

A BATTLE ON TWO FRONTS: A CRITIQUE OF
RECENT SUPREME COURT JURISPRUDENCE
ESTABLISHING THE INTENT AND MEANING OF
THE CONSTITUTION'S ACTUAL
ENUMERATION CLAUSE

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INTRODUCTION

The Constitution requires that an “actual Enumeration” of the population of the United States be conducted every ten years.¹ The importance of this count should not be overlooked as statute dictates that the census numbers be used, among other things, to determine the apportionment of Congress.² Indeed, the census is viewed as “apportioning power in American democracy.”³ Unfortunately, failure to count some portion of the population has plagued every census count.⁴ This undercount creates the risk that congressional seats may be malapportioned.⁵ As a result, the Department of Commerce’s Census Bureau has undertaken to improve census-taking methods in order to correct the perennial undercount problems caused by the traditional procedures.⁶

This note will analyze the differences between the measures that the Census Bureau has attempted to use (which have been ruled illegal by courts) and those that have withstood judicial scrutiny in the Bureau’s attempt to improve the apportionment count. Section I provides a brief summary of the undercount. Section II will provide a short history of the statutory basis of the Census, so as to better understand the foundation of the Supreme Court’s decisions. Section III will begin with an analysis of one system that the Census Bureau recently used in an attempt to alleviate the undercount—statistical sampling. After briefly describing the history and methods of statistical sampling, it will discuss why the Supreme Court ruled statistical sampling unconstitutional for the purposes of the apportionment count in *Department of Commerce v. United States House of Representatives*.⁷ Section IV will analyze “hot-deck imputation,” which is a new estimation system the Census Bureau has devised to supplant sampling. This section will explore why the Supreme Court ruled in *Utah v. Evans*⁸ that such a methodology passes both statutory and constitutional muster. Section V will then examine the apparent inconsistency of these two rulings, breaking down each decision according

¹ U.S. CONST. Art. I, § 2, cl. 3.

² 2 U.S.C. § 2a(a) (2000); *see also* *Dep’t of Commerce v. United States House of Representatives*, 525 U.S. 316, 321–22 (1999).

³ Nathaniel Persily, *Color by Numbers: Race, Redistricting, and the 2000 Census*, 85 MINN. L. REV. 899, 903 (2001).

⁴ *House of Representatives*, 525 U.S. at 322. *See generally* Daniel Garth Hazard, Note, *Department of Commerce v. United States House of Representatives—Constitutional Text: Out of Sight, Out of Mind*, 32 U. TOL. L. REV. 89 (2000); Persily, *supra* note 3, at 902–19 (“Statistical Adjustment to Correct the Undercount”).

⁵ Persily, *supra* note 3, at 903.

⁶ *See id.* at 904. Under the traditional method, the Census Bureau mailed census forms to individuals and sent enumerators to conduct follow-up interviews with those who did not return their forms.

⁷ 525 U.S. 316 (1999).

⁸ 536 U.S. 452 (2002).

to rationale and the opinions of certain justices in an attempt to rationalize the results. Finally, Section VI will analyze the quagmire created by the Supreme Court's two forays into interpretation of the Census Clause. First, it will consider the inconsistency of the *Evans* decision vis-à-vis the history of the Actual Enumeration Clause and try to provide insight into what the Framers intended the census to be and how they intended it to be conducted. Then it critiques the opposite view, championed by a plurality in *House of Representatives* and the State of Utah in *Evans*. Finally, this note will discuss how this solution is unworkable and problematic, not to mention unconstitutional.

The problems discussed in this paper are very real because each time the census is conducted, a significant portion of the population is not counted. Furthermore, minorities and urban residents are undercounted at a significantly higher rate than majority and suburban residents.⁹ The undercount from the last six censuses can be summarized as follows:

ESTIMATED NET CENSUS UNDERCOUNT FROM 1940 TO 1990 AS MEASURED BY DEMOGRAPHIC ANALYSIS (REVISED 1990 ESTIMATES)¹⁰

YEAR	BLACK	NON-BLACK	DIFFERENCE	OVERALL NET UNDERCOUNT
1940	8.4%	5.0%	3.4%	5.4%
1950	7.5%	3.8%	3.8%	4.1%
1960	6.6%	2.7%	3.9%	3.1%
1970	6.5%	2.2%	4.3%	2.7%
1980	4.5%	0.8%	3.7%	1.2%
1990	5.7%	1.3%	4.4%	1.8%

The results of each census determine the size of a state's delegation in the House of Representatives and the Electoral College and are also used to allocate revenue to state and local governments for social and educational programs.¹¹ Thus, an inaccurate count can have far-reaching constitutional and social effects.¹² An inaccurate census contributes to social problems, unconstitutional malapportionment and seemingly endless litigation. Therefore, it is necessary to find a solution that remedies

⁹ Margo Anderson & Stephen E. Fienberg, *The 2000 Census: Litigation, Results, and Implications*, 77 N.D. L. REV. 665, 669 (2001).

¹⁰ *Id.* at 669 (revised 1990 estimates).

¹¹ *Id.* at 666–67.

¹² *Id.* at 667, 669. The effects of revenue allocation can become very significant. For example, in 1960, federal aid comprised 15% of all state and local spending. *Id.* at 669. These effects will be discussed in more detail below.

these problems while also passing constitutional muster. Unfortunately, as this paper will show, such a solution remains far outside our grasp.

I. THE STATUTORY BASIS FOR THE CENSUS

The first census was conducted in 1790.¹³ During this census, Congress required the enumerators to “swear an oath to make ‘a just and perfect’ enumeration of every person.”¹⁴ Congress clarified this direction in 1810 by directing that the “enumeration shall be made by an actual inquiry at every dwelling-house . . . and not otherwise.”¹⁵ Statutes governing the next fourteen censuses maintained this requirement.¹⁶

The 1954 Census Act, which governs modern censuses, initially contained language requiring enumerators to personally visit each “dwelling-house” within their area of responsibility.¹⁷ In 1957, however, the Secretary of Commerce asked Congress to allow departure from this requirement and approve the use of statistical sampling in gathering census information.¹⁸ In response to this request, Congress added § 195¹⁹ to the 1954 Census Act, which allowed the use of “the statistical method known as ‘sampling’” in carrying out the census, except with regard to the “determination of population for apportionment purposes.”²⁰ In 1964, Congress repealed the requirement of a personal visit to each dwelling and permitted the Census Bureau to replace the personal visit with the postal delivery and return of a form.²¹ When this “mailout-mailback” system fails to result in a returned form, Census Bureau enumerators conduct personal visits to the dwelling to gather the necessary information.²²

The provisions of the 1954 Census Act took their present form in 1976, when Congress revised § 141, specifically allowing the use of sampling procedures for the census of “population, housing, and matters relating to population and housing.”²³ However, this broad grant of authority to use statistical sampling in the census remains restricted by

¹³ Thomas R. Lee, *The Original Understanding of the Census Clause: Statistical Estimates and the Constitutional Requirement of an “Actual Enumeration”*, 77 WASH. L. REV. 1, 6 (2002).

¹⁴ *Id.* (quoting *House of Representatives*, 525 U.S. at 335 (quoting Act of Mar. 1, 1790, § 1, 1 Stat. 101)).

¹⁵ *Id.* (quoting *House of Representatives*, 525 U.S. at 335 (quoting Act of Mar. 26, 1810, § 1, 2 Stat. 565–66)).

¹⁶ *Id.*

¹⁷ *House of Representatives*, 525 U.S. at 336 (citing Act of Aug. 31, 1954, §25(c), 68 Stat. 1012, 1015).

¹⁸ *Id.*

¹⁹ 13 U.S.C. § 195 (1970).

²⁰ *House of Representatives*, 525 U.S. at 336. (citing 13 U.S.C. § 195 (1970)).

²¹ *Id.* at 337.

²² *Id.*

²³ *Id.* at 337–38 (citing 13 U.S.C. § 141(g)).

§ 195, which “directly prohibits” the use of sampling in the decennial census to determine population for the apportionment of seats in the House of Representatives in Congress.²⁴

II. ATTACK ON THE EASTERN FRONT: THE SAMPLING DISPUTE

The Constitution’s Actual Enumeration Clause generally provokes a wealth of litigation as each decennial census is planned and conducted. For a time, especially in the 1970s and 1980s, much of the litigation concerned the perpetual undercount and sought to force the Census Bureau to acknowledge and remedy the problem.²⁵ When the Bureau finally implemented new methods to correct the undercount, the litigation did not abate but rather shifted to whether these methods were prohibited by statute or the Constitution.²⁶ For example, after the 1990 census more than 170 different actions challenging the results were filed.²⁷ One such case, *Wisconsin v. City of New York*,²⁸ was brought by an amalgamation of states, cities, and citizens to challenge the Secretary of Commerce’s decision not to statistically adjust the 1990 census to make up for the differential undercount.²⁹ This challenge, though victorious before the Second Circuit Court of Appeals, was overruled by the Supreme Court.³⁰ In fact, no state or other group has *ever* prevailed in an action to win a Congressional seat that was apportioned to another state,³¹ notwithstanding the wealth of litigation that has been fueled by over twenty censuses. However, this fact has not quelled recent litigious efforts by those who fear their state will lose Congressional seats as a result of inaccurate cen-

²⁴ *Id.* at 338; *see also id.* at 339 n.6.

²⁵ Anderson & Fienberg, *supra* note 9, at 672. The Department of Commerce and the Census Bureau were able to prevail in these actions because they were able to demonstrate that there was no known method available to correct the undercount. *Id.* However, some decisions implied that the Bureau might be liable for discrimination under the Administrative Procedures Act if serious research into the problem was not conducted. *Id.* (referring specifically to *Cuomo v. Baldrige*, 674 F. Supp. 1089, 1098 (S.D.N.Y. 1987)).

²⁶ *Id.* at 673.

²⁷ Michael Janofsky, *Utah, in Census War, Fights North Carolina for House Seat*, N.Y. TIMES, Feb. 8, 2001, at A18.

²⁸ 517 U.S. 1 (1996).

²⁹ *Id.* at 10. The Secretary decided not to adjust the Census based on statistics because that would “abandon a two hundred year tradition of how we actually count people” and he wanted to be sure that such a method would “make the census better . . . and more accurate.” *Id.* at 11. He was concerned that although numerical accuracy at the national level might be improved, it could not be assured that distributive accuracy at the state and local levels would be augmented. *Id.* This decision was challenged as unconstitutional and contrary to federal law. *Id.* at 10–11.

³⁰ *Id.* at 24.

³¹ *See* Janofsky, *supra* note 27, at A18.

sus data. The Census Bureau was well aware of this litigiousness as it prepared for and conducted the 2000 census.³²

The cause of some of the more recent litigation began in 1997, when the Census Bureau released a report to Congress describing how it proposed to conduct the then-forthcoming 2000 census.³³ In this report, the Bureau proposed the use of statistical sampling to supplement the apportionment count.³⁴ Statistical sampling uses a randomly selected sample of households that do not respond to the traditional census inquiry as “statistically representative” of the entire non-responding group.³⁵ The Bureau recommended this method in response to a congressional mandate³⁶ directing the Secretary of Commerce to study new “means by which the Government could achieve the most accurate population count possible.”³⁷ It was intended to alleviate the “chronic and apparently growing problem” of the census undercounting certain groups of individuals.³⁸ In addition to increasing accuracy, the new method was aimed at reducing the cost of conducting the census.³⁹ Unfortunately, statistical sampling has “become the chief controversy surrounding the 2000 census.”⁴⁰

³² See, e.g., *Utah v. Evans*, 536 U.S. 452, 473–74 (2002); see also *Dep’t of Commerce v. United States House of Representatives*, 525 U.S. 316 (1999); *United States House of Representatives v. Dep’t of Commerce*, 11 F. Supp. 2d 76 (D.D.C. 1998); *Glavin v. Clinton*, 19 F. Supp. 2d 543 (E.D. Va. 1998).

³³ Lee, *supra* note 13, at 1.

³⁴ *House of Representatives*, 525 U.S. at 320. It is interesting to note that this is not the first time that the Census Bureau has sought to use sampling to supplement the census. Before the 1990 Census, the Bureau tried to use statistical sampling, but they were blocked by then Secretary of Commerce Robert Mosbacher. Steven A. Holmes, *Census Plan for 2000 Is Challenged on 2 Fronts*, N.Y. TIMES, June 6, 1996 at A21.

³⁵ *House of Representatives*, 525 U.S. at 324. The Census Bureau has long used sampling as a method for determining national statistics such as poverty and unemployment rates, but it had never been used for purposes of apportionment. Steven A. Holmes, *In a First, 2000 Census Is to Use Sampling*, N.Y. TIMES, Feb. 29, 1996 at A16. Even with sampling added, the Bureau proposed to use either mail-in forms or enumerators until 90% of all households had been counted. *Id.* Thereafter, they proposed to take a statistical sample of the remaining 10%, dispatch enumerators to count them (repeatedly if necessary), and use those results to estimate the total number that were originally missed. *Id.*

³⁶ Decennial Census Improvement Act of 1991 §2(a)(1). Under the statute, the Secretary was to contract with the National Academy of Sciences to undertake this study. *Id.*; see also *House of Representatives*, 525 U.S. at 323.

³⁷ *House of Representatives*, 525 U.S. at 323 (quoting Decennial Census Improvement Act of 1991 § 2(a)(1)). In fact, two of the three panels established by the National Academy of Sciences to study the undercount problem concluded that “undercount cannot be reduced to acceptable levels at acceptable costs without the use of [a statistical sampling procedure].” *Id.* It was in response to this study, as well as other research, that the Census Bureau decided to formulate the plan to use statistical sampling for the 2000 Census. *Id.* at 323–24.

³⁸ *Id.* at 320; see also Persily, *supra* note 3, at 902–16.

³⁹ Steven A. Holmes, *In a First, 2000 Census Is to Use Sampling*, N.Y. TIMES, Feb. 29, 1996, at A16. These two aims—increasing accuracy and reducing costs—were cited as the “twin goals” of the 2000 Census by then Census Bureau Director Martha Farnsworth Rice. *Id.*

⁴⁰ Persily, *supra* note 3, at 902.

A. CONGRESS LAUNCHES AN OFFENSIVE: *DEPARTMENT OF COMMERCE v. UNITED STATES HOUSE OF REPRESENTATIVES*

Congress opposed the Census Bureau's proposal to use sampling as a method to correct the expected census undercount and tried repeatedly to force the Bureau to reject this measure. First, the House of Representatives attached a provision designed to suspend plans for sampling to a bill appropriating funds for the Commerce Department.⁴¹ Defying the House's expectations, President Clinton vetoed the bill.⁴² A compromise was eventually reached, which, among other things, allowed members of Congress and private citizens to sue the executive branch before the census to force a decision on the legality or constitutionality of the sampling plan.⁴³

The two District Courts hearing these disputes both found for the plaintiffs, permanently enjoining the Bureau's use of statistical sampling for the purposes of determining the population for the congressional apportionment on the grounds that such utilizing such methods would violate the Census Act.⁴⁴ The Supreme Court, consolidating the two cases for oral argument in *Department of Commerce v. United States House of Representatives*, affirmed the *Glavin* decision and then dismissed the appeal in *House of Representatives* because, after *Glavin*, it no longer offered a compelling federal question.⁴⁵

B. THE REPUBLICAN LEADERSHIP TAKES A VICTORY MARCH

The Supreme Court narrowly upheld the District Courts' orders issuing permanent injunctions enjoining the Census Bureau's use of statistical sampling for the congressional apportionment on statutory grounds.⁴⁶ In a "classic" Rehnquist Court five-four decision,⁴⁷ the majority interpreted the text of § 195 of the Census Act⁴⁸ to expressly pro-

⁴¹ MARGO J. ANDERSON & STEPHEN E. FIENBERG, WHO COUNTS: THE POLITICS OF CENSUS-TAKING IN CONTEMPORARY AMERICA 211 (1999).

⁴² *Id.* at 207-08, 211.

⁴³ Anderson & Feinberg, *supra* note 9, at 674. Although seemingly benign, this provision proved to be vitally important to the House's challenge, as it was one of the bases on which the Supreme Court determined that the challenge was justiciable. *House of Representatives*, 525 U.S. at 328-29.

⁴⁴ *Id.*

⁴⁵ *Id.*

⁴⁶ *Id.*

⁴⁷ The determinative portion of the Court's opinion, delivered by Justice O'Connor, was joined by Chief Justice Rehnquist, Justice Scalia, Justice Kennedy and Justice Thomas. (Justices Scalia and Thomas did decline to join in Part III-B, which attempted to bolster the majority's decision by drawing upon Congressional silence as evidence of Congressional intent. The essential holding having already been reached, however, this fractured portion of the opinion had no effect on the outcome.) Justices Stevens, Souter, Ginsburg, and Breyer all dissented. *Id.* at 319.

⁴⁸ 13 U.S.C. § 195 (2000).

hibit the use of sampling for the purpose of determining congressional apportionment, even though the Census Act expressly encourages the use of sampling in other situations.⁴⁹

The Court based its interpretation of § 195 on both the legislative history surrounding the 1976 revisions to the Census Act and the history of the Census Act itself. It noted that the current Act contained substantially the same language as its predecessors, requiring the Bureau's enumerators to "visit personally each dwelling" in order to gather census information.⁵⁰ In 1957, the Secretary of Commerce asked Congress to amend the Census Act to permit the Bureau to use statistical sampling. Congress then added § 195, which allowed the use of sampling procedures only for "supplemental, nonapportionment" purposes.⁵¹ Although Congress later repealed the provision requiring the Bureau to conduct a personal visit, the Court found there was "no suggestion from any quarter that this change altered the prohibition in § 195 on the use of statistical sampling for apportionment purposes."⁵² The Court also found that, while the 1976 amendment to the Census Act altered the language of the relevant provisions, this change served only to *require*, rather than merely to permit, that sampling be used for purposes *other than* apportionment.⁵³ Indeed, the Court found that the only "plausible reading" of the amended § 195 was that it still "prohibits the use of sampling in calculating the population for purposes of apportionment."⁵⁴

The Court also found that the Census Bureau itself had expressed the same view when it determined that the Census Act "'clearly' continued the 'historical precedent of using the 'actual Enumeration' for purposes of apportionment, which eschewing estimates based on sampling or other sophisticated procedures.'"⁵⁵ As such, the Court affirmed the judgments of the two District courts.⁵⁶ Because the Court decided the

⁴⁹ *House of Representatives*, 525 U.S. at 334. Justice O'Connor notes that § 195 qualifies the "broad grant of authority given in §141(a)" of the Census Act. *Id.* at 338.

⁵⁰ *Id.* at 336 (citing 13 U.S.C. § 25(c) (1954)).

⁵¹ *Id.* at 336-37.

⁵² *Id.* at 337.

⁵³ *Id.* at 341.

⁵⁴ *Id.* at 340. As mentioned in the text cited *supra*, at note 52, Justice O'Connor further based her decision on the fact that not a single member of Congress suggested that the 1976 amendment would "so fundamentally change" the method by which the Census Bureau was allowed to conduct the Census. This silence, she inferred, demonstrates that Congress did not intend "to enact what would arguably be the single most significant change in the . . . census since its inception." *Id.* at 342-43. However, in his concurrence, Justice Scalia (joined by Justice Thomas) "of course" took exception to this rationale based on "what was *not* said." *Id.* at 344.

⁵⁵ *Id.* at 340 (citing 45 Fed. Reg. 69366, 69372 (1980)).

⁵⁶ *Id.* at 344. Only a plurality of the Court supported this rationale, however. *See id.* at 344 (Scalia, J., concurring in part) (relying on the plain meaning of the statute and the doctrine of constitutional doubt).

question on statutory grounds, it declined to reach the constitutional questions posed by the use of sampling or other statistical methods.⁵⁷ Although the decision to not reach the constitutional issues in *House of Representatives* is perhaps sound as a matter of constitutional jurisprudence,⁵⁸ this decision would come back to haunt four of the five justices in the majority three years later in *Utah v. Evans*.

The dissenting Justices⁵⁹ argued that § 195 of the Census Act did not limit the Bureau's authorization to use sampling in the apportionment count, though they reached this conclusion on two different rationales. Justice Breyer argued that § 195 banned only the use of sampling as a *substitute* for traditional enumeration methods.⁶⁰ Therefore, as long as sampling is used to supplement the traditional enumeration methods, it should be allowed. Justice Breyer further argued that the language of § 195 permits such a distinction.⁶¹ Interestingly, he conceded this provision can be interpreted as the majority did, but he argued that § 195 also applies to the use of sampling "*in place of*" traditional census methods, because the "except" clause "does not necessarily apply to every conceivable use of statistical sampling. . . ."⁶² Justice Breyer continued by discussing how the "history and context" of § 195 supports his point.

Justice Stevens took a different approach. Stevens argued that § 195 simply informs the Bureau that it is not *compelled* to use sampling in the apportionment count as would be true for other portions of the

⁵⁷ *Id.* at 343. Justice O'Connor relied on the doctrine first promulgated in Justice Brandeis' famous concurrence in *Ashwander v. Tennessee Valley Authority*: "[I]f a case can be decided on either of two grounds, one involving a constitutional question, the other a question of statutory construction or general law, the Court will decide only the latter." *Id.* (quoting *Ashwander v. TVA*, 297 U.S. 288, 347 (1936) (Brandeis, J., concurring)).

⁵⁸ A long line of Supreme Court opinions has advocated the doctrine that the Court has a duty to avoid Constitutional decisions when the case can be decided on statutory grounds. A concurring opinion by Justice Brandeis in *Ashwander* is perhaps the most cited authority of this doctrine. See *supra* note 57. This doctrine of self-restraint is justified because of the conflict between the judiciary and the democratic system. JOHN E. NOWAK & RONALD D. ROTUNDA, CONSTITUTIONAL LAW §2.12(g) (Hornbook Series 2000).

⁵⁹ Two opinions dissenting on the merits were offered—one by Justice Breyer and the other by Justice Stevens, who was joined by Justices Souter and Ginsburg. *House of Representatives*, 525 U.S. at 349–57 (Breyer, J., dissenting in part), 357–65 (Stevens, J., dissenting).

⁶⁰ *Id.* at 349–50.

⁶¹ *Id.* at 350.

⁶² *Id.* The actual text of § 195 reads: "Except for the determination of population for purposes of apportionment of Representatives in Congress among the several States, the Secretary shall, if he considers it feasible, authorize the use of the statistical method known as "sampling" in carrying out the provisions of this title." 13 U.S.C. § 195 (1994). It seems that Justice Breyer is right in that the first clause does not apply to every "conceivable use of statistical sampling," but a plain reading of the statute surely demonstrates that it *does* prohibit every conceivable use of sampling in the apportionment. The word "substitute" or "supplement" or any term implying something similar are nowhere to be found in this provision. It is interesting to note, however, that Justice Breyer cites a then-17-year-old District Court opinion to support this view. *House of Representatives*, 525 U.S. at 351.

census.⁶³ He went so far as to argue that a textual comparison of the 1957 Census Act and the 1976 version demonstrates that Congress “specifically intended” to allow the use of sampling for the purposes of apportionment.⁶⁴ Congress’s replacement of the word “may” in the old version with “shall” in the current version, he argued, “unambiguously endorsed” the use of sampling.⁶⁵

The dissent also reached the merits of the constitutional question, arguing that sampling was clearly allowed under the Actual Enumeration Clause.⁶⁶ Although the dissenting justices conceded that the apportionment count was to be based on “actual population counts, rather than mere speculation or bare estimate,” they argued that this does not limit the authority of Congress to direct the manner by which this count is conducted.⁶⁷ The justices supported this view by citing the absence of debate in the Constitutional Convention over the actual methods to be used in the census.⁶⁸ The justices noted that the “constitutional goal” of the census, as a matter of policy, is to provide equal representation, and thus the census requires the most accurate methods possible.⁶⁹

Perhaps the most telling portion of the Court’s decision, however, is the four-justice concurrence authored by Justice Scalia.⁷⁰ Though certainly not binding, Part II of this opinion offers interesting insight into what the plurality thought of the constitutional issue—insights that would, in at least in one instance, later prove to be inconsistent with the decision in *Utah v. Evans*.

In seeking to construe the text to avoid serious constitutional doubt, the four concurring justices argued that it is “doubtful” whether statistical sampling is permissible under the Actual Enumeration Clause.⁷¹ The justices did not stop there, but rather extended their analysis to suggest that the Actual Enumeration Clause would require an “actual count” without any “estimation.”⁷² To support this view, they relied upon defi-

⁶³ *House of Representatives*, 525 U.S. at 358 (Breyer, J., dissenting in part).

⁶⁴ *Id.* at 359 (Stevens, J., dissenting).

⁶⁵ *Id.*

⁶⁶ *Id.* at 362. Note that Justice Breyer did not reach this question in his dissent, but joined Justice Stevens’ opinion as to the merits of this issue.

⁶⁷ *Id.* at 363.

⁶⁸ *Id.*

⁶⁹ *Id.* at 364.

⁷⁰ *Id.* at 344–49 (Scalia, J., concurring in part). Part II of this concurrence—the portion at issue here—is joined Chief Justice Rehnquist, Justice Thomas and Justice Kennedy. Part I is joined only by Justice Thomas. This concurrence is indeed interesting for reasons other than the merits, as Justice Scalia actually injects the phrase “Congress swallows a camel and strains out a gnat” into the annals of American jurisprudence. *Id.* at 346.

⁷¹ *Id.* Justice Scalia also notes that the Department of Commerce, which here argues that sampling is consistent with the Actual Enumeration Clause, once argued the opposite. *Id.* at 349 (citing *Young v. Klutznick*, 497 F. Supp. 1318, 1332 (E.D. Mich. 1980)).

⁷² *Id.* at 346–47.

nitions of “enumeration” found in dictionaries that are contemporaneous with the drafting of the Constitution—definitions that promulgate “the notion of counting ‘singly,’ ‘separately,’ ‘number by number,’ [and] ‘distinctly.’”⁷³ The concurring justices argued that these definitions are incompatible with statistical estimates.⁷⁴

The plurality also opposed allowing “estimation techniques” based on policy grounds.⁷⁵ They feared the advent of partisan manipulation into congressional apportionment if Congress was allowed to regulate the entire manner in which the census was taken, unbound by any constitutional constraint as to method.⁷⁶ This, they argued, would create a situation where the Court would be forced to review the estimation techniques employed by the Bureau after each census, a prospect which these four justices saw as “not a happy one.”⁷⁷ Indeed, they even pondered whether the Court had authority to review census results, or whether it would be prohibited from doing so by the separation-of-powers doctrine.⁷⁸ This portion of the concurrence proved prophetic, as the Court would be compelled to face these very issues just three years later in *Utah v. Evans*.

III. ALL’S NOT QUIET ON THE WESTERN FRONT (UNTIL UTAH RUNS TO THE COURTHOUSE TWICE): THE IMPUTATION DISPUTE

Although the Census Bureau was bound by the decision to not use statistical sampling for purposes of Congressional apportionment, it used another methodology to correct the perennial undercount problem for the 2000 census. This method, called “hot-deck imputation,” fills in missing information by “imput[ing] the relevant information by inferring that the address or unit about which it is uncertain has the same population characteristics as those of a ‘nearby sample or donor’ address or unit.”⁷⁹

The Bureau used this method of imputation during the 2000 census, and it caused the final count for that census to be increased by a total of 1.2 million people (representing 0.4% of the total population count).⁸⁰ However, problems soon developed as this relatively small percentage was unevenly spread across the country, causing it to affect the appor-

⁷³ *Id.*

⁷⁴ *Id.*

⁷⁵ *Id.* at 348.

⁷⁶ *Id.* at 348–49 (Scalia, J., concurring in part).

⁷⁷ *Id.* at 349.

⁷⁸ *Id.*

⁷⁹ Brief of Appellants at 7–8, 11, *Utah v. Evans*, 536 U.S. 452, 458 (2002) (No. 01-714). The “nearby sample or ‘donor’ address is defined as the “geographically closest neighbor of the same type . . . that did not return a census questionnaire.” *Id.*

⁸⁰ *Id.*

tionment of the House of Representatives.⁸¹ For example, North Carolina's population increased by 0.4% while Utah's population increased by only 0.2%.⁸² This meant that North Carolina gained one Representative in the House, while Utah received one fewer representative than it otherwise would have had imputation not been used.⁸³ In fact, Utah missed qualifying for its fourth congressional seat by a mere 856 people.⁸⁴

A. UTAH'S FIRST KNOCK AT THE COURTHOUSE DOOR—*UTAH V. EVANS* (VERSION 1)

Not surprisingly, given that it had failed to increase its representation in the House of Representatives by less than one-quarter of one percent,⁸⁵ Utah immediately launched a campaign to challenge the census results.⁸⁶ Utah argued against the census procedure so that it would not, as Governor Michael Leavitt said, "lose" a seat in the House of Representatives in what the governor deemed an unfair count.⁸⁷

Utah first challenged a census rule that allowed the apportionment count to include federal employees living abroad, while excluding private employees or other Americans living outside the United States.⁸⁸ Modifying this regulation to include non-federal employees living abroad would have created a drastic change in Utah's final count, because over 11,000 overseas missionaries⁸⁹ would have been included.⁹⁰ This would have been more than enough for Utah to close the 856 person lead held by North Carolina, thus gaining the state an additional seat in the House of Representatives.⁹¹

⁸¹ *Id.*

⁸² *Id.*

⁸³ *Id.*

⁸⁴ Janofsky, *supra* note 27, at A18.

⁸⁵ In fact, had it been able to increase its representation in the House from three to four seats, Utah would have increased its overall representation by roughly 0.23%.

⁸⁶ Janofsky, *supra* note 27, at A18.

⁸⁷ *Id.* Utah Officials and supporters often refer to the "loss" or "shift" of its fourth Congressional seat to North Carolina. *See id.*; *see also* Lee, *supra* note 13, at 4. However, the results of the 2000 Census, both before and after Utah's challenge, left Utah with three seats in the House of Representatives—the same number of seats it maintained for the previous decade as a result of the 1990 Census.

⁸⁸ Janofsky, *supra* note 27, at A18.

⁸⁹ Mostly from the Church of Jesus Christ of Latter-Day Saints. *Id.*

⁹⁰ Janofsky, *supra* note 27, at A18. It is interesting to note that North Carolina far outpaced Utah in the number of federal civilian and military employees abroad in 2000, with 18,360 to Utah's 3,545. *Id.* Had Utah succeeded in this action, North Carolina would have benefitted from the inclusion of only 107 foreign-serving missionaries. *Id.*

⁹¹ *Id.* Had Utah's action been successful, this would not be the first time that private American workers living abroad would be included in the census totals. *Id.* However, Congress had elected not to include them in the last three census counts because of the difficulty of finding Americans outside the country and thus the lack of accuracy that would result. *Id.*

Upon presentation of this challenge, the House delayed final certification of the disputed seat until a court decided the issue.⁹² Utah advanced three claims before the panel: first, that the regulation was “arbitrary and capricious” and thus violated the Administrative Procedure Act; second, that the Bureau’s exclusion of missionaries violated the Free Exercise Clause in the First Amendment; and third, that the Apportionment Clause of the Constitution requires an “actual Enumeration.”⁹³ Utah’s hopes were quickly derailed, though, when a unanimous three-judge panel rejected all three claims and granted summary judgment in favor of the defendants.⁹⁴ Utah appealed to the Supreme Court, but the decision was affirmed without comment.⁹⁵

B. ONCE, TWICE, THREE TIMES A LOSER—*UTAH V. EVANS*
(VERSION 2)

After its first challenge failed, Utah brought a second action challenging the census results.⁹⁶ This challenge advanced two separate claims. First, Utah argued that the Bureau’s use of “hot-deck imputation” was not allowed on statutory grounds, because it violated the Census Act’s prohibition against using “the statistical method known as sampling.”⁹⁷ Second, Utah argued that such “hot-deck imputation” is unconstitutional because it is inconsistent with the “actual Enumeration” required by the Constitution.⁹⁸ Like the plaintiffs in *House of Representatives*, Utah sought injunctive relief.⁹⁹ However, because the census had already been conducted using this method, the Utah sought an injunction compelling the Census Bureau to change the official census results.¹⁰⁰ The District Court found in favor of the Bureau,¹⁰¹ but Utah appealed, and the Supreme Court granted certiorari to determine whether the Bureau’s use of “hot-deck imputation” violated either the Census Act or the Constitution’s Actual Enumeration Clause.¹⁰²

The Supreme Court affirmed the judgment of the District Court denying Utah’s claim to compel the Bureau to change the official census results.¹⁰³ Justice Breyer, writing for what even a beginning law student

⁹² *Id.*

⁹³ *Utah v. Evans*, 143 F. Supp. 2d 1291, 1295-98 (D. Utah 2001).

⁹⁴ *Id.* at 1290, 1293.

⁹⁵ *Utah v. Evans*, 534 U.S. 1038 (2001).

⁹⁶ *Utah v. Evans*, 536 U.S. 452 (2002).

⁹⁷ *Id.* at 459 (citing 13 U.S.C. § 195).

⁹⁸ *Id.* at 459 (citing U.S. CONST. art. I, § 2, cl. 3).

⁹⁹ *Id.*

¹⁰⁰ *Id.*

¹⁰¹ *Utah v. Evans*, 182 F. Supp. 2d 1165, 1175 (D. Utah 2001).

¹⁰² *Evans*, 536 U.S. at 457.

¹⁰³ *Id.* at 479.

would concede is an interesting (and truly rare) majority,¹⁰⁴ found in favor of the Census Bureau on the statutory claim by distinguishing the methodology of “hot-deck imputation” in both “degree” and “kind” from the sort of statistical sampling that violated the statute in *House of Representatives*.¹⁰⁵ The purpose of sampling, the Court declared, is to extrapolate the features of a large population from a small sample, while imputation only fills in missing population data.¹⁰⁶

To illustrate the distinction, the majority opinion borrowed an example from the Government’s presentation of its argument before the Court:

[Visualize] a librarian who wishes to determine the total number of books in a library. If the librarian finds a statistically sound way to select a sample . . . and if the librarian then uses a statistically sound method of extrapolating from the part to the whole . . . then the librarian has determined the total number of books by using the statistical method known as “sampling.” If, however, the librarian simply tries to count every book one by one, the librarian has not used sampling. Nor does the latter process suddenly become “sampling” simply because the librarian, finding empty shelf spaces, “imputes” to that empty shelf space the number of books . . . that likely filled them.¹⁰⁷

The majority insisted that that latter process is not sampling even if the librarian goes about the imputation process by technical means, such as “measuring the size of nearby books and dividing the length of each empty shelf space by . . . the average size of nearby books on the same shelf.”¹⁰⁸

The majority also examined the phraseology of the statute and the technical definition of sampling to support its decision. It keyed upon the “known as” language that precedes “sampling” in § 195, finding that this suggested that Congress thus intended sampling to be a term of art

¹⁰⁴ Justice Breyer was joined in his opinion by Chief Justice Rehnquist, Justice Stevens, Justice Souter and Justice Ginsburg. *Id.* at 456. Justice Thomas, joined by Justice Kennedy, concurred in the majority’s treatment of the statutory issue, but dissented as to the constitutional issue. *Id.* at 488. Justice O’Connor wrote an opinion dissenting on both the statutory and constitutional merits (though concurring on the majority’s treatment of jurisdiction). *Id.* at 479. Justice Scalia, who had his own separation-of-powers fish to fry, dissented on jurisdictional grounds. *Id.* at 510.

¹⁰⁵ *Id.* at 454.

¹⁰⁶ *Id.* at 465.

¹⁰⁷ *Id.*

¹⁰⁸ *Id.*

“with a technical meaning.”¹⁰⁹ Based on technical literature¹¹⁰ and expert testimony¹¹¹ from the District Court proceedings, the Court decided that the term did not encompass imputation methodology.¹¹²

In addition to ruling against Utah on its statutory claim, the Court was not persuaded by Utah’s constitutional claim. Utah argued that the inclusion of the term “actual Enumeration” in the Constitution requires the Census Bureau to seek out each individual in order to include him or her in the apportionment count.¹¹³ However, the majority found that the Constitution implies no limitation as to the methodology of the enumeration.¹¹⁴ Instead, the Court read the “in such Manner as the Congress shall by Law direct” portion of the Actual Enumeration Clause to suggest that the Constitution grants Congress broad authority in selecting the methodology by which the census is to be conducted.¹¹⁵

IV. GIVE PEACE A CHANCE: RECONCILING THE TWO SUPREME COURT DECISIONS

An attempt to reconcile the decisions in *House of Representatives* and *Evans* reveals that the Supreme Court has utterly failed to provide any guidance on the issue of what types of potential estimation methods will pass constitutional muster. On their faces, these two opinions do *not* seem to conflict with each other, since the constitutional issue was never reached in *House of Representatives*.¹¹⁶ Nonetheless, an analysis of the different opinions reveals that Chief Justice Rehnquist was wholly inconsistent in his rationale. This fact is of vital importance to lawmakers, practitioners, and constitutional scholars today because it limits their ability to predict what the Constitution will tolerate as to census methodology. The inconsistencies between these opinions mean that these groups are no more informed now than before these cases reached the high court. The results of future census litigation are thus seemingly unpredictable.

House of Representatives and *Evans*, however, present a rare opportunity to compare two opinions that were issued by the same court on the same issue only three years apart. (As such, the number of variables that

¹⁰⁹ *Id.* at 467.

¹¹⁰ The Court cited several technical treatises to support its view that sampling includes only those methodologies where a part of a population is used to make inferences about the whole population. *Id.* at 467–68.

¹¹¹ It is interesting to note that the expert testimony on which the Court relied came from the Census Bureau’s own statisticians. *Id.* at 468.

¹¹² *Id.* at 467–70.

¹¹³ *Id.* at 473. See also Brief of Appellant at 35, *Utah v. Evans*, 536 U.S. 452 (2002) (No. 01-714).

¹¹⁴ *Evans*, 536 U.S. at 474.

¹¹⁵ *Id.*

¹¹⁶ *House of Representatives*, 525 U.S. at 343.

might explain the apparent divergence of these two opinions is greatly reduced.) Easily the most curious thing that is revealed by these two decisions is the complete about-face that Chief Justice Rehnquist made from his decision in *House of Representatives* to his decision in *Evans*.¹¹⁷

It is not difficult to understand the Chief Justice's agreement with the majority's treatment of the statutory question in *Evans*, as Justice Breyer convincingly distinguished *imputation* from the *sampling* that was banned by § 195.¹¹⁸ Even the most ardent critic of the Court's decision in that case can recognize that the inclusion of the "known as" language in § 195 can be fairly read to inform the courts that the word "sampling" was to be interpreted according to its technical definition.¹¹⁹ Had this not been the case, it seems plausible Congress would simply have not included the words "known as" and would have instead used such language as "shall authorize the use of sampling."¹²⁰

Unfortunately, one cannot feasibly reconcile Chief Justice Rehnquist's determination of the constitutional issue in these two cases. Admittedly, the *House of Representatives* Court did not reach the constitutional issue in Justice O'Connor's majority opinion.¹²¹ Nonetheless, Chief Justice Rehnquist joined the portion of Justice Scalia's concurrence that clearly suggested that the Actual Enumeration Clause requires the Census Bureau to undertake an "actual counting" without allowing any sort of estimation.¹²² This opinion sought to divine the meaning the Framers intended to import into the word "enumeration" by referring to several dictionaries that were published or in use at the time of the writing of the Constitution's text.¹²³ These concurring Justices, including the Chief Justice, did not attempt to limit their argument to "statistical sampling"; rather, they specifically argued against the consti-

¹¹⁷ In *Evans*, Chief Justice Rehnquist joined the four "liberal" justices, giving them the majority needed to decide the case. The other four justices (Scalia, O'Connor, Kennedy and Thomas), with whom the Chief Justice most often aligns, each dissented on one ground or another.

¹¹⁸ See *Evans*, 536 U.S. at 465-73.

¹¹⁹ *Id.* at 467.

¹²⁰ Principles of constitutional interpretation justify the Court's argument that the "known as" language limits the definition of the word "sampling." In interpreting a statute, the Court will "consider not only the bare meaning" of the critical word or phrase "but also its placement and purpose in the statutory scheme." *Bailey v. United States*, 516 U.S. 137, 145 (1995). Furthermore, because Congress included these words in the statute, it is well-settled that they should be given meaning. Cf. *Pa. Dep't. Pub. Welfare v. Davenport*, 495 U.S. 552 (1990) (citing the proposition that all statutory interpretation must begin with the language of the statute itself). See also E.A. DRIEDGER, *CONSTRUCTION OF STATUTES* 92 (2d ed. 1983) (citing the proposition that a "reader of statutes . . . has the right to assume . . . that every word has meaning and function").

¹²¹ *House of Representatives*, 525 U.S. at 343.

¹²² *Id.* at 346-47 (Scalia, J., concurring).

¹²³ *Id.*

tutionality of any “estimation of number.”¹²⁴ Had the Justices intended to limit the scope of their argument to the constitutionality of statistical sampling, it seems they would have articulated that intent.¹²⁵ However, the opinion employed other non-limiting terms, which suggests that concurring justices meant to broaden the scope of the argument.¹²⁶

However, only three years later, the Chief Justice reversed course from the concurring opinion in *House of Representatives* and joined a rare majority¹²⁷ in *Evans* that specifically allowed imputation as consistent with the Actual Enumeration Clause within the constitutional text.¹²⁸ The *Evans* majority (of which the Chief Justice was a part) took a position diametrically opposed to Justice Scalia’s in *House of Representatives* (which the Chief Justice also joined). The *Evans* majority specifically found that the Actual Enumeration Clause does not specify “any . . . limitation” to the method by which the Census Bureau may conduct its work.¹²⁹ Instead, it asserted that the “in such Manner as Congress shall by Law direct” language at the end of the Actual Enumeration Clause suggests a broad methodological allowance to Congress (and therefore to the Census Bureau, to whom Congress delegates the power to conduct the census), rather than a limited one.¹³⁰ The majority even sought to use the same semantic evidence that the majority employed in *House of Representatives*, finding that a study of “[c]ontemporaneous general usage” of the term “Enumeration” reveals no particular reference to methodology.¹³¹ Furthermore, it argued that “actual Enumeration,” as it was used in the constitutional text, could *not* have been a term of art, as the Constitution later refers to a “Census of Enumeration.”¹³²

In sum, we are left with two contradictory opinions, both of which were joined by Chief Justice Rehnquist, regarding whether methods other than an actual count will pass constitutional muster. Owing to the pur-

¹²⁴ *Id.* at 346–47. One will notice later that the concurrence refined its analysis to disallow “gross statistical estimates.” *Id.* at 347. However, this seemingly still is a broad definition, reaching far beyond the limits of sampling.

¹²⁵ *See id.* at 346. *See also supra* note 102.

¹²⁶ *See* DRIEDGER, *supra* note 120, at 92. Although Professor Driedger refers to the interpretation of statutes, it seems plausible that the same principles may be applied to the interpretation of judicial opinions. It strikes one as particularly unlikely that a writing technician such as Justice Scalia would interchange these terms so loosely.

¹²⁷ A search of the Supreme Court databases on both Westlaw® and Lexis® reveals, at the time of this writing, only one other case where the majority was comprised solely of Chief Justice Rehnquist and Justices Stevens, Souter, Ginsburg and Breyer, with no other justice concurring in the judgment. Interestingly enough, that case concerned the constitutionality of a state redistricting plan—an issue not totally unrelated to apportionment at issue here. *See* *Lawyer v. Dep’t of Justice*, 512 U.S. 567–68 (1997).

¹²⁸ *Evans*, 536 U.S. at 473–79.

¹²⁹ *Id.* at 474.

¹³⁰ *Id.*

¹³¹ *Id.* at 475.

¹³² U.S. CONST. art. I, § 9, cl. 3.

posefully broad arguments presented in each opinion, we cannot reconcile the two. Therefore, after two decisions on the merits, we still do not know whether the Chief Justice thinks the Actual Enumeration Clause permits the Census Bureau to employ any methodology other than an actual count. As both cases were decided by a slim five-four majority, the Chief Justice's opinion will most likely prove vital in predicting the results of future litigation over census methodology.¹³³ It remains unclear, however, why Chief Justice Rehnquist reversed courses in *Evans* and decided in favor of granting the Census Bureau wide constitutional latitude in conducting the decennial enumeration.¹³⁴ But perhaps even more important and difficult, it must be decided whether the Supreme Court will adopt the *Evans* majority's broad permissive view of the Actual Enumeration Clause or whether it will seek to give it some formal meaning in future census litigation.

V. WHO WON THE BATTLE?: A CRITIQUE OF EACH OPINION'S APPROACH

Based on the long history of litigation over the constitutionality of the method by which the Census is conducted¹³⁵ and the seemingly convoluted opinions offered by the Supreme Court on the matter, it seems safe to assume that such litigation will continue to increase. Nonetheless, the resolution of this debate involves far more than a mere theoretical exercise. The figures and statistics arrived at by the census have a variety of applications with far-reaching practical and constitutional implications.

Census figures, besides determining the strength of a state's delegation to the House of Representatives, are also used to allocate Electoral College votes and to distribute funds to state and local governments for programs such as education, public health, and highway construction.¹³⁶ As such, the constitutional guarantee of equal protection is naturally im-

¹³³ Indeed, Chief Justice Rehnquist seems to have become the Court's swing vote on this particular issue.

¹³⁴ One possible explanation for the Chief Justice's switch is fear of the looming separation-of-powers problem that might well have resulted had Utah been successful before the Court. This fear, first predicted in the now infamous concurrence in *House of Representatives* was the subject of some debate during oral arguments. See 525 U.S., at 349. In fact, Justice Scalia openly doubted whether the Court had the power to compel the executive to redress Utah's supposed injury at all. Supreme Court Official Transcript at 5-13, *Utah v. Evans*, 536 U.S. 452 (March 27, 2002) (No. 01-714). Justice Scalia's dissent on jurisdictional grounds was based on this issue. *Evans*, 122 S. Ct. 2223-26 (Scalia, J., dissenting). However, this cannot be justified as the Chief Justice's rationale, for even had he sided with his usual conservative bedfellows, Justice Scalia's dissent on jurisdictional grounds would have created a fractured opinion, which would have resulted in an affirmation of the decision below (which was also against Utah). Thus, the final result of the case would not have changed.

¹³⁵ See generally Anderson & Fienberg, *supra* note 9, at 673.

¹³⁶ *Id.* at 667, 670.

plicated in the census results. The constitutional determination of the question of the meaning of the Actual Enumeration Clause will dictate how the Census Bureau ensures that it does not violate citizens' rights to equal protection by undercounting them. We must determine whether the majority's broad view of this census clause in *Evans* will withstand future court scrutiny.

At this time, it seems unclear whether this clause should retain this broad meaning, or whether the Court should follow the formal analysis that Justice Scalia promulgated in his concurrence in *House of Representatives*. Of course, it is far outside the ability of this author's legal mind to provide a solution that has befuddled our country's highest court. But several points should perhaps be considered before one attempts to answer this question in the future.

First, an analysis of the history of the Actual Enumeration Clause and the Constitutional Convention will attempt to shed light on the thinking and intent of the Framers.¹³⁷ Second, a brief analysis of the solution proposed by the State of Utah in its case before the Supreme Court will reveal several fundamental problems that render it undesirable. Finally, an argument will be offered that the Court should have exercised self-restraint and declined to touch these cases because they present a political question outside the authority of the judiciary.

A. DRUMBEATS OF WAR: THE HISTORY OF THE ACTUAL ENUMERATION CLAUSE

The Framers mandated the decennial census in order to determine how political power would be apportioned among the "disparate" population of the New Republic.¹³⁸ This was fundamental because the Framers, having deemed the people of the United States responsible for running the national government, believed the correct apportionment of political power would be the "fundamental . . . instrument" of this republican government.¹³⁹ Those areas of where population was declining or growing more slowly would have to cede political power to areas of high population growth.¹⁴⁰ In selecting this method, the Framers rejected other available methods of apportioning representatives, such as according to wealth.¹⁴¹

¹³⁷ The reader will surely note that several of the sources relied on by this author here were also cited by both Justice Scalia in his concurrence in *House of Representatives*, Justice Stevens in his treatment of the constitutional questions in *Evans*, and Justice Thomas in his opposite treatment in the same case.

¹³⁸ Anderson & Fienberg, *supra* note 9, at 666.

¹³⁹ *Id.* at 666–67.

¹⁴⁰ *Id.* at 667.

¹⁴¹ See Hazard, *supra* note 4, at 91.

The Framers sought to make the apportionment count as objective as possible, and so they gave responsibility for this count to the federal government in order to avoid the possibility of corruption by state politics.¹⁴² To do so, they included a clause in the Constitution that would require a recount of the population every ten years.¹⁴³ The early drafts of this clause referred specifically to a “census” that would be taken every ten years.¹⁴⁴ However, the final version of the Constitution, as ratified, replaced this term with “actual Enumeration.”¹⁴⁵ Some argue that this language choice was not “out of naiveté or unfamiliarity with methods of estimation,” but rather was a deliberate choice in order to minimize the risk of political manipulation of congressional apportionment.¹⁴⁶

Of course, the Constitution’s text does not specify what is meant by “actual Enumeration.”¹⁴⁷ The clause reads only:

Representatives and direct Taxes shall be apportioned among the several States . . . according to their respective Numbers . . . counting the whole number of free Persons in each state. . . . The actual Enumeration shall be made within three Years after the first Meeting of the Congress of the United States in such Manner as they shall by Law direct. . . .¹⁴⁸

However, the history of the writing of this phrase does provide some insight into its meaning. The Constitutional Convention sent its Committee of Detail a draft which stated that the Congress was to “regulate the number of representatives by the number of inhabitants, . . . which number shall . . . be taken in such manner as . . . [Congress] shall direct.”¹⁴⁹ The Committee of Detail sent this draft to the Committee of Style, which revised the language to include the phrase “actual Enumeration.”¹⁵⁰ Since the Convention granted the Committee of Style absolutely no authority to alter the meaning of its drafts,¹⁵¹ the majority in

¹⁴² *Id.*

¹⁴³ *Id.*

¹⁴⁴ *Id.* at 92.

¹⁴⁵ *Id.*

¹⁴⁶ Lee, *supra* note 13, at 1. Professor Lee, one of those who espouse this view, represented the State of Utah before the Supreme Court in *Utah v. Evans*.

¹⁴⁷ See, e.g., U.S. CONST. art. I, § 2, cl. 3; *Utah v. Evans*, 536 U.S. 452, 474 (2002).

¹⁴⁸ U.S. CONST. art. I, § 2, cl. 3.

¹⁴⁹ 2 MAX FARRAND, RECORDS OF THE FEDERAL CONVENTION OF 1787 178, 182-83 (rev. ed. 1966).

¹⁵⁰ *Id.* at 590-91. Before submitting its draft to the Committee of Style, the Committee of Detail made some minor changes to the draft submitted to it by the Convention. These changes, however, are irrelevant to the present discussion.

¹⁵¹ *Utah v. Evans*, 536 U.S. 452, 474-75 (2002) (citing *Powell v. McCormack*, 395 U.S. 486, 538-39 (1969) and *Nixon v. United States*, 506 U.S. 224, 231 (1993)). In fact, after the Committee on Style had prepared its revised draft of the Constitution, it spent three full days in

Evans took this: to “strongly suggest” that the terms “actual Enumeration” have a similar meaning to the words in the original draft.¹⁵² As such, the Justices argued, “actual Enumeration” became the substantial equivalent of the draft phrase “which number [of inhabitants] shall . . . be taken in such manner as [Congress] shall direct.”¹⁵³

However, both the Framers’ writings and the transcripts of the their debates perhaps justify a different conclusion as to the meaning of “actual Enumeration.” George Washington wrote a letter contrasting a population “estimate” with a “census” or “enumeration.”¹⁵⁴ Similarly, Thomas Jefferson compared the “actual returns” with “conjectures.”¹⁵⁵ George Mason argued for “some permanent & precise standard as essential” while debating the proposal to compel a decennial census.¹⁵⁶ James Madison made a similar distinction during a debate over the first Census Act when he noted that the census would provide an “exact number of every division” as opposed to “assertions and conjectures.”¹⁵⁷ Madison also provided some of the stronger evidence regarding the meaning the founders ascribed to the term “actual Enumeration” when he pointed out during this same debate that there would be substantial difficulties in taking the Census “in the way required by the Constitution,” but noting that Congress was nevertheless “obliged to perform.”¹⁵⁸ Madison further discussed the importance of ensuring an accurate count when he wrote that the Constitution extended the apportionment to control direct taxation in order to directly counter the states’ temptation to inflate their population counts to secure greater representation.¹⁵⁹ This evidence suggests the Framers intended for the Actual Enumeration Clause to implicate some formal requirements and not simply to be a broad grant of power to Congress to manipulate methodology without limit.

As mentioned above, both opinions referred to the general usage of the word “enumeration” during the 18th century to provide support for their view of the meaning the Framers intended to subscribe to “actual

the Convention comparing each article of the revised draft delivered by the Committee with the record that was provided to that committee to ensure that no substantive changes were made. MAX FARRAND, *THE FRAMING OF THE CONSTITUTION* 187 (1913).

¹⁵² *Evans*, 536 U.S. at 474–75. Although the Supreme Court characterizes this lack of authority as a strong suggestion, it also notes that it can provide no dispositive definition to the term. *Id.*

¹⁵³ *Id.* at 475.

¹⁵⁴ 31 *WRITINGS OF GEORGE WASHINGTON* 329 (J. Fitzpatrick ed., 1931). Utah relied upon this letter in its appeal in *Evans*, but the majority quickly dismissed it. *Evans*, 536 U.S. at 475.

¹⁵⁵ 8 *THE WRITINGS OF THOMAS JEFFERSON* 236 (Andrew A. Lipscomb ed., 1903).

¹⁵⁶ 2 *THE FOUNDERS’ CONSTITUTION* 102–03 (Philip B. Kurland, & Ralph Lerner, eds., 1987).

¹⁵⁷ *Id.* at 139.

¹⁵⁸ *Id.*

¹⁵⁹ *THE FEDERALIST* No. 54 (James Madison).

Enumeration.” Dictionaries extant at the time of the Constitutional Convention defined the word “enumeration” as an “act of numbering or counting over”¹⁶⁰ or a “numbering or summing up.”¹⁶¹ Legal documents at the time did not give the term a specialized meaning.¹⁶² The term “actual” was defined in dictionaries contemporaneous with the writing of the Constitution as “really done . . . which has real being or existence, and is opposite to potential”¹⁶³ or “not merely potential . . . not purely in speculation.”¹⁶⁴ However, the Constitution does later refer to the “actual Enumeration” as a “Census or Enumeration” in a different clause of Article IX.¹⁶⁵ Of course, the *Evans* majority rejects these definitions as providing no evidence of the Framers’ intent to place limits on the conduct of the Census because they make no reference to methodology.¹⁶⁶ However, based on plain language, “counting” or “numbering” seems to be methodologically separate and distinct from “sampling” or “estimation.”

B. WRONG IS NOT BETTER THAN RIGHT: THE UNREASONABLENESS OF UTAH’S CONSTITUTIONAL ARGUMENT

In *Evans*, Utah argued before the Court that the Actual Enumeration Clause requires an actual count, without any sort of adjustment.¹⁶⁷ Of course, it supported this argument with a myriad of historical and semantic evidence, much of which is discussed above, and much of which seems quite convincing.

Unfortunately, this solution gives rise to another ugly issue that cannot easily be dismissed. Based on the fact that the census perpetually undercounts the population,¹⁶⁸ especially before the Bureau tried to supplement traditional methods, Utah appeared to believe that the Constitution prefers incorrect and undercounted census returns over accurate ones. This would result in the undesirable situation where the Constitution would require a potentially malapportioned Congress and Electoral

¹⁶⁰ *Dep’t of Commerce v. United States House of Representatives*, 525 U.S. 316, 347 (1999) (Scalia, J., dissenting) (citing S. JOHNSON, A DICTIONARY OF THE ENGLISH LANGUAGE 658 (4th rev. ed. 1773)).

¹⁶¹ *Utah v. Evans*, 536 U.S. 452, 475 (2002) (citing N. BAILEY, AN UNIVERSAL ETYMOLOGICAL ENGLISH DICTIONARY (26th ed. 1789)).

¹⁶² *Id.* at 475–76.

¹⁶³ *Id.* at 475 (citing N. BAILEY, AN UNIVERSAL ETYMOLOGICAL ENGLISH DICTIONARY (26th ed. 1789)).

¹⁶⁴ *House of Representatives*, 525 U.S. at 347 (Scalia, J., dissenting) (citing T. SHERIDAN, A COMPLETE DICTIONARY OF THE ENGLISH LANGUAGE (6th ed., 1796)).

¹⁶⁵ U.S. CONST. art. I, § 9, cl. 4. This provision prohibits the Congress from levying a “Capitation” or other direct tax unless in proportion to the Census.

¹⁶⁶ *Evans*, 536 U.S. at 475.

¹⁶⁷ Brief of Appellant at 35, *Utah v. Evans*, 536 U.S. 452 (2002) (No. 01-714). *See also* Lee, *supra* note 13.

¹⁶⁸ There is also evidence that even the first censuses resulted in inaccurate counts. *Evans*, 536 U.S. at 504 (Thomas, J., dissenting).

College and the inequitable allocation of funds and services to state and local government.

This result is not only absurd, but also surely unconstitutional. For one, it would certainly violate the Equal Protection Clause in that it would result in congressional districts that were not apportioned according to population.¹⁶⁹ As such, it would undo four decades of Supreme Court civil rights jurisprudence.¹⁷⁰ Furthermore, it would violate the fundamental principle of statutory and constitutional interpretation that all laws be given a sensible construction so as to avoid “injustice, oppression, or an absurd consequence.”¹⁷¹ Finally, favoring census undercounts would lead to a paradoxical situation in which a provision of the Constitution compels an unconstitutional result.¹⁷² That is simply unacceptable, and so this solution must be rejected.

CONCLUSION

Thanks in part to potentially unworkable solutions and an inconsistent Chief Justice, predicting the constitutionality of methodologies to enhance the census remains beyond the ken of mortal lawyers. The issue is a complicated and politically charged one, and the Supreme Court, despite two attempts, has been unable to arrive at an appropriate solution that provides guidance for future census disputes. In an era of ever-shrinking budgets and increased costs, the Census Bureau will likely continue to rely on methods other than actual counting to increase the accuracy of the decennial count. However, the subjectivity inherent in those results will surely provoke future litigation. Instead of providing the Census Bureau with guidance for how the future counts can be validly conducted, recent opinions from the Supreme Court have only rendered the issue more muddled and confusing.

¹⁶⁹ See generally *Baker v. Carr*, 369 U.S. 186 (1962).

¹⁷⁰ See *Anderson & Feinberge*, *supra* note 9, at 670–71.

¹⁷¹ *United States v. Kirby*, 74 U.S. 482 (1868).

¹⁷² One can only imagine, after reading his camel/gnat reference in *House of Representatives*, how Justice Scalia would characterize this unique situation. See *Dep’t of Commerce v. United States House of Representatives*, 525 U.S. 316, 346 (Scalia, J., concurring).

