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In Defense of the American Community Survey

Michael Lewyn

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VI. CONCLUSION

Trump did do "so much winning," 871 and some Americans got "sick and tired" 872 of it. However, many of his sound bites also bit him back at times. He may not have lost to China yet, but he's lost some court battles and some voters while still managing to accomplish some of his stated objectives.

Though many factors affect Trump's "wins," his superhero-storytelling techniques aided him "bigly." 873 However, aspects of those techniques as well as his ethically questionable techniques and gaffes also made him a "loser" 874 at times.

Those who persuade or campaign can learn much both from his ethical, successful techniques and from the cautionary tale of his failures. In the follow-up to this article, I will be further examining the superhero approach in Trump's narratives, using others' past campaigns to reveal how advocates for truth and equality can ethically combat discriminatory or unsound narratives with their own superhero approaches, and discussing how to respond to unethical muting of the counter-narrative.

The wheels of justice and politics may turn slowly, and legal battles are fought on a variety of fronts before a variety of audiences. However, a true and fair story told well may ultimately be faster than a speeding bullet, more powerful than a locomotive, and able to leap tall buildings in a single bound.

In Defense of The American Community Survey

Michael Lewyn

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

MICHAEL LEWYN

I. INTRODUCTION

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

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

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

4 See infra notes 31, 34 and accompanying text.
5 See infra notes 28-29 and accompanying text.
6 See infra notes 22, 35-36 and accompanying text.
II. Background

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

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

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

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

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

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

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

1 See U.S. Const., art. I, § 2.
2 See supra note 134 and accompanying text.
3 See U.S. Const., Article I, § 2.
4 See U.S. Const., Article I, § 2.
7 See U.S. Const., Article I, § 2.
8 See U.S. Const., Article I, § 2.
9 See U.S. Const., Article I, § 2.
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63 See U.S. Const., Article I, § 2.
64 See U.S. Const., Article I, § 2.
65 See U.S. Const., Article I, § 2.
67 See U.S. Const., Article I, § 2.
68 See U.S. Const., Article I, § 2.
saves taxpayers money by helping agencies distribute federal dollars properly, for example, by guiding funding for anti-poverty programs to areas with high poverty.31 The House voted to approve the amendment.32 However, the Senate did not enact, or even vote on, the amendment.33 Opposition to the amendment was led not only by liberal groups interested in the administration of anti-poverty programs, but also by business groups such as the U.S. Chamber of Commerce, which argued that the demographic information provided by the ACS helps businesses decide where to invest.34

In 2014 and 2015, Rep. Poe’s efforts to make ACS compliance voluntary was met with more success; in both years, he proposed amendments to appropriations bills, both of which were approved by voice vote on the House floor.35 However, the Senate has consistently ignored anti-ACS legislation. In addition to ignoring the 2012 anti-ACS amendment, it also failed to consider the 2014-15 proposals to make ACS participation voluntary.36 Senior Rand Paul has repeatedly introduced similar legislation; these bills have failed to reach the Senate floor.37

III. Why Better?

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

31 Id. at 125250 (revisions of Rep. Clay) (“State per capita ACS-guided funding is positively related to income inequality—high median pay, high poverty—Medicaid income limits, and the percent of the population that is rural. The higher any of these measures, the higher per capita funding limits to be. The ACS is absolutely vital. If you want to eliminate this, I’m sure you have certain reasons to do it, but it will take away an essential tool for us to be accountable with taxpayer dollars.”).
32 Id. at 125250.
33 See H. Amend 1070 to H.R. 3236, 112th Cong. (2012).
35 See 160 CONG. REC. H11908 (daily ed., May 29, 2014); 114 CONG. REC. 10730–32 (daily ed., June 2, 2018). For example, in 2014, Representative Poe offered a similar amendment to the House floor, which was not voted on by the full House, or even in a committee. See H.R. 1105, 115th Cong. (2017).
37 See supra note 23 and accompanying text.
39 Id. at 1.
40 See supra note 38, at 6.
41 See supra note 38, at 6.
42 See supra note 38, at 6.
43 See supra note 38, at 6.
otherwise be more likely to lose if districts were not so designed.\textsuperscript{45} For example, if voting is so racially polarized that minority group X will not be able to elect candidates of its choice without a district dominated by group X, state or local governments may need to create such a district in order to comply with the VRA.\textsuperscript{46} But, a state or local legislature cannot create such a district without knowing where group X’s voters live, which in turn requires Census data.\textsuperscript{47}

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

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

State and local governments use ACS data for their own purposes. For example, many state laws require state legislatures to consider “communities of interest” in redistricting; a term that can include a wide variety of groupings categorized by the ACS, including ethnic groups, persons of similar economic status, or users of similar infrastructure.\textsuperscript{51} Transportation planners use ACS data to discover where new services are needed—for example, where demand for public transit is likely to be high.\textsuperscript{52} In particular, demand for transit is likely to be highest where many workers do not own cars.\textsuperscript{53}

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

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

2. Business and the ACS

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

\textsuperscript{46} Id. at 1057 (“In some cases, based on turnout or other considerations, a district may have to comprise more than 50% minority voters to yield an effective opportunity district.”)
\textsuperscript{47} Id. at 1079-80 (Although decennial Census data also includes information about race, ACS data is more frequent and is thus “the best available means to identify substantial minority populations” between censuses).
\textsuperscript{49} Id. (signature added).
\textsuperscript{50} See Value, supra note 39, at 25 (EPA used ACS data to research “variations in reported housing values, rent, income, and household migration as it relates to data from other sources on . . . pollution concentration”).
\textsuperscript{52} See Monocluous Depend on the American Community Survey: Stories from Wisconsin 2017, MACS 2020, https://www.macs.wisconsin.edu/MACS-Support/Depend-on-ACS-census-data-JAC 2017_Series-303048.pdf (last visited April 14, 2018) [hereinafter Monocluous Chamber] (Planners use ACS data to determine “the mix of transit services, by analyzing neighborhood characteristics (for block groups) and predicting statistically what neighborhoods have the greatest potential ridership response to transit service offerings”).
\textsuperscript{53} See Value, supra note 39, at 27 (citations omitted).
\textsuperscript{55} Id. at 81-82.
appealing to younger consumers in its urban stores and merchandise appealing to older consumers in its suburban stores.\textsuperscript{39}

Other businesses use ACS data to find out where qualified workers are.\textsuperscript{40} For example, a business that seeks to hire engineers might wish to search in cities where engineers, or college graduates with engineering majors, are plentiful—data available through the ACS.\textsuperscript{41}

Chambers of commerce also use ACS data. In a letter endorsing ACS funding, over a dozen regional chambers of commerce and similar organizations argued that businesses need ACS data "to spur economic development, sustain and create jobs, revitalize communities, allocate resources, invest wisely, compete globally, provide value to customers, develop strategy, guide operations, and more."\textsuperscript{42} These chambers cited the following examples of business reliance on ACS: (1) the Greater Houston Partnership uses ACS data on labor force skills to attract new companies to Houston;\textsuperscript{43} (2) the Minneapolis Chamber of Commerce uses ACS data to develop a "Business Vitality Index" to compare Minneapolis with other markets.\textsuperscript{44} Similarly, the Nashville Area Chamber of Commerce uses ACS data as part of a similar "Vital Signs report";\textsuperscript{45} (3) the Tulsa Chamber of Commerce attracted a Macy's distribution center to Tulsa by using ACS data about the quality of the local labor force.\textsuperscript{46}

Chambers also benefit from the ACS, because ACS poverty data allows them to target resources to the areas of greatest need. For example, the Greater Twin Cities United Way used ACS data to learn that poverty in the Minneapolis suburbs was increasing, and responded by allocating more money to suburban anti-poverty programs.\textsuperscript{47}

\textsuperscript{39} U.S. Census Bureau, State in Action: Target Users ACS Data, YouTube (Feb. 13, 2012), https://www.youtube.com/watch?v=3weQzrV5Y.

\textsuperscript{40} See Rampell, supra note 57.


\textsuperscript{43} Id.\textsuperscript{44} Id. (Report presents "indicators to regional leaders . . . for the purposes of informing actionable policy solutions").

\textsuperscript{45} Id.\textsuperscript{46} See Minneapolis Chamber, supra note 52, at 9.

It could be argued that businesses should be responsible for collecting their own data, rather than relying on the federal government. However, the ACS is more useful than data collected by businesses, for a few reasons. First, government data is consistent over time, allowing users to become aware of long-term trends. By contrast, businesses might not be willing to continue collecting data as demand fluctuates.\textsuperscript{48} Second, the ACS is more reliable, because transparency requirements imposed by Congress require the agencies to provide documentation and correct errors.\textsuperscript{49}

3. Scholarship, Policy Analysis and the ACS

The ACS is also relevant to persons seeking to influence public policy. For example, Catholic Charities of Saint Paul and Minneapolis uses "ACS rental housing cost burden data to [explain] . . . the expansion of housing instability and homelessness among low-income households."\textsuperscript{50} Food banks use ACS data to direct food and services to the areas of highest need.\textsuperscript{51}

Use of ACS data is not limited to progressive and anti-poverty activists; for example, a recent report by the conservative Heritage Foundation used ACS data to show that immigrants tended to be less educated than native-born Americans, and argued that immigration law should be reformed to encourage immigration by more educated persons.\textsuperscript{52}

ACS data is also relevant to scholarship of all sorts: in 2014, there were 29,300 search results using the term "American Community Survey" in the "Google Scholar" database.\textsuperscript{53} The ACS is also relevant to legal scholarship; I myself used ACS data in a recent article on gentrification.\textsuperscript{54} I used ACS data to show that even expensive, gentrifying cities have become more racially diverse since the 1990s,\textsuperscript{55} and that one allegedly gentrifying zip code in New York City had
experienced increasing poverty rates and rent increases comparable to those of Manhattan as a whole.16

4. Now More Than Ever

It is possible that the 2020 Census will be significantly underfunded. Typically, Census Bureau spending is ramped up in the last years of a decade, so that the Bureau may prepare for the upcoming decennial Census. For example, Bureau funding increased by 79 percent from 2006 to 2008, and by 143 percent from 1996 to 1998.17 By contrast, the President’s most recent budget proposed only a 23 percent increase in Bureau funding over the 2016 level.18 Thus, it is quite possible that the Census may undercount Americans to a greater extent than usual, which means that the ACS will become even more important than in the past.

B. On the Other Hand . . .

As noted above, ACS critics argue that the survey’s questions violate respondents’ privacy.19 This impingement on privacy is quite minor, for three reasons. First, ACS data is confidential. Federal law provides that no Commerce Department employee may use information for any non-statistical purpose,20 make any publication that allows an individual to be identified,21 or permit any employee of another government agency, or any private individual, to examine individual Census forms.22 Such forms may not be used in any legal proceeding.23

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

video-streaming services exposing what you watch; internet browsing history indicating whether you have searched for symptoms of disease or investigated substance abuse treatment options; and travel records from airlines, hotels, rental car companies, or other third parties like Orbitz or Kayak.24

Given government’s ability to use such individualized information, politicians’ complaints about ACS questions seem a bit like searching for a gnat while swallowing a camel,25 that is, absurdly trivial.

Third, the ACS only affects a small proportion of American households, less than one out of every thirty.26 And because the ACS affects only a small proportion of American households, it is unlikely to affect civil liberties. In an article attacking the ACS, Carrie Pioker alleges that the government used Census data to facilitate Japanese internment camps during World War II, and to locate Arab populations in 2004.27 But, because the ACS compiles data on only a small minority of Americans, government cannot effectively use the ACS to track such ethnic minorities. At most, government will have a general idea of which neighborhoods are dominated by which groups, something it can often and easily obtain merely by reading a webpage or newspaper article.28

Some legislators argue that even if the ACS is a legitimate exercise of government power, answering the survey should be voluntary.29 However, the Census Bureau experimented with a

16 Emily Herman, When Database Queries Are Fourth Amendment Searches, 102 Mich. L. Rev. 577, 597 (2017) (noting that such information lacks Fourth Amendment protections because voluntarily revealed to third parties). I note, however, that none of these searches are subject to statutory limits. Id. at 598.
18 See supra note 24 and accompanying text (3 million households involved; FastFinder, supra note 1 (116 million households in the United States)).
19 See Pioker, supra note 1, at 1125–26.
21 See supra note 25 and accompanying text. A related proposal in Pioker’s proposal that individual agencies, rather than the Census Bureau, should conduct surveys. See Pioker, supra note 1, at 1125. But submitting Americans to dozens of surveys (one from every interested federal agency) seems to me to be far more invasive, and less efficient, than to conduct one longer survey per year. Pioker also suggests that Americans’ privacy would be less affected by such a system because data is “sifted through across many agencies.” Id. at 1126. But it is hard for me to imagine that the compilation of data makes the ACS any more oppressive than it already is: for example, if it is dangerous for any federal agency to know where Arab-Americans live, that danger is not significantly enhanced by the same agency knowing which Arab-American neighborhoods have the highest percentage of two color or college graduates.
IV. CONSTITUTIONAL ISSUES

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

A. First Amendment

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

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

Second, the court wrote that courts are most likely to find a First Amendment violation when the government compelled plaintiffs “to disseminate publicly a message with which [they] disagree.” For example, courts have prohibited the government from forcing motorists to place an ideological message on their license plates or compelling a school child to salute the American flag.

95 See *Morales*, supra note 1, at 1112-13.
97 See id.
98 See id.
100 See id.
101 See id.
103 See *Morales*, supra note 1, at 816 (citation omitted).
104 Id. at 815 (Compelled display of state motto “Lone Star or Die” on license plates unconstitutional) (citation omitted).
105 Id. at 816 (citation omitted).
the case in Morales. In Morales, the Census did not force the plaintiffs to endorse any message, but merely to provide information.105

The Morales court noted in passing that “plaintiffs are not confident that their answers would not be used purely for statistical purposes or that they would be maintained in confidentiality. This inchoate concern is not enough to make this case one of compelled speech.”106 Pitzer argues that because government has in fact misused Census data, the Morales court’s “characterization of the misuse as an ‘inchoate concern’ is no longer applicable . . . [so in] a new suit, a challenge using First Amendment grounds might hold water.”107 She claims that in 2004, “the Census Bureau released information regarding Arab population groups in the United States to the Department of Homeland Security.”108 In a footnote, she adds that the “Homeland Security used census data to locate Arab-Americans,”109 language that implies that government agents knocked on doors to attack or oppress Arab-Americans. But the truth is far less dramatic. The New York Times article cited in the footnote stated that the Census Bureau provided the Department of Homeland Security with information “on how many people of Arab backgrounds live in certain ZIP codes.”110 Obviously, this information breached no individual’s confidentiality, and the Times article admits that the Census Bureau’s conduct was perfectly legal.111

More importantly, the Morales decision was not based on the assumption that only the Census Bureau would use Census-related information. In fact, the court noted that data on race and national origin is used by various branches of government for a wide variety of purposes, such as judicial review of “equal protection challenges to redistricting plans”112 and litigation related to employment discrimination on the basis of race and national origin.113 Thus, the Morales court was quite aware that agencies other than the Census Bureau, use Census data.

105 See supra note 1, at 1113.
106 See Pitzer, supra note 1, at 1112.
111 See supra note 1, at 1113.
112 See supra note 107 and accompanying text.
113 See supra note 108 and accompanying text.
111 Id. at 814.

The court’s language about “inchoate concern” does not show otherwise. After stating that the plaintiffs “inchoate concern [about misuse] is not enough to make this case one of compelled speech,”118 the court could have reaffirmed the Census Bureau’s commitment to confidentiality. Instead, the court stated that this concern “is not enough to make this case one of compelled speech, such as Wooley [the "license plate" case discussed above].”119 In the compulsory flag salute case discussed above120, the court involved cases in which the plaintiffs were compelled to publish a controversial message. Thus, the court’s “inchoate concern” language was meant to address cases in which plaintiffs were forced to endorse such messages, not the disclosure of information to the Census Bureau, or the use of Census data by other federal agencies.

B. Fourth Amendment

The Fourth Amendment prohibits unreasonable searches and seizures.112 However, the courts have repeatedly rejected Fourth Amendment challenges to the Census. In United States v. Rickenbacker,121 the U.S. Court of Appeals Second Circuit upheld the criminal conviction of a man who was convicted for refusal to answer census questions.122 The court held that the census questions “related to important federal concerns, such as housing, labor, and health, and were not unduly broad or sweeping in their scope [and that added] [t]he fact that some public opinion research experts might regard the size of the household questionnaire ‘sample’ as larger than necessary to obtain an accurate result does not support a conclusion that the census was arbitrary or in violation of the Fourth Amendment.”123
Similarly, in Morales, the plaintiff argued that Census questions about his medical condition "compel[ed] him to submit to a medical examination against his will [and thus constituted] a search that implicates the Fourth Amendment." 126 The court rejected this claim, for two reasons. First, the intrusion on privacy caused by the Census was limited, given "the methods used to collect the census data and the statutory assistance that the answers and attribution to an individual will remain confidential." 127 Second, the government's interest in taking the Census was significant, because the "census has been thought to be necessary for over two hundred years." 128

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

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

But, Congress's failure to authorize a long-form census in 1790 does not mean that they believed that either the Fourth Amendment or any other portion of the Constitution precluded such a Census. In fact, the historical record suggests that Congress merely believed such questions to be unnecessary as a matter of policy; Madison later wrote that his proposal was rejected by the Senate as "a waste of trouble and supplying materials by idle people to make a book." 137 Thus, Congress's rejection of the Madison proposal does not support a Fourth Amendment challenge either to the ACS or to long form Census questions. In fact, Pikler herself implicitly admits the weakness of the Fourth Amendment argument by writing that "the more elaborate scheme rejected by Congress does not necessarily mean that the ACS is an unconstitutional violation of the Fourth Amendment." 138

C. The Census Clause

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

Pikler writes that the term "manner" is limited to the form of the Census, not the Census' object or purpose. 142 She therefore reasons that the Clause does not allow a "census for purposes other than apportionment," 143 which means that the Census Bureau may not collect non-population statistical data such as that covered by the ACS, or by implication, the pre-ACS long form. 144 But this argument proves too much. A court that adopted Pikler's theory would have to outlaw not only the ACS and the pre-ACS long form, but all Census questions beyond the number of persons because presumably, any other numbers are irrelevant to the apportionment of Representatives between the states. But if this theory was correct, the very first Census would have been unconstitutional. As the Morales

126 See Morales, 116 F. Supp. 2d at 817.
127 Id. at 828.
128 Id.
130 Id. at 309.
131 Id. at 321.
132 Id.
133 See Pikler, supra note 1, at 1114.
134 Id.
135 Id.
136 Id.
137 Id. (emphasis added).
138 Id. (numbers generated by Census shall include all "free persons...and excluding Indians not taxed, three fifths of all other Persons").
139 See Pikler, supra note 1, at 1117.
140 Id. at 1115.
141 Id. at 1114.
court pointed out, the 1790 Census was not limited to questions about the number of persons in a household— the question most directly related to apportionment. Instead, this Census asked "if a household had white males or females, whether the white males were 16-years-old or older."143 Age and gender are not related to apportionment yet the first Census asked about these facts. So, the Framers' generation apparently rejected such a limited understanding of the Census Clause. The following generation went even further, the 1810 Census added questions about manufacturing, the 1820 Census added questions about employment,146 and the 1830 Census asked if household members suffered from hearing, speaking or visual impairments.147 The 1840 Census asked for information about insane household members.148

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

V. CONCLUSION

A wide variety of commentators, both inside and outside of Congress, challenge the ACS as intrusive and unconstitutional. But in fact, the ACS adds little to the total amount of governmental intrusion into Americans' privacy because while Census data is anonymous, government agencies can easily obtain a wide variety of non-anonymous data about individuals. Moreover, the constitutional claims against the ACS have been repudiated by federal case law, and rightly so. Although the Census Clause does not directly state what it authorizes, two centuries of Census practice support federal collection of statistical data beyond the bare minimum required for Congressional apportionment.

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145 See Morales, 116 F. Supp. 2d at 818 ("If the census asked if members of the household were "deaf," "dumb," or "blind.")."
146 Id.
147 See Peltz, supra note 1, at 1117.
148 See Morales, 116 F. Supp. 2d at 828 n.10.
150 Peltz also argues that the ACS is not justified by the Necessary and Proper Clause of the Constitution. He reasons that if the ACS does not "compel [] with the stated purpose of the Census Clause." Peltz, supra note 1, at 1119, the Necessary and Proper Clause cannot be used to stretch the Census Clause beyond its appropriate boundaries. Id. at 1117-19. But if, as suggested above, the Census Clause authorizes the ACS, this argument falls short.