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COMPELLED COMPLIANCE WITH THE  
CENSUS BUREAU'S AMERICAN  
COMMUNITY SURVEY AS AN  
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PRIVACY

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# COMPELLED COMPLIANCE WITH THE CENSUS BUREAU'S AMERICAN COMMUNITY SURVEY AS AN UNCONSTITUTIONAL INVASION OF PRIVACY

## I. INTRODUCTION

The US Constitution makes it clear that the federal government must conduct an “actual [e]numeration” of the people to apportion representation.<sup>1</sup> In 1790 Congress passed the Census Act.<sup>2</sup> The first census asked only six questions.<sup>3</sup> By 1840 the scope of the census's questions had expanded considerably.<sup>4</sup> In 1940 the census was split into a “short form” and “long form” census. Those receiving the “long form” had many more questions to answer.<sup>5</sup> In 1954 Congress enacted provisions in Title 13 to authorize the Department of Commerce to conduct the census.<sup>6</sup> Title 13 included a criminal fine punishing those who did not furnish answers to the census – 13 U.S.C. § 221.

In 2003 the Census Bureau replaced the “long form” census with the American Community Survey (ACS).<sup>7</sup> Unlike the short form sent out as part of the decennial census, the ACS is sent out every year to approximately three million households.<sup>8</sup> The ACS asks a wide range of questions that many people have found to be intrusive.<sup>9</sup> Despite the threat of prosecution, over forty percent of the people who receive the ACS fail to respond<sup>10</sup> whereas the short form for the

<sup>1</sup> U.S. CONST. art. I, § 2, cl. 3.

<sup>2</sup> Census Act of 1790, ch. 2, 1 Stat. 101, 101 (1790).

<sup>3</sup> *Id.* at 101-103.

<sup>4</sup> William R. Merriam, *Census*, in THE ENCYCLOPEDIA AMERICANA VOLUME 4, (Frederick Converse Beach, George Ewin Rines, eds., The Americana Company, 1904).

<sup>5</sup> 1940 Census, <http://2010.census.gov/mediacenter/the-big-count/1940-farming.php> (last visited June 19, 2010).

<sup>6</sup> 13 U.S.C.A. §§ 1 – 402 (West 2010).

<sup>7</sup> Memorandum from the Comptroller General to the Honorable Bob Barr, Vice Chairman, Committee on Government Reform, House of Representatives (Apr. 4, 2002 ), *available at* 2002 WL 732361, at \*1 [hereinafter *Memorandum*].

<sup>8</sup> About the ACS: What is the Survey?, <http://www.census.gov/acs/www/SBasics/What/What1.htm> (last visited June 19, 2010) (“About three million housing unit addresses are sampled annually throughout the United States and Puerto Rico.”).

<sup>9</sup> John W. Whitehead, *American Community Survey: "Big Brother at its Worst,"* Mar. 4, 2010, <http://www.opposingviews.com/i/american-community-survey-big-brother-at-its-worst>.

<sup>10</sup> ANTHONY TERSINE, ITEM NONRESPONSE: 1996 AMERICAN COMMUNITY SURVEY (United States Census Bureau 1998),

decennial census has a non-response rate of around thirty percent.<sup>11</sup>

In the twentieth century only seven people were prosecuted under 13 U.S.C. § 221, however, in theory, thousands of Americans every year are guilty of a federal misdemeanor for failing to fill out the ACS.<sup>12</sup> The Census Bureau asserts that each person who does not comply with the ACS could face a \$5,000 fine for a federal misdemeanor spelled out in Title 18 of the United States Code.<sup>13</sup> Title 13, however, specifies that the fine is \$100. Case law indicates that the fine could be \$100 per question not answered.<sup>14</sup> At any rate, the deterrent effect of this fine is small but its constitutional implications are large. This paper contends that the ACS's questions violate an individual's right to privacy; therefore, it is unconstitutional for Congress to impose a criminal fine when a person “refuses or wilfully neglects, when requested . . . to answer, to the best of his knowledge any of the questions on . . . [the American Community] survey.”<sup>15</sup>

The right to privacy is said to have its genesis in a nineteenth century Harvard Law Review article written by then law student Louis Brandeis. The article argued for a new tort to combat some of the questionable practices of journalists in that day.<sup>16</sup> It is best stated as “the right to be let alone.”<sup>17</sup> After Brandeis was elevated to the Supreme Court he planted a seed for the constitutional protection of this right to privacy in his dissent to *Olmstead v. United States*.<sup>18</sup>

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<http://www.census.gov/acs/www/AdvMeth/Papers/ACS/Paper13.htm>.

<sup>11</sup> DEBORAH H. GRIFFIN, MEASURING SURVEY NONRESPONSE BY RACE AND ETHNICITY, 1, (United States Census Bureau 2007), available at <http://www.census.gov/acs/www/Downloads/Bibliography/asa02%20DG.pdf>.

<sup>12</sup> Stephen Kruger, *The Decennial Census*, 19 W. ST. U. L. REV. 1, 57-58 (1991).

<sup>13</sup> About the ACS: What is the Survey?, *supra* note 8 (“Title 18 . . . in effect amends Title 13 U.S.C. Section 221 by changing the fine for anyone over 18 years old who refuses or willfully neglects to complete the questionnaire or answer questions posed by census takers from a fine of not more than \$100 to not more than \$5,000.”).

<sup>14</sup> 14 Am. Jur. 2d *Census* § 15 (2010) (“Under this statute, a refusal or willful neglect to answer any question on any schedule submitted would constitute a violation and there could be a separate violation for each unanswered question. . .”); 14 C.J.S. *Census* § 10 (2010) (“There can be a separate violation for each unanswered question.”).

<sup>15</sup> 13 U.S.C.A. § 221 (West 2010).

<sup>16</sup> Samuel D. Warren and Louis D. Brandeis, *The Right to Privacy*, 4 HARV. L. REV. 193 (1890).

<sup>17</sup> *Id.* at 193, 195 (quoting “Cooley on Torts, 2d ed., p. 29.”).

<sup>18</sup> 277 U.S. 438 (1928) (Brandeis, J., dissenting) (*overruled by Katz v. United States*, 389 U.S. 347 (1967)).

This seed took root in *Griswold v. Connecticut*<sup>19</sup> in which the Supreme Court found a right to privacy lurking in the shadows cast by the “specific guarantees” in the Bill of Rights.<sup>20</sup> The right to privacy was also meant to extend and explain an earlier chain of “privacy and repose” cases.<sup>21</sup>

Even after *Griswold* the right to privacy itself was never given the status of a fundamental right. Instead, it was used to justify the Court in finding certain unenumerated rights ought to receive protection as a fundamental right when government action trod too boldly into a “zone of privacy.” Although *Lawrence v. Texas*<sup>22</sup> casts some doubt, the privacy test used most often by the Court is a balancing between an individual's privacy interest and the government's important interest that is served in making the intrusion.<sup>23</sup> This paper first weighs the government's interest in gathering statistical data to help Congress, other federal agencies, and the states in their efforts to govern.<sup>24</sup> The government's assertions are taken at face value, although, a foray into the background cases – the *Legal Tender Cases*<sup>25</sup> and *United States v. Moriarity*<sup>26</sup> – shows that the foundation upholding the Constitutionality of the Census Bureau's far reaching statistical mission is hardly built on bedrock.<sup>27</sup>

Following *Whalen v. Roe*<sup>28</sup> and *Nixon v. Administrator of General Services*,<sup>29</sup> the government seems to have a trump card it can play during the balancing test whenever there is a proven statutory framework that protects the confidentiality of information disclosed to the government

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<sup>19</sup> 381 U.S. 479 (1965).

<sup>20</sup> *Id.* at 484.

<sup>21</sup> *Id.* at 485.

<sup>22</sup> 539 U.S. 558 (2003).

<sup>23</sup> *See id.* at 601 (Scalia, J., dissenting) (suggesting that a “searching” form of rational basis may have been applied by the majority).

<sup>24</sup> *See infra* Part III.D.2.

<sup>25</sup> 79 U.S. 457 (1870).

<sup>26</sup> 106 F. 886 (C.C.S.D.N.Y. 1901).

<sup>27</sup> *See infra* Part II.C.

<sup>28</sup> 429 U.S. 589 (1977).

<sup>29</sup> 433 U.S. 425 (1977).

combined with a lack of failure on the part of the government in protecting that confidentiality.<sup>30</sup> This trump card, however, is not dispositive. In the past the Census Bureau and its predecessors have intentionally violated then existing statutory commitments to confidentiality.<sup>31</sup> The courts, too, have been willing to force disclosure of information accumulated by the census that ought to be confidential.<sup>32</sup> Finally, the Census Bureau has had inadvertent disclosures of data and ongoing problems with physical and data security.<sup>33</sup> Additionally, the Census Bureau is under continuous pressure to release the confidential data that it has.<sup>34</sup> Despite these issues, the Census Bureau continues to collect data that has nothing to do with conducting an “enumeration” so that representation can be properly apportioned.<sup>35</sup>

The risk that an individual's confidential information could be accidentally or intentionally disclosed, in an environment where unethical businesses and criminals alike can use that information for ill, is a real threat to one's life and happiness.<sup>36</sup> Such considerations ought to weigh heavily in the individuals favor given the ease of copying data. The individual's privacy interest against such disclosure rests on the fringes of fundamental unenumerated rights that the Supreme Court has already found.<sup>37</sup> It also lurks in the penumbras of the Fourth, Fifth, and Ninth Amendments.<sup>38</sup>

This paper posits that an individual cannot be threatened with criminal prosecution for withholding information from the government – unless he has consented to disclose the

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<sup>30</sup> See generally *Whalen v. Roe*, 429 U.S. 589 (1977); *Nixon v. Administrator of General Services*, 433 U.S. 425 (1977).

<sup>31</sup> See *infra* Part III.D.3.

<sup>32</sup> See *infra* Part III.D.3.

<sup>33</sup> See *infra* Part III.D.3.

<sup>34</sup> See *infra* Part III.D.3.

<sup>35</sup> See *infra* Part III.D.3.

<sup>36</sup> See *infra* Part III.D.4.

<sup>37</sup> See *infra* Part III.D.4.

<sup>38</sup> See *infra* Part III.D.4.

information in seeking a benefit from the government – or there is a compelling government interest at stake and the information requested is narrowly tailored to meet that interest.<sup>39</sup> The federal material witness statute is one example of how this previously unarticulated rule already seems to operate in practice.<sup>40</sup>

The scope of the government's compelling interest in conducting a census is depends on a proper interpretation of the Enumeration Clause.<sup>41</sup> A review of the Framers's intent, along with how the First Congress approached the census of 1790, tells us that the Enumeration Clause ought to be narrowly construed.<sup>42</sup> Since the scope of the Census Bureau's compelling interest is narrow, the only criminal punishment that can be justified for failure to comply with the census is one for failure to disclose that which is constitutionally mandated: the number of persons in the household, the state in which the household is located, and – optionally – those questions relating to the disenfranchisement of males who are US citizens over the age of twenty-one years of age.<sup>43</sup>

Since the ACS is relatively new, there is no caselaw exactly on point. There are a handful cases dealing with challenges to the short and long form censuses. Most defendants prosecuted under 13 U.S.C. § 221 and its predecessors have had their convictions upheld. Therefore, this paper provides only a cursory overview of those previous challenges and their possible application to the ACS.<sup>44</sup> This paper also advances untried arguments based on the Excessive Fines Clause and the Takings Clause and rules them out as ineffective.<sup>45</sup> Therefore, the right to privacy is the best tool to use when challenging the constitutionality of the ACS.

<sup>39</sup> See *infra* Part III.D.5.

<sup>40</sup> See *infra* Part III.D.5.

<sup>41</sup> See *infra* Part III.D.5.

<sup>42</sup> See *infra* Part III.D.5.

<sup>43</sup> See *infra* note 441.

<sup>44</sup> See *infra* Part III.A.

<sup>45</sup> See *infra* Parts III.B-C.

## II. BACKGROUND

### A. Historical Background

Though there were many factors that led the Colonies to revolt against Great Britain, Americans resort to a simple slogan to sum up the causes of the Revolution: “no taxation without representation.”<sup>46</sup> Following the Revolution, the United States was first governed under the Articles of Confederation.<sup>47</sup> A July 12, 1776 draft of the Articles of Confederation would have required an enumeration of persons since “[e]xpences [sic] . . . incurred for the common [d]efense or general [w]elfare” would have been “defrayed out of a common [t]reasury . . . supplied by the several [c]olonies in [p]roportion to the [n]umber of [i]nhabitants . . . .”<sup>48</sup> However, this plan was discarded so there was no need for any enumeration of the population for purposes of taxation or representation.<sup>49</sup> Under the Articles, each state was allowed to send two to seven representatives to Congress, but each state only received one vote no matter how large its delegation.<sup>50</sup>

When the delegates to the Constitutional Convention set out to replace the Articles of

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<sup>46</sup> A blogger who has investigated the origins of this phrase attributes the earliest use of the phrase “no taxation without representation” to “Rev. John Joachim Zubly (1724-1781) of Georgia [who] authored a pamphlet titled *An Humble Enquiry into the Nature of the Dependency of the American Colonies upon the Parliament of Great-Britain, and the Right of Parliament to Lay Taxes on the Said Colonies.*” Zubly wrote “In England there can be no taxation without representation, and no representation without election . . .” The phrase might be better attributed to “James Burgh (1714-1775) [who] also used the phrase in his long work *Political Disquisitions; or, An Enquiry into Public Errors, Defects, and Abuses*, published in 1774. He even titled the second chapter of his Book II ‘Of Taxation without Representation.’” J.L. Bell, *Looking for “Taxation Without Representation,”* BOSTON 1775: HISTORY, ANALYSIS, AND UNABASHED GOSSIP ABOUT THE START OF THE AMERICAN REVOLUTION IN MASSACHUSETTS, Apr. 27, 2009, <http://boston1775.blogspot.com/2009/04/looking-for-taxation-without.html>.

<sup>47</sup> James Sullivan, Phd., *United States – The Articles of Confederation*, in THE ENCYCLOPEDIA AMERICANA VOLUME 16, (Frederick Converse Beach, George Ewin Rines, eds., The Americana Company, 1904).

<sup>48</sup> Kruger, *supra* note 12, at 11 n.41 (citing JOURNALS OF THE CONTINENTAL CONGRESS 1774-1789, 547-48, (Worthington Chauncey Ford et al. eds., 1937)).

<sup>49</sup> See Kruger, *supra* note 12, at 12.

<sup>50</sup> Article V says, “[n]o State shall be represented in Congress by less than two, nor more than seven members. . .” and “[i]n determining questions in the united States, in Congress assembled, each State shall have one vote.” Articles of Confederation art. V, cl. 2.

Confederation in 1787, one of the major stumbling blocks was how states would be represented and how those representatives would be chosen. This author will not dwell on the debates and the outlines of the Virginia Plan and New Jersey Plan.<sup>51</sup> Sufficed to say, from the time the Constitution was ratified until today the number of members of the House of Representatives from each state has been based in some way on the population of each state.<sup>52</sup> The US Constitution makes it clear that the federal government must conduct an “actual [e]numeration” of the people so representation can be apportioned.<sup>53</sup>

The Framers did not use the word “census” in the text of the Constitution.<sup>54</sup> However, during the Constitutional Convention in 1787, the word “census” was often used to describe the process that would be used to apportion representation of political power and direct taxes among the states.<sup>55</sup> James Madison, when transcribing the final draft of the Constitution itself into his notes on September 12, 1787, wrote, “No capitation tax shall be laid, unless in proportion to the *census* herein before directed to be taken.”<sup>56</sup> In the Federalist Papers, which post-date the Constitution, Madison and Alexander Hamilton used the term “census” instead of “enumeration” when discussing apportionment.<sup>57</sup> Yet, it is clear that the Framers intentionally replaced the word

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<sup>51</sup> To see some of the ink that has been spilled on the competing plans, *see, e.g.*, Herman V. Ames, *United States – The Federal Convention of 1787*, in *THE ENCYCLOPEDIA AMERICANA VOLUME 27*, (Frederick Converse Beach, George Ewin Rines, eds., The Americana Company, 1904) and Kruger, *supra* note 12, at 14-19.

<sup>52</sup> U.S. CONST. art. I, § 2, cl. 3; U.S. CONST. amend. XIV, § 2.

<sup>53</sup> U.S. CONST. art. I, § 2, cl. 3; U.S. CONST. amend. XIV, § 2.

<sup>54</sup> *See* U.S. CONST.

<sup>55</sup> *Id.* at art. I, § 2, cl. 3 (“Representatives and direct Taxes shall be apportioned among the several States”). James Madison used the word “census” in his notes on the 1787 Constitutional Convention on June 11, July 10, July 11, July 12, July 13, July 16, July 24, July 26, Aug. 6, Aug. 20, Aug. 21, Sept. 12, and Sept. 14. JAMES MADISON, *THE DEBATES IN THE FEDERAL CONVENTION OF 1787 WHICH FRAMED THE CONSTITUTION OF THE UNITED STATES OF AMERICA REPORTED BY JAMES MADISON*, 88, 228, 231, 233, 240, 243, 245-48, 317, 434-35, 437, 549, 566 (Gaillard Hunt & James Brown Scott eds., 1920) (1787). Robert Yates used the word “census” in his notes from June 11, 1787. ROBERT YATES & JOHN LANSING, *PROCEEDINGS AND DEBATES OF THE CONVENTION ASSEMBLED AT PHILADELPHIA FOR THE PURPOSE OF FORMING THE CONSTITUTION OF THE UNITED STATES OF AMERICA*, 122, (Louisville, Alston Mygatt, 1844).

<sup>56</sup> MADISON, *supra* note 44, at 549 (emphasis added).

<sup>57</sup> THE FEDERALIST No. 36 (Alexander Hamilton); THE FEDERALIST No. 43 (James Madison); THE FEDERALIST No. 54 (Alexander Hamilton & James Madison); THE FEDERALIST No. 55 (Alexander Hamilton & James Madison); THE FEDERALIST No. 58 (James Madison).

“[c]ensus” with “[e]numeration.”<sup>58</sup> For lawyers this is more than a distinction without a difference. The Constitution is “the supreme Law of the Land.”<sup>59</sup> As pointed out in *Marbury v. Madison*, “if both the law and the constitution apply to a particular case . . . and the constitution is superior to any ordinary act of the legislature; the constitution, and not such ordinary act, must govern the case to which they both apply.”<sup>60</sup> Additionally, courts and commentators have regularly turned to the historical record, including debates and Federalist Papers, to discern the intention of the Framers to give the Constitution proper effect.<sup>61</sup>

As many of the Framers were Christians, they would have been familiar with the Biblical nativity story of the census conducted in the time of Augustus Caesar.<sup>62</sup> Those with a classical education may also have understood how the census functioned in Roman times.<sup>63</sup> In ancient Rome, a census was not only an enumeration of persons, it was an assessment of wealth and status.<sup>64</sup> Although the British had not conducted a census of all of the Colonies, the Framers did have some first-hand experience to guide them.<sup>65</sup> There had been censuses in 1776 in

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<sup>58</sup> Kruger, *supra* note 12, at 19 (“On September 12, [1787,] the Committee of Style . . . [used] 'Enumeration' in place of 'Census' to describe the process of counting . . .”).

<sup>59</sup> U.S. CONST. art. VI, cl. 2.

<sup>60</sup> *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 178 (1803).

<sup>61</sup> This author's June 19, 2010 search of the Westlaw database of Journals and Law Review articles for the terms “originalism” and “textualism” returned over 1300 results.

<sup>62</sup> *Luke 2:1-7*. The Bible mentions two other censuses. God ordered Moses to count his people in *Numbers 1:1-4*, *Numbers 1:19*. King David sinned by counting his people and they were punished with a plague in 2 *Samuel 24:1-17*, 1 *Chronicles 21:1-27*.

<sup>63</sup> THE EXAMINER, AMERICANIZED ENCYCLOPEDIA BRITANNICA, REVISED AND AMENDED: A DICTIONARY OF ARTS, SCIENCES AND LITERATURE: VOLUME III, 1430-31 (San Francisco, The Examiner, 1890).

<sup>64</sup> *Id.* (describing the role of the census in dividing the people and property into classes and “indicat[ing] not only the number and respective classes of all free persons, but their domestic position as husbands and wives, fathers and mothers, and sons and daughters. . . . [L]anded properly was analyzed into several classes according to its character and produce.”); *City of Huntington v. Cast*, 48 N.E. 1025, 1026 (Ind. 1898) (“Burrill, Law Dict.: 'In the Roman law. A numbering or enrollment of the people, with a valuation of their fortunes.'”).

<sup>65</sup> Britain's Office of National Statistics states that there had been opposition to any census being conducted anywhere in the British Empire. The opposition abated after the publication of Malthus' “essay on the 'principle of population' in 1798. . . Parliament passed the Census Act in 1800 and the first official Census of England and Wales was on 10 Mar. 1801.” Census Background, [http://www.statistics.gov.uk/census2001/cb\\_8.asp](http://www.statistics.gov.uk/census2001/cb_8.asp) (last visited July 17, 2010)

Massachusetts and Rhode Island “to decide . . . shares of debt payments” within those colonies.<sup>66</sup> Additionally, “New York used a periodic census to distribute the seats in its colonial legislature.”<sup>67</sup> Only the Rhode Island census had been more than a “simple count [because] most other colonies found their people too fiercely independent to answer what they regarded as all kinds of foolish questions, and the sheriffs acting as census-takers were not inclined to ask them either.”<sup>68</sup> Thus, when the Framers chose the word “enumerate” over the word “census” they were making a conscious choice to limit the scope of the government's inquiry.

The first session of Congress passed the Census Act of 1790.<sup>69</sup> In that Act, Congress authorized a set of marshals to “cause the number of the inhabitants within their respective districts to be taken.” The Act instructed the marshals to omit “Indians not taxed” and required them to provide the number of “free persons, including those bound to service for a term of years, from all others; distinguishing also the sexes and colours [sic] of free persons, and the free males of sixteen years and upwards from those under that age.”<sup>70</sup> The marshals could “appoint as many assistants within their respective districts as to them . . . appear[ed] necessary. . .”<sup>71</sup> The assistants were to be paid “one dollar for every one hundred and fifty persons by him returned” for those living in the country and “one dollar for every three hundred persons” for those living in the cities.<sup>72</sup> The marshals were also given discretion to provide further compensation to an assistant when the assistant's territory was especially “dispersed” up to a

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<sup>66</sup> Luis Kutner, *Our Extraconstitutional Census*, 68 U. DET. L. REV. 117, 118 n.14 (1991) (citing HYMAN ALTERMAN, COUNTING PEOPLE: THE CENSUS IN HISTORY, 168, (Harcourt, Brace & World, Inc. 1969)).

<sup>67</sup> *Id.* at 118 n.15 (citing HYMAN ALTERMAN, COUNTING PEOPLE: THE CENSUS IN HISTORY, 175, (Harcourt, Brace & World, Inc. 1969)).

<sup>68</sup> *Id.* at 118 n.16 (citing HYMAN ALTERMAN, COUNTING PEOPLE: THE CENSUS IN HISTORY, 175, (Harcourt, Brace & World, Inc. 1969)).

<sup>69</sup> Census Act of 1790, ch. 2, 1 Stat. 101, 101 (1790).

<sup>70</sup> *Id.*

<sup>71</sup> *Id.*

<sup>72</sup> *Id.* at 102.

limit of “one dollar for every fifty persons.”<sup>73</sup> The Act finally provided that “each and every person more than sixteen years of age, whether heads of families or not . . . [was] obligated to render to [the] assistant . . . a true account . . . to the best of his or her knowledge . . . on pain of forfeiting twenty dollars, to be sued for and recovered by such assistant, the half for his own use, and the other half for the use of the United States.”<sup>74</sup> Because an assistant was paid based on the number of people counted, if a person refused to be counted the assistant would lose wages.

Two things are readily discernible by referring to the Census Act of 1790. First, the twenty dollars was not a criminal fine; instead, it was a private right of action that the assistant had standing to bring to make up for lost wages. Second, the questions themselves only slightly exceeded what was required by the Constitution. The Constitution – at that time – stated that:

Representatives and direct Taxes shall be apportioned among the several States which may be included within this Union, according to their respective Numbers, which shall be determined by adding to the whole Number of free Persons, including those bound to Service for a Term of Years, and excluding Indians not taxed, three fifths of all other Persons.<sup>75</sup>

The Census Act required the assistant to distinguish the “sexes and colours [sic] of free persons, and the free males of sixteen years and upwards from those under that age.”<sup>76</sup> Ultimately, six questions were asked during the first census.<sup>77</sup> Those six questions concerned a person's age, “gender, race, relationship to the head of household, name of the head of household, and the number of slaves [owned], if any.”<sup>78</sup> The debates on passage of the Census Act do not explain why these questions were asked.<sup>79</sup> One could speculate that lawmakers knew that the balance of

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<sup>73</sup> *Id.* at 102.

<sup>74</sup> *Id.* at 103.

<sup>75</sup> U.S. CONST. art. I, § 2, cl. 3.

<sup>76</sup> Census Act of 1790, ch. 2, 1 Stat. 101, 101 (1790).

<sup>77</sup> Kutner, *supra* note 55, at 121.

<sup>78</sup> Census in the Constitution: Why Jefferson, Madison and the Founders Enshrined the Census in our Constitution, <http://2010.census.gov/2010census/why/constitutional.php> (last visited July 17, 2010).

<sup>79</sup> 1 ANNALS OF CONG. 1165-66, (Joseph Gales ed., 1834) available at <http://memory.loc.gov/cgi-bin/ampage?collId=llac&fileName=001/llac001.db&recNum=583>.

power among the states was precarious during the early years of the Republic and that having statistics about race, age, and sex would have been the minimum necessary to detect any kind of padding or egregious errors in subsequent censuses.

When the First Congress decided whether to ask a question about employment on the first census, an interesting exchange occurred on the floor of the House between Representatives Samuel Livermore, John Page, and James Madison.<sup>80</sup> The debate concerned a House bill requiring census marshals to question and categorize persons based on their occupation. Livermore believed that it would be impractical to try to gather the information since “many inhabitants . . . pursued two, three, or four occupations” and “the principal one depended upon the season of the year.”<sup>81</sup> John Page, Representative of Virginia, declared:

[T]his particular method of describing the people [will] occasion an alarm among them; they [will] suppose the [Congress] [intends] something[] by putting the Union to this additional expense, beside gratifying an idle curiosity; their purposes cannot be supposed the same as the historian's or philosopher's – they are statesmen, and all their measures are suspected of policy.<sup>82</sup>

Page further warned that “[i]f he had not heard the object so well explained on [the] floor” he, like his constituents, “might have been jealous of the attempt” to gather the information. Finally, the information “could serve no real purpose” since even if Congress became “acquainted with the minutia, they would not be benefited by it.”<sup>83</sup>

Madison disagreed and “thought it was more likely, that the people would suppose the information was required for its true object, namely to know in what proportion to distribute the

benefits resulting from an efficient General Government.”<sup>84</sup> Madison believed that it was

<sup>80</sup> CHARLES LANMAN, BIOGRAPHICAL ANNALS OF THE CIVIL GOVERNMENT OF THE UNITED STATES DURING IT'S FIRST CENTURY, xxiii (Washington, James Anglim, 1876) (listing the members of the First Congress).

<sup>81</sup> 1 ANNALS OF CONG. 1145, (Joseph Gales ed., 1834) available at <http://memory.loc.gov/cgi-bin/ampage?collId=llac&fileName=001/llac001.db&recNum=573>.

<sup>82</sup> *Id.* at 1146-47.

<sup>83</sup> *Id.* at 1147.

<sup>84</sup> *Id.* at 1147.

necessary to know the “real state of society” so Congress could draft “bills intended . . . to benefit the agricultural, commercial, and manufacturing parts of the community.” Madison felt that knowing the “exact number” of people employed in a given occupation was necessary so that Congressmen “might rest their arguments on facts, instead of assertions and conjectures.”<sup>85</sup> When word of the proposal got out, the Boston Gazette was critical of the proposed questions about employment.<sup>86</sup> Madison's viewpoint was rejected and Congress did not include a question about occupation in the 1790 census. Thus, in the eighteenth century the people had little tolerance for questions too far afield from those required for an “actual enumeration.”

### *B. The Census Today*

Today there is a Census Bureau contained within the Department of Commerce. The statutory provisions in Title 13 under which the Census Bureau operates are largely unchanged since they were enacted in 1954. Title 13 purports to grant the Secretary of Commerce broad discretion: “[t]he Secretary shall prepare questionnaires, and shall determine the inquiries, and the number, form, and subdivisions thereof, for the statistics, surveys, and censuses provided for in this title.”<sup>87</sup> Furthermore, the code states that “‘census of population’ means a census of population, housing, and matters relating to population and housing.”<sup>88</sup> The code provides a criminal fine for those who fail to complete the census:

Whoever, being over eighteen years of age, refuses or willfully neglects, when requested . . . to answer, to the best of his knowledge, any of the questions on any schedule submitted to him in connection with any census or survey . . . applying to himself or to the family to which he belongs or is related, or to the farm or farms of which he or his family is the occupant, shall be fined not more than

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<sup>85</sup> *Id.* at 1146.

<sup>86</sup> Kutner, *supra* note 55, at 121.

<sup>87</sup> 13 U.S.C.A. § 5 (West 2010).

<sup>88</sup> *Id.* § 141(g).

\$100.<sup>89</sup>

The only exemption from a criminal fine is carved out for questions concerning “religious beliefs” or “membership in a religious body.”<sup>90</sup>

Starting in 1940, the census was split into a “short form” mailed to most everyone and a “long form” sent to only a “sample” of the population.<sup>91</sup> The “long form” was previously administered as part of the decennial census. Beginning in 2003 the Census Bureau replaced the “long form” census with the ACS.<sup>92</sup> The ACS is sent out every year to a sample of the population.<sup>93</sup> The Census Bureau asserts, and the Comptroller General agrees, that the “Bureau has the authority under 13 U.S.C. §§ 141 and 193 to conduct the ACS. . . [T]he Bureau clearly has authority to require responses from the public to this survey. See 13 U.S.C. § 221.”<sup>94</sup>

13 U.S.C. § 193 states: “In advance of, in conjunction with, or after the taking of each [decennial] census provided for by this chapter, the Secretary may make surveys and collect such preliminary and supplementary statistics related to the main topic of the census as are necessary to the initiation, taking, or completion thereof.”<sup>95</sup> Furthermore, 13 U.S.C. § 182 provides that “The Secretary may make surveys deemed necessary to furnish annual and other interim current data on the subjects covered by the censuses provided for in this title.”<sup>96</sup> Thus, as an interim census the ACS does seem to have statutory support in Title 13.

The ACS asks a bevy of questions. Paraphrased, they include such questions as a person's

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<sup>89</sup> *Id.* § 221(a). The Census Bureau also contends that Title 18 “in effect amends . . . 13 U.S.C. [§] 221 by changing the fine . . . from a fine of not more than \$100 to not more than \$5,000.” About the ACS: What is the Survey?, *supra* note 8. See Excessive Fines discussion *infra* Part III.B.

<sup>90</sup> 13 U.S.C.A. § 221(c) (West 2010); 14 Am. Jur. 2d Census § 15.

<sup>91</sup> 1940 Census, *supra* note 5.

<sup>92</sup> *Memorandum*, *supra* note 7, at \*1.

<sup>93</sup> About the ACS: What is the Survey?, *supra* note 8 (“About three million housing unit addresses are sampled annually throughout the United States and Puerto Rico.”).

<sup>94</sup> *Memorandum*, *supra* note 7, at \*1; About the ACS: What is the Survey?, *supra* note 8.

<sup>95</sup> 13 U.S.C.A. § 193 (West 2010).

<sup>96</sup> *Id.* § 182.

name; telephone number; sex; race; date of birth; relationship to the head of the household (also known as “Person 1”) including whether the person is a biological child, adopted child, foster child, in-law, housemate, or unmarried partner of “Person 1.” The ACS asks the person what type of building he lives in; when was it built; how many acres is it on; how many rooms it has; how many bedrooms it has; when “Person 1” moved in; whether the home has a flush toilet; what kind of fuel(s) used to heat the home; how many vehicles are used by the people living at that home; how much the monthly electric and gas bills were in the last month; how much water, sewer, homeowner's insurance and property taxes cost annually; whether anybody at the home receives food stamps; if the person has a home equity loan; how much the person pays for rent or how much the home would be worth if sold; whether the person has a mortgage; if so, what is the person's monthly mortgage payment; and, if applicable, how much the person pays on junior or secondary mortgages on the property on a monthly basis.<sup>97</sup>

The ACS also asks, for each person at the home, whether the person is a US citizen; what education level the person has attained; the person's college major; what other languages the person speaks at home; where the person was living a year ago; what kind of health insurance plan the person has; whether the person is hearing or sight impaired; whether the person's mental condition interferes with the person's lifestyle; the person's marital status and how many times the person has been married; whether the person served in the military; whether the person is employed; by what mode and how long the person commutes to his or her job; what time the person leaves for work; the person's job title and income from employment; and, the person's income from dividends.<sup>98</sup> Concerning the ACS, the Comptroller General wrote, “[W]e found no

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<sup>97</sup> The American Community Survey, [http://www.census.gov/acs/www/Downloads/ACS-1\(info\)\(2010\) Stateside English\\_web.pdf](http://www.census.gov/acs/www/Downloads/ACS-1(info)(2010) Stateside English_web.pdf) (last visited May 31, 2010).

<sup>98</sup> The American Community Survey, *supra* note 86.

other government surveys that respondents are required to respond to that ask specific, detailed personal information similar to that required by the ACS.”<sup>99</sup>

The Republican Representative from Minnesota, Michele Bachmann was recently interviewed by The Washington Times. As the paper wrote, “[Representative Bachmann] says she's so worried that information from [the 2010] national census will be abused that she will refuse to fill out anything more than the number of people in her household. . . [she] said the questions have become 'very intricate, very personal'.”<sup>100</sup> Similarly Republican Representative from Texas (and 2008 Presidential Candidate) Ron Paul, M.D. has written an article entitled “None of Your Business!” concerning the ACS. Dr. Paul describes the ACS as:

[Twenty-four] pages of intrusive questions concerning matters that simply are none of the government's business, including your job, your income, your physical and emotional health, your family status, your dwelling, and your intimate personal habits. The questions are both ludicrous and insulting. The survey asks, for instance, how many bathrooms you have in your house, how many miles you drive to work, how many days you were sick last year, and whether you have trouble getting up stairs. It goes on and on, mixing inane questions with highly detailed inquiries about your financial affairs. One can only imagine the countless malevolent ways our federal bureaucrats could use this information.<sup>101</sup>

Dr. Paul introduced an amendment to eliminate funding for the ACS but “[t]he amendment was met by either indifference or hostility, as most members of Congress either don't care about or actively support government snooping into the private affairs of citizens.”<sup>102</sup> The Republican Party's 2008 Platform includes a plank urging Congress “to specify -- and to constitutionally justify -- which census questions require a response.”<sup>103</sup>

<sup>99</sup> Memorandum, *supra* note 7, at \*4.

<sup>100</sup> Stephen Dinan, *EXCLUSIVE: Minn. lawmaker vows not to complete Census*, THE WASHINGTON TIMES, June 17, 2009, <http://www.washingtontimes.com/news/2009/jun/17/exclusive-minn-lawmaker-fears-census-abuse/>.

<sup>101</sup> Rep. Ron Paul, M.D., *None of Your Business!*, LEWROCKWELL.COM, July 13, 2004, <http://www.lewrockwell.com/paul/paul192.html>.

<sup>102</sup> *Id.*

<sup>103</sup> COMMITTEE ON ARRANGEMENTS FOR THE 2008 REPUBLICAN NATIONAL CONVENTION, 2008 REPUBLICAN PLATFORM, 21 (2008) <http://www.gop.com/2008Platform/2008platform.pdf>.

The Democratic Party's 2008 Platform makes no similar demand for Congressional restraint. Instead, the platform urges “enforcement on disaggregation of Census data” for Asian-Americans and Pacific Islanders and promises to “make the Census more culturally sensitive, including outreach, language assistance, and increased confidentiality protections.”<sup>104</sup> As will be seen below, this emphasis on data protection as the solution to citizen's privacy concerns mirrors the stance of the Census Bureau.

The Green Party appears to have no stance on the census. The Constitution Party has a link on their website to Dr. Paul's article *supra*.<sup>105</sup> The Libertarian Party takes a stance most in line with meeting the Constitutional requirements of enumeration after the adoption of the Fourteenth Amendment: “We believe that the census is constitutionally limited to collecting only one piece of information about each residence: the number of persons living in it. We urge Congress to change the census laws to comply with this constitutional limitation.”<sup>106</sup>

Even as Congress has failed to act, the American people have taken matters into their own hands. A large portion do not respond to the Census Bureau at all.<sup>107</sup> Some ignore certain questions.<sup>108</sup> And a very small portion take aim directly at the Census Bureau with violence. On June 20, 2010 the Washington Post reported that census workers making follow-up visits to homes that had not properly responded to the 2010 census were meeting with resistance:

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<sup>104</sup> DEMOCRATIC NATIONAL CONVENTION COMMITTEE, THE 2008 DEMOCRATIC NATIONAL PLATFORM: RENEWING AMERICA'S PROMISE, 52 (2008), <http://www.democrats.org/page/-/pdf/dem-platform.pdf>.

<sup>105</sup> <http://www.constitutionparty.com/news.php?aid=1187> (last visited July 17, 2010).

<sup>106</sup> The Libertarian Party, *Libertarians oppose census questions*, March 16, 2010, <http://www.lp.org/news/press-releases/libertarians-oppose-census-questions>.

<sup>107</sup> GRIFFIN, *supra* note 11 (“[The]national overall mail response rate” for the short form during the 2000 Census was 64 percent. . . The rate was about 54 percent for decennial long forms.”).

<sup>108</sup> UNITED STATES GENERAL ACCOUNTING OFFICE, STATEMENT OF GENE L. DODARO, ASSOCIATE DIRECTOR, GENERAL GOVERNMENT DIVISION BEFORE THE COMMITTEE ON POST OFFICE AND CIVIL SERVICE, HOUSE OF REPRESENTATIVES ON THE CENSUS BUREAU'S PREPARATIONS FOR THE 1990 DECENNIAL CENSUS, 4 (1986) <http://archive.gao.gov/d39t12/129876.pdf> [hereinafter *Dodaro*] (“Of the 64 million questionnaires that were returned by mail in the 1980 census, 13 percent of the short forms did not meet the Bureau's [criteria] for completeness . . . [and] 36 percent of the long forms did not meet [the] criteria.”).

[C]ensus takers have encountered . . . flashes of violence. They have been shot at with pellet guns and hit by baseball bats. They have been confronted with pickaxes, crossbows and hammers. They've had lawn mowers pushed menacingly toward them and patio tables thrown their way. They have been . . . bitten by pit bulls and chased by packs of snarling dogs. . . . So far, the Census Bureau has tallied 379 incidents involving assaults or threats on the nation's 635,000 census workers, more than double the 181 recorded during the 2000 census. Weapons were used or threatened in a third of the cases.<sup>109</sup>

One of encounter with a census worker left a homeowner dead after the homeowner brandished a weapon at a census worker and the police officers who responded.<sup>110</sup>

Recognizing the sometimes farcical and sometimes tragic circumstances facing census workers, the long running comedy show Saturday Night Live created a skit wherein a census worker faced an earnest, if confused citizen (played by Christopher Walken) who believed he lived with eighty people in his apartment counting houseplants, candy bars and a bobcat. In fact, he lived alone.<sup>111</sup>

Citizens who fail to respond face theoretically face federal prosecution under 13 U.S.C. § 221.<sup>112</sup> In actuality, the risk is not as great as it would seem. As one commentator has pointed out, in the twentieth century only seven people were prosecuted for failing to fill out the census – with mixed results.<sup>113</sup> Because prosecutions under 13 U.S.C. § 221 (and its predecessors) are rare, the Census Bureau's activities go largely unchallenged in the courts even though those activities affect millions of Americans each year. The Census Bureau prefers community

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<sup>109</sup> Carol Morello, *An unexpected result for some census takers: the wrath of irate Americans*, WASHINGTON POST, June 20, 2010, [http://www.washingtonpost.com/wp-dyn/content/article/2010/06/19/AR2010061901896\\_pf.html](http://www.washingtonpost.com/wp-dyn/content/article/2010/06/19/AR2010061901896_pf.html); Beau Zimmer, *Census worker attacked with pickaxe in Tampa*, <http://www.wtsp.com/news/mostpop/story.aspx?storyid=131820> (last visited July 17, 2010). The Census Bureau headquarters in Indiana recently reacted to a perceived threat by evacuating its building when a powdery substance was found enclosed with a returned census form. The substance was red gelatin powder. Jason Overholt, *Gelatin prompts evacuation of Census Bureau office*, WSBT, May 4, 2010, <http://www.wsbt.com/news/regional/92777114.html>.

<sup>110</sup> Rob Young, *UPDATE: Y.C. woman killed by police pointed gun at officers*, APPEAL-DEMOCRAT, May 22, 2010, <http://www.appeal-democrat.com/articles/family-95100-city-woman.html>.

<sup>111</sup> <http://www.hulu.com/watch/4165/saturday-night-live-census-taker> (last visited July 17, 2010).

<sup>112</sup> See Excessive Fines discussion *infra* Part III.B.

<sup>113</sup> Kruger, *supra* note 12, at 57-58.

outreach and promoting its commitment to privacy over an emphasis on criminal prosecution.<sup>114</sup>

Knowing that so few are prosecuted, why, then, is this article important? The trend, since at least the 1890s, has been for the census to demand an ever increasing amount of information.<sup>115</sup> With the advent of the computer age, the ability to store, copy, and transmit this information has increased exponentially.<sup>116</sup> Today, the threat of identity theft enhances the harm done by any inadvertent disclosure of personal information gathered by the census. As discussed *infra*, identity theft is merely one of many misuses a person must worry about when that person divulges information in response to Census Bureau's prompting. Given these legitimate concerns, and the intrusive nature of the majority of the questions on the ACS, it ought to be unconstitutional for Congress to impose a criminal fine when a person “refuses or willfully neglects, when requested . . . to answer, to the best of his knowledge any of the questions on . . . [the American Community] survey.”<sup>117</sup>

So far, the Census Bureau has not had to square off against a facial challenge to the criminal fines imposed by 13 U.S.C. § 221. Despite that more than one third of US citizens fail to respond to the ACS,<sup>118</sup> without being prosecuted it is doubtful that any of them could establish standing for lack of a “particularized injury” necessary to meet the “injury in fact” requirement.<sup>119</sup> It is well known that federal courts do not render advisory opinions on the Constitutionality of particular statutes.<sup>120</sup> Furthermore, any facial challenge on 13 U.S.C. § 221

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<sup>114</sup> See, e.g., THE CENSUS BUREAU, PROMOTING THE 2010 CENSUS PORTRAIT OF AMERICA ROAD TOUR: AN ACTIVITY GUIDE FOR PARTNERS, [http://2010.census.gov/partners/pdf/RoadTour\\_Overview.pdf?bcsi\\_scan\\_082EA17FE118A781=0&bcsi\\_scan\\_filename=RoadTour\\_Overview.pdf](http://2010.census.gov/partners/pdf/RoadTour_Overview.pdf?bcsi_scan_082EA17FE118A781=0&bcsi_scan_filename=RoadTour_Overview.pdf) (last visited July 17, 2010).

<sup>115</sup> See *United States v. Sarle*, 45 F. 191 (C.C.R.I. 1891).

<sup>116</sup> This was recognized by one commentator as early as the 1970s. See generally Vern Countryman, *The Diminishing Right of Privacy: The Personal Dossier and the Computer*, 49 TEX. L. REV. 837 (1971).

<sup>117</sup> 13 U.S.C.A. § 221(a) (West 2010).

<sup>118</sup> See *infra* notes 363-64 and accompanying text.

<sup>119</sup> See *Sierra Club v. Morton*, 405 U.S. 727 (1972); *Lujan v. Defenders of Wildlife*, 504 U.S. 555 (1992).

<sup>120</sup> *Golden v. Zwickler*, 394 U.S. 103, 108 (1969).

would have to clear the hurdle created by the "no set of circumstances" test enunciated by the Supreme Court in *United States v. Salerno*.<sup>121</sup> Although commentators may argue that the distinctions between a facial and as-applied challenge are not so sharp as they seem, with the exception of First Amendment challenges like *Flast v. Cohen*,<sup>122</sup> federal courts are quite happy to dismiss facial challenges for lack of standing and clear the docket for real "cases and controversies."<sup>123</sup> A criminal defendant, necessarily, has standing to challenge the constitutionality of the statutes under which he is prosecuted since his life, liberty, or property is put at risk.<sup>124</sup> Therefore, this paper concerns itself primarily with "as applied" challenges while leaving theoretical facial challenges to others.

### C. *The Constitutionality of the Modern Census: A House Built On Shifting Sand*

The Census Bureau relies on two early federal cases of questionable application as the foundation of their authority to ask questions going beyond those needed for a mere enumeration: *Legal Tender Cases*<sup>125</sup> and *United States v. Moriarity*.<sup>126</sup>

At the start of the Civil War, Congress authorized the issuance of demand notes to finance the war.<sup>127</sup> Demand notes of "fifty dollars or upwards" could be "exchange[d] for coin" – in other words redeemed in gold or silver specie.<sup>128</sup> In November 1861, the United States Navy stopped

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<sup>121</sup> 481 U.S. 739 (1987). *Id.* at 745.

<sup>122</sup> 392 U.S. 83 (1968).

<sup>123</sup> U.S. CONST. art. III, § 2, cl. 1. *See generally* Richard H. Fallon, Jr., As-applied and Facial Challenges and Third-party Standing, 113 HARV. L. REV. 1321 (2000).

<sup>124</sup> *Sharrow v. Brown*, 447 F.2d 94, 96 (2d Cir. 1971) ("[T]here was little doubt that, as a person convicted of violating the census statute, Sharrow had standing to attack the constitutionality of that statute."); 10B Fed. Proc., L. Ed. § 27:188 ("A defendant, having been convicted for refusing to answer questions asked by a census taker, has the requisite standing to attack the constitutionality of the Census Act and its administration by the Census Bureau.").

<sup>125</sup> *Legal Tender Cases*, 79 U.S. 457 (1870).

<sup>126</sup> *United States v. Moriarity*, 106 F. 886 (C.C.S.D.N.Y. 1901). *See also* Census in the Constitution: Why Jefferson, Madison and the Founders Enshrined the Census in our Constitution, *supra* note 67.

<sup>127</sup> Act of July 17, 1861, ch. 5, 37 Stat. 259, 259 (1861), available at <http://memory.loc.gov/cgi-bin/ampage?collId=llsl&fileName=012/llsl012.db&recNum=290>.

<sup>128</sup> *Id.* at 260.

a British ship and created a diplomatic row now known as the Trent affair. Subsequently, a financial panic ensued as people feared Britain would intervene on the side of the Confederacy. The United States was forced to suspend specie payments in January 1862 as a result.<sup>129</sup> On February 25, 1862, Congress passed the first Legal Tender Act, and authorized the issue of \$150 million of United States notes. The United States notes were authorized to be “legal tender in payment of debts, public and private, apply to debts contracted before as well as to debts contracted after enactment.”<sup>130</sup>

After the Civil War, there were a large number of cases contended that the Legal Tender Acts were unconstitutional, or questioning their interpretation and application. In *Hepburn v. Griswold*<sup>131</sup> the Supreme Court held that a litigant was not required to “receive from the plaintiffs the currency tendered to him in payment of their note, made before the passage of the act of February 25th, 1862.”<sup>132</sup> United States notes were legal tender for payment of any contract made after the first Legal Tender Act was passed, but the notes could not be used for contracts already extant.

Following on the heels of *Hepburn* came the *Legal Tender Cases* which consolidated a number of actions. The “case had been decided” on November 27, 1869.<sup>133</sup> The “opinion had been read and agreed to in conference” on January 29, 1870.<sup>134</sup> It was scheduled to be “delivered in court” on January 31, 1870 however the delivery of the opinion was “postponed for a week to give time for the preparation of the dissenting opinion.”<sup>135</sup> Justice Robert Grier then resigned

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<sup>129</sup> WESLEY CLAIR MITCHELL, *A HISTORY OF THE GREENBACKS WITH SPECIAL REFERENCE TO THE ECONOMIC CONSEQUENCES OF THEIR ISSUE 1862-65*, 37-43 (University of Chicago Press 1903).

<sup>130</sup> *Hepburn v. Griswold*, 75 U.S. 603, 604-605 (1869).

<sup>131</sup> 75 U.S. 603 (1869).

<sup>132</sup> *Id.* at 626.

<sup>133</sup> *Legal Tender Cases*, 79 U.S. 457, 572 (1870) (Chase, J., dissenting); *Id.* at 572 n.111 (Chase, J., dissenting).

<sup>134</sup> *Id.* at 572 (Chase, J., dissenting); *Id.* at 572 n.112 (Chase, J., dissenting).

<sup>135</sup> *Id.* at 572 (Chase, J., dissenting); *Id.* at 572 n.113 (Chase, J., dissenting).

from the Supreme Court. After a new Justice was appointed, “the then majority [found] themselves in a minority.” The Court reversed *Hepburn*.

The opinion in the *Legal Tender Cases* runs on for over one hundred pages with a roughly equal page count between the majority and dissenting opinions.<sup>136</sup> Tucked in the midst of the majority opinion is a comment that is dicta regarding the power of the government to collect statistics as part of a census. The Court, already already promoting an expansive view of the nature of the Necessary and Proper clause, said:

[A] power may exist as an aid to the execution of an express power . . . . [An] illustration of this may be found in connection with the provisions respecting a census. The Constitution orders an enumeration of free persons in the different States every ten years. The direction extends no further. Yet Congress has repeatedly directed an enumeration not only of free persons in the States but of free persons in the Territories, and not only an enumeration of persons but the collection of statistics respecting age, sex, and production. Who questions the power to do this?<sup>137</sup>

Stephen Kruger, in an article entitled “The Decennial Census,” has closely examined this passage.<sup>138</sup> One problem with the majority opinion above is that the Enumeration Clause is incorrectly stated to be limited to just an enumeration of free persons.”<sup>139</sup> As Kruger puts it, “Both before and after ratification of the Fourteenth Amendment in 1868, an enumeration restricted to [just] free persons would result in an improper count, and would cause an unconstitutional distortion in the apportionment of Representatives.”<sup>140</sup> Consider the Fourteenth Amendment, section 2, which states:

Representatives shall be apportioned among the several States according to their respective numbers, counting the whole number of persons in each State, excluding Indians not taxed. *But when the right to vote* at any election for the

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<sup>136</sup> *See id.*

<sup>137</sup> *Id.* at 536.

<sup>138</sup> Kruger, *supra* note 12, at 42-45.

<sup>139</sup> *Legal Tender Cases*, 79 U.S. at 536.

<sup>140</sup> Kruger, *supra* note 12, at 42.

choice of electors for President and Vice President of the United States, Representatives in Congress, the Executive and Judicial officers of a State, or the members of the Legislature thereof, *is denied to any of the male inhabitants of such State, being twenty-one years of age, and citizens of the United States, or in any way abridged, except for participation in rebellion, or other crime, the basis of representation therein shall be reduced in the proportion which the number of such male citizens shall bear to the whole number of male citizens twenty-one years of age in such State.*<sup>141</sup>

Also, the selection from the *Legal Tender Cases* above wrongly conflates what Congress *has done* with what the Constitution allows Congress *to do*.<sup>142</sup> Kruger points out that an enumeration of persons in the Territories is not in the Constitution at all.<sup>143</sup> The Enumeration Clause states “Representatives and direct taxes shall be apportioned *among the several states* which may be *included within this union*, according to their respective numbers.”<sup>144</sup> Territories have never had representation in Congress.<sup>145</sup>

In summary, a few sentences of dicta concerning the census in a poorly written section of an opinion running over a hundred pages concerning the effect of the Legal Tender Acts is scarcely the kind of “unquestionable” case law upon which the Census Bureau can rely.<sup>146</sup>

Another early case the Census Bureau points to for its authority was *Moriarity*, decided by a federal district court<sup>147</sup> William Moriarity was a “special agent” helping to conduct the 1900 census.<sup>148</sup> Moriarity was indicted for filing a “fictitious return” concerning a manufacturing company in New York City.<sup>149</sup> Moriarity challenged the sufficiency of the indictment on five

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<sup>141</sup> U.S. CONST. amend. XIV, § 2 (emphasis added).

<sup>142</sup> Kruger, *supra* note 12, at 45.

<sup>143</sup> *Id.*

<sup>144</sup> U.S. CONST. art. I, § 2, cl. 3 (emphasis added).

<sup>145</sup> Current United States Territories are overseen by the Department of Interior's Office of Insular Affairs. For example, Guam and Samoa do not have representation in Congress. See generally DOI Office of Insular Affairs (OIA) - OIA History, <http://www.doi.gov/oia/Firstpginfo/oiahistory.htm> (last visited July 17, 2010).

<sup>146</sup> Census in the Constitution: Why Jefferson, Madison and the Founders Enshrined the Census in our Constitution, *supra* note 67.

<sup>147</sup> *Id.*; *United States v. Moriarity*, 106 F. 886 (C.C.S.D. N.Y. 1901).

<sup>148</sup> *Id.* at 887.

<sup>149</sup> *Id.* at 888-89.

grounds.<sup>150</sup> Four of the objections “alleged a technical defect in the indictment” and the court overruled them.<sup>151</sup> Moriarity's last objection had two prongs. First he argued:

that the Enumeration Clause is limited, and that collection of information thereunder without compensation was a taking of private property. [But the court found this defense inapplicable.] . . . [O]nly a person whose information [was] taken . . . not the census-taker to whom it [was] given, [had] standing to make a Fifth Amendment argument.<sup>152</sup>

This left only Moriarity's argument based on the Enumeration Clause. Kruger points out:

[T]he court should have found . . . that Moriarity had no standing to assert that claim, just as he had none for a Fifth Amendment claim. Only a respondent, not the census-taker, has standing to assert that . . . [the census] asked [] too many questions. The issue raised by the indictment was whether Moriarity had submitted a falsified Questionnaire, not whether the questions therein were overboard. Thus, the Enumeration Clause was improperly before the court.<sup>153</sup>

The *Moriarity* court opined that the Enumeration Clause:

does not prohibit the gathering of other statistics, if ‘necessary and proper,’ for the intelligent exercise of other powers enumerated in the constitution, and in such case there could be no objection to acquiring this information through the same machinery by which the population is enumerated, especially as such course would favor economy as well as the convenience of the government and the citizens.<sup>154</sup>

Kruger characterizes this as dictum and calls it an “economy-and-convenience argument” prompted by “mindless nationalism” and a misapplication of *McCullough v. Maryland*.<sup>155</sup> For Kruger, convenience is in the eye of the beholder: “[H]ow [is a] citizen[’s] convenience [] served by a long census rather than a short enumeration[?]”.<sup>156</sup> Furthermore, the Constitution, as “supreme Law of the Land” must be complied with, often at great cost.<sup>157</sup> How else can one explain the massive effort to desegregate the schools brought on by the decisions in *Brown v.*

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<sup>150</sup> *Id.* at 887-90.

<sup>151</sup> Kruger, *supra* note 12, at 50 n.235 (citing *Moriarity*, 106 F. at 889-90).

<sup>152</sup> *Id.* at 50 n.237 (citing *Moriarity*, 106 F. at 891).

<sup>153</sup> *Id.* at 50; *Id.* at 50 n.239 (citing *Moriarity*, 106 F. at 889).

<sup>154</sup> *Moriarity*, 106 F. at 891.

<sup>155</sup> Kruger, *supra* note 12, at 51.

<sup>156</sup> *Id.*

<sup>157</sup> U.S. CONST. art. VI, cl. 2.

*Board of Education of Topeka*<sup>158</sup> and *Swann v. Charlotte-Mecklenburg Board of Education*?<sup>159</sup> Complying with the Constitution can be very inconvenient to “government and the citizens.”<sup>160</sup> Consider the inconvenience to the city government, police force, and Jewish residents living in Skokie, Illinois to accommodate freedom of assembly for neo-Nazi's.<sup>161</sup> The reasoning in *Moriarity*, like the *Legal Tender Cases*, is not the kind of bedrock upon which to build a house, it is, rather, shifting sand.<sup>162</sup>

### III. ARGUMENT

When faced with prosecution under 13 U.S.C. § 221, the defendant could bring a wide array of challenges against the ACS. Some challenges have been tried before with varying degrees of success against the short or long form decennial census; other challenges hinge on factual issues; and some challenges have not yet been brought. It is the author's contention that a challenge based on the right of privacy has the most likelihood of success.

#### A. Previous Challenges

##### 1. Statutory Construction

In *United States v. Sarle*,<sup>163</sup> Oliver Sarle was indicted because he did not cooperate with the census enumerator<sup>164</sup>. He objected to such questions as:

the total number of acres [of his] farm; . . . the number of acres . . . tilled; . . . the number of acres . . . consisting of permanent meadow or pasture, cultivated forests, orchards, vineyards, nurseries, and market gardens; . . . the estimated value of all the productions of [the] farm for the year A.D. 1889; and . . . the total

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<sup>158</sup> 347 U.S. 483 (1954).

<sup>159</sup> 402 U.S. 1 (1971). *Swann* was later limited by *Milliken v. Bradley*, 418 U.S. 717 (1974).

<sup>160</sup> *United States v. Moriarity*, 106 F. 886, 891 (C.C.S.D. N.Y. 1901) (“ . . . government and the citizens . . . ”).

<sup>161</sup> *National Socialist Party of America v. Village of Skokie*, 432 U.S. 43 (1977).

<sup>162</sup> *Matthew* 7:21-29.

<sup>163</sup> 45 F. 191 (C.C.R.I. 1891).

<sup>164</sup> *See id.*

amount of milk produced on [the] farm in the year A.D. 1889.<sup>165</sup>

Sarle argued that the proper construction of the census statute was a narrow one and that while he was required to answer questions relating to persons or be subject to criminal penalty, questions regarding property were not covered by the statute so he could not be compelled to answer the questions relating to the farm.<sup>166</sup> The court disagreed and concluded that “[an] answer shall be made according to the best knowledge of the person interrogated” in accordance with the statute.<sup>167</sup> It seems to be a losing proposition to argue with the interpretation of the statute, given courts' deference toward Congress and the willingness of many courts to look beyond the plain meaning of the words of a statute.<sup>168</sup>

## 2. Violations of Equal Protection

When the federal government denies a person “equal protection of the laws,” the Fifth Amendment is implicated; the analysis of equal protection under the Fifth Amendment is the same as the analysis under the Fourteenth Amendment.<sup>169</sup> In a Fifth Amendment Equal Protection challenge, if the federal government creates a classification scheme based on race, strict scrutiny usually ought to apply since race is a suspect class.<sup>170</sup> Getting a court to apply strict scrutiny to a statute is usually a winning strategy for the party challenging the statute's

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<sup>165</sup> *Id.* at 191.

<sup>166</sup> *Id.* at 192.

<sup>167</sup> *Id.* at 192.

<sup>168</sup> *But see* *Republic of Hawaii v. Paris*, 10 Haw. 579 (1897) *available at* 1897 WL 1620, at \*2-3. In *Republic of Hawaii* (decided before Hawaii became a state) the defendant failed to answer a certain question pertaining to his wealth for a census conducted by a Board of Education. The court found that “neither the dictionaries nor the reported cases . . . [had] undertaken to define what particular enquiries [sic] [were] properly relative to or necessary . . . to make a complete census of the inhabitants.” The court explained that the questions relating to wealth “only express[ed] [the defendant's] relation to material things.” Therefore, the court quashed Paris' conviction and found that the questions were outside the scope of the statute.

<sup>169</sup> *See* *Adarand Constructors v. Peña*, 515 U.S. 200, 217 (1995).

<sup>170</sup> Ann K. Wooster, Annotation, *Equal Protection and Due Process Clause Challenges Based on Racial Discrimination—Supreme Court Cases*, § 2[a], 172 A.L.R. FED. 1 (2009) (“The Supreme Court has held that all laws that classify citizens on the basis of race are constitutionally suspect and must be strictly scrutinized under the equal protection analysis.”) (paraphrasing *Hunt v. Cromartie*, 526 U.S. 541 (1999)).

constitutionality because the burden is placed on the government to prove both a compelling interest for the statute and a narrowly tailored means of accomplishing it.

In *Morales v. Daly*,<sup>171</sup> the plaintiffs sought injunctive relief against their obligation to answer census questions.<sup>172</sup> The plaintiffs brought a number of constitutional challenges including an Equal Protection claim based on the theory that self-identification of ethnicity and race on census forms was subject to misuse as demonstrated in World War II when census data was used to identify those with Japanese ancestry so they could be hauled off to internment camps.<sup>173</sup> The plaintiffs also argued that any use of racial and ethnic data kept America from achieving a “color-blind” society.<sup>174</sup> As proof of their second proposition, the plaintiffs argued that racial data from past censuses had been used by state legislatures as a basis for redistricting.<sup>175</sup>

In deciding the race and ethnicity question, the court first explained in its footnotes that the misuse of census data in World War II was of no import in the present case:

[This] 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. Nevertheless, a solution to this problem is one properly addressed by Congress, not by a court dealing with a purely hypothetical situation.<sup>176</sup>

Furthermore, “the fact that the plaintiffs have demonstrated that in time of war census data was improperly used against persons of Japanese ancestry does not establish that it is likely that the

Census Bureau would improperly promulgate and attribute to plaintiffs their answers to the

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<sup>171</sup> 116 F. Supp. 2d 801 (S.D. Tex. 2000).

<sup>172</sup> *Id.* at 803.

<sup>173</sup> *Id.* at 811, 814; *Id.* at 811 n.5; *Id.* at 816 n.7. The plaintiffs also made arguments concerning alienage and illegitimacy, however the court chose to focus on race and ethnicity since that claim made up the bulk of the plaintiffs' arguments. *See id.* at 811-13.

<sup>174</sup> *Id.* at 813 (S.D. Tex. 2000); *See also* Cristina M. Rodriguez, *Symposium: Latinos and Latinas at the Epicenter of Contemporary Legal Discourses*, 83 *IND. L.J.* 1405 (2008) (contending that the court failed to apply strict scrutiny in *Morales* because the action of classifying took place when the individual self-identified his race so that the government was not the actor doing the classifying).

<sup>175</sup> *Morales*, 116 F. Supp. 2d at 813.

<sup>176</sup> *Id.* at 811 n.5.

Census 2000 questions.”<sup>177</sup> Lastly, “[p]laintiffs have not alleged or shown, however, that the data is likely to be used to discriminate against them specifically.”<sup>178</sup>

In dismissing the plaintiffs’ “color-blind” society argument, the court was less than sympathetic:

[Plaintiffs’] argument is that racial and ethnic self-classification that is mandated by the government itself can do nothing to propel this country toward a society in which race and ethnicity do not matter. Many would agree with their argument, but the issue here is not social, moral, or political. The issue is whether requiring a person to self-classify racially or ethnically, knowing to what use such classifications have been put in the past, can violate the due process implications of the Fifth Amendment. This court holds that such self-classifications do not. The issue raised by the plaintiffs is one properly addressed by Congress, not by the courts. The Bureau has stated for each of the challenged questions the statutory mandate, other reasons, or both why this demographic information is needed. The Constitution requires nothing more.<sup>179</sup>

A previous equal protection claim against the Census Bureau had also failed in the civil suit *Prieto v. Stans*.<sup>180</sup> In *Prieto* the plaintiffs brought a class action alleging “invidious discrimination” (an equal protection violation) because the 1970 census’ short form did not include a racial category for Mexican-Americans. Because Mexican-Americans would not be properly counted, the plaintiffs alleged there would be an “underestimation of the resources needed in Mexican-American communities” and “programs of education and financial aid aimed at the Mexican-American community [would] be underfunded.”<sup>181</sup> Although the court was “sympathetic” the court said that the Census bureau had taken other measures to ensure Mexican-Americans were adequately counted such as studying Spanish surnames and analyzing long-form data that included questions about country of origin.<sup>182</sup> Again, the plaintiffs lost.

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<sup>177</sup> *Id.* at 816 n.7.

<sup>178</sup> *Id.* at 811.

<sup>179</sup> *Id.* at 814-15.

<sup>180</sup> 321 F. Supp. 420 (N.D. Cal. 1970).

<sup>181</sup> *Id.* at 422.

<sup>182</sup> *Id.* at 422.

Following *Morales* and *Prieto*, as one commentator pointed out, “That the use of racial categories in the census would be held unconstitutional without regard to its intended or actual use is intuitively unlikely.”<sup>183</sup>

### 3. The Right Not To Speak

The only case asserting a First Amendment challenge to the census based on whether the individual was compelled to speak was also *Morales*.<sup>184</sup> It has long been recognized that freedom of speech under the First Amendment is a fundamental right and government infringement of such speech often involves heightened scrutiny.<sup>185</sup> Furthermore, courts have found that the First Amendment “right against compelled speech . . . occurs . . . in the context of actual compulsion, although that compulsion need not be a direct threat.”<sup>186</sup> The plaintiffs in *Morales* argued that:

[D]efendants' efforts to coerce them under threat of criminal prosecution into categorizing themselves by race. . . is an effort to coerce political speech . . . [T]here are few more politically charged issues in the United States today than those touching on race . . . and that entire government programs and policies are structured around questions of race . . . The plaintiffs argue that the defendants' own statements in published census material stress the importance of racial . . . information and the use of such information in political decisionmaking. The plaintiffs believe that there are “far too many divisions in this country based on race . . . and . . . these divisions are exacerbated by the government's persistence in categorizing people according to race. . . . [P]laintiffs do not wish to [play] the ‘race game’ by cooperating with and acquiescing with in what they see as the ‘Balkanization’ of America.”<sup>187</sup>

The plaintiffs based their argument on the famous “Live Free or Die” license plate case

*Wooley v. Maynard*.<sup>188</sup> The court was unsympathetic and likened this to a similar argument made

<sup>183</sup> Frank Goodman, *Principles in Practice: “Unstuck” or Sticky?*, 155 U. PA. L. REV. PENNUMBRA 26, 36 (2007).

<sup>184</sup> *Morales*, 116 F. Supp. 2d at 815-16.

<sup>185</sup> *Gitlow v. New York*, 268 U.S. 652, 665-67 (1925) (assuming that freedom of speech was a “fundamental personal right” and ought to apply to states via the due process clause of the Fourteenth Amendment).

<sup>186</sup> *Miller v. Mitchell*, 598 F.3d 139, 152 (3d Cir. 2010).

<sup>187</sup> *Morales*, 116 F. Supp. 2d at 815.

<sup>188</sup> 430 U.S. 705 (1977).

in a tax case where an attorney, who had not answered certain questions posed by the Internal Revenue Service (IRS), argued he did not have to answer the questions based on the First Amendment right not to speak.<sup>189</sup> In *Morales*, the court concluded that “[s]ince . . . only information [was] being sought, and plaintiffs [were] not being asked 'to disseminate publicly a message with which [they] disagree[d] . . .' the First Amendment protection against compelled speech [did] not prevent the government from requiring the plaintiffs to answer.”<sup>190</sup> Thus, the court found that *Wooley* and its progeny were distinguishable from *Morales*. A successful challenge based on *Wooley* requires that the person has transmitted the government's favored message to some third party.<sup>191</sup> Because the Census Bureau assures people that information transmitted to the Bureau will remain private, a challenge based on *Wooley* is destined to fail.

#### 4. Discriminatory (Selective) Prosecution

A prosecutor's discretion is not unlimited. Discriminatory prosecution (also called “selective prosecution”) violates the defendant's constitutional rights under the “equal protection component of the Due Process Clause of the Fifth Amendment” when a defendant is prosecuted based on “an unjustifiable standard such as race, religion, or other arbitrary classification.”<sup>192</sup>

In *United States v. Steele*,<sup>193</sup> the Ninth Circuit found that a census protestor had been singled out for prosecution because he was a prominent critic of the census. Only four people in Hawaii were prosecuted for failing to fill out a census even though the record revealed that there were at least six other Hawaiians who had failed to cooperate with the census that year.<sup>194</sup> The Regional

<sup>189</sup> *United States v. Sindel*, 53 F.3d 874 (8th Cir. 1995).

<sup>190</sup> *Morales*, 116 F. Supp. 2d at 816 (citing *Sindel*, 53 F.3d at 878).

<sup>191</sup> See generally *Miller*, 598 F.3d 139.

<sup>192</sup> *United States v. Armstrong*, 517 U.S. 456, 464 (1996) (quoting *Bolling v. Sharpe*, 347 U.S. 497, 500 (1954)); *Id.* at 464 (quoting *Oyler v. Boles*, 368 U.S. 448, 456 (1962)).

<sup>193</sup> 461 F.2d 1148 (9th Cir. 1972).

<sup>194</sup> *Id.* at 1150-51.

Technician for the census in Hawaii had described the four individuals who had been prosecuted – David Watamull, Donald Dickinson, William Danks and William Steele – as “hard core resisters.”<sup>195</sup> The Regional Technician “ordered his staff to compile special background dossiers on them, a discretionary procedure not followed with any other offenders.”<sup>196</sup> Furthermore the Regional Technician “testified that his organization had been very concerned about the census resistance movement.” William Steele “held a press conference, led a protest march, and distributed pamphlets entitled 'Big Brother is Snooping.’”<sup>197</sup> The court found the Regional Technician's testimony to be questionable:

[The census's] information-gathering system should have apprised the Regional Technician of the names of all who refused to complete the questionnaire. Yet [the Regional Technician] recollected only four total refusals, while the evidence establishe[d] a minimum of ten. That fact alone strongly suggests a questionable emphasis upon the census resisters. When one also considers that background reports were compiled only on persons who had publicly attacked the census, the inference of discriminatory selection becomes almost compelling. An enforcement procedure that focuses upon the vocal offender is inherently suspect, since it is vulnerable to the charge that those chosen for prosecution are being punished for their expression of ideas, a constitutionally protected right.

Therefore, the court overturned Steele's conviction under 13 U.S.C. § 221(a).<sup>198</sup> Another one of the four census resisters mentioned above – William Danks – also had his conviction overturned because he had been selectively prosecuted.<sup>199</sup>

## 5. Right Against Self-Incrimination

One of Steele's other arguments was that his refusal to cooperate with the census was because Steele thought “he may have been in violation of the Honolulu Zoning Code because more than

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<sup>195</sup> *Id.* at 1151.

<sup>196</sup> *Id.* at 1151.

<sup>197</sup> *Id.* at 1151.

<sup>198</sup> *Id.* at 1150, 1152.

<sup>199</sup> *See United States v. Danks*, 357 F. Supp. 193 (D. Haw. 1973).

five unrelated people lived in his single-family dwelling.”<sup>200</sup> Steele argued that “[a]nswering the questionnaire would have disclosed this fact, and might have subjected him to criminal prosecution by municipal authorities.”<sup>201</sup> The court never reached that issue and no other census case has dealt with this issue. The merits of this challenge are questionable.

The Fifth Amendment states: “No person shall. . . be compelled in any criminal case to be a witness against himself.”<sup>202</sup> This right can include statements made even before a criminal case has arisen such as with police custodial interrogations.<sup>203</sup> As one commentator has stated, “[t]he privilege clearly protects the citizen from compulsion to divulge information that might constitute, or be admissible in evidence toward, proof of a crime.”<sup>204</sup> Furthermore, “[t]he Supreme Court has consistently held that self-incrimination includes any disclosure that could constitute a “link in the chain of evidence necessary to prove guilt.” In *Hoffman v. United States*,<sup>205</sup> the Supreme Court expanded the links-in-the-chain test to cover investigatory leads.”<sup>206</sup>

One pitfall to asserting this privilege is that the facts must demonstrate a clear and unambiguous and unequivocal expression of a desire to invoke the privilege.<sup>207</sup> For a defendant prosecuted under 13 U.S.C. § 221, the facts will often rule out this defense. Also, the conditions

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<sup>200</sup> *Steele*, 461 F.2d at 1150, 1152.

<sup>201</sup> *Id.* at 1150, 1152.

<sup>202</sup> U.S. Const. amend. V.

<sup>203</sup> *Miranda v. Arizona*, 384 U.S. 436, 467 (1966) (“[T]here can be no doubt that the Fifth Amendment privilege is available outside of criminal court proceedings and serves to protect persons in all settings in which their freedom of action is curtailed in any significant way from being compelled to incriminate themselves.”).

<sup>204</sup> The privilege is as old as the Republic. See Richard E. Timbie, *Constitutionally Privileged False Statements*, 22 STAN. L. REV. 783 (1970) (citing *United States v. Burr*, In re Willie, 25 F. Cas. 38 (No. 14,692e) (C.C.D. Va. 1807)).

<sup>205</sup> 185 F.2d 617 (3d Cir. 1950) (aff’d *Hoffman v. United States*, 341 U.S. 479 (1951)).

<sup>206</sup> Richard E. Timbie, *Constitutionally Privileged False Statements*, 22 STAN. L. REV. 783 (1970) (citing *United States v. Hoffman*, 185 F.2d 617, 620 (3d Cir. 1950) aff’d *Hoffman v. United States*, 341 U.S. 479 (1951). See also *United States v. Hubbell*, 530 U.S. 27, 38 (2000) (“It is also well settled that compelled testimony communicating information that may lead to incriminating evidence is privileged even if the information itself is not inculpatory.”) (citation omitted).

<sup>207</sup> The Supreme Court recently reiterated the need for a clear and unambiguous and unequivocal expression of desire to invoke the privilege of remaining silent in *Thompkins v. Berghuis*, 130 S.Ct. 2250 (2010), 2010 WL 2160784. Following the Supreme Court’s lead in *Thompkins*, a lower federal court would likely come to a similar conclusion about the right against self incrimination.

under which the right can be invoked are limited. The Supreme Court made it clear in *Chavez v. Martinez*<sup>208</sup> that the privilege against self incrimination only applies after the initiation of legal proceedings in a criminal case and does not “encompass the entire criminal investigatory process.”<sup>209</sup> As Justice Thomas stated in the majority opinion, “[t]he text of the Self-Incrimination Clause simply cannot support the . . . view that the mere use of compulsive questioning, without more, violates the Constitution.”<sup>210</sup> One year later, the Supreme Court further explained that “[t]he Fifth Amendment . . . protects only against disclosures that the witness reasonably believes could be used in a criminal prosecution or could lead to other evidence that might be so used.”<sup>211</sup> Finally, the Supreme Court explained in *Pennsylvania v. Muniz*<sup>212</sup> that the privilege protects the disclosure of evidence of a “testimonial or communicative nature”<sup>213</sup> – meaning a communication that “explicitly or implicitly[] relate[s] a factual assertion or disclose[s] information.”<sup>214</sup>

Since 13 U.S.C. § 221(a) makes the age of the person filling out the census form an element of the crime, a challenge might be based on refusal to answer a question on the ACS relating to age.<sup>215</sup> The privilege might also arguably apply to other questions whose answers might tend to prove the element of age such as age and number of children, education status, employment history.

However, even a limited challenge based on questions related to age will likely fail. The

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<sup>208</sup> 538 U.S. 760 (2003).

<sup>209</sup> *Id.* at 766.

<sup>210</sup> *Id.* at 767.

<sup>211</sup> *Hibel v. Sixth Judicial Dist. Court*, 542 U.S. 177, 178-79 (2004).

<sup>212</sup> 496 U.S. 582 (1990).

<sup>213</sup> *Id.* at 589 (citing *Schmerber v. California*, 384 U.S. 757, 764 (1966)).

<sup>214</sup> *Id.* at 589 (citing *Doe v. United States*, 487 U.S. 201, 210 (1988)).

<sup>215</sup> 13 U.S.C.A. § 221(a) (West 2010) (“Whoever, being over eighteen years of age, refuses or willfully neglects . . . to answer, to the best of his knowledge, any of the questions on any schedule submitted to him in connection with any census or survey . . . shall be fined not more than \$100.”).

Supreme Court made it clear in *United States v. Hubbell*<sup>216</sup> that “the fact that incriminating evidence may be the byproduct of obedience to a regulatory requirement, such as filing an income tax return, maintaining required records, or reporting an accident, does not clothe such required conduct with the testimonial privilege.”<sup>217</sup> Even where the privilege has been held to apply to refusal to fill out an income tax form, there are numerous cases that indicate that the privilege against self-incrimination when filing a tax return can only be asserted on a question-by-question basis.<sup>218</sup> Therefore a challenge based on the privilege against self-incrimination is, at best, severely hamstrung and could not take on the Census' ACS in its entirety.

## 6. The Census as an Illegal Search

The Fourth Amendment states:

The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.<sup>219</sup>

In *United States v. Mitchell*,<sup>220</sup> the defendant did make a Fourth Amendment argument, but the court decided the case on other grounds.<sup>221</sup> Almost seventy years later, federal courts finally considered whether the Fourth Amendment shielded a defendant who was prosecuted for failure to fill out a census. William Rickenbacker decided to not answer the Household Questionnaire

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<sup>216</sup> 530 U.S. 27 (2000).

<sup>217</sup> *Id.* at 35 (footnotes omitted).

<sup>218</sup> *United States v. Moore*, 692 F.2d 95, 97 (10th Cir. 1979) (“[A] Fifth Amendment objection can be raised in response to a particular question on the return if the question calls for a privileged answer.”); *United States v. Schiff*, 612 F.2d 73, 83 (2d Cir. 1979) (“Only those who assert as to each particular question that the answer to that question would tend to incriminate them are protected [by the privilege].”); *United States v. Heise*, 709 F.2d 449, 450-51 (6th Cir. 1983) (implying that asserting the privilege against every question violated the spirit of the rule set out in *United States v. Sullivan* that every person must file an income tax return). *See also* *United States v. Sullivan*, 274 U.S. 259 (1927).

<sup>219</sup> U.S. CONST. amend. IV.

<sup>220</sup> 58 F. 993 (N.D. Ohio 1893).

<sup>221</sup> *Id.* at 998.

for the 1960 census. This Household Questionnaire was a “supplementary . . . questionnaire [sent] to every fourth household in the United States.”<sup>222</sup> Rickenbacker was indicted under 13 U.S.C. § 221 and his motion to dismiss the indictment was denied.<sup>223</sup> Rickenbacker argued that the “household questionnaire violated his right under the Fourth Amendment to be free from illegal searches and seizures.”<sup>224</sup> Rickenbacker apparently argued that because “public opinion research experts might regard the size of the household questionnaire ‘sample’ as larger than necessary to obtain an accurate result” the questionnaire must be either an “arbitrary” exercise of government power (thus violating the rational basis test) or else it violated his Fourth Amendment rights.<sup>225</sup> Without any Fourth Amendment analysis, the court in *United States v. Rickenbaker*<sup>226</sup> simply stated that “[t]he questions contained in the household questionnaire related to important federal concerns, such as housing, labor, and health, and were not unduly broad or sweeping in their scope.”<sup>227</sup>

In *Morales*, one plaintiff named Van Fleet – who had received a long form census much like today's ACS – made a Fourth Amendment argument “that the numerous and intrusive questions that he [was] required to answer . . . constitute[d] an unreasonable and illegal search.”<sup>228</sup> Van Fleet contended that *Katz v. United States*<sup>229</sup> ought to control the analysis and, therefore, “[t]he greater the privacy interest of the individual, the greater must be the government's justification for invading that privacy.”<sup>230</sup>

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<sup>222</sup> *United States v. Rickenbaker*, 309 F.2d 462, 463 (C.A.N.Y. 1962).

<sup>223</sup> *United States v. Rickenbaker*, 197 F. Supp. 924 (S.D.N.Y. 1961).

<sup>224</sup> *Rickenbaker*, 309 F.2d at 463.

<sup>225</sup> *Id.* at 463.

<sup>226</sup> 309 F.2d 462 (C.A.N.Y. 1962).

<sup>227</sup> *Id.* at 463; *See* 14 Am. Jur. 2d *Census* § 7 (relying on this language from *United States v. Rickenbaker* in holding that the Fourth Amendment is an inapplicable challenge to the census).

<sup>228</sup> *Morales v. Daley*, 116 F. Supp. 2d 801, 817 (S.D. Tex. 2000). *See supra* Part III.A.2 for a discussion of the Equal Protection claim from *Morales*.

<sup>229</sup> 389 U.S. 347 (1967).

<sup>230</sup> *Morales*, 116 F. Supp. 2d at 817 (citing *Katz*, 389 U.S. 347). In *Morales* the plaintiff also cited *United States v.*

*Katz* tells us that the Fourth Amendment protects against “unreasonable searches and seizures” whether there has been a physical intrusion or not.<sup>231</sup> In *Katz*, a suspect's phone conversations had been recorded by an “electronic listening recording device” placed on the top of a public phone booth.<sup>232</sup> The police did not get a warrant in advance. The police knew that *Katz* regularly used the phone booth for his bookie operation. Based on the electronic intercept, *Katz* was indicted and convicted of running a bookie operation.<sup>233</sup> In *Katz* the Court said that although the Fourth Amendment was not a “general constitutional ‘right to privacy,’” it does “protect[] individual privacy against certain kinds of governmental intrusion.”<sup>234</sup> The focus of the Fourth Amendment, the Court stated, was properly on the person and not the place. *Katz* did not “shed” his Fourth Amendment right to privacy just because he used a phone booth in which he could be seen and to which the public had regular access.<sup>235</sup> Therefore, the intrusion, without a warrant, violated *Katz*'s constitutional rights and the Court held that *Katz*'s conviction must be reversed.<sup>236</sup>

The concurrence to *Katz* written by Justice Harlan creates a bright line rule to follow when evaluating whether the Fourth Amendment's privacy protection ought to apply: “[T]here is a twofold requirement, first that a person have exhibited an actual (subjective) expectation of privacy and, second, that the expectation be one that society is prepared to recognize as ‘reasonable.’”<sup>237</sup> Justice Harlan's formulation is still used today, mostly concerning cases involving the internet. When a law enforcement agency flunks the “reasonable expectation of

Janik, 723 F.2d 537, 547-48 (7th Cir.1983), but this particular page range simply points out that *Katz* is still good law as of 1983.

<sup>231</sup> See generally *Katz*, 389 U.S. 347.

<sup>232</sup> *Id.* at 349.

<sup>233</sup> *Id.* at 348.

<sup>234</sup> *Id.* at 350.

<sup>235</sup> *Id.* at 352.

<sup>236</sup> *Id.* at 359.

<sup>237</sup> *Id.* at 361.

privacy test from *Katz v. United States*” a court applies a probable cause standard to judge law enforcement conduct.<sup>238</sup>

But the court in *Morales* sidestepped *Katz* entirely. Furthermore, instead of starting with the proposition that a warrantless search was *per se* unreasonable as its starting point, the *Morales* court based its analysis on *Wyoming v. Houghton*<sup>239</sup> – a Supreme Court decision rendered a year earlier.<sup>240</sup> Under the two-step analysis articulated in *Wyoming*, the *Morales* court first inquired whether the Census Bureau's action “was regarded as an unlawful search or seizure under the common law when the Amendment was framed.”<sup>241</sup> The *Morales* court decided that the answer to the first question was “no.” The *Morales* court reasoned that since the census had asked questions going beyond a simple enumeration starting with the census in 1790, and since the census had begun asking more intrusive questions – like the ones Van Fleet was challenging – starting with the census in 1830, that such question would not have been “regarded as an unlawful search or seizure under the common law when [the Fourth Amendment] was framed.”<sup>242</sup> This is a rather odd conclusion since the Bill of Rights was introduced by Madison in 1789, there had never been a census of the States before 1790, and there was, therefore, no “common law” on which the court could reflect.

The *Morales* court then moved to the second part of the *Wyoming* inquiry and asked “to what degree . . . Van Fleet's privacy [was] intruded upon, and to what degree . . . the information [was] needed for the promotion of legitimate governmental interests[.]”<sup>243</sup> In *Morales* the court

relied on the Census Bureau's assertion that each of the questions served a legitimate government

<sup>238</sup> Paul Ohm, *Probably Probable Cause: The Diminishing Importance of Justification Standards*, 94 MINN. L. REV. 1514, 1558 (2010) (emphasis added).

<sup>239</sup> 526 U.S. 295 (1999).

<sup>240</sup> *Id.* at 299-300.

<sup>241</sup> *Morales v. Daley*, 116 F. Supp. 2d 801, 818 (S.D. Tex. 2000).

<sup>242</sup> *Id.* at 818 (S.D. Tex. 2000); *Wyoming*, 526 U.S. at 299-300.

<sup>243</sup> *Morales*, 116 F. Supp. 2d at 819; *Cf. Wyoming*, 526 U.S. at 299-300.

interest. For example, the two questions asked on the long form census about disability were “[u]sed [by the government] to distribute funds and develop programs for people with disabilities and the elderly under the Rehabilitation Act” and were “[n]eeded under the Americans with Disabilities Act to ensure that comparable public transportation services [were] available for all segments of the population.”<sup>244</sup> The court cited *Moriarity* and *Rickenbacker* for the proposition that a “modern government” must be able to “gather reliable statistical data reasonably related to governmental purposes and functions. . . to legislate intelligently and effectively.”<sup>245</sup>

The *Morales* court examined the intrusion into Van Fleet's privacy and found that the Census Bureau's statutory confidentiality requirement – discussed as an illusory guarantee *infra*<sup>246</sup> – reduced whatever non-physical intrusion the government had made in putting such questions to Van Fleet.<sup>247</sup> Finally, it cited *Wyman v. James*,<sup>248</sup> “which held that a welfare caseworker's home visit was no more an unreasonable intrusion within the Fourth Amendment's ban than the 'census taker's questions.’”<sup>249</sup> *Wyman*, incidentally, arrived at it's conclusion about the welfare careworker's home visit based on a cursory reference to *Rickenbacker*. The court in another census case – *United States v. Little*<sup>250</sup> discussed *infra*<sup>251</sup> – also based part of its reasoning on *Wyman*. As commentator Stephen Kruger has pointed out, “[a]ssuming somehow that an individual who receives governmental money has less privacy in his residence than an employed individual, there is no comparison between a voluntary signing up for welfare with strings attached and an involuntary imposition on the personal privacy of individuals in the general

<sup>244</sup> *Morales*, 116 F. Supp. 2d at 819 (citing “Exhibit I to Defendants' Brief, 'Uses for Questions on Census 2000' at 58.”).

<sup>245</sup> *Id.* at 819-20.

<sup>246</sup> See *infra* Part III.D.3.

<sup>247</sup> *Morales*, 116 F. Supp. 2d at 819.

<sup>248</sup> 400 U.S. 309, 321 (1971).

<sup>249</sup> *Morales*, 116 F. Supp. 2d at 819 (citing *Wyman*, 400 U.S. at 321).

<sup>250</sup> 317 F. Supp. 1308, 1309 (D. Del. 1970).

<sup>251</sup> See *infra* Part III.B.

population.”<sup>252</sup> Kruger is not the first commentator to make this observation.<sup>253</sup>

Thus, the *Morales* court's Fourth Amendment analysis of the census as a search is deeply flawed and *Rickenbacker's* Fourth Amendment analysis is entirely absent. For the practitioner whose client is charged under 13 U.S.C. § 221, however, the practical reality is that there are two cases – *Morales* and *Rickenbacker* – standing for the proposition that the census, even the long form census, does not violate the Fourth Amendment. The Census Bureau is effectively the king of this mountain. Even if the defendant won under a Fourth Amendment theory and the exclusionary rule was able to strip the government of the proof needed to satisfy the requirements to convict the defendant under 13 U.S.C. § 221, the challenge would only apply to a particular defendant and leave unchecked the continuing evil of the ACS.

### *B. Excessive Fines*

Congress has the power to impose fines for criminal offenses, however this power is limited by the Eighth Amendment which states: “Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted.”<sup>254</sup> An “excessive fine” can mean a criminal fine, civil fine, civil forfeiture, or even a tax.<sup>255</sup> To bring an excessive fines challenge,

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<sup>252</sup> Kruger, *supra* note 12, at 54. Kruger also makes an interesting argument that the head of the household (the person filling out the questionnaire) becomes, during the time he/she is filling it out, an agent of the government as to information conveyed about others in the house without their consent. However, it is hard to see how such a challenge could be asserted against the Census Bureau in practice. The person filling out the form would not have standing to make a Fourth Amendment challenge on behalf of others. The other persons in the household would not be on trial under 13 U.S.C. § 221 and so their challenge against the Census Bureau, contending that the head of the household was a government agent who had violated their right to privacy under the Fourth Amendment, would need to find some way to overcome the “particularized injury” hurdle as well as apparent consent doctrine.

<sup>253</sup> See Benjamin S. DuVal, Jr., *The Occasions of Secrecy*, 47 U. PITT. L. REV. 579, 652-653 (1986) (comparing information businesses voluntarily turn over to government with disclosures compelled by the Census Bureau and Internal Revenue Service).

<sup>254</sup> U.S. CONST. amend. VIII. See generally 21A Am. Jur. 2d *Criminal Law* § 875 (discussing the Excessive Fines Clause); 21A Am. Jur. 2d *Criminal Law* § 876 D (discussing the Excessive Fines clause).

<sup>255</sup> This is a paraphrase of a Westlaw headnote found in *Dep't of Revenue v. Kurth Ranch*, 511 U.S. 767, 767 (1994). As an additional note, *Taylor v. Cisneros* pointed out that a legislature's categorization of a fine as civil or criminal cannot be taken at face value. See *Taylor v. Cisneros*, 913 F. Supp. 314 (D.N.J. 1995).

the defendant must first be convicted of failure to fill out the census and ordered to pay the fine, otherwise there is no requisite standing.<sup>256</sup> Thus, asserting this challenge depends on the posture of the defendant's case.

*United States v. Bajakajian*,<sup>257</sup> a leading case on the Excessive Fines clause, indicates that there is no bright line rule on what constitutes an excessive fine.<sup>258</sup> In *Bajakajian*, the defendant failed to report that he was transporting \$357,144 out of the country. This violated a federal statute and the punishment for the violation of this statute was to forfeit the property involved. The Supreme Court stated:

The harm that respondent caused was also minimal. Failure to report his currency affected only one party, the Government, and in a relatively minor way. There was no fraud on the United States, and respondent caused no loss to the public fisc. [sic] Had his crime gone undetected, the Government would have been deprived only of the information. . . .<sup>259</sup>

The Court held that the forfeiture of \$357,144 was excessive.<sup>260</sup>

In the case of failure to comply with the ACS, 13 U.S.C. § 221(a) sets the fine at \$100.<sup>261</sup> This is hardly an “excessive” sum when compared to the cost of following up on a non-response to the census. According to the Census Bureau, “[i]t costs taxpayers \$57 per person to send a census taker door-to-door to collect the . . . information” if the short form census is not mailed back.<sup>262</sup>

<sup>256</sup> *Commonwealth v. Mellon*, 262 U.S. 447, 488 (1923) (“The party who invokes the power must be able to show, not only that the statute is invalid, but that he has sustained or is immediately in danger of sustaining some direct injury as the result of its enforcement, and not merely that he suffers in some indefinite way in common with people generally.”); *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 555 (1992) (“[The party] invoking federal jurisdiction . . . bear[s] the burden of showing standing by establishing, *inter alia*, that they have suffered an injury in fact, i.e., a concrete and particularized, actual or imminent invasion of a legally protected interest.”).

<sup>257</sup> 524 U.S. 321 (1998).

<sup>258</sup> *See id.*

<sup>259</sup> *Id.* at 323.

<sup>260</sup> The district court had also ordered a \$15,000 forfeiture for the same offense, however, this issue was not presented on appeal. *Id.* at 339 n.11.

<sup>261</sup> Under 13 U.S.C. § 222, fines of \$1,000 are also available if an individual gives suggestions to cause a false enumeration. A government employee who falsifies a census return can be fined \$500 under 13 U.S.C. § 221.

<sup>262</sup> *The Whole Story: Real People, Real Questions, Real Answers*,

There are, however, two possible ways that a census fine could be excessive. In the first scenario, a defendant is not fined \$100 under 13 U.S.C. § 221(a) but rather fined \$5,000. The Census Bureau contends that Title 18 “in effect” amends Title 13.<sup>263</sup> 18 U.S.C. § 3571(b) provides that “an individual who has been found guilty of an offense may be fined not more than the greatest of . . . (1) the amount specified in the law setting forth the offense . . . [or] (7) for an infraction, not more than \$5,000.”<sup>264</sup> *United States v. Pyatt*<sup>265</sup> seems to be the only case on point applying this statute.<sup>266</sup> In *Pyatt*, an Army Major forged a Pentagon parking permit. Upon conviction, instead of being fined the \$50 prescribed by the statute, a magistrate used 18 U.S.C. § 3571(b)(7) to impose a \$1000 fine.<sup>267</sup> The federal district court held that the magistrate had the discretion to do this because 41 CFR 101-20.315, the relevant statutory framework, said that “nothing in these rules and regulations shall be construed to abrogate any other Federal laws.”<sup>268</sup> Regarding the ACS, however, there is no similar section in Title 13 making reference to “other Federal laws.” In fact, almost every fine imposed in Title 13, including 13 U.S.C. § 221(a), uses the phrase “shall be fined not more than” before the fine to be imposed.<sup>269</sup> The Congressional intent seems to be to limit fines to those explicitly listed in Title 13. Regardless, a \$5,000 fine for causing the government \$57 worth of follow-up work is arguably “grossly disproportionate” which is the yardstick for finding a violation of the Eighth Amendment.<sup>270</sup>

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<http://2010.census.gov/2010census/about/whole.php> (last visited June 29, 2010) The ACS, undoubtedly, has a higher follow up cost because it asks more questions.

<sup>263</sup> About the ACS: What is the Survey?, *supra* note 8.

<sup>264</sup> 18 U.S.C.A. § 3571(b) ss (1) – (7) (West 2010).

<sup>265</sup> 725 F. Supp. 885 (E.D. Va. 1989).

<sup>266</sup> *See id.*

<sup>267</sup> *Id.* at 886-887.

<sup>268</sup> *Id.* at 886 (citing 41 CFR 101-20.315).

<sup>269</sup> The glaring exception to this parallelism is in 13 U.S.C. § 305 which was added in 2002 following the September 11, 2001 attack on the United States. Even this section of Title 13, however, makes it clear that fines are limited to those expressly outlined in § 305.

<sup>270</sup> *United States v. Bajakajian*, 524 U.S. 321, 322 (1998).

In the second scenario, a defendant is convicted and the court imposes the \$100 fine for each answer the defendant refused to provide on the ACS. In *United States v. Little*, the district court, in analyzing 13 U.S.C. § 221(a), mused that “[A] refusal or wilful neglect to answer any question on any [census form] submitted would constitute a violation of [13 U.S.C. § 221(a)]. Presumably there could be a separate violation for each unanswered question.”<sup>271</sup> Although this was not central to the holding in *Little*, several secondary sources cite this phrase as being authoritative.<sup>272</sup> As Kruger points out:

The uncertainty of the *Little* court about the reading of the statute was of its own making. It is clear from an unstrained reading of section 221(a) that “any” is inclusive, and refers to all unanswered questions in a Questionnaire. If there is doubt whether “any” is individual or aggregate, the “ambiguity” is necessarily read in favor of the defendant.<sup>273</sup>

Should a court conclude that the proper sentence for failure to complete the ACS is \$100 for each unanswered blank, the fine could be thousands of dollars. In this scenario, an argument could be made that the fine is “grossly disproportionate” to the offense to the public good and thus violative of the Excessive Fines clause.

### C. *A Taking Without Just Compensation*

A person cannot be deprived of “life, liberty, or property” without “due process of law.”<sup>274</sup> When the federal government acts to deprive a person of property, the Fifth Amendment is implicated.<sup>275</sup> The Fifth Amendment says that a person's “private property” shall not “be taken for public use, without just compensation.”<sup>276</sup> While imposing a criminal fine does take away a

<sup>271</sup> *United States v. Little*, 317 F. Supp. 1308, 1309 (D. Del. 1970).

<sup>272</sup> 14 Am. Jur. 2d *Census* § 15 (2010) (“Under this statute, a refusal or willful neglect to answer any question on any schedule submitted would constitute a violation and there could be a separate violation for each unanswered question. .”); 14 C.J.S. *Census* § 10 (2010) (“There can be a separate violation for each unanswered question.”).

<sup>273</sup> Kruger, *supra* note 12, at 56.

<sup>274</sup> U.S. CONST. amend. V.

<sup>275</sup> *Morales v. Daly*, 116 F. Supp. 2d 801, 803 n.1 (S.D. Tex. 2000).

<sup>276</sup> U.S. CONST. amend. V.

person's private property, that is not the kind of challenge envisioned by the Fifth Amendment.

The defendant in *Mitchell* won his case because Congress had failed to specify the punishment for non-compliance with the census.<sup>277</sup> However, Mitchell had argued that, by requiring labor to fill out a census return, the census effectuated a taking.<sup>278</sup> The court analyzed this argument even though the case was ultimately decided on other grounds. Jethro Mitchell, the Treasurer of Mitchell & Rowland Lumber Company, refused to answer a number of census questions concerning the operation and assets of his corporation and was indicted.<sup>279</sup> In construing the provisions of the census statutes, the court decided that Congress intended for corporate officers to answer questions like those posed to Mitchell.<sup>280</sup> Therefore, the court *was not* sympathetic to Mitchell's argument as it related to “officers of railroads, telegraph, and insurance companies, corporations of a public character.”<sup>281</sup> The court explained, “As to such corporations, the public good requires that wholesome and strict supervision should be exercised, and all the information needed as the basis for such regulation and control should be produced when required.”<sup>282</sup>

However, the court, in dicta, *was* sympathetic to the plight of individuals filling out an intrusive census:

The zeal with which such information is sometimes solicited to maintain favorite theories of public officials, or to afford the basis for discussing economical questions, often leads to excesses, and imposes upon the citizen duties for which no just compensation is afforded, either in money, or in his proportion of the reward of the good results to follow to the public. . . . [W]hen such information is required as the basis for proper legislation or the just enforcement of the public laws, the power to compel its disclosure may exist, and, if unusual expense attends its preparation, proper remuneration to the citizen can be made[.]<sup>283</sup>

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<sup>277</sup> United States v. Mitchell, 58 F. 993, 997, 999 (N.D. Ohio 1893).

<sup>278</sup> *Id.* at 999-1000.

<sup>279</sup> *Id.* at 994.

<sup>280</sup> *Id.* at 996.

<sup>281</sup> *Id.* at 999-1000.

<sup>282</sup> *Id.* at 999-1000.

<sup>283</sup> *Id.* at 1000.

The question of whether the census, by compelling an individual's labor, effectuates a taking is still open. The ACS form states that it “take[s] 38 minutes to complete, including the time for reviewing the instructions and answers.”<sup>284</sup> Applying the *Mitchell* dicta to the ACS, it seems, at first glance, that a takings argument might be mounted. Yet, doctors and lawyers have made takings claims based on the idea that this or that regulation has deprived them of their labor without compensation.<sup>285</sup> Those claims usually fail.

There is another reason why the *Mitchell* dicta is no help to a defendant challenging prosecution under 13 U.S.C. § 221: ripeness. A takings challenge does not arise until after a person parts with the property and is denied just compensation after exhausting available administrative remedies. A person who parts with the property, obviously, would not be prosecuted under 13 U.S.C. § 221 so long as the return was truthful. The same result occurs whether the theory is that the taking was the transcribed information on the ACS form itself, or the labor used in assembling the answers.

In *Ruckelshaus v. Monsanto Co.*,<sup>286</sup> Monsanto argued that requiring disclosure of “health, safety, and environmental data” to the Environmental Protection Agency (EPA) was a taking of intangible personal property for public use without just compensation.<sup>287</sup> If Monsanto refused to disclose the data, it could not register its pesticide for sale within the United States.<sup>288</sup> Monsanto argued that the withholding of a government benefit (registration of their product) until data had been disclosed without compensation was effectively “placing an unconstitutional condition on

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<sup>284</sup> The American Community Survey, *supra* note 86.

<sup>285</sup> *See, e.g.*, *State v. Rush*, 217 A.2d 441 (N.J. 1966) (holding that an attorney appointed to represent indigent defendant without compensation was not a taking of the attorney's labor for public use without just compensation); *Garelick v. Sullivan*, 987 F.2d 913 (2d Cir. 1993) (finding that a statute fixing the amount doctors could charge Medicare patients for services was not a taking).

<sup>286</sup> 467 U.S. 986 (1984).

<sup>287</sup> *Id.* at 1000-1001.

<sup>288</sup> *Id.* at 1007 n.11. The pesticides could still be sold overseas.

the right to a valuable Government benefit.”<sup>289</sup> The Supreme Court first decided that “Monsanto ha[d] an interest in its . . . data cognizable as a trade-secret property right . . . that [was] protected by the Taking Clause of the Fifth Amendment.”<sup>290</sup> The Court explained that it had “found other kinds of intangible interests to be property for purposes of the Fifth Amendment's Taking Clause” such as a “materialman's lien . . . real estate lien . . . [and] valid contracts.”<sup>291</sup> The Court explained that “[g]enerally, an individual claiming that the United States has taken his property can seek just compensation under the Tucker Act, 28 U.S.C. § 1491.”<sup>292</sup> The Tucker Act created a Court of Claims with jurisdiction to hear certain claims founded on the Constitution.<sup>293</sup> Therefore the Court decided that Monsanto had to file suit in the Claims Court to be compensated for any taking.<sup>294</sup> In summary, a takings challenge cannot be a defense to prosecution under 13 U.S.C. § 221. Even if there is a right to bring a separate civil action against the Census Bureau after disclosing the data on the ACS, the takings claim would not be ripe “until the government entity charged with implementing the regulations [] reached a final decision regarding the application of the regulations to the property at issue.”<sup>295</sup>

#### *D. The Census as a Violation of the Right to Privacy*

##### 1. Origin of the Right to Privacy

By process of elimination it seems that an argument grounded on the right to privacy has a

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<sup>289</sup> *Id.* at 1007.

<sup>290</sup> *Id.* at 1003-1004..

<sup>291</sup> *See id.* at 1003 (referring to other Supreme Court decisions:

*See, e.g.,* *Armstrong v. United States*, 364 U.S. 40, 44, 46 . . . (1960) (materialman's lien provided for under Maine law protected by Taking Clause); *Louisville Joint Stock Land Bank v. Radford*, 295 U.S. 555, 596-602 . . . (1935) (real estate lien protected); *Lynch v. United States*, 292 U.S. 571 . . . (1934) (valid contracts are property within meaning of the Taking Clause)).

<sup>292</sup> *Id.* at 1016-17.

<sup>293</sup> *Id.* at 1016-17.

<sup>294</sup> *Id.* at 1020.

<sup>295</sup> *Williamson County Regional Planning Com'n v. Hamilton Bank of Johnson City*, 473 U.S. 172, 186 (1985).

decent chance of success and does not turn on a particular procedural posture or factual situation. Indeed, the *Morales* court pointed out that “[t]o argue beyond search and seizure . . . plaintiffs would need to resort to the privacy rights theories of *Griswold v. Connecticut* . . . and *Roe v. Wade*<sup>296</sup> . . . to find . . . protection from coerced revelations on a census form of one's medical, mental, birth, and financial status.<sup>297</sup> The plaintiffs in *Morales* never made those arguments but future defendants can, and should.<sup>298</sup>

The genesis of the right to privacy is attributed to a nineteenth century Harvard Law Review article co-authored by then law student and future Supreme Court Justice Louis Brandeis. Brandeis pointed out, “legal rights [have] broadened; and now the right to life has come to mean the right to enjoy life, — the right to be let alone.”<sup>299</sup> Brandeis found roots for the right to privacy scattered among the legal decisions in tort, specifically libel and slander; in “breach of an implied contract or of a trust or confidence;” and, in the “law of trade secrets”<sup>300</sup> He also found roots in “the common-law right to intellectual and artistic property.”<sup>301</sup> However, Brandeis pointed out that intellectual and property law was an insufficient remedy. What Brandeis argued for was the recognition of a new right – the right to privacy – that previous decisions in America and England had hinted at.<sup>302</sup> Brandeis illustrated the need for the right through the use of one telling hypothetical:

A man records in a letter to his son . . . that he did not dine with his wife on a certain day. No one into whose hands those papers fall could publish them to the world, even if possession of the documents had been obtained rightfully; and the

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<sup>296</sup> 410 U.S. 113 (1973).

<sup>297</sup> *Morales v. Daley*, 116 F. Supp. 2d 801, 818 n.9 (S.D. Tex. 2000) (emphasis added).

<sup>298</sup> *Id.*

<sup>299</sup> Warren & Brandeis, *supra* note 15, at 193, 195 (quoting “Cooley on Torts, 2d ed., p. 29.”).

<sup>300</sup> *Id.* at 197, 207, 212.

<sup>301</sup> *Id.* at 198.

<sup>302</sup> The article, however, aimed at only producing some sort of remedy in tort that individuals could use against the publication of gossip or images which was a rampant problem due to newspapers' practices at the close of the nineteenth century.

prohibition would not be confined to the publication of a copy of the letter itself . . . ; the restraint extends also to a publication of the contents. What is the thing which is protected? Surely, not the intellectual act of recording the fact that the husband did not dine with his wife, but that fact itself. It is not the intellectual product, but the [event's] . . . occurrence [that is protected].<sup>303</sup>

Brandeis explained that the rule ought not be limited to “thoughts, sentiments, and emotions, expressed through the medium of writing.” He felt the rule ought to be expressed more generally as the “right of the individual to be let alone” and that the unauthorized publication of writings was merely a specific instance of the general rule.<sup>304</sup>

The right to privacy gained traction after Brandeis was elevated to the Supreme Court and penned a dissent in *Olmstead*.<sup>305</sup> Defendant Olmstead was the head of very successful bootlegging operation during prohibition that employed at least fifty people, “two sea-going vessels” and other smaller vessels, used “several offices” in Seattle and probably brought in annual revenue in excess of \$2 million dollars.<sup>306</sup> Federal prohibition officers tapped the phone lines of four of the conspirators and the main office in Seattle.<sup>307</sup> Many of the conspirators were rounded up and convicted of “conspiracy to violate the National Prohibition Act.”<sup>308</sup> The majority opinion upheld their convictions despite that the federal officers both violated state law in conducting the wiretap.<sup>309</sup>

Dissenting in *Olmstead*, Justice Brandeis argued that the Fourth and Fifth Amendments carved out what is now sometimes called a “zone of privacy.” Brandeis wrote that the Fourth and Fifth Amendments protect against more than “force and violence” used by the government to

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<sup>303</sup> Warren & Brandeis, *supra* note 15, at 201.

<sup>304</sup> *Id.* at 205.

<sup>305</sup> *Olmstead v. United States*, 277 U.S. 438 (1928) (*overruled by Katz v. United States*, 389 U.S. 347 (1967)).

<sup>306</sup> *Id.* at 456.

<sup>307</sup> *Id.* at 457.

<sup>308</sup> *Id.* at 455.

<sup>309</sup> *Id.* at 483 n.15 (1928) (Brandeis, J., dissenting) (“The Prohibition Unit of the Treasury disclaims [wire tapping] and the Department of Justice has frowned on it.”).

compel “testimony” or production of “papers and other articles incident to . . . private life.”<sup>310</sup>

Brandeis pointed to earlier cases in which this right of individual privacy had been implicitly acknowledged such as *In re Pacific Ry. Commission*<sup>311</sup> in which the court had said:

Of all the rights of the citizen, few are of greater importance or more essential to his peace and happiness than the right of personal security, and that involves, not merely protection of his person from assault, but exemption of his private affairs, books, and papers from the inspection and scrutiny of others. Without the enjoyment of this right, all other rights would lose half their value.<sup>312</sup>

Brandeis argued that regardless of the text of the Fourth and Fifth Amendments, “the protection guaranteed by the Amendments is much broader in scope.”<sup>313</sup> Brandeis explained that he would have sustained the defendants' objections to the use of wiretapping evidence. Most importantly, Justice Brandeis emphasized that “it [was] . . . immaterial that the intrusion was in aid of law enforcement.”<sup>314</sup> He explained, quiet presciently, that:

Experience should teach us to be most on our guard to protect liberty when the government's purposes are beneficent. Men born to freedom are naturally alert to repel invasion of their liberty by evil-minded rulers. *The greatest dangers to liberty lurk in insidious encroachment by men of zeal, well-meaning but without understanding.*<sup>315</sup>

Justice Brandeis' dissent in *Olmstead* was quoted with approval in Justice Goldberg's concurring opinion in *Griswold*.<sup>316</sup> Justice Goldberg stated, “the right of privacy is a fundamental personal right, emanating ‘from the totality of the constitutional scheme under which we live.’”<sup>317</sup> Furthermore, Justice Goldberg made it clear that he felt the Ninth Amendment was most important in protecting the fundamental right to privacy. However, the

<sup>310</sup> *Id.* at 473 (Brandeis, J., dissenting).

<sup>311</sup> 32 F. 241, 250 (C.C. Cal. 1887).

<sup>312</sup> *Id.* at 250.

<sup>313</sup> *Olmstead*, 277 U.S. at 478 (Brandeis, J., dissenting).

<sup>314</sup> *Id.* at 479 (Brandeis, J., dissenting).

<sup>315</sup> *Id.* at 479 (Brandeis, J., dissenting) (emphasis added).

<sup>316</sup> *Griswold v. Connecticut*, 381 U.S. 479, 486 (1965).

<sup>317</sup> *Id.* at 494.

majority opinion did not go quite so far.

In *Griswold*, a married couple had received and used contraceptives from the Planned Parenthood League of Connecticut in violation of a Connecticut statute which forbade the use of contraceptives. The statute also forbade anyone from abetting the use of contraceptives. The Executive Director of the Planned Parenthood League – *Griswold* – and one of the physicians was arrested, tried, convicted, and fined \$1000 each. They brought suit challenging the accessory statute.<sup>318</sup> They also asserted that they had standing to challenge the “use” statute on behalf of the married couple and the Supreme Court agreed.<sup>319</sup> The Court found that the Connecticut laws unconstitutional. In its analysis, the majority opinion first explained that a previous line of “freedom of association” cases had already demonstrated that “the First Amendment has a penumbra where privacy is protected from governmental intrusion.”<sup>320</sup> Similarly, other “specific guarantees in the Bill of Rights have penumbras, formed by emanations from those guarantees that help give them life and substance.”<sup>321</sup> The Court found that “zones” of privacy were to be found hiding in the shadows of the specific guarantees of the First Amendment, Third Amendment, Fourth Amendment, Fifth Amendment, and Ninth Amendment.<sup>322</sup> The privacy rights implicated in *Griswold* were – to the majority – another link in a chain of “privacy and repose” cases the Court had already decided.<sup>323</sup> Because the Court found that marriage was “a relationship lying within the zone of privacy created by several fundamental constitutional guarantees” and the Connecticut law swept too broadly and invaded that “area of protected freedoms” the law was unconstitutional.<sup>324</sup> Therefore the convictions

<sup>318</sup> *Id.* at 480.

<sup>319</sup> *Id.* at 481.

<sup>320</sup> *Id.* at 483.

<sup>321</sup> *Id.* at 484.

<sup>322</sup> *Id.* at 484.

<sup>323</sup> *Id.* at 485.

<sup>324</sup> *Id.* at 485.

were overturned.

In the cases that followed *Griswold*, it became apparent that although the right to privacy was being used to craft protection for certain unenumerated rights, the right to privacy itself would never be recognized as a fundamental right afforded heightened scrutiny due to its nature as an agglomeration of penumbral rights. Eventually the Court settled on a right to privacy balancing test where the degree of intrusion into an individual's privacy would be balanced against the government interest in making that intrusion. If the individual won the balancing test, a new unenumerated right would spring into being and that unenumerated right would be protected by future courts.<sup>325</sup>

The facts of *Row v. Wade* are well known as are the results. The “thrust” of the argument against the “Texas statutes is that they improperly invade[d] a right [for a] pregnant woman[] to choose to terminate her pregnancy” and the argument was that either the right was a to be found within “the concept of personal ‘liberty’ embodied in the Fourteenth Amendment's Due Process Clause; or in personal marital, familial, and sexual privacy said to be protected by the Bill of Rights or its penumbras.”<sup>326</sup> The Supreme Court then spent some time discussing the “history and tradition” of abortion going back to the Persian Empire.<sup>327</sup> The Court then related the reasons why abortion had come to be criminalized in the states in the nineteenth century. Of those reasons, the Court explained that the present case was concerned with whether the state had

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<sup>325</sup> This is a bit of an oversimplification of the substantive due process process analysis that applies in the case of the right of privacy. As explained in *Bowers v. Hardwick*, the dissent in *Lawrence v. Texas*, and in the recent *McDonald v. Chicago* decision, for the court to find a new fundamental right, that right must meet two tests. First it must be “implicit in the concept of ordered liberty.” Second, the right must be “deeply rooted in this Nation's history and tradition.” *Bowers v. Hardwick*, 478 U.S. 186, 192 (1986) (overruled in *Lawrence v. Texas*, 539 U.S. 558 (2003)); *McDonald v. Chicago*, 561 U.S. \_\_\_\_ (2010) (slip opinion at 20); *McDonald v. Chicago*, 561 U.S. \_\_\_\_ (2010) (slip opinion at 16 n.11) (citing *Washington v. Glucksberg*, 521 U. S. 702, 721 (1997)).

<sup>326</sup> *Roe v. Wade*, 410 U.S. 113, 129 (1973).

<sup>327</sup> *See id.* 129-148.

an interest in protecting the life of the fetus, the mother, or both.<sup>328</sup> The Court then examined the right to privacy and explained that:

[This] Court has recognized that a right of personal privacy, or a guarantee of certain areas or zones of privacy, does exist under the Constitution. In varying contexts, the Court or individual Justices have, indeed, found at least the roots of that right in the First Amendment, in the Fourth and Fifth Amendments, in the penumbras of the Bill of Rights, in the Ninth Amendment, or in the concept of liberty guaranteed by the first section of the Fourteenth Amendment. . . . [D]ecisions make it clear that only personal rights that can be deemed ‘fundamental’ or ‘implicit in the concept of ordered liberty,’ are included in this guarantee of personal privacy. They also make it clear that the right has some extension to activities relating to marriage, procreation, contraception, family relationships, and child rearing and education.<sup>329</sup>

The Court decided that “[t]his right of privacy . . . is broad enough to encompass a woman's decision whether or not to terminate her pregnancy.”<sup>330</sup> However, because the state also had “important interests in safeguarding health, in maintaining medical standards, and in protecting . . . life” the Court said that the right to privacy – as applied to a pregnant woman's right to choose an abortion – was not “absolute.”<sup>331</sup> Therefore, the Court engaged in a balancing test between the privacy right asserted and the government's important interests. The Court acknowledged that “[w]here certain ‘fundamental rights’ are involved, the Court has held that regulation limiting these rights may be justified only by a ‘compelling state interest,’ . . . and that legislative enactments must be narrowly drawn to express only the legitimate state interests at stake.”<sup>332</sup> However, in *Roe* the Court declined to apply strict scrutiny to strike down the Texas statutes. Instead, the Supreme Court stated that “[a]t some point in pregnancy” the state's interests could become compelling.<sup>333</sup> The Court went on to outline how, in its view, the balance

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<sup>328</sup> *Id.* at 151-52.

<sup>329</sup> *Id.* at 152-53 (citations omitted).

<sup>330</sup> *Id.* at 153.

<sup>331</sup> *Id.* at 154.

<sup>332</sup> *Id.* at 155 (citations omitted).

<sup>333</sup> *Id.* at 154, 162-63.

ought to be struck during each trimester. The important lesson from *Roe v. Wade* was that if a court finds a particular instance of “the right to be let alone” is “fundamental” because the individual's interests outweighs the government's interests, then strict scrutiny will be applied when analyzing any attempted government regulation of that particular instance.

In *Lawrence* both the majority and the dissent (penned by Justice Scalia) agreed that even if a court does not create a new unenumerated right, rational basis review would still apply to a state's attempt to intrude upon a person's privacy.<sup>334</sup> Obviously, only the most egregious intrusions of privacy on the Census Bureau's ACS are likely to flunk the rational basis test. Fortunately, there is hope for using a balancing test when challenging the intrusive questions of the ACS based on *Whalen* and *Nixon*.<sup>335</sup>

*Whalen* is closely analogous to the situation posed by a person who is required to fill out the Census Bureau's ACS. In *Whalen* “a group of patients regularly receiving prescriptions . . . doctors . . . and . . . two associations of physicians” brought suit challenging the constitutionality of a newly passed New York law.<sup>336</sup> Concerned with the illicit drug market, the New York legislature authorized the creation of “a centralized computer file” into which would be placed “the names [and ages] and addresses of all persons who have obtained, pursuant to a doctor's prescription, certain drugs for which there is both a lawful and an unlawful market.”<sup>337</sup> The physician and the pharmacist were required to collect the information and retain it for five years

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<sup>334</sup> See generally *Lawrence v. Texas*, 539 U.S. 558 (2003).

<sup>335</sup> Privacy after *Roe*: Informational Privacy, Privacy of the Home or Personal Autonomy? <http://supreme.justia.com/constitution/amendment-14/32-privacy-after-roe.html> (last visited July 4, 2010) (“[A] cryptic opinion in *Whalen v. Roe* may indicate the Court's continuing willingness to recognize privacy interests as independent constitutional rights . . . Lower court cases have raised substantial questions as to whether [*Whalen v. Roe*] established a “fundamental right” to informational privacy, and instead found that some as yet unspecified balancing test or intermediate level of scrutiny was at play.”) For this proposition, the article cites *Plante v. Gonzalez*, 575 F.2d 1119, 1134 (5th Cir. 1978).

<sup>336</sup> *Whalen v. Roe*, 429 U.S. 589, 595 (1977).

<sup>337</sup> *Id.* at 589, 591.

with no requirement to destroy the information. The forms they submitted to the state, however, would be destroyed after five years.<sup>338</sup> The state created physical and data security measures to protect the data. Access to the files was limited to Department of Health employees.<sup>339</sup>

Furthermore, “[p]ublic disclosure of the identity of patients [was] expressly prohibited by the statute and by a Department of Health regulation. Willful violation of these prohibitions [was] a crime punishable by up to one year in prison and a \$2,000 fine.”<sup>340</sup>

The plaintiffs argued that there were individuals who would “decline . . . treatment because of their fear that the misuse of the computerized data will cause them to be stigmatized as 'drug addicts.’”<sup>341</sup> The lower court had ruled that the Act “invaded” the zone of privacy created by the “doctor-patient relationship” with “a needlessly broad sweep” and “enjoined enforcement of the provisions of the Act which deal[t] with the reporting of patients' names and addresses.”<sup>342</sup> The lower court had also found that during the first twenty months of operation of the new law, the state had received and processed 100,000 forms a month. The two million forms received had been used to launch only “two investigations involving alleged overuse by specific patients.”<sup>343</sup>

The Supreme Court reversed pointing out that:

State legislation which has some effect on individual liberty or privacy may not be held unconstitutional simply because a court finds it unnecessary, in whole or in part. For we have frequently recognized that individual States have broad latitude in experimenting with possible solutions to problems of vital local concern.<sup>344</sup>

Instead of subjecting the statute to rational basis analysis the Court instead balanced the two

individual privacy interests that were of concern to the plaintiffs – an “individual interest in

<sup>338</sup> *Id.* at 593-95; *Id.* at 595 n.11.

<sup>339</sup> *Id.* at 59-95.

<sup>340</sup> *Id.* at 594-95.

<sup>341</sup> *Id.* at 589, 595.

<sup>342</sup> *Id.* at 596.

<sup>343</sup> *Id.* at 595-96.

<sup>344</sup> *Id.* at 597.

avoiding disclosure of personal matters, and another is the interest in independence in making certain kinds of important decisions”– against the government's interest in stopping the proliferation of illicit drug use and its attendant ills.<sup>345</sup> The Court recognized the plaintiff's privacy concerns and said, “We are not unaware of the threat to privacy implicit in the accumulation of vast amounts of personal information in computerized data banks . . . much of which is personal in character and potentially embarrassing or harmful if disclosed.”<sup>346</sup> However, the Court then added a twist to its analysis. The Court accepted evidence concerning the protections that New York had put in place to protect confidentiality as a factor that could tip the scales in favor of the government. The Court decided that “New York's statutory scheme, and its implementing administrative procedures, evidence a proper concern with, and protection of, the individual's interest in privacy.” Therefore, the plaintiffs lost.

In *Nixon v. Administrator of General Services* – decided in 1977 as was *Whalen* – the Supreme Court used a similar balancing test. Former President Nixon challenged the constitutionality of the Presidential Recordings and Materials Preservation Act to prevent the disclosure of “an estimated 42 million pages of documents and 880 tape recordings” made during his Presidency.<sup>347</sup> One of the arguments Nixon advanced was that even though when “he entered public life he voluntarily surrendered the privacy secured by law for those who elect not to place themselves in the public spotlight . . . he was not . . . stripped of all legal protection of his privacy.”<sup>348</sup> He contended that the Act violated his “fundamental right[] . . . of privacy . . . guaranteed to him by the First, Fourth, and Fifth Amendments.”<sup>349</sup> Nixon's concern was that the

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<sup>345</sup> *Id.* at 597-99.

<sup>346</sup> *Id.* at 605.

<sup>347</sup> *Nixon v. Administrator of General Services*, 433 U.S. 425, 430 (1977).

<sup>348</sup> *Id.* at 455.

<sup>349</sup> *Id.* at 455.

records included an unknown number of private documents that the public had no right to have.<sup>350</sup> The federal district court “reasoned that the proportion of the 42 million pages of documents and 880 tape recordings implicating appellant's privacy interests was quite small” and “the great bulk . . . related to [Nixon's] conduct of his duties as President, and were therefore materials to which great public interest attached.”<sup>351</sup> The district court weighed the invasion of privacy that the “archival screening necessarily entail[ed]” and “concluded that the Act was not unreasonable and hence not facially unconstitutional.”<sup>352</sup>

In affirming the district court's decision, and applying the same balancing of individual privacy interests against the government's interest, the Supreme Court placed some emphasis on “the Act's sensitivity to appellant's legitimate privacy interests, . . . the unblemished record of the archivists for discretion, and the likelihood that the regulations to be promulgated by the Administrator will further moot appellant's fears that his materials will be reviewed by ‘a host of persons.’”<sup>353</sup>

Commentator Stephen Kruger pessimistically concluded that:

*Whalen/Nixon* demands a history of public disclosures by the governmental unit which collects the personal data. There is no way a [litigant] can garner enough evidence to prove his case. *Whalen/Nixon* transforms the Census Bureau into the civil equivalent of the grand jury. As long as the Census Bureau maintains (or appears to maintain) the confidentiality of its records, there is not, under *Whalen/Nixon*, any legal or logical limit to the type or extent of information which the United States can demand.<sup>354</sup>

If one subscribes to Kruger's view, the Census Bureau's public commitment to privacy; statutory prohibitions on sharing personal information with other government agencies; and, 13 U.S.C. §

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<sup>350</sup> *Id.* at 456.

<sup>351</sup> *Id.* at 456.

<sup>352</sup> *Id.* at 456.

<sup>353</sup> *Id.* at 465.

<sup>354</sup> Kruger, *supra* note 12, at 38-39.

221's criminal penalty for disclosure of information by the Census Bureau's employees are dispositive post *Whalen/Nixon*. However, an open minded reading of the *Whalen/Nixon* indicates that these are merely factors and are not dispositive. Additionally, the Census Bureau's commitment to confidentiality is not without its failures.<sup>355</sup>

## 2. Balancing Test: The Government's Interest

As stated in *Morales*, “modern government” must be able to “gather reliable statistical data reasonably related to governmental purposes and functions. . . to legislate intelligently and effectively.”<sup>356</sup> The statistics assist Congress in using the spending power to “promote the general [w]elfare.”<sup>357</sup> One legal encyclopedia states, “[a]lthough the Constitution mandates only that the census be taken for reapportionment purposes, census data is used for myriad other purposes.”<sup>358</sup> A learned treatise further explains that “[m]any state statutes make the federal census the basis for governmental regulation, such as classification of municipalities, apportionment into state election districts, apportionment of taxes and distribution of tax revenues among the municipalities, creation of judicial districts, establishment of license quotas, and compensation of public officials and employees.”<sup>359</sup> However, aside from the questions required to fulfill the constitutional mandate of apportionment, there is no reason why the Census Bureau needs to compel disclosure with criminal fines. First, much of the statistical data that the Census Bureau accumulates could be purchased in the private marketplace or copied from other

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<sup>355</sup> See *infra* Part III.D.3.

<sup>356</sup> *Morales v. Daley*, 116 F. Supp. 2d 801, 819-20 (S.D. Tex. 2000).

<sup>357</sup> U.S. CONST. Preamble; See also *Buckley v. Valeo*, 424 U.S. 1, 90-91 (1976).

<sup>358</sup> 14 C.J.S. *Census* § 4 (2010).

<sup>359</sup> 5B Am. Jur. Pl. & Pr. Forms *Census* § 1 (West 2010).

government agencies.<sup>360</sup> The Census Bureau has actively resisted getting its raw data elsewhere.<sup>361</sup> Second, the lack of prosecutions for non-compliance with the census under 13 U.S.C. § 221, and the Census Bureau's own statements, make it clear that the Census Bureau is able to accumulate statistics, other than those mandated by the Constitution, sufficient to aid Congress in its efforts to “legislate intelligently and effectively.”

As mentioned *supra*, in the twentieth century only seven people were prosecuted for failing to fill out the census.<sup>362</sup> Although response rates for the census vary based on age, ethnicity, wealth, the question asked, and other factors, non-compliance with the ACS can be in excess of 40 percent.<sup>363</sup> For the 2000 decennial census the “national overall mail response rate” for the short form census was 64 percent while the “rate was about 54 percent for decennial long forms.”<sup>364</sup> Given that the population of the United States in 2000 was 248,709,873, millions upon millions of households chose not to participate at all.<sup>365</sup> The same thing happened during the most recent 2010 decennial census in which “roughly 48 million households . . . did not mail back their census forms.”<sup>366</sup> It seems, then, that the fines imposed by 13 U.S.C. § 221 serve little deterrent effect. Furthermore, despite massive non-participation Congress does not seem

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<sup>360</sup> The Privacy Act (5 U.S.C. § 552) may provide some impediment to sharing information from other agencies to the Census Bureau. The Census fits within an exception to the Privacy Act. *See* 5 U.S.C.A. § 552a(k)(4). *See also* James T. O'Reilly, *The Privacy Act: History, Scope and Definitions*, 2 FED. INFO. DISCL. § 20:52 (2010) (stating that legislative history indicates a specific intent that Privacy Act requirements not "modify or relax in any way the safeguards of [T]itle 13." (quoting 120 Cong. Rec. 36,646 (Nov. 20, 1974) (remarks of Congressman Moorhead))).

<sup>361</sup> *See generally* UNITED STATES GENERAL ACCOUNTING OFFICE, CENSUS REFORM: MAJOR EXPANSION IN USE OF ADMINISTRATIVE RECORDS FOR 2000 IS DOUBTFUL, STATEMENT OF L. NYE STEVENS, DIRECTOR GOVERNMENT BUSINESS OPERATIONS ISSUES GENERAL GOVERNMENT DIVISION (1992) <http://archive.gao.gov/t2pbat6/146958.pdf>.

<sup>362</sup> Kruger, *supra* note 12, at 57-58; *Supra* Part I; *Supra* Part II.B.

<sup>363</sup> Tersine, *supra* note 10.

<sup>364</sup> GRIFFIN, *supra* note 11.

<sup>365</sup> <http://www2.census.gov/prod2/statcomp/documents/1991-02.pdf> (last visited July 17, 2010) (listing the population in the table on page seven).

<sup>366</sup> The Census Bureau, *2010 Census: Cooperation with Enumerators Is Critical to a Successful Headcount*, April 30, 2010, <http://www.gao.gov/products/GAO-10-665T>. *See generally* UNITED STATES GENERAL ACCOUNTING OFFICE, 2010 CENSUS: COOPERATION WITH ENUMERATORS IS CRITICAL TO A SUCCESSFUL HEADCOUNT (2010) <http://www.gao.gov/new.items/d10665t.pdf>.

hamstrung by the statistics provided by the Census Bureau in passing legislation – effective, intelligent, or otherwise.

In fact, the Census Bureau long ago concluded that it cannot increase response rates through use of the criminal fine. Instead, the Census Bureau attempts to gauge public opinion about questions it plans to ask by conducting sample surveys. As a general rule, intrusive questions lower response rates and this drives up costs for the Census Bureau as it does face-to-face follow up interviews.<sup>367</sup> As one Director pointed out to Congress in a sub-committee hearing in 1986, “[w]e continue to believe that the short form should be limited to the basic questions needed to obtain an accurate population count . . . Housing questions – such as plumbing, value, and rent of housing units – increase the questionnaire's complexity and consequently discourage response.”<sup>368</sup> The Director goes on to say that “[o]ur more recent work has raised questions regarding the federal need for housing data from 100 percent of the nation's households. For example, we found that some federal data users were actually using sample data even though 100 percent data . . . was available.”<sup>369</sup> The Director reported the results from three focus groups: “All three studies showed the participants had concern over the housing questions. . . the plumbing question caused groups to discuss why any of the housing questions were needed for the census.”<sup>370</sup> The participants in the Tampa focus group stated that “some of the information requested for the census – e.g., value of an individual's home – was 'none of the government's business.’”<sup>371</sup> The Mississippi focus group, when asked questions about housing such as “entrance to living quarters and value of home” asked aloud, “[W]hy do[es] [the Census Bureau]

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<sup>367</sup> See generally *Dodaro*, *supra* note 97.

<sup>368</sup> *Dodaro*, *supra* note 97, at 1-2.

<sup>369</sup> *Id.* at 2.

<sup>370</sup> *Id.* at 7.

<sup>371</sup> *Id.* at 7.

need to know all those other questions' when the census is a count of population[?]"<sup>372</sup>

At the end of the nineteenth century the government tried to allay growing public concern with the census' implications for personal privacy. A Harvard Law Review article states that: "[c]itizens' concerns about the privacy of their returns increased apace, and, beginning in 1840, instructions to census takers ordered that individual returns be treated as confidential . . . In 1889, a penalty for such disclosure was enacted."<sup>373</sup> When the 1890 census asked questions about "secret diseases and home mortgages" it "arous[ed] a storm of public protest that such questions were impertinent, illegal, and unconstitutional. Lawyers as eminent as David Dudley Field took to the national press, advising citizens not to answer. . . . [and] a large number refused to give any census information whatsoever."<sup>374</sup>

### 3. The Census Bureau's Illusory Promise of Confidentiality

Despite the Census Bureau's public relations efforts and the Title 13 provisions designed to thwart disclosure of information by the Census Bureau, "49 percent of Americans [in 2010] are not confident that their data will be kept confidential."<sup>375</sup> As explained in one treatise:

The federal census statute (13 U.S.C.A. §§ 1 et seq.) gives discretionary power to the Secretary of Commerce, on request, to furnish census data, but in no case can any information furnished be used to the detriment of the persons to whom it relates. To litigants, this is a protective device similar to the prohibition against evidential use of privileged communications. Information furnished the Bureau of the Census may not be used by any person or governmental agency for anything

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<sup>372</sup> *Id.* at 7.

<sup>373</sup> Note, *The Right to Privacy in Nineteenth Century America*, 94 HARV. L. REV. 1892, 1905 (1981).

<sup>374</sup> *Id.* at 1905-1906; FIELD, David Dudley, (1805 – 1894) <http://bioguide.congress.gov/scripts/biodisplay.pl?index=F000104> (last visited July 17, 2010).

<sup>375</sup> Declan McCullagh, *Census time heightens privacy concerns*, Mar. 22, 2010, [http://news.cnet.com/8301-13578\\_3-20000859-38.html](http://news.cnet.com/8301-13578_3-20000859-38.html) ("49 percent of Americans [in 2010] are not confident that their data will be kept confidential"). See also More Security Topics: For your protection, <http://2010.census.gov/2010census/privacy/more-security-topics.php> (last visited July 17, 2010) (exemplifying the Census Bureau's marketing efforts); 13 U.S.C.A. § 9 (West 2010) (describing how the data may be used); 13 U.S.C.A. § 214 (West 2010) (outlining criminal fines for government employees that disclose census data); 14 Am. Jur. 2d *Census* § 14 (outlining the privacy provisions of Title 13 toward census data).

other than the statistical purpose for which it is supplied.<sup>376</sup>

Despite the supposed protections, census data *has* been released.

During World War I, “in May 1917 Congress created . . . [the] Selective Service . . . The U.S. Census Bureau provided estimates of the distribution of draft age men for planning the location and capacity of the registration and draft system.”<sup>377</sup> As the American war effort ramped up, the Census Director began receiving requests from Selective Service “registration officials” around the country to provide information from the 1910 census returns “showing the ages of men who they believe have failed to register, although between the ages of 21 and 30.”<sup>378</sup> Academicians Anderson and Seltzer recount what happened next:

On June 25, [1943] the Commerce Department Acting Solicitor issued the requested opinion. It gave the Census Director the authority to provide names and ages to the registration authorities . . . as a result of this opinion “personal information for several hundred young men was released to courts, draft boards, and the Justice Department.”<sup>379</sup>

As pointed out *supra* in *Morales*, in World War II the Census Director turned over “a list of Japanese residents in the Washington Metropolitan Area.”<sup>380</sup> At least 79 persons were identified.<sup>381</sup> There could, of course, have been more. This information was used to haul those with Japanese ancestry off to an internment camp for the remainder of the war. The Census Bureau has repeatedly “denied that any such disclosures at the micro-level occurred, although from time to time over the years individual census staff have explicitly acknowledged in

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<sup>376</sup> 5B Am. Jur. Pl. & Pr. Forms *CENSUS* § 1 (2010).

<sup>377</sup> Margo Anderson & William Seltzer, *Challenges to the Confidentiality of U.S. Federal Statistics, 1910-1965*, 23 *JOURNAL OF OFFICIAL STATISTICS* 1, 5 (2007), available at <https://pantherfile.uwm.edu/margo/public/publications/ChallengesJOSarticle.pdf>.

<sup>378</sup> *Id.* (citing Census Director Samuel Rogers’s request to the Secretary of Commerce in a letter dated June 22, 1917).

<sup>379</sup> *Id.*

<sup>380</sup> See *supra* Part III.A.2.

<sup>381</sup> MARGO ANDERSON & WILLIAM SELTZER, *CENSUS CONFIDENTIALITY UNDER THE SECOND WAR POWERS ACT (1942-1947)*, 22-23, 63-68 (2007) (draft paper), available at <https://pantherfile.uwm.edu/margo/www/govstat/Seltzer-AndersonPAA2007paper3-12-2007.doc>.

unpublished papers and correspondence that business data [was] disclosed.”<sup>382</sup>

In 2004, during the current “Global War on Terror,” the Electronic Privacy Information Center (EPIC) discovered that:

the Census Bureau provided the Department of Homeland Security statistical data on people who identified themselves on the 2000 census as being of Arab ancestry. The special tabulations were prepared specifically for the law enforcement agency . . . . The tabulations . . . include[d] information about United States citizens, as well as individuals of Arab descent whose families have lived in the United States for generations . . . . The tabulations were produced using data from the 2000 census long-form questionnaire.<sup>383</sup>

Courts, too, have not always been willing to protect census data from discovery when the data is not in the hands of the Census Bureau. In *St. Regis Paper Company v. United States*,<sup>384</sup> the Federal Trade Commission (FTC) was investigating St. Regis Paper Company to see if their business acquisitions had run afoul of antitrust laws.<sup>385</sup> St. Regis Paper Company failed to comply with several of the FTC's discovery requests including a request to turn over copies of the census reports St. Regis had submitted to the Census Bureau.<sup>386</sup> The Supreme Court found that those records were not protected from disclosure.<sup>387</sup> Thus, the very act of preparing such records has been no guarantee that they cannot be disclosed.<sup>388</sup> In the wake of this decision, Congress amended Title 13 to make “[c]opies of census reports . . . immune from legal process.”<sup>389</sup> This Amendment also prevented such reports from being used as evidence without

<sup>382</sup> *Id.* at 6.

<sup>383</sup> Freedom of Information Documents on the Census: Department of Homeland Security Obtained Data on Arab Americans From Census Bureau, <http://epic.org/privacy/census/foia/> (last visited July 17, 2010). See also Douglas J. Sylvester & Sharon Lohr, *Counting on Confidentiality: Legal and Statistical Approaches to Federal Privacy Law after the USA Patriot Act*, 2005 WIS. L. REV. 1033 (2005).

<sup>384</sup> 368 U.S. 208 (1961).

<sup>385</sup> *Id.* at 212.

<sup>386</sup> *Id.* at 215.

<sup>387</sup> *Id.* at 215.

<sup>388</sup> *But see* *Brauner v. Mutual Life Insurance Co. of N.Y.*, 1956 WL 8242 where the defendant insurance company sought to compel the plaintiff to authorize the Census Bureau to release personal data for purposes of finding out if the plaintiff had lied about his age when he applied for insurance. The court refused to order the plaintiff to do so.

<sup>389</sup> Pub. L. 87-813, Oct. 15, 1962, 76 Stat. 922. See also *LaMorte v. Mansfield*, 438 F.2d 448, 451-52 (S.D.N.Y. 1971).

“consent of the individual or establishment” too which the copies referred.<sup>390</sup>

The Census Bureau, doubtless, would counter with a long trail of documentary evidence proving its good faith attempt to ward off requests for information. For example, in 1930 the Director of the Census requested and received an opinion letter from the US Attorney General's office advising it to decline to furnish information to the “Women's Bureau of the Department of Labor with the names, addresses, occupations, and status of employment of workers in the city of Rochester, [New York]” and also to decline requests from “individuals and associations” who had requested “the names and addresses of persons unable to read and write.”<sup>391</sup> A 1958 federal district court decision revealed that “[t]he Department of Commerce ha[d] declined to grant access to . . . [census] reports [filed by other steel companies] or to make the information contained therein available to the Department of Justice or to any other person.”<sup>392</sup> In 1962, the Secretary of Commerce – the department that includes the Census Bureau – requested and received another opinion letter from the US Attorney General's office. The Attorney General explained that “[t]he confidentiality provisions of 13 U.S.C. 9(a) apply to the 'voluntary' replies filed in response to surveys taken more frequently than annually under the authority of 13 U.S.C. 18[2].”<sup>393</sup> In 1994 the Census Bureau resisted sharing address data with the post office and state governments.<sup>394</sup>

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<sup>390</sup> Pub. L. 87–813, Oct. 15, 1962, 76 Stat. 922. *But see* 5B Am. Jur. Pl. & Pr. Forms *CENSUS* § 1 (2010) (stating “[i]f not privileged, census records are ordinarily admissible in evidence, where relevant, as proof of their contents. For example, such records have been held admissible to show a person's age, status as an alien, pedigree, and other details.”).

<sup>391</sup> Census Data Unavailable to Women's Bureau of Department of Labor and Individuals, 36 Op. Att'y Gen. 362 (1930), *available at* 1930 WL 1801.

<sup>392</sup> U.S. v. Bethlehem Steel Corp, 21 F.R.D. 568, 569 (S.D.N.Y. 1958). In *Bethlehem* the court also discusses the non-disclosure requirements and the legislative history of 13 U.S.C. §§ 8-9.

<sup>393</sup> Confidentiality of 'Voluntary' Reports Under the Census Laws, 42 Op. Att'y Gen. 151 (1962).

<sup>394</sup> *See* UNITED STATES GENERAL ACCOUNTING OFFICE, LEGISLATIVE PROPOSAL TO SHARE ADDRESS LIST DATA HAS BENEFITS AND RISKS: STATEMENT OF WILLIAM M. HUNT, DIRECTOR, FEDERAL MANAGEMENT ISSUES GENERAL GOVERNMENT DIVISION (1994) <http://archive.gao.gov/t2pbat2/152175.pdf> (last visited July 17, 2010).

The point is that the Census Bureau not only has *intentionally* disclosed personal information in World War I, World War II, and during the current Global War on Terror, it is under constant pressure to do so by various agencies. Additionally, even when the Census Bureau turns over redacted statistical information to other agencies, depending on the amount of detail included, an individual can still be identified based on certain known characteristics such as zip code, employer name, etc. This process is called “un-sanitizing” or “re-identifying” the data.<sup>395</sup>

Moreover, there is an ongoing risk of *inadvertent* disclosure of a person's information through a breach the Census Bureau's information security protections. In 2007 the Census Bureau “mistakenly posted personal information from 302 households on a public Internet site multiple times over a five-month period. The data included names, addresses, phone numbers, birth dates and family income ranges.”<sup>396</sup> In 2008 the GAO reported that the Census Bureau had lost 672 laptops “of which 246 contained some degree of personal data.”<sup>397</sup> In 2010 the Office of Inspector General (OIG) for the Department of Commerce reported that although the OIG had discovered minor problems with the physical security of “three national data-capture centers through which completed census forms are processed” the OIG had also “discovered some significant vulnerabilities at other sites.”<sup>398</sup> Numerous GAO reports indicate that the latest information technology infrastructure to support the 2010 census may have been sloppily built

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<sup>395</sup> See The Census and Privacy, <http://epic.org/privacy/census/> (last visited July 17, 2010) (explaining that re-identification is possible and citing LATANYA SWEENEY, UNIQUENESS OF SIMPLE DEMOGRAPHICS IN THE U.S. POPULATION (Carnegie Mellon University Laboratory for International Data Privacy 2000)). See generally C. Christine Porter, De-identified Data and Third Party Data Mining: The Risk of Re-identification of Personal Information, 5 SHIDLER J. L. COM. & TECH. 3 (2008).

<sup>396</sup> Census Data Mix Up, [http://www.wzzm13.com/news/news\\_article.aspx?storyid=72173](http://www.wzzm13.com/news/news_article.aspx?storyid=72173) (last visited July 17, 2010).

<sup>397</sup> UNITED STATES GENERAL ACCOUNTING OFFICE, INFORMATION SECURITY: ALTHOUGH PROGRESS REPORTED FEDERAL AGENCIES NEED TO RESOLVE SIGNIFICANT DEFICIENCIES, STATEMENT OF GREGORY C. WILSHUSEN, DIRECTOR, INFORMATION SECURITY ISSUES (2008) <http://www.gao.gov/new.items/d08496t.pdf> (last visited July 17, 2010).

<sup>398</sup> OFFICE OF INSPECTOR GENERAL, DEPARTMENT OF COMMERCE, 2010 CENSUS: QUARTERLY REPORT TO CONGRESS (2010) <http://www.oig.doc.gov/oig/reports/2010/OIG-19791-4.pdf> (last visited July 17, 2010).

with attendant risks to information security.<sup>399</sup>

While *Whalen/Nixon* stand for the idea that the Census Bureau's practices and the statutory protections are factors that can weigh in favor of the constitutionality of the Census Bureau's invasion of an individual's privacy, the weight given to these factors cannot be dispositive. Indeed, as more government agencies find themselves under similar non-disclosure requirements such as the Privacy Act and those agencies implement state of the art information and physical security programs, the Census Bureau stands out less and less from the pack.<sup>400</sup> Furthermore, while some privacy breaches can be attributed to a government employee, in which case the culpable person could be prosecuted, in many cases a single individual may not be at fault or may be at fault in such a way that the data breach cannot solely be attributed to him. And, as has been shown, the exigencies of war and the actions of the courts have sometimes led to disclosures. This is why the promise of data confidentiality that the Census Bureau takes great pains to promote is an illusory promise.

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<sup>399</sup> See UNITED STATES GENERAL ACCOUNTING OFFICE, 2010 CENSUS: CENSUS BUREAU NEEDS TO TAKE PROMPT ACTIONS TO RESOLVE LONG-STANDING AND EMERGING ADDRESS AND MAPPING CHALLENGES (2006) <http://www.gao.gov/new.items/d06272.pdf> (last visited July 17, 2010); UNITED STATES GENERAL ACCOUNTING OFFICE, INFORMATION TECHNOLOGY: CENSUS BUREAU NEEDS TO IMPROVE ITS RISK MANAGEMENT OF DECENNIAL SYSTEMS, STATEMENT OF DAVID A. POWNER, DIRECTOR, INFORMATION TECHNOLOGY MANAGEMENT ISSUES (2007) <http://www.gao.gov/new.items/d08259t.pdf> (last visited July 17, 2010); UNITED STATES GENERAL ACCOUNTING OFFICE, 2010 CENSUS: CENSUS BUREAU'S DECISION TO CONTINUE WITH HANDHELD COMPUTERS FOR ADDRESS CANVASSING MAKES PLANNING AND TESTING CRITICAL (2008) <http://www.gao.gov/new.items/d08936.pdf> (last visited July 17, 2010); UNITED STATES GENERAL ACCOUNTING OFFICE, 2010 CENSUS: FUNDAMENTAL BUILDING BLOCKS OF A SUCCESSFUL ENUMERATION FACE CHALLENGES, STATEMENT OF ROBERT GOLDENKOFF, DIRECTOR, STRATEGIC ISSUES & DAVID A. POWNER, DIRECTOR, INFORMATION TECHNOLOGY MANAGEMENT ISSUES (2009) <http://www.gao.gov/new.items/d09430t.pdf> (last visited July 17, 2010); UNITED STATES GENERAL ACCOUNTING OFFICE, 2010 CENSUS: LITTLE TIME REMAINS TO ADDRESS OPERATIONAL CHALLENGES, STATEMENT OF ROBERT GOLDENKOFF, DIRECTOR, STRATEGIC ISSUES & DAVID A. POWNER, DIRECTOR, INFORMATION TECHNOLOGY MANAGEMENT ISSUES (2009) <http://www.gao.gov/new.items/d09408t.pdf> (last visited July 17, 2010)

<sup>400</sup> United States Department of Justice Office of Privacy and Civil Liberties, The Privacy Act of 1974, <http://www.justice.gov/opcl/privacyact1974.htm> (last visited July 17, 2010) Explaining that:

The Privacy Act of 1974, 5 U.S.C. § 552a, establishes a code of fair information practices that governs the collection, maintenance, use, and dissemination of personally identifiable information about individuals that is maintained in systems of records by federal agencies . . . . The . . . Act prohibits the disclosure of information from a system of records absent the written consent of the subject individual, unless the disclosure is pursuant to one of twelve statutory exceptions.

#### 4. The Individual's Privacy Interest

Against the government's interest in useful statistics, most of which could be gathered voluntarily or from other public or private sources, and the Census Bureau's illusory promise of data confidentiality, stands the individual's privacy interest.

First, the individual has a right to fear that personal data in the hands of others can be used for ill purposes. For example, business entities have used information about family, health history, disability, and race to make hiring and retention decisions. Certainly, this is illegal, but the fact that it is illegal has not quashed such practices altogether. It only makes sense to give the individual the choice as to whether to disclose such matters rather than to compel the individual through the threat of criminal prosecution.

Similarly, personal information has been used by criminals to target individual homes for burglary, individual persons for kidnapping, jilted lovers for harassment, and celebrities (former and current) for stalking. Given such risks, again, the individual should have the freedom of choice given his or her individual circumstances whether to disclose information on the ACS.

Identity theft is an ongoing problem and criminals have identified the 2010 decennial census as the perfect cover to scam individuals out of their personal information. The problem with identity theft is that once the information is disclosed it can be digitized (if it is not already in digital form) and copied over and over again with ease. Hundreds of Oklahomans recently filled out fake census forms which asked for their signatures and Social Security numbers.<sup>401</sup> Congress introduced Public Law 111-155 on April 7, 2010 to “prohibit deceptive mail practices that attempt to exploit the decennial census.” But even that law is not sufficient protection. Florida

police have reported that identity thieves have “pass[ed] themselves off as Census takers, have

<sup>401</sup> Kevin King, *Fake Census Forms Could Lead To ID Theft*, KTUL, Mar. 29, 2010, <http://www.ktul.com/news/stories/0310/720340.html>.

talked their way into Miami-Dade homes and then have asked for sensitive, personal information that the Census does not collect . . . . includ[ing] Social Security numbers, bank account numbers and personal identification numbers, which can be later used to wipe out accounts or run up credit card debt.” Sometimes the the fake census takers have even “stolen cash and jewelry.”<sup>402</sup> In May 2010 the Census Director issued a press release to allay concerns and tell people how to identify legitimate census workers.<sup>403</sup> In that statement, and in other statements by the Census Bureau, the official position is that the Census Bureau does not collect Social Security numbers.

In the case of Social Security numbers, as part of a test by the Census Bureau to decide if it was possible to do an overseas enumeration, the census test questions “[a]sked respondents to provide their passport numbers and [S]ocial [S]ecurity numbers to verify citizenship”<sup>404</sup> EPIC recently discovered that:

the Census Bureau has engaged in a study to see whether the public will object to the collection of Social Security numbers on census forms. The Census Bureau has created a program called SPAN, Social Security Number, Privacy Attitudes and Notification Experiment. The experiment would consist of asking 20,000 people to fill out their special census form, which would include their SSN [(Social Security number)].<sup>405</sup>

EPIC also reports that “[t]he Administrative Records Steering Committee continues to assess whether or not a public outcry would follow the use of SSNs in the Census.”<sup>406</sup> The trend it seems is always toward the collection of more data by the Census Bureau, not less. It is hard to

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<sup>402</sup> Adam H. Beasley, *In Florida, fake Census takers causing identity theft*, MIAMI-HERALD, Feb. 22, 2010, <http://www.mcclatchydc.com/2010/02/22/87396/in-florida-fake-census-takers.html>.

<sup>403</sup> CENSUS BUREAU, PREPARED REMARKS OF ROBERT M. GROVES, DIRECTOR, US CENSUS BUREAU: 2010 CENSUS: DOOR-TO-DOOR ENUMERATION UNDERWAY (2010) [http://2010.census.gov/news/pdf/remarks\\_may3.pdf](http://2010.census.gov/news/pdf/remarks_may3.pdf) (last visited July 17, 2010).

<sup>404</sup> UNITED STATES GENERAL ACCOUNTING OFFICE, 2010 CENSUS: COUNTING AMERICANS OVERSEAS AS PART OF THE DECENNIAL CENSUS WOULD NOT BE COST-EFFECTIVE (2004) <http://www.gao.gov/new.items/d04898.pdf> (last visited July 17, 2010).

<sup>405</sup> The Census and Privacy, *supra* note 384.

<sup>406</sup> *Id.*; Also see generally SUSAN TRENTHAM AND LAURIE LARWOOD, SYNTHESIS OF RESULTS FROM THE SOCIAL SECURITY NUMBER, PRIVACY ATTITUDES, AND NOTIFICATION EXPERIMENT (2003) [http://www.census.gov/pred/www/rpts/SPAN\\_Synthesis.pdf](http://www.census.gov/pred/www/rpts/SPAN_Synthesis.pdf) (last visited July 17, 2010).

understand why the Census Bureau needs such information to fulfill its constitutional mandate or satisfy any need on the part of Congress for statistics when the same information is maintained by another federal agency equally capable of providing statistics to Congress.

Since data is easily copied, the threat of loss of data and potential misuse outlined above ought to weigh heavily in the individual's favor. But a court should also give weight to the zones of privacy surrounding unenumerated rights that the Supreme Court has already found. Questions on the ACS about marriage, family, and education seem to invade the same privacy interests protected in numerous Supreme Court decisions such as *Griswold* discussed *supra*,<sup>407</sup> *Loving v Virginia* (protecting marriage as a fundamental right),<sup>408</sup> *Meyer v. Nebraska*<sup>409</sup> and its progeny including *Wisconsin v Yoder* (affirming as fundamental a parents' right to direct the educational upbringing of their children),<sup>410</sup> and *Moore v. East Cleveland* (holding that even family living arrangements have a zone of privacy about them).<sup>411</sup> If the government has to have a compelling interest to invade these fundamental rights, then the government ought to have to show some level of heightened scrutiny to ask questions touching upon these fundamental rights.

Moreover, weight must be given to those zones of privacy that exist in the shadows cast by the Fourth and Fifth Amendments. Questions on the ACS about race and ethnicity and other suspect and quasi-suspect classes may not quite rise to the level of being an Equal Protection challenge as shown *supra* by *Morales* and *Prieto*, however, this does not necessarily mean that the ACS cannot violate the privacy interest that stands in the penumbra of the Fifth Amendment.

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<sup>407</sup> See *supra* Part III.D.1.

<sup>408</sup> See *Loving v. Virginia*, 388 US 1 (1967).

<sup>409</sup> See *Meyer v. Nebraska* 262 U.S. 390 (1923).

<sup>410</sup> See *Wisconsin v. Yoder*, 406 US 205 (1972).

<sup>411</sup> See *Moore v. City of East Cleveland*, 431 US 494 (1977).

Likewise, questions on the ACS about the home may not be intrusive enough to trigger the Fourth Amendment's protection, but the Fourth Amendment's penumbral privacy right could still be violated by the ACS.

Finally, the “forgotten” penumbra cast by Ninth Amendment deserves careful scrutiny.<sup>412</sup> The Ninth Amendment states: “The enumeration in the Constitution, of certain rights, shall not be construed to deny or disparage others retained by the people.”<sup>413</sup> Justice Goldberg's concurring opinion in *Griswold* examines the Ninth Amendment closely. Justice Goldberg explains that the Ninth Amendment “was proffered to quiet expressed fears that . . . [the Bill of Rights] could not be sufficiently broad to cover all essential rights and that the specific mention of certain rights would be interpreted as a denial that others were protected.”<sup>414</sup> Justice Goldberg reasoned that “(i)t cannot be presumed that any clause in the constitution is intended to be without effect.”<sup>415</sup> Furthermore, “In interpreting the Constitution, ‘real effect should be given to all the words it uses.’”<sup>416</sup> Justice Goldberg understood the Ninth Amendment to mean that “other fundamental personal rights should not be denied such protection or disparaged in any other way simply because they are not specifically listed in the first eight constitutional amendments.”<sup>417</sup>

Justice Goldberg concluded:

To hold that a right so basic and fundamental and so deeprooted in our society as the right of privacy in marriage may be infringed because that right is not guaranteed in so many words by the first eight amendments to the Constitution is to ignore the Ninth Amendment and to give it no effect whatsoever.<sup>418</sup>

Similarly, the Ninth Amendment ought to protect an individual's right to keep information to

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<sup>412</sup> *Griswold v. Connecticut*, 381 U.S. 479, 492 n.6 (1965).

<sup>413</sup> U.S. CONST. amend. IX.

<sup>414</sup> *Griswold*, 381 U.S. at 488-89 (Goldberg, J., concurring).

<sup>415</sup> *Id.* at 490-91 (Goldberg, J., concurring) (citing *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 174 (1803)).

<sup>416</sup> *Id.* at 490-91 (Goldberg, J., concurring) (citing *Myers v. United States*, 272 U.S. 52, 151 (1926)).

<sup>417</sup> *Id.* at 492 (Goldberg, J., concurring).

<sup>418</sup> *Id.* at 491 (Goldberg, J., concurring).

himself when he has not bargained for its disclosure to the government as when he signs up for a government program. Justice Goldberg echoed what Justice Brandeis had stated in his dissent in *Olmstead*:

The makers of our Constitution undertook to secure conditions favorable to the pursuit of happiness. . . . They sought to protect Americans in their beliefs, their thoughts, their emotions and their sensations. They conferred, as against the government, the right to be let alone—the most comprehensive of rights and the right most valued by civilized men.<sup>419</sup>

## 5. The Result of the Balancing Test: A Common-Sense Approach

After weighing the individual interest against the government interest with due consideration of the *Whalen* and *Nixon* decisions a court might still find the scales tipped in favor of the federal government. If that is the result, then it is an absurd one as demonstrated recently in another skit on the television comedy Saturday Night Live.<sup>420</sup> In the skit, actor Fred Armisen impersonated President Barack Obama and explained a “simple and straightforward” census form to the American people. He assured viewers that their answers would be “strictly confidential.” The gag form asked:

- How important is the role of fantasy in your sex life?
- What bank do you use?
- What is your ATM PIN number?
- Have any individuals residing in this household on April 1, 2010 criticized President Obama's health care reform plan?
- What are their names?
- If some member of this household had to die, so that others might live, who should that be?
- ¿Esta aqui ilegalmente?
- What is the most embarrassing thing you've ever done? Explain.<sup>421</sup>

<sup>419</sup> *Olmstead v. United States*, 277 U.S. 438, 478 (1928) (Brandeis, J., dissenting) (*overruled by Katz v. United States*, 389 U.S. 347 (1967)).

<sup>420</sup> <http://www.hulu.com/watch/141553/saturday-night-live-obama-census-cold-open> (last visited July 17, 2010). See also Ron Brynaert, *SNL: Obama explains why census includes sex questions*, RAWSTORY.COM, Apr. 11, 2010, <http://rawstory.com/rs/2010/0411/snl-obama-explains-census-includes-sex-questions/>.

<sup>421</sup> <http://www.hulu.com/watch/141553/saturday-night-live-obama-census-cold-open> (last visited July 17, 2010).

If there is no outer limit on what the Census Bureau can ask the “population” to disclose under threat of a criminal fine, then the gag is really on the American People and the entire concept of an individual's right to privacy ought to be scrapped as an unworkable joke.<sup>422</sup>

Essentially, what is being asked is for a court to find that an individual cannot be threatened with criminal prosecution for withholding information from the government – unless he has consented to grant such information in seeking a benefit from the government – or there is a compelling government interest and the information requested is narrowly tailored to meet that interest.

It already seems as if the rule described above is in use when one considers how material witnesses are treated. Black's Law Dictionary defines a material witness as “[a] witness who can testify about matters having some logical connection with . . . consequential facts, [especially] if few others, if any, know about those matters.”<sup>423</sup> Because the government has a compelling interest in investigating and preventing crime<sup>424</sup> a material witness who chooses to not cooperate with a “criminal proceeding” can be arrested and held under the federal material witness statute – 18 U.S.C. § 3144.<sup>425</sup> If the material witness fails to disclose information to a grand jury investigation, for example, that witness can be held in custody.<sup>426</sup> Thus, the government can compel the disclosure of “material testimony” under 18 U.S.C. § 3144 because the government has a compelling interest and the questions put to the witness are narrowly limited to eliciting “material testimony” in an ongoing criminal investigation at a grand jury or

other “criminal proceeding.”

<sup>422</sup> 13 U.S.C.A. §§ 141(d), 141(g) (West 2010) (defining “census of population”).

<sup>423</sup> BLACK'S LAW DICTIONARY (8th ed. 2004).

<sup>424</sup> *Branzburg v. Hayes*, 408 U.S. 665, 676 (1972); *U.S. v. Salerno*, 481 U.S. 739, 750 (1987); *District of Columbia v. Heller*, 128 S.Ct. 2783, 2851 (2008).

<sup>425</sup> 18 U.S.C.A. § 3144 (West 2010).

<sup>426</sup> Michael A. Rosenhouse, *Annotation, Validity, Construction, and Application of 18 U.S.C.A. § 3144, Governing Arrest and Detention of Material Witnesses to Federal Crimes*, § 4, 2 A.L.R. FED. 2D 425 (2005).

Applying the rule above to the case of the ACS (or other census form) it seems that the government can only compel disclosure of information using the criminal fine in 13 U.S.C. § 221 if the government interest is compelling and the questions put to the person are narrowly tailored to address that interest. In the case of a census, the compelling government interest is spelled out in the Enumeration Clause.<sup>427</sup> The question becomes, how wide the scope of that interest is.

The contention that the Enumeration Clause ought to be narrowly interpreted is not novel.<sup>428</sup> A broader interpretation of “enumeration” could be based on *Ludwig v. Board of County Commissioners of Sarpy County*<sup>429</sup> in which the definitions of “census” and “enumeration” are used to refer to each other.<sup>430</sup> The Sixteenth Amendment has muddied the waters a bit, too, since it arguably uses “census” and “enumeration” interchangeably: “No Capitation, or other direct, Tax shall be laid, unless in proportion to the Census or Enumeration herein before directed to be taken.”<sup>431</sup>

A court could find that the terms are equivalent if the court believes that the Framers' decision to swap out the word “enumeration” for “census” was based on wordsmithing and not on the meanings of the words. As pointed out in an Indiana case, the word “census” has a broad definition:

Webster says that a census is “an official registration of the number of the people.” The Century Dictionary: “An official enumeration of the inhabitants of a state or country, with details of sex and age,” etc. The Standard Dictionary: “An official numbering of the people of a country or district.” Burrill, Law Dict.: “In the Roman law. A numbering or enrollment of the people, with a valuation of their fortunes.” Black, Law Dict.: “The official counting or enumeration of the people of a state or nation, with statistics,” etc. Bouv. Law Dict.: “An official

<sup>427</sup> U.S. CONST. art. I, § 2, cl. 3.

<sup>428</sup> See generally Robert R. McCoy, *A Battle on Two Fronts: A Critique of Recent Supreme Court Jurisprudence Establishing the Intent and Meaning of the Constitution's Actual Enumeration Clause*, 13 CORNELL J.L. & PUB. POL'Y 637 (2004).

<sup>429</sup> 103 N.W.2d 838 (Neb. 1960).

<sup>430</sup> *Id.*

<sup>431</sup> U.S. CONST. amend. XVI, cl. 3.

reckoning or enumeration of the inhabitants and wealth of a country.”<sup>432</sup>

Predating the cases above, and arguing for a narrow interpretation, is *Loughborough v. Blake*.<sup>433</sup> In *Loughborough* it was argued that the District of Columbia was exempt from taxation unless Congress, acting as a “local legislature” for the District, imposed direct taxes and used them solely for District purposes.<sup>434</sup> Even though the Supreme Court did not agree with this argument, the Court did say that: “the direct and declared object of [the] census is, to furnish a standard by which ‘representatives, and direct taxes, may be apportioned among the several States which may be included within this Union.’”<sup>435</sup> In other words, the purpose of the census is a narrow one. In *Department of Commerce v. United States House of Representatives*,<sup>436</sup> Justice Scalia takes some time in his dissent to include dictionary definitions of “enumerate” and “enumeration” roughly contemporaneous with the enactment of the Constitution and Census Act of 1790:

Noah Webster's 1828 American Dictionary of the English Language defines “enumerate” as “[t]o count or tell, number by number; to reckon or mention a number of things, each separately”; and defines “enumeration” as “[t]he act of counting or telling a number, by naming each particular,” and “[a]n account of a number of things, in which mention is made of every particular article.” Samuel Johnson's 1773 Dictionary of the English Language 658 (4th ed.) defines “enumerate” as “[t]o reckon up singly; to count over distinctly; to number”; and “enumeration” as “[t]he act of numbering or counting over; number told out.” Thomas Sheridan's 1796 Complete Dictionary of the English Language (6th ed.) defines “enumerate” as “[t]o reckon up singly; to count over distinctly”; and “enumeration” as “[t]he act of numbering or counting over.”<sup>437</sup>

For textualists, then, enumerate means “to count” people solely for purposes of determining how representation is to be apportioned. An additional consideration is that when drafting the

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<sup>432</sup> *City of Huntington v. Cast*, 48 N.E. 1025, 1026 (Ind. 1898).

<sup>433</sup> 18 U.S. 317 (1820).

<sup>434</sup> *Id.* at 318.

<sup>435</sup> *Id.* at 321.

<sup>436</sup> 525 U.S. 316 (1999).

<sup>437</sup> *Id.* at 346-47 (Scalia, J., dissenting).

Constitution, The Committee of Style and Arrangement settled on the word “[e]numerate” instead of “census.”<sup>438</sup> Finally, as mentioned *infra*, the fact that a proposed question about employment was rejected by the First Congress when drafting the Census Act of 1790, and the fact that the scope of the questions on that first census were determined within the Act itself, ought to lead to a conclusion that the proper interpretation of the Enumeration Clause is narrow.<sup>439</sup>

Since the scope of the compelling government interest based on the Enumeration Clause is narrow, only failing to answer those questions that satisfy the government's compelling interest ought to be subject to criminal punishment under 13 U.S.C. § 221.<sup>440</sup> Those questions are: the number of persons in the household, the state in which the household is located, and – optionally – those questions relating to the disenfranchisement of males who are US citizens over the age of twenty-one years of age.<sup>441</sup>

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<sup>438</sup> Kruger, *supra* note 12, at 19; September 12 Draft of the Constitution, [http://www.usconstitution.net/draft\\_sep12.html](http://www.usconstitution.net/draft_sep12.html) (last visited July 17, 2010).

<sup>439</sup> See *supra* Part II.A.

<sup>440</sup> The idea of setting an outer limit on the Census Bureau's discretion to ask questions is not new. In 1980 a bill was introduced in the Arizona Senate “that would limit census responses by residents of Arizona to their name, address, and age. See *Constitutionality of State-Imposed Restrictions on Responses to Census Questions*, 4B U.S. Op. Off. Legal Counsel 416, 1 (1980).

<sup>441</sup> See U.S. Const. art. I, § 2, cl. 3; U.S. Const. amend. XIV, § 2. As a result of the Sharrow cases the fact that the census does not count disenfranchised males over twenty-one does not mean that the census, as conducted, is unconstitutional. The federal government can find other ways to count disenfranchised males over the age of twenty-one. Victor Sharrow, a law school graduate who never bothered to take the bar exam, brought five separate suits challenging the lack of enforcement of Fourteenth Amendment, Section 2 to no avail. See *Sharrow v. Eisenhower*, 60 Civ. 3569 (D.D.C.) (1960); *United States v. Sharrow*, 309 F.2d 77 (2d Cir. 1962) (holding that Sharrow had no ability to challenge the Census Bureau's failure to comply with the Fourteenth Amendment because the issue was a non justiciable political question); *Sharrow v. Brown*, 447 F.2d 94 (2d Cir. 1971); *Sharrow v. Peyser*, 443 F. Supp. 321, (S.D.N.Y. 1977) (dismissing the case for lack of standing because there was no particularized injury to Sharrow); and, *Sharrow v. Fish*, 501 F. Supp. 202 (S.D.N.Y. 1980) (fining Sharrow \$250 based on his litigiousness and summarily dismissing his claim). For the backstory on the Sharrow cases see Irving Younger, *Prosecuting*, 73 MINN. L. REV. 829 (1989).

#### IV. CONCLUSION

Despite massive non-compliance with the ACS – and the census in general – the Census Bureau has proven that it can still provide Congress with meaningful statistics so Congress can “legislate intelligently and effectively”<sup>442</sup> or, as James Madison put it, so that Congressmen “might rest their arguments on facts, instead of assertions and conjectures.”<sup>443</sup>

The criminal fine imposed by 13 U.S.C. § 221 continues to evade proper review because of the Census Bureau's conscious decision to not refer cases for prosecution. Resting comfortably in the benign judicial neglect created by a confluence of justiciability issues, the Census Bureau is seemingly free to revise the questions on the ACS and threaten the American people with a \$5,000 fine for not complying with this “census.”<sup>444</sup> Divorced from Congressional direction and operating outside judicial review, the Bureau, at a whim decides whether to include on its forms questions about Social Security numbers, disability, “secret diseases”, personal wealth, and plumbing.<sup>445</sup>

Prominent lawyers, Congressional Representatives, and even a state legislative body have opposed the worst excesses.<sup>446</sup> The people themselves have declared judgment upon the census through both peaceful non-compliance and violent opposition.<sup>447</sup> However, if we are to be a “government of laws, and not of men,” it is paramount that either Congress or the courts act to stop the Census Bureau from running amok and put it back in its constitutionally mandated cage.<sup>448</sup>

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<sup>442</sup> *Morales v. Daley*, 116 F. Supp. 2d 801, 819-20 (S.D. Tex. 2000).

<sup>443</sup> 1 ANNALS OF CONG. 1146, (Joseph Gales ed., 1834) available at <http://memory.loc.gov/cgi-bin/ampage?collId=llac&fileName=001/llac001.db&recNum=573>.

<sup>444</sup> See Excessive Fines discussion *supra* Part III.B.

<sup>445</sup> See *supra* Part III.D.2.

<sup>446</sup> See *supra* Part II.B; *supra* Part III.D.3; *supra* Part III.D.5.

<sup>447</sup> See *supra* Part II.B.

<sup>448</sup> *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 163 (1803).

Although this paper has been written with an eye toward vindicating the Constitution and the people that, ostensibly, live under its protections, it has also been written to aid the practitioner whose client is prosecuted under 13 U.S.C. § 221. When such a case arises, there are many challenges that the practitioner could bring, but most of those challenges have hidden pitfalls. Some depend on a particular factual situation (such as a challenge based on discriminatory prosecution where only known census protestors are targeted to quell dissent).<sup>449</sup> In cases where the statutory construction of Title 13 is challenged, a court will give great deference to the interpretation it discerns was intended by Congress.<sup>450</sup> Self-identification of race or ethnicity and questions about other suspect or quasi-suspect classes could make for a good Equal Protection challenge to certain questions on the ACS, but the decisions in *Morales* and *Prieto* now stand in the way.<sup>451</sup> It seems that self identification on a form is more likely to be characterized as an individual choice and not government action after *Morales* in particular.<sup>452</sup> Additionally, the First Amendment challenge brought in *Morales* based on the right not to speak was not a good fit for the case law of *Wooley* and its progeny.<sup>453</sup> *Wooley* and its progeny seem to require that a person transmit the government's message to some third party and this does not fit the facts of a completed form allegedly held in confidence by the Census Bureau.<sup>454</sup> As with the Equal Protection challenge above, a challenge based on the right against self-incrimination can only be brought based on a specific set of questions on the ACS such as those relating to age or questions that could tend to prove age. Furthermore, the privilege would likely to be found to operate much like it does in the context of income tax forms. In short, a defendant must assert the

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<sup>449</sup> See *supra* Part III.A.4.

<sup>450</sup> See *supra* Part III.A.1.

<sup>451</sup> *Morales v. Daly*, 116 F. Supp. 2d 801 (S.D. Tex. 2000); *Prieto v. Stans*, 321 F. Supp. 420 (N.D. Cal. 1970).

<sup>452</sup> See *supra* Part III.A.2.

<sup>453</sup> *Wooley v. Maynard*, 430 U.S. 705 (1977).

<sup>454</sup> See *supra* Part III.A.3.

privilege on a question-by-question basis.<sup>455</sup>

An Excessive Fines challenge has never been brought.<sup>456</sup> Procedurally the right does not arise until after the defendant is convicted and ordered to pay the fine. The resolution of the challenge would depend upon the amount of fines imposed. If only fined \$100 under a straight interpretation of 13 U.S.C. § 221, there really is not a challenge because the fine is not much larger than the ill it is designed to deter. If the prosecutor convinces the court that the \$5,000 general fine for federal misdemeanors applies from 18 U.S.C. § 3571(b) and the defense cannot convince the court that both statutory construction and *Pyatt* dictate that only 13 U.S.C. § 221 ought to apply, then an Excessive Fines argument might be appropriate.<sup>457</sup> Likewise, if the prosecutor convinces the court that the musing from *Little* applies, the defendant could be fined \$100 for each question on the ACS he fails to fill out.<sup>458</sup> In the latter two circumstances, the defendant may be able to argue that the fine is “grossly disproportionate” to the ill the government is trying to prevent or punish.<sup>459</sup> It is, then, the last line of defense and not an effective challenge to the constitutionality of 13 U.S.C. § 221 itself.

Two arguments could be made that the ACS is a taking without just compensation.<sup>460</sup> First, the argument could be made that the data – either in the defendant's head or as transcribed on the census form – is intangible personal property that the government is taking for public use without just compensation. Unfortunately, this is of little use to a criminal defendant because one must first part with the property and exhaust administrative remedies under the Tucker Act,

28 U.S.C. § 1491, before such a challenge is ripe for adjudication.<sup>461</sup> A defendant charged with

<sup>455</sup> See *supra* Part III.A.5.

<sup>456</sup> See *supra* Part III.B.

<sup>457</sup> See *supra* Part III.B; U.S. v. Pyatt, 725 F. Supp. 885 (E.D. Va. 1989).

<sup>458</sup> See *supra* Part III.B; United States v. Little, 317 F. Supp. 1308, 1309 (D. Del. 1970).

<sup>459</sup> See *supra* Part III.B; United States v. Bajakajian, 524 U.S. 321 (1998).

<sup>460</sup> See *supra* Part III.C.

<sup>461</sup> Ruckelshaus v. Monsanto Co., 467 U.S. 986, 1016-1017 (1984).

violating 13 U.S.C. § 221, however, obviously has not parted with the property. Thus the challenge is inappropriate in the context of a criminal case. The second argument, aside from having the ripeness issue just discussed, also faces negative caselaw. The argument, first posited in *Mitchell*, is that the government cannot compel labor for public good (such as the good flowing from information on a completed census form) without just compensation.<sup>462</sup> There are numerous cases where doctors have challenged Medicare's capping of their compensation as a taking. Lawyers have also challenged situations where the court has forced them to represent clients without compensation. In the case of doctors and lawyers such a challenge appears to be fruitless.<sup>463</sup>

The argument that the census is an illegal search that violates the Fourth Amendment is also a losing one.<sup>464</sup> Two cases, *Rickenbacker* and *Morales*, have made this challenge and failed.<sup>465</sup> Although the reasoning in *Morales* is suspect and the analysis in *Rickenbacker* is altogether missing, a defendant would still have an uphill fight to overturn this precedent. Even if a court conceded that *Rickenbacker* and *Morales* were wrongly decided as to this issue, the best that can be had is probably the balancing test from *Katz* leading to a finding that the evidence of violation of 13 U.S.C. § 221 should be suppressed.<sup>466</sup> While this would get an individual defendant off the hook, it would leave unchallenged the intrusive questioning by the Census Bureau.

By process of elimination, then, this paper argues that the best challenge to make, when faced with prosecution under 13 U.S.C. § 221, is one based on the right to privacy.<sup>467</sup> The proper test

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<sup>462</sup> *United States v. Mitchell*, 58 F. 993, 999-1000 (N.D. Ohio 1893).

<sup>463</sup> *See supra* Part III.C.

<sup>464</sup> *See supra* Part III.A.6.

<sup>465</sup> *United States v. Rickenbacker*, 309 F.2d 462 (C.A.N.Y. 1962); *Morales v. Daly*, 116 F. Supp. 2d 801 (S.D. Tex. 2000).

<sup>466</sup> *Katz v. United States*, 389 U.S. 347 (1967).

<sup>467</sup> *See generally supra* Part III.D.

that applies is a simple balancing test.<sup>468</sup> The proper result to reach is that an individual's "right to be let alone" should overcome the government's nosy questioning.<sup>469</sup> This paper asks a court that considers the privacy issue to find that an individual cannot be threatened with criminal prosecution for withholding information from the government – unless he has consented to disclose the information in seeking a benefit from the government – or there is a compelling government interest at stake and the information requested is narrowly tailored to meet that interest. The practical result of this rule is that a fine only can be justified for failure to disclose the number of persons in the household, the state in which the household is located, and – optionally – those questions relating to the disenfranchisement of males who are US citizens over the age of twenty-one years of age. This most closely matches the intent of the Framers, clarifies the role of the Census Bureau, vindicates a long line of "privacy" jurisprudence created by the Supreme Court, and gives the proper respect to the individual right to privacy originally envisioned by Cooley, Brandeis and Warren: the individual's "right to be let alone."<sup>470</sup>

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<sup>468</sup> See *supra* Part III.D.1.

<sup>469</sup> See *supra* Part III.D.1.5.

<sup>470</sup> Warren & Brandeis, *supra* note 15, at 193, 195 (quoting "Cooley on Torts, 2d ed., p. 29.").