parents' needs.<sup>73</sup> Additionally, the government went further by using these circumstances to justify closing DMF access. Notwithstanding the understandable sympathy felt towards these families, one must still ask whether, in a society exceeding three hundred million people, the experience of a relative few<sup>74</sup> justifies this legislation that adversely affects so many.

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69. Agin Testimony Feb. 2, 2012, *supra* note 65, at 61.

70. *Id.*

71. *Id.*

72. See McClung Statement May 25, 2011, *supra* note 64; Agin Testimony Feb. 2, 2012, *supra* note 65; see also Kenneth H. Ryesky, Comments on Proposed Treasury Regulations Regarding Truncated Taxpayer Identification Numbers, REG-148873-09 at 5 (Jan. 14, 2013), <http://www.regulations.gov/#!documentDetail;D=IRS-2013-0004-0003> [hereinafter Ryesky Comments Jan. 14, 2013].

73. See McClung Statement May 25, 2011, *supra* note 64 ("The IRS had opened a federal investigation, and that's the last information we were . . . told. . . . To this day, we don't know what if anything has come out of this."). While extant privacy constraints prevented the IRS from sharing case details with law enforcement, the Identity Theft Victim Disclosure Waiver Process now uses victim waivers to permit information release for investigations. See *Hearing on Tax Fraud and Identity Theft: Moving Forward with Solutions Before S. Fin. Comm.*, 113th Cong. 8 (2013) [hereinafter Miller Testimony], <http://www.finance.senate.gov/imo/media/doc/Miller%20Testimony.pdf> (statement of Steven T. Miller).

74. Mr. Agin learned of several other families who experienced the same identity theft. Agin Testimony Feb. 2, 2012, *supra* note 65, at 62.



1. *The IRS Ignored Persistent Warnings of PII Theft<sup>75</sup> and DMF<sup>76</sup> Abuse*

For years prior to Section 203's enactment, the IRS was aware of system vulnerabilities that could lead to widespread identity theft. First, the SSN<sup>77</sup> is "central to the commission of the crime of identity theft."<sup>78</sup> According to a 2002 General Accountability Office (GAO) Report, the SSN is one of the three pieces of information most sought by identity thieves.<sup>79</sup> There have been considerable warnings concerning the dangers of the widespread use of SSNs.<sup>80</sup> The GAO has generated over twenty such warnings since 2002, addressing the misuse of SSNs and recommending reform.<sup>81</sup>

FTC representatives urged the House Committee on Ways and Means to demand "comprehensive reviews of both private and public sector usage of SSNs."<sup>82</sup> Significantly, even the SSA counseled against the disclosure of SSNs, discouraging banks and other businesses from using them for identification purposes.<sup>83</sup> Nonetheless, as of 2008, forty-one states and three-quarters of the nation's counties continued to display SSNs on public records.<sup>84</sup>

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75. The losses are staggering; the Federal Trade Commission estimates annual costs exceeding \$50,000,000,000. In 1997, a credit card company reported annual losses approaching \$400,000,000. Identity theft is both the fastest-growing financial crime and the fastest-growing crime in the United States Darrow & Lichtenstein, *supra* note 53, at 8–9 (internal citation omitted). Importantly, these numbers do not distinguish generic identity theft from DMF theft.

76. Credit card companies' data is breached regularly yet there are no known efforts to outlaw credit cards. See *infra* Section II.B.2.b (comment attributable to Barbara J. Mathews).

77. Grayson Barber, *Personal Information in Government Records: Protecting the Public Interest in Privacy*, 25 ST. LOUIS U. PUB. L. REV. 63, 108 (2006) ("The Social Security Number originally ensured that workers paid into the system but soon became a prerequisite for taxation and government services, and . . . [became] the key to massive amounts of personal data.").

78. Darrow & Lichtenstein, *supra* note 53, at 9.

79. *Id.* at 9. According to Jones Day, an international law firm, the SSN is "the No. 1 identifier used by criminals in identity theft." *Id.* (citation omitted). When identifying the SSN the "most valuable commodity for an identity thief," the President's Identity Theft Task Force described it as "critical" and "key" for thieves. *Id.* at 10. (citations omitted).

80. *Id.* at 9.

81. *Id.* at 39.

82. *Id.*

83. *Id.* at 9–10.

84. *Id.* at 15; see also Daniel J. Solove, *Access and Aggregation: Public Records*,

States have begun to address identity theft; from California to Connecticut, Vermont to New York, Minnesota to New Mexico, Virginia to Rhode Island, and Maine to Massachusetts, attempts are underway to reduce the scope of readily available personal identifying information (PII),<sup>85</sup> with some states restricting access to vital records.<sup>86</sup> Similar attempts exist internationally.<sup>87</sup>

The prevalent use of stolen identities to commit tax refund fraud has risen to “alarming levels.”<sup>88</sup> A 2009 study revealed that, in the five previous years, about five hundred million records containing the PII of U.S. “residents stored in government and corporate databases [were] either lost or stolen.”<sup>89</sup> In 2010, nearly five hundred thousand incidents of a stolen identity being used to file tax returns were reported.<sup>90</sup> By 2011, the incidents more than doubled,<sup>91</sup> costing billions of dollars annually.<sup>92</sup>

Theft of PII of living individuals far exceeds that involving the deceased.<sup>93</sup> The June 2008 report of the SSA’s Office of the Inspector General (OIG) indicated that, “from January 2004 through April 2007, SSA’s publication of the DMF resulted in the

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*Privacy and the Constitution*, 86 MINN. L. REV. 1137, 1199–1200 (2002) (noting that SSNs are “a gateway to highly sensitive information such as financial accounts, school records, and a host of other data” and should be redacted from every document prior to public disclosure, and recommending that the Federal Privacy Act be amended to provide more meaningful SSN protections).

85. It is difficult for states to succeed in their efforts to address identity theft. Even scholars have expressed alarm at the degree of PII publically available through state sources. Solove, *supra* note 84, at 1144–49.

86. See Editorial, *Genealogists Shouldn’t Need Town Hall Appointments*, HARTFORD COURANT (Sept. 30, 2014, 6:42 PM), <http://www.courant.com/opinion/editorials/hc-ed-genealogists-must-call-ahead-for-vital-recor-20140930-story.html> (referring to recent attempts by the Connecticut legislature to restrict genealogists’ access to vital record).

87. Jan Meisels Allen et al., *Genealogy Under Fire: Government Actions to Impede Access to Records You Need*, INT’L ASS’N OF JEWISH GENEALOGICAL SOC’YS (2013), <http://www.iajgs.org/pramc/Handout%20for%20IAJGS%20Records%20Access%20Session-final.pdf>.

88. U.S. SENATE COMM. ON FIN., SUMMARY OF STAFF DISCUSSION DRAFT: TAX ADMIN. 1 (2013), <http://www.finance.senate.gov/imo/media/doc/Chairman's%20Staff%20Discussion%20Draft%20of%20Tax%20Administration%20Reform%20Summary.pdf> [hereinafter SUMMARY OF STAFF DISCUSSION DRAFT].

89. Allen Statement Mar. 2012, *supra* note 29, at 2.

90. SUMMARY OF STAFF DISCUSSION DRAFT, *supra* note 88.

91. *Id.*

92. *Id.*

93. See *Hearing on Social Security’s Death Records*, *supra* note 4.

potential exposure of PII for more than twenty thousand *living individuals* erroneously listed as deceased,”<sup>94</sup> while the numbers of PII stolen from the deceased were likely so insignificant that they were not even reported.

In fact, prosecutions of SSN-related fraud point in many directions beyond the DMF.<sup>95</sup> A study conducted by the Treasury Inspector General for Tax Administration (TIGTA), which was a rigorous examination of the variety of this fraud, identified seven categories of undetected individuals whose SSNs were used in this way and only one category involved the deceased, representing only 19,102 people whose SSNs were abused, out of approximately 1.1 million taxpayers.<sup>96</sup> Moreover, that DMF records may have been unlawfully accessed does not prove that this access caused the resulting fraud—fraudsters could have received details of deaths from medical institutions, schools, prisons, and more.

In any event, the TIGTA study “deceased” category indicates that the maximum percentage of the files that could have been compromised through DMF use was 1.8 percent; embargoing the DMF will have no effect on the remaining 98.2 percent.<sup>97</sup> Additionally, fraudulently paid claims traceable to IRS records abuse pale in comparison to those paid by other federal agencies.<sup>98</sup> “In 2012, the IRS recovered 210,003 fraudulent tax refunds totaling

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94. *Id.*

95. See McClung Statement May 25, 2011, *supra* note 64; Agin Testimony Feb. 2, 2012, *supra* note 65. It has been assumed that thieves accessed the McClung and Agin information from the DMF or genealogy websites. Agin Testimony Feb. 2, 2012, *supra* note 65. Other possible sources, particularly involving Agin, include medical caregivers privy to the information. *Id.*; see also Blankley, *supra* note 4, at 418–19 n.20. (“[I]t is hard to determine exactly where the wrongdoers procured their information. At least one crime ring admitted to using PACER, the federal online database, in order to secure personal information about prisoners . . . [and] open false bank and credit accounts.”); Videotape: Hearing on Tax Fraud and Tax ID Theft: Moving Forward with Solutions (Apr. 15, 2013), <http://www.finance.senate.gov/hearings/hearing/?id=62739085-5056-a032-5281-4500bf4d4fb3> (Agin testimony at hour 1:00-1:03).

96. TIGTA Report Sept. 20, 2013, *supra* note 20, at 8 (analyzing tax year 2011 returns); see also Goodman, *The Deathly Flaw*, *supra* note 51.

97. See Barbara J. Mathews, *RPAC 2013 Year-End Report: SSDI Recent-Death Redactions Begin in 90 Days*, BOARD FOR CERTIFICATION OF GENEALOGISTS (Dec. 18, 2013), <http://bcgcertification.org/blog/2013/12/rpac-2013-year-end-report-ssdi-recent-death-redactions-begin-in-90-days>.

98. Goodman, *Returns of the Living Dead*, *supra* note 7.

more than \$779 million,” while other federal agencies that year improperly distributed nearly \$108 billion.<sup>99</sup>

Admittedly, there is likely some fraudulent use of the DMF to access SSNs,<sup>100</sup> but there is reliable proof that causes *other* than the DMF are responsible for far more.<sup>101</sup> Take, for example, Alan Scott, who was convicted in 1998 for making false claims to a United States agency.<sup>102</sup> He aimed to obtain \$80,000 in 1996 by claiming refunds for at least twelve people through the filing of twenty false returns.<sup>103</sup> Scott used names and SSNs of the living.<sup>104</sup>

A case involving a Los Angeles-based financial planner who “pleaded guilty to . . . fil[ing] more than 900 false income tax refund claims” was erroneously portrayed as DMF fraud.<sup>105</sup> David Sanborn obtained SSNs from files at United Grocers, where he worked, not from the DMF, then used software to create fictitious businesses, issued false wage statements using the stolen names, and prepared refund requests for mail drops nationwide.<sup>106</sup>

Though the connection between illegal use of SSNs and DMF fraud has rarely been proved, it is certain that the IRS has mismanaged the information it collects. In fact, this lax safeguarding has become a joke to those in the field.<sup>107</sup> “Right now, the question is, what does it take to get the IRS to pay you cash money? The answer is, all it takes is a social security number and name—and the IRS won’t check it!” stated board-certified genealogist Barbara J. Mathews, who advocated for confronting the

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99. *Id.* While this may contrast apples and oranges, it illustrates the comparatively insignificant amounts involved in IRS record abuse. *Id.*

100. See Rubin, *Death List Limits*, *supra* note 63. An alternate explanation blames unscrupulous medical workers. See Darrow & Lichtenstein, *supra* note 53, at 16.

101. *United States v. Scott*, 270 F.3d 30, 33 (1st Cir. 2001), *cert. denied*, 535 U.S. 1007 (2002).

102. *Id.*

103. *Id.*

104. *Id.* at 37.

105. See Jim Herron Zamora, *Mastermind of Tax Return Fraud Ring Gets 4 1/2 Years: Courts: The Studio City Financial Planning Expert Admitted Conspiring to File More Than 900 False Refund Claims Nationwide. Two Others Await Trial*, L.A. TIMES (Oct. 8, 1992), [http://articles.latimes.com/1992-10-08/local/me-982\\_1\\_financial-planning-expert](http://articles.latimes.com/1992-10-08/local/me-982_1_financial-planning-expert).

106. *Id.*

107. See Goodman, *The Deathly Flaw*, *supra* note 51.

underlying issue—IRS incompetence.<sup>108</sup> Another professional genealogist, forensic genealogist Sharon Sergeant, lamented:

The IRS is handing out money like candy—and nobody wants to acknowledge it . . . Why isn't it checking to make sure dead people aren't getting tax returns? Somebody who reads the obituaries and makes up a social security number the right way, according to the algorithm, can file a tax return and get a payment. It's got nothing to do with the Death Master File. It has everything to do with the IRS not doing its job.<sup>109</sup>

Certain IRS failures are curious. Reviewing Treasury audits of the filings from 2011 “the top five addresses used on fraudulent tax returns . . . combined with the volume of payments to those addresses, should have raised all kinds of red flags at the IRS.”<sup>110</sup> During a five-year period, losses suffered from false payments could total \$26,000,000,000.<sup>111</sup> The recipients are located worldwide, from Kaunas, Lithuania, from which 655 tax returns were sent to the same address, to Shanghai, China, from which 343 returns were sent to one location.<sup>112</sup> A scheme in Tampa, Florida, that filed false tax returns online amounted to more than \$130 million in tax fraud.<sup>113</sup> The profits were so substantial that some police attributed a drop in local illegal drug activity to the more reliable income dealers were earning through false IRS filings.<sup>114</sup>

Despite the gravity of the problem, many suggestions offered to ameliorate the situation have been ignored, allowing the theft to continue in the meantime.<sup>115</sup> In its February 2012 Report, the SSA's OIG recommended that the SSA delay releasing DMF updates, allowing time to correct erroneous entries.<sup>116</sup> The Treasury likewise tried to persuade the IRS to limit issuing tax refunds to the same

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108. *Id.*

109. *Id.*

110. *Id.*

111. Scott Zamost, *Identity Thieves Could Rake in \$26 Billion in Tax Refunds*, CNN (May 8, 2012), <http://www.cnn.com/2012/05/08/us/tax-refund-fraud>.

112. Goodman, *Returns of the Living Dead*, *supra* note 7.

113. Alessandra Da Pra, *Epic Tax Scam Uncovered in Tampa*, SEMINOLE HEIGHTS PATCH (Sept. 2, 2011), <http://patch.com/florida/seminoleheights/epic-tax-scam-uncovered-in-tampa>.

114. *Id.*

115. *See supra* Section II.A.b.1.

116. *See Hearing on Social Security's Death Records*, *supra* note 4.

bank account.<sup>117</sup> The delay in making these changes, which will not be operational until 2017, will result in a loss of up to \$385 million annually.<sup>118</sup>

The IRS was also asked to “scrutinize returns more aggressively . . . through the use of better filters and the comparison of various available databases to recognize deceased individuals on tax returns.”<sup>119</sup> In April 2013, acting Treasury Commissioner Steven T. Miller presented to the Senate Finance Committee numerous possible enhancements, including expanding prosecutions and screening cases to identify false returns before issuing refunds.<sup>120</sup> The IRS’s meager response spurred even a Congress infamous for inaction<sup>121</sup> to take action and enact Section 203.<sup>122</sup>

Genealogists also suggested fixes, including eliminating SSNs as Medicare identification.<sup>123</sup> The practice ensures that SSNs are not:

[R]evealed to numerous clerks working in the billing offices of every doctor’s office, medical lab, therapist, hospital or nursing home from which a senior receives health related services, including independent companies to which the healthcare providers may outsource, . . . [making] the healthcare industry . . . fertile ground for identity thieves, with thousands of cases of identity theft originating there in recent years. Private insurers were required to abandon the use of social security numbers as health insurance ID . . . years ago . . . . [T]he US military has also ceased to use social security numbers as serial numbers . . . . Medicare has

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117. *Hearing on Identify Theft and Tax Fraud Before the Subcomm. on Oversight and Soc. Sec. of the H. Comm. on Ways and Means*, 112th Cong. 3 (2012), [http://waysandmeans.house.gov/UploadedFiles/JRussellGeorge\\_OS\\_SS\\_5\\_8\\_12.pdf](http://waysandmeans.house.gov/UploadedFiles/JRussellGeorge_OS_SS_5_8_12.pdf) (statement of Honorable J. Russell George, Treasury Inspector General for Tax Admin.).

118. TIGTA Report Sept. 20, 2013, *supra* note 20.

119. Allen, AVOTAYNU, *supra* note 30, at 50.

120. Moss Testimony, *supra* note 29, at 5 (citing *Tax Fraud and Tax ID Theft: Moving Forward with Solutions: Hearing Before U.S. Senate Comm. on Fin.* (2013), <http://www.finance.senate.gov/hearings/hearing/?id=62739085-5056-a032-5281-4500bf4d4fb3>) (referencing Miller’s testimony).

121. *See supra* text accompanying note 4.

122. *See* Moss Testimony, *supra* note 29, at 4.

123. GR Gordon, Comment to *Johnson: Into the Sunset for SSDI*, LEGAL GENEALOGIST (July 23, 2013, 2:14 PM), <http://www.legalgenealogist.com/blog/2013/07/23/johnson-into-the-sunset-for-ssdi/>.

supposedly been “studying” the issue for years, but has yet to come up with a concrete plan . . . .<sup>124</sup>

The lax nature of the IRS’s verification methodologies is hard to fathom. For example, one criminal complaint described a randomly-selected tax return that requested a childcare credit; the return used a SSN for the caregiver belonging to someone living a considerable distance from the applicant.<sup>125</sup> Such a discrepancy “should not be discovered because the tax return is ‘randomly selected.’”<sup>126</sup> Clearly, the IRS, with its unrestricted DMF access,<sup>127</sup> could prevent much of the false filing fraud by checking refund claims against the DMF before paying them.<sup>128</sup> For, “[i]f thieves were using the SSDI, the IRS clearly was not.”<sup>129</sup> The 2012 Tax Advocate’s Report to Congress criticized the IRS for its lack of response to these issues.<sup>130</sup> While the 2012 Tax Advocate’s Report suggested that stakeholders, such as the Tax Advocate and those adversely affected by tax identity fraud, be involved in creating solutions, notably, Section 203 does not mention the IRS.<sup>131</sup>

More recently, the GAO discussed issues involving the IRS’s ongoing failure to address tax return identity theft. In *Identity Theft: Additional Actions Could Help IRS Combat the Large, Evolving Threat of*

124. *Id.* In April 2015, President Obama signed a bill ending the use of SSNs on Medicare cards. *Medicare Cards to Shift ID Numbers*, BOS. GLOBE, Apr. 21, 2015, at A2.

125. Ryesky Comments Jan. 14, 2013, *supra* note 72, at 5.

126. *Id.*

127. *See* 42 U.S.C. § 1306 (2014).

128. E-mail from Kenneth H. Ryesky to author (Apr. 20, 2014) (on file with author).

129. Moss Testimony, *supra* note 29, at 4.

130. *National Taxpayer Advocate*, *supra* note 21, at 6.

131. *See* Ryesky Blog Comments July 23, 2013, *supra* note 49 (noting that, “[c]onspicuous by its absence from the bill text is any reference to the IRS or . . . Treasury . . . . [R]eal countermeasures to tax fraud identity theft must directly involve the IRS,” and that the IRS’s poor “data stewardship” is the problem.”); *see also* Ryesky Comments Jan. 14, 2013, *supra* note 72, at 4, 9 (the problem has resulted “in an epidemic of tax fraud through stolen identity perpetuated by fraudsters who exploit the gaping lacunae in the IRS’s data stewardship practices . . . . The IRS has known of the problem . . . well beyond the past decade; . . . failure to properly verify and match the data on the tax returns . . . is costing America dearly, not only in dollars . . . but in public confidence . . . .”); Press Release, U.S. Attorney S. Dist. of Ind., *New York City Man Sentenced in Tax Refund Conspiracy* (Jan. 4, 2002), [http://www.justice.gov/archive/tax/usaopress/2002/txdv0201042002\\_1.htm](http://www.justice.gov/archive/tax/usaopress/2002/txdv0201042002_1.htm) (describing sentencing of New York individual for tax fraud refund conspiracy).

*Refund Fraud*, it highlighted the estimated \$29.4 billion in attempted fraud occurring in the 2013 filing season;<sup>132</sup> conspicuously absent from the list of the sources of these fraudulent refund requests was the DMF, a clue that the IRS has begun screening refund returns against fraud detection filters, with promising results.<sup>133</sup> The question this raises is obvious: Was the stated objective of Section 203 accomplished even before it was enacted?<sup>134</sup>

Overstatement of the DMF's role in identity theft frustrates researchers, stymied by the new restrictions. However, according to Jan Meisels Allen, "Use of the SSDI actually could be an effective identity fraud deterrent. If the IRS matched the filings in its computer database against those listed on the SSDI who now are deceased, fewer inappropriate tax refunds would go to those perpetrating identity theft of the deceased."<sup>135</sup> Rather than restricting or curtailing open access to the DMF, "[t]he SSDI should be retained and used effectively."<sup>136</sup>

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132. U.S. GOV'T ACCOUNTABILITY OFFICE, IDENTITY THEFT: ADDITIONAL ACTIONS COULD HELP IRS COMBAT THE LARGE, EVOLVING THREAT OF REFUND FRAUD 10 (2014), <http://www.gao.gov/assets/670/665368.pdf>. An audit conducted between May and August 2014 found the IRS estimated it prevented/recovered about \$24.2 billion (eighty-two percent) of attempted fraud. *Id.* at 3–10. "What GAO Found" (inside page) concluded that "[s]tronger [p]re-refund and [p]ost-refund [s]trategies [c]an [h]elp [c]ombat IDT [r]efund [f]raud." *Id.* at 13 (indicating the difficulty of "pay and chase" aspects of fraud recovery). These strategies "[m]ay [p]revent [b]illions of [d]ollars in [e]stimated IDT [r]efund [f]raud . . . ." *Id.* at 14.

133. *See id.* at 3 ("[The] IRS instituted IDT filters in 2012, which helped IRS find additional IDT incidents.").

134. *See* Miller Testimony, *supra* note 73; *see also* Fred Moss, *Senate Finance Committee 16 April Hearing—Tax Fraud and Tax ID Theft*, RECORDS PRESERVATION AND ACCESS COMMITTEE (May 5, 2013), <http://www.fgs.org/rpac/2013/05/05/senate-finance-committee-16-april-hearing-update-pending>. DMF fraud is not mentioned in the recent TIGTA report, wherein the Treasury critiques the IRS's report on prisoner tax refund fraud for excluding information about fraudulent returns. Kenneth H. Ryesky, *Slow Learners at the IRS*, AMERICAN THINKER (Dec. 1, 2014), [http://www.americanthinker.com/blog/2014/12/slow\\_learners\\_at\\_the\\_irs.html#ixzz3Khj5zpum](http://www.americanthinker.com/blog/2014/12/slow_learners_at_the_irs.html#ixzz3Khj5zpum).

135. Allen, AVOTAYNU, *supra* note 30, at 50.

136. *Id.*



## 2. *Tax Return Identity Theft Caused by Sources beyond the DMF*

For several years prior to Section 203's enactment, numerous congressional committees were informed of causes of identity theft beyond the DMF. Attorney Fred Moss's January 2014 submission to the Senate Committee on Finance emphasized this: "To the extent that [SSDI] may ever have been used, the thieves have moved on."<sup>137</sup> Moss also noted that, based on a list of people recently sentenced for identity theft, the SSNs had been stolen: (1) from a community college's financial aid office; (2) by trickery used to secure taxpayer's personal information; (3) from a medical center records office; or (4) by breaking into a tax preparer's office.<sup>138</sup> Additionally, in another case, a "trusted user" of a commercially-available, non-genealogical site misused an online database.<sup>139</sup>

### a. *Misuse of State Databases*

The degree of publicly available PII in various state records has alarmed some.<sup>140</sup> In 2002, for example, shortly after a Cincinnati employer used a county website to research job applicants, he was the victim of SSN theft, apparently acquired from a traffic ticket available online.<sup>141</sup> Also, despite the fact that Ohio traffic tickets are public records, state law does *not* allow for the "redaction of sensitive materials" before the records are put online.<sup>142</sup> Vulnerabilities such as these have led some to seek dramatic restrictions on public access to records of court hearings.<sup>143</sup>

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137. Moss Testimony, *supra* note 29, at 5.

138. *Id.*

139. *Id.* at 5–6. Others revealing PII include hospitals, stores, universities, and workers. See Darrow & Lichtenstein, *supra* note 53, at 16, 22, 23, 37, 38; see also Tom Zeller, Jr., *Breach Points Up Flaws in Privacy Laws*, N.Y. TIMES (Feb. 24, 2005), <http://www.nytimes.com/2005/02/24/business/24datas.html?pagewanted=print&position=>.

140. Various state suggestions have surfaced. In Minnesota, documents may be separated between public and private files for civil cases, and access to certain criminal case documents restricted. Solove, *supra* note 84, at 1199.

141. Blankley, *supra* note 4, at 419 n.23.

142. *Id.*

143. See *supra* notes 85–87 and accompanying text.

b. *Theft of Credit Card Information*

The ongoing assault against all types of consumers, from those visiting high-end stores (like Nieman Marcus), to the more economically-minded (like Target), persists. The PII of as many as 110 million Target customers was stolen in 2013, apparently by malware installed on store terminals.<sup>144</sup> The Nieman Marcus attacks, between July and October 2013, struck eleven million credit and debit cardholders, apparently using the same malware used against Target.<sup>145</sup> Since then, MasterCard, Visa, and Discover have informed Nieman Marcus of fraudulent activity involving about 2,400 cards used at its stores.<sup>146</sup> Store representatives claim they were unaware of the theft before mid-December 2013.<sup>147</sup> In September 2014, Home Depot also fell victim to a similar attack,<sup>148</sup> compromising not only payment cards, but also fifty-three million customer e-mail addresses.<sup>149</sup> Banks and governments are not immune from attacks either: In September 2014, J.P. Morgan acknowledged a cyber attack the prior summer against about seventy-six million households.<sup>150</sup> In November 2014, the U.S. Postal Service revealed a major computer data theft potentially compromising information about postal employees' names, birth dates, addresses, and SSNs.<sup>151</sup>

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144. Elizabeth A. Harris & Nicole Perlroth, *For Target, the Breach Numbers Grow*, N.Y. TIMES (Jan. 10, 2014), [http://www.nytimes.com/2014/01/11/business/target-breach-affected-70-million-customers.html?\\_r=0](http://www.nytimes.com/2014/01/11/business/target-breach-affected-70-million-customers.html?_r=0).

145. Elizabeth A. Harris et al., *Nieman Marcus Data Breach Worse Than First Said*, N.Y. TIMES, Jan. 24, 2014, at B1.

146. *Id.*

147. *Id.*

148. Mitch Lipka, *Home Depot Hack Could Lead to \$3 Billion in Fake Charges*, CBS NEWS: MONEY WATCH (Sept. 16, 2014, 8:06 AM), <http://www.cbsnews.com/news/credit-monitoring-company-home-depot-breach-could-result-in-2b-in-fraud>.

149. Nicole Perlroth, *Home Depot Says Hackers Also Stole E-mail Addresses*, N.Y. TIMES (Nov. 6, 2014, 6:38 PM), <http://bits.blogs.nytimes.com/2014/11/06/home-depot-says-hackers-also-stole-email-addresses>.

150. Emily Glazer & Danny Yadron, *J.P. Morgan Says about 76 Million Households Affected By Cyber Breach*, WALL ST. J. (Oct. 2, 2014, 9:32 PM), <http://online.wsj.com/articles/j-p-morgan-says-about-76-million-households-affected-by-cyber-breach-1412283372>.

151. David E. Sanger, *Postal Service Reveals Theft of Computer Data on Employees*, BOS. GLOBE, Nov. 11, 2014, at A2. The problem is monumental, with the attacks on SONY Pictures in late 2014 emblematic. See Brooks Barnes & Nicole Perlroth, *SONY Breach, Now Wider, Draws Alert from F.B.I.*, N.Y. TIMES, Dec. 3, 2014, at B1.

c. *Public Access to Electronic Court Records (PACER)*

PACER, the publicly-accessible system for case records that are neither sealed nor otherwise restricted, remains an additional source of identity theft.<sup>152</sup> To date, one crime ring has admitted to using PACER to access prisoners' PII in order to open bank and credit accounts.<sup>153</sup> This system will shortly undergo an expansion enabling users to search all courts from a single site, free of charge, at courthouses.<sup>154</sup> Not surprisingly, opponents of expanded access are preparing resistance to this effort.<sup>155</sup>

d. *Common Sloppiness (and Theft)*

Everyday life stands as a cause of much PII exposure. SSNs can be found in a variety of places such as "on websites, in trash cans and dumpsters, including refuse containers of hospitals, schools, law firms, and banking and finance institutions."<sup>156</sup> Law enforcement personnel inadequately shredding documents can also place SSNs in the public arena "when the paper shreds [sic] are used as confetti at public parades and celebrations."<sup>157</sup> Additionally, "[t]he images stored on . . . hard drives of copy machines are natural vehicles for SSNs"<sup>158</sup> and "[p]aper records in transit can, during a crash or other misadventure, be spilled, strewn, and dispersed along the highway; indeed, traffic mishaps with such potential have befallen the IRS's own couriers."<sup>159</sup>

e. *Tax Refund Fraud against the Living*

A more significant problem than DMF-related abuse is tax refund fraud against the living. According to Moss, "It is significant that all three recent cases of tax fraud identity theft

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152. Darrow & Lichtestein, *supra* note 53.

153. *Id.*; see also Blankley, *supra* note 4.

154. Paula J. Hane, *Wider Access to U.S. Court Records Database Stirs Up Controversy*, INFORMATION TODAY, INC.: NEWS BREAKS & THE WEEKLY NEWS DIGEST (Feb. 12, 2001), <http://newsbreaks.infotoday.com/NewsBreaks/Wider-Access-to-US-Court-Records-Database-Stirs-Up-Controversy-17657.asp>.

155. *Id.*

156. Ryesky Comments Jan. 4, 2013, *supra* note 72, at 6-7 (citations omitted).

157. *Id.* at 7.

158. *Id.* at 7 (citations omitted).

159. *Id.* at 7.

mentioned . . . involved *living* victims, rather than the deceased.”<sup>160</sup> Moss also warns, “[w]e should continue to be concerned that the SSNs of *living* persons will continue to be vulnerable so long as the IRS is mandated to expedite the payment of refund claims before they have even received information returns necessary to determine their validity.”<sup>161</sup>

### III. FORMULATING SECTION 203

Notwithstanding that only a small portion of tax return identity theft is due to public access to SSNs through the DMF,<sup>162</sup> one family’s story seems to have inspired Representative Johnson’s campaign to end public access to the DMF.<sup>163</sup> Representative Johnson’s efforts may have provided cover for the void the IRS created when it failed to close loopholes, cross-check SSNs before issuing refunds,<sup>164</sup> or steward<sup>165</sup> PII in its possession. Representative

160. Moss Testimony, *supra* note 29, at 5–6 (referencing Acting IRS Commissioner Miller’s testimony on April 16, 2013 at a hearing before the S. Fin. Comm.). Significant PII breaches have befallen living persons erroneously included in the DMF as deceased. OFFICE OF THE INSPECTOR GEN., SSA, PERSONALLY IDENTIFIABLE INFORMATION MADE AVAILABLE TO THE GENERAL PUBLIC VIA THE DEATH MASTER FILE (2008), <http://oig.ssa.gov/sites/default/files/audit/full/html/A-06-08-18042.html>; *see also* Lori Kurtzman, *World War II Vet Works to Convince the IRS that He’s Not Dead*, COLUMBUS DISPATCH (Jan. 23, 2015 3:43 PM), [http://www.dispatch.com/content/stories/local/2015/01/23/IRS\\_snafu.html?ncid](http://www.dispatch.com/content/stories/local/2015/01/23/IRS_snafu.html?ncid).

161. Moss Testimony, *supra* note 29, at 9.

162. *See supra* notes 82–83 and accompanying text. The scant impact of this was apparent during a September 21, 2014, segment of *60 Minutes*, which did not even mention theft of deceased persons’ records. *See* Steve Kroft, *Biggest IRS Scam Around: Identity Tax Refund Fraud*, CBS NEWS (Sept. 21, 2014), [www.cbsnews.com/news/irs-scam-identity-tax-refund-fraud-60-minutes](http://www.cbsnews.com/news/irs-scam-identity-tax-refund-fraud-60-minutes).

163. Ryesky Blog Comments July 23, 2013, *supra* note 49 (noting that, apparently, Alexis Agin’s father, Jonathan Agin, a well-spoken lawyer, was “convinced that (1) [t]he availability of the DMF/SSDI was the cause of the expropriation of his deceased daughter’s identity (never mind [sic] that she received extensive medical treatments, which entail the exposure of numerous SSNs and other personal info to numerous low-salaried, often temporary employees); and (2) [t]he IRS’s missteps in the matter were relatively minor in comparison to the public availability of the DMF/SSDI . . .”).

164. *See supra* Section II.B.1.

165. *Tax Fraud by Identity Theft, Part 2: Status, Progress, and Potential Solutions: Hearing Before the Subcomm. on Fiscal Resp. & Econ. Growth of S. Comm. on Fin.*, 112th Cong. 134, 136 (2012), <https://www.gpo.gov/fdsys/pkg/CHRG-112shrg78502/pdf/CHRG-112shrg78502.pdf>(statement of Kenneth H. Ryesky) (“[T]he IRS’s stewardship over its data has proven to be a miserable failure.”). Information

Johnson was seemingly unaware that denying the public access to the DMF “would still leave a plentitude of other sources from which tax fraudsters could obtain SSNs of the living and dead alike.”<sup>166</sup> In 2011, while chairing the House Ways and Means Social Security Committee, Representative Johnson, through his introduction of the *Keeping IDs Safe Act of 2011*,<sup>167</sup> sought to abolish public access to the DMF beginning January 1, 2019.<sup>168</sup> Johnson, a former prisoner of war from the Vietnam era, aimed to maintain DMF access for the Department of Defense’s POW/MIA Accounting Agency, which provides “the fullest possible accounting for our missing personnel to their families and the nation.”<sup>169</sup> A subcommittee held hearings

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stewardship, or who has access to data, is distinguishable from securing it, or restricting data access. *Id.*; see also Sara Rosenbaum, *Data Governance and Stewardship: Designing Data Stewardship Entities and Advancing Data Access*, 45 HEALTH SERV. RES. 1442, 1442 (2010).

166. Ryesky Comments Jan. 14, 2013, *supra* note 72, at 8; see also *supra* Section II.B.2.

167. H.R. 3475; see also *Hearing on Social Security’s Death Records*, *supra* note 4, at 1.

168. Keeping IDs Safe Act of 2011, H.R. 3475, 112th Cong. (2011); see also Press Release, Sam Johnson Introduces the Keeping IDs Safe Act (Nov. 18, 2011), <http://samjohnson.house.gov/news/documentsingle.aspx?DocumentID=269671>. Senator Johnson’s motives have been questioned by many in the genealogical community. See Judy G. Russell, Comment to *Johnson: Into the Sunset for SSDI*, LEGAL GENEALOGIST BLOG (July 23, 2013, 3:49 PM), <http://www.legalgenealogist.com/blog/2013/07/23/johnson-into-the-sunset-for-ssdi/> (“Jonathan Agin was the key witness in Rep. Johnson’s anti-genealogist hearings last year, and he is definitely the moving force here. You can’t help but have your heart ache . . . [Yet] this . . . doesn’t begin to address the real issues of closing loopholes at the IRS and controlling the misuse of Social Security numbers . . .”); Judy G. Russell, *Johnson: Into the Sunset for SSDI*, The Legal Genealogist (July 23, 2013), <http://www.legalgenealogist.com/blog/2013/07/23/johnson-into-the-sunset-for-ssdi/> (“Johnson has specifically targeted genealogists as The Bad Guys in the fight against identity theft. Hearings held by his subcommittee . . . were specifically designed to make genealogists the scapegoat while deliberately keeping the genealogical community from having a fair chance to present our views.”). Kenneth Ryesky has opinions as to why genealogists were targeted. He served as an IRS attorney and conducts genealogical research, and believes genealogists are considered “‘low hanging fruit,’ it’s easier to close off the DMF than use the government’s investigative resources to find out who is stealing PII . . .” Interview with Kenneth Ryesky (Mar. 28, 2014) (on file with author). He believes that, “had a company or hospital done this,” the bureaucrats “surely would have been screaming,” as well as suing. *Id.*

169. *Vision, Mission, Values*, DEFENSE POW MIA ACCOUNTING AGENCY, <http://www.dpaa.mil/About/VisionMissionValues.aspx> (last visited Feb. 03, 2016).

at which genealogists' requests to testify were denied, although they were permitted to submit comments, which several did.<sup>170</sup> The bill was never voted upon.<sup>171</sup>

In mid-2013, Johnson introduced another bill to restrict the DMF, titled the *Alexis Agin Identity Theft Protection Act of 2013*.<sup>172</sup> A congressional record search has revealed that at least five additional related bills that sought to limit DMF access were introduced during the 113th Congress.<sup>173</sup> Four died or languished in committee.<sup>174</sup> One, H.R.J. Res. 59, the current subject of discussion, became law.<sup>175</sup>

While Representative Johnson claimed victory when Section 203 was enacted,<sup>176</sup> his bid failed in an essential goal, as Section 203 embargoed recent information from the Public DMF for three calendar years after a person's death, not forever, and further, JPAC was included in the embargo.<sup>177</sup> Johnson voted *against* the Bipartisan Budget Bill, and therefore against Section 203, but took credit for its passage, as illustrated in a press release stating, "[a]s chairman of the Ways and Means Social Security Subcommittee, Johnson has led the effort to protect families and the American taxpayer from identity thieves by restricting access to Social Security's Death Master File (DMF)."<sup>178</sup>

Why did Representative Johnson and others aim at the DMF, when it involves such a small portion of the tax fraud problem?

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170. Ryesky Statement Feb. 5, 2012, *supra* note 33, at 3–4.

171. Keeping IDs Safe Act of 2011, H.R. 3475, 112th Cong. (2011), <https://www.congress.gov/bill/112th-congress/house-bill/3475/all-info?resultIndex=3#summary>.

172. Alexis Agin Identity Theft Protection Act of 2013, H.R. 2720, 113th Cong. (2013). This was co-sponsored with Rep. Xavier Becerra of California.

173. H.R. 295, 113th Cong. (2013); H.R. 466, 113th Cong. (2013); H.R. 531, 113th Cong. (2013); S. 676, 113th Cong. (2013); H.R. 2777, 113th Cong. (2013).

174. *Id.*

175. H.R.J. Res. 59, 113th Cong. (2013) (enacted and codified at 42 U.S.C. § 1306c (2014)).

176. Press Release, Sam Johnson, House Passes Anti-Fraud Cause Championed by Johnson: Provision Included in the Bipartisan Budget Act of 2013 (Dec. 12, 2013), <http://samjohnson.house.gov/news/documentsingle.aspx?DocumentID=364655> [hereinafter Johnson Press Release].

177. Alexis Agin Identity Theft Protection Act of 2013, H.R. 2720, 113th Cong. (2013).

178. Johnson Press Release, *supra* note 176. For vote, see *House Vote 640—Passes Bipartisan Budget Bill*, N.Y. TIMES, <http://politics.nytimes.com/congress/votes/113/house/1/640> (last visited Oct. 26, 2015).

Perhaps, as has been suggested, genealogists were seen as “low hanging fruit” and aligned with few powerful supporters. Given the insignificant number of professional genealogists in the nation, two to three thousand (even though about eighty million people are interested in individual genealogy), genealogists cast as the “bad guys” seemed to be an easy target for blame.<sup>179</sup>

The reasons underlying the DMF restrictions being located in H.R.J. Res. 59 are unclear, as the legislative history reveals no record of any related hearing being held in conjunction with its introduction.<sup>180</sup> However, it is known, though, that Johnson was joined by other legislators targeting the DMF, including Senator Bill Nelson and Representative Richard Nugent, both Floridians, who introduced similar legislation. A comparison of Section 203’s language with that of the other bills introduced reveals that Nelson’s and Nugent’s bills were likely the blueprints for Section 203, as both their language and structure closely mirror that of Section 203.<sup>181</sup> Further, a November 2013 staff draft report from the Senate’s Committee on Finance identifies Nelson’s bill as the blueprint for future DMF restrictions.<sup>182</sup>

Senator Nelson’s hand in this is not surprising, as he represents Florida, which suffers some of the most flagrant instances of tax identity fraud, even being dubbed the “Silicon Valley for scam artists.”<sup>183</sup> Long-serving Nelson, formerly a House Representative, was, in the fall of 2013, a senior member of the Senate Budget Committee, which negotiated the terms of H.R.J. Res. 59.<sup>184</sup> His colleague, Representative Nugent, was a member of

179. *U.S. House of Rep. Comm. on Ways and Means, Subcomm. on Soc. Sec. and Oversight, Joint Hearing on Identity Theft and Tax Fraud*, 112th Cong. 156 (2012), <https://www.gpo.gov/fdsys/pkg/CHRG-112hhrg78817/pdf/CHRG-112hhrg78817.pdf> (statement for the record of Kenneth Ryesky). “[T]here is reason to fear that the [House] Hearings might . . . function as a lynch mob against the public’s (including the genealogical community’s) interest in accessing the . . . DMF. There is concern that the targeting of the DMF is . . . a convenient exercise in blame assignment . . . to avoid the vexing issues inherent in crafting real solutions.” *Id.*

180. H.R.J. Res. 59, 113th Cong. (2013).

181. *Compare id.*, and S. 676, 113th Cong. (2013), with H.R. 295, 113th Cong. (2013).

182. See SUMMARY OF STAFF DISCUSSION DRAFT, *supra* note 88 (“This proposal is based on a provision in S.676 (113th), Identity Theft and Tax Fraud Prevention Act of 2013, sponsored by Sen. Nelson.”).

183. *Biggest IRS Scam Around*, *supra* note 162.

184. See *Biography*, UNITED STATES SENATE: BILL NELSON (Oct. 26, 2015),

both the House Committee on Rules and its Subcommittee on Legislation and Budget Process.<sup>185</sup> In addition, other Floridians belonged to the House Committee on Rules.<sup>186</sup> In all, three of the twelve members of the Committee on Rules at this time hailed from Florida.<sup>187</sup> As described below, this committee played an important role in securing passage of Section 203.

In December 2013, the Senate Budget Committee negotiated the final deal with the House Budget Committee.<sup>188</sup> Surely, the respective chairs of each committee, as well as their senior members, must have played significant roles in these negotiations. Senator Patty Murray (D-WA) and Representative Paul Ryan (R-WI) chaired their respective budget committees.<sup>189</sup> It is likely that Senator Nelson, as a senior member of the budget committee, also had significant input into the final budget compromise.<sup>190</sup>

Significantly, Section 203, a minute part of the Bipartisan Budget Bill, arose during an appropriations process under dramatic pressure in the months preceding enactment.<sup>191</sup> On September 10, 2013, prior to the start of budget negotiations, which eventually stalled and caused a governmental shutdown lasting from October 1–16,<sup>192</sup> H.J.R. Res 59 was introduced and later was passed on September 20, after a mere hour of debate.<sup>193</sup> On September 27, the Senate passed the resolution with one

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<http://www.billnelson.senate.gov/about-bill>. This information was gathered during the 114th Congress (Fall 2014).

185. *Richard B. Nugent*, MAPLIGHT.ORG, <http://maplight.org/us-congress/legislator/1421-richard-b-nugent> (last visited Dec. 23, 2015).

186. Press Release, House of Reps. Comm. on Rules, Sessions Welcomes Rules Members for the 113th Congress (Jan. 4, 2013), <https://rules.house.gov/press-release/sessions-welcomes-rules-members-113th-congress>.

187. *Id.*

188. John Bresnahan & Jake Sherman, *Budget Agreement Reached*, POLITICO (Dec. 10, 2013, 10:20 PM), <http://www.politico.com/story/2013/12/budget-deal-update-patty-murray-paul-ryan-100960.html>.

189. See Press Release, House of Reps. Comm. on the Budget, Murray and Ryan Introduce Bipartisan Budget-Conference Agreement, (Dec. 10, 2013), <http://budget.house.gov/news/documentsingle.aspx?DocumentID=364030>.

190. See *supra* text accompanying notes 179–85.

191. See *supra* notes 178–81 and accompanying text.

192. See Jeanne Sahadi, *Shutdown: What Happens Next*, CNN: MONEY (Oct. 1, 2013, 1:08 AM), <http://money.cnn.com/2013/10/01/news/economy/shutdown-what-next>.

193. 159 CONG. REC. H5787 (daily ed. Sep. 20, 2013) (Roll No. 478).



amendment.<sup>194</sup> Essentially, the Senate struck the House's version, replacing it with one containing minimal changes,<sup>195</sup> a process that was repeated until a stalemate was reached.

On October 17, 2013, an interim appropriations bill that temporarily ended the shutdown passed.<sup>196</sup> Finally, on December 10, 2013, the chairs of the Senate and House Budget Committees, Murray and Ryan, announced their bipartisan agreement.<sup>197</sup> This stripped the extant language of H.J.R. Res. 59, and replaced it with language reflecting the new budget deal.<sup>198</sup> All that remained was a formal vote.<sup>199</sup>

On December 12, 2013, the House voted in favor of the bill by a vote of 332–94.<sup>200</sup> For the first time, this bill included Section 203 as enacted.<sup>201</sup> The House considered and debated the Section for merely seventy minutes, under restrictions of a special rule, House Resolution 438, promulgated by the Committee on Rules.<sup>202</sup> This not only abbreviated the debate, but, more importantly, mandated that H.J.R. Res. 59 be considered in the House “without intervention of any point of order.”<sup>203</sup> This foreclosed legislators from having a vehicle through which to raise objections concerning violations of rules, such as lack of germaneness.<sup>204</sup>

With past efforts to restrict the DMF through traditional legislative channels having failed,<sup>205</sup> proponents of Section 203

194. 159 CONG. REC. S6992 (daily ed. Sep. 27, 2013) (Rollcall Vote No. 208 Leg.).

195. 159 CONG. REC. H5773 (daily ed. Sep. 20, 2013) (H.J. Res. 59).

196. Continuing Appropriations Act, 2014, Pub. L. No. 113–46, 127 Stat. 558 (2013).

197. See *Biography*, Bill Nelson, *supra* note 184.

198. *Id.*

199. *Id.*

200. 159 CONG. REC. H8083 (daily ed. Dec. 12, 2013) (Roll No. 640).

201. 159 CONG. REC. H8059 (daily ed. Dec. 12, 2013).

202. See H.R. Res. 438, 113th Cong. (2013–14).

203. 159 CONG. REC. H7702 (daily ed. Dec. 12, 2013); see also H.R. REP. NO. 113-290 (2012–14) (Conf. Rep.) (showing that, along partisan lines, the House Rules Committee, whose members included four from the Florida delegation, voted to report this rule to the full house (9-3 vote)); 159 CONG. REC. H7715 (daily ed. Dec. 12, 2013) (Roll No. 638) (noting that the House passed this rule, 226-195).

204. See KAREN L. HAAS, RULES OF THE HOUSE OF REPRESENTATIVES 114TH CONGRESS, at 30 (Jan 6, 2015), <http://clerk.house.gov/legislative/house-rules.pdf>.

205. See Identity Theft and Tax Fraud Prevention Act of 2013, S. 676, 113th Cong. (2013); see also Protect and Save Act of 2013, H.R. 295, 113th Cong. (2013);

finally slipped their legislation in under the guise of the budget bill. Representative Johnson attempted to take credit for the enactment, announcing:

I introduced the Alexis Agin Identity Theft Protection Act with my Democrat colleague Xavier Becerra. And thanks to the budget deal, which includes a provision to restrict access to the Death Master File, American families will be better protected from tax fraud. I salute the Agins for their tireless advocacy, and God bless America.<sup>206</sup>

Senator Nelson added that he had also been trying for several years to limit access to the DMF,<sup>207</sup> emphasizing that the measure would “save the U.S. government money that otherwise is being stolen;” the money anticipated to be salvaged was estimated at \$786 million during the following decade.<sup>208</sup> Omitted from this report was the fact that \$517 million of this savings would be derived from a costly certification program for those seeking access to the Limited Use Death Master File (LUDMF).<sup>209</sup> With Section 203 set to save only \$269 million over the next decade,<sup>210</sup> a fair inference can be made that the actual intent behind Section 203 was to help supplant budget cuts Congress enacted in 2011,<sup>211</sup> not to fight identity fraud.

In short, Section 203 provided that beginning March 26, 2014, for three calendar years following a person’s death, all but those

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Social Security Death Master File Privacy Act of 2013, H.R. 466, 113th Cong. (2013); Tax Crimes and Identity Theft Prevention Act, H.R. 531, 113th Cong. (2013).

206. 159 CONG. REC. H7699 (daily ed. Dec. 12, 2013).

207. Rubin, *Death List Limits*, *supra* note 63.

208. *Id.*

209. CONG. BUDGET OFFICE, CONG. BUDGET OFFICE COST ESTIMATE (2013), <https://www.cbo.gov/sites/default/files/113th-congress-2013-2014/costestimate/bipartisan-budget-act-20130.pdf>; *see also* Lori Montgomery, *Senate Passes Bipartisan Budget Agreement*, WASH. POST (Dec. 18, 2013), [http://www.washingtonpost.com/politics/senate-poised-to-pass-bipartisan-budget-agreement/2013/12/18/54fd3a1a-6807-11e3-a0b9-249bbb34602c\\_story.html?hpid=z1](http://www.washingtonpost.com/politics/senate-poised-to-pass-bipartisan-budget-agreement/2013/12/18/54fd3a1a-6807-11e3-a0b9-249bbb34602c_story.html?hpid=z1); *infra* Section III.A (describing certification process).

210. Brad Plumer, *Here’s What’s in the Budget Deal the Senate’s Voting On*, WASH. POST (Dec. 17, 2013), <http://www.washingtonpost.com/blogs/wonkblog/wp/2013/12/17/heres-whats-in-the-budget-deal-the-senates-voting-on/>.

211. *See* Gregory Korte, “Death Master File” Remains Fodder for Scams, USA TODAY (Feb. 6, 2014), <http://www.usatoday.com/story/news/politics/2014/02/06/anti-fraud-efforts-stalled-as-death-master-file-lives-on/5231223/>.

certified by the DOC would be unable to access the DMF,<sup>212</sup> causing delayed access to the DMF for many by nearly four years.

A. *Key Aspects of Section 203*

Section 203 remains one of the few accomplishments of the 113th Congress.<sup>213</sup> Section 203(a) restricts access to the DMF for three calendar years, beginning on the date of an individual's death, to individuals certified under a program established by the Secretary of Commerce.<sup>214</sup> Thus, genealogical websites that had posted the SSDI can no longer do so for deaths occurring on or after March 26, 2014.<sup>215</sup> Section 203 imposes user fees, as well as penalties of \$1,000 per unauthorized disclosure and fines reaching \$250,000.<sup>216</sup>

B. *Concerns Raised about Section 203*

Section 203 was drafted hastily, without the benefit of either public hearings or full committee discussions.<sup>217</sup> The result reflects this lack of orderly process. Senator Nelson insisted that Section 203 be included in the November 2013 discussion draft "as is," likely because it became evident that it "was in contention to be a part of the budget compromise, so they hurried to get some text for the budget compromisers to use."<sup>218</sup> Because the regular legislative drafting procedure was bypassed,<sup>219</sup> the drafters apparently did not appreciate the bill's unintended consequences to the public, medical and genealogical researchers, states, financial institutions, insurance companies, and others. While Section 203 was being developed, stakeholders were neither

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212. See 42 U.S.C. § 1306(f) (2014).

213. See *supra* note 4.

214. Those receiving certification are granted access to the Limited Use Death Master File (LUDMF). See Mathews, *RPAC 2013 Year-End Report*, *supra* note 97.

215. Ancestry.com now limits access to SSNs to 10 years following death. *Why Is the SSDI Data Publicly Available Online?*, ANCESTRY (Oct. 5, 2015, 4:57 PM), [http://help.ancestry.com/app/answers/detail/a\\_id/593/kw/death%20master%20file](http://help.ancestry.com/app/answers/detail/a_id/593/kw/death%20master%20file).

216. 42 U.S.C. § 1306(c) (2014).

217. E-mail from Barbara J. Mathews, Certified Genealogist, Bd. For Certification of Genealogists, to author (Oct. 8, 2014) (on file with author).

218. *Id.*

219. See *infra* Section III.B.1 (discussing Senate colloquies).

notified of its wording nor afforded opportunities to suggest revisions. In fact, prior to the vote:

The Senate Finance Committee scheduled a hearing, cancelled it for snow, rescheduled it, and cancelled it again. The Finance Committee Chair released his staff's notes about what they might put in the bill. The Ranking Member of the Finance Committee . . . released a statement that this was *not* agreed-upon text. (Both statements appear to have been removed from the Finance Committee [web] page.) One week later, there still had not been a hearing, but the Finance Committee's text turned up as Section 203 of the Ryan-Murray Budget Conference Committee's compromise. Section 203 had bypassed committee hearings and public feedback; it lacked committee approval.<sup>220</sup>

While genealogists' concerns about lack of input had little effect on the legislative process, it seems that, shortly prior to the vote, insurance companies and state administrators learned of the details and raised concerns; from the colloquies in the Congressional Record in the days preceding the vote, it became clear that these stakeholders' concerns were appreciated by the legislators,<sup>221</sup> who on the floor of Congress, asked for reassurance that DMF access would not be unnecessarily curtailed upon enactment.

### 1. Legislators' Concerns

The following excerpts from the Congressional Record highlight the frustrations of many concerning the legislative process engaged in developing the Bipartisan Budget Bill generally, and Section 203 specifically.

On December 17, the day before the vote, Senator Enzi from Wyoming addressed the Senate:

Mr. President, I rise to express my disappointment that the budget deal we will soon be voting on reflects just that, a deal—not legislation, a deal.

. . . .

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220. Mathews, *RPAC 2013 Year-End Report*, *supra* note 97; *see also* Martinez, *supra* note 17, at 557 n.25 (“[I]t does not help that legislators conduct the people’s business by primarily consulting each other rather than their constituents.”).

221. *See infra* Section III.B (discussing colloquies of legislators).

Because Members are going to be voting on a deal rather than a bill that had the opportunity to be improved through the committee process with feedback from other Members, we will not have the opportunity to discuss the potential unintended consequences and address them before they become law. . . . I am on that conference committee. When the deal was made, we read about it in the papers just like everybody else. We did not get any special notice that there had been a deal made . . . . I have seen the deals made before. I have never seen one made by so few people before. In this one there was a Democrat from the Senate and a Republican from the House. The two of them came up with a conclusion that this is what we should have.

That is not too bad, provided it goes through a normal process, which means we get to make some amendments. When we make amendments, . . . at least we get to bring up the unintended consequences. . . . That is why we have so many people in Congress . . . a whole lot of backgrounds looking at everything that happens . . . from a whole lot of perspectives so maybe we can stop the unintended consequences.

But that is only if it goes through a normal process. So far the tree is filled on this bill. . . . That means no amendments allowed. Take it or leave it. No matter what you think of it, forget it. We are going to have some unintended consequences . . . and they are going to become law.

I applaud the proposal that would limit access to Social Security's Death Master File to prevent identity theft, and individuals from fraudulently claiming government benefits and tax refunds associated with those who have passed away. . . . However, I am concerned that certain organizations that use that same Death Master File for legitimate business purposes that benefit consumers may have their access restricted.

If we discussed these issues in committee, we might have been able to address them, perhaps with a sensible solution, perhaps in a way that would have protected the identity and still protected the benefits to the consumer.

. . . .

A few of the concerns I have just raised could be addressed, if not in committee, then on the Senate floor. Once again, the majority leader has decided that no

amendments will be allowed. They won't be allowed to be offered, and they won't be allowed to be voted on.

....

We have to stop dealmaking [sic] and we have to start legislating.

Our constituents sent us here to legislate. They deserve better than a deal agreed to behind closed doors without input and improvements from the rest of the legislators, not even the committee to which it was assigned. Even though I am disappointed in the process that has led to this point today, I am even more disappointed in the product that resulted from the dealmaking [sic].<sup>222</sup>

Senator Nelson responded:

It was never the intent of this Senator or the cosponsors to deny access to the master file by the people who need it for legitimate purposes. The language in this budget deal would include the [DMF] file in the Freedom of Information Act exemptions so that it will not be available to just anyone off the street. However, the Social Security Administration and Commerce would still be able to release the information in the file for those who need it.<sup>223</sup>

When Senator Nelson asked Senator Murray whether, "as Commerce sets up a certification program, the Social Security Administration and Commerce will still be able to release the Death Master File to folks who need to use it for legitimate purposes,"<sup>224</sup> Senator Murray responded: "That is absolutely our intention. There is nothing in law that prevents the continued public release of the Death Master File while the Commerce Department sets up the certification program. This act simply exempts the Social Security Administration's death records from freedom of information requests . . . ."<sup>225</sup>

Senator Casey offered the following:

Mr. President, echoing the comments of my colleague from Florida, I am pleased that the budget includes language to address the fraud that is perpetrated with information from the Death Master File. Tax fraud is a large and growing problem. . . .

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222. 159 CONG. REC. S8875-76 (daily ed. Dec. 17, 2013) (statement of Sen. Enzi).

223. *Id.* at S8891 (statement of Sen. Nelson).

224. *Id.*

225. *Id.* (statement of Sen. Murray).

As a member of the Finance Committee, I have worked . . . to address this issue. I am pleased to see the language limiting access to the Death Master File in the budget deal.

As Commerce begins its rulemaking, it is essential to strike the correct balance. The reality is that the Death Master File is used by companies across Pennsylvania and the Nation to prevent fraud and provide other essential consumer protections. Banks, investment companies, insurers, and numerous other businesses run this file to ensure the identity of those accessing their services. Striking the correct balance in the regulatory process is critical to ensuring the continued legitimate use of this information.

Businesses and those who contract for assistance with fraud prevention . . . must maintain access to the file. Furthermore, access must remain available as those regulations are promulgated.

In short, as a certification program is set up, it is important that we get it right. The Death Master File is critical to fraud prevention and must remain available to legitimate users. To that point, I ask the Senator from Washington, the distinguished chairwoman, is it the intention of the Bipartisan Budget Act for the Commerce Department to seek input from stakeholders as it creates the certification program to ensure legitimate users maintain access to the file?<sup>226</sup>

Senator Murray then reassured Senator Casey that standard rulemaking procedures would be followed in establishing the certification program.<sup>227</sup>

Senator Orin Hatch shared his significant concerns:

Mr. President, I have decided to support the budget agreement, though . . . it contains some imperfections.

Following up on earlier remarks today in a colloquy on the Senate floor by my colleagues from Florida, Pennsylvania, and the Senate Budget Committee Chair, Senator Murray, I wish to provide some instructive remarks about the Death Master File provision of the budget agreement. . . . Many researchers, genealogists, and businesses use the data for bona fide reasons including fraud prevention, ancestry research, identifying

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226. *Id.* (statement of Sen. Casey).

227. *Id.* (statement of Sen. Murray).

remains of deceased individuals, retirement plan administration and prevention of improper payments. As long as they can show the Commerce Department that they have rigorous privacy protections and protocols put in place, they should be able to become certified by Commerce to have access to the Death Master File data.

I concur with what much of what my colleagues have said in their recent colloquy about the Death Master File provision of the budget agreement. . . . [I] wish to reiterate the need for balance in the regulatory process and in the rulemaking procedures . . . in the budget legislation to undertake. We need a robust rule-making process, where all interested parties are afforded the time and opportunity to adequately express their interests. . . . [W]e need to ensure that during that process, there will be access to Death Master File data for bona fide purposes, including fraud prevention, identifying remains of deceased individuals, forensic and other genealogical research, prevention of improper payments, and assurance of proper payments.

As the budget agreement is currently written, there appears to be some confusion and ambiguity concerning implementation of the regulatory process and rulemaking procedures that the Commerce Department is to undertake and whether access to data in the interim, when rules are being promulgated and aired, will be assured. . . . [A] more robust and inclusive process for arriving at the Death Master File provision of the budget agreement could have eliminated the confusion and ambiguity that has arisen. The Finance Committee . . . has jurisdiction over the manner in which the Social Security Administration governs Death Master File data, and the Finance Committee has expertise that could have been called upon. Unfortunately, that was not the case, as the Death Master File provision of the budget agreement was not processed through regular order with adequate Finance Committee input.<sup>228</sup>

Senator Hatch continued to express frustration with the legislative process:

Mr. President, it is becoming far too common for important legislation to bypass committees of jurisdiction and for it to be written by legislators who do not

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228. *Id.* (statement of Sen. Hatch).



necessarily have the depth of knowledge and expertise necessary to avoid writing laws that either do not work or contain glitches, ambiguities, and confusing language.<sup>229</sup> In my opinion, we need to return to regular order where committees of jurisdiction are the places where issues in their jurisdiction are debated, processed, and agreed upon in a bipartisan fashion. Certainly, committees of jurisdiction must be consulted when others decide to write legislation that involves issues that lie squarely within their jurisdictions. That will be the surest route to preventing a reoccurrence of the ambiguity and confusion that has, unfortunately, arisen from the Death Master File provision of the budget agreement.<sup>230</sup>

The following day of the vote, Senator Edward Markey echoed Senator Hatch's concerns about implementation and fears of insurance companies and pension administrators, both of which use the DMF to determine the appropriate timing of benefits payments.<sup>231</sup> He emphasized that "nine states actually require that insurers access the DMF prior to the payment of benefits," and that state treasurers and comptrollers also rely on the DMF daily, so ongoing DMF access was critical and must continue uninterrupted while the certification process was being instituted.<sup>232</sup> Senator Markey concluded:

I . . . urge the Department of Commerce to take immediate regulatory action to ensure that insurance companies, pension plans, and State Treasurers and Comptrollers' access to the DMF is not inhibited during the initiation of the certification program and that all parties have an opportunity to obtain certification prior to losing access to the DMF. The Department of Commerce should also ensure that stakeholders, both in the industry and in the beneficiary communities, have an opportunity to provide input on any rulemakings regarding either the certification program or the access restrictions themselves.<sup>233</sup>

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229. Rubin, *Death List Limits*, *supra* note 63 (highlighting Senator Hatch's concerns).

230. *Id.*

231. 159 CONG. REC. S8946 (daily ed. Dec. 18, 2013) (statement of Sen. Markey).

232. *Id.*

233. 159 CONG. REC. S8920 (daily ed. Dec. 18, 2013) (statement of Sen. Markey). Senator Blumenthal's remarks reiterated the comments of the other

The press noticed the quantity and gravity of these concerns: “In the Senate yesterday, Nelson, . . . Patty Murray and . . . Bob Casey said the government shouldn’t interpret the law to cut off access [to the DMF] immediately. ‘It’s essential to strike the correct balance,’ Casey said, adding that banks and investment companies in his state use the information.”<sup>234</sup>

## 2. *Adverse Consequences*

For a law whose necessity seems debatable—the 2014 Treasury Department Inspector General’s Interim Report indicates that, as the IRS started to more carefully screen filings prior to Section 203’s enactment, fewer fraudulent tax refunds have been detected<sup>235</sup>—considerable adverse consequences have ensued.

### a. *To the Public DMF*

Section 203(a) prohibits disclosure of information during the three-year period beginning on the date of an individual’s death. Thus, a death occurring even as early as January 2015 will not appear in the SSDI until January 2019, causing the three-year information embargo to essentially last four years. The considerable effect of this delay was calculated by Barbara Mathews in her blog post, *How Many Deaths before the SSDI gets Updated Again*.<sup>236</sup> The last time the SSDI could legally be updated was March 28, 2014; the next will be January 1, 2018 for 2014 deaths—forty-

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Senators concerning safeguarding PII, and reassured his constituents, including businesses, that he did not want legitimate DMF users to be adversely affected pending the certification program’s implementation. *Id.* Other senators echoed these concerns about the states, stakeholders, and ensuring uninterrupted DMF access. See 159 CONG. REC. S8920 (daily ed. Dec. 18, 2013).

234. Rubin, *Death List Limits*, *supra* note 63.

235. TREASURY INSPECTOR GEN. FOR TAX ADMIN., INTERIM RESULTS OF THE 2014 FILING SEASON 11 (2014), [http://www.treasury.gov/tigta/auditreports/2014reports/201440029\\_oa\\_highlights.pdf](http://www.treasury.gov/tigta/auditreports/2014reports/201440029_oa_highlights.pdf) (“According to the IRS, expanded use of controls to identify fraudulent claims before they are accepted . . . identified 555,235 fraudulent ones as of February 28, 2014.”).

236. Barbara J. Mathews, *How Many Deaths Before the SSDI Gets Updated Again?*, MGC SENTINEL (Nov. 3, 2014), <http://massgencouncil.org/index.php/easyblog/entry/how-many-deaths-before-the-ssdi-gets-updated-again>.

five months later.<sup>237</sup> During that time, there will have been 9.4 million more deaths in the U.S.<sup>238</sup>

Rather than this lengthy embargo, the law could have been sunset a few years following enactment, affording the IRS time to make necessary adjustments that for years, aware of the fraud issues, it did not.

*b. To Long-Term Users of the Public DMF*

Long-term Public DMF users have experienced serious restrictions in their abilities to conduct research. Recent additional decreases in the materials in the Public DMF<sup>239</sup> have caused a decrease of seven million searchable records. In addition, as Kenneth H. Ryesky explained, the high cost of the certification process means it will be too expensive for many genealogists, whether professional or amateur.<sup>240</sup> Also, the new “Open DMF” does not contain the decedents’ last addresses, and researchers need to know ahead of time what information, including SSNs, they are searching for.<sup>241</sup> “Wouldn’t it be simpler,” Ryesky, a genealogist, added, “for the IRS to just screen its tax returns before cutting the refund checks?”<sup>242</sup>

In addition to these professional researchers, Section 203 also adversely affects millions of individual genealogy researchers, who are excluded from certification. This is due to the requirement that the applicant’s interest in the information be either for a legitimate fraud prevention or a business purpose.<sup>243</sup>

Further, applicants must maintain appropriate “systems, facilities, and procedures . . . to safeguard such information,” and must have “experience in maintaining . . . confidentiality [and]

237. *Id.*

238. *Id.*

239. *See supra* note 20 and accompanying text.

240. E-mail from Kenneth H. Ryesky to author (Apr. 20, 2014) (on file with author).

241. *Id.* “Some refer to the publicly available DMF as the ‘Open DMF.’” *Id.* For a review of experiences using the LUDMF, *see supra* notes 213–22 and accompanying text.

242. E-mail from Kenneth H. Ryesky to author (Apr. 20, 2014) (on file with author).

243. 42 U.S.C. § 1306(b)(2)(A) (2014); *see also* 15 C.F.R. § 1101 (2014) (interim regulations).

security,<sup>244</sup> a requirement that effectively eliminates individual researchers from certification.

While professional genealogists may be disappointed that the interim (and likely final) regulations will not automatically grant them certification,<sup>245</sup> certification itself has led to considerable disappointment.

Forensic genealogist Dee Dee King, likely the first genealogist to obtain certification under the interim regulations,<sup>246</sup> described her experiences in both attaining certification and in using the LUDMF.<sup>247</sup> A member of the Council for Advancement of Forensic Genealogy, King was working for the Department of Defense to help identify and repatriate military personnel remains.<sup>248</sup> She describes completing the detailed application as a time-consuming and frustrating process.<sup>249</sup> She found the product expensive for a small business owner, ranging from \$995 for a single user's online interactive annual subscription to \$14,500 for fifty-one or more registered users, with queries "priced by the number of inquiries, ranging . . . from \$600 packages to \$14,400 packages."<sup>250</sup> Further, research capabilities were limited: database fields are limited to SSN, first name, last name, date of birth, and date of death.<sup>251</sup> In

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244. 42 U.S.C. § 1306(b)(2)(B) (2014).

245. Professional genealogists suggested the law permit certain categories of individuals to have immediate access if they are certified by the U.S. Department of Commerce. Barbara J. Mathews, *RPAC Report, January 2014*, BOARD FOR CERTIFICATION GENEALOGISTS: SPRINGBOARD (Feb. 1, 2014), <http://bcgcertification.org/blog/2014/02/rpac-report-january-2014>. The request was ignored. The suggested exceptions included those assisting in military repatriation, identifying unidentified decedents, assisting attorneys in finding missing heirs, researching genetically-inherited diseases and locating family members, and working as forensic/heir researchers and certified/accredited genealogists. See *supra* text accompanying note 31.

246. Forensic Genealogy Services, LLC, About Us, <http://www.forensicgenealogyservices.com/AboutUs.html> (providing background information on Dee Dee King) (last visited Jan. 14, 2016); see Temporary Certification Program for Access to the Death Master File, 79 Fed. Reg. 16668, 16668–72 (Mar. 26, 2014) (to be codified at 15 C.F.R. pt. 1110).

247. See Dee Dee King, *Demystifying the DMF*, COUNCIL FOR ENACTMENT FORENSIC GENEALOGY (Apr. 2014), [http://www.forensicgenealogists.org/wp-content/uploads/CAFG\\_Vol\\_4\\_Issue\\_3\\_DMF-Special.pdf](http://www.forensicgenealogists.org/wp-content/uploads/CAFG_Vol_4_Issue_3_DMF-Special.pdf).

248. See *id.* at 7.

249. See *id.* at 7–9.

250. *Id.* at 8.

251. *Id.* at 9.

the name search fields, neither middle names nor initials are permitted, a “primitive [search process] compared to some of the current SSDI search forms offered by third parties.”<sup>252</sup> Wildcard searches<sup>253</sup> do not work: “names must be exact.”<sup>254</sup> Attempts to identify people with a common first name or last name or both produced only a few “hits,” whereas with other online products, far more results are obtained.<sup>255</sup> King concluded that the DMF had undergone a radical change since Section 203’s enactment, contained considerably less information, and was expensive “for a less useful product than many already online,” particularly if the purpose is strictly for genealogical research.<sup>256</sup> “The search engine is primitive and appears to be designed for basic verification of facts one already knows . . . . This is NOT a tool for researching . . .”<sup>257</sup> or producing “a broader set of information.”<sup>258</sup> She opined, “The Bipartisan Budget Act of 2013 did not kill our ability to use the DMF. It did, however, certainly cripple the ability to access the information, the amount of information available, and the ability to mine the database.”<sup>259</sup>

#### IV. CHALLENGING “BUSINESS AS USUAL” IN LEGISLATING

The process of enacting Section 203 perpetuates a dangerous practice that will exacerbate the public’s mistrust in government

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252. *Id.* at 10.

253. *Wildcard Character*, WHATIS.COM, <http://whatis.techtarget.com/definition/wildcard-character> (last visited Mar. 4, 2016) (“A wildcard character is a special character that represents one or more other characters. The most commonly used wildcard characters are the asterisk (\*), which typically represents zero or more characters in a string of characters, and the question mark (?), which typically represents any one character.”).

254. King, *supra* note 247, at 10.

255. *See id.*

256. *Id.*

257. *Id.* at 10–11.

258. *Id.* at 11.

259. *Id.* at 11; *see also* Jan Meisels Allen, *What Does IRS Tax Fraud Have to Do with Genealogists? Nothing but We Have Been Blamed*, IAJGS (Oct. 15, 2014), <http://lists.iajgs.org/mailman/private/records-access-alerts/msg00223.html>. For additional information regarding the inadequate and degraded data and search engine, *see* Frederick E. Moss, *Response to Proposed Final Rule: Certification Program for Access to the Death Master File*, FEDERATION GENEALOGICAL SOCIETIES 1, 9 (Mar. 30, 2015), <http://www.fgs.org/rpac/wp-content/uploads/2015/04/FGS-Response-to-proposed-Final-Rule-30-March-2015.pdf>.

and lack of faith in the democratic process.<sup>260</sup> Notably, a recent Gallup Poll found that “only 7 percent of Americans have ‘quite a lot’ or a ‘great deal’ of confidence in the country’s legislative branch,” representing the lowest confidence rate for Congress that Gallup has ever recorded in its more than forty-year history and represents a sharp drop from the first poll taken, in 1973, finding forty-two percent of Americans confident in Congress.<sup>261</sup> This skepticism is unlikely to recede so long as Congress continues to bypass the expertise of legislators; the “take it or leave it” attitude detailed in the colloquies of many senators prior to this enactment evidences the damage caused by current legislative habits.<sup>262</sup> That these cynical maneuvers endure was plain during the fall of 2014, when Congress authorized the President to engage in military action in Syria<sup>263</sup> with scant congressional debate.<sup>264</sup>

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260. Lauren Fox, *Poll: Congressional Popularity Tanks*, U.S. News & World Rep. (June 19, 2014, 10:19 AM), <http://www.usnews.com/news/blogs/ballot-2014/2014/06/19/poll-congressional-popularity-tanks>.

261. *Id.*

262. Editorial, *Don't Hide the Syrian Aid Vote*, N.Y. TIMES (Sept. 15, 2014), <http://www.nytimes.com/2014/09/16/opinion/dont-hide-the-syrian-aid-vote.html>.

263. The Continuing Appropriations Resolution was the bill that kept the government operating through mid-December. See H.R.J Res. 124, 113th Cong. (2014) (enacted). Like the 2013 Act, it was used as the “vehicle for a major foreign policy decision: arming and training Syrian rebels to fight against the Islamic State in Iraq and Syria . . . .” Editorial, *supra* note 262. The war resolution amended the spending bill, pressing lawmakers to decide “between paying for the rebels and shutting down the government.” *Id.* Widespread opposition arose in Congress. See Paul Kane, *House Moving Toward Vote on Syria Amendment*, WASH. POST (Sept. 12, 2014), <https://www.washingtonpost.com/news/post-politics/wp/2014/09/12/house-moving-toward-vote-on-syria-amendment>. The bill passed on September 16. See Jonathan Weisman, *House Votes to Authorize Aid to Syrian Rebels in ISIS Fight*, N.Y. TIMES (Sept. 17, 2014), [www.nytimes.com/2014/09/18/us/politics/house-vote-isis.html](http://www.nytimes.com/2014/09/18/us/politics/house-vote-isis.html). Like Section 203, the aid was buried “inside an emergency spending bill so that its members [wouldn’t] have to be held accountable.” David Firestone, *Will Congress Bother to Debate War Against ISIS?*, N.Y. TIMES: TAKING NOTE (Sept. 17, 2014, 10:33 AM), <http://takingnote.blogs.nytimes.com/2014/09/17/will-congress-bother-to-debate-war-against-isis/?partner=rss&emc=rss>. This action was not “surprising for a Congress that ha[d] spent years avoiding big votes, but [it was] a pretty shameful abdication of one of the legislature’s most profound obligations as the branch of government that declares war.” *Id.*

264. The co-chair of the seventy-member Congressional Progressive Caucus objected. See Greg Sargent, *Congress May Vote on War, After All (Sort of)*, WASH. POST: THE PLUM LINE (Sept. 12, 2014), <https://www.washingtonpost.com/blogs/plum-line/wp/2014/09/12/congress-may-vote-on-war-after-all-sort-of> (“Attaching the

A. *Section 203 Represents Creeping Congressional Constraint of Core Democratic Principles*

Using appropriations measures to legislate is, arguably, anti-democratic. When Congress inserts substantive provisions into appropriations bills, it thwarts the long-established process of legislative democracy and threatens to undermine and erode public confidence in the federal government.<sup>265</sup>

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money for Syria to the continuing resolution forces members of Congress to make a false choice: arm the Syrian rebels or shut down the government. These two issues should be separate. The public must have their voices heard . . . in a full and robust debate . . .”). The Senate’s vote, which “sidestep[ped] the debate over the extent of American military action until the lame-duck session of Congress” was approved seventy-eight to twenty-two. Jonathan Weisman & Jeremy W. Peters, *Congress Gives Final Approval to Aid Rebels in Fight With ISIS*, N.Y. TIMES (Sept. 18, 2014), <http://www.nytimes.com/2014/09/19/world/middleeast/senate-approves-isis-bill-avoiding-bigger-war-debate.html>; see also David Firestone, *The Senate Ducks a Clear Vote on Aid for Syrian Rebels*, N.Y. TIMES: TAKING NOTE (Sept. 18, 2014, 7:05 PM), <http://takingnote.blogs.nytimes.com/2014/09/18/the-senate-ducks-a-clear-vote-on-aid-for-syrian-rebels/> (“Most voters will never know whether their senator approved the rebel aid out of principle, or to prevent a government shutdown. And that ambiguity is just the way that most senators who are up for re-election in November wanted it. . . . [T]hey ducked the issue and fled the Capitol. Firestone quotes Senator Rand Paul, “[i]t’s inexcusable that the debate over whether we involve a country in war . . . would be debated as part of a spending bill and not as part of an independent, free-standing bill.” *Id.* (Firestone notes that this is not surprising coming from “one of the least productive Congresses in history”). This, from “one of the least productive Congresses in history . . . .” Note the frustration of Massachusetts Congresswoman Tsongas: “We just simply have not had the opportunity to robustly debate the President’s strategy. . . . I did vote against it because . . . I just felt we needed to have a chance to debate the . . . strategy and an opportunity to vote to authorize or not . . . .” *Congresswoman Niki Tsongas: President Obama “Needs a Congressional Vote” on Action Against ISIS*, BOS. PUB. RADIO (Oct. 21, 2014, 3:09 PM), <http://wgbhnews.org/post/congresswoman-niki-tsongas-president-obama-needs-congressional-vote-action-against-isis>. On the lack of legislative involvement in the war effort, see the comments of Massachusetts Representative Jim McGovern suggesting that if Congress fails to take up the issue next year, he would “introduce a ‘privileged resolution’ to force a vote.” Bryan Bender, *A Quest for Clarity: Massachusetts Delegation Says a Congressional Debate on War With Islamic State Is Overdue*, BOS. GLOBE, Dec. 19, 2014, at E7 (“We are not living up to our constitutional responsibility and we are getting sucked deeper and deeper into a war that hasn’t been authorized’ . . .”).

265. Edward L. Rubin, *Law and Legislation in the Administrative State*, 89 COLUM. L. REV. 369, 408–09 (1989) [hereinafter Rubin, *Law and Legislation*] (“[L]egislation must be fair . . . [L]egislation should be effective, [and] it should achieve the purpose for which it was designed . . . [T]he conception of fairness is

Not only does legislating through appropriations riders violate both House and Senate rules, but the frequent legislative enactments using the appropriations process<sup>266</sup> are problematic for other reasons: (1) substantive legal changes made through appropriations receive scant deliberation; (2) policymaking through appropriations alters the balance of power by giving undue advantage to last-minute, less-considered legislation; (3) appropriations riders enact substantive laws that would otherwise likely fail to survive conventional legislative channels; and (4) appropriations riders interfere with the President's constitutional authority to veto problematic legislation, given that the President is unable to reject specific spending propositions.<sup>267</sup>

Inclusion of substantive legislation in appropriations bills breaches both House Rule XXI and Senate Rule XVI. House Rule XXI states, "[a] provision changing existing law may not be reported in a general appropriation bill."<sup>268</sup> Furthermore, this rule requires that "[a]n amendment to a general appropriation bill shall not be in order if changing existing law."<sup>269</sup> Senate Rule XVI also requires that "[n]o amendments shall be received to any general appropriation bill the effect of which will be to . . . add a new item of appropriation, unless it be made to carry out the provisions of some existing law."<sup>270</sup> The fourth clause provides, "[o]n a point of order made by any Senator, no amendment offered by any other Senator which proposes general legislation shall be received to any

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that the government must take positive action to change social conditions . . . . Legislation is the mechanism by which these positive norms of fairness are implemented; if we cannot legislate effectively, we shall fail to produce a regime that we regard as just."); *see also* Martinez, *supra* note 17, at 552–55.

266. *E.g.*, H.R.J. Res. 124, 113th Cong., 128 Stat. 1867 (2014) (training Syrian rebels); Department of Defense and Full-year Continuing Appropriations Act of 2011, Pub. L. No. 112-10, § 1713, 125 Stat. 38, 150 (2011); *see also* MARK CHAMPOUX & DAN SULLIVAN, AUTHORIZATIONS AND APPROPRIATIONS: A DISTINCTION WITHOUT DIFFERENCE? (2006), [http://www.law.harvard.edu/faculty/hjackson/auth\\_appro\\_15.pdf](http://www.law.harvard.edu/faculty/hjackson/auth_appro_15.pdf).

267. *See* Edward A. Fitzgerald, *Alliance for Wild Rockies v. Salazar*, *Congress Behaving Badly*, 25 VILL. ENVTL. L.J. 351, 394–96 (2014).

268. KAREN L. HAAS, RULES OF THE HOUSE OF REPRESENTATIVES, 114TH CONGRESS, XXI cl. 2(b), (Jan. 6, 2015), <http://clerk.house.gov/legislative/house-rules.pdf>.

269. *Id.* at cl. 2(c).

270. COMM. ON RULES & ADMIN., RULES OF THE SENATE, XVI, cl. 1 (Jan. 24, 2013), <http://www.gpo.gov/fdsys/pkg/CDOC-113sdoc18/pdf/CDOC-113sdoc18.pdf>



general appropriation bill, nor shall any amendment not germane or relevant to the subject matter contained in the bill be received.”<sup>271</sup>

Notwithstanding these rules, which are intended to resist the effective interests and opacity that permeate the appropriations process,<sup>272</sup> appropriations bills often contain substantive provisions.<sup>273</sup> Harvard law students Mark Champoux and Dan Sullivan note that “[s]ometimes these provisions enact entire laws while other times they simply implement a single policy objective.”<sup>274</sup> This strategy of tacking legislative provisions onto appropriations bills has become a “favorite tool” of Congress,<sup>275</sup> inhibiting public participation and legislative accountability.<sup>276</sup>

271. *Id.*

272. Fitzgerald, *supra* note 267, at 387. This means of legislating remains alive, evidenced by the 2014 Bipartisan Budget Bill, approved December 2014, under pressure to forestall a government shutdown. See Jennifer Epstein, *Barack Obama Signs Budget Bill*, POLITICO (Dec. 26, 2013, 4:51 PM), <http://www.politico.com/story/2013/12/president-barac-obama-signs-budget-bill-bipartisan-budget-act-101551.html>; see also H.R. 59, 112th Cong. (1st Sess. 2011). The bill is “also packed with policy add-ons known as riders, many of which couldn’t get through Congress on their own. The riders include provisions affecting pension plans, bank investments, school lunches, trucking safety, marijuana sales, and even old-fashioned light bulbs.” Charles Babington, *Spending Deal May Not Signal More Compromise in 2015 Congress*, BOS. GLOBE (Dec. 15, 2014), <https://www.bostonglobe.com/news/nation/2014/12/15/spending-deal-may-not-signal-more-compromise-congress/UFtPWDLm8OXVCV2k14tweP/story.html>. For example, the spending bill “loosens some banking rules imposed after the 2008 financial crisis. . . . [and] [a]llows some pension plans to cut benefits promised to current and future retirees.” *Id.* Even trucking safety rules were rolled back, prompting industry opposition. *Id.* Like the budget bill of 2013, it was a “must-pass.” *Id.*; see Fitzgerald, *supra* note 267, at 387 (“This rule rests on the recognition that the appropriation process is dominated by well-organized interests and lacks visibility.”); see also Noah Bierman, *Spending Bill Had No Fans in Mass. Delegation*, BOS. GLOBE (Dec. 16, 2014), <https://www.bostonglobe.com/news/politics/2014/12/16/massachusetts-congressional-delegation-opposes-spending-bill-even-though-will-fund-some-their-projects/MXuK4knpBuCfr1TTP7Wx3M/story.html>.

273. See Fitzgerald, *supra* note 267, at 386 (“House and Senate rules prohibit the attachment of substantive legislation to appropriation bills, but Congress often ignores this rule.”).

274. CHAMPOUX & SULLIVAN, *supra* note 266, at 17 (footnote omitted).

275. Sandra Beth Zellmer, *Sacrificing Legislative Integrity at the Altar of Appropriations Riders: A Constitutional Crisis*, 21 HARV. ENVTL. L. REV. 457, 457 (1997).

276. *Id.* at 500.

The practice reverses the customary legislative process that typically requires committee research, drafts, reviews, and recommendations followed by floor debate and passage in each legislative chamber.<sup>277</sup> This process provides ample opportunity for both public and legislative scrutiny.<sup>278</sup> While these reviews do not guarantee quality legislation, they do encourage public involvement, deliberated policymaking, and transparency. As Justice Brandeis once remarked: "Publicity is justly commended as a remedy for social and industrial diseases. Sunlight is said to be the best of disinfectants; electric light the most efficient policeman."<sup>279</sup>

Congressional rules and procedures, while not expressly required by the Constitution, developed to ensure that policy issues receive informed consideration.<sup>280</sup> Despite being voluntary, these rules, adopted by Congress as a means of self-governance, leave each chamber free to amend, repeal, or waive them as they see fit.<sup>281</sup>

Congress has at least five means of enacting substantive legislation through appropriations bills. It can:

- (1) Not enforce its rules;
- (2) Enact continuing resolutions not subject to the rules, instead of a general appropriations bill;
- (3) Insert authorization provisions into omnibus appropriations acts;
- (4) Legislate through appropriations bills by including provisions restricting the use of funds; and
- (5) Repeal or amend existing law by implication.<sup>282</sup>

Section 203 invokes only the first of these measures—Congress's failure to enforce its own rules. Put simply, Congress can elect not to enforce its own rules.<sup>283</sup> Because points of order are not self-executing, a member must raise them in order to enforce a

277. *Id.* For a description of dozens of interviews with congressional legislative drafters about the drafting process, see Victoria F. Nourse & Jane S. Schacter, *The Politics of Legislative Drafting: A Congressional Case Study*, 77 N.Y.U. L. REV. 575, 582–624 (2002).

278. Zellmer, *supra* note 275, at 500.

279. LOUIS D. BRANDEIS, *OTHER PEOPLE'S MONEY AND HOW THE BANKERS USE IT* 92 (1914).

280. See Zellmer, *supra* note 275, at 500–11.

281. See *id.* at 504–05.

282. CHAMPOUX & SULLIVAN, *supra* note 266, at 17–21.

283. *Id.* at 17.

rule.<sup>284</sup> If no member raises a point of order, Congress passes a bill, the President signs it, and it becomes law.<sup>285</sup> In essence, Congress sweeps the rule violation under the rug.

Legislators usually do not object to this practice.<sup>286</sup> At times, they pass ad hoc rules similar to those adopted during Section 203's enactment, prohibiting points of order.<sup>287</sup> They can even avoid compliance with their own rules by simply waiving or suspending them.<sup>288</sup>

More significant to Section 203, the House commonly attaches a "special rule" to appropriations bills under consideration.<sup>289</sup> A special rule outlines the procedures applicable during a bill's consideration and often waives points of order, including those usually available under House Rule XXI;<sup>290</sup> this enables Congress to avoid implementing its appropriations rules when it sees fit.<sup>291</sup>

Critiques of this method of legislating are common. In 1997, Sandra Beth Zellmer described the "perils of enacting substantive environmental legislation through the appropriations process."<sup>292</sup> She highlighted that such use of substantive appropriations riders determined "the outcome of public policy issues ranging from abortion to oil development,"<sup>293</sup> facilitating major changes in public policy "without public input or legislative accountability."<sup>294</sup>

284. *Id.*

285. See WILLIAM N. ESKRIDGE, JR., ET AL., *CASES AND MATERIALS ON LEGISLATION: STATUTES AND THE CREATION OF PUBLIC POLICY* 24–38 (3d ed. 2001); see also U.S. CONST. art. 1, § 7, cl. 2–3 (Presentment Clause).

286. Cf. ESKRIDGE ET AL., *supra* note 285, at 17 n.1 ("[The] Rules Committee . . . recommends to the full house a rule allowing expedited consideration of important bills. . . . [T]he Majority Leader normally expedites consideration by negotiating a *unanimous consent agreement* . . .").

287. See H.R. Res. 438, 113th Cong. § 10 (2013); see also *supra* Part II.

288. CHAMPOUX & SULLIVAN, *supra* note 266, at 7–8.

289. *Id.* at 8 (citing Louis Fisher, *The Authorization-Appropriation Process in Congress: Formal Rules and Informal Practices*, 29 CATH. U. L. REV. 51, 93–94 (1979)).

290. *Id.*

291. *Id.*

292. Zellmer, *supra* note 275, at 488.

293. *Id.* at 457.

294. *Id.*; see also Fitzgerald, *supra* note 267, at 387 ("Politics is not designed to satisfy private interests . . . . The republican view advises politicians to view with skepticism and subject interest group demands to examination through an open deliberative process. Republican theories 'require public-regarding justifications offered after multiple points of view have been consulted and . . . understood.'").

Denunciations of the practice illuminate the need for reform;<sup>295</sup> notwithstanding the efficiency of riders in tying up loose ends, critiques elucidate how the practice's inadequate tolerance for transparent debate creates a vehicle for enacting legislation that "would likely not survive the scrutiny of . . . committees and full floor debate."<sup>296</sup>

One common critique is that riders encourage "logrolling," wherein a bill incorporates inconsistent provisions, forcing passage by uniting divergent interest groups when any one provision would not pass on its own.<sup>297</sup> Because legislators are often faced with proposals containing inconsistent, or "logrolled," sections, and because these prospects sometimes occur under the threat of a government shutdown,<sup>298</sup> incentive to oppose objectionable substantive provisions in appropriations bills is scant.

While members of Congress are undoubtedly aware of these practices, and of ongoing critiques of them, they have largely acceded to the persistence of these practices.<sup>299</sup> Notably, however, there have been some attempts at reform.<sup>300</sup> One significant effort is found in the "Pork-Barrel Reduction Act," proposed by Senator John McCain in 2006,<sup>301</sup> which would have amended Senate rules to require sixty votes to defeat a point of order for either new

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295. See Fitzgerald, *supra* note 267, at 391 ("Lawmaking through appropriations subverts the legislative process and results in the enactment of special interest legislation. Prominent scholars and jurists have urged the courts to remand . . . any legislation impinging on important values . . . enacted through dubious legislative procedures. The Supreme Court has examined the legislative process and invalidated laws not supported by adequate fact-finding. Judicial enforcement of Congressional rules, which is less intrusive, will move Congress towards 'due process' lawmaking."); see also Zellmer, *supra* note 275, at 457–59.

296. Zellmer, *supra* note 275, at 457.

297. See Fitzgerald, *supra* note 267, at 396 (citing *Martin v. Zimmerman*, 289 N.W. 662, 664 (Wis. 1940)); accord PHILLIP P. FRICKEY ET AL., LEGISLATION AND STATUTORY INTERPRETATION 250 (2006) (explaining justification for logrolling).

298. This occurred in the run-up to Section 203. See CHAMPOUX & SULLIVAN, *supra* note 266, at 27 (citation omitted); see also *supra* notes 14, 188 and accompanying text. For more, see Jackie Calmes, *Demystifying the Fiscal Impasse That Is Vexing Washington*, N.Y. TIMES, Nov. 16, 2012, at A20; Andrew Kirell, *A Brief History of the 2013 Government Shutdown*, MEDIAITE (Oct. 17, 2013, 11:19 AM), <http://www.mediaite.com/tv/a-brief-history-of-the-2013-government-shutdown/>.

299. See *supra* text accompanying notes 278–80.

300. See *supra* text accompanying notes 293–96.

301. See S. Res. 2265, 109th Cong. (2006).

legislation or unauthorized appropriations.<sup>302</sup> It would also have prohibited these actions through amendment or conference report.<sup>303</sup> The bill died in committee.<sup>304</sup>

Appropriations riders threaten the integrity of democracy by preventing public involvement and informed legislative debate on critical issues.<sup>305</sup> Zellmer warned that “[i]nadequate enforcement of existing rules, a willingness to waive rules, and the growing use of omnibus Continuing Resolutions in the appropriations process allow substantive riders to flourish, undermining the goal of deliberative government.”<sup>306</sup> “This is particularly damaging,” she added, “when the appropriations process is used to dictate complex substantive issues . . . that would greatly benefit from the give and take of the normal legislative process.”<sup>307</sup>

Others have also noted the difficulties raised by appropriations riders. Edward Fitzgerald recently warned of these “deficiencies in the legislative process,”<sup>308</sup> proposing both “judicial enforcement of Congressional rules and heightened judicial scrutiny of special interest legislation . . . to further an open deliberative legislative process.”<sup>309</sup> He did acknowledge that the Supreme Court had yet to invalidate riders because of their enactment within appropriations bills.<sup>310</sup>

Additionally, notwithstanding the Court’s hesitancy to nullify riders, it has recognized that congressional rules are legally enforceable;<sup>311</sup> hence, it has invalidated some acts that violated congressional rules.<sup>312</sup>

For example, in 1949 it reversed a perjury conviction on the grounds that a required quorum was absent in the House committee when the perjury was committed.<sup>313</sup> Later, in a 1963 case involving accusations of “un-American” activities, the Court, in

302. *See id.* at § 2.

303. *See id.*

304. *See generally* S. Res. 2265, 109th Cong. (2006), <https://www.congress.gov/bill/109th-congress/senate-bill/2265/all-actions>.

305. *See Zellmer, supra* note 275, at 503–04.

306. *Id.*

307. *Id.* at 504.

308. Fitzgerald, *supra* note 267, at 352.

309. *Id.* at 354.

310. *See id.* at 387.

311. *See id.* at 392.

312. *See id.* at 392.

313. *Id.* (citing *Cristoffel v. United States*, 338 U.S. 84, 90 (1949)).

*Yellen v. United States*,<sup>314</sup> confirmed that legislative rules are “judicially cognizable,” and that legislative committees must adhere to their own rules.

Significantly, the Court has recognized the key distinction between legislative authorizations and appropriations.<sup>315</sup> Unlike legislative proposals, appropriation measures “have the limited and specific purpose of providing funds for authorized programs” and “are not proposals for legislation.”<sup>316</sup> “If appropriation bills were used for substantive changes in legislation, it would lead to the absurd result of requiring Congress to review exhaustively the background of every authorization before voting on an appropriation.”<sup>317</sup>

Legislation such as Section 203, that waives internal rules, subverts the traditional process of legislating, and encourages members of Congress to ignore rules in favor of opaque methods of legislating, threatens our polity. Attaching riders to appropriations bills and circumventing the traditional legislative process that occurs during committee hearings and debates on the floors of the House and Senate diminishes both accountability and communication between Congress, the citizenry, and the democratic process.

The process leading to the enactment of Section 203 detailed in Part II, which truncated the time-honored system of legislating, should be curbed. That these maneuvers occur regularly<sup>318</sup> should give pause to government observers, who cannot be sanguine about the public’s increasingly unenthusiastic view of it.<sup>319</sup>

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314. *Yellen v. United States*, 374 U.S. 109, 114 (1963) (declaring reversible error the refusal to call executive session when rule required it); see also Fitzgerald, *supra* note 267, at 392. For an example of the detriment to confidence in government from breaches of agency rules, see Kay Lazar & Shelley Murphy, *Marijuana Licensing Went Awry Early On*, BOS. GLOBE (Dec. 28, 2014), <https://www.bostonglobe.com/metro/massachusetts/2014/12/27/state-effort-license-medical-marijuana-dispensaries-went-off-rails-from-start/9UfRwaG7TpxvTspkSFDkI/story.html> (“‘Few things,’ [Judge] Billings wrote, ‘erode public confidence in government like an agency’s disregard for its own regulations, procedures, and policies.’”).

315. Fitzgerald, *supra* note 267, at 393 (citing *Andrus v. Sierra Club*, 442 U.S. 347, 359–61 (1979)).

316. *Id.*

317. *Id.* at 393–94 (quoting *Tenn. Valley Auth. v. Hill*, 437 U.S. 153, 190 (1978)).

318. See *supra* Part II.

319. The problem is long-standing. See KEEFE & OGUL, *supra* note 17, at 441

The judicial branch could help stem this growing tide of voter cynicism by scrutinizing substantive appropriations; it has done so recently with regard to other areas of law.<sup>320</sup> Addressing these issues is a proper exercise of the Court's powers and would ensure, not endanger, separation-of-powers principles.<sup>321</sup> Such scrutiny would ensure that new legislation reflects the democratic principles of rationality and due process, stimulating confidence in government in general, and the Court in particular, which could then take its rightful place among the other branches of government.<sup>322</sup> Clearly,

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("[I]n the midst of public opinion surveys showing enormous public disaffection with Congress, the House and Senate agreed in 1992 to . . . study and make recommendations for overhauling the institution."). None of the proposals was adopted. *Id.* "The belief that Congress . . . [is] not functioning properly is widely held." *Id.* at 4. See also Daniel A. Farber & Philip P. Frickey, *The Jurisprudence of Public Choice*, 65 TEX. L. REV. 873, 907 (1987) (noting that, "[T]he work of some legal scholars has begun to reflect this increasingly negative view of government." and that "[t]he real risk is . . . that special interest groups . . . will destroy the credibility of the democratic ethos of the ordinary citizen. The notorious increases in public cynicism over government, combined with concurrent declines in voter turnout, suggest that this process may be underway already.").

320. For a detailed account of the Supreme Court's engagement with immigration legislation, see Irene Scharf, *Un-Torturing the Definition of Torture and Employing the Rule of Immigration Lenity*, 66 RUTGERS L. REV. 1, 14 n.70 (2013). For additional examples, see *infra* Section III.B.1.a.

321. I am not alone in suggesting the Court scrutinize the legislative process. See Ittai Bar-Siman-Tov, *The Puzzling Resistance to Judicial Review of the Legislative Process*, 91 B.U. L. REV. 1915, 1916 (2011); see also Rubin, *Law and Legislation*, *supra* note 265, at 408–09 ("Legislation . . . must be fair and must not oppress private persons. To some extent, this . . . is secured by judicial supervision of the legislature. Such supervision is essential . . . if only because of our . . . belief that no branch of government can adequately police itself."); Michael J. Teter, *Letting Congress Vote: Judicial Review of Arbitrary Legislative Inaction*, 87 S. CAL. L. REV. 1435, 1436 (2014) (encouraging increased judicial scrutiny of federal legislation); Timothy Zick, *Marbury Ascendant: The Rehnquist Court and the Power to "Say What the Law Is"*, 59 WASH. & LEE L. REV. 839, 840–41 (2002) (discussing the Rehnquist Court's assertion of its power under *Marbury v. Madison* to "say what the law is" *vis-à-vis* legislative enactments).

322. See Penny Starr, *Flashback: Obama Praises 3 'Coequal Branches' of Gov't, Preventing Tyranny*, CNSNEWS.COM (Dec. 5, 2013, 4:03PM), <http://cnsnews.com/news/article/penny-starr/flashback-obama-praises-3-coequal-branches-gov-t-preventing-tyranny>; see also Charles E. Hughes, *The Court and Constitutional Interpretation* (Oct. 19, 2015), <http://www.supremecourt.gov/about/constitutional.aspx> ("The Constitution of the United States is a carefully balanced document. It is designed to provide for a national government sufficiently strong and flexible . . . yet sufficiently limited and just to protect the guaranteed rights of citizens; it permits a balance between society's need for order and the individual's

the public interest in maintaining the integrity of the Constitution, rather than bureaucratic protectionism, must be the main standard against which to test legislation.

B. *Judicial Solutions to Issues Raised by Section 203's Enactment—  
Legisprudence*

“Legisprudence,” the “analysis of statutes within the framework of jurisprudential philosophies about the role and nature of law,”<sup>323</sup> could inspire improvements in the ways in which laws are enacted so they more closely reflect principles underlying a democratic form of government.

1. *The Separation of Powers Doctrine Supports Scrutiny of the  
Legislative Process*

Contrary to the claims of some,<sup>324</sup> Supreme Court scrutiny of legislation does not violate the Separation of Powers Doctrine, but rather is justified by the structure and nature of the Constitution. The doctrine “can be traced to the Madisonian effort to mediate the problem of faction—the influence of interest groups in the political process,”<sup>325</sup> given that “[t]he accumulation of all powers legislative, executive and judiciary in the same hands, whether of one, a few or many . . . may justly be pronounced the very definition of tyranny.”<sup>326</sup> The Constitution’s structural division

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right to freedom. To assure these ends, the Framers . . . created three independent and coequal branches of government.”).

323. ESKRIDGE ET AL., *supra* note 285, at 559 (citing Julius Cohen, *Towards Realism in Legisprudence*, 59 YALE L.J. 886 (1950)). Professor Turley calls legisprudence “the study and interpretation of legislation.” Jonathan Turley, *Seeing Red and Blue: Critics Attack Judges in the DC and 4th Circuits over Health Care Rulings* (July 30, 2014), [jonathanturley.org/2014/07/30/seeing-red-and-blue-critics-attack-judges-in-the-dc-and-4th-circuits-over-health-care-rulings/](http://jonathanturley.org/2014/07/30/seeing-red-and-blue-critics-attack-judges-in-the-dc-and-4th-circuits-over-health-care-rulings/) (discussing Obamacare rulings from legisprudence lens).

324. See Farber & Frickey, *supra* note 319, at 874; see also MARK TUSHNET, *TAKING THE CONSTITUTION AWAY FROM THE COURTS* 6 (1999) (pressing for elimination of judicial review).

325. Farber & Frickey, *supra* note 319, at 875.

326. THE FEDERALIST No. 47 at 324 (James E. Cooke ed., 1961) (James Madison) (explaining the need to separate governmental powers as written by James Madison); see also David B. Rivkin, Jr., *The Partial Constitution or the Sunstein Constitution?* 18 HARV. J. L. & PUB. POL’Y 293, 306–07 (1994) (citation omitted) (“[T]he power of Congress, the branch . . . the Founding Generation recognized had the greatest tendency to aggrandize itself, was limited



creates a precise design in its creation of the three branches, each deemed “co-equal” with the others.<sup>327</sup> Within this structure, explicitly vesting in the Supreme Court “[t]he judicial power of the United States,”<sup>328</sup> and extending it “to all Cases . . . arising under this Constitution, [and] the laws of the United States,”<sup>329</sup> lies the assurance that the job of the Court is to review laws enacted by the legislature to ensure that they comport with the Constitution. To be sure, historically, the Court has hesitated to settle certain controversies. However, Supreme Court jurisprudence has evolved, with immigration cases being an example. In the early years, it deferred to the other branches, but gradually, over the last century, it has opined over controversies involving immigration legislation.<sup>330</sup> Likewise, the Court’s customary reluctance to decide issues that might be considered legislative has developed over time, with the Court deciding a wide range of issues, including national health care,<sup>331</sup> delegation of authority to the executive,<sup>332</sup> veto power,<sup>333</sup> bills of attainder,<sup>334</sup> and even gun control.<sup>335</sup> Supreme Court review of the ways in which federal laws are enacted is particularly fitting in the current climate, as the legislative process not only violates Congress’ rules, but also denies the public a transparent view of its process.

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through . . . enumerated powers: Article I . . . vests in the Congress only those powers ‘herein granted.’”); Jeffrey Rosen, Opinion, *Madison’s Privacy Blind Spot*, N.Y. TIMES (Jan. 19, 2014), <http://www.nytimes.com/2014/01/19/opinion/sunday/madisons-privacy-blind-spot.html?mtrref=www.google.com&assetType=opinion> (explaining that debates concerning the Bill of Rights indicate Madison was more concerned with congressional abuses than executive ones). One can infer that Madison would support Supreme Court oversight of Congress.

327. See Douglas E. Edlin, *A Constitution Right to Judicial Review: Access to Courts and Ouster Clauses in England and the United States*, 57 AM. J. COMP. L. 67, 70 (2009).

328. U.S. CONST. art. III, § 1.

329. U.S. CONST. art. III, § 2.

330. See *supra* note 311 and accompanying text.

331. Nat’l Fed’n of Indep. Bus. v. Sebelius, 132 S.Ct. 2566, 2577 (2012).

332. See *Panama Ref. Co. v. Ryan*, 293 U.S. 388, 433 (1935) (showcasing an early example of delegating authority).

333. *I.N.S. v. Chadha*, 462 U.S. 919, 920 (1983).

334. *United States v. Brown*, 381 U.S. 437, 440 (1965).

335. *United States v. Lopez*, 514 U.S. 549, 551 (1995) (reviewing whether Congress is following its own rules, or whether suspension by a house of its rules might be reviewable, is different).

## 2. *Rationality and Due Process Principles Restrain the Legislative Process*

### a. *Rational Legislating<sup>336</sup> and the Legislative Process*

Injecting a measure of rationality into the legislative process would likely enhance the quality of new laws. In the early years of the nation, judges assumed the view, espoused by William Blackstone, that statutes were irrational creations of legislators, and thus inconsequential to the common law.<sup>337</sup> Through the late nineteenth century, judges believed themselves responsible for maintaining a so-called “objective system of interpreting the common law, coined ‘common law formalism.’”<sup>338</sup>

Denounced by Justice Oliver Wendell Holmes at the end of the nineteenth century as being disconnected with the real world,<sup>339</sup> this formalistic approach was largely abandoned during the first half of the twentieth century, inspired by the writings of Dean Roscoe Pound, Jerome Frank, Karl Llewellyn, and others who founded the theories of “sociological jurisprudence” and legal realism to underscore that case results are not inevitable, but largely arise out of ideology.<sup>340</sup> Thereafter, statutes began to replace common law as “the source of policy, law, and even principle.”<sup>341</sup> During the 1930s through the 1960s, the Legal Realists postulated that law mirrored social policy; accordingly, legislative analysis should account for theories that were both legal and non-legal.<sup>342</sup> Dean Roscoe Pound boldly pronounced that judging mechanically,

336. The ensuing description is merely an abbreviated sketch. See Martinez, *supra* note 17, for a more elaborate description of rational legislating.

337. See 4 WILLIAM BLACKSTONE, COMMENTARIES 407–43 (1765) (describing the improvements of England Law and how the common law has “accumulated wisdom of ages”).

338. See ESKRIDGE ET AL., *supra* note 285, at 561.

339. While simplistic, I think it captures his essence. See HOLMES, THE PATH OF THE LAW 15 (1899); see also MORTON HORWITZ, THE TRANSFORMATION OF AMERICAN LAW, 1870–1960, 129–43 (1992); G. EDWARD WHITE, JUSTICE OLIVER WENDELL HOLMES 196–224 (1993).

340. See ESKRIDGE ET AL., *supra* note 285, at 562.

341. *Id.* at 561–62, 566.

342. For archetypical legal realism, see Roscoe Pound, *Mechanical Jurisprudence*, 8 COLUM. L. REV. 605 (1908). Other theorists, including Brandeis and Frankfurter, supplemented this view of the modern regulatory state. See LEONARD BAKER, BRANDEIS AND FRANKFURTER: A DUAL BIOGRAPHY, 492 (1984).

as had been the case through the 1930s, was “stupid.”<sup>343</sup> In the early 1940s, Lon Fuller, an idealist, suggested in his famous quotation that, “in the moving world of law, the *is* and the *ought* are inseparably linked.”<sup>344</sup> Thus, “when law fails to fulfill worthy goals, it falls short of being law . . . .”<sup>345</sup> Emphasizing the centrality of the “law’s relationship to democracy,”<sup>346</sup> Fuller thought that what most distinguished a democracy from a totalitarian society was the former’s commitment to the free exchange of ideas.<sup>347</sup> In the citizens, Fuller believed, is where the “responsibility for the law” lies.<sup>348</sup>

Julius Cohen, in the 1950s, suggested that we broaden the Realist critique to legislative conduct, acknowledging that, “judges do not just find the law; they make it.”<sup>349</sup> As “legislatures are the paradigm ‘law makers,’ legislative conduct should be examined [by courts] for rationality . . . .”<sup>350</sup>

From the early 1940s through the 1970s, Legal Process Theory ascended through the ideas of Herbert Wechsler, Lon Fuller, Henry Hart, and Albert Sacks. These men advanced the notion that the purpose of the law was to offer solutions to society’s problems.<sup>351</sup> Professor Tribe’s proposal in the 1970s, that legislative conduct should be subject to judicial review, was his solution to the problem of insufficient legislative process.<sup>352</sup> Given that the Constitution requires legislative conduct to “take a certain form, to

343. ESKRIDGE ET AL., *supra* note 285, at 566; *see also* *Lochner v. New York*, 198 U.S. 45, 63 (1905).

344. ESKRIDGE ET AL., *supra* note 285, at 566 (citing LON L. FULLER, *THE LAW IN QUEST OF ITSELF* 64 (1940)).

345. *Id.* at 567.

346. *Id.*

347. *Id.* (citing LON L. FULLER, *THE LAW IN QUEST OF ITSELF* 122–23, 126 (1940)).

348. *Id.*

349. Martinez, *supra* note 17, at 572.

350. *Id.* at 573 (citation omitted) (“However, Cohen did not solve the manner in which such ‘legisprudence’ should proceed. And . . . no one else has discussed [it] either.”).

351. *Id.* at 571 (citing HENRY HART, JR., & ALBERT SACKS, *THE LEGAL PROCESS: BASIC PROBLEMS IN THE MAKING AND APPLICATION OF LAW* 148 (William Eskridge, Jr. & Philip Frickey, eds., 1st ed. 1994)).

352. Laurence H. Tribe, *Structural Due Process*, 10 HARV. C.R.-C.L. L. REV. 269 (1975); *see also* Victor Goldfeld, *Legislative Due Process and Simple Interest Group Politics: Ensuring Minimal Deliberation Through Judicial Review of Congressional Processes*, 79 N.Y.U. L. Rev. 367, 372–73 (2004).

follow a process . . . or to display a particular structure,”<sup>353</sup> for Tribe, constitutional structure—particularly the Due Process Clauses—authorized this oversight.

To date, while some cases have reflected Tribe’s theory, these have largely concerned issues of state sovereignty, not irrational legislation.<sup>354</sup> For example, in *Laney v. Fairview City*,<sup>355</sup> which involved a power line electrocution, the Utah Supreme Court struck down a statute stripping Utah from liability, concluding that its “immunization of all municipal activities was not justified by any legislative investigation, findings, or relevant history.”<sup>356</sup> This legislative scrutiny, while promising, is likely “far greater than would be authorized by rational legislating requirements.”<sup>357</sup> To be sure, Section 203’s enactment compares favorably to that of Utah’s law, given its exclusion of important stakeholders from the process and the absence of legislative hearings.<sup>358</sup> Were the Supreme Court to scrutinize Section 203 from the vantage point of *Laney v. Fairview City*, it would likely be struck down.

Back to legisprudence. Following Professor Tribe’s proposals, Hans Linde, former justice of the Oregon Supreme Court, studied the “problem of oversight of legislative conduct.”<sup>359</sup> Like Cohen, Linde considered the problem one of determining “‘rationality’ in the legislative process.”<sup>360</sup> Like Tribe, Linde noted the lack of judicial review of legislative action, which he agreed was subject to due process constraints.<sup>361</sup> Linde cautioned, though, that existing theory, which encouraged “judicially formulated and judicially

353. Tribe, *supra* note 352, at 291.

354. See, e.g., *Laney v. Fairview City*, 57 P.3d 1007, 1007 (Utah 2002).

355. *Id.*

356. *Id.* at 1026.

357. Martinez, *supra* note 17, at 587.

358. See *supra* Part III.

359. Martinez, *supra* note 17, at 574.

360. *Id.* at 574; see also ESKRIDGE ET AL., *supra* note 285, at 381 (noting that, to Linde, “rational lawmaking” requires legislators to “inform themselves . . . about the existing conditions on which the proposed law would operate, and about the likelihood that the proposal would . . . further the intended purposes.”); Farber & Frickey, *supra* note 319, at 877 (noting that recent Supreme Court cases affirm that statutes should be invalidated when borne out of “legislative irrationality,” see *Logan v. Zimmerman Brush Co.*, 455 U.S. 422, 434] (1982), or prejudice, see *City of Cleburne v. Cleburne Living Center*, 473 U.S. 432, 450 (1985)]).

361. Martinez, *supra* note 17, at 574 (citation omitted).

administered review of legislative conduct, . . . leaves the courts vulnerable to a charge of institutional illegitimacy.”<sup>362</sup>

In succeeding years, Legal Process Theory has been tested by Critical Legal Studies (CLS) scholars,<sup>363</sup> who argue that, rather than being an elaboration of legitimate legislative activity, law was “rational, subjective, and political.”<sup>364</sup> These scholars further argue that, “the rule of law is not neutral; law subordinates the wills of some citizens to the wills of others,”<sup>365</sup> with rulings often illuminated through the lens of the court’s alignment with one party over another.<sup>366</sup> Legislators are part of this, too, as they have become “excessively responsive to the monied [sic] and the well-organized, to the detriment of groups already disadvantaged.”<sup>367</sup> While it seems that we remain too close, temporally, to this theory to evaluate its lasting influence, it persists in public discourse.<sup>368</sup> In fact, one could view Section 203 as a classic example of this type of legislation.

The Public Choice theorists<sup>369</sup> soon moved CLS a step further, suggesting that legislators, primarily concerned with reelection, are actually immune to “efforts to improve their effectiveness in achieving public purposes”<sup>370</sup> or working in the public interest! Though this theory is often raised in discussions of legal scholarship about judicial interpretation and not legislative process,<sup>371</sup> it could be employed to challenge legislative efforts that

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362. *Id.* at 574–75.

363. See Jonathan Turley, *The Hitchhiker’s Guide to CLS, Unger, and Deep Thought*, 81 NW L. REV. 593, 595 (1987).

364. ESKRIDGE ET AL., *supra* note 285, at 595.

365. *Id.* at 596.

366. *Id.* (discussing the court’s denial of a defense of necessity in an anti-nuclear protest case involving Vermont Yankee Nuclear Power Station, *State v. Warshow*, 138 Vt. 22 (1979)).

367. *Id.*

368. See generally DAVID CALLAHAN & J. MIJIN CHA, DEMOS, STACKED DECK: HOW THE DOMINANCE OF POLITICS BY THE AFFLUENT & BUSINESS UNDERMINES ECONOMIC MOBILITY IN AMERICA (2013), [http://www.demos.org/sites/default/files/imce/StackedDeck\\_1.pdf](http://www.demos.org/sites/default/files/imce/StackedDeck_1.pdf). But see Richard A. Smith, *Interest Group Influence in the U.S. Congress*, 20 LEGIS. STUD. Q. 89, 91 (1995) (arguing that “campaign contributions of interest groups have far less influence than commonly thought”).

369. Public choice is “the application of economics to political science.” Farber & Frickey, *supra* note 319, at 878 (quoting D. MUELLER, PUBLIC CHOICE I (1979)).

370. Rubin, *Law and Legislation*, *supra* note 265, at 410.

371. *Id.*

appear irrelevant to the public's interest. Professors Farber and Frickey question some of these conclusions,<sup>372</sup> including whether the influence of special interests demands heightened judicial scrutiny of legislation. They also question legal scholars' claims of mistrust of legislatures.<sup>373</sup> Rather, they suggest that "judicial sensitivity to . . . factors that . . . skew political outcomes is a more effective means of promoting legislative deliberation than is stricter scrutiny of . . . statutes."<sup>374</sup> Nonetheless, even they allow for judicial involvement, positing that "the more sophisticated recent literature [in Public Choice Theory] . . . suggests that the flaws in the legislative process are sufficiently serious to warrant cautious judicial intervention."<sup>375</sup>

Contemporary theorists, including Martha Minnow, Richard Posner, William Eskridge, Philip Frickey, and Cass Sunstein, referring to themselves as "pragmatics," see the law involving "a balance between form and substance, tradition and innovation, text and context."<sup>376</sup> These scholars are pessimistic that legislative issues will be solved by "heightened judicial review,"<sup>377</sup> "although courts are appropriately concerned about the role of special interests in the political process, judges ordinarily will be unable to identify . . . instances in which that process has malfunctioned because of undue influence by special interests."<sup>378</sup>

The scholars whose work is summarized here would be troubled by the birth of Section 203. Fuller would likely have criticized the undemocratic way in which it was drafted and enacted. Cohen would have courts scrutinize the legislative conduct for rationality, and Professor Tribe and Justice Linde would agree, raising due process objections.<sup>379</sup> It is likely that CLS scholars would support judicial scrutiny while questioning its impact, given their

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372. Farber & Frickey, *supra* note 319, at 874.

373. *Id.*

374. *Id.* at 912.

375. *Id.* at 875.

376. ESKRIDGE ET AL., *supra* note 285, at 599.

377. Farber & Frickey, *supra* note 319, at 908.

378. *Id.* at 911–12; *see also id.* at 899–900, 925 (discussing small group influence on legislators, concluding that while "ideology may play at least as great a role in the political process as economics" and the "fear [that statutes are nothing more than deals between contending interest groups] is exaggerated "special interest groups undoubtedly wield too much collective influence in the legislative process").

379. For analysis of due process, see *infra* Section IV.B.2.

cynicism about judicial objectivity. They are revealed, through details described earlier,<sup>380</sup> to have been correct about the powered interests “working” Congress—legislators spoke out, finally, not to protect citizen researchers, but to protect insurance companies and bureaucrats.<sup>381</sup>

*b. Due Process and the Legislative Process*

Due Process in Legislating, a theory articulated by Justice Linde in 1976, postulates that the Due Process Clauses “instruct government itself to act” through an appropriate process, and “not simply to legislate subject to later judicial second-guessing.”<sup>382</sup> Others agree.<sup>383</sup>

Linde suggested that a legislative process imbued with due process would ensure that at least one committee explained to the full body the “factual and value premises” of proposed legislation.<sup>384</sup> Further, legislators would “explicitly lay out in the . . . record the path they have followed in enacting legislation.”<sup>385</sup> This record would likely diminish the public’s skepticism, “minimize enactment of baseless legislation, and allow courts to exercise meaningful judicial review without . . . being perceived to overstep . . . the proper judicial role in our democratic society.”<sup>386</sup> Julius Cohen apparently agreed, indicating, “if there is a crying need for

380. See *supra* Section III.B.1.

381. See *supra* Section III.B.1.

382. ESKRIDGE ET AL., *supra* note 285, at 381 (referencing Hans A. Linde, *Due Process of Lawmaking*, 55 NEB. L. REV. 197, 222 (1976)). “Due process of legislating” should be distinguished from requiring legislation to be the product of deliberation. The question is whether the legislators considered the evidence and made findings supported by it. See Martinez, *supra* note 17, at 551 n.8 (citing Cass R. Sunstein, *Interest Groups in American Public Law*, 38 STAN. L. REV. 29 (1985)).

383. See ESKRIDGE ET AL., *supra* note 285, at 595; see also LAURENCE H. TRIBE, *AMERICAN CONSTITUTIONAL LAW* 17-2 to 17-3 (2d ed. 1988) (examining Court review of the legislature); Farber & Frickey, *supra* note 319, at 920–25 (postulating that structural legislative review would reduce the power of interest groups); Martinez, *supra* note 17, at 573 (citing Julius Cohen, *Towards Realism in Legisprudence*, 59 YALE L.J. 886 (1950)) (reasoning that the rationality of judicial decision making can be evaluated; therefore, the rationality of legislative decision making can be too).

384. ESKRIDGE ET AL., *supra* note 285, at 381 (citing Linde, *supra* note 382, at 223–24).

385. Martinez, *supra* note 17, at 575.

386. *Id.* at 576.

'realism' in the [judicial] area, there is more than sufficient evidence of such need in the [legislative]."<sup>387</sup>

This approach was reflected in *Hampton v. Mow Sun Wong*, which challenged a civil service rule barring non-citizens from employment; based on principles of rational legislating, it was stricken as violating due process.<sup>388</sup> "In a variety of contexts, the Supreme Court has begun to give greater consideration to matters of lawmaking structure and process."<sup>389</sup> the process of "the great debates and compromises that produced the Constitution . . ." required that "the power to enact statutes 'may only be exercised in accord with a single, finely wrought and exhaustively considered, procedure.'"<sup>390</sup> Even the requirement of bicameralism proposed by James Madison in *Federalist No. 51* "ensures that factious and partial laws would not be adopted."<sup>391</sup> While the Court has occasionally refused to intercede when a particular bill-creation process was ignored,<sup>392</sup> it has, at other times, done precisely that.<sup>393</sup>

Legislation in accordance with these views would likely have resulted in a revised Section 203, had it been enacted at all. As adherence to due process principles requires fact-based support, informed legislators would have realized that the provision would not substantially further their stated goals. Moreover, if even one relevant committee had functioned as the rules anticipated, the legislative record would have reflected "the path [it] . . . followed in enacting [the] legislation."<sup>394</sup> Had the electorate witnessed Congress following its own prescribed process regarding Section 203 and provisions like it, some of their mistrust of Congress could have been allayed.

387. Cohen, *supra* note 383, at 888.

388. 426 U.S. 88, 115–17 (1976).

389. Farber & Frickey, *supra* note 319, at 915.

390. ESKRIDGE ET AL., *supra* note 285, at 383 (citing *Clinton v. City of New York*, 524 U.S. 417, 439–40 (1998)). This procedure, enacted by Congress, should be followed.

391. *Id.* (citing THE FEDERALIST NO. 51 (James Madison)).

392. See *Marshall Field & Co. v. Clark*, 143 U.S. 649, 696–97 (1892) (refusing to strike a bill although the "enrolled bill" requirement was unmet).

393. See *United States v. Ballin*, 144 U.S. 1, 11 (1892) (reviewing whether the necessary quorum was established when a bill was passed, and concluding that it in fact was, and that; therefore, the bill was binding law).

394. Martinez, *supra* note 17, at 575.



Cases support the recommendation that legislative decisions “reflect . . . true deliberation.”<sup>395</sup> Take a 1980 dissenting opinion written by Justice Stevens, who advanced the significance of this notion. The case, *Fullilove v. Klutznick*, involved a failed challenge to a federal statutory requirement that a grantee of federal funds for local public works projects expend at least ten percent of the grant on purchases from minority owned businesses.<sup>396</sup> In his dissent, Justice Stevens noted the failure of Congress to explain its goals. He also pinpointed the absence of either testimony or inquiry vital to the legislation, during either the legislative hearings or floor debate, highlighting that “Congress for the first time . . . has created a broad legislative classification for entitlement . . . based solely on racial characteristics” and identifying “a dramatic difference between this Act and . . . thousands of statutes that preceded it.”<sup>397</sup> He noted that:

This dramatic point of departure is not even mentioned in the statement of purpose of the Act or in the Reports of either the House or the Senate Committee that processed the legislation, and was not the subject of any testimony or inquiry in any legislative hearing on the bill . . . . [T]here was a brief discussion on the floor of the House as well as in the Senate . . . but only a handful of legislators spoke and there was virtually no debate.<sup>398</sup>

Justice Stevens also appreciated the constitutional implications of disregarding legislative procedures:

If the [] language of the Due Process Clause . . . authorizes this Court to review Acts of Congress under the standards of the Equal Protection Clause . . . there can be no separation-of-powers objection to a . . . holding of unconstitutionality based on a failure to follow procedures that guarantee the kind of deliberation that a fundamental constitutional issue . . . merits.<sup>399</sup>

He concluded that the statute was unconstitutional because “[i]t cannot fairly be characterized as a ‘narrowly tailored’ racial classification because it . . . raises too many . . . questions that Congress failed to answer or even to address in a responsible

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395. Farber & Frickey, *supra* note 319, at 917.

396. 448 U.S. 448, 453 (1980).

397. *Id.* at 549–50 (Stevens, J., dissenting).

398. *Id.*

399. *Id.* at 551–52 (Stevens, J., dissenting) (citation omitted).

way.”<sup>400</sup> Justice Stevens’ rationale remains prescient today; Section 203, like the statute at issue in *Fullilove*, resulted from negligible deliberation.<sup>401</sup> Similarly, Section 203 obscures the legislature’s explanation of purpose, as both testimony and inquiry about the law’s rationale were lacking. Moreover, the colloquies preceding the enactment highlight members’ confusion about the law’s drafting process and intention.<sup>402</sup> Finally, while hearings were conducted concerning perceived DMF abuses prior to Section 203’s conception, public participation in that process, beyond written submissions, was limited.<sup>403</sup> Regarding Section 203, there were neither legislative hearings nor meaningful floor debate.<sup>404</sup>

*c. Theories of Legislating Support the Foregoing Suggestions*

Applying these legislative theories to the enactment of Section 203 and other appropriations, riders would likely produce both more effective legislation and increased confidence in government.

While some theories, including CLS and Public Choice, suggest that attempts to affect the status quo will be fruitless, as they presuppose that legislators’ views are fully formed,<sup>405</sup> not all agree with this deterministic view.<sup>406</sup> Some are more optimistic, particularly concerning statutory interpretation,<sup>407</sup> whose purpose, according to Professor Sunstein, “is to promote . . . deliberation in the lawmaking process . . .”<sup>408</sup> achieved through a reading of legislative history.<sup>409</sup> Professor Bell’s emphasis on statutory interpretation would encourage legislators to “explain statutes and avoid misleading the public,”<sup>410</sup> and to elucidate the rationale

400. *Id.* at 552 (Stevens, J. dissenting).

401. *Id.*

402. *See supra* Section III.B.1.

403. *See supra* Part III.

404. *See supra* Part III.

405. Bernard W. Bell, *Legislative History Without Legislative Intent: The Public Justification Approach to Statutory Interpretation*, 60 OHIO ST. L.J. 1, 39–40 (1999) (citation omitted).

406. *Id.* at 40 (citation omitted) (noting that others posit “that participation in the legislative process does affect the preferences of individual legislators . . .”).

407. Bernard W. Bell, *Using Statutory Interpretation to Improve the Legislative Process: Can it Be Done in the Post-Chevron Era?* 13 J.L. & POL. 105 (1997).

408. *Id.* at 115 n.55 (citing Cass R. Sunstein, *Beyond the Republican Revival*, 97 YALE L.J. 1539, 1581–82 (1988)).

409. Bell, *Legislative History*, *supra* note 405, at 3.

410. *Id.* at 4. While theories of legislating need to have been noted, a detailed

behind statutory language.<sup>411</sup> Had legislators considering DMF changes evidenced deliberation and explained their rationale and the provision's intended impact, the democratic process would have been safeguarded.

Finally, a rationality requirement could foster valuable legislative improvements, even lacking a constitutional mandate of legislative deliberation. Such a requirement would uphold new laws only when supported by explicit connections between legislative purpose and constitutional rationale. In *United States v. Lopez*, Congress's failure to make such findings doomed the legislation, when the Court struck the Gun-Free School Zones Act, finding that it exceeded Congress' power to legislate concerning interstate commerce.<sup>412</sup> Presumably, the legislation would have survived had these connections been identified.

While a subsequent case challenged the notion that statutes would survive if a nexus was demonstrated between the target of legislation and the Constitution, that situation differs from the one involving Section 203. In *United States v. Morrison*, the Court struck the Violence Against Women Act as violating the Commerce Clause, although it was supported by exhaustive references to the impact of this violence on interstate commerce;<sup>413</sup> congressional findings, the Court said, were insufficient to sustain federal control where, as here, the "effect[s] on interstate commerce [were] attenuated."<sup>414</sup> While *Morrison* casts doubt on the degree of legislative deliberation sufficient to dispute a challenge,<sup>415</sup> it should have little effect on an analysis of Section 203, which arose from a paucity of evidence of deliberation.

C. *Equitable Estoppel Principles Can Forestall Threats to Core Democratic Principles*

Congressional actions that undermine both the public's trust and due process can be challenged by claims sounding in equity. Equitable estoppel, a common law doctrine, prevents one party

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analysis is beyond the scope of this piece.

411. *Id.* at 6, 97; *see also id.* at 10 ("Madison argued in the Federalist Papers that popular sovereignty was the essence of republicanism . . . government . . . derives . . . its powers directly or indirectly from the . . . people . . .").

412. 514 U.S. 549, 562 (1995).

413. 529 U.S. 598, 602, 615 (2000).

414. *Id.* at 612.

415. This question could be the topic of an entire study.

from taking unfair advantage of another when, through false language or conduct, one party induces the other to act in a certain way, causing injury.<sup>416</sup> While successfully invoked between private litigants, courts have been reluctant to apply equitable estoppel to governmental action,<sup>417</sup> with denials<sup>418</sup> based on deference to separation of powers principles or reasoning that the government was safeguarding public funds, protecting sovereign immunity, or avoiding fraudulent schemes.<sup>419</sup> This resistance to employing equitable remedies has eased somewhat in recent years, with courts acknowledging that an estoppel is sometimes warranted to avoid injustice.<sup>420</sup>

The Supreme Court has rarely addressed the suitability of governmental equitable estoppel; in at least four cases, it ruled against it.<sup>421</sup> In *Federal Crop Insurance Corp. v. Merrill*, farmers sued when they were denied crop insurance because they had re-seeded their farmland<sup>422</sup> in violation of a known regulation, but only after a local federal agent had reassured them that their crops were insurable, despite their actions.<sup>423</sup> The Court denied relief; while the farmers relied on the agent's representation to their detriment, and while a claim against a private insurer would have prevailed, the government was deemed not "just another private litigant."<sup>424</sup> Ultimately, the Court concluded that the farmers had constructive notice that their policy had been invalidated.<sup>425</sup>

Decades later, in 1981, the Court examined the issue in a case that again involved incorrect advice from a government agent. In *Schweiker v. Hansen*, the Court did affirm a general rule that the government could be estopped when engaging in "affirmative misconduct,"<sup>426</sup> but failed to elaborate on what that would look

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416. See *Estoppel*, BLACK'S LAW DICTIONARY (10th ed. 2014).

417. Stephen Holstrom, *Contract Law—Estopping Big Brother: The Constitution, Too, Has Square Corners*, 33 W. NEW ENG. L. REV. 163, 164 (2011).

418. *Id.* at 164.

419. *Id.* at 164–65.

420. *Id.* at 165.

421. See *Office of Pers. Mgmt. v. Richmond*, 496 U.S. 414 (1990); *Heckler v. Cmty. Health Servs.*, 467 U.S. 51 (1984); *Schweiker v. Hansen*, 450 U.S. 785 (1981); *Fed. Crop Ins. Corp. v. Merrill*, 332 U.S. 380 (1947).

422. *Merrill*, 332 U.S. at 382.

423. *Id.*

424. *Id.* at 383, 385.

425. *Id.* at 383–86.

426. *Schweiker*, 450 U.S. at 788–89 .

like.<sup>427</sup> Here, the incorrect information came from a SSA field agent, mistakenly telling a recent widow that she was ineligible for certain benefits, which caused her to fail to apply for them.<sup>428</sup> The instruction manual had instructed agents to suggest that potential applicants fill out an application even if they may be ineligible.<sup>429</sup> When the plaintiff later learned of her eligibility, she sued, but lost because, according to the Court, the agent's failure to instruct her accurately fell "far short" of action justifying governmental estoppel.<sup>430</sup>

Two years later, the Court reexamined equitable estoppel in *Heckler v. Community Health Services of Crawford County, Inc.*, again denying relief when an agent mistakenly informed a healthcare provider that certain expenditures of federal funds were proper.<sup>431</sup> Although the Court ruled that the plaintiff had failed to establish the elements of estoppel,<sup>432</sup> it did recognize that the government could be estopped; unfortunately, it again failed to specify situations in which it would be justified.<sup>433</sup>

Finally, in *Office of Personnel Management v. Richmond*, the Court enunciated a bright-line rule denying governmental estoppel in cases involving monetary claims, unless authorized by legislation.<sup>434</sup> Here, a government employee, collecting disability payments, accepted overtime work only after being told erroneously that it would not affect his disability payments.<sup>435</sup> The employee sued when he lost his benefits for that precise reason. Again, the Court refused to estop the government, reasoning that ordering it to pay would violate the Appropriations Clause of the Constitution, as it would constitute a distribution of non-appropriated funds.<sup>436</sup> Yet again, while allowing for the possibility of estoppel, the Court failed to specify the conditions under which it would be warranted.<sup>437</sup>

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427. *See id.*

428. *Id.* at 786.

429. *Id.*

430. *Id.* at 789–90.

431. 467 U.S. 51, 52–53 (1984).

432. *Id.* at 62–63.

433. *Id.* at 60–61.

434. 496 U.S. 414, 426 (1990) (“[J]udicial use of the equitable doctrine of estoppel cannot grant respondent a money remedy that Congress has not authorized.”).

435. *Id.* at 417–18.

436. *Id.* at 425–26.

437. *Id.* at 423 (“[I]t remains true that we need not embrace a rule that no

Scholars have offered suggestions to address the shortcomings in these rulings,<sup>438</sup> which do establish that government estoppel can succeed in cases involving both affirmative misconduct and proof that payments will not derive from non-appropriated funds.<sup>439</sup> First, it is suggested that estoppel applies when the government acts proprietarily.<sup>440</sup> This is irrelevant to the Section 203 situation, as the government is not acting proprietarily.

Second, two forms of estoppel can be identified: substantive and procedural.<sup>441</sup> Substantive estoppel is invoked when one demands a benefit to which one is not entitled,<sup>442</sup> such as a claim owed because of a government agent's misstatement.<sup>443</sup> It is unlikely that Section 203 would be subject to a substantive estoppel claim. Procedural estoppel, on the other hand, could be invoked in a case like the one at hand. It applies when the government fails to follow its own rules, causing harm.<sup>444</sup> The Second Circuit Court of Appeals, in *Hansen v. Harris*, allowed for this remedy, which was held to be sustainable by a violation of either a procedural requirement or "an internal procedural manual or guide or some other source of objective standards of conduct," supporting "an inference of misconduct by a Government employee."<sup>445</sup>

The Supreme Court rejected this broad interpretation in *Schweiker*, holding that procedural shortfalls, such as a government agent failing to follow a claims manual and neglecting to recommend that an applicant file a written application, were insufficient to invoke estoppel when the government refused

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estoppel will lie against the Government in any case in order to decide this case. We leave for another day whether an estoppel claim could ever succeed against the Government.").

438. Holstrom, *supra* note 417, at 178.

439. *Id.* at 173–74 (noting that courts are concerned that "[E]stoppel would violate the Appropriations Clause, since it would be tantamount to the court forcing the government to pay funds that Congress never appropriated . . .").

440. *Id.* at 178–79.

441. *Id.* at 179.

442. *Id.*

443. See *Fed. Crop Ins. Corp. v. Merrill*, 332 U.S. 380 (1947) (notwithstanding that insured knew nothing of regulation, had informed authorities of intention to reseed, and was incorrectly advised that crop was insurable, was barred recovery on insurance claim for lost crop because federal regulations precluded coverage).

444. Holstrom, *supra* note 417, at 179–80.

445. *Hansen v. Harris*, 619 F.2d 942, 949 (2d Cir. 1980).

benefits because the applicant failed to file the required written application.<sup>446</sup>

Appellate courts have followed *Schweiker's* affirmative misconduct mandate. The Fifth Circuit, for example, requires “more than mere negligence, delay, inaction, or failure to follow an internal agency guideline.”<sup>447</sup> This standard could be met in the Section 203 case, as Congress intentionally, not negligently, breached its own rules, violating procedure in a substantial manner.

The elements of an equitable estoppel claim challenging a congressional act include:

- (1) Affirmative misconduct by members of Congress in the passage of legislation;<sup>448</sup>
  - (a) Basic estoppel elements
  - (b) False representation;
  - (c) Intent to induce claimants to act on the misrepresentation;
  - (d) Ignorance/inability of claimant to learn the truth;
  - (e) Detrimental reliance on the misrepresentation;<sup>449</sup>

and
- (2) That failure to estop will result in a serious injustice.<sup>450</sup>

Challenging Section 203 based on equitable estoppel has considerable merit. The pre-enactment colloquies in Congress alone attest to the significant violations of internal rules accompanying the enactment. Affirmative misconduct, on the other hand, could prove a more difficult hurdle to overcome. Generally defined as an “affirmative act of misrepresentation or concealment of a material fact,”<sup>451</sup> with misrepresentation requiring “making a false or misleading assertion . . . , usually with the intent

446. *Schweiker*, 450 U.S. 789–90.

447. *Ingalls Shipbuilding, Inc. v. U.S. Dep’t of Labor*, 976 F.2d 934, 938 (5th Cir. 1992) (quoting *Fano v. O’Neill*, 806 F.2d 1262, 1265 (5th Cir.1987)).

448. *Bartlett v. U.S. Dep’t of Agric.*, 716 F.3d 464, 475 (8th Cir. 2013) (quoting *Charleston Hous. Auth. v. U.S. Dep’t of Agric.*, 419 F.3d 729, 739 (8th Cir. 2005)) (“To succeed on a claim of equitable estoppel against the government, a plaintiff must prove not only all the elements of equitable estoppel, but also that the government committed affirmative misconduct.”).

449. *Story v. Marsh*, 732 F.2d 1375, 1383 (8th Cir. 1984).

450. *Watkins v. U.S. Army*, 875 F.2d 699, 706 (9th Cir. 1989).

451. *Misconduct*, BLACK’S LAW DICTIONARY (10th ed. 2014).

to deceive;<sup>452</sup> an estoppel claim requires more than innocent or negligent misrepresentation.<sup>453</sup>

Members of Congress committed affirmative misconduct when they misrepresented material facts concerning the DMF. The claim that Section 203 was intended to combat fraudulent tax returns was false and misleading, satisfying the first element of traditional estoppel; at best, Section 203 will save minimal funds over the next decade, relative to a problem costing tens of billions during that time.<sup>454</sup> Noteworthy, yet distressing, is the fact that the Congressional Budget Office (CBO) cost estimate exposes legislators' awareness of the insignificant financial consequence of Section 203.

Finally, the government's intent to induce the public to act on its misrepresentations is evidenced by Section 203's requirement that researchers apply for certification in order to access recent DMF data. The CBO cost estimates of Section 203 saving \$269 million over the next decade establish that Congress calculated that the public would participate in this certification process, projected to bring in \$517 million over that time.<sup>455</sup> Further, the government's ongoing withholding of information about claims of DMF abuse<sup>456</sup> is harming the public, which has detrimentally relied on the government's misrepresentations and which faces an expensive certification process for an inferior product. Those who are denied access to recent DMF data because they have not applied for certification, likely because of statutory ineligibility, are harmed as well.

Given the egregious nature of the injustices resulting from Section 203's enactment, estoppel should be employed here. The intent of Congress *vis-à-vis* Section 203 was not to address tax refund fraud, but to use budget ruses to deceive.<sup>457</sup> Congress needed Section 203 to help balance the budget.<sup>458</sup> It is implausible that legislators believed Section 203 would do much to combat fraudulent tax returns, a multi-billion-dollar problem, by

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452. *Misrepresentation*, BLACK'S LAW DICTIONARY (10th ed. 2014).

453. *See Schweiker v. Hansen*, 450 U.S. 785, 788 (1981); *see also supra* text accompanying note 423.

454. *See supra* Part III.

455. *See supra* notes 207–11 and accompanying text.

456. *See supra* note 64.

457. *See supra* notes 191–95 and accompanying text.

458. *See supra* note 204 and accompanying text (describing estimated savings).



implementing this provision, which will save little.<sup>459</sup> The numbers do suggest, though, that the DMF presented a simple way to claim savings while justifying excessive certification fees.

Failure to estop Section 203 and similar appropriation riders interferes with the executive department's constitutional authority to veto legislation.<sup>460</sup> Appropriations riders similar to Section 203 are often included in appropriation bills posing the specter of government shutdown; one had just occurred in October 2013.<sup>461</sup> Inserting a provision like Section 203 undermined the President's ability to veto the full bill if he found this or other riders objectionable, given the dramatic results of an unfunded government. As the Presentment Clause guards against "ill-conceived legislation,"<sup>462</sup> putting the President's 'back against the wall' in this way exceeds ordinary politics—it threatens our finely-tuned system, as it creates a dramatic power shift from the executive to the legislature, making "a mockery of the President's ability to exercise the veto power," and corrupting "the delicate structure of shared powers."<sup>463</sup>

## V. CONCLUSION

Edward Lorenz, when coining the phrase "butterfly effect,"<sup>464</sup> surely was not thinking of consequences like the ones examined in this paper. Nonetheless, this exploration has revealed the unintended consequences of substantive appropriations riders, and

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459. See *supra* notes 175–76 and accompanying text.

460. See Fitzgerald, *supra* note 267, at 396; see also Zellmer, *supra* note 257, at 527.

461. See *supra* note 188 and accompanying text (discussing government shutdown).

462. *Clinton v. City of New York*, 524 U.S. 417, 418–19 (1998); U.S. CONST. art. I, § 7, cl. 2, 3.

463. Zellmer, *supra* note 275, at 527. Had space allowed, this paper would conclude with a discussion of principles of "best practices in legislating," to be used to enhance the legislative process, at least at the federal level. Such principles could be fostered through a number of measures, some of which have been touched upon: from securing commitments to engage in procedural regularity ("following the rules"), to employing a legislative transparency process, to fostering input from constituents and stakeholders, to reconsidering a renewed presidential line-item veto.

464. Larry Bradley, *The Butterfly Effect*, CHAOS & FRACTALS, <http://www.stsci.edu/~lbradley/seminar/butterfly.html> (last visited Mar. 13, 2016).

has offered a host of options for addressing this challenging state of affairs.

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