

William & Mary Bill of Rights Journal

Volume 18 (2009-2010)
Issue 4 Symposium: Families, Fundamentalism,
& the First Amendment

Article 11

May 2010

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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 (2010), <https://scholarship.law.wm.edu/wmboj/vol18/iss4/11>

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SETTING THE BOUNDARIES OF THE CENSUS CLAUSE: NORMATIVE AND LEGAL CONCERNS REGARDING THE AMERICAN COMMUNITY SURVEY

Carrie Pixler*

INTRODUCTION

The biographies of Adolf Hitler, General William Tecumseh Sherman, and Franklin Delano Roosevelt share one common element: each leader used census data to advance infamous governmental objectives. Hitler used European census data to identify and target the Jewish population;¹ Sherman employed United States census data to assist with his march through Georgia;² finally, Roosevelt used census data to facilitate the creation of Japanese internment camps during World War II.³

While most view the census as an innocuous count of the population that occurs every ten years by a constitutional mandate,⁴ the United States government has increasingly begun to ask more questions on the mandatory decennial census.⁵ Some consider these additional questions to be an invasion of privacy and outside the scope of what is constitutionally authorized for enumeration.⁶ As a result of the controversy

* J.D., William & Mary School of Law, 2010; B.A., The University of Arizona, 2007. I dedicate this Note to my parents, Alan and Linda, who provide constant support in all of my endeavors. Thank you to Thomas, my fiancé, for commenting on prior drafts and always finding the humor in every situation.

¹ See generally EDWIN BLACK, *IBM AND THE HOLOCAUST: THE STRATEGIC ALLIANCE BETWEEN NAZI GERMANY AND AMERICA'S MOST POWERFUL CORPORATION* (2001) (discussing Hitler's use of census data to locate the German Jewish population during the Holocaust).

² Kent Walker, *Where Everybody Knows Your Name: A Pragmatic Look at the Costs of Privacy and the Benefits of Information Exchange*, 2000 STAN. TECH. L. REV. 2, 27.

³ A. Michael Froomkin, *The Metaphor Is the Key: Cryptography, the Clipper Chip, and the Constitution*, 143 U. PA. L. REV. 709, 732–33 (1995); see *infra* notes 190–95 and accompanying text.

⁴ U.S. CONST. art. I, § 2, cl. 3.

⁵ U.S. Census Bureau, *History: Index of Questions*, http://www.census.gov/history/www/through_the_decades/index_of_questions/index.html (last visited Jan. 21, 2010) (“[T]he census has grown from a ‘head count’ to a tool enabling us to better understand the nation’s inhabitants, their pursuits and activities, and needs. Expansion of the census began in 1810, when enumerators also asked questions related to the industrial pursuits of the nation’s inhabitants. In 1850, the census began collecting ‘social statistics’ (information about taxes, education, crime, and value of estate, etc.) and mortality data. . . . As a result of the census’s evolution, the constitutionally mandated census has grown to provide volumes of data about the U.S. population and its housing.”).

⁶ See, e.g., *Census Chief Says He Doesn’t Expect Privacy Lawsuit to Stand in Court*, DALLAS MORNING NEWS, Mar. 26, 2000, at 29A; Rhonda Cook, *Atlantan Pushing Census*

stemming from privacy concerns, and the subsequent drop in return rates of completed census questionnaires during the 2000 census, the Census Bureau devised a new approach for the 2010 census.⁷

Prior to the 2010 census, the census included both a long form and a short form questionnaire.⁸ The short form asked questions only for enumeration, while the long form asked myriad questions that assessed everything from commuter times to the respondent's access to running water.⁹ The privacy objections from the 2000 census focused on the invasiveness of the information gathered by the census long form,¹⁰ which Congress and government agencies justified as necessary for general legislative and administrative purposes like allocating federal funding for programs such as Medicaid.¹¹

Overhaul, ATLANTA J.-CONST., Apr. 3, 2000, at A1; *see also infra* notes 41–44 and accompanying text.

⁷ See U.S. GEN. ACCOUNTING OFFICE, DECENNIAL CENSUS: OVERVIEW OF HISTORICAL CENSUS ISSUES (1998) (“As a result of changing attitudes toward government in general, concerns that census information will be passed to other government agencies, and fears of further loss of privacy in the computer age, the rate at which the population voluntarily responds to requests for census information has declined. For example, mail response (considered to be the most reliable and cost-efficient means of obtaining census information) declined from 78 percent in 1970 to 65 percent in 1990.”); Haya El Nasser, *Plan Could Make Census’ Long Questionnaire Short-Lived*, USA TODAY, Apr. 7, 2000, at 4A; *see also infra* notes 58, 60 and accompanying text.

⁸ U.S. GEN. ACCOUNTING OFFICE, *supra* note 7, at 12 n.5 (“Decennial census data are gathered from short and long form questionnaires. Questions on the short form are asked of the entire population, and questions on the long form are asked of only a portion of the population for projection of national information.”); *see also infra* note 37 and accompanying text.

⁹ Letter from Robert P. Parker, Chief Statistician, U.S. Gen. Accounting Office, to The Honorable Dave Weldon, M.D., Chairman, Subcomm. on Civil Serv., Census, and Agency Org., Comm. on Gov’t Reform, House of Representatives, and to The Honorable Dan Miller, Vice-Chairman, Subcomm. on Civil Serv., Census, and Agency Organization, Comm. on Gov’t Reform, House of Representatives 4 (Sept. 30, 2002) (on file with author) [hereinafter Letter from Parker] (“To provide the basic population counts, which are required for congressional apportionment and redistricting, a short form is mailed to all housing units. A long form is mailed to a sample of housing units to provide detailed information for many federal programs, including such topics as population and housing characteristics, incomes, education, transportation, and disabilities at the Census tract level.” (citations omitted)); *see also infra* notes 38, 40 and accompanying text.

¹⁰ Letter from Parker, *supra* note 9, at 4 (“[F]or the tests conducted from 1996 to 2002, the Bureau reported that it had received about 250 letters expressing concern about the ACS. In a review of 82 of these letters . . . the major concern appeared to be privacy.”); *see also infra* note 44 and accompanying text.

¹¹ U.S. GEN. ACCOUNTING OFFICE, *supra* note 7, at 14 (“For fiscal year 1998, funding estimates indicate states should receive about \$170 billion in aid through 20 federal programs that used census data, in whole or in part, to allocate that aid. The largest of these programs is Medicaid, which plans to distribute about \$104.4 billion in fiscal year 1998, followed by the Federal Aid Highway Program at \$20 billion, and \$7.5 billion under Title I grants to local education agencies.”); *see also infra* notes 33–35 and accompanying text.

Given the perceived usefulness of the data from the census long form, Congress did not want to completely eliminate it; however, Congress also felt compelled to address constituent privacy concerns.¹² The solution for the 2010 Census: Congress and the Census Bureau re-named the long form the American Community Survey (ACS).¹³ The ACS is administered annually instead of every ten years, and is still considered a mandatory component of the census even though the questions asked are not required for enumeration.¹⁴

This Note examines the normative concerns and constitutionality of the new American Community Survey. Part I explains the impetus for the ACS and provides pertinent background information regarding the history of the census. Part II introduces the ACS, particularly addressing how the government will use it. In addition, Part II provides the Census Bureau's rationale and justifications for the creation of the ACS. Part III argues that the ACS is not constitutionally authorized under the Census Clause, and that normative concerns over misuse and privacy trump the government's need to collect the data. Part IV provides an alternative to the ACS, and notes that if the government sincerely needs the information for efficient planning purposes, then the Census Bureau must collect the data in a manner that minimizes privacy concerns as well as guards against the potential for misuse.

I. LEGAL AND HISTORICAL EVOLUTION OF THE CENSUS

A. The Constitution and Title 13 of the United States Code

The United States census occurs every ten years by constitutional mandate.¹⁵ The constitutional purpose is to count the population in order to apportion proper

¹² See Robert A. Rosenblatt, *GOP Addresses Public's Census Concerns*, L.A. TIMES, Apr. 7, 2000, at 20.

¹³ Letter from Parker, *supra* note 9, at 5 ("If approved, beginning with the 2010 Census, the ACS would replace the long form, which, as GAO reported in 1998, '... is a cost-effective method of providing baseline and trend data for use by federal agencies and various other census stakeholders, compared to the alternative of multiple data collections by other federal agencies for their own purposes.' Thus, because the ACS would replace the decennial census long form, it would be important for the ACS to continue to serve federal agencies in the same role as the long form." (citing U.S. GEN. ACCOUNTING OFFICE, *supra* note 7)); see also *infra* notes 60–62 and accompanying text.

¹⁴ U.S. GOV'T ACCOUNTABILITY OFFICE, AMERICAN COMMUNITY SURVEY: KEY UNRESOLVED ISSUES 1–2 (2004) ("The ACS will contain the same questions as the long form but will be mailed monthly to an annual sample of 3 million housing units. With the smaller sample, the ACS is designed to provide the same information at the same level of geographic detail as the long form by means of a continuous measurement methodology in which survey responses will be accumulated over time."); Letter from Parker, *supra* note 9, at 3 ("The Bureau determined, and GAO has agreed in a recently issued legal opinion, that it has the statutory authority to conduct the ACS as a mandatory survey, like the decennial census long form the ACS would replace."); see also *infra* note 65 and accompanying text (supporting the assertion that the ACS is an annual survey).

¹⁵ U.S. CONST. art. I, § 2, cl. 3 ("The actual Enumeration shall be made within three Years

representation in Congress, as well as allot electors for the Electoral College.¹⁶ Until 1902, either Congress passed authorizing legislation or the President issued an executive order to dictate the guidance for each decennial census.¹⁷ This ad hoc practice resulted in a census that varied in terms of how the government administered it every ten years.¹⁸ As opposed to the earlier census, the modern census is rooted in two pieces of legislation and is administered by one federal agency.¹⁹ Congress passed the first piece of legislation when Theodore Roosevelt pushed for the creation of a permanent agency to administer the census.²⁰ The Permanent Census Act created the Census Office on March 6, 1902.²¹ The second piece of legislation is found in Title 13 of

after the first Meeting of the Congress of the United States, and within every subsequent Term of ten Years, in such Manner as they shall by Law direct.”).

¹⁶ *Id.*; *see also* U.S. CONST. amend. XIV, § 2 (“Representatives shall be apportioned among the several States according to their respective numbers, counting the whole number of persons in each State. . . .”); U.S. CONST. art. II, § 1 (“Each State shall appoint, in such Manner as the Legislature thereof may direct, a Number of Electors, equal to the whole Number of Senators and Representatives to which the State may be entitled in the Congress . . .”).

¹⁷ *See* U.S. Census Bureau, History: Legislation, http://www.census.gov/history/www/census_then_now/legislation/ (last visited Jan. 21, 2010) (providing “sample[s] of the legislation and executive orders affecting census activity throughout the history of the United States”).

¹⁸ *Id.* (“The census has been guided by authorizing legislation since 1790. Through the mid-nineteenth century, this legislation was very detailed: it listed questions to be asked and gave detailed instructions to the enumerators. . . . [A]lmost all of the work for the count was done on the state and local level by federal marshals. The lack of national leadership meant that census acts had to be very specific; it was the only way the federal government could assure that the marshals would return standardized information. As census operations became more centralized and federalized in the latter part of the nineteenth century, legislation relating to the census became less detailed. Instead, it . . . left the actual design of census questionnaires up to the superintendent of the census.”).

¹⁹ *Id.*; U.S. Census Bureau, History: Legislation 1902–1941, http://www.census.gov/history/www/census_then_now/legislation/legislation_1902_-_1941.html (last visited Jan. 1, 2010) (stating that the Permanent Census Act “[m]akes the temporary census office a permanent bureau within the Department of the Interior”); U.S. Census Bureau, History: Legislation 1943–1954, http://www.census.gov/history/www/census_then_now/legislation/legislation_1943_-_1954.html (last visited Jan. 21, 2010) (stating that Title 13 of the United States Code “[c]ollects and codifies the various laws governing the statistical activities of the Census Bureau”); *see also* the current census legislation at 13 U.S.C. §§ 1-402 (2006).

²⁰ U.S. Census Bureau, Census: Then and Now, http://www.census.gov/history/www/census_then_now/ (last visited Jan. 21, 2010) (“Recognizing the growing complexity of the decennial census, President Theodore Roosevelt asked Congress to convert the temporary Census Office into a permanent agency in 1902.”).

²¹ U.S. Census Bureau, History: Legislation 1902–1941, *supra* note 19; *see also* U.S. GEN. ACCOUNTING OFFICE, *supra* note 7, at 17 (“[T]he census offices that Congress authorized every 10 years closed when the work of each successive census was done. In 1902, Congress established the Bureau of the Census, under the Department of the Interior, as a permanent agency that, for the first time, would not disband between censuses.”).

the United States Code, which Congress enacted on August 31, 1954.²² This title codified the administrative details for carrying out the census.²³ Currently, the Bureau of the Census (Census Bureau) conducts the decennial census.²⁴ If an individual receives a census survey, a response is mandatory, with noncompliance punishable by fines and criminal sanctions.²⁵

B. Financial and Administrative Evolution of the Census

Thomas Jefferson directed the first census, which counted a population of 3.9 million and took place on August 2, 1790.²⁶ This first enumeration asked just five questions at a total cost of \$44,000, or 1.1 cents per capita.²⁷ By comparison, the 2010 census is anticipated to cost “around \$11 billion,” or around \$36 dollars per capita,²⁸ and count over 308 million people in the United States.²⁹ The Director of the Census Bureau defended the high cost of the modern census by stating:

²² Act of Aug. 31, 1954, ch. 1158, 68 Stat. 1012; U.S. Census Bureau, History: Legislation 1943–1954, *supra* note 19 (noting that Title 13 “[c]ollects and codifies the various laws governing the statistical activities of the Census Bureau”); *see also* U.S. GEN. ACCOUNTING OFFICE, *supra* note 7, at 17 (“While legislation passed in 1850 made a new authorization for each decennial census unnecessary, Congress continued to pass legislation every decade for implementation of upcoming censuses. In 1954, title 13 of the U.S. Code was enacted to establish the basic rules for the taking of future decennial censuses. . .”).

²³ *See* 13 U.S.C. §§ 1-402.

²⁴ U.S. Census Bureau, Censuses and Surveys, http://factfinder.census.gov/jsp/home/saff/main.html?_lang=en (follow “About the Data” hyperlink) (last visited Jan. 24, 2010) (noting that in addition to the decennial census, “the Census Bureau conducts nearly one hundred other surveys and censuses every year”).

²⁵ *See* 13 U.S.C. §§ 221-225 (explaining the offenses and penalties associated with the census); Douglas J. Sylvester & Sharon Lohr, *The Security of Our Secrets: A History of Privacy and Confidentiality in Law and Statistical Practice*, 83 DENV. U. L. REV. 147, 159 n.53 (2005) (“Although these legal sanctions are rarely applied to nonrespondents, there is evidence that a reminder that a response is required by law increases the rate of compliance to requests for data from the census . . .”). Upon a request by Congress, the Census Bureau tested the ACS using “voluntary” instructions, which stated that the survey was not mandatory. *Id.* Return rates fell by twenty percent with the voluntary language. *Id.*

²⁶ U.S. Census Bureau, History: Fast Facts—1790, http://www.census.gov/history/www/through_the_decades/fast_facts/1790-2.html (last visited Jan. 21, 2010). The United States “in 1790, was the first modern nation to undertake a comprehensive and periodic count of its population as a regular responsibility of government.” U.S. GEN. ACCOUNTING OFFICE, *supra* note 7, at 8.

²⁷ U.S. Census Bureau, History: Fast Facts—1790, *supra* note 26.

²⁸ *Preparing for 2010: Is the Census Bureau Ready for the Job Ahead?: Hearing Before the Fed. Financial Mgmt., Gov’t Info., Fed. Services, and Int’l Security Subcomm. of the S. Comm. on Homeland Security and Governmental Affairs*, 110th Cong. 2 (2007) [hereinafter *Preparing for 2010: Hearing*] (opening statement of Sen. Thomas R. Carper, Chairman, Fed. Financial Mgmt., Gov’t Info., Fed. Services and Int’l Security Subcomm).

²⁹ U.S. Census Bureau, Interim Projections of the Total Population for the United States

[In 1790], [w]e only collected the name of the householder and the number of other people in the household, by free and slave. There was very little detail on that questionnaire, and that makes it easier.

In addition, we were not concerned about confidentiality in those days, and the results were posted in local areas to see if anyone had been missed. So it was a collaborative effort. There were not so many people, apparently, as we perceive today less enthusiastic about being reported to the government. And we used U.S. Marshals to collect the census results, which may have added a more urgent tone to their visits.³⁰

The likely culprit of the modern census's increasing costs is the fact that census officials "have constantly sought to increase both the amount and the diversity of information they collect[] about the people of the United States."³¹ Thus, the census asks increasingly more questions that some individuals consider an invasion of their privacy.³² The Census Bureau defends the type and number of questions on the decennial census by arguing that those questions outside of the scope of pure enumeration are statutorily required for the allocation of federal funding.³³ "Census data directly

and States: April 1, 2000 to July 1, 2030, <http://www.census.gov/population/projections/SummaryTabA1.pdf> (last visited Jan. 24, 2009).

³⁰ *Preparing for 2010: Hearing, supra* note 28, at 5–6 (statement of Charles Kincannon, Director, U.S. Census Bureau).

³¹ U.S. Census Bureau, History of the Census—Demographics, <http://www.census.gov/history/www/programs/demographic/> (last visited Apr. 1, 2010).

³² *E.g.*, Dennis Byrne, *Check Box Marked 'None of Your Business,'* CHI. SUN-TIMES, Mar. 29, 2000, at 43 (editorializing about the "unreasonable, . . . intrusive, overly complex, unclear, repetitive [and] unnecessary" census questions); Sherry Sylvester, *Questions Questioned; Census' Long Form Too Personal to Some,* SAN ANTONIO EXPRESS-NEWS, Mar. 25, 2000, at 1A (discussing census respondents concerns about the invasiveness and purpose of census questions).

³³ *Preparing for 2010: Hearing, supra* note 28, at 1 (opening statement of Sen. Carper) ("Innumerable programs at all levels of government depend on an accurate census, as does the work of a number of academics and others out side of government."); *Preparing for 2010: Hearing, supra* note 28, at 24 (testimony of Andrew Reamer, Fellow, Metropolitan Policy Program, The Brookings Inst.) ("In fiscal year 2004, I estimate that at least \$287 billion across 75 grant programs were allocated across the country on the basis of census numbers or census-derived numbers."); D. SUNSHINE HILLYGUS ET AL., THE HARD COUNT: THE POLITICAL AND SOCIAL CHALLENGES OF CENSUS MOBILIZATION 1 (2006) ("[T]wo of the most fundamental government commodities—money and representation—are linked to the census count. . . ."); *see also* U.S. Census Bureau, About the ACS: Subjects Planned for the 2010 Census and ACS, http://www.census.gov/acs/www/SBasics/Final_2010_Census_and_American_Community_Survey_Subjects_Notebook.html (last visited Jan. 21, 2010) [hereinafter U.S. Census Bureau, About the ACS].

affect how more than \$200 billion per year in federal and state funding is allocated to local, state and tribal governments. The data is also vital to other planning decisions, such as emergency preparedness and disaster recovery.”³⁴ In addition to the constitutional and statutory uses, census data in the twentieth and now twenty-first century is used to fulfill programmatic functions such as “planning the right locations for schools, [and] roads” as well as providing data for “the distribution of funds for government programs such as Medicaid.”³⁵ Due to the government’s expanded use of census data, conducting the census is now one of the most coordinated efforts by the federal government.

C. The Controversial Long Form Provided the Impetus for the Use of the ACS

The 2000 census (Census 2000) “was the largest peacetime mobilization in the history of the United States, employing approximately 970,000 people to distribute, collect, and tabulate 400 million questionnaires covering 115.9 million housing units and 281.4 million people.”³⁶ The census itself consisted of a short form that collected essential information for purposes of reapportionment as well as “a long form sent to approximately 1 in 6 households that was designed to collect detailed information used to distribute fiscal resources under a wide array of federal, state, local, and tribal programs.”³⁷

³⁴ U.S. Census Bureau, About the ACS, *supra* note 33.

³⁵ U.S. Census Bureau, Decennial Census, <http://factfinder.census.gov/home/saff/main.html> (follow “Decennial Census Learn More” hyperlink) (last visited Jan. 21, 2010) (noting that since the mid-1970s, the Census Bureau has “produce[d] small-area population data needed to redraw state legislative and congressional districts”). Census data is also used to distribute government funding “for government programs such as Medicaid; planning the right locations for schools, roads, and other public facilities; helping real estate agents and potential residents learn about a neighborhood; and identifying trends over time that can help predict future needs.” *Id.*; see also H.R. Res. 1262, 110th Cong. (2008) (“Whereas the decennial census is crucial to Federal policy-makers who distribute billions of taxpayer dollars among many Federal programs based on the results of those enumerations”); MARGO J. ANDERSON & STEPHEN E. FIENBERG, WHO COUNTS? THE POLITICS OF CENSUS-TAKING IN CONTEMPORARY AMERICA 1 (1999) (“New census numbers also trigger changes in legislative formulas that allocate tax revenue . . . through revenue-sharing and grant-in-aid systems. Government policy makers, scholars, the media, and the private sector also eagerly await the census results each decade and use the information for myriad public and private purposes.”).

³⁶ Douglas A. Kysar, *Kids & Cul-de-Sacs: Census 2000 and the Reproduction of Consumer Culture*, 87 CORNELL L. REV. 853, 859 (2002) (book review).

³⁷ U.S. CENSUS BUREAU, QUESTIONS PLANNED FOR THE 2010 CENSUS AND AMERICAN COMMUNITY SURVEY vii (2008), available at http://www.census.gov/acs/www/Downloads/Questions_Planned_for_the_2010_Census_and_American_Community_Survey.pdf. “Beginning with the 1960 Census, the first conducted by mail, it became necessary to use separate forms—a short form to collect population data from all households and a long form to collect the detailed items from a sample of households.” U.S. GOV’T ACCOUNTABILITY OFFICE, *supra* note 14, at 47.

Specifically, the short form asked “100-percent characteristics” questions for both people and housing: “Age, Hispanic or Latino origin, Household relationship, Race, Sex, Tenure (whether the home is owned or rented), [and] Vacancy characteristics.”³⁸ Beginning in 1940, the long form, which nearly twenty percent of all households received every ten years,³⁹ also addressed housing and population but with more detailed and probing questions that covered the following topics:

Population: Ancestry, Disability, Grandparents as caregivers, Income in 1999, Labor force status, Language spoken at home and ability to speak English, Marital status, Migration (residence in 1995), Occupation, industry, and class of worker, Place of birth, citizenship, and year of entry, Place of work and journey to work, School enrollment and educational attainment, Veteran status, Work status in 1999

Housing: Farm residence, Heating fuel, Number of rooms and number of bedrooms, Plumbing and kitchen facilities, Telephone service, Units in structure, Utilities, mortgage, taxes, insurance, and fuel costs, Value of home or monthly rent paid, Vehicles available, Year moved into residence, Year structure built.⁴⁰

Although the Census Bureau utilized the long form for a majority of the twentieth century, Census 2000 coincided with a social and political climate that was highly suspect of the government requiring the populace to provide extensive information.⁴¹ The news media widely reported the controversy surrounding the privacy concerns and highlighted the public’s “fears of government databases soaking up vast amounts of personal information, despite assurances that it will remain confidential.”⁴²

Census 2000 was not the only time in history that citizens considered the census controversial:

The census has been the subject of controversy at a number of points in its history. In 1940, there were objections to the inclusion of questions on income, while a proposal to include a question on religion in the 1960 Census was dropped in the face of

³⁸ U.S. Census Bureau, Decennial Census, *supra* note 35.

³⁹ U.S. Census Bureau, About the ACS, *supra* note 33.

⁴⁰ U.S. Census Bureau, Decennial Census, *supra* note 35; *see also* HILLYGUS, *supra* note 33, at 76–79 (discussing the Census 2000 long form).

⁴¹ *See generally* HILLYGUS, *supra* note 33, at 17–40 (describing the social and political climate surrounding the 2000 census).

⁴² D’Vera Cohn, *Census Too Nosy? Don’t Answer Invasive Questions, GOP Suggests*, WASH. POST, Mar. 30, 2000, at A01; *see also* HILLYGUS, *supra* note 33, at 79–95 (describing the public reaction to the census controversy).

public opposition. The criticism seems to have grown in recent decades, becoming particularly intense in 2000. George W. Bush said, ‘I can understand why people don’t want to give over that information to the government. . . . I’m not sure I would either.’ One member of Congress suggested that people who received the long form should complete only the first six questions and include a letter of protest with their return.⁴³

A Census Bureau study about privacy concerns surrounding the most recent census revealed that respondents’ main concern focused on the long form.⁴⁴ Specifically, the “heightened privacy and confidentiality concerns among long form recipients” dealt primarily with the skepticism about the government’s purpose for asking such questions.⁴⁵ The Census Bureau concluded that the most commonly cited reasons for reluctance to answer census questions on the long form included: (1) the census’s “perceived lack of purpose,” and (2) the sentiment that the information gathered by the census was “none of the government’s business.”⁴⁶ In particular, questions regarding income or disability “arous[ed] considerable concern about the confidentiality of the answers.”⁴⁷

In response to the controversy over the long form⁴⁸ as well as the fact that the Supreme Court heard constitutional challenges regarding the design of the census,⁴⁹ and no doubt due to the impending 2000 election,⁵⁰ members of Congress intervened

⁴³ David Weakliem & Wayne J. Villemez, *Public Attitudes Toward the Census: Influences and Trends*, 85 SOC. SCI. Q. 857 (2004) (internal citations omitted).

⁴⁴ See ELIZABETH MARTIN, U.S. CENSUS BUREAU, PRIVACY CONCERNS AND THE CENSUS LONG FORM: SOME EVIDENCE FROM CENSUS 2000, at 5 (2001), available at <http://www.amstat.org/sections/srms/proceedings/y2001/Proceed/00466.pdf> (“Respondents expressed the greatest reluctance to answer long form questions (particularly income) but also some short form items, such as race and names.”); see also HILLYGUS, *supra* note 33, at 2 (“[T]he Census Bureau was unprepared for a political debate that would ultimately question the bureau’s very right to collect census data beyond a basic head count. This debate centered on the census long form [the ACS is based on the census long form]: within the heightened political context of an election year, and with growing public concern about privacy issues, an acrimonious controversy emerged regarding the form’s intrusiveness.”).

⁴⁵ MARTIN, *supra* note 44, at 5.

⁴⁶ *Id.*

⁴⁷ *Id.*

⁴⁸ See, e.g., Petition for Writ of Certiorari, *Morales v. Evans*, 534 U.S. 1135, 2 n.1 (2002) (No. 01-1011) (showing that the long form controversy even spilled over into the court system).

⁴⁹ See HILLYGUS, *supra* note 33, at 30 (explaining that “[c]ensus design decisions were attacked as unconstitutional” and argued twice before the Supreme Court).

⁵⁰ *Id.* at 74 (“Every twenty years the constitutionally mandated decennial census in the United States falls on a presidential election year. In 2000, just as the census mail-back phase got underway, the census became briefly embroiled in the partisan rancor of the heated political environment.”).

in the census debate.⁵¹ Six bills came before Congress to limit the information the census could ask of the population.⁵² The six bills either proposed to severely limit the information the Census Bureau could gather or nullified any fines to those who failed to complete the census forms.⁵³ One bill even created a “Commission for the Comprehensive Study of Privacy Protection” that would strike a proper balance between individual concerns for civil liberty and the governmental interest in mandating and monitoring personal information.⁵⁴ Although ultimately all of the bills failed, the proposals typified the growing American sentiment that the government should not require the populace to provide such extensive details when the information is attached to a name and location of each enumerated person.⁵⁵ The Senate, however, passed a nonbinding resolution stating that “no American [should] be prosecuted, fined, or in any way harassed by the federal government” for failing to answer questions on the long form.⁵⁶

II. THE HISTORY AND CONTENT OF, AND THE POLICY BEHIND, THE AMERICAN COMMUNITY SURVEY

A. *The ACS Replaces the Controversial Long Form from the 2000 Census*

Since “the political climate surrounding Census 2000 was unprecedented in intensity, visibility, and partisan hostility,”⁵⁷ planning for the 2010 census necessarily addressed the privacy concerns over the long form.⁵⁸ To the Census Bureau, it was critically important for census form return rates that the respondents felt secure that the government would protect personal information.⁵⁹ Accordingly, the Census Bureau hoped to allay privacy concerns for the 2010 census by “[d]ecoupling the

⁵¹ Rosenblatt, *supra* note 12.

⁵² HILLYGUS, *supra* note 33, at 75.

⁵³ See, e.g., H.R. 4085, 106th Cong. (2000) (proposing “[t]o amend title 13, United States Code, to provide that decennial census questionnaires be limited to requesting only the information required by the Constitution”); Common Sense Census Act of 2000, H.R. 4154, 106th Cong. (2000) (introducing an amendment to Title 13 to “provide that the penalty for refusing or neglecting to answer decennial census questions shall apply only to the extent necessary to allow the Government to obtain the information needed for its enumeration of the population, as required by the Constitution of the United States”).

⁵⁴ Privacy Commission Act, H.R. 4049, 106th Cong. (2000).

⁵⁵ See HILLYGUS, *supra* note 33, at 75.

⁵⁶ *Id.* at 74.

⁵⁷ *Id.* at 30.

⁵⁸ *The American Community Survey—A Replacement for the Census Long Form?: Hearing Before the Subcomm. on the Census of the Comm. on Government Reform*, 106th Cong. 1 (2000) [hereinafter *ACS Hearing to Replace Long Form*] (opening statement of Rep. Dan Miller, Chairman, Subcomm. on the Census) (“Today we are here to begin the process of eliminating the problematic census long form.”).

⁵⁹ See MARTIN, *supra* note 44, at 4.

short form and long form.”⁶⁰ This change in the 2010 census means that the actual national census will only use the short form to count the population.⁶¹ In addition, the new annual American Community Survey replaces the controversial census long form.⁶² The yearly ACS requires a mandatory response and “collects essentially the same detailed information on population and housing characteristics, as did the ‘long form.’”⁶³ Further, the Census Bureau asserts that the data collected in the ACS is absolutely confidential and any Census Bureau employee found to violate the confidentiality requirement of Title 13, the applicable U.S. Code section, will face fines and imprisonment.⁶⁴

B. The Content of the Annual ACS

Initiated in 1996 as a sample survey, the ACS is a “yearly survey that eliminates the need for a decennial long-form questionnaire, while providing key socioeconomic and housing data about the nation’s rapidly changing population every year rather than once a decade.”⁶⁵ It provides annual data for every area in the United States with a population of over 65,000, and over time the ACS data will include information on smaller population groups.⁶⁶ It is estimated that the ACS will reach 250,000 households each month at a cost approximating \$150 million annually.⁶⁷

Since the ACS is essentially an annual census long form, according to the Census Bureau, federal law requires every question included on the ACS to relate to funding allocations.⁶⁸ Ranging from available kitchen facilities in the residence, to income from tips over the past year, to whether members of the household have hearing disabilities, the questions cover every subject that the census long form addressed.⁶⁹ If federal agencies want to add a question to the ACS, then the Interagency Committee

⁶⁰ U.S. CENSUS BUREAU, *supra* note 37.

⁶¹ *Id.*

⁶² *Id.*

⁶³ *Id.*

⁶⁴ U.S. CENSUS BUREAU, AMERICAN COMMUNITY SURVEY: QUESTIONS & ANSWERS 3 (2005), available at http://www.census.gov/acs/www/SBasics/congress_toolkit/QandA.pdf.

⁶⁵ U.S. Census Bureau, About the ACS, *supra* note 33. See generally U.S. CENSUS BUREAU, *supra* note 37, at 1.

⁶⁶ *ACS Hearing to Replace Long Form*, *supra* note 58, at 5 (statement of Rep. Carolyn B. Maloney, Member, Comm. on Government Reform); see also Letter from Parker, *supra* note 9, at 2 (“ACS data will be published annually for geographic areas with a population of over 65,000; as 3-year averages for geographic areas with a population of 20,000 to 65,000; and as 5-year averages for geographic areas with a population of less than 20,000.”).

⁶⁷ HILLYGUS, *supra* note 33, at 116; Letter from Parker, *supra* note 9, at 1.

⁶⁸ *ACS Hearing to Replace Long Form*, *supra* note 58, at 24 (statement of John Spotila, Administrator, Office of Information and Regulatory Affairs, Office of Mgmt. and Budget); see also Letter from Parker, *supra* note 9, at 2 (“Federal agencies that extensively use the 2000 Decennial Census long-form data for program implementation would use ACS data in the future if the long form was eliminated.”).

⁶⁹ See U.S. CENSUS BUREAU, *supra* note 37.

for the ACS, which is headed by the Office of Management and Budget, reviews the potential question to ensure it is rooted in proper legal authority.⁷⁰ Congress must then officially approve the proposed questions for the ACS.⁷¹

C. Policy Justifications for the ACS

The Census Bureau argues that the ACS is justified and sensible as an alternative to the long form because (1) it is cost-effective,⁷² (2) timely,⁷³ and (3) provides the control for all other surveys.⁷⁴ The ACS “allows the Census Bureau to focus efforts on the constitutional requirements to produce a count of the resident population, employ technology to improve efficiencies, provide more timely data [because the ACS is annual], improve coverage accuracy, and contain costs while keeping operational risk to a minimum.”⁷⁵ Proponents, such as Representative Jo Ann Emerson from Missouri, cite the need for more data in an “era of decentralized community-based decisionmaking” in order to effectively plan for the future.⁷⁶ In short, the ACS “provides more current, detailed information than has ever been available before.”⁷⁷

⁷⁰ Letter from Anthony H. Gamboa, Gen. Counsel, U.S. Gen. Accounting Office, to Rep. Bob Barr, Vice Chairman, Comm. on Gov’t Reform, House of Representatives, at 5 (Apr. 4, 2002) [hereinafter Letter from Anthony H. Gamboa]; *see also* Letter from Parker, *supra* note 9, at 2–3 (explaining how the question justification process functions with respect to the ACS).

⁷¹ U.S. Census Bureau, About the ACS, *supra* note 33 (“[T]he Census Act requires that not later than 2 years before the next census, the questions to be included on that census be submitted to Congress. . . . In advance of providing the questions to be included on the next census to Congress, the U.S. Census Bureau asked federal agencies to provide information on their data needs, so that only necessary data are collected. . . . The Office of Management and Budget facilitates the process to validate current uses of census data, determine unnecessary subjects and questions, and identify new subjects for which questions are required.”); *see also* U.S. GEN. ACCOUNTING OFFICE, *supra* note 7, at 22 (“Until the 1930 Census, the details of the questions on the form were specified minutely by Congress. In the 1929 law authorizing the 1930 Census, Congress specified areas to be investigated but, for the first time, left the exact questions to the Bureau.”).

⁷² Letter from Anthony H. Gamboa, *supra* note 70, at 4 (“It is clear that [the] Census [Bureau] was not reacting to congressional direction in developing the ACS but acting on its own initiative to address the costs associated with the collection of data in the decennial census and the timeliness of that data.”).

⁷³ U.S. CENSUS BUREAU, *supra* note 37 (“Since the American Community Survey is conducted every year, rather than once every 10 years, it provides more current data throughout the decade.”).

⁷⁴ *ACS Hearing to Replace Long Form*, *supra* note 58, at 40 (statement of Kenneth Prewitt, Director, Bureau of the Census) (“The difference in the ACS and all of these other important surveys is that the American Community Survey is the platform against which all of the other surveys create their statistical controls.”).

⁷⁵ U.S. CENSUS BUREAU, *supra* note 37.

⁷⁶ *ACS Hearing to Replace Long Form*, *supra* note 58, at 10 (statement of Rep. Jo Ann Emerson of Missouri).

⁷⁷ U.S. CENSUS BUREAU, *supra* note 37.

D. Legal Justifications for the ACS

Initially, the ACS began as a supplementary survey in 1996 to “test the operational feasibility of collecting long form type data” without using the decennial census.⁷⁸ The Census Bureau justified its actions under the authority granted to it by 13 U.S.C. § 182, which gives the Secretary of Commerce the discretion to administer any survey “deemed necessary to furnish annual and other interim current data on the subjects covered by the censuses.”⁷⁹

Once Congress and the Census Bureau determined that they could expand the ACS to act as an annual auxiliary to the census, questions arose concerning its legal authority.⁸⁰ In response to a letter from Representative Bob Barr, the Vice Chairman of the Committee on Government Reform, the General Accounting Office (GAO) justified the ACS in a letter dated April 4, 2002.⁸¹ According to the GAO, the Census Bureau maintains the legal authority to conduct the ACS pursuant to 13 U.S.C. § 141 and § 193.⁸² Further, the Census Bureau can force respondent compliance by making the ACS mandatory under 13 U.S.C. § 221.⁸³ Although the GAO letter highlighted that court decisions and Congressional actions grant substantial deference and discretion to the Census Bureau with respect to census information, the GAO pointed out that “the uses of census data have grown significantly beyond congressional apportionment,”⁸⁴ which was the original constitutional purpose of the census.⁸⁵

III. CONSTITUTIONAL CHALLENGES TO THE AMERICAN COMMUNITY SURVEY

A. First and Fourth Amendment Challenges to the ACS

In the midst of the long form controversy during the 2000 census,⁸⁶ in *Morales v. Daley* plaintiffs challenged the constitutionality of the content of the questions

⁷⁸ Letter from Anthony H. Gamboa, *supra* note 70, at 2.

⁷⁹ 13 U.S.C. § 182 (2006); Letter from Anthony H. Gamboa, *supra* note 70, at 2 (“The Bureau began conducting supplementary surveys of selected counties under its authority at 13 U.S.C. § 182 . . .”).

⁸⁰ Letter from Anthony H. Gamboa, *supra* note 70, at 1.

⁸¹ *Id.*

⁸² *Id.*

⁸³ *Id.* at 4. According to the Census Bureau:

If the ACS was conducted as a voluntary survey, the Bureau would need to make up for the lower mail response with more interviews to maintain the proposed level of accuracy of the ACS. Because obtaining responses by interview is more costly than obtaining responses by mail, conducting the ACS as a voluntary survey would be more expensive. . . . [T]he Bureau estimates that a voluntary ACS would cost as much as \$20 to \$35 million a year more.

Letter from Parker, *supra* note 9, at 3.

⁸⁴ Letter from Anthony H. Gamboa, *supra* note 70, at 3. *See generally* Kysar, *supra* note 36.

⁸⁵ *See supra* Part I.A.

⁸⁶ *See supra* notes 41–47 and accompanying text.

asked by the Census Bureau on both the long and short forms.⁸⁷ The plaintiffs sought a permanent injunction to protect them from answering census questions.⁸⁸ The question presented asked, “what kind of information may the United States Government demand of its citizens and compel them to provide under threat of criminal penalties should they not do so.”⁸⁹ The plaintiffs argued that the only subjects about which the government could lawfully ask must pertain to “the constitutionally-mandated enumeration or ‘head-count’ of the people who inhabit the United States and this only for purposes of apportionment.”⁹⁰ Specifically, the plaintiffs asserted that the Census Bureau has “virtually no limits to the intrusiveness of census questions” and as such, the questions were “an unconstitutional invasion of the plaintiffs’ privacy” in violation of the First, Fourth and Fourteenth Amendments.⁹¹ In response to the plaintiffs’ arguments, the government argued that Congress’s power under the Necessary and Proper Clause in conjunction with the Census Clause, which permits Congress to conduct

⁸⁷ See 116 F. Supp. 2d 801 (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).

⁸⁸ *Id.* at 803.

⁸⁹ *Id.*

⁹⁰ *Id.*

⁹¹ *Id.*

Plaintiffs are complaining . . . about the questions on the short form that ask a resident of the United States if he is Hispanic and what kind of Hispanic he is. Plaintiffs also object to the question which asks the resident what race he would self categorize himself to be. They also object to the question asking how a person is related to the other persons who live in the house with him.

On the long form they object to these question[s] and a number of others. Specifically, they object to the question concerning marital status, educational background (8–10), ancestry and ethnic origin (10), whether the person speaks a language other than English, and, if so, which one, and how well the person speaks English (11), length of residence in the dwelling (15), medical conditions or problems (16 and 17), where the person worked ‘last week’ (22), how the person got to work (23), when the person left home for work and how long it took to get there (24), work/layoff/absence history (25 and 26), occupation and employer (27–30), income and source of income (31 and 32), the nature of the housing, including the number of rooms and bedrooms in the house (37 and 38), plumbing, kitchen, and phone service (39 to 41), information about rent, mortgage, insurance, and home value (46–53). Plaintiffs also object to the fact that stated prominently on the envelope in which the census forms are mailed are the words, ‘You are required by law to answer these questions.’

. . . They [plaintiffs] feel intimidated by the threat of criminal sanctions . . . and they feel that if they protect their privacy and refuse to answer that they will be exposing themselves to hundreds or . . . thousands of dollars in fines.

Id. at 809.

the decennial census “in such Manner as they shall by Law direct,”⁹² enables Congress to collect the nation’s demographic data to carry out “[Congress’s] delegated powers to govern that population intelligently.”⁹³

Ultimately, the court of appeals affirmed the district court’s holding that the census questions were constitutional.⁹⁴ This Note, however, argues that the ACS, which uses those same questions previously asked on the long form, is unconstitutional. The ACS is not part of the decennial census.⁹⁵ It is an annual survey, which provides information for federal funding, and not apportionment.⁹⁶ The ACS is treated as part of the census merely in order to justify mandatory compliance under penalty of law.⁹⁷ This Note contends that although the district court in *Morales* found that Title 13 authorized the decennial long form, the ACS is unlawful because it is an annual survey, which, by nature of its yearly implementation, is not authorized by the Census Clause of the Constitution. The Census Clause may permit additional mandatory questions on the decennial census; however, the ACS is an annual survey that is not a part of the census count conducted every ten years. The following sections analyze some of the plaintiffs’ constitutional challenges to the long form in *Morales*. Further, the sections distinguish the court’s analysis of the long form from Census 2000⁹⁸ to demonstrate why the ACS is not constitutionally justified like the long form and thus is unlawful.

1. The First Amendment Protection Against Compelled Speech

In *Morales*, plaintiffs argued that the forced self-classification, on highly charged issues such as race and ethnicity, in the census questions “violate[d] their rights under the First Amendment by forcing them to engage in speech which is abhorrent and contrary to their beliefs.”⁹⁹ The plaintiffs stated that they refused to define themselves by their race and did not wish to categorize themselves in such a manner.¹⁰⁰ The free speech protections of the First Amendment therefore allowed them to refrain from speech such as filling out the census long form.¹⁰¹ Further, plaintiffs stated that as

⁹² U.S. CONST. art. I, § 2, cl. 3.

⁹³ *Morales*, 116 F. Supp. 2d at 810.

⁹⁴ *Morales*, 116 F. Supp. 2d 801, *aff’d sub nom. Morales v. Evans*, 275 F.3d 45 (5th Cir. 2001).

⁹⁵ As explained in Part II.A, the decennial census will use the short form to collect data while the ACS, which replaces the census long form, is collected on an annual basis and is not technically part of the enumeration of the population that occurs every ten years by constitutional mandate. *See supra* notes 60–63 and accompanying text.

⁹⁶ *See supra* note 65 and accompanying text.

⁹⁷ *See supra* notes 68, 83 and accompanying text.

⁹⁸ *See Morales*, 116 F. Supp. 2d 801.

⁹⁹ *Id.* at 815.

¹⁰⁰ *Id.*

¹⁰¹ *Id.*

a matter of public policy the government should not compile this wealth of data in one location because of the potential for misuse, arguing instead that misuse is only completely prevented if the information is never collected.¹⁰²

The government argued against the notion that the plaintiffs maintained a right “not to speak” and could “withhold information which the federal government has determined to be necessary for informed government decision making.”¹⁰³ The census did not ask the plaintiffs to participate in political speech or to adopt a point of view.¹⁰⁴ The government asserted that participants in the census must provide statistical information, which is not “published in any format” that identifies the individual and “only sworn officers or employees [can] examine individual returns.”¹⁰⁵

While the district court recognized the plaintiffs’ concern that the government would use the information for purposes other than statistical analysis, the court determined that the “inchoate concern is not enough to make this case one of compelled speech.”¹⁰⁶ The court found no violation of the First Amendment and asserted that Congress enacted a valid statute mandating that all residents must provide the information, which is used to advance a legitimate governmental purpose.¹⁰⁷ Moreover, although the district court recognized that the United States government misused information from the Census Bureau during World War II to facilitate the administration of Japanese internment camps,¹⁰⁸ the court did not address the public policy concern because the plaintiffs did not allege a misuse aimed at discrimination against them specifically.¹⁰⁹

The ACS is a violation of the First Amendment under the logic expounded by the district court in *Morales* because there is no longer an “inchoate concern” that the government will use the data for purposes other than statistical analysis.¹¹⁰ In 2004, the Census Bureau released information regarding Arab population groups in the United States to the Department of Homeland Security.¹¹¹ While the particular uses

¹⁰² *Id.* at 811.

¹⁰³ *Id.* at 816.

¹⁰⁴ *Id.*

¹⁰⁵ *Id.*

¹⁰⁶ *Id.*

¹⁰⁷ *Id.*

¹⁰⁸ *Id.* at 811 (“Plaintiffs cite, with no challenge by the government, that census data of this type was used during the Second World War to identify Americans with Japanese ancestry. These persons were then placed in internment camps for the duration of the war. This is a startling example of how census data, collected for proper purposes, has been illegally used by the government for improper purposes.”).

¹⁰⁹ *Id.* (“Plaintiffs argue that if such data is collected, it could only be used for discriminatory purposes. Plaintiffs have not alleged or shown, however, that the data is likely to be used to discriminate against them specifically.” (citation omitted)). *But cf. infra* Part III.C.3 (highlighting specific instances of census data misuse to further explain the privacy concerns).

¹¹⁰ *See infra* Part III.C.3.d (explaining how the government recently used census data to locate Arab-Americans).

¹¹¹ Lynette Clemetson, *Homeland Security Given Data on Arab-Americans*, N.Y. TIMES,

of that information are unknown, the disclosure of “confidential”¹¹² information in 2004 demonstrates that the World War II misuse of census data to implement internment camps was not an isolated incident.¹¹³ The ACS will now provide more incentive for misuse because the data is updated annually and admittedly gives the government “more current, detailed information than has ever been available before.”¹¹⁴ The court’s characterization of the misuse as an “inchoate concern” is no longer applicable given this 2004 incident. Therefore, if a plaintiff, such as an Arab-American, brought a new suit, a challenge using First Amendment grounds might hold water, given the available information on the 2004 potential misuse of census data.

2. The Fourth Amendment Protection Against Unreasonable and Illegal Search

The plaintiffs contended in *Morales* that the long form, specifically with its “numerous and intrusive” mandatory questions, “constitute[s] an unreasonable and illegal search under the Fourth Amendment.”¹¹⁵ The contention rests upon the assertion that the government should not compel those who receive the long form to answer questions because recipients of the long form maintain a reasonable expectation of privacy on those subjects inquired into on the form, which include “medical history and [physical disabilities],” “ancestry and [ethnicity],” “income,” “work habits,” commuting time, and residence information—bedrooms, plumbing, whether the residence is rented or owned and if rented, whether the person pays cash for the rent.¹¹⁶

The government argued in its defense that even the first census in 1790 supports the constitutionality of census questions that do not directly relate to apportionment.¹¹⁷

July 30, 2004, at A14 (reporting that Homeland Security used census data to locate Arab-Americans).

¹¹² U.S. CENSUS BUREAU, *supra* note 64, at 3 (defending the ACS by asserting that “data are confidential under Title 13 . . . , [this law] specifies that the Census Bureau can use the information provided by individuals for statistical purposes only and cannot publish or release information that would identify any individual”).

¹¹³ The district court in *Morales* agreed that the World War II example is likely not a one-time occurrence in U.S. history.

The horrors of the twentieth century do not allow one comfortably to accept the notion that the Japanese-American experience during the Second World War was an isolated incident in the history of the United States. We all can envision other ethnic groups who could be treated in a similar fashion, given the ‘proper’ emergency.

Morales, 116 F. Supp. 2d. at 811 n.5.

¹¹⁴ U.S. Census Bureau, About the ACS, *supra* note 33. Even the district court in *Morales* acknowledged that “in the era of the World Wide Web, with computer ‘glitches’ and human error that can instantaneously disseminate private information literally all over the world, the citizen can have a justifiable wariness about the secrecy of the information he gives.” *Morales*, 116 F. Supp. 2d at 811 n.5.

¹¹⁵ *Morales*, 116 F. Supp. 2d at 817.

¹¹⁶ *Id.*

¹¹⁷ *Id.* at 818.

The district court found it significant that the First Congress administered the first census and also helped craft the questions and content in the 1790 questionnaire. Because the first census asked questions of age, gender, and race, the court concluded that additional questions on the modern census are not “regarded as an unlawful search.”¹¹⁸ The district court then proceeded to note the historical underpinnings of the questions pertaining to medical history.¹¹⁹ Holding that Census 2000 did not violate the Fourth Amendment, the district court’s reasoning also focused on the methods used to collect Census 2000 data, which consisted of a mailing as opposed to an intrusion of the home, as well as the Census Bureau’s strict confidentiality policy.¹²⁰

Although the district court in *Morales* justified the long form questions because the first census asked more questions than just those subjects requisite for counting or apportionment purposes, the court missed a significant piece of history in forming its conclusion. It is important to note that the First Congress rejected an “elaborate census” proposal by James Madison.¹²¹ The First Congress ultimately chose a “more modest scheme” that focused on a “simple count of the free and slave population required by the Constitution” and excluded Madison’s questions that sought to classify “the population by age and sex and a census of occupations.”¹²² The First Congress included the minimal race, sex and age questions on the first census¹²³ “to achieve the object of an ‘actual enumeration’ of persons for the purpose of implementing the apportionment formula contained in Article I, Section 2, Clause 3.”¹²⁴

While the more elaborate scheme rejected by Congress does not necessarily mean that the ACS is an unconstitutional violation of the Fourth Amendment, it demonstrates that Congress sought to limit the information gathered by the decennial census. The First Congress’s limitations on data collected in the 1790 census means that the modern Congress’s conception of the census arguably needs boundaries in its application. The annual ACS, in seeking the same information as the long form,

¹¹⁸ *Id.* “The first census asked if a household had white males or females, whether the white males were 16 years old or older, and whether ‘other free persons’ lived in the household.” *Id.* at 818 n.10.

¹¹⁹ *Id.* at 819.

¹²⁰ *Id.*

¹²¹ ANDERSON & FIENBERG, *supra* note 35, at 17; *see also* Petition for Writ of Certiorari, *supra* note 48, at 19–20.

¹²² ANDERSON & FIENBERG, *supra* note 35, at 17–18.

¹²³ U.S. Census Bureau, History: Index of Questions—1790, http://www.census.gov/history/www/through_the_decades/index_of_questions/1790_1.html (last visited Jan. 25, 2010) (stating that in 1790, the first census asked “the name of each head of household,” as well as: 1) “The number of free White males,” 2) “Number of free White females,” 3) “Number of other free persons,” and 4) “Number of slaves”).

¹²⁴ Petition for Writ of Certiorari, *supra* note 48, at 17–18 (discussing how the Three-Fifths Clause, which was later amended, was the reason for asking a race question because the apportionment formula required a counting of both non-whites and whites for purposes of counting “whole” persons).

is “decoupled” from the constitutionally mandated decennial census and is a mandatory annual survey without the constitutional purpose of counting for apportionment.

B. Census Clause Challenges to the ACS

Assuming that Title 13 authorizes Congress to conduct an annual survey as part of the census, the issue is whether the language of Article I, Section 2, Clause 3 (amended by Section 2 of the Fourteenth Amendment) grants Congress the authority to conduct an annual census for purposes other than apportionment. Although in *Department of Commerce v. United States House of Representatives* the Supreme Court acknowledged that Title 13, the authorizing legislation for the census, permits the statistical “gathering [of] supplemental, nonapportionment census information regarding population, unemployment, housing, and other matters,”¹²⁵ the Court did not address “the constitutionality of including in the decennial census form questions ad-ducing information for a non-apportionment purpose.”¹²⁶ These “non-apportionment” questions are precisely what the annual ACS asks. Further, the Court did not expound on the constitutionality of an annual census, like the ACS, aimed at gathering information solely for purposes other than apportionment.¹²⁷

1. The Need for a “Vigilant” Court to Check Congress’s Expansive View of the Census Clause

The original purpose of Article I, Section 2, Clause 3 is “the apportionment of the nation’s population, state-by-state, for the dual purposes of ascertaining the number of each state’s representatives in the House of Representatives and the proportion of direct taxes to be paid by the people of each state.”¹²⁸ Thus, Congress used direct tax as a “fulcrum to counterbalance the ‘principle of representation’” so that the states did not inflate census numbers in an attempt to gain more representation in Congress.¹²⁹ If a state had attempted to exaggerate census numbers, it would have faced high direct tax consequences.¹³⁰

¹²⁵ 525 U.S. 316, 337 (1999) (rejecting sampling techniques and requiring actual enumeration for the purposes of counting people for the census).

¹²⁶ Petition for Writ of Certiorari, *supra* note 48, at 3; *see Dep’t of Commerce*, 525 U.S. 316.

¹²⁷ Petition for Writ of Certiorari, *supra* note 48, at 3.

¹²⁸ *Id.* at 8–9, 9 n.3; *see also id.* at 9 (citing THE FEDERALIST NO. 54 (James Madison) (G. Carey & J. McClellan, eds., 2001) (expounding on the “two-fold purpose” of apportionment)).

¹²⁹ *Id.* at 10 (quoting 1 J. STORY, COMMENTARIES ON THE CONSTITUTION § 642 n.2 (5th ed. 1891)).

¹³⁰ U.S. GEN. ACCOUNTING OFFICE, *supra* note 7, at 12 (“The census, according to Article I, section 2, of the Constitution, was also to be used to apportion any direct taxes levied by the federal government. The founding fathers purposefully linked the two. Their thinking was that any incentive for a state to boost population in order to gain additional representation would be offset by the disincentive of raising its tax burden. Direct taxation, however, was enacted

In 1913, the Sixteenth Amendment provided for a federal income tax without reliance on apportionment and ended the “disincentive of an increase in federal taxes to curb the natural incentive to over-inflate a state’s population in an effort to enhance the number of its representatives in the House.”¹³¹ This amendment, however, did not unhinge the responsibility charged by the Census Clause to ensure an accurate enumeration for purposes of apportionment.¹³²

This addition to the Constitution in 1913 means that the “Court should be even more vigilant to ensure that Congress does not manipulate the decennial census.”¹³³ *Department of Commerce v. United States House of Representatives* is an example of the Court checking Congress’s expansive interpretation of the Census Clause.¹³⁴ Justice Scalia noted in a separate opinion, that “Congress should not be permitted to depart from the requirement of an ‘actual Enumeration’ of the American people ‘under the guise of regulating the ‘Manner’ by which the census is taken.’”¹³⁵

2. Interpreting the Language of the Census Clause: Defining “In Such Manner as They Shall by Law Direct.”¹³⁶

In *Morales v. Daley*, the government argued that the Constitution grants Congress the power to gather data unrelated to apportionment because the Census Clause authorizes Congress to carry out the census “in such Manner as they shall by Law direct.”¹³⁷ This argument, however, wrongly assumes that those eight words permit Congress to change the decennial census’s “constitutionally-defined purpose” of apportionment.¹³⁸ This change in purpose is what Congress is doing by adding a yearly ACS aimed at

only twice—once in 1798 to try to diversify the federal government’s reliance on tariffs and customs duties and once to finance the War of 1812. Both taxes were based on the value of land, houses, and slaves, and both were difficult to assess and collect. While this authority has never been repealed, direct taxation based on a decennial census never became practical.”); *see also* Petition for Writ of Certiorari, *supra* note 48, at 10 (stating that in the 1895 case *Pollock v. Farmer’s Loan and Trust Co.*, 157 U.S. 429 (1895), the Supreme Court “expressly reaffirmed Madison’s view that the constitutional wedding of representation in the House to direct taxation ‘would produce impartiality in enumeration’”).

¹³¹ Petition for Writ of Certiorari, *supra* note 48, at 10; *see also* U.S. CONST. amend. XVI.

¹³² Petition for Writ of Certiorari, *supra* note 48, at 11.

¹³³ *Id.* (emphasis omitted).

¹³⁴ *Id.*; *see also* Dep’t of Commerce v. U.S. House of Representatives, 525 U.S. 316, 343 (1999) (rejecting sampling techniques and requiring actual enumeration for the purposes of counting people for the census).

¹³⁵ Petition for Writ of Certiorari, *supra* note 48, at 11 (citing *Dep’t of Commerce*, 525 U.S. at 348).

¹³⁶ U.S. CONST. art. I, § 2, cl. 3.

¹³⁷ *Id.*; *Morales v. Daley*, 116 F. Supp. 2d 801, 810 (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); *see also* Petition for Writ of Certiorari, *supra* note 48, at 4.

¹³⁸ Petition for Writ of Certiorari, *supra* note 48, at 15.

supplying the government with information for federal funding.¹³⁹ “[D]ictionaries roughly contemporaneous with the ratification of the Constitution demonstrate that ‘manner’ means ‘form’ or ‘method,’ not object or purpose.”¹⁴⁰ Thus, the plain language of the Census Clause, as amended by the Fourteenth Amendment, authorizes Congress to select the “manner” or “form” of administering the census, but does not grant Congress the power to change the purpose of the census by mandating the ACS, which is an annual census explicitly created for providing federal funding data rather than for apportionment purposes.

Further, the First Congress rejected an expansive questionnaire, similar to the information collected by the ACS, which would have provided data for legislating in the First Census Act.¹⁴¹ James Madison described the proposal to “‘extend[] the census so as to embrace some other objects besides the bare enumeration of the inhabitants,’” which gave the House “‘an opportunity of obtaining the most useful information for those who should hereafter be called upon to legislate for their country.’”¹⁴² Congress implemented the first census in accordance with the purpose of actual enumeration and specifically declined Madison’s proposal to add more questions aimed at providing data for future legislation.¹⁴³ In light of the rejection of Madison’s proposal, the Census Clause authorizes a decennial census to count the population; the clause does not authorize a yearly survey that permits the government to create a massive body of statistical data on the populace. The First Congress embraced this view by administering a census that included questions for apportionment rather than for the purpose of legislating.¹⁴⁴

3. The ACS is Not Constitutionally Justified by the Necessary and Proper Clause

Much like the Supreme Court’s Commerce Clause jurisprudence does not permit an expansive interpretation simply because the Necessary and Proper Clause is invoked, the ACS is not justified by the assertion that the Necessary and Proper Clause authorizes Congress to carry out annual surveys for non-apportionment purposes.

If Congress cannot mutate its Commerce power into a general police power for a purpose not permitted under the Constitution, then Congress should not be permitted to convert its census power

¹³⁹ U.S. CENSUS BUREAU, *supra* note 64, at 1 (describing how the ACS “provide[s] critical economic, social, demographic, and housing information” to assist with planning for federal legislation).

¹⁴⁰ Petition for Writ of Certiorari, *supra* note 48, at 16 (alteration in original) (citation omitted).

¹⁴¹ *Id.* at 19.

¹⁴² *Id.* (citing 2 P. KURLAND & R. LERNER, *THE FOUNDERS’ CONSTITUTION* 139–40 (1987) (recording Madison’s observations)).

¹⁴³ *Id.*

¹⁴⁴ *Id.*

into a general power to require the American people to answer any question that the Census Bureau chooses to ask every 10 years.¹⁴⁵

The additional questions on the census long form, which the ACS now asks, were justified by the district court in *Morales* as necessary “to enable Congress to exercise its delegated powers to govern . . . [the nation’s] population intelligently.”¹⁴⁶ The lower court, relying on *McCulloch v. Maryland*,¹⁴⁷ adopted the conclusion that the Constitution authorizes the long form when considering the Necessary and Proper Clause in conjunction with the Census Clause.¹⁴⁸

In the seminal case *McCulloch*, Chief Justice Marshall reasoned that the Necessary and Proper Clause gave Congress “‘discretion, with respect to the means by which the powers it confers are to be carried into execution,’ [and] not discretion with respect to the objects or purposes of those enumerated powers.”¹⁴⁹ Moreover, in *Gibbons v. Ogden*,¹⁵⁰ after determining that interstate commerce was within the purview of the Commerce Clause, which permits regulation by Congress so long as it pertains to “commerce . . . among the several states,” the Court asked, “whether the licensing statute [at issue] fit within the constitutionally stated *object [or purpose]* of that enumerated power.”¹⁵¹

More recent Commerce Clause cases reject the idea that Congress wields a general federal police power to implement legislation and can rely on the Necessary and Proper Clause, even when the power at issue is specifically addressed by the Constitution. Regarding the commerce power, according to the Court, Congress had no authority in either *United States v. Lopez*¹⁵² or *United States v. Morrison*¹⁵³ to enact the Gun-Free School Zones Act of 1990¹⁵⁴ or the Violence Against Women Act, respectively.¹⁵⁵ Without relying on the Necessary and Proper Clause to extend Congress’s power under the Commerce Clause, the Court’s reasoning in both cases focused on the tenuous relationship between commerce and violence: in schools for *Lopez*¹⁵⁶ and against women in *Morrison*.¹⁵⁷ Essentially, the Court struck down the laws under

¹⁴⁵ Press Release, William J. Olson, P.C., Census 2000 Fight Continues, <http://www.lawandfreedom.com/site/constitutional/cenintro.pdf> (last visited Feb. 13, 2010).

¹⁴⁶ *Morales v. Daley*, 116 F. Supp. 2d 801, 809–10 (S.D. Tex. 2000).

¹⁴⁷ 17 U.S. (4 Wheat.) 316 (1819).

¹⁴⁸ *Morales*, 116 F. Supp. 2d at 809–10; Petition for Writ of Certiorari, *supra* note 48, at 23.

¹⁴⁹ Petition for Writ of Certiorari, *supra* note 48, at 24 (citing *McCulloch*, 17 U.S. (4 Wheat.) at 421) (emphasis omitted).

¹⁵⁰ 22 U.S. (9 Wheat.) 1 (1824).

¹⁵¹ Petition for Writ of Certiorari, *supra* note 48, at 24–25 (citing *Gibbons*, 22 U.S. (9 Wheat.) at 212–17).

¹⁵² 514 U.S. 549 (1995).

¹⁵³ 529 U.S. 598 (2000).

¹⁵⁴ *See Lopez*, 514 U.S. at 561.

¹⁵⁵ *See Morrison*, 529 U.S. at 618.

¹⁵⁶ *See Lopez*, 514 U.S. at 561–62.

¹⁵⁷ *See Morrison*, 529 U.S. at 618.

the Commerce Clause because the laws were not directed at regulating commerce, which was the purpose of the power granted to Congress under the Commerce Clause, and the laws failed to comport with the jurisprudence that has interpreted the clause since 1783.¹⁵⁸

Borrowing from the reasoning of *McCulloch* and *Gibbons*, the pertinent issue here is whether asking arguably invasive and extraneous questions on the ACS, which yields annual data for federal funding that is not for apportionment needs, comports with the stated purpose of the Census Clause. In short, does the ACS statute “fit within the constitutionally stated *object [or purpose]* of” the Census Clause?¹⁵⁹ Even the First Congress recognized that the Census Clause was only for apportionment purposes, rather than a constitutional authorization for the government to collect legislative and administrative statistical data.¹⁶⁰ Just as the Court in *Lopez* rejected the argument that violence in schools pertains to commerce, an annual survey that asks questions concerning the availability of indoor plumbing does not sufficiently relate to the purpose of apportionment, which is the only explicit act authorized by the Census Clause. Giving Congress the power under the Census Clause to administer an annual survey is akin to granting them a general police power.¹⁶¹ As the late Chief Justice Rehnquist wrote in *Morrison*, “[u]nder our written Constitution . . . the limitation of congressional authority is not solely a matter of legislative grace.”¹⁶² The connection between statistical data for federal funding purposes and actual enumeration for apportionment is too tenuous to authorize an annual census aimed not at counting for representation, but rather at accumulating data specifically rejected by the First Congress in Madison’s proposal for the first census in 1790.¹⁶³

C. Normative Concerns Regarding the ACS

As discussed in Part I, the Census 2000 long form raised a great deal of privacy concerns.¹⁶⁴ Because “[l]ong form questions are not less . . . intrusive because they

¹⁵⁸ See *Lopez*, 514 U.S. 549; *Morrison*, 529 U.S. 598; see also U.S. CONST. art. I, § 8.

¹⁵⁹ Petition for Writ of Certiorari, *supra* note 48, at 25.

¹⁶⁰ ANDERSON & FIENBERG, *supra* note 35, at 17–18 (“[T]he history of successful census taking turns on . . . the willingness of Americans to see the census as a legitimate and essential part of the federal governmental machinery. The same men who wrote the Constitution discovered as much when they found themselves as legislators and officials in the new federal government. One of their first tasks was to write a bill to take the 1790 census. James Madison proposed a rather elaborate census, which included questions classifying the population by age and sex and a census of occupations, instead of the simple count of the free and slave population required by the Constitution. Congress rejected Madison’s proposal and settled on a more modest scheme.”).

¹⁶¹ See generally Olson, *supra* note 145, at 2.

¹⁶² *Morrison*, 529 U.S. at 616.

¹⁶³ See *supra* note 139.

¹⁶⁴ See *supra* notes 44–47 and accompanying text.

are asked in the ACS rather than the decennial environment,¹⁶⁵ the same privacy arguments raised against the long form apply to the ACS. Privacy, “a shield that protects the sword of liberty,” is “arguably ‘the most comprehensive of rights and the right most valued by civilized men,’ and an ‘aspect of individual liberty’ that implicates ‘self-possession, autonomy, and integrity.’”¹⁶⁶ In addition to the constitutional inquiry necessarily involved when asking penetrating, intrusive questions of United States residents in an annual mandatory ACS, a normative question inevitably arises: Should the government collect the data? “[E]very time the Census Bureau requests . . . census or a demographic survey, it is involved in a complicated interaction regarding privacy concerns and confidentiality beliefs,”¹⁶⁷ and the “inevitable conflict between an individual’s right to privacy and the government’s need for information.”¹⁶⁸ Given the government’s “data-mining” in the last one hundred years,¹⁶⁹ the persistent privacy concerns with the ACS, as well as the potential for misuse of ACS data, the United States government should not assemble this wealth of information on its residents using the ACS.

1. The Government’s Increasing Need for Statistical Data

“The United States government has long sought data about individuals,” however, the collection process was too “time-consuming and expensive and resulted in data that [was] difficult to use because of the form in which [it was] captured.”¹⁷⁰ But the technological advances and changes to the law in the twenty-first century “have combined to erode the protection for personal privacy previously afforded by practical obscurity.”¹⁷¹ The government’s need for increasingly more statistical information clashed with the public’s “fear of secondary uses, grounded in an abiding mistrust of governmental purpose” and resulted in a “long-standing obstacle to willing participation and disclosure.”¹⁷² The ACS is an example of this ever expanding government data mining, which has sought to “expand the authority of the government to collect personal data through mandatory disclosure, seizure, independent creation,

¹⁶⁵ *ACS Hearing to Replace Long Form*, *supra* note 58, at 31 (statement of Kenneth Prewitt, Director, Bureau of the Census).

¹⁶⁶ Walker, *supra* note 2, at 1 (internal citations omitted).

¹⁶⁷ THOMAS S. MAYER, STATISTICAL RESEARCH DIV., U.S. BUREAU OF THE CENSUS, PRIVACY AND CONFIDENTIALITY RESEARCH AND THE U.S. CENSUS BUREAU: RECOMMENDATIONS BASED ON A REVIEW OF THE LITERATURE 3 (2002), available at <http://www.census.gov/srd/papers/pdf/rsm2002-01.pdf>.

¹⁶⁸ *Id.* at 4.

¹⁶⁹ See generally Fred H. Cate, *Government Data Mining: The Need for a Legal Framework*, 43 HARV. C.R.-C.L. L. REV. 435 (2008).

¹⁷⁰ *Id.* at 435.

¹⁷¹ *Id.*

¹⁷² Sylvester & Lohr, *supra* note 25, at 155.

and purchase.”¹⁷³ In fact, the same arguments that press the government to gain more information as technology progresses provided the impetus and goals for the ACS.¹⁷⁴

2. Persistent Privacy Concerns with the Census

The ACS and the long form are not the first times the census has encountered privacy concerns. Initially, instead of addressing the census privacy concerns, the United States “focused their efforts on coercing compliance” by imposing “substantial penalties . . . on individuals for failing to comply with census takers” and did not adopt laws “employed to ensure that data would be kept confidential or otherwise used appropriately by the census takers or the government.”¹⁷⁵

In addition to the “coercive fines,” the first five censuses used “community policing” by posting the results in “‘two of the most public places’ within each enumeration district,” which allowed everyone to see who submitted inaccurate or false information and exposed those who just chose not to participate.¹⁷⁶ Privacy concerns about the census continued to grow in the 1800s, particularly as a result of “abuses of census data by various officials suspected of exposing survey results for personal gain, curiosity, or respondent embarrassment,” and “Congress’ insistence that the subject matter of the census increase beyond mere head-counting.”¹⁷⁷

3. Potential for Misuse

To protect census data, the Census Bureau works diligently to ensure confidentiality by requiring the utmost standard of care from enumerators.¹⁷⁸ The potential for

¹⁷³ Cate, *supra* note 169, at 436.

¹⁷⁴ U.S. CENSUS BUREAU, *supra* note 37 (The Census Bureau created the ACS in order to “provide[] more current, detailed information than has ever been available before.”); Cate, *supra* note 169, at 436 (“The government faces new and intense pressure to collect and use personal data. Much of that pressure reflects the conviction that greater reliance on digital data will reduce costs and enhance convenience, speed, efficiency, and accountability. Perhaps the greatest source of that pressure, however, is the fear of terrorist attacks and the widely shared view, as the National Commission on Terrorist Attacks Upon the United States (commonly referred to as the 9-11 Commission) Vice Chairman Lee Hamilton testified before Congress in November 2005, that the inability of federal agencies to marshal and share information about suspected terrorists and their activities ‘was the single greatest failure of our government in the lead-up to the 9/11 attacks.’”).

¹⁷⁵ Sylvester & Lohr, *supra* note 25, at 155.

¹⁷⁶ *Id.* at 155–56.

¹⁷⁷ *Id.* at 156–57.

¹⁷⁸ *ACS Hearing to Replace Long Form*, *supra* note 58, at 31 (statement of Kenneth Prewitt, Director, Bureau of the Census) (“I believe it is hard to sustain the argument that government data collection is an invasion of privacy when there are such strong protections of the data, when they are used only for statistical purposes, not for regulation or law enforcement, and

misuse, however, continues to undermine confidence in a government mandated data collection survey that is somehow justified by the Census Clause, which was included in the Constitution for apportionment purposes. Although Congress passed legislation that overturned the Supreme Court's ruling in *St. Regis Paper Co. v. United States*, which held that courts could subpoena business-retained copies of census forms,¹⁷⁹ it is potentially possible for parties in court to use any personally retained copies of the ACS against the respondents. Since the ACS is not part of the decennial census, the question remains as to whether it will receive the same protections afforded to the census in terms of the parties' ability to subpoena an individual's responses to the ACS.¹⁸⁰ Moreover, history is riddled with numerous examples of privacy and confidentiality abuses, and "privacy advocates often dwell on the catastrophic nightmare scenarios facilitated by unlimited exchange of personal information, from Hitler's misuse of the European Census to Sherman's use of census data to facilitate his March through Georgia."¹⁸¹ Hitler used German census data to formulate lists of Jewish names and addresses with the help of IBM Germany, which developed a census tabulating machine that "not just . . . count[ed] the Jews—but *identiffied*] them."¹⁸² As horrifying as Hitler's plan may sound, even the United States government is not immune from such misuse. The government's use of census data during World War II to facilitate Japanese internment camps as well as the Department of Homeland Security's use of census data to locate Arab populations in 2004 are just two examples of the United States government demanding that the Census Bureau turn over data and yield to the interest of national security.¹⁸³

The following sections examine the potential for misuse of ACS data in light of (a) the *St. Regis* case, (b) the congressional ban on the use of questions regarding religion, (c) the World War II internment camps, and (d) the use of census data to locate Arab-Americans in 2004.

a. The St. Regis Case: Can a Court Subpoena ACS Responses for Court Proceedings?

The Census Bureau provides a second copy of the census form to business respondents who can then keep a filled-out copy of the submission.¹⁸⁴ In *St. Regis Paper Co. v. United States*, the Supreme Court held that "these company-retained copies of census reports could be subpoenaed and used against the reporting com-

when each questionnaire item is linked to a program that the people's representatives have enacted."); MAYER, *supra* note 167, at 4 ("Census data are protected by law (e.g., Title 13 United States Code) as manifested in a variety of disclosure limitation techniques.").

¹⁷⁹ 368 U.S. 208 (1961).

¹⁸⁰ See *infra* text accompanying note 186.

¹⁸¹ Walker, *supra* note 2, at 27.

¹⁸² BLACK, *supra* note 1, at 10; see also *id.* at 52–74.

¹⁸³ See *infra* Parts III.C.3.c & d.

¹⁸⁴ MAYER, *supra* note 167, at 23.

pany in legal proceedings,” which meant that the *St. Regis Paper Company* had to turn over purportedly confidential and purely statistical census forms to the Federal Trade Commission.¹⁸⁵ Although by the fall of 1962 Congress “amended section 9 of title 13 to extend the confidentiality protection to cover company-retained copies of census reports,” the question now is will Congress offer the same protections to the ACS or are submissions to the ACS guided by the standard enunciated in *St. Regis*?¹⁸⁶ While the ACS is authorized by Title 13 and is currently only sent to households, instead of businesses as in *St. Regis*, it is not part of the decennial census, which means it is potentially outside of the protections offered to the census and could lead to a party using a respondent’s own submissions against them in court.

b. Census Religion Questions

When the proposal to include a question on the census regarding religion arose in 1960, “a number of Jewish and liberal organizations . . . made emotional comparisons to the question and the circumstances associated with Nazi Germany.”¹⁸⁷ In an effort to “maintain good public relations, and the decision that the need for these particular data did not merit the possible antagonism of the respondents,”¹⁸⁸ Congress dropped the question and amended Title 13 to forbid a question of that nature in the future.¹⁸⁹ But religion is arguably not any different from data collection about race, which has an equal if not greater potential for misuse by the government, especially in light of how the United States used census data pertaining to race in the past.

c. World War II Internment Camps

First Lady Eleanor Roosevelt recognized the enormous capacity of the census in the 1940s when she asserted in a radio address that the census was ““the greatest assemblage of facts ever collected by any people about the things that affect their welfare.””¹⁹⁰ Within two days of the attack on Pearl Harbor and before the United States declared war, the Census Bureau began locating Japanese Americans with the same IBM tabulating machines that Hitler was simultaneously using in Germany.¹⁹¹ The Census Director at the time stated that although “[w]e’re by law required to keep confidential information by individuals, . . . [i]f the defense authorities found 200 Japs missing and they wanted the names of the Japs in that area, I would give them further means of checking individuals.”¹⁹²

¹⁸⁵ *Id.*; see also *St. Regis Paper Co. v. United States*, 368 U.S. 208 (1961).

¹⁸⁶ *MAYER, supra* note 167, at 23.

¹⁸⁷ *Id.* at 24.

¹⁸⁸ *Id.*

¹⁸⁹ See 13 U.S.C. § 9(a) (2006).

¹⁹⁰ *BLACK, supra* note 1, at 345 (quoting First Lady Eleanor Roosevelt).

¹⁹¹ *Id.*

¹⁹² *Id.* at 346.

Ultimately, the government used census data to locate 112,000 Japanese Americans in order to facilitate their relocation to internment camps during World War II.¹⁹³ Even the Director of the Census Bureau in 2000 admitted “the historical record is clear that senior Census Bureau staff proactively cooperated with the internment, and that census tabulations were directly implicated in the denial of civil rights to citizens of the United States [sic] who happened to also be of Japanese ancestry.”¹⁹⁴ The district court in *Morales* recognized the legitimate concerns of citizens regarding the extent of the information that the government now requires via the census, and hypothesized that the World War II example was not an “isolated incident.”¹⁹⁵

d. Arab-Americans in 2004

Given the government’s broad conception of what is proper in the name of national security, it is not surprising that the Department of Homeland Security turned to the Census Bureau again in 2004.¹⁹⁶ In July of 2004, the New York Times reported that the Census Bureau “provided specially tabulated population statistics on Arab-Americans to the Department of Homeland Security, including detailed information on how many people of Arab backgrounds live in certain ZIP codes.”¹⁹⁷ According to the Deputy Director of the Census Bureau, the information given to Homeland Security was standard operating procedure.¹⁹⁸ He also admitted concern about how Homeland Security would use the data, but stated that the Census Bureau did not maintain the “authority to determine which organization gets which information.”¹⁹⁹ The solution to the issues surrounding the release of information to some government departments to fulfill federal funding guidelines versus the provision of data that might be misused (as in the case of the Arab-Americans) is rather simple, argues the deputy director: “The only way we can guarantee that no one will ever be harmed by our information is to release nothing We understand that groups can be

¹⁹³ Froomkin, *supra* note 3, at 732–33.

¹⁹⁴ MAYER, *supra* note 167, at 24 (citation omitted).

¹⁹⁵ *Morales v. Daley*, 116 F. Supp. 2d 801, 811 n.5 (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).

¹⁹⁶ Froomkin, *supra* note 3, at 731–33 (discussing how “public servants have shown a tendency to adopt a ‘vacuum cleaner[.]’ approach to private information” when national security is at risk: “[T]he Senate committee charged with investigating domestic surveillance noted ‘the tendency of intelligence activities to expand beyond their initial scope’ and stated that government officials ‘have violated or ignored the law over long periods of time and have advocated and defended their right to break the law.’”).

¹⁹⁷ Clemetson, *supra* note 111, at 14; *see also* Timothy M. Weber, *Values in a National Information Infrastructure: A Case Study of the U.S. Census PORTIA PROJECT* (2004), <http://crypto.stanford.edu/portia/papers/weber.pdf> (last visited Jan. 24, 2010) (“[F]rom ‘day one’ the census has been an institution which has pushed the limits of its Constitutionally enumerated powers.”).

¹⁹⁸ Clemetson, *supra* note 111, at A14.

¹⁹⁹ *Id.*

affected by what we give out, and we understand that can be sensitive. But that is a societal debate, not a census debate.”²⁰⁰ Thus, if Congress stops hinging federal funding on data from the Census Bureau, then there is no legislative need for the Census Bureau to release data to government entities. This undercuts the need for any questions on the census outside of those that directly pertain to apportionment.

IV. A PROPOSAL TO REMEDY THE CONSTITUTIONAL AND NORMATIVE ISSUES WITH THE AMERICAN COMMUNITY SURVEY

The Census Clause does not constitutionally justify the ACS. Further, as a matter of public policy and as a normative concern, the overriding privacy issues as well as the potential for misuse of the data demonstrate that the government should not amass this much information on its citizens. Congress needs to eliminate the ACS.²⁰¹

Alternatively, if Congress argues that the data is critical for legislating in a modern world, then Congress needs to justify it under some other clause in the Constitution or delegate to the individual agencies the power to collect statistical data. Because the ACS is no longer part of the decennial census, Congress should not administer it like a census by directing the Census Bureau to conduct annual surveys in order to produce data for legislative purposes. Instead, Congress needs to direct each agency that requires data to formulate questions and survey the relevant population group in order to administer the program at issue. For example, if the Department of Transportation (DOT) needs information regarding commuter times to effectively plan for future development, then Congress should charge the DOT with developing questions and targeting the specific areas where information is needed. Not only is this solution cost-effective, but it also addresses the constitutional concern with justifying the ACS under the Census Clause, as well as tackles the overwhelming privacy issues necessarily involved with housing the data from the ACS in one government agency.

A. Cost and Efficiency Arguments for Potential Solutions

In addition to the \$11 billion undertaking of conducting a decennial census, the Census Bureau projects that the ACS costs roughly \$150 million on an annual basis, which amounts to \$1.5 billion over a period of ten years.²⁰² Forcing each agency to

²⁰⁰ *Id.*; see also *ACS Hearing to Replace Long Form*, *supra* note 58, at 31 (statement of Kenneth Prewitt, Director, Bureau of the Census) (“I take note that some Members of Congress believe that long-form-type questions should not be asked, period. That is an issue for Congress to resolve. It is not for the Census Bureau to decide what kind of society we should be or even whether we should have timely and relevant data to make that vision possible.”).

²⁰¹ The district court in *Morales* stated that a congressional solution to the privacy concerns is more appropriate than court intervention. “[A] solution to this problem is one properly addressed by Congress, not by a court dealing with a purely hypothetical situation.” *Morales v. Daley*, 116 F. Supp. 2d 801, 811 n.5 (S.D. Tex. 2000).

²⁰² See *supra* note 67 and accompanying text.

determine the questions and fund its own survey eliminates the need to allocate those ACS dollars to the Census Bureau, which is essentially acting as a middleman for collecting information in the current setup for the ACS. The Census Bureau may then refocus efforts on the constitutionally mandated task of counting the populace for apportionment. Also, presumably if each agency is charged with the task of formulating and paying for the questions, the process itself will become much more efficient. Agencies will only ask those questions that are necessary and maintain the flexibility to change the format or questions to address what is needed in any given year.

B. Constitutional Concerns Regarding Potential Solutions

By implementing an annual ACS and arguing that the Census Clause permits such an activity, the Census Bureau, which conducts itself in accordance with Title 13 of the U.S. Code, is acting beyond the scope of what is constitutionally authorized. In delegating to agencies the responsibility to survey the relevant population group, the constitutional justification for the questions falls within the purpose of these agencies. Using the previously mentioned example, if the DOT seeks survey data, then the survey is likely justified under Congress's plenary power to regulate commerce, which is the authority under which Congress created the Department of Transportation.

C. Privacy Issues Alleviated with the Proposal

Allowing each agency to conduct its own survey also addresses privacy concerns associated with the ACS, which currently permits one government agency to accumulate massive amounts of data, in that the data is splintered across multiple agencies. Although data spread out across myriad agencies might increase the risk of misuse or a privacy breach because the data is in the hands of more people, the counterargument is that each agency would maintain a database of very little information, which means that less harm is associated with misuse of the data in that limited agency-wide context.

Also, two critical components of the proposed solution are (1) the agencies could not demand mandatory participation as the ACS now requires,²⁰³ and (2) the respondents would submit responses anonymously. Past proposals to reform the census and the long form included efforts to eliminate the compulsion component of the extraneous questions because those extra questions do not pertain to apportionment. As one scholar noted: "It has been argued that compulsion should only be used to require name, date of birth, sex and usual place of residence, and that the remainder of the census questions should be asked by means of a voluntary, anonymous questionnaire."²⁰⁴ While the Census Bureau contends that participation rates would drop

²⁰³ U.S. CENSUS BUREAU, *supra* note 64, at 4 ("Congress's decision that citizen participation in the decennial census is so important that there is a mandatory duty to respond also applies to the American Community Survey.").

²⁰⁴ CENSUSES, SURVEYS AND PRIVACY 128 (Martin Bulmer ed., 1979).

without a mandatory compliance law, the government admittedly does not currently prosecute individuals who choose not to respond.²⁰⁵ Thus, because the government does not even enforce the mandatory compliance element, eliminating the compulsion laws associated with the survey would work to quell privacy advocates' concerns that the government is forcing disclosure of answers to sometimes invasive questions.²⁰⁶

CONCLUSION

This Note highlights the normative concerns with government data collection via the ACS and explains how the Census Clause of the Constitution does not authorize the current ACS. In an era of technological advances that make it possible for the government to collect more information about the country's population, it is important to pause and ask whether the use of a mass survey of society is a prudent idea as a matter of public policy. Further, if Congress decides that it needs the data in order to govern more effectively or efficiently, Congress also needs to consider less invasive, more secure alternatives that fall within the scope of what is constitutionally authorized.

The Obama administration recently signaled that the Director of the Census Bureau will report directly to President Obama, rather than to the Secretary of Commerce, who is the head of the department under which the Census Bureau is housed.²⁰⁷ Republican leaders criticize the move as politicizing the census,²⁰⁸ and as a "career professional" in the Census Bureau explained, "[t]here's only one reason to have that high level of White House involvement . . . [A]nd it's called politics."²⁰⁹ Regardless of the *purpose* of the President's direct involvement with how the census is conducted, this Note documents evidence supporting a concern with how the government, and specifically the President, will *use* the data now and in the future given the enormous amount of information that is collected, particularly with the use of the American Community Survey.

²⁰⁵ HILLYGUS, *supra* note 33, at 5.

²⁰⁶ *ACS Hearing to Replace Long Form*, *supra* note 58, at 15 (statement of Rep. Mac Collins of Georgia) (explaining that most constituent objections focused on "the long form, which they said took too long to complete and asked questions which were too personal. They wanted to know why the Census Bureau needed to know about their plumbing or about the size of their paychecks. Many of them were also worried about the fines for those who either lie or refuse to answer the questions on the form . . . [W]e have to ask ourselves if this additional information is absolutely necessary to fulfill the constitutional purpose of the census, which is to enumerate the population for the purpose of redistricting.").

²⁰⁷ See John Fund, Op-Ed., *Why Obama Wants Control of the Census*, WALL ST. J., Feb. 10, 2009, at A17.

²⁰⁸ See Press Release, Rep. John Boehner, Leader Boehner Questions White House Takeover of U.S. Census Bureau (Feb. 6, 2009), *available at* <http://republicanleader.house.gov/News>.

²⁰⁹ Fund, *supra* note 207.