ARTICLE I, SECTION 2, CLAUSE 3—CENSUS CLAUSE—PROPOSAL TO USE STATISTICAL SAMPLING IN THE 2000 CENSUS IN CONJUNCTION WITH TRADITIONAL ENUMERATION METHODS TO CALCULATE THE POPULATION FOR PURPOSES OF APPORTIONMENT VIOLATES THE CENSUS ACT—*Department of Commerce v. United States House of Representatives*, 119 S. Ct. 765 (1999).

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I. INTRODUCTION

The Census Clause of the United States Constitution provides for a decennial census with its primary goal being the apportionment of representatives among the states.[1] The census further serves subsidiary purposes such as determining the disbursement of federal funds among the states and delineating each state's intrastate political districts.[2] Because the decennial census is heavily relied on for apportionment, the Secretary of Commerce ("Secretary"),[3] as-

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[1] *See* U.S. CONST. art. I, § 2, cl. 3. Section 2, clause 3 of Article I of the United States Constitution provides, in pertinent part:

> Representatives . . . 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 . . . .The actual Enumeration shall be made within three Years after the first Meeting of the Congress of the United States, and within every subsequent Term of ten Years, in such Manner as they shall by Law direct. The Number of Representatives shall not exceed one for every thirty Thousand, but each State shall have at Least one Representative . . . .

Id.; *see also* U.S. CONST. amend. XIV, § 2 ("Representatives shall be apportioned among the several States according to their respective numbers, counting the whole number of persons in each State . . . .").

[2] *See* Christopher Taylor, Note, *Vote Dilution and the Census Undercount: A State-by-State Remedy*, 94 MICH. L. REV. 1098, 1099 (1996).

[3] Title 13 of the United States Code delegates most of the authority, responsibility and obligation regarding the census to the Secretary of the Department of Commerce. *See* 13 U.S.C. § 1 (1990). Robert A. Mosbacher served as the Secretary of Commerce at the time of the 1990 census, while William M. Daley serves as the Secretary of Commerce at the time of the 2000 census. *See* Department of Commerce, Secretaries of Commerce (last modified May 12, 1999) <http://204.193.246.62/public.nsf/docs/secretaries-of-commerce>. Throughout this casenote, the Secretary will not be referred to by name but it will be clear, given the context and year, which Secretary is being discussed.

sisted by the Bureau of the Census ("Bureau"),[4] must attempt to insure that the census figure is accurate and complete.[5] No census, however, has been considered a complete and accurate count of the population.[6] Instead, people have failed to be counted, counted at the wrong location, double counted, mistakenly counted after their death and even counted when they were not a citizen.[7] These errors are collectively known as the "undercount."[8] Today, urban and minority communities represent a majority of the undercount population, primarily because these groups suffer from "poverty, lack of education, transitory residential patterns, language obstacles, and hostility toward government."[9] The Bureau also concluded that the inaccuracy of the census and the undercount is attributed to Americans who are busier and less willing to fill out a census form, the abundance of junk mail that may obscure the census form that is mailed to the household, the remote or inaccessible location of American households and Americans' growing concern over their privacy.[10]

Since 1940, the Department of Commerce and Bureau have measured the undercount.[11] The Bureau, in tracking the undercount, has distinguished be-

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[4] Pursuant to statute, the Bureau of the Census is an agency within and under the jurisdiction of the Department of Commerce. *See* 13 U.S.C. § 2 (1990). The Secretary may delegate his functions and duties regarding the census to the officers and employees of the Department of Commerce, which includes the Bureau. *See* 13 U.S.C. § 4 (1990).

[5] *See* Nathan Judish & Julia E. Judish, *Falling Through the Cracks: Voting Rights and the Census* - City of New York v. United States Department of Commerce, 34 F.3d 1114 (2d Cir. 1994), 30 HARV. C.R.-C.L. L. REV. 199, 199 (1995).

[6] *See* Taylor, *supra* note 2, at 1098. For example, the 1870 census was so "notoriously inaccurate" that it prompted the sitting President, Ulysses S. Grant, to order a recount of "several cities, including Indianapolis, Philadelphia, and New York." Samuel Issacharoff & Allan J. Lichtman, *The Census Undercount and Minority Representation: The Constitutional Obligation of the States to Guarantee Equal Representation*, 13 REV. LITIG. 1, 6 (1993) (citation omitted).

[7] *See* Wisconsin v. City of New York, 517 U.S. 1, 6 (1996); *see also* Issacharoff & Lichtman, *supra* note 6, at 5.

[8] *See Wisconsin*, 517 U.S. at 6. The first acknowledged discovery of the undercount was in 1940. *See* Issacharoff & Lichtman, *supra* note 6, at 6.

[9] Taylor, *supra* note 2, at 1101; *see also* Judish & Judish, *supra* note 5, at 200-01.

[10] *See* United States Dep't of Commerce, Bureau of the Census, *Report to Congress - The Plan for Census 2000*, 1, 5 (Aug. 1997) [hereinafter "*Census 2000 Report*"].

[11] *See supra* note 8 and accompanying text. The Bureau has reported the percent net undercount from 1940-1990 as follows: 1940 - 5.4%, 1950-4.1%, 1960-3.1%, 1970-2.7%,

tween the percentage of whites and the percentage of blacks that have failed to be included in the population statistics.[12] Generally, the percentage of the U.S. population unaccounted for in the decennial census has decreased over the last fifty years.[13] Likewise, the percentage of blacks that were not counted in the decennial census has also decreased.[14]

A priority of both the Secretary and Bureau has been to eliminate the undercount by using methods of enumeration that would achieve a complete and accurate count of the entire United States population.[15] With the rapid growth in population and urbanization of the United States, it has become nearly impossible to use personal visits as the sole means of counting the population.[16] Accordingly, other methods to count the population have emerged, including the most prominent "mail-out/mail-back,"[17] which allows people to fill out a long or short census form[18] and mail it back to the Bureau.[19] Unfortunately, this

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1980-1.2%, and 1990-1.8%. *See Census 2000 Report*, *supra* note 10, at 2 n.1 (noting that percentage figures are based on a demographic analysis).

[12] The percentage of whites missed in the undercount has been recorded as follows: 1940-5.1%, 1950-3.8%, 1960-2.7%, 1970-2.4% and 1980-1.3%. *See* Issacharoff & Lichtman, *supra* note 6, at 7, Table 1 ("Differential Census Undercounts of Blacks and Whites: 1940-1980"); Taylor, *supra* note 2, at 1102, Table 1 ("Differential Census Undercounts of African Americans and Whites: 1940-1980"). The percentage of blacks missed in the undercount from 1940-1980 are: 1940-10.3%, 1950-9.6%, 1960-8.3%, 1970-8.1%, and 1980-6.2%. *See id.* The census data, prior to 1990, did not estimate the undercount of Hispanics but it is estimated that the figure is comparable to the undercount of blacks. *See* Issacharoff & Lichtman, *supra* note 6, at 8. The Bureau estimated the breakdown of the 1990 census undercount as follows: .7% Non-Hispanic Whites, 4.4% African Americans, 5.0% Hispanics-All Races, and 12.2% American Indians on Reservations. *See Census 2000 Report*, *supra* note 10, at 4.

[13] *See* Issacharoff & Lichtman, *supra* note 6, at 7. In 1940, the national undercount was 5.6% and had decreased to 1.4% in 1980. *See id.*

[14] *See supra* note 12 and accompanying text.

[15] *See* Issacharoff & Lichtman, *supra* note 6, at 5.

[16] *See* Jeffrey S. Crampton, Comment, *Lies, Dam Lies and Statistics: Dispelling Some Myths Surrounding the United States Census*, 1990 DET. C. L. REV. 71, 73 n.12 (1990); *see also Census 2000 Report*, *supra* note 10, at xi (stating that "[d]ue to changes in American society, the most accurate census feasible can no longer be taken by traditional physical enumeration methods alone").

[17] *See Census 2000 Report*, *supra* note 10, at 1.

[18] For the 2000 census, the long census form will contain thirty-two population questions and twenty-one housing questions. *See* Bureau of the Census, *Census 2000 Informa-*

process proved unsuccessful in remedying the undercount.[20]

In preparation for the 1980 census, a panel formed by the National Academy of Sciences[21] reviewed the plans for the decennial census.[22] In 1978, the Academy concluded that "a complete enumeration of the population" could not be attained, and thus, recommended a statistical adjustment to remedy the anticipated inaccuracies of the census.[23] However, the Bureau refused to accede to any type of adjustment.[24] As a result of the Bureau's unwillingness to use an adjustment, numerous citizens, cities, counties and states initiated litigation.[25] Almost fifty cases were filed by cities and urban groups challenging the De-

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tional Long Form Questionnaire (visited Jan. 26, 2000) <www.census.gov/dmd/www/inforquest.html>.

The short census form will contain six population questions and only one housing question. *See id.* Approximately one in six households will receive the long census form. *See id.* Population questions include how many people live in the household, demographics (such as age, race, sex, marital status, familial status and residency) of people residing in the household, military and employment information and income. *See id.* Housing questions include ownership, description and history of the house, apartment or mobile home where the household resides, utility and fuel costs, mortgage, real estate taxes, and fire, hazard and flood insurance. *See id.*

[19] *See* Department of Commerce v. United States House of Representatives, 119 S. Ct. 765, 783 (1999).

[20] *See* Crampton, *supra* note 16, at 71-75.

[21] The National Academy of Sciences (hereinafter Academy) was created through an Act of Incorporation signed by President Abraham Lincoln on March 3, 1863. *See* National Academy of Sciences, *Act of Incorporation* (visited Feb. 1, 2000) <http://www4.nationalacademies.org/nas/nashome.nsf/00b2cceaef4bf16f852566ea00514ede/a2be99b640a556db852566ea0072c2c5?OpenDocument>. The National Academy of Sciences' role is to "investigate, examine, experiment, and such report upon any subject of science or art" when a department of the Government asks the Academy to do so. *Id.*

[22] *See* Issacharoff & Lichtman, *supra* note 6, at 9.

[23] *Id.*

[24] *See id.*

[25] *See* Recent Case, *Equal Protection—Census Undercount—Second Circuit Applies Heightened Scrutiny to the Commerce Department's Decision Not to Compensate for Minority Undercount in the 1990 Census*—City of New York v. United States Dep't of Commerce, 34 F.3d 1114 (2d Cir. 1994), 108 HARV. L. REV. 971, 971 (1995) [hereinafter "*Equal Protection*"].

partment of Commerce's refusal to adjust the 1980 census for the undercount.[26]

Due to the 1980 undercount and subsequent litigation, the Bureau undertook an extensive inquiry into possible solutions to remedy the undercount for the 1990 census.[27] The inquiry resulted in the creation of the Undercount Steering Committee and the Undercount Research Staff to propose a plan for undercount research and policy development, thereby increasing research on improving the accuracy of the census.[28] From this inquiry, the Bureau decided to use a post-enumeration survey[29] to adjust the 1990 census for the undercounted popula-

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[26] *See id.* In *Carey v. Klutznick*, the Second Circuit listed the challenges to the 1980 census. *See* Carey v. Klutznick, 653 F.2d 732, 735 n. 10 (2d Cir. 1981).

[27] *See* Taylor, *supra* note 2, at 1102; *see also* Wisconsin v. City of New York, 517 U.S. 1, 7 (1996).

[28] *See* Taylor, *supra* note 2, at 1102; *Wisconsin*, 517 U.S. at 7. The Bureau attempted to make the U.S. population better informed regarding the 1990 census, particularly the traditionally undercounted groups, through advertisements, development of an easier, bilingual census questionnaire and increasing the use of automation. *See Wisconsin*, 517 U.S. at 7-8.

[29] A post-enumeration survey (hereinafter "PES") is a dual system estimation or "capture-recapture" method where a second, smaller survey is taken and "[t]he rate at which people are missed by the first survey [the census] [and] appear in the second survey indicates the undercount in the first survey . . . ." *Equal Protection*, *supra* note 25, at 971 n.2 (citing Statistical Adjustment of the 1990 Census, 56 Fed. Reg. 33,582, 33,586-87 (1991)). More specifically, the Bureau would:

> [conduct] a PES of sufficient size and sophistication to derive adjustment rates that, according to its proponents, could have been applied even at the level of blocks—the smallest unit of Census geography. An adjustment procedure for Census blocks would have proceeded as follows: First, the nation would have been divided into nine Census regions and within each region into different types of places (e.g., central cities and rural areas). For each category of region and community, PES results would have been used to derive estimates of the undercount for groups defined according to ethnicity (e.g., blacks and Hispanics), sex, age, and home ownership. The count for each group within a block would have been multiplied by the adjustment factor and that number would have been added to (or subtracted from) the initial [census]. If, for example, a block included twenty black males between ages thirty and thirty-four and the adjustment factor for the group was ten percent, the adjusted count for the group would have been twenty-two.

Issacharoff & Lichtman, *supra* note 6, at 11 (internal citations omitted). Part of the PES is called the Dual System Estimation and an example of how the DSE method works is as follows:

> (1) capture 1000 fish from a lake, tag them, and release them; and (2) capture 100

tion.[30] However, the Department of Commerce did not agree with the Bureau's decision and reversed it.[31] This reversal prompted a challenge by several cities, counties and states,[32] "[a]rguing that the undercount would harm them in 'both efficacy of their votes and their entitlement to an equitable portion of federal funds.'"[33] The Bureau resolved this claim by agreeing to reconsider the decision not to adjust the census and to undertake the post-enumeration survey for the 1990 census.[34] After reconsidering the decision and evaluating the post-enumeration survey data, the Secretary ultimately decided not to adjust the census[35] and thus, continued to leave open the question of whether and how, if at all, the decennial census could be adjusted.

After the final results of the 1990 census were obtained, the Bureau estimated that the 1990 census produced a less accurate census than the 1980 census.[36] The 1990 census missed approximately 4.7 million people, or 1.8 percent of the population, whereas the 1980 census fell 2.8 million people short.[37] In addition, the Bureau concluded that the 1990 undercount "was not spread

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> fish from the same lake. If fifty of those fish have tags, then you estimate that your initial sweep captured fifty percent of all the fish. The total estimated population—the DSE—therefore, is 2000 fish. In the example, the initial census corresponds to step (1), the [post-enumeration survey] corresponds to step (2), and the DSE corresponds to the final adjusted population estimate.

Taylor, *supra* note 2, at 1103-04 (internal citations omitted).

[30] *See Wisconsin*, 517 U.S. at 7-8.

[31] *See* Taylor, *supra* note 2, at 1102 n.26 (citing City of New York v. United States Dep't of Commerce, 34 F.3d 1114, 1118 (2d Cir. 1994), *cert. granted sub. nom*, Wisconsin v. City of New York, 517 U.S. 1 (1996)).

[32] *See* City of New York v. United States Dep't of Commerce, 713 F. Supp. 48 (E.D.N.Y 1989).

[33] *Equal Protection*, *supra* note 25, at 972.

[34] *See id.*; *see also supra* note 29 and accompanying text which discusses the PES.

[35] *See* Taylor, *supra* note 2, at 1005. In *Wisconsin v. City of New York*, the decision on appeal from *City of New York v. Department of Commerce*, the Supreme Court upheld the Secretary's decision not to use a statistical adjustment to remedy the undercount in the 1990 census. *See* Wisconsin v. City of New York, 517 U.S. 1, 1 (1996).

[36] *See Census 2000 Report*, *supra* note 10, at ix.

[37] *See id.*

out evenly across the nation; children and minorities were disproportionately undercounted."[38] This step backwards in counting the population prompted the Bureau to consider significant changes to conducting the 2000 census.[39] These changes included a public outreach and marketing campaign to increase awareness of the census, more effective census questionnaires and most importantly, "a limited use of scientific [statistical] sampling" that "will result in a more accurate, less costly census."[40] The use of statistical sampling in conducting the decennial census for apportionment purposes had been rejected in the past, and it was not clear whether its use would be permitted for the 2000 census.[41]

In 1999, the United States Supreme Court revisited the census issue in *Department of Commerce v. United States House of Representatives*. The Court held that statistical sampling could not be used to calculate the population for purposes of apportionment.[42] In a five-to-four decision, the Court approached the decennial census in a manner favored by many Republicans, yet feared by Democrats. By ordering an unadjusted census, the Court continued to perpetuate the undercounted minority, thereby excluding a group that tends to vote Democrat in matters of apportionment.[43]

II. STATEMENT OF THE CASE

In anticipation of the 2000 census, the Bureau formulated and announced a statistical sampling plan that would be used to remedy the traditional undercounting of certain groups such as minorities, children and renters.[44] Since 1940, the Bureau had used two methods to measure the undercount rate: demographic analysis and post-enumeration survey.[45] However, these procedures

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[38] *See id.*

[39] *See id.*; *see also infra* notes 44-59 and accompanying text for a discussion of the Bureau's proposal to change the conduct of the decennial census.

[40] *Census 2000 Report*, *supra* note 10, at x. The Bureau defines "sampling" as "whenever the information on a portion of a population is used to infer information on the population as a whole." *Id.* at 23.

[41] *See supra* notes 31-35 and accompanying text.

[42] *See* Department of Commerce, 119 S. Ct. 765, 768 (1999).

[43] *See infra* Part V.

[44] *See Department of Commerce*, 119 S. Ct. at 768-69.

[45] *See id.* at 769. According to the Bureau,

did not effectively count those United States citizens who were routinely missed or miscounted,[46] thereby prompting the Bureau to take more aggressive measures.[47] Through legislative action, the Secretary, in conjunction with the National Academy of Sciences, studied more accurate methods of achieving decennial census.[48] From these studies, the Bureau formulated a two-step plan to supplement the information collected through the traditional census means: Nonresponse Followup ("NRFU") followed by the Integrated Coverage Measurement ("ICM").[49]

The first step, the NRFU, would be used to contact those households that did not respond to the mailed census questionnaires.[50] Following the return of the census forms, the Bureau would divide the entire population into census tracts comprised of approximately 1,700 housing units, for a total of 4,000 people, who have "homogeneous population characteristics, economic status and living conditions."[51] Depending on the mail response rate, the Bureau would send enumerators to visit a sample of non-responsive households in each

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> Demographic Analysis is one of the two standard methods that the [Bureau] uses to measure coverage, that is the extent that the official census totals cover or completely account for the true total. Demographic Analysis relies on administrative records of births, deaths, immigration, and emigration to provide estimates of the true total. Demographic Analysis is the only method for analyzing historical trends in the shortfall in coverage, the national undercount.

Census 2000 Report, *supra* note 10, at 2 n.1. The PES, on the other hand, "provided undercount information for detailed categories, such as renter/homeowner and racial and ethnic group, that are not possible with demographic analysis." *Id.* at 3 n.2; *see also supra* note 29 for a complete discussion of PES.

[46] *See supra* notes 7-10 and accompanying text.

[47] *See Department of Commerce*, 119 S. Ct. at 769-70.

[48] *See id.* Pursuant to the Decennial Census Improvement Act of 1991, the National Academy of Sciences examined sampling methods and basic data collection techniques that could be used to achieve a more accurate and complete census. *See id.* at 770; *see also* Decennial Census Improvement Act of 1991, Pub. L. No. 102-135, 105 Stat. 635 (1991).

[49] *See Department of Commerce*, 119 S. Ct. at 770-71.

[50] *See id.* at 770; *see also Census 2000 Report*, *supra* note 10, at 26-27.

[51] *Department of Commerce*, 119 S. Ct. at 770 (citing *Census 2000 Report*, *supra* note 10, at 27). The Bureau estimates there will be more than 60,000 tracts in 2000. *See Census 2000 Report*, *supra* note 10, at 27.

tract.[52] After gathering census data from at least 90% of the households in a tract, either by mail or visit, the Bureau would estimate the size and characteristics of the households that did not respond or were not visited.[53] The ICM would then be used to adjust the census for the undercount.[54] Under the ICM, the Bureau would divide the country's seven million blocks[55] into "strata," based upon certain characteristics including state, racial composition, ethnic composition and status as homeowner or renter.[56] A random sample of each stratum, totaling 25,000 blocks or 750,000 housing units, would be visited by enumerators, and the information gathered from these interviews would be compared to the pre-ICM results.[57] If discrepancies arose, the Bureau would conduct follow-up interviews to figure out the true composition of the individual household.[58] Each household or person would then be assigned to a post-stratum based on demographic characteristics.[59]

The adoption of this plan prompted Congress to attempt an amendment of the Census Act to prohibit sampling for purposes of apportionment of representatives.[60] However, this attempt failed when the President vetoed the amendment.[61] Congress then passed legislation in this area which mandated an

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[52] *See Department of Commerce*, 119 S. Ct. at 770. From 1970 to 1990, the mail response rate declined from 78% to 65%. *See Census 2000 Report*, *supra* note 10, at 26. The Bureau estimates that the mail response rate in 2000 would be 55% based on one mailing, but with additional promotions and notices, it could rise to 67%, thus leaving 34 million occupied households expected not to respond. *See id.*

[53] *See Department of Commerce*, 119 S. Ct. at 770.

[54] *See id.* at 770-71.

[55] A block for purposes of the ICM has an average of thirty housing units. *See Census 2000 Report*, *supra* note 10, at 30.

[56] *See Department of Commerce*, 119 S. Ct. at 770.

[57] *See id.* at 770-71.

[58] *See id.* at 771.

[59] *See id.* The statistical method of comparing the pre-ICM results (the census data) and the post ICM results is known as Dual System Estimation. *See Census 2000 Report*, *supra* note 10, at 31; *Department of Commerce*, 119 S. Ct. at 771. For a discussion of Dual System Estimation, *see* Taylor, *supra* note 2, at 1103-04; *Census 2000 Report*, *supra* note 10, at 31-32.

[60] *See Department of Commerce*, 119 S. Ct. at 771.

[61] *See id.*

outline of the Bureau's statistical sampling plan for the 2000 census.[62] Furthermore, persons aggrieved received the right to bring legal action before a three-judge panel formed from the local district court.[63] Such suit would be

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[62] *See id.* The bill passed by Congress stated that

> [t]he Department of Commerce is directed within thirty days of enactment of this Act to provide to the Congress a comprehensive and detailed plan outlining its proposed methodologies for conducting the 2000 decennial Census and available methods to conduct an actual enumeration of the population. This plan description shall specifically include: (1) a list of all statistical methodologies that may be used in conducting the Census; (2) an explanation of these statistical methodologies; (3) a list of statistical errors which may occur as a result of the use of each statistical methodology; (4) the estimated error rate down to the census tract level; (5) a costs estimation showing cost allocations for each census activity plan; and (6) an analysis of all available options for counting hard-to-enumerate individuals, without utilizing sampling or any other statistical methodology . . . .

Emergency Supplemental Appropriations Act for Recovery from Natural Disasters, and for Overseas Peacekeeping Efforts, Including Those in Bosnia of 1997, Pub. L. No. 105-18, Title VIII, 111 Stat. 158, 217 (1997).

[63] *See Department of Commerce*, 119 S. Ct. at 771 (citing Departments of Commerce, Justice, and State, the Judiciary, and Related Agencies Appropriations Act of 1998, Pub. L. No. 105-119, §209, 111 Stat. 2240, 2481-82 (1998)). Section 209 reads in pertinent part:

> (b) Any person aggrieved by the use of any statistical method in violation of the Constitution or any provision of law (other than this Act), in connection with the 2000 or any later decennial census, to determine the population for purposes of apportionment or redistricting of Members in Congress, may in civil action obtain declaratory, injunctive, and any other appropriate relief against the use of such method.
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> (d) For purposes of this section, an 'aggrieved person' includes - (1) any resident of a State whose congressional representation or district could be changed as a result of the use of a statistical method challenged in the civil action; (2) any Representative or Senator in Congress; and (3) either House of Congress.
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> (e)(1) Any action brought under this section shall be heard and determined by a district court of three judges in accordance with section 2284 of title 28, United States Code . . . Any final order of injunction of a United States district court that is issued pursuant to an action brought under this section shall be reviewable by appeal directly to the Supreme Court of the United States. . . .

Id.

directly appealable to the United States Supreme Court.[64]

Concerned over loss of representatives, aggrieved U.S. citizens and the United States House of Representatives brought actions in the Eastern District Court of Virginia and the District Court for the District of Columbia, respectively.[65] The first action,[66] brought by four counties and residents of 13 states, alleged violations of both the Census Act and Census Clause of the Constitution,[67] thereby seeking a declaratory judgment that the plan was unconstitutional.[68] The second suit,[69] initiated by the United States House of Representatives, claimed similar violations and requested a permanent injunction against using the sampling plan for apportionment purposes in the 2000 census.[70]

In the first suit, the Eastern District Court of Virginia held that the case was ripe for review and stated that the plaintiffs had standing and that the Census Act prohibited sampling for apportionment purposes.[71] However, the district court was silent as to the alleged constitutional violation of the Census Clause.[72] The district court granted plaintiffs' motion for summary judgment, denied defendants' motion to dismiss and permanently enjoined the use of sampling for apportionment purposes.[73] In the second suit, the District Court for the District of Columbia reached a similar decision,[74] but noted that equitable

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[64] *See id.*

[65] *See id.* at 771-72.

[66] Glavin v. Clinton, 19 F. Supp.2d 543 (E.D. Va. 1998).

[67] *See* U.S. CONST. art. I, § 2, cl. 3; *see also supra* note 1 and accompanying text.

[68] *See Department of Commerce*, 119 S. Ct. at 771. The four counties were Cobb County, Georgia; Bucks County, Pennsylvania; Delaware County, Pennsylvania; and DuPage County, Illinois. The thirteen states included Arizona, California, Connecticut, Florida, Georgia, Illinois, Indiana, Montana, Nevada, Ohio, Pennsylvania, Virginia, and Wisconsin. *See id.*

[69] United States House of Representatives v. United States Dep't of Commerce, 11 F. Supp.2d 76 (D.D.C. 1998).

[70] *See Department of Commerce*, 119 S. Ct. at 772.

[71] *See id.* at 772 (citing Glavin, 19 F. Supp.2d at 547-48, 550, 553).

[72] *See id.* (citing Glavin, 19 F. Supp.2d at 553).

[73] *See id.*

[74] *See* United States House of Representatives v. United States Dep't of Commerce, 11

concerns did not warrant a dismissal and therefore, the suit did not violate separation of powers.[75]

Pursuant to federal law,[76] the two cases were directly appealed to the United States Supreme Court.[77] Noting probable jurisdiction, the Court consolidated the two cases for purposes of oral argument.[78] Reviewing whether the Census Act permitted the use of statistical sampling for purposes of apportionment, the Court affirmed the judgment of the Eastern District of Virginia, and therefore, dismissed the appeal from the judgment of the District Court for the District of Columbia.[79] In a five-to-four decision, with Justice O'Connor writing for the majority, the Court held that the Census Act prohibited the use of statistical sampling for apportionment purposes.[80]

III. THE SUPREME COURT'S PRIOR TREATMENT OF APPORTIONMENT STATUTES AND THE CENSUS ACT

Not until the 1990's had the United States Supreme Court fully addressed

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F. Supp.2d 76 (D.D.C. 1998).

[75] *See id.* at 95, 97. The district court for the District if Columbia reasoned that

> even though this case involves litigation between the legislative and executive branches as to whether a decision of the executive violates the law or the Constitution, the fact that 1) the House has satisfied Article III's 'case' or 'controversy' requirement; 2) a jurisdictional statute permits this plaintiff to bring the case; and 3) the federal courts routinely resolve census disputes, leaves no doubt that the court should resolve this matter.

Id. at 95. In regard to the separation of powers concern, the court concluded "that permitting the House to prosecute [a] lawsuit in order to vindicate an Article III injury to itself does not violate separation of powers." *Id.* at 96.

[76] *See supra* note 63 and accompanying text.

[77] *See Department of Commerce*, 119 S. Ct. at 772; *see also supra* note 63 and accompanying text.

[78] *See Department of Commerce*, 119 S. Ct. at 772 (citing Clinton v. Glavin, 119 S. Ct. 290 (1998)).

[79] *See id.* at 768.

[80] *See id.*

the issue of statistical sampling as applied to the decennial census.[81] Rather, the Supreme Court had only issued opinions on various components of a possible challenge to the Census Act.[82] As early as the Court's 1962 decision in *Baker v. Carr*,[83] citizens were held to have Article III standing[84] in challenges to apportionment statutes.[85] In *Baker*, residents of five Tennessee counties challenged the 1901 Tennessee apportionment statute,[86] alleging that the statute "constitute[d] arbitrary and capricious state action . . . in its irrational disregard of the standard of apportionment prescribed by the State's Constitution."[87] Finding that the plaintiffs had standing for suit, the *Baker* Court ruled that the plaintiffs were "asserting a 'plain, direct and adequate interest in maintaining the effectiveness of their votes,'"[88] which rose to the level of satisfying the

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[81] *See* Issacharoff & Lichtman, *supra* note 6, at 23. Prior to the post-1980 litigation, the leading case in the area of challenges to the census was *City of Newark v. Blumenthal*. *See* Issacharoff & Lichtman, *supra* note 6, at 23. In *City of Newark v. Blumenthal*, the district court:

> rejected claims for adjustment of Census data on the grounds that the Secretary of the Treasury had plenary discretion to use or adjust Census data and, alternatively, that even were the court inclined to credit plaintiffs' claims of an undercount bias, the 'decision not to estimate the undercount for Baltimore and for Newark was neither arbitrary nor capricious.'

See Issacharoff & Lichtman, *supra* note 6, at 23 (citing *Blumenthal*, 457 F. Supp. at 34).

[82] *See infra* notes 83-115 and accompanying text for a discussion of previous cases on statistical sampling.

[83] 369 U.S. 186 (1962).

[84] Articulating the notion of standing, the *Baker* Court posed the following question: "Have the appellants alleged such a personal stake in the outcome of the controversy as to assure that concrete adverseness which sharpens the presentation of issues upon which the court so largely depends for illumination of difficult constitutional questions?" *Id.* at 204.

[85] *See id.* at 206.

[86] *See id.* at 191 n.9 (stating that the 1901 statute read in pertinent part: "[t]he Federal census of 1900 has been very recently taken and by reference to said Federal census an accurate enumeration of the qualified voters of the respective counties of the state of Tennessee can be ascertained and thereby save the expense of an actual enumeration").

[87] *Id.* at 207.

[88] *Id.* at 208 (quoting Coleman v. Miller, 307 U.S. 433, 438 (1939)).

"injury-in-fact" requirement of standing.[89]

More than twenty years after *Baker*, the Court revisited a state reapportionment statute in the context of intrastate, district population deviations.[90] In *Karcher v. Daggett*,[91] the Court held that a reapportionment plan, resulting in small population deviations among New Jersey congressional districts, "was not a good-faith effort to achieve population equality."[92] In so holding, the *Karcher* Court stated that population equality was the most important objective in the case of apportionment of congressional districts.[93]

In 1992, the United States Supreme Court decided *United States Department of Commerce v. Montana*.[94] In *Montana*, the Court reviewed a challenge by Montana legislators that a 1941 federal statute, providing for the "method of equal proportions"[95] used after each decennial census, violated the Census

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[89] *Baker*, 369 U.S. at 208 (internal citations omitted). The standing established by the plaintiffs in *Baker* also extended to those that they sued on behalf of; that is, to "all qualified voters of their respective counties, and further, on behalf of all voters of the State of Tennessee who [were] similarly situated . . . ." *Id.* at 204-05.

[90] Karcher v. Daggett, 462 U.S. 725, 728 (1983).

[91] *Id.*

[92] *Id.* at 744.

[93] *See id.* at 732-33. The Court rejected the defense "that the plan protected minority-controlled districts, as both unrelated to the systematic contortion of districts and as having been applied haphazardly with regard to the population deviations." Issacharoff & Lichtman, *supra* note 6, at 21-22 (citing *Karcher*, 462 U.S. at 742-44).

[94] 503 U.S. 442 (1992).

[95] The statute at issue in *Montana* was 2 U.S.C. § 2a(a) which provides:

> On the first day, or within one week thereafter, of the first regular session of the Eighty-second Congress and of each fifth Congress thereafter, the President shall transmit to the Congress a statement showing the whole number of persons in each State . . . and the number of Representatives to which each State would be entitled under an apportionment of the then existing number of Representatives by the method known as the method of equal proportions, no State to receive less than one Member.

2 U.S.C. § 2a(a) (1990). According to the Bureau,

> [the method of equal proportions] assigns seats in the House of Representatives ac-

Clause of the Constitution.[96] The challenged statute apportioned representatives, based on the census, "according to [the States'] respective numbers."[97] Reversing the district court and finding for the Department of Commerce, the Court concluded that Congress acted within its authority by enacting the 1941 statute."[98] Writing for a unanimous Court,[99] Justice Stevens explained that the intrastate districting analysis used in *Wesberry v. Sanders*[100] should not be applied to interstate districting even though the language, "according to their respective numbers," could be interpreted as requiring principles of equality.[101] Ultimately, the Court found that application of such a strict standard to interstate districting would have a greater impact on one state as compared to an-

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cording to a 'priority' value. The priority value is determined by multiplying the population of a State by a 'multiplier.' For example, following the 1990 census, each of the 50 states was given one seat out of the current total of 435. The next, or 51st seat, went to the State with the highest priority value and thus became that State's second seat. This continued until all 435 seat has been assigned to a state.

Bureau of the Census, *Computing Apportionment* (last modified March 23, 1999) <http://www.census.gov/population/www/censusdata/methodof.html>.

[96] *See Montana*, 503 U.S. at 444-46. After the 1990 census, Montana, similar to other states, lost a seat in the House of Representatives, bringing its representation down to one seat. *See id.* at 445. Montana had a population of 803,655, and if it were broken down into two districts, each district would have 170,638 less people than the ideal congressional district of 572,466. *See id.* The plaintiffs alleged that the apportionment method used "'[did] not achieve the greatest possible equality in the number of individuals per representative . . . .'" *Id.* at 446 (citation omitted).

[97] *Id.* at 444-45 (citing U.S. CONST. art. I, § 2, cl. 3). Three requirements must be met to satisfy this provision: first, the number of representatives for each state cannot exceed one for every 30,000 people; second, each state must have at least one representative; and third, "district boundaries may not cross state lines." *Id.* at 447-48 n. 14.

[98] *See id.* at 444-45.

[99] *See id.* at 443.

[100] 376 U.S. 1 (1964). The district court in *Montana* had applied the standard in *Wesberry v. Sanders*, an intrastate districting case, which held that "the only population variances that are acceptable are those that 'are unavoidable despite a good-faith effort to achieve absolute equality, or for which justification is shown . . . .'" *Montana*, 503 U.S. at 446 (citing Kirkpatrick v. Preisler, 394 U.S. 526, 531 (1969)). The *Montana* district court held that the method of equal proportions did not comply with the Supreme Court's later "one-person, one-vote" rule. *See id.* at 447.

[101] *See id.* at 461 (citing U.S. CONST. art. I, § 2, cl. 3).

other, thereby forcing one state to meet the ideal congressional district size, but forcing another away from the ideal size.[102] Concluding, Justice Stevens reiterated the need for compromise in matters of apportionment stemming from the broad Congressional discretion to adopt measures and methods to effectuate constitutional goals.[103]

Three months after the *Montana* decision, the Supreme Court reiterated the rationale of the *Karcher* decision in *Franklin v. Massachusetts*.[104] In *Franklin*, the Court held that federal employees, working overseas, should be counted in the population of their designated home states or usual residence for purposes of the decennial census.[105] In outlining the history of the Census Act, Justice O'Connor noted that the purpose of the periodic census was to "ensure that [the] entrenched interests in Congress did not stall or thwart needed reapportionment"[106] and reflect the "constitutional goal of equal representation."[107]

The Supreme Court's most recent decision addressing statistical sampling is *Wisconsin v. City of New York*.[108] In *Wisconsin*, the Court upheld the Secretary's decision not to statistically adjust the 1990 census to remedy the undercount.[109] In refusing to implement an adjustment to the census, the Secretary,

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[102] *See id.* at 461-62. Justice Stevens explained that

> [i]n cases involving variances within a State, changes in the absolute differences from the ideal [size] produce parallel changes in the relative differences . . . [but] in contrast, the reduction in the absolute difference between the size of Montana's district and the size of the ideal district has the effect of increasing the variance in the relative difference between the ideal and the size of the districts in both Montana and Washington.

Id.

[103] *See id.* at 464.

[104] 505 U.S. 788 (1992).

[105] *See id.* at 790-91.

[106] *Id.* at 791.

[107] *Id.* at 804 (citing United States Dep't of Commerce v. Montana, 503 U.S. 442, 459 (1992)).

[108] 517 U.S. 1 (1996).

[109] *See id.* at 4-5.

hesitant to "abandon a two hundred year tradition," was predominantly concerned with the "distributive accuracy [rather than numerical accuracy] - that is, getting most nearly correct the proportion of people in different areas."[110] Writing for the Court, Chief Justice Rehnquist explained that the Secretary's decision should not be subjected to a heightened scrutiny because he acted in accordance with both the Constitution and Census Act.[111] The Chief Justice, in rejecting the application of a heightened scrutiny, found that the "good-faith effort to achieve population equality"[112] for intrastate redistricting did not apply to the conduct of the census.[113] Although given deference in determining how to best conduct the census under the Census Clause, Congress ceded that power and discretion to the Secretary.[114] Given this delegation of broad authority, Chief Justice Rehnquist concluded that the Secretary's decision of whether to statistically adjust the census must only have a reasonable relationship to the constitutional goal of the census—an actual enumeration used primarily for purposes of apportionment.[115]

In *Wisconsin v. City of New York*, the Court addressed the situation in which the Secretary refused to use a statistical adjustment to remedy the undercount of the decennial census. However, the Court had not yet ruled on whether, and by what method, the Secretary and Bureau could use a statistical sampling under the Census Act until *Department of Commerce v. United States House of Representatives*.

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[110] *Id.* at 11 (citations omitted).

[111] *See id.* at 4. Plaintiffs, on appeal from the district court's finding in favor of the Secretary, argued that the district court used the wrong standard of review and that a heightened scrutiny should be applied since a "fundamental right, viz., the right to have one's vote counted" was involved. *Id.* at 12. The Court of Appeals for the Second Circuit accepted the plaintiffs' argument. *See id.* Chief Justice Rehnquist, citing *Montana*, pointed out that intrastate apportionment, such as that in *Karcher*, was subject to a higher level of scrutiny because such decisions could be reviewed under a more rigid mathematical or numerical standard, which could not be done with interstate apportionment. *See id.* at 14-15.

[112] *Id.* at 17; *see supra* notes 96, 99-101 and accompanying text.

[113] *Wisconsin*, 517 U.S. at 17.

[114] *See id.* at 18-19.

[115] *See id.* at 24. Chief Justice Rehnquist found three factors which showed that the Secretary's decision bore a reasonable relationship with the goal of actual enumeration: 1) the determination that "distributive accuracy was more important than . . . numerical accuracy;" 2) the determination that an unadjusted census was the most distributively accurate; and 3) the determination that the proposed statistical adjustment "would not improve the distributive accuracy." *Id.* at 20.

IV. *DEPARTMENT OF COMMERCE V. UNITED STATES HOUSE OF REPRESENTATIVES:* PROPOSAL TO USE STATISTICAL SAMPLING IN THE YEAR 2000 CENSUS TO CALCULATE THE POPULATION FOR PURPOSES OF APPORTIONMENT VIOLATES THE CENSUS ACT

A. THE COURT'S DISCUSSION OF THE HISTORY OF THE CENSUS ACT, THE UNDERCOUNT AND THE BUREAU'S PROPOSED SOLUTIONS

Justice O'Connor began the Court's opinion[116] by summarizing the basis and history of the Census Act.[117] Pursuant to the United States Constitution, the Justice stated that Congress was authorized to implement a means for conducting an actual enumeration of the United States population on a decennial basis.[118] In passing the Census Act, Justice O'Connor continued, Congress provided a method of conducting the census as well as disseminating the final population results to both federal and state governments.[119] The Justice then identified the historical problem which the census failed to address, the undercount, and explained the ways the Bureau measured the undercount and the measures taken through congressional legislation to remedy it.[120] Justice O'Connor then discussed the specific statistical sampling measures formulated by the Bureau that are at issue in this case and the legislative response to such

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[116] Department of Commerce v. United States House of Representatives, 119 S. Ct. 765, 768 (1999). Justice O'Connor delivered the opinion of the Court, in which Chief Justice Rehnquist, Justices Scalia, Kennedy and Thomas joined as to Parts I, III-A and IV; Chief Justice Rehnquist, Justices Scalia, Kennedy, Thomas and Breyer joined as to Part II and Chief Justice Rehnquist and Justice Kennedy joined as to Part III-B, which Justice O'Connor did not author. *See id.* at 768. Justice Scalia filed a concurring opinion, in which Justice Thomas joined and Chief Justice Rehnquist and Justice Kennedy joined as to Part II. *See id.* at 779. Justice Breyer filed an opinion, concurring in part and dissenting in part. *See id.* at 782. Justice Stevens filed a dissenting opinion, in which Justices Souter and Ginsberg joined as to Parts I and II and which Justice Breyer joined as to Parts II and III. *See id.* at 786. Justice Ginsberg filed a dissenting opinion in which Justice Souter joined. *See id.* at 789.

[117] *See id.* at 768-69.

[118] *See id.* at 769.

[119] *See id.*

[120] *See id.*; *see also supra* notes 27-30 and accompanying text.

proposed measures.[121]

B. Loss Of Seats In The House Of Representatives Met Justiciability And Standing Requirements

Justice O'Connor first addressed the justiciability of *Clinton v. Glavin*[122] before the Court.[123] Finding that an aggrieved party had the right to directly appeal its case to the Supreme Court,[124] the Justice focused on the issue of the standing.[125] In addressing the Article III requirement of standing, Justice O'Connor relied on a series of Supreme Court cases setting forth the three-part test for standing: (1) injury-in-fact; (2) fairly traceable to defendant's conduct; and (3) likely to redressed by the requested relief.[126] In the context of standing, Justice O'Connor then identified the burden of proof in a summary judgment motion[127] and the lower court's holding regarding standing.[128] In agreeing with the lower court that the appellees met both their standing requirement to bring the suit and their burden under the summary judgment standard, Justice O'Connor examined the testimony of the appellants' witness and concluded that appellants failed to show that there was "a genuine issue of material fact regarding Indiana's loss of a Representative."[129]

Justice O'Connor found that the anticipated loss of a representative satisfied the injury-in-fact requirement of standing because statistical sampling caused

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[121] *See Department of Commerce*, 119 S. Ct. at 770-71; *see also supra* notes 44-64 and accompanying text.

[122] 19 F. Supp.2d 543 (E.D. Va. 1998).

[123] *See Department of Commerce*, 119 S. Ct. at 772.

[124] *See supra* note 63and accompanying text.

[125] *See Department of Commerce*, 119 S. Ct. at 772.

[126] *See id.* (citing Allen v. Wright, 468 U.S. 737, 751 (1984); Lujan v. Defenders of Wildlife, 504 U.S. 555, 560-61 (1992); Valley Forge Christian College v. Americans United for Separation of Church and State, Inc., 454 U.S. 464, 472 (1982)).

[127] *See id.* at 772. To prevail on a motion for summary judgment, "a plaintiff must establish that there exists no genuine issue of material fact as to justiciability or the merits." *Id.* (citing Lujan v. Nat'l Wildlife Fed'n, 497 U.S. 871, 884 (1990)).

[128] *See id.* at 773.

[129] *Id.*

vote dilution.[130] Again referring to the testimony of appellants' witness, the majority found that the injury was traceable to the use of statistical sampling undertaken by the appellant.[131] Furthermore, the Court held that a permanent injunction against the use of sampling would redress the injury, satisfying the second and third requirements of Article III standing.[132] Justice O'Connor also noted that intrastate vote dilution satisfied the three-part standing test because states use federal census numbers for intrastate redistricting.[133]

C. THE COURT'S INTERPRETATION OF THE CENSUS ACT DETERMINED WHETHER STATISTICAL SAMPLING CAN BE USED FOR PURPOSES OF APPORTIONMENT

Similar to the district court's analysis, Justice O'Connor examined the legislative history and language of the disputed provisions of the Census Act to determine that they prohibited statistical sampling for apportionment purposes.[134] According to the majority, since 1790, when the first census was taken, Congress had prohibited the use of sampling to determine the population for apportionment purposes.[135] Justice O'Connor noted that legislation enacted by the First Congress required a census enumerator to take an oath of a "just and perfect enumeration."[136] The Justice explained that modification of the First Congress' legislation, which occurred twenty years later, allowed for an actual inquiry to be made at every house or to the head of every household within each district.[137]

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[130] *See id.* at 774. Other Supreme Court cases have held that an injury which is "certainly impending" satisfies the Article III injury requirement. *See* James I. Alexander, *No Place to Stand: The Supreme Court's Refusal to Address the Merits of Congressional Members' Line-Item Veto Challenge in* Raines v. Byrd, 6 J.L. & POL'Y 653, 677 (1998) (citing Whitmore v. Arkansas, 495 U.S. 149, 158 (1990) (stating that "[a] threatened injury must be 'certainly impending' to constitute injury in fact") (citations omitted)).

[131] *See Department of Commerce*, 119 S. Ct. at 774.

[132] *See id.* at 774.

[133] *See id.* at 774-75 (citing Karcher v. Daggett, 462 U.S. 725, 728 (1983)).

[134] *See id.* at 775.

[135] *See id.*

[136] *Id.*

[137] *See Department of Commerce*, 119 S. Ct. at 775.

Focusing on more contemporary legislation, the Court stated that the current Census Act, enacted in 1954 with amendments that followed, contained similar language regarding how the census was to be conducted.[138] Justice O'Connor highlighted the 1957 amendment, which was passed to permit statistical sampling in some cases, thereby replacing the personal visits that were used in previous censuses.[139] Additional changes were made to the Census Act through the enactment of federal statute § 195 which allowed the Secretary to "authorize the use of the sampling procedures in gathering supplemental, nonapportionment census information regarding population, unemployment, housing, and other matters . . . ."[140] While sampling was authorized in conducting the census, Justice O'Connor observed that "[§ 195] did not authorize the use of sampling procedures in connection with apportionment of Representatives."[141]

The Court stated that the version of the Census Act at issue in this case took its form in 1976.[142] Reflecting on the changes made to the Census Act under § 141, Justice O'Connor concluded that Congress set forth a broad statement permitting the Bureau to use sampling procedures and special surveys to collect demographic information.[143] The Court emphasized that the changes included allowing the Secretary of Commerce to take a "decennial census of population . . . in such form and content as he may determine, including the use of sampling procedures and special surveys."[144] However, as the Court ex-

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[138] *See id.* at 776. Procedurally, the enumeration procedure changed the most in 1964 with the repeal of former § 25(c) of the Census Act which required all information to be obtained by personal visit. *See id.* The repeal allowed the Census Bureau to use forms which would be delivered by and returned to the United States Postal Service. *See id.* If a form was not returned, the Bureau would conduct a follow-up visit to gather the census information. *See id.* As Justice O'Connor pointed out, nothing in the change of the census procedure affected the prohibition on using sampling for apportionment purposes. *See id.*

[139] *See id.*

[140] *Id.* Section § 195 as it appeared in 1970 provides that "[e]xcept for the determination of population for apportionment purposes, the Secretary may, where he deems appropriate, authorize the use of the statistical method known as 'sampling' in carrying out the provisions of this title." *Id.* (citing 13 U.S.C. § 195 (1970)).

[141] *Id.*

[142] *See id.*

[143] *See Department of Commerce*, 119 S. Ct. at 777.

[144] *Id.* at 776 (citing 13 U.S.C. § 141(a) (1990)). Section § 141(a) provides:

plained, § 195 of the Census Act narrowed the definition of the "use of sampling" language found in § 141(a).[145] Consequently, the Court found that the statute prohibited the use of statistical sampling to determine the apportionment of Representatives.[146]

Despite the many changes to the Census Act, Justice O'Connor observed that the prohibition on the use of sampling for determining apportionment had not changed.[147] Similar to § 141, § 195 underwent changes; but, according to the Justice, such revisions to § 195 did not override or alter the purpose of § 195—to limit the "use of [statistical] sampling in matters relating to apportionment."[148] In modifying § 195, Congress only made minor changes to the statute, relating to the permissive language and discretion granted to the Secretary.[149] Justice O'Connor cited the two major changes, including the redefining of "apportionment purposes" and the requirement that the Secretary of Commerce use statistical sampling in assembling the demographic data collected

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> [t]he Secretary shall, in the year 1980 and every 10 years thereafter, take a decennial census of population as of the first day of April of such year, which date shall be known as the "decennial census date," in such form and content as he may determine, including the use of sampling procedures and special surveys. In connection with any such census, the Secretary is authorized to obtain such other census information as necessary.

13 U.S.C. § 141(a) (1990).

[145] *See Department of Commerce*, 119 S. Ct. at 777.

[146] *See id.*

[147] *See id.*

[148] *Id.*

[149] *See id.* With the changes adopted in 1976, § 195 currently reads: "[e]xcept 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. As the district court in *United States House of Representatives v. Department of Commerce* found, Congress intended the changes to §§ 195 and 141(a) to be only "minor textual modifications" which would not affect they way in which the Secretary would conduct the census for apportionment purposes. *See* Recent Cases, *Statutory Interpretation—Census Act—Special D.C. District Court Panel Holds that Statistical Sampling Cannot be Used for Congressional Apportionment*—United States House of Representatives v. United States Department of Commerce, 11 F. Supp.2d 76, Prob. Juris. Noted, 119 S. Ct. 27 (1998), 112 HARV. L. REV. 566, 568 (1998) [hereinafter "*Statutory Interpretation*"].

during the census, rather than granting him permissive authority.[150]

Given the amended language of the statute, Justice O'Connor recognized how § 195 could be read to both permit and prohibit statistical sampling for purposes of apportionment in light of past cases where the "except/shall" language was challenged.[151] With regard to interpretation of the "except/shall" language, the Justice pointed to the contrasting examples cited in the briefs of the appellees and appellants and concluded that the broader context determines the appropriate interpretation of the language.[152] Focusing on the historical

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[150] *See Department of Commerce*, 119 S. Ct. at 777. Justice O'Connor contrasted the pre-amendment language of § 195, "may, where he deems it appropriate," and the post-amendment language of § 195, "shall, if he considers it feasible," classifying the former as permissive language and the latter as a mandate upon the Secretary. *Id.*

[151] *See id.*

[152] *See id.* Justice O'Connor cited to the Brief for Glavin in *Clinton v. Glavin* to explain the prohibitive reading of the "except/shall language." *See id.* at 777 (citing Brief of Appellees Matthew J. Glavin et al. at 35-36, Clinton v. Glavin, 19 F. Supp.2d 543 (E.D. Va. 1998) (No. 98-564), available in 1998 WL 767664). In its brief, the appellees argued that

> the appellants' argument is plainly wrong because an exception from a mandate does constitute a prohibition on agency action and, in any event, the second half of Section 195 is not a "mandatory directive." As a matter of common usage, an exception from a command is most naturally read as a prohibition . . . . Here, the 180-year practice of conducting the census on the basis of a headcount provides the context for determining the meaning of Section 195. This historical background strongly suggests that the exception in Section 195 was intended to continue the prohibition against sampling for Congressional apportionment.

Brief of Appellees Matthew J. Glavin et al. at 35-36, Clinton v. Glavin, 19 F. Supp.2d 543 (E.D. Va. 1998) (No. 98-564), available in 1998 WL 767664. Illustrating how § 2 of the Fourteenth Amendment implicates the prohibitive interpretation of the "except/shall" language described above, the appellants stated, in a footnote, that:

> [s]pecifically, Section 2 of the Fourteenth Amendment provides in relevant part that "when the right to vote . . . is denied to any of the male inhabitants of such State . . . 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." Thus, the Fourteenth Amendment is mandatory insofar as it requires the relative representation of each state to be reduced to the extent adult males are disenfranchised. The amendment contains an exception to this mandatory rule for disenfranchisement of those who had participated in "rebellion" or other crimes. It is clear that this exception did in fact constitute a prohibition against penalizing (by re-

context of the census, however, the majority concluded that the only proper interpretation of the statute was to prohibit sampling when determining the population for apportionment purposes.[153] The Justice bolstered this conclusion by citing numerous cases where the Census Bureau itself favored the prohibitive interpretation of § 195.[154] The Court further noted that the Bureau's posi-

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> ducing their population) states that disenfranchised sympathizers to the Confederacy . . . . Thus, the Fourteenth Amendment plainly demonstrates that an exception to a requirement does in fact operate as a prohibition against application of the provision.

Id. at 36 n.36 (internal citations omitted).

The Justice also referenced the Brief for United States Department of Commerce in *United States Department of Commerce* v. *United States House of Representatives*, which argued that the "except/shall" language in § 195 should not be read as "prohibiting the excepted activity." *See id.* at 777 (citing Brief for Appellant at 28-29 n.15, United States Department of Commerce v. United States House of Representatives, 11 F. Supp.2d 76 (D.D.C. 1998) (No. 98-404), available in 1998 WL 691297 (noting in a footnote that other federal laws including 2 U.S.C. §§ 179n(a)(1) and 384(a) and 5 U.S.C. § 555(e) "cannot reasonably be construed as prohibiting the excepted activity")). Contending that § 195 did not prohibit sampling, the appellant stated that

> Section 195's generally applicable mandatory directive to the Secretary—i.e., that statistical sampling "shall" be used if its use is considered "feasible"—does not apply to the determination of state-level population figures used for purposes of apportionment. No rule of statutory construction suggests, however, that activities specifically excepted from a mandatory directive are thereby prohibited. Rather, the effect of Section 195's opening proviso is to render that Section's mandatory directive inapplicable to "the determination of population for purposes of apportionment," leaving the scope of the Secretary's authority in that area to be defined by other provisions of law—specifically, by Section 141(a)'s express vesting of discretion in the Secretary to use "sampling procedures" in the conduct of the decennial census.

Brief for Appellant at 28-29, United States Department of Commerce v. United States House of Representatives, 11 F. Supp.2d 76 (D.D.C. 1998) (No. 98-404), available in 1998 WL 691297 (internal citation omitted).

[153] *See Department of Commerce*, 119 S. Ct. at 777.

[154] *See id.* at 777-78 (citing Young v. Klutznick, 652 F.2d 617, 621 (6th Cir. 1981) ("noting that the Census Director and other officials explained at trial that 'since 1790 the census enumeration has never been adjusted to reflect an estimated undercount and that in their opinion Congress by statute had prohibited such an adjustment in the figures used for purposes of Congressional apportionment.'"); Philadelphia v. Klutznick, 503 F. Supp. 663, 678 (E.D. Pa. 1980) ("noting that the Bureau argued that 'Congress has clearly rejected the use of an adjustment figure in the Census Act'"); Carey v. Klutznick, 508 F. Supp. 404

tion did not change until 1994, when it concluded "that using statistical sampling to adjust census figures would be consistent with the Census Act."[155]

Justice O'Connor next addressed Justice Stevens' and Justice Breyer's dissents.[156] In response to Justice Stevens' argument that "the 1976 amendments had no purpose," Justice O'Connor reiterated the change in authority given to the Secretary of Commerce, thereby challenging the feasibility of sampling and "the manner in which the decennial census is conducted."[157] Rebutting Justice Stevens' assertion that the census had a limited purpose in the apportionment context, the majority stated that its purpose and result had also become a way of gathering demographic information and gauging the characteristics of the population.[158]

In addressing Justice Breyer's assertion that § 195 allowed statistical sampling as a "supplement" to the census, Justice O'Connor cited the broad language of the statute.[159] The Census Act states that "sampling cannot be used 'for the determination of population for purposes of apportionment of Representatives,'" which, as Justice O'Connor reasoned, did not permit the use of sampling for supplemental or substitutive purposes.[160] The Justice contended that the method used in the Bureau's plan did not allow for a true determination of population because it lacked a definite and firm enumeration.[161]

Lastly, Justice O'Connor supported the majority opinion by citing the legislative history of the 1976 amendments.[162] The Justice surmised that members

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(S.D.N.Y. 1980) (emphasizing that the defendants' argument that the Census Act precluded using statistical adjustment for purposes of apportionment)).

[155] *Id.* at 778 (citing Memorandum from Assistant Attorney Dellinger to Solicitor General 1 (October 7, 1994)).

[156] *See id.* at 778-79; *see also* discussion *infra* Parts IV.E and IV.F.

[157] *See Department of Commerce*, 119 S. Ct. at 778.

[158] *See id.*

[159] *See id.* at 778-79.

[160] *Id.* (citing 13 U.S.C. § 195).

[161] *See id.* at 779. Justice O'Connor cited the definition of determining as "the act of deciding definitely and firmly." *Id.* (citing WEBSTER'S NINTH NEW COLLEGIATE DICTIONARY 346 (1993)). The statistical sampling plan proposed by the Bureau required additional steps after the census in the form of follow-ups, which did fulfill the "definitely and firmly" requirement. *See id.*

[162] *See id.*

of Congress, who would be most affected by a change in the Census Act, would have engaged in a more aggressive debate if Congress thought that the revisions to §§ 141 and 195 permitted statistical sampling for apportionment purposes.[163] The fact that the amendments were not the focus of the debate, the Court concluded, evidenced that Congress reached the conclusion that the amendments did not change the prohibition on the use of statistical sampling for apportionment purposes.[164]

In concluding the Court's opinion, Justice O'Connor reiterated and affirmed the discussion in *Glavin v. Clinton*,[165] which held that "the Census Act prohibit[ed] the proposed uses of statistical sampling in calculating the population for purposes of apportionment."[166] This holding, the Court stated, further resolved the issues in *United States House of Representatives v. United States Department of Commerce*,[167] therefore meriting the dismissal of the appeal.[168] Deciding the case on statutory grounds, the Court declined to address the constitutional issues presented.[169]

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[163] *See Department of Commerce*, 119 S. Ct. at 779.

[164] *See id.*

[165] 19 F. Supp.2d 543 (E.D. Va. 1998).

[166] *Department of Commerce*, 119 S. Ct. at 779.

[167] 11 F. Supp.2d 76 (D.D.C. 1998).

[168] *See Department of Commerce*, 119 S. Ct. at 779.

[169] *See id.* (citing Spector Motor Serv. v. McLaughlin, 323 U.S. 101, 104-05 (1944); Ashwander v. TVA, 297 U.S. 288, 347 (1936) (Brandeis, J., concurring)). The constitutional claim raised by appellees alleged the proposed sampling plan violated the Census Clause of the Constitution. *See id.* at 771. The Court's failure to address the constitutional issue "left the [C]ourt's interpretation incomplete, and undermined its persuasiveness" and left the constitutional requirement of "actual Enumeration" open to multiple interpretations. *See Statutory Interpretation*, *supra* note 149, at 568-69 (criticizing the district court in *United States House of Representatives v. United States Department of Commerce* for not taking the opportunity to remove constitutional doubt). Various district courts have found statistical sampling permissible in some circumstances. *See id.* (citing Carey v. Klutznick, 508 F. Supp. 404, 415 (S.D.N.Y. 1980); Young v. Klutznick, 497 F. Supp. 1318, 1335 (E.D. Mich. 1980)).

D. JUSTICE SCALIA'S TEXTUAL ANALYSIS OF THE CENSUS ACT DETERMINED THAT STATISTICAL SAMPLING FOR APPORTIONMENT PURPOSES WAS NOT PERMITTED

Concurring in the judgment, Justice Scalia wrote separately to address Justice Stevens' interpretation of § 141(a), emphasizing a textual analysis and introducing the doctrine of constitutional doubt.[170] Disagreeing with Justice Stevens' argument that a reading of § 195 as a prohibition on statistical sampling for apportionment purposes contradicts the language of § 141(a)'s, thereby allowing a "decennial census of population . . . including the use of sampling procedures," Justice Scalia focused on the phrase "decennial census of population" in § 141(a).[171] According to the Justice, § 141(b) further defines "decennial census of population" as "more than the 'tabulation of total population by States . . . as required for the apportionment of Representatives in Congress among the several States . . . .'"[172] Justice Scalia noted that while § 141(a) authorized statistical sampling in some cases, it does not permit it in all aspects of the census.[173] Justice Scalia also criticized Justice Stevens' interpretation of the "except/shall" language as misplaced and concluded that the Secretary has no obligation to authorize sampling if "he does not consider it feasible."[174]

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[170] *See Department of Commerce*, 119 S. Ct. at 780 (Scalia, J., concurring in part).

[171] *Id.* (quoting 13 U.S.C. § 141(a) (1990)).

[172] *Id.* (quoting 13 U.S.C. § 141(a) (1990)). Justice Scalia stated that it included "a census of population, housing, and matters relating to population and housing." *Id.* Section 141(b) provides: "The tabulation of total population by States under subsection (a) of this section as required for the apportionment of Representatives in Congress among the several states shall be completed within 9 months after the census date and reported by the Secretary to the President of the United States." 13 U.S.C. § 141(b) (1990).

[173] *See Department of Commerce*, 119 S. Ct. at 780 (Scalia, J., concurring in part). In referring to other aspects of the law, Justice Scalia hypothesized that if the Constitution prohibited sampling with regard to apportionment, to say that the Secretary's right, under § 141(a), to use sampling in the census generally, could not be contradictory. *See id.* There is no contradiction, according to the Justice, because § 141(a) sets out a lawful use of sampling which clearly does not extend to apportionment purposes. *See id.* Justice Scalia applied this hypothetical to the analysis Justice Stevens' conducted and said that if § 141(a) had been interpreted as authorizing statistical sampling in "all aspects of the decennial census," then Justice Stevens' claim that § 195 contradicts § 141(a) would be correct. *Id.*

[174] *Id.* Justice Scalia interpreted § 195 literally, noting that the language of § 195, "shall, if he considers it feasible," was limited by the introductory phrase "[e]xcept for the determination of population for purposes of apportionment of Representatives in Congress among the several States" and by the phrase "if he considers it feasible." *See id.*; 13 U.S.C.

As an alternative argument to concluding that §§ 141(a) and 195 work together to prohibit sampling for apportionment purposes, Justice Scalia offered the doctrine of constitutional doubt, entailing the practice of "construfing] the text in such fashion as to avoid serious constitutional doubt."[175] Applying this doctrine, Justice Scalia concluded that it is "unquestionably doubtful whether the constitutional requirement of an 'actual Enumeration,' Art. I, § 2, cl. 3, is satisfied by statistical sampling."[176] Referring back to the majority's discussion of the historical method of conducting the census, Justice Scalia concluded that it "demonstrate[d] a longstanding tradition of Congress's [sic] forbidding the

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§ 195 (1990). Therefore, Justice Scalia concluded that where the exception applies, the Secretary could not use sampling. *See Department of Commerce*, 119 S. Ct. at 780. (Scalia, J., concurring in part). Justice Scalia further articulated that § 181 of the Census Act "requires the Secretary to compile annual and biennial 'interim current data,'" and use sampling in this compilation "only if [the Secretary] determines that it will produce 'current, comprehensive, and reliable data.'" *Id.*; 13 U.S.C. § 181(a) (1990). Section 181 reiterates the Secretary's discretion in using statistical sampling for apportionment purposes. *See Department of Commerce*, 119 S. Ct. at 780 (Scalia, J., concurring in part). Section 181(a) provides in full:

> During the intervals between each census of population required under section 141 of this title, the Secretary, to the extent feasible, shall annually produce and publish for each State, county, and local unit of general purpose government which has a population of fifty thousand or more, current data on total population and population characteristics and, to the extent feasible, shall biennially produce and publish for other local units of general purpose government current data on total population. Such data shall be produced and published for each State, county, and other local unit of general purpose government for which data is compiled in the most recent census of population taken under section 141 of this title. Such data may be produced by means of sampling or other methods, which the Secretary determines will produce current, comprehensive, and reliable data.

13 U.S.C. § 181(a) (1990).

[175] *Department of Commerce*, 119 S. Ct. at 780-81 (Scalia, J., concurring in part) (citing Edward J. DeBartolo Corp. v. Florida Gulf Coast Bldg. & Constr. Trades Council, 485 U.S. 568 (1988)).

[176] *Id.* at 781 (Scalia, J., concurring in part). In making this observation, Justice Scalia traced the history and evolution of the definition of "enumeration" beginning with the definition at the time of the ratification of the Constitution which required "an actual counting, and not just an estimation of number" and evolving over time to define the verb enumerate as "[t]o reckon up singly; to count over distinctly" and enumeration as "[t]he act of numbering or counting over." *Id.* (citing THOMAS SHERIDAN'S 1796 COMPLETE DICTIONARY OF THE ENGLISH LANGUAGE (6th ed. 1796)).

use of estimation techniques in conducting the apportionment census."[177] Although the undercount existed as early as the 1800's, the Justice noted that sampling was never considered as an alternative method of calculating the population.[178] Concluding that the use of sampling is not the "'actual Enumeration' that the Constitution requires," Justice Scalia opined that the "genuine enumeration may not be the most accurate way of determining population, but it may be the most accurate way of determining population with minimal possibility of partisan manipulation."[179]

E. JUSTICE BREYER DISTINGUISHED THE ROLE OF STATISTICAL SAMPLING AS A SUPPLEMENT TO THE CENSUS, RATHER THAN A SUBSTITUTE

Justice Breyer authored an opinion, concurring in part and dissenting in part.[180] Although siding with the majority on the issue of standing, Justice Breyer agreed with portions of Justice Stevens' dissent.[181] The Justice articulated that the Bureau's statistical sampling plan did not violate the Census Act because § 195 did not bar the use of statistical sampling to *supplement* the traditional census, but rather prohibited its use as a *substitute* for traditional census methods.[182]

Finding that § 195 permitted sampling as a valid supplemental method, Justice Breyer turned to the "except" language of § 195.[183] While the Justice

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[177] *Id.* Justice Scalia cited to the majority opinion stating "that the Census Acts of 1790 and 1800 required a listing of persons by family name, and the Census Acts of 1810 through 1950 required census enumerators to visit each home in person." *Id.*

[178] *See id.* at 781

[179] *Id.* at 782 (Scalia, J., concurring in part). This assertion, according to the Justice, stemmed from concerns that an "estimate [may not be] more accurate than a headcount" or that "Congress could [not] be relied upon to permit only those estimates that are more accurate than headcounts." *Id.* at 781-82 (Scalia, J., concurring in part).

[180] *See id.*

[181] *See Department of Commerce*, 119 S. Ct. at 782 (Breyer, J., concurring in part, dissenting in part). Justice Breyer agreed with Part II of the majority opinion and Parts II and III of Justice Stevens' dissent. *See id.* He agreed with the conclusion set forth in Part I of Justice Stevens' dissent, but differed as to the basis for the conclusion that the Bureau's plan did not violate the Census Act. *See id.*

[182] *See id.*

[183] *See id.*

agreed with the majority that the language could be read to prohibit sampling for apportionment purposes, the Justice stated that the language could alternatively be read "as applicable only to the use of sampling in place of the traditional 'determination of population for purposes of apportionment.'"[184] Focusing on the context and history of § 195, Justice Breyer concluded that the limited interpretation of scope was appropriate.[185]

The Justice next traced the history of statistical sampling, from its beginning in the 1940's, when the government used short and long census forms that each family and one in twenty families were asked to fill out, respectively.[186] Justice Breyer identified this long form as a precursor to what the Secretary would be able to do under § 195.[187] Supporting the use of statistical sampling for supplemental purposes, Justice Breyer cited legislative history, which explained that the purpose of sampling under § 195 was to effectively gather information without undertaking a complete enumeration.[188] The Justice further noted that

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[184] *Id.* Justice Breyer continued by saying that the "except" clause does not apply in every use of sampling, just as "a statutory rule forbidding 'vehicles' in the park [does not] appl[y] to everything that could possibly be characterized as a 'vehicle.'" *Id.*

[185] *See id.* Justice Breyer, in addition to looking at the briefs of the parties, looked to district court decisions in finding that § 195 should be interpreted as only prohibiting sampling for substitutive purposes. *See id.* at 782-83 (Breyer, J., concurring in part, dissenting in part) (citing Young v. Klutznick, 497 F. Supp. 1318, 1335 (E.D. Mich. 1980) (holding that "[a]ll that § 195 does is prohibit the use of figures derived solely by statistical techniques. It does not prohibit the use of statistics in addition to the more traditional measuring tools to arrive at a more accurate population count"); Carey v. Klutznick, 508 F. Supp. 404, 415 (S.D.N.Y. 1980) (finding that the "Census Act permits sampling in the context of apportionment as long as it is used only in addition to more traditional methods of enumeration")).

[186] *See id.* at 783 (Breyer, J., concurring in part, dissenting in part).

[187] *See Department of Commerce*, 119 S. Ct. at 783 (Breyer, J., concurring in part, dissenting in part). In showing § 195's realistic impact on the headcount, Justice Breyer stated that

> [§] 195 of the Census Act, at least in my view, could not have been intended as a prohibition so absolute as to stop the Census Bureau from imputing the existence of a living family behind closed doors of an apparently occupied house, should that family refuse to answer the bell. Similarly, I am not convinced that the Act prevents the use of sampling to ascertain the existence of a certain number of families that fail to mail back their census forms.

Id. at 785 (Breyer, J., concurring in part, dissenting in part).

[188] *See id.* at 783 (Breyer, J., concurring in part, dissenting in part) (citation omitted).

the Bureau had, both before and after the enactment of § 195, used sampling, most commonly as a "quality check on the headcount itself."[189]

Justice Breyer equated the Bureau's prior use of sampling with the Bureau's proposal under its sampling plan for the 2000 census, which would supplement, not substitute, the traditional census methods to achieve an accurate enumeration by eliminating the undercount problem.[190] Although part of the sampling plan would serve "to determine the last 10% of population in each census tract," Justice Breyer classified this as supplemental rather than substitutive because it would not have a great impact upon the headcount, and therefore would not fall within the § 195 "except" clause.[191] Justice Breyer agreed with Justice Stevens in concluding that the changes made to the Census Act, par-

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[189] *Id.* at 783-84 (Breyer, J., concurring in part, dissenting in part). Statistical estimation, called imputation, had been used since 1940 to fill in gaps in the headcount. *See Census 2000 Report*, *supra* note 10, at 23. The Bureau would "impute" information using demographics of the neighborhood "[w]hen an enumerator believe[d] a residence [was] occupied but [was] unable to obtain any information about how many people lived there." *Department of Commerce*, 119 S. Ct. at 783 (Breyer, J., concurring in part, dissenting in part). Specifically, 1,068,882 people were added to the 1970 population, 761,000 to the 1980 population and 53,590 in 1990 through imputation. *See Census 2000 Report*, *supra* note 10, at 23.

[190] *See Department of Commerce*, 119 S. Ct. at 784 (Breyer, J., concurring in part, dissenting in part). Justice Breyer had confidence in this plan, elaborating on its "intensive investigating [of] sample blocks in each State, comparing the results from that investigation with the results of the headcount, and using that information to estimate to what extent different groups of persons were undercounted during the headcount." *Id.* The sampling plan's focus on racial and ethnic minority neighborhoods is due to those groups being historically undercounted. *See id.* At the same time, the Justice also noted the complexity of using statistical sampling to correct the headcount, but also pointed out that traditional or unadjusted headcounts can have similar inaccuracies and problems. *See id.*

[191] *Id.* at 785 (Breyer, J., concurring in part, dissenting in part). As Justice Breyer explained,

> [f]or each census tract (made up of roughly 1,700 housing units), the Nonresponse Followup program will assign population figures to no more than 170 housing units. Census Bureau enumerators will personally visit enough of the housing units in each census tract to ensure that 90% of all housing units have been counted either by mail or in person. The Census Bureau will then use the information gathered from the housing units that the census enumerators actually visited in that tract to arrive at a number for the remaining 10% . . . . [T]he Secretary . . . believes . . . the Nonresponse Followup plan "will increase the accuracy of the census as a whole."

Id.

ticularly §§ 141 and 195, have favored the use of statistical sampling.[192] Concluding his dissent, Justice Breyer claimed that the Census Act entrusted the Secretary with "broad discretionary authority," to which the Court should defer.[193]

F. JUSTICE STEVENS' DISSENT CONCLUDED THAT THE SECRETARY OF COMMERCE IS AUTHORIZED TO USE STATISTICAL SAMPLING IN THE DECENNIAL CENSUS

Justice Stevens began his dissent by unequivocally stating that the Census Act permits the use of statistical sampling for the 2000 Census.[194] In arriving at this conclusion, the Justice pointed to the unlimited authorization to use sampling in § 141(a) and the limited mandate regarding sampling in § 195.[195] Section 141(a), according to the dissent, plainly states that the Secretary has an "unqualified authority to use sampling procedures when taking the decennial census, the census used to apportion the House of Representatives."[196] In addition, Justice Stevens found that the language in § 195, which gives the Secretary discretion to reject sampling for apportionment purposes and to only resort to sampling if feasible, does not limit the unlimited authority given to the Secretary under § 141(a).[197] Under this analysis, Justice Stevens determined that the use of sampling was statutorily sound, but could not be prohibited in the determination of population for apportionment purposes.[198]

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[192] *See id.* at 784 (Breyer, J., concurring in part, dissenting in part). In making this conclusion, Justice Breyer cited the repeal of former § 25(c) of the Census Act which had required personal visits, the change to § 141(a) in allowing the Secretary to "take a decennial census" and the change of the language in § 195 from "may" to "shall." *See id.* at 784-85 (Breyer, J., concurring in part, dissenting in part).

[193] *Id.* at 785-86 (Breyer, J., concurring in part, dissenting in part).

[194] *See id.* at 786 (Stevens, J., dissenting).

[195] *See id.*

[196] *Department of Commerce*, 119 S. Ct. at 786 (Stevens, J., dissenting).

[197] *See id.* Justice Stevens noted that while § 195 does not mandate that the Secretary use sampling to determine the population for apportionment purposes, it does not prohibit such sampling either. *See id.* The Justice also differentiated between § 141(a) and § 195, noting that § 141(a) refers to the decennial census, while § 195 refers to both mid-decade and decennial censuses. *See id.*

[198] *See id.*

To bolster this argument, the dissenting Justice discussed the history of the changes to §§ 141(a) and 195.[199] Justice Stevens reemphasized that Congress, with the 1976 amendments to the two sections, intended to allow sampling for apportionment purposes.[200] Like Justice Breyer, Justice Stevens highlighted two changes to the Census Act which favored sampling: first, the addition of § 141(a) which specifically allowed for "the use of sampling procedures" and second, "may" replacing "shall" in § 195.[201] Justice Stevens next discussed the majority's argument that the absence of Congressional debate regarding whether sampling restrictions changed at the time of the amendments mandates a presumption that sampling is still prohibited as to apportionment.[202] The Justice argued that such silence was not based on the unchanged status of sampling, but rather Congress' understanding and support for a change in the law.[203]

Justice Stevens next considered the appellants' arguments that the "actual Enumeration" language in Article 1, Section 2, Clause 3 of the Constitution did not contemplate the use of sampling to supplement the traditional census methods.[204] The Justice reasoned that the original Framers were not concerned with the "Manner" in which the census was conducted, but were more focused on insuring that a decennial census was conducted for periodic reapportionment purposes.[205] This "Manner," Justice Stevens explained, must fulfill "the con-

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[199] *See id.*

[200] *See id.*

[201] *See id.* at 786-87 (Stevens, J., dissenting). Justice Stevens addressed the application of the statutes to the mid-decade and decennial census and asserted that the mid-decade census was to be used for non-apportionment purposes, therefore the only census in question for determining apportionment was the decennial census. *See id.* at 787 (Stevens, J., dissenting); *see also supra* note 149 and accompanying text.

[202] *See Department of Commerce*, 119 S. Ct. at 787-88 (Stevens, J., dissenting); *see also supra* notes 162-164 and accompanying text.

[203] *See Department of Commerce*, 119 S. Ct. at 787-88 (Stevens, J., dissenting). Justice Stevens continued by questioning the Court's analysis of the change; that is, according to the majority, the pre-1976 statute had the same effect as the 1976 statute, which gives rise to the question of why did Congress make such a change. *See id.* at 788 (Stevens, J., dissenting); *see also supra* notes 162-164 and accompanying text.

[204] *See id.* at 788 (Stevens, J., dissenting).

[205] *See id.* at 788-89 (Stevens, J., dissenting). Justice Stevens stated the key questions as "whether the rule of reapportionment would be constitutionally fixed and whether subsequent allocations of seats would be based on population or property." *Id.* at 788 (Stevens, J., dissenting).

stitutional goal of equal representation,"[206] which requires any method that is complete and accurate.[207] Just as the Bureau replaced personal visits with short and long forms returned by mail, so too, according to Justice Stevens, could the Bureau undertake a sampling method that would effectuate the "actual Enumeration" mandated by the Constitution.[208] In conclusion, Justice Stevens agreed with the majority's finding that each plaintiff had standing to bring suit, but rejected the Court's holding.[209]

V. CONCLUSION

The Supreme Court's decision in *Department of Commerce v. United States House of Representatives* represents the first definitive decision on whether statistical sampling can be used to calculate the population for apportionment purposes. In concluding that the Census Act prohibits statistical sampling, the Court left unaddressed the issue of whether sampling could be used for other purposes such as the determination of federal funding among the states. While the Court has made a determinative ruling on the sampling issue, the history of the Secretary's approach to sampling still causes confusion in this area.

According to some scholars, numerical accuracy, which would be achieved by an adjusted census, is favored over distributive accuracy."[210] The Secretary has teetered on this issue, by rejecting adjustment in the past, as illustrated by cases including *Wisconsin v. City of New York*,[211] *Young v. Klutznick*[212] and

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[206] *Id.* at 789 (Stevens, J., dissenting) (quoting Franklin v. Massachusetts, 505 U.S. 788, 804 (1992)).

[207] *See id.* at 789

[208] *See Department of Commerce*, 119 S. Ct. at 789 (Stevens, J., dissenting).

[209] *See id.* In a separate dissent, Justice Ginsburg agreed with Parts I and II of Justice Stevens' dissent. *See id.* at 789 (Ginsburg, J., dissenting). However, on the issue of standing, the Justice argued that while both appellees in the consolidated cases of *Glavin* and the *United States House of Representatives* had standing, the effects on intrastate redistricting was not a valid basis for standing for the other appellees in *Glavin*. *See id.*

[210] *See* Taylor, *supra* note 2, at 1105-06 (arguing that "DSE produces a better estimate of the nation's actual population than the official census in terms of numerical accuracy"). Numerical accuracy refers to "how closely a data set approximates the actual number of people in a particular jurisdiction," while distributive accuracy concerns "how closely a data set approximates the true distribution of population shares among the states." *See id.*; *see also supra* notes 110-111 and accompanying text

[211] 517 U.S. 1 (1996).

Carey v. Klutznick.[213] However, the Secretary is currently supporting a statistical adjustment to the 2000 census through sampling. The decision to change positions on the issue cannot be based on a recent emergence of an undercount because the undercount has been measured since the 1940's.[214] Therefore, the likely reason for the Secretary's change in position is political.[215]

Justice Scalia, in his concurrence in *Department of Commerce*, addressed the issue of political motivation for conducting the census.[216] In the Justice's view, an "actual Enumeration," without the use of sampling, may be the only way to avoid a political battle between Republicans and Democrats due to their opposing views on the permissibility of sampling.[217] The Court avoided both a separation-of-powers problem and a political battle by ruling that statistical sampling for purposes of apportionment is impermissible on statutory grounds.[218] However, as Justice Scalia pointed out, it would be difficult for the Court to conduct a review of any proposed sampling techniques without the availability of an actual headcount, for comparison purposes, to evaluate the accuracy of such methods.[219] Deciding not to use a statistical adjustment in the 1990 census, the Secretary also expressed similar concern over political is-

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[212] 652 F.2d 617 (6th Cir. 1981); *see also supra* note 154 and accompanying text.

[213] 509 F. Supp. 404 (S.D.N.Y. 1980); *see also supra* note 154 and accompanying text.

[214] *See supra* note 45 and accompanying text.

[215] *See* Issacharoff & Lichtman, *supra* note 6, at 15 (stating that "political factors are almost certain to influence decision making for the Census of 2000").

[216] *See* Department of Commerce v. United States House of Representatives, 119 S. Ct. 765, 782 (1999) (Scalia, J., concurring in part). Justice Scalia stated that:

> genuine enumeration may not be the most accurate way of determining population, but it may be the most accurate way of determining population with minimal possibility of partisan manipulation. The prospect of this Court's reviewing estimation techniques in the future, to determine which of them so obviously creates a distortion that it cannot be allowed, is not a happy one.

Id.

[217] *See id.*

[218] *Id.* at 779.

[219] *See id.* at 782 (Scalia, J., concurring in part). Justice Scalia also expressed concern over a possible separation-of-powers problem. *See id.*

sues.[220]

As some commentators have speculated, the decision of the Secretary to forgo a statistical adjustment in the 1990 census reflected "Democratic inclinations of the undercounted population," —a political consideration which persuaded the Secretary to abandon the idea of an adjustment.[221] For example, during the 1990 census, a Republican president was in office who appointed Republican officials to his Cabinet.[222] In trying to keep the Republican party in power, the Secretary was encouraged not to adjust the census for fear that it would augment the number of undercounted minorities who tend to vote for the Democratic Party.[223] This theory is illustrated by the position of the current Secretary, who is presiding under a Democratic president.[224] Indeed, the Sec-

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[220] *See* Wisconsin v. City of New York, 517 U.S. 1, 11-12 (1996). Chief Justice Rehnquist reviewed the Secretary's decision not to use a statistical adjustment, reasoning that "[b]ecause small changes in adjustment methodology would have a large impact upon apportionment—an impact that could be determined before a particular methodology was chosen—the Secretary found that statistical adjustment of the 1990 census might open the door to political tampering in the future." *Id.*

[221] *See* Taylor, *supra* note 2, at 1105 ("Some commentators have speculated that given the strong Democratic inclinations of the undercounted population, political considerations influence the Secretary's decision not to adjust the 1990 census, but, whatever, the core motivation, the Secretary's choice meant that an estimated four million persons would suffer vote dilution and underrepresentation in the construction of congressional districts.").

[222] President George Bush was in office until January, 1993, at which time President Bill Clinton was sworn in, and will serve as President until January 2001. *See* The White House, *The Presidents of the United States of America* (visited Feb. 13, 2000) <http://www.whitehouse.gov/WH/glimpse/presidents/html/presidents.html>.

[223] *See* Issacharoff & Lichtman, *supra* note 6, at 13-14. One commentator has explained that the Secretary's decision not to adjust the census as follows:

> The published guidelines for the decision whether to adjust included manifestly non-methodological concerns such as the effects of adjustment on the "political process" and on "future Census efforts." Although composed primarily of impartial academic authorities, the Department of Commerce's Advisory Panel was co-chaired by Republican Party pollster and political adviser Lance Tarrance. Obviously, a procedure that increased representation for predominantly Democratic blacks and Hispanics would have been contrary to Republic interests and could be classified as falling within the gray area left open in the Commerce Department guidelines regarding effects on the "political process."

Id. (internal citations omitted); *see also Census Sampling Still an Issue for Bush*, ASSOCIATED PRESS, Jan. 3, 2000.

[224] *See* Press Briefing by Secretary of Commerce Bill Daley, Office of the Press Secre-

retary is in favor of statistical sampling.[225] Conversely, the Republican controlled House of Representatives challenged the Bureau's proposed sampling plan.[226] Under the guise of insuring that "[e]very person in America counts -

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tary (Apr. 14, 1999).

[225] In a press briefing, Secretary of Commerce Bill Daley commented on the Supreme Court's decision in *Department of Commerce v. United States House of Representatives*, 119 S. Ct. 765 (1999). He said, in relevant part:

> As you know, the Supreme Court ruled last January that the use of scientific sampling to apportion congressional seats was not consistent with the Census Act. They did not rule that it was unconstitutional, they ruled it was not legal according to the Census Act. The Court also wrote, however, that the use of scientific sampling was required for purposes other than apportionment, if it's feasible. Those other purposes include the distribution of federal funds to states and localities, and the drawings of lines both state, local and federal legislative districts. The Census Bureau is determined that it would be feasible to use scientific methods for these purposes.
>
> Obviously, this has produced a great controversy in the Congress, and until the Congress acts and settles its differences with the administration over the use of sampling, funding for the entire Department of Commerce, State, and Justice will cease on June 15th. It is clear, as the experts at the Census Bureau and the National Academy of Sciences and the vast majority of the statistical community have concluded, that a plan that includes modern scientific methods is the only plan that can correct the differential undercount of children, minorities, the poor, and residence of the very rural and the very urban areas of our country. This is the case, regardless of how much money or effort we poor into non-sampling efforts.
>
> Once again, to reiterate, the 1990 census missed over 8 million people, including 4.4 percent of African Americans, 5 percent of Hispanics, 2.3 [sic] of Americans of Asian descent, and over 12 percent of American Indians living on reservations. Let me again state that without these scientific methods, the Census Bureau will not be able to correct for similar, if not worse, undercounts in 2000.
>
> The President, the Census Bureau, all of us at the Commerce Department and the entire administration are committed to using the most accurate, most modern, most effective methods to ensure this is a success, as the President has emphasized, Because [sic] every person in America counts, everyone must be counted.

Press Briefing by Secretary of Commerce Bill Daley, Office of the Press Secretary (Apr. 14, 1999).

[226] *See supra* notes 60-62 and accompanying text.

so every American must be counted," the current government seeks to preserve the democratic hold over the Presidency, and perhaps, gain control of Congress, in the 2000 elections.[227] If Republicans and Democrats were to focus on the purpose of census—an enumeration of the United States population—and the overall benefit of a complete and accurate count, while putting aside their personal hopes of obtaining and maintaining control of the federal government, the two parties might be able to agree on a solution for the undercount.

After twenty-one decennial censuses, the best "Manner" for conducting a decennial census has not yet been determined. Unfortunately the Court's decision in *Department of Commerce* has not necessarily clarified the issue. Political battles and legislative differences will continue, thereby stalling the ability to move toward a true census that is an accurate and fair reflection of United States population. In 1797, the Framers of the Constitution established the constitutional goal of "actual Enumeration." At that time, the Framers could not have been aware of the rapid growth and diverse nature of the United States in the future. Furthermore, the Framers were unaware of the statistical methods that would later emerge to remedy what has become known as the undercount. It is from this evolving growth and diversity that new methods must be explored and undertaken to insure that each person in the United States is "actually enumerated."

[227] *See* Statement by the President, Office of the Press Secretary (Norfolk, Virginia) (Apr. 1, 1999).