

In Defense of The American Community Survey

Michael Lewyn

The American Community Survey (ACS) is an annual survey conducted by the U.S. Census Bureau. The ACS asks millions of households questions about education, income, poverty, housing, race, commuting and other matters, in order to help government at all levels decide how and where to allocate funds. This article critiques the policy and constitutional challenges to the ACS. In particular, the article asserts that the public interests favoring the ACS outweigh any possible privacy concerns, and that precedent under the First and Fourth Amendments support ACS inquiries. In addition, the article suggests because the Census has always asked a wide range of questions, ACS questions are authorized by the Census Clause.

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MICHAEL LEWYN[†]

I. INTRODUCTION

How do we know which towns and neighborhoods need social services for the poor, and which are more affluent? How do we know which neighborhoods have lots of bus and train riders, and which are dominated by automobiles? How do we know which neighborhoods have lots of vacant homes, and which have very few? How do we know which neighborhoods have expensive housing, and which do not? The American Community Survey (“ACS”), an annual survey conducted by the U.S. Census Bureau,¹ can help us answer all these questions. In theory, someone who receives the ACS and does not respond can be fined.² However, it is not clear whether anyone has actually been fined for ACS nonresponse.³

Over the past decade, the U.S. House has repeatedly voted either to abolish the ACS or to make responses to ACS questions voluntary.⁴ Supporters of these proposals argued that some ACS questions violated respondents’ privacy.⁵ However, the Senate has generally refused to vote on these proposals.⁶

The purpose of this article is to discuss the policy arguments for and against the ACS, and to address lingering questions concerning its constitutionality. Part I discusses the historical background of the ACS. Part II discusses the policy debate surrounding the ACS. Part III discusses the possible constitutional problems surrounding the ACS.

[†] Associate Professor, Touro Law Center. Wesleyan University, B.A.; University of Pennsylvania, J.D.; University of Toronto, L.L.M. I thank James C. Smith for his helpful suggestions. I also note that a shorter piece on the ACS will be published in the Real Estate Law Journal.

¹ See Carrie Pixler, *Setting the Boundaries of the Census Clause: Normative and Legal Concerns Regarding the American Community Survey*, 18 WM. & MARY BILL RTS. J. 1097, 1099 (2010) (noting that ACS is conducted annually); U.S. CENSUS BUREAU, AMERICAN FACTFINDER, https://factfinder.census.gov/faces/nav/jsf/pages/community_facts.xhtml (last visited Apr. 7, 2018) [hereinafter “Factfinder”].

² See 13 U.S.C. § 221 (2012) (imposing fines for refusal to answer questions from Commerce Department representatives); *Wisconsin v. City of New York*, 517 U.S. 1, 5 (1996) (Commerce Department administers Census).

³ See CONG. REC H3731 (daily ed. June 2, 2015) (remarks of Rep. Fattah).

⁴ See *infra* notes 31, 34 and accompanying text.

⁵ See *infra* notes 28–29 and accompanying text.

⁶ See *infra* notes 32, 35–36 and accompanying text.

II. BACKGROUND

The U.S. Constitution requires an enumeration of the population every ten years “in such manner as [Congress] shall by law direct.”⁷ The first Census was quite limited; it asked free Americans only their age, race and gender.⁸ But by 1900, the Census had expanded to contain twenty-eight questions.⁹ One major change occurred in 1940: instead of placing every question in every Census form, the Census added sixteen questions that were only administered to a representative sample of householders.¹⁰ By 1990, the Census only asked fourteen questions of all Americans.¹¹ Twenty-three more questions were administered through a “long form” given to the sample.¹²

After the 1990 Census, the Census Bureau began to research the idea of creating a survey that obtained data more than once a decade.¹³ The Bureau tested such a survey throughout the late 1990s.¹⁴

In 2000, the Bureau reduced the main Census to an eight-question short form, but added a forty-five-question long form.¹⁵ The long form became controversial due to its length and to public concern that the long form questions were too intrusive.¹⁶ Six bills were introduced in Congress to curtail the long form in various ways; however, all of these bills failed to pass.¹⁷

As part of the 2000 Census, the Bureau also conducted a supplementary survey that was more extensive than its 1990s

⁷ U.S. CONST., art. I, § 2.

⁸ See *infra* note 134 and accompanying text.

⁹ See U.S. CENSUS, HISTORY, 1900, https://www.census.gov/history/www/through_the_decades/index_of_questions/19001.html (last visited Apr. 7, 2018).

¹⁰ See U.S. CENSUS, HISTORY, 1940 (POPULATION), https://www.census.gov/history/www/through_the_decades/index_of_questions/1940population.html (last visited Apr. 7, 2018).

¹¹ See U.S. CENSUS, HISTORY, 1990 (POPULATION), https://www.census.gov/history/www/through_the_decades/index_of_questions/1990population.html (last visited Apr. 7, 2018).

¹² *Id.*

¹³ U.S. CENSUS BUREAU, AMERICAN COMMUNITY SURVEY: DESIGN AND METHODOLOGY, CHAPTER 2: PROGRAM HISTORY 1–2, (2012) [hereinafter “ACS Design”], https://www2.census.gov/programs-surveys/acs/methodology/design_and_methodology/acs_design_methodology_ch02_2014.pdf (noting that in “the early 1990s, Congress expressed renewed interest in an alternative to the once-in-a-decade Census” and that as a result the Census Bureau “developed a research proposal for continuous measurement”).

¹⁴ *Id.* at 2–3.

¹⁵ See U.S. CENSUS BUREAU, HISTORY, 2000, https://www.census.gov/history/www/through_the_decades/index_of_questions/2000_1.html (last visited Apr. 7, 2018).

¹⁶ See Pixler, *supra* note 1, at 1104–05.

¹⁷ *Id.* at 1106.

surveys.¹⁸ After the 2000 Census, the Bureau chose to eliminate the long form and use a yearly survey instead.¹⁹

In 2006, the Bureau fully implemented the ACS throughout the United States.²⁰ The ACS is now conducted yearly, and includes much of the same data requested by the 2000 long form.²¹ In particular, the ACS includes data related to population, businesses, governments, education, income, poverty, housing, languages spoken, race, and veteran status; not just for cities and states, but for places as small as a zip code.²² Every question on the ACS must, under federal law, relate to how federal funds should be allocated.²³ To obtain this data, the Census Bureau interviews 3 million households per year.²⁴

Because the ACS addresses the same issues as the long form, it quickly became as controversial as the long form. As early as 2004, Rep. Ron Paul proposed to amend an appropriations bill to prohibit use of federal funds for the ACS; his amendment failed by voice vote.²⁵ In 2009, 2011, and 2013, Rep. Ted Poe introduced a bill to make participation in the ACS voluntary; these bills were never voted on, either in committee or on the House floor.²⁶ In 2012, ACS opponents shifted their strategy. Rep. Daniel Webster moved on the House floor to strike ACS funding from an appropriations bill.²⁷ Rep. Webster argued that ACS questions violated respondents' privacy. In particular, he noted that the ACS asked "what time respondents left for work and how long it took them to get home . . . [and] if respondents have difficulty dressing, or [if] they have need to go shopping,"²⁸ Rep. Webster claimed that such questions were "invasions of privacy."²⁹ Other legislators responded that ACS data

¹⁸ See ACS Design, *supra* note 13, at 4. While the 1990s surveys were conducted in 36 counties, the 2000 survey was conducted in 1239 counties. *Id.* at 3–4.

¹⁹ See Pixler, *supra* note 1, at 1106–07. However, the Census Bureau's pre-2000 planning suggests that it was contemplating creation of the ACS even before the long form controversy. See *supra* notes 13–14 and accompanying text.

²⁰ See ACS Design, *supra* note 13, at 5.

²¹ See Pixler, *supra* note 1, at 1107.

²² See Factfinder, *supra* note 1.

²³ See Pixler, *supra* note 1, at 1107.

²⁴ See ACS Design, *supra* note 13, at 5.

²⁵ See H. Amdt. 641 to H.R. 4754, 108th Cong. (2004).

²⁶ See H.R. 3131, 111th Cong. (2009) ("To make participation in the American Community Survey voluntary, except with respect to certain basic questions") (35 cosponsors); H.R. 931, 112th Cong. (2011) ("To make participation in the American Community Survey voluntary, except with respect to certain basic questions"); H.R. 1078, 113th Cong. (2013) ("To make participation in the American Community Survey voluntary, except with respect to certain basic questions and for other purposes").

²⁷ See CONG. REC. H2507 (daily ed. May 9, 2012).

²⁸ *Id.*

²⁹ *Id.*

saves taxpayers money by helping agencies distribute federal dollars properly, for example, by guiding funding for antipoverty programs to areas with high poverty.³⁰ The House voted to approve the amendment.³¹ However, the Senate did not enact, or even vote on, the amendment.³² Opposition to the amendment was led not only by liberal groups interested in the administration of anti-poverty programs, but also by business groups such as the U.S. Chamber of Commerce, which argued that the demographic information provided by the ACS helps businesses decide where to invest.³³

In 2014 and 2015, Rep. Poe's efforts to make ACS compliance voluntary was met with more success; in both years, he proposed amendments to appropriations bills, both of which were approved by voice vote on the House floor.³⁴

However, the Senate has consistently ignored anti-ACS legislation. In addition to ignoring the 2012 anti-ACS amendment, it also failed to consider the 2014-15 proposals to make ACS participation voluntary.³⁵ Senator Rand Paul has repeatedly introduced similar legislation; these bills have failed to reach the Senate floor.³⁶

III. WHY BOTHER?

The ACS is useful not just to government, but to business and to scholars. Part II-A below addresses the benefits of the ACS, and Part II-B addresses policy criticisms of the ACS.

³⁰ *Id.* at H2509 (remarks of Rep. Clay) ("State per capita ACS-guided funding is positively related to income inequality—high annual pay, high poverty—Medicaid income limits, and the percent of the population that is rural. The higher any of these measures, the higher per capita funding tends to be. The ACS is absolutely vital. If you want to eliminate that, I'm sure you have certain reasons to do it, but it will take away an essential tool for us to be accountable with taxpayer dollars.")

³¹ *Id.* at H2520.

³² See H. Amdt. 1077 to H.R. 5326, 112th Cong. (2012).

³³ See Russell Berman, *Republicans Try to Curtail the Census*, THE ATLANTIC (June 9, 2015), <https://www.theatlantic.com/politics/archive/2015/06/republicans-try-to-rein-in-the-census-bureau/395210/>; Ben Weyl, *Brady Says Making American Community Survey Voluntary Would Ease Concerns*, CQ Today, June 19, 2012, 2012 WLNR 13180564.

³⁴ See 160 CONG. REC. H4988 (daily ed., May 29, 2014); 161 CONG. REC. H3730–32 (daily ed., June 2, 2015). I note that Rep. Poe filed a similar bill in 2017. However, this bill was never voted on by the full House, or even in a committee. See H.R. 1305, 115th Cong. (2017).

³⁵ See H. Amdt. 752 to H.R. 4660, 113th Cong. (2014); H. Amdt. 316 to H.R. 2578, 114th Cong. (2015) (no Senate action taken).

³⁶ See S. 3079, 112th Cong. (2012) ("A bill to make participation in the American Community Survey voluntary, except with respect to certain basic questions, and for other purposes."); S. 530, 113th Cong. (2013) ("A bill to make participation in the American Community Survey voluntary, except with respect to certain basic questions, and for other purposes").

A. *The Importance of the ACS*

The ACS is important to business, to scholars, and to government at all levels. Examples of each type of benefit will be addressed below.

1. *The ACS and Government*

The ACS is primarily designed to assist the federal government; as noted above, all ACS questions relate in some way to federal activities of some sort.³⁷ Sixty-nine percent of all federal grants are related in some way to ACS data,³⁸ and 184 federal programs are guided by ACS data.³⁹

For example, the federal government distributes Medicaid funds to states based on a formula related to each state's per capita income, data that the federal government obtains through the ACS.⁴⁰ Sixty-three percent of all ACS-guided funding relates to Medicaid.⁴¹ Another example is that under the Community Development Block Grant program, funds are distributed to cities through a formula that considers the city's poverty rate, extent of housing overcrowding, and the age of housing;⁴² all data available through ACS.⁴³

The ACS is also relevant to federal regulation of state and local government. For example, the Voting Rights Act ("VRA") prohibits redistricting that provides members of a racial or language minority less opportunity than other voters to "participate in the political process and elect representatives of their choice."⁴⁴ A violation of the VRA occurs "where groups facing historical discrimination are sufficiently large and sufficiently politically cohesive that they would be able to elect their chosen candidates in districts designed for that purpose [and] voting is sufficiently polarized that they would

³⁷ See *supra* note 23 and accompanying text.

³⁸ See ANDREW D. REAMER, METRO. POLICY PROGRAM AT BROOKINGS, SURVEYING FOR DOLLARS: THE ROLE OF THE AMERICAN COMMUNITY SURVEY IN THE GEOGRAPHIC DISTRIBUTION OF FEDERAL FUNDS 1 (2010), https://www.brookings.edu/wp-content/uploads/2016/06/0726_acs_reamer.pdf.

³⁹ *Id.* See also METRO. POLICY PROGRAM AT BROOKINGS, SURVEYING FOR DOLLARS: UNITED STATES (2016), https://www.brookings.edu/wp-content/uploads/2016/07/0726_acs_us_table.pdf; U.S. DEP'T OF COMMERCE, ECONS. AND STATISTICS ADMIN., THE VALUE OF THE AMERICAN COMMUNITY SURVEY: SMART GOVERNMENT, COMPETITIVE BUSINESSES, AND INFORMED CITIZENS 17–25, <https://www.commerce.gov/bureaus-and-offices/ousea#1/39/-77> (last visited April 9, 2018) [hereinafter Value] (Describing various examples in more detail).

⁴⁰ See REAMER, *supra* note 38, at 6.

⁴¹ *Id.* at 1.

⁴² *Id.* at 6.

⁴³ See Factfinder, *supra* note 1.

⁴⁴ 52 U.S.C. § 10301(b) (2012) (formerly cited as 42 U.S.C. § 1973 (2012)).

otherwise be more likely to lose if districts were not so designed.”⁴⁵ For example, if voting is so racially polarized that minority group X will not be able to elect candidates of its choice without a district dominated by group X, state or local governments may need to create such a district in order to comply with the VRA.⁴⁶ But, a state or local legislature cannot create such a district without knowing where group X’s voters live, which in turn requires Census data.⁴⁷

Similarly, § 203 of the VRA provides that if either (a) more than 5 percent of all voting-age adults in a state or political subdivision speak the same non-English language and have limited English proficiency, or (b) over 10,000 voting-age adults satisfy those elements, ballots and other election materials in that state or subdivision must be provided in the language of the applicable minority group.⁴⁸ This section explicitly references the ACS, providing that bilingual materials are necessary “if the Director of the Census determines, based on the 2010 *American Community Survey census data and subsequent American Community Survey data* in 5-year increments”⁴⁹ that the 5 percent or 10,000 person requirement is satisfied for a state or municipality.

The ACS is also relevant to environmental regulations. For example, the Environmental Protection Agency uses ACS data on neighborhoods to research the relationships between pollution and neighborhood housing values, household migration, and other social indicators.⁵⁰

State and local governments use ACS data for their own purposes. For example, many state laws require state legislatures to consider “communities of interest” in redistricting; a term that can include a wide variety of groupings categorized by the ACS, including ethnic groups, persons of similar economic status, or users of similar

⁴⁵ Justin Levitt, *Democracy on the High Wire: Citizen Commission Implementation of the Voting Rights Act*, 46 U.C. DAVIS L. REV. 1041, 1048 (2013).

⁴⁶ *Id.* at 1057 (“In some cases, based on turnout or other considerations, a district may have to comprise more than 50% minority voters to yield an effective opportunity district”).

⁴⁷ *Id.* at 1079–80 (Although decennial Census data also includes information about race, ACS data is more frequent and is thus “the best available means to identify substantial minority populations” between censuses).

⁴⁸ See 52 U.S.C. § 10503(b)–(c) (2012).

⁴⁹ *Id.* (b)(2)(A) (emphasis added).

⁵⁰ See Value, *supra* note 39, at 25 (EPA uses ACS data to research “variation in reported housing values, rent, income, and household migrations as it relates to data from other sources on . . . pollution concentrations”).

infrastructure.⁵¹ Transportation planners use ACS data to discover where new services are needed—for example, where demand for public transit is likely to be high.⁵² In particular, demand for transit is likely to be highest where many workers do not own cars.⁵³

Local governments use ACS data on housing values to examine cities' housing affordability problems. For example, a 2013 report by the Lexington-Fayette County, Kentucky Human Rights Commission noted, based on ACS data, that the median rent was 35 percent of the median renter income, a share high enough to impose severe cost burdens on renters.⁵⁴

In the mid-2000s, New York City sought to identify the population eligible for public health insurance but not enrolled, in order to prevent hospital emergency rooms from being clogged with uninsured patients.⁵⁵ In particular, the city used ACS data to determine the size and geographic distribution of persons with limited English proficiency (LEP), in order to effectively target resources towards those persons.⁵⁶

2. *Business and the ACS*

After the House threatened to terminate the ACS, business groups such as the U.S. Chamber of Commerce and the National Association of Home Builders rose to its defense.⁵⁷ One major retail chain, Target, pointed out that it used ACS data to decide where to locate stores.⁵⁸ For example, after Target learned from ACS data that younger people were moving into urban areas, it decided to sell merchandise

⁵¹ See Andrew Reamer, *American Community Survey: Uses and Users* 4, THE GEORGE WASH. INST. OF PUB. POLICY (Dec. 11, 2012), https://gwipp.gwu.edu/files/downloads/ACS_uses_and_users_revised12-11-12.pdf.

⁵² See *Minnesotans Depend on the American Community Survey: Stories from Minnesota 2017* 9, MACS 2020, https://mn.gov/admin/assets/MACS-Supporters-Depend-on-ACS-census-data-Jan-2017_tcm36-302689.pdf (last visited April 14, 2018) [hereinafter *Minneapolis Chamber*] (Planners use ACS data to determine “the mix of transit services, by analyzing neighborhood characteristics (for block groups) and predicting statistically what neighborhoods have the greatest potential ridership response to transit service offerings”).

⁵³ *Id.* (“[P]opulation without private vehicles” a key variable, and one determined through ACS data).

⁵⁴ See Value, *supra* note 39, at 27 (citation omitted).

⁵⁵ See Joseph J. Salvo & Arun Peter Lobo, *The Federal Statistical System: The Local Government Perspective*, 631 ANNALS AM. ACAD. POL. & SOC. SCI. 75, 75–76 (2010).

⁵⁶ *Id.* at 81–82.

⁵⁷ See Catherine Rampell, *The Beginning of the End of the Census?*, N.Y. TIMES, May 20, 2012, at SR5.

⁵⁸ *Id.*

appealing to younger consumers in its urban stores and merchandise appealing to older consumers in its suburban stores.⁵⁹

Other businesses use ACS data to find out where qualified workers are.⁶⁰ For example, a business that seeks to hire engineers might wish to search in cities where engineers, or college graduates with engineering majors, are plentiful—data available through the ACS.⁶¹

Chambers of commerce also use ACS data. In a letter endorsing ACS funding, over a dozen regional chambers of commerce and similar organizations argued that businesses need ACS data “to spur economic development, sustain and create jobs, revitalize communities, allocate resources, invest wisely, compete globally, provide value to customers, develop strategy, guide operations, and more.”⁶² These chambers cited the following examples of business reliance on ACS: (1) the Greater Houston Partnership uses ACS data on labor force skills to attract new companies to Houston;⁶³ (2) the Minneapolis Chamber of Commerce uses ACS data to develop a “Business Vitality Index” to compare Minneapolis with other markets.⁶⁴ Similarly, the Nashville Area Chamber of Commerce uses ACS data as part of a similar “Vital Signs report”;⁶⁵ (3) the Tulsa Chamber of Commerce attracted a Macy’s distribution center to Tulsa by using ACS data about the quality of the local labor force.⁶⁶

Charities also benefit from the ACS, because ACS poverty data allows them to target resources to the areas of greatest need. For example, the Greater Twin Cities United Way used ACS data to learn that poverty in the Minneapolis suburbs was increasing, and responded by allocating more money to suburban anti-poverty programs.⁶⁷

⁵⁹ U.S. Census Bureau, *Stats in Action: Target Uses ACS Data*, YOUTUBE (Feb. 13, 2012), https://www.youtube.com/watch?time_continue=149&v=jgsdQxTv5kY.

⁶⁰ See Rampell, *supra* note 57.

⁶¹ See Nicholas Eberstadt et al., “*In Order That They Might Rest Their Arguments on Facts*”: *The Vital Role of Government-Collected Data*, THE HAMILTON PROJECT (Mar. 2, 2017) https://www.aei.org/wp-content/uploads/2017/03/THP_GovDataFacts_0317_Fixed.pdf.

⁶² Letter from Austin TX Chamber of Commerce et al. to Honorable John Culberson, Chairman, & Honorable Chaka Fattah, Ranking Member, Subcomm. on Commerce, Justice, Sci. & Related Agencies, House Comm. on Appropriations (Mar. 24, 2015), <https://censusproject.files.wordpress.com/2015/12/housechamberletterinsupportofacscensusmarch2015.pdf>.

⁶³ *Id.*

⁶⁴ *Id.*

⁶⁵ *Id.* (Report presents “indicators to regional leaders . . . for the purposes of informing actionable policy solutions”).

⁶⁶ *Id.*

⁶⁷ See Minneapolis Chamber, *supra* note 52, at 9.

It could be argued that businesses should be responsible for collecting their own data, rather than relying on the federal government. However, the ACS is more useful than data collected by businesses, for a few reasons. First, government data is consistent over time, allowing users to become aware of long-term trends. By contrast, businesses might not be willing to continue collecting data as demand fluctuates.⁶⁸ Second, the ACS is more reliable, because transparency requirements imposed by Congress require the agencies to provide documentation and correct errors.⁶⁹

3. *Scholarship, Policy Analysis and the ACS*

The ACS is also relevant to persons seeking to influence public policy. For example, Catholic Charities of Saint Paul and Minneapolis uses “ACS rental housing cost burden data to [explain] . . . the expansion of housing instability and homelessness among low-income households.”⁷⁰ Food banks use ACS data to direct food and services to the areas of highest need.⁷¹

Use of ACS data is not limited to progressive and anti-poverty activists; for example, a recent report by the conservative Heritage Foundation used ACS data to show that immigrants tended to be less educated than native-born Americans, and argued that immigration law should be reformed to encourage immigration by more educated persons.⁷²

ACS data is also relevant to scholarship of all sorts: in 2014, there were 29,300 search results using the term “American Community Survey” in the “Google Scholar” database.⁷³ The ACS is also relevant to legal scholarship; I myself used ACS data in a recent article on gentrification.⁷⁴ I used ACS data to show that even expensive, gentrifying cities have become more racially diverse since the 1990s,⁷⁵ and that one allegedly gentrifying zip code in New York City had

⁶⁸ See Eberstadt et al., *supra* note 61, at 4.

⁶⁹ *Id.*

⁷⁰ See Minneapolis Chamber, *supra* note 52, at 6.

⁷¹ See Value, *supra* note 39, at 29.

⁷² See David Inserra, *Legal Immigration and the U.S. Economy: How Congress Should Reform the System*, THE HERITAGE FOUND. (Jan. 30, 2018), <https://www.heritage.org/immigration/report/legal-immigration-and-the-us-economy-how-congress-should-reform-the-system> (Asserting, based on ACS data, that “currently 51 percent of working-age immigrants to the U.S. have an education level of high school or less, while 62 percent of American-born individuals have at least some college.”).

⁷³ See Value, *supra* note 39, at 36.

⁷⁴ See Michael Lewyn, *Does the Threat of Gentrification Justify Restrictive Zoning?*, 46 REAL EST. L.J. 447 (2017).

⁷⁵ *Id.* at 452–53, 452 nn.33–34, 453 nn.35–36.

experienced increasing poverty rates and rent increases comparable to those of Manhattan as a whole.⁷⁶

4. *Now More Than Ever*

It is possible that the 2020 Census will be significantly underfunded. Typically, Census Bureau spending is ramped up in the last years of a decade, so that the Bureau may prepare for the upcoming decennial Census. For example, Bureau funding increased by 79 percent from 2006 to 2008, and by 143 percent from 1996 to 1998.⁷⁷ By contrast, the President's most recent budget proposed only a 23 percent increase in Bureau funding over the 2016 level.⁷⁸ Thus, it is quite possible that the Census may undercount Americans to a greater extent than usual, which means that the ACS will become even more important than in the past.

B. *On the Other Hand . . .*

As noted above, ACS critics argue that the survey's questions violate respondents' privacy.⁷⁹ This impingement on privacy is quite minor, for three reasons. First, ACS data is confidential. Federal law provides that no Commerce Department employee may use information for any non-statistical purpose,⁸⁰ make any publication that allows an individual to be identified,⁸¹ or permit any employee of another government agency, or any private individual, to examine individual Census forms.⁸² Such forms may not be used in any legal proceeding.⁸³

Second, the government already may obtain personal data in a variety of far more invasive and onerous ways. For example, law enforcement officials may, without violating the Fourth Amendment, obtain phone records identifying who you associate with; bank records showing who you do business with; credit card records revealing where you eat, shop, and seek entertainment; medical records listing your prescriptions; the records of cable companies and

⁷⁶ *Id.* at 453–54, 453 n.42, 454 nn.43–47.

⁷⁷ See Arloc Sherman, *This Chart Says It All - Again*, THE CENSUS PROJECT (Feb. 19, 2018), <https://thecensusproject.org/2018/02/19/this-chart-says-it-all-again>.

⁷⁸ *Id.* (Also noting that 2020 Census may ask questions about citizenship, thus depressing participation among immigrants).

⁷⁹ See *supra* notes 28–29 and accompanying text.

⁸⁰ See 13 U.S.C. § 9(a)(1) (2012).

⁸¹ *Id.* § 9(a)(2).

⁸² *Id.*

⁸³ *Id.*

video-streaming services exposing what you watch; internet browsing history indicating whether you have searched for symptoms of disease or investigated substance abuse treatment options; and travel records from airlines, hotels, rental car companies, or other third parties like Orbitz or Kayak.⁸⁴

Given government's ability to use such individualized information, politicians' complaints about ACS questions seem a bit like searching for a gnat while swallowing a camel,⁸⁵ that is, absurdly trivial.

Third, the ACS only affects a small proportion of American households, less than one out of every thirty.⁸⁶ And because the ACS affects only a small proportion of American households, it is unlikely to affect civil liberties. In an article attacking the ACS, Carrie Pixler alleges that the government used Census data to facilitate Japanese internment camps during World War II, and to locate Arab populations in 2004.⁸⁷ But, because the ACS compiles data on only a small minority of Americans, government cannot effectively use the ACS to track such ethnic minorities. At most, government will have a general idea of which neighborhoods are dominated by which groups, something it can often and easily obtain merely by reading a webpage or newspaper article.⁸⁸

Some legislators argue that even if the ACS is a legitimate exercise of government power, answering the survey should be voluntary.⁸⁹ However, the Census Bureau experimented with a

⁸⁴ Emily Berman, *When Database Queries Are Fourth Amendment Searches*, 102 MINN. L. REV. 577, 597 (2017) (Noting that such information lacks Fourth Amendment protection because voluntarily revealed to third parties). I note, however, that some of these searches are subject to statutory limits. *Id.* at 598.

⁸⁵ *Cf. Matthew 23:24* (Attacking unspecified Pharisees by stating: "You strain out a gnat but swallow a camel").

⁸⁶ *See supra* note 24 and accompanying text (3 million households involved); Factfinder, *supra* note 1 (116 million households in United States).

⁸⁷ *See Pixler, supra* note 1, at 1122–25.

⁸⁸ Pixler notes that the Census asks no questions about religion. *Id.* at 1123. But even without Census data, it is not difficult to determine which New York City neighborhoods are heavily Jewish. *See, e.g.,* Josh Nathan-Kazis, *The Fast-Shifting Map of Jewish New York*, THE FORWARD (Jan. 18, 2013), <https://forward.com/news/169506/the-fast-shifting-map-of-jewish-new-york> (discussing Jewish population patterns in New York).

⁸⁹ *See supra* note 26 and accompanying text. A related proposal is Pixler's proposal that individual agencies, rather than the Census Bureau, should conduct surveys. *See Pixler, supra* note 1, at 1125. But subjecting Americans to dozens of surveys (one from every interested federal agency) seems to me to be far more intrusive, and less efficient, than to conduct one longer survey per year. Pixler also suggests that Americans' privacy would be less affected by such a system because data is "splintered across multiple agencies." *Id.* at 1126. But it is hard for me to imagine that the centralization of data makes the ACS any more oppressive than it already is: for example, if it is dangerous for any federal agency to know where Arab-Americans live, that danger is not significantly enhanced by the same agency knowing which Arab-American neighborhoods have the highest percentage of bus riders or college graduates.

voluntary version of the ACS in 2003-04, but the results were not satisfactory. Participation decreased by 20 percent which was enough to make survey results far less reliable given the small sample size of the survey.⁹⁰ To make the ACS equally reliable under a voluntary testimony regime, the ACS would need to increase its sample size by 23 percent, at an additional annual cost of \$66 million to taxpayers.⁹¹

The recent experience of Canada is instructive. For the 2011 census, the Canadian government replaced its traditional census with a voluntary survey.⁹² This change resulted in a 25-percentage point decline in response rates, even though the Canadian government spent \$22 million increasing the number of households sampled.⁹³ Because of lower response rates, many cities had unreliable data. For example, the city of Peterborough, Ontario had so few responses that it chose to use ten-year old data from an earlier census to estimate the percentage of children with certain illnesses.⁹⁴ Even in larger cities, the voluntary census reduced the quality of data at the neighborhood level, making it more difficult for city governments to decide where to place services.⁹⁵ In 2015, the government chose to return to the traditional mandatory census.⁹⁶ The Canadian experience suggests that a voluntary ACS would be more costly and less useful.

It could be argued that by making government more efficient, the ACS encourages government to become bigger and more intrusive. But better information may actually combat efforts to increase government regulation. For example, some commentators want government to limit new urban housing in order to prevent an alleged epidemic of gentrification and displacement of the poor.⁹⁷ However, ACS data shows that even allegedly gentrifying cities, and even some gentrifying neighborhoods within those cities, continue to have higher poverty rates than their suburb counterparts.⁹⁸

⁹⁰See REAMER, *supra* note 38, at 3.

⁹¹*Id.*

⁹²See Value, *supra* note 39, at 13.

⁹³*Id.*

⁹⁴*Id.*

⁹⁵*Id.* (Some cities lacked information “regarding provisions of services, such as where to build a library or fire hall” and were “no longer making historical comparisons” with earlier data).

⁹⁶See Lee Berthiaume & Kathryn May, *The Long-Form Census Is Back—With Penalties Still Possible if You Ignore It*, OTTAWA CITIZEN (Nov. 5, 2015), <http://ottawacitizen.com/news/national/the-long-form-census-is-back-in-time-for-2016>.

⁹⁷See Lewyn, *supra* note 74, at 450–51 (describing argument).

⁹⁸*Id.* at 452–53.

IV. CONSTITUTIONAL ISSUES

Pixler's criticism of the ACS focuses on three portions of the Constitution: the First Amendment, the Fourth Amendment, and the Census Clause.

A. First Amendment

Pixler suggests that the ACS violates the First Amendment by compelling Americans to disclose data about themselves.⁹⁹ The federal courts have already spoken on this subject. In *Morales v. Daley*, plaintiffs argued that the Census violated "their rights under the First Amendment by forcing them to engage in speech which is abhorrent or contrary to their beliefs."¹⁰⁰ In particular, the plaintiffs complained that any questions about race or national origin were "deeply offensive and abhorrent."¹⁰¹

In a decision that was summarily affirmed in the U.S. Court of Appeals by the Fifth Circuit,¹⁰² the court rejected this claim on two grounds. First, the court noted that as a general matter, "[t]here is no right to refrain from speaking when essential operations of government require it for the preservation of an orderly society."¹⁰³ For example, the government could compel disclosure of information on Internal Revenue Service forms,¹⁰⁴ or compel a motorist to disclose information to a police officer during a traffic stop.¹⁰⁵

Second, the court wrote that courts are most likely to find a First Amendment violation when the government compelled plaintiffs "to disseminate publicly a message with which [they] disagree."¹⁰⁶ For example, courts have prohibited the government from forcing motorists to place an ideological message on their license plates,¹⁰⁷ or compelling a school child to salute the American flag.¹⁰⁸ This was not

⁹⁹ See Pixler, *supra* note 1, at 1112–13.

¹⁰⁰ See *Morales v. Daley*, 116 F. Supp. 2d 801, 815 (S.D. Tex. 2000), *aff'd sub. nom. Morales v. Evans*, 275 F.3d 45 (5th Cir. 2001), *cert. denied*, 534 U.S. 1135 (2002).

¹⁰¹ *Id.*

¹⁰² *Id.*

¹⁰³ See *Id.* at 816, *citing* *United States v. Sindel*, 53 F.3d 874, 878 (8th Cir. 1995).

¹⁰⁴ *Id.*

¹⁰⁵ See *McCann v. Texas*, No. 3:16-CV-335, 2017 WL 2799867, at *2 n.3 (S.D. Texas June 27, 2017), *citing Morales*, 116 F. Supp. 2d at 816.

¹⁰⁶ *Morales*, 116 F. Supp. 2d at 816.

¹⁰⁷ *Id.* at 815 (Compelled display of state motto "Live Free or Die" on license plates unconstitutional) (citation omitted).

¹⁰⁸ *Id.* at 816 (citation omitted).

the case in *Morales*. In *Morales*, the Census did not force the plaintiffs to endorse any message, but merely to provide information.¹⁰⁹

The *Morales* court noted in passing that “plaintiffs are not confident that their answers would not be used purely for statistical purposes or that they would be maintained in confidentiality. This inchoate concern is not enough to make this case one of compelled speech.”¹¹⁰ Pixler argues that because government has in fact misused Census data, the *Morales* court’s “characterization of the misuse as an ‘inchoate concern’ is no longer applicable . . . [so in] a new suit, a challenge using First Amendment grounds might hold water.”¹¹¹ She claims that in 2004, “the Census Bureau released information regarding Arab population groups in the United States to the Department of Homeland Security.”¹¹² In a footnote, she adds that the “Homeland Security used census data to locate Arab-Americans,”¹¹³ language that implies that government agents knocked on doors to attack or oppress Arab-Americans. But the truth is far less dramatic. The *New York Times* article cited in the footnote stated that the Census Bureau provided the Department of Homeland Security with information on “how many people of Arab backgrounds live in certain ZIP codes.”¹¹⁴ Obviously, this information breached no individual’s confidentiality, and the *Times* article admits that the Census Bureau’s conduct was perfectly legal.¹¹⁵

More importantly, the *Morales* decision was not based on the assumption that only the Census Bureau would use Census-related information. In fact, the court noted that data on race and national origin is used by various branches of government for a wide variety of purposes, such as judicial review of “equal protection challenges to redistricting plans”¹¹⁶ and litigation related to employment discrimination on the basis of race and national origin.¹¹⁷ Thus, the *Morales* court was quite aware that agencies other than the Census Bureau, use Census data.

¹⁰⁹ *Id.* (“[I]t is only information that is being sought” as opposed to forcing plaintiffs to endorse a message with which they disagree).

¹¹⁰ *Id.*

¹¹¹ See Pixler, *supra* note 1, at 1113.

¹¹² *Id.* at 1112.

¹¹³ *Id.* at 1112 n.111. *citing* Lynette Clemetson, *Homeland Security Given Data on Arab-Americans*, N.Y. TIMES, July 30, 2004, at A14.

¹¹⁴ *Id.*

¹¹⁵ *Id.* (“[T]he assistance [to Homeland Security] is legal . . .”)

¹¹⁶ See *Morales v. Daley*, 116 F. Supp. 2d 801, 813 (S.D. Tex. 2000), *aff’d sub. nom. Morales v. Evans*, 275 F.3d 45 (5th Cir. 2001), *cert. denied*, 534 U.S. 1135 (2002).

¹¹⁷ *Id.* at 814.

The court's language about "inchoate concern" does not show otherwise. After stating that the plaintiffs' "inchoate concern [about misuse] is not enough to make this case one of compelled speech,"¹¹⁸ the court could have reaffirmed the Census Bureau's commitment to confidentiality. Instead, the court stated that this concern "is not enough to make this case one of compelled speech, such as *Wooley [the "license plate" case discussed above]*¹¹⁹; *West Virginia Board of Education v. Barnette*, 319 U.S. 624, 63 S.Ct. 1178, 87 L.Ed. 1628 (1943) [the "compulsory flag salute" case discussed above]¹²⁰; or *Miami Herald Publishing Co. v. Tornillo*, 418 U.S. 241, 94 S.Ct. 2831, 41 L.Ed.2d 730 (1974) (requiring a newspaper to publish the replies of political candidates whom it had criticized)."¹²¹ All of the cases cited by the court involve cases in which the plaintiffs were compelled to publish a controversial message. Thus, the court's "inchoate concern" language was meant to address cases in which plaintiffs were forced to endorse such messages, not the disclosure of information to the Census Bureau, or the use of Census data by other federal agencies.

B. Fourth Amendment

The Fourth Amendment prohibits unreasonable searches and seizures.¹²² However, the courts have repeatedly rejected Fourth Amendment challenges to the Census. In *United States v. Rickenbacker*,¹²³ the U.S. Court of Appeals Second Circuit upheld the criminal conviction of a man who was convicted for refusal to answer census questions.¹²⁴ The court held that the census questions "related to important federal concerns, such as housing, labor, and health, and were not unduly broad or sweeping in their scope [and added that] [t]he fact that some public opinion research experts might regard the size of the household questionnaire 'sample' as larger than necessary to obtain an accurate result does not support a conclusion that the census was arbitrary or in violation of the Fourth Amendment."¹²⁵

¹¹⁸ *Id.* at 816.

¹¹⁹ *See supra* note 107 and accompanying text.

¹²⁰ *See supra* note 108 and accompanying text.

¹²¹ *See Morales*, 116 F. Supp. 2d at 816.

¹²² U.S. CONST. amend. IV.

¹²³ *United States v. Rickenbacker*, 309 F.2d 462 (2d Cir. 1962), *cert. denied*, 371 U.S. 962 (1963).

¹²⁴ *Id.* at 463.

¹²⁵ *Id.* at 463–64. *See also* *United States v. Steele*, 461 F.2d 1148, 1149 n.3 (9th Cir. 1972) (Rejecting similar Fourth Amendment claim in one-sentence footnote).

Similarly, in *Morales*, the plaintiff argued that Census questions about his medical condition “compel[led] him to submit to a medical examination against his will [and thus constituted] a search that implicates the Fourth Amendment.”¹²⁶ The court rejected this claim, for two reasons. First, the intrusion on privacy caused by the Census was limited, given “the methods used to collect the census data and the statutory assistance that the answers and attribution to an individual will remain confidential.”¹²⁷ Second, the government’s interest in taking the Census was significant, because the “census has been thought to be necessary for over two hundred years.”¹²⁸

Supreme Court case law supports lower court precedent. In *Wyman v. James*,¹²⁹ a welfare recipient argued that visits by a caseworker violated the Fourth Amendment.¹³⁰ In particular, she noted that the caseworker asked personal questions “which are unnecessary for a determination of continuing eligibility.”¹³¹ In the course of a decision rejecting this claim, the Supreme Court wrote: “the same complaint could be made of the census taker’s questions,”¹³² implying that a Fourth Amendment challenge to the census would be nonsensical.

Pixler criticizes the *Morales* court’s historical reasoning. She writes that the *Morales* court emphasized the antiquity of the Census,¹³³ and admits that the first Census “asked questions of age, gender and race.”¹³⁴ But she then responds by noting that the First Congress rejected a more elaborate proposal by James Madison to not only classify the population by age and sex, but to add “a census of occupations.”¹³⁵ She therefore concludes that “Congress sought to limit the information gathered by the decennial census.”¹³⁶

But, Congress’s failure to authorize a long-form census in 1790 does not mean that they believed that either the Fourth Amendment or any other portion of the Constitution precluded such a Census. In fact, the historical record suggests that Congress merely believed such questions to be unnecessary as a matter of policy; Madison later wrote

¹²⁶ See *Morales*, 116 F. Supp. 2d at 817.

¹²⁷ *Id.* at 820.

¹²⁸ *Id.*

¹²⁹ *Wyman v. James*, 400 U.S. 309 (1971).

¹³⁰ *Id.* at 309.

¹³¹ *Id.* at 321.

¹³² *Id.*

¹³³ See Pixler, *supra* note 1, at 1114.

¹³⁴ *Id.*

¹³⁵ *Id.*

¹³⁶ *Id.*

that his proposal was rejected by the Senate as “a waste of trouble and supplying materials by idle people to make a book.”¹³⁷ Thus, Congress’s rejection of the Madison proposal does not support a Fourth Amendment challenge either to the ACS or to long form Census questions. In fact, Pixler herself implicitly admits the weakness of the Fourth Amendment argument by writing that “the more elaborate scheme rejected by Congress does not necessarily mean that the ACS is an unconstitutional violation of the Fourth Amendment.”¹³⁸

C. *The Census Clause*

The Census Clause of the Constitution provides that representatives shall be apportioned among the states “according to their respective Numbers”¹³⁹ and that the population of each state shall be enumerated “within three years after the first Meeting of the Congress of the United States, and within every subsequent term of Ten Years, in such *manner* as they [Congress] by Law direct.”¹⁴⁰ The Clause allows free persons to be counted separately from slaves,¹⁴¹ but otherwise does not directly authorize specific questions.

Pixler writes that the term “manner” is limited to the form of the Census, not the Census’ object or purpose.¹⁴² She therefore reasons that the Clause does not allow a “census for purposes other than apportionment,”¹⁴³ which means that the Census Bureau may not collect non-population statistical data such as that covered by the ACS, or by implication, the pre-ACS long form.¹⁴⁴

But this argument proves too much. A court that adopted Pixler’s theory would have to outlaw not only the ACS and the pre-ACS long form, but *all* Census questions beyond the number of persons because presumably, any other numbers are irrelevant to the apportionment of Representatives between the states. But if this theory was correct, the very first Census would have been unconstitutional. As the *Morales*

¹³⁷ *Baldrige v. Shapiro*, 455 U.S. 345, 353 n.9 (1982) (citation omitted). I note that Censuses quite close to the Framers’ generation added questions similar to those proposed by Madison. See *infra* notes 145-48 and accompanying text. If the 1790 Congress really believed such questions to be unconstitutional, would government have forgotten this knowledge just two or three decades later?

¹³⁸ See Pixler, *supra* note 1, at 1114.

¹³⁹ U.S. CONST., art. I, § 2, cl. 3.

¹⁴⁰ *Id.* (emphasis added).

¹⁴¹ *Id.* (numbers generated by Census shall include all “free persons... and excluding Indians not taxed, three fifths of all other Persons”).

¹⁴² See Pixler, *supra* note 1, at 1117.

¹⁴³ *Id.* at 1115.

¹⁴⁴ *Id.* at 1117.

court pointed out, the 1790 Census was not limited to questions about the number of persons in a household—the question most directly related to apportionment. Instead, this Census asked “if a household had white males or females, whether the white males were 16-years-old or older.”¹⁴⁵ Age and gender are not related to apportionment yet the first Census asked about these facts. So, the Framers’ generation apparently rejected such a limited understanding of the Census Clause. The following generation went even further, the 1810 Census added questions about manufacturing, the 1820 Census added questions about employment,¹⁴⁶ and the 1830 Census asked if household members suffered from hearing, speaking or visual impairments.¹⁴⁷ The 1840 Census asked for information about insane household members.¹⁴⁸

Pixler relies on Congress’s refusal to endorse Madison’s proposal to add additional questions to the first Census.¹⁴⁹ But this argument lacks merit for two reasons. First, as noted above, Congress in fact did add some questions not obviously relevant to apportionment, even if they added fewer questions than Madison wished.¹⁵⁰ Second, there is no evidence that Congress’s rejection of Madison’s proposal was related to its constitutionality. As noted above, the Senate thought his proposal to be unwise,¹⁵¹ but this does not mean that the Senate also believed it violated the Census Clause. Thus, the historical record actually supports a broad interpretation of the Census Clause.¹⁵²

V. CONCLUSION

A wide variety of commentators, both inside and outside of Congress, challenge the ACS as intrusive and unconstitutional. But in fact, the ACS adds little to the total amount of governmental intrusion into Americans’ privacy because while Census data is

¹⁴⁵ See *Morales v. Daley*, 116 F. Supp. 2d 801, 828 n.10 (S.D. Tex. 2000), *aff’d sub nom.*, *Morales v. Evans*, 275 F.3d 45 (5th Cir. 2001), *cert. denied*, 534 U.S. 1135 (2002).

¹⁴⁶ See Douglas A. Kysar, *Book Review, Kids & Cul-de-Sacs: Census 2000 and the Reproduction of Consumer Culture*, 87 CORNELL L. REV. 853, 861–62 (2002).

¹⁴⁷ See *Morales*, 116 F. Supp. 2d at 818 (“[T]hat census asked if members of the household were ‘deaf,’ ‘dumb,’ or ‘blind.’”).

¹⁴⁸ *Id.*

¹⁴⁹ See Pixler, *supra* note 1, at 1117.

¹⁵⁰ See *Morales*, 116 F. Supp at 828 n.10.

¹⁵¹ See *Baldrige v. Shapiro*, 455 U.S. 345, 353 n.9 (1982)

¹⁵² Pixler also argues that the ACS is not justified by the Necessary and Proper Clause of the Constitution. She reasons that if the ACS does not “comport [] with the stated purpose of the Census Clause.” Pixler, *supra* note 1, at 1119, the Necessary and Proper Clause cannot be used to stretch the Census Clause beyond its appropriate boundaries. *Id.* at 1117–19. But if, as suggested above, the Census Clause authorizes the ACS, this argument lacks merit.

anonymous, government agencies can easily obtain a wide variety of non-anonymous data about individuals. Moreover, the constitutional claims against the ACS have been repudiated by federal case law, and rightly so. Although the Census Clause does not directly state what it authorizes, two centuries of Census practice support federal collection of statistical data beyond the bare minimum required for Congressional apportionment.

