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Utah v. Evans: How Census 2000's "Sampling in Disguise" Fooled the Supreme Court into Allocating Utah's Seat in the U.S. House of Representatives to North Carolina

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Utah v. Evans: How Census 2000's "Sampling in Disguise" Fooled the Supreme Court into Allocating Utah's Seat in the U.S. House of Representatives to North Carolina

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I. INTRODUCTION

How would people feel if the U.S. Supreme Court, and not the voters, decided which party controlled the U.S. House of Representatives? It would seem contrary to the spirit of democracy, something that would disrupt the

checks and balances of government we hold so dear. However, the likelihood of this occurring is a very real possibility considering the outcome of the 2000 election. First, the Supreme Court was left to resolve a Presidential election that was decided by only 537 popular votes.¹ Further, the election left a 50-50 split in the U.S. Senate and a slim ten vote margin of control in the House of Representatives.² Most people fail to realize that the Supreme Court also decided which state would be allocated the 435th and last seat in Congress in the 2002 term, though their decision appears to have been incorrect.³

The lines between the executive and judicial branch appear to be blurring. If the Supreme Court continues to make mistakes in apportionment cases, as it did in *Utah v. Evans*, it could be the judicial branch, and not the voters, who will decide which party controls Congress.⁴

"The goal in Census 2000 was to conduct a census that was both numerically and distributively accurate."⁵ To achieve that goal the Census Bureau employed approximately 900,000 people to count the U.S. population and spent over \$6.5 billion in the process.⁶ The results of the census showed the United States population to be 281,421,906 people.⁷ With 435 members serving in the U.S. House of Representatives, each Representative represents approximately 646,952 people.⁸

When the counting was all done, the state of Utah fell 856 residents short of gaining the last seat up for grabs; North Carolina was the recipient of that seat.⁹ Utah, unhappy with these results, brought a lawsuit that challenged the Census Bureau's methods for conducting the census arguing that the Bureau's procedures violated both the Constitution and federal statute.¹⁰ Once the lawsuit was filed, North Carolina, who was not named as a party, participated in the litigation alongside the Secretary of Commerce

1. Jess Bravin & Robert S. Greenberger, *Election 2000: U.S. Supreme Court's Voice Could be Muted*, WALL ST. J., Nov. 29, 2000, at A14.

2. Jim VandeHei and Shailagh Murray, *Bush's Ability to Exploit Democrats' Rifts Could be Key to Advancing His Agenda*, WALL ST. J., Jan. 3, 2001, at A16.

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

4. See *id.*

5. *Id.* at 470 (internal quotations omitted).

6. Margo Anderson & Stephen E. Fienberg, *The 2000 Census: Litigation, Results, and Implications*, 77 N.D. L. REV 665, 665 (2001). This was the largest peacetime workforce employed in the history of the United States. *Id.*

7. U.S. Department of Commerce, U.S. Census Bureau, *Your Gateway to Census 2000*, at <http://www.census.gov/main/www/cen2000.html> (last visited Nov. 13, 2002). The total population for reapportionment purposes is slightly higher (281,424,177) because the reapportionment population includes U.S. citizens living abroad who work for the U.S. government, while the normal population count does not. U.S. Department of Commerce, U.S. Census Bureau, *Apportionment Population and Number of Representatives, by State: Census 2000, Table 1*, at <http://www.census.gov/population/cen2000/tab01.pdf> (last visited Nov. 13, 2002) [hereinafter *Apportionment Table*]. Further, the apportionment count does not include citizens of the District of Columbia because there is no Congressional seat there. *Id.*

8. U.S. Department of Commerce, U.S. Census Bureau, *Congressional Apportionment*, at <http://www.census.gov/population/www/censusdata/apportionment.html> (last visited Nov. 13, 2002).

9. Paul Foy, *House Seat is up to Bench; North Carolina, Utah Fight for It*, SAN ANTONIO EXPRESS-NEWS, Mar. 26, 2002, at 5A.

10. *Id.*

(representing the U.S. government) to prevent losing the seat they had just gained.¹¹ North Carolina is no stranger to census litigation, as they appeared before the Supreme Court four times regarding the results of the 1990 Census.¹²

By the time *Utah v. Evans* was heard by the Supreme Court, the Congressional race was well underway in the new, disputed, North Carolina district.¹³ Utah was optimistic that they would prevail in the courts and drew a new district in the event they were successful.¹⁴ The ensuing legal fight is evidence that the states care greatly about the reapportionment process. The Court's decision in *Utah v. Evans* has implications not only on the use of sampling in the census but also on Congressional redistricting, state funding, the reluctance of citizens to participate in the census, and the caseload of federal courts.¹⁵

This note analyzes the Supreme Court's decision in *Utah v. Evans*. Utah attempted to challenge the "hot-deck imputation"¹⁶ process used in Census 2000 by suing the government, specifically Donald L. Evans, the U.S. Secretary of Commerce.¹⁷ Complicating Utah's challenge was the fact that they were required to satisfy the constitutional requirements of justiciability, proving that they had standing to bring their challenge.¹⁸ Ultimately, the Supreme Court granted Utah standing but ruled against them, finding that the Census Bureau's "hot-deck imputation" process was allowable under both the federal Census Act and the Constitution.¹⁹ Part II of this article discusses the historical background of the census, the process through which the census is taken, standing requirements particular to

11. See Paul H. Edelman & Suzanna Sherry, *Pick a Number, Any Number: State Representation in Congress After the 2000 Census*, 90 CAL. L. REV. 211, 211 (2002).

12. *Id.* See generally *Easley v. Cromartie*, 532 U.S. 234 (2001) (holding invalid a district court's finding that race rather than politics was the predominant factor in congressional redistricting plan); *Hunt v. Cromartie*, 526 U.S. 541 (1999) (holding that issues regarding whether a state redistricting plan was drawn based on an illegal racial motive prevented summary judgment); *Shaw v. Hunt*, 517 U.S. 899 (1996) (holding that voters who did not live in the district in which they challenged the election had no standing); *Shaw v. Reno*, 509 U.S. 630 (1993) (holding that an allegation of improper redistricting legislation as an effort to segregate voting was sufficient for standing).

13. Anne Gearan, *Supreme Court to Weigh in on Guesswork in Census*, THE PHILADELPHIA INQUIRER, Jan. 23, 2003, at A5.

14. *Id.*

15. See *infra* notes 198-207 and accompanying text.

16. See *infra* notes 76-81 and accompanying text.

17. The Commerce Department houses the U.S. Census Bureau. U.S. Department of Commerce, U.S. Census Bureau, *Facis About the Census Bureau*, at <http://www.census.gov/main/www/aboutus.html> (last visited Jan. 24, 2003).

18. *Utah v. Evans*, 182 F. Supp. 2d 1165 (D. Utah 2001), *aff'd*, 536 U.S. 452 (2002). The district court characterized the case by stating that "[t]he State of Utah and numerous elected Utah officials ('Plaintiffs') bring this suit against the Secretary of Commerce and the Acting Director of the Census Bureau ('Defendants') seeking injunctive and declaratory relief." *Id.* at 1167.

19. *Utah v. Evans*, 536 U.S. 452, 457 (2002). The Court concluded "that use of 'hot-deck imputation' violates neither the statute nor the Constitution." *Id.*

census cases, the Federal Census Act, and the “actual enumeration” clause of the Constitution.²⁰ Part III recounts the factual development of the litigation in *Utah v. Evans*.²¹ Part IV analyzes the majority and dissenting opinions.²² Part V explores the probable impact of this decision²³ and Part VI concludes with a brief summary.²⁴

II. HISTORICAL BACKGROUND

A. *History of the Census*

The census is taken every ten years pursuant to Article I, Section 2, Clause 3 of the U. S. Constitution and subsequent legislation enacted by Congress.²⁵ The census counts all persons whose usual residence is within the United States on April 1st of the census year.²⁶ The taking of a census in the U.S. began around the time of the Revolutionary War when people were regularly being counted in the British colonies.²⁷ Immediately after the colonies were granted their independence, the need for a census surfaced for two reasons: the seats in the newly formed House of Representatives needed to be allocated, and the states were asked to pay for their share of the costs of the war based on their population.²⁸ Thus, Article 1, Section 2 of the Constitution was adopted, which called for an actual enumeration in order to apportion representation and levy taxes.²⁹ The first census was taken in 1790, yet it was quite different from the process that takes place today; enumerators ventured out using their own papers, pencils, and other materials.³⁰ Today, the U.S. Census Bureau oversees a \$6.5 billion process and conducts the census in several phases that includes both mail-back forms and personal interviews.³¹

Since its inception, one of the primary uses of the census has been apportioning the representatives in the House of Representatives. “Apportionment is the process of dividing the 435 memberships, or seats, in

20. *See infra* notes 25-69 and accompanying text.

21. *See infra* notes 70-113 and accompanying text.

22. *See infra* notes 114-197 and accompanying text.

23. *See infra* notes 198-207 and accompanying text.

24. *See infra* Part VI.

25. *Utah v. Evans*, 182 F. Supp. 2d 1165, 1168 (D. Utah 2001), *aff'd*, 536 U.S. 452 (2002).

26. Jeffery D. Coleman & Julie L. Bentz, *Redistricting and Reapportionment*, ELECTION LAW 16-1 (Mathias W. Delart ed., 2002). In addition to providing the numbers for reapportioning the House, “[t]he Federal Government considers census data in dispensing funds through federal programs to the States, and the States use the results in drawing intrastate political districts.” *Wisconsin v. City of New York*, 517 U.S. 1, 5-6 (1996).

27. U.S. Department of Commerce, U.S. Census Bureau, *Factfinder for the Nation*, at <http://www.census.gov/prod/2000pubs/cff-4.pdf> (last visited Jan. 20, 2003).

28. *Id.*

29. *Id.*

30. *Id.*

31. *Id.* U.S. Marshals supervised the first nine censuses. *Id.* In 1880, “Congress established a census office in the U.S. Department of the Interior” and in 1913 the Census Bureau was moved to its current home in the U.S. Department of Commerce. *Id.*

the U.S. House of Representatives among the 50 states.”³² However the process is not as simple as it sounds as some groups are not included in the counts.³³ Different apportionment methods have been used over the past two centuries, yet the only real difference in methods has been over how to round fractions, as the allocation process rarely leads to a whole number.³⁴ Reapportionment is currently determined by the “method of equal protections” which apportions the remaining 385 (of 435) seats among the states, as the first fifty seats are reserved one per state to ensure that each state receives at least one seat in compliance with the Constitution.³⁵

B. Standing Problems for Census Cases

A challenge to census reapportionment must clear an additional hurdle before being heard by a court, that of justiciability. In doing so, a court must decide whether the challenging plaintiff has standing to sue.³⁶ Article III Section 2 of the Constitution requires that there be an “actual case or controversy” at issue for a court to hear a case and make a decision on the merits. Thus, standing will be granted when the dispute is presented in an

32. U.S. Department of Commerce, U.S. Census Bureau, *Questions and Answers on Apportionment*, at <http://www.census.gov/population/www/censusdata/apportionment/faq.html> (last visited Sept. 27, 2002) [hereinafter *Apportionment*]. Apportionment differs from redistricting, which is the “the process of creating new political units with distinct geographic boundaries and substantially equal populations.” Coleman & Bentz, *supra* note 26, at 16-5.

33. See *Apportionment*, *supra* note 32. Apportionment counts include all residents of the fifty states (citizens and non citizens) and federal employees and their dependents living overseas (including those in the U.S. Armed Forces). *Id.* The constitutionality of whether to include illegal aliens in the census has not yet been resolved. See *Ridge v. Verity*, 715 F.Supp. 1308 (W.D. Pa. 1989) (holding that states that would be affected by the inclusion of illegal aliens in the census were not identifiable, thus plaintiffs had no standing); see also *Fed’n for Am. Immigration Reform v. Klutznick*, 486 F. Supp. 564 (D.D.C. 1980) (holding that states challenging the inclusion of illegal aliens in the census lacked standing as they had failed to demonstrate any individualized harm). Federal employees living overseas are allocated back to their home state based on records from the federal department or agency that employs them. *Apportionment*, *supra* note 32. Private U.S. citizens living abroad and those citizens living in the District of Columbia, Puerto Rico, and the U.S. Island Areas are not counted for reapportionment purposes. *Id.*

34. Edelman & Sherry, *supra* note 11, at 216-17. Additional problems surface as some states could be allocated zero representatives using some of these methods. *Id.* at 216-20.

35. Coleman & Bentz, *supra* note 26, at 16-6. The equal proportions method was codified at 2 U.S.C. § 2a in 1941. *Id.* The method “takes each of the 385 seats to be allocated sequentially and determines which state will receive each successive seat according to a mathematical formula” that determines which of the 50 states has the highest priority. *Id.*

36. *Utah v. Evans*, 536 U.S. 452, 459 (2002) (“Article III, § 2 of the Constitution extends the ‘judicial Power’ of the United States to actual ‘Cases’ and ‘Controversies.’”); see also *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560-62 (1992) (holding that standing shall be denied when the injury is not redressable and plaintiffs fail to assert sufficient personal injury); *Allen v. Wright*, 468 U.S. 737, 751 (1984) (holding that to achieve standing the injury in fact must be traceable to the challenged governmental conduct).

adversarial context and the dispute is of the type typically “viewed as capable of judicial resolution.”³⁷

Several lawsuits have sprung up based on differing interpretations of the Census Act and justiciability requirements.³⁸ In the 1981 U.S. Court of Appeals case of *Young v. Klutznick*, the city of Detroit and its mayor brought an action seeking adjustment of the 1980 Census because they alleged it undercounted Blacks and Hispanics.³⁹ The Sixth Circuit Court of Appeals held that the mayor and the city lacked standing to bring the action because the issue was not ripe for judicial review.⁴⁰

The 1992 case of *Franklin v. Massachusetts* pitted the state of Massachusetts and two registered Massachusetts voters against the U.S. Secretary of Commerce.⁴¹ Massachusetts challenged the legality of the 1990 Census counting procedure.⁴² In practice, federal employees living overseas were being counted as part of the census while private persons living abroad were not being counted.⁴³ Massachusetts argued that this distinction was “arbitrary and capricious” and sought a recalculation that would have led to one more Representative for their state.⁴⁴ In the U.S. Supreme Court, eight justices found that the plaintiffs had standing to bring the case—four on grounds that the court could review the Census Bureau’s actions based on the Administrative Procedure Act⁴⁵ and four finding that there was an actual controversy that was adversary in nature and satisfied justiciability requirements.⁴⁶ As to the merits, the majority held that the allocation of federal employees living overseas to their home states was in line with the “usual residence” standard used in the census and served a valid purpose in making representation in Congress more equal.⁴⁷

In the 1996 case of *Wisconsin v. City of New York*, citizens brought an action challenging the Secretary of Commerce’s decision not to statistically adjust the 1990 Census for differential undercounting (those persons who are not counted despite the Bureau’s best efforts).⁴⁸ After finding that the

37. 2 AM. JUR. 2D *Administrative Law* § 438 (2002); see also *Flast v. Cohen*, 392 U.S. 83, 105-06 (1942) (holding that taxpayers have standing to challenge federal spending regulations so long as the challenged spending deals with a spending power and the constitutional clause challenged was intended to limit spending).

38. Since 1944 over thirty cases have been heard in the Supreme Court dealing with reapportionment resulting from the census. See generally *Dep’t of Commerce v. United States House of Representatives*, 525 U.S. 316 (1999) (discussing the major cases on reapportionment).

39. *Young v. Klutznick*, 652 F.2d 617, 619-23 (6th Cir. 1981). The plaintiffs used the Census Bureau’s own statistics to prove they were underrepresented. *Id.*

40. *Id.* at 624-26.

41. *Franklin v. Massachusetts*, 505 U.S. 788, 790-91 (1992).

42. *Id.*

43. *Id.*

44. *Id.*

45. 5 U.S.C. § 701-706 (2002). The Administrative Procedure Act gives plaintiffs a way to challenge an action of a federal administrative agency when no adequate form of review is authorized by statute. 2 AM. JUR. 2D *Administrative Law* § 549 (2002).

46. *Franklin*, 505 U.S. at 803-07.

47. *Id.* at 803-06.

48. *Wisconsin v. City of New York*, 517 U.S. 1, 4-6 (1996). “In preparing for the 1990 census, the Bureau and the task forces also looked into the possibility of using large-scale statistical adjustment to compensate for the undercount.” *Id.* at 8. The undercount resulted from several types

plaintiffs had standing, the Supreme Court held that the Bureau's decision not to adjust the results was not subject to heightened scrutiny and was within the Bureau's constitutional discretion given them by Congress.⁴⁹ Thus the decision not to statistically adjust the census results was constitutional.⁵⁰

C. *The Census Act*

In 1976 Congress amended the Census Act to read “[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.”⁵¹ Thus, sampling is clearly prohibited.⁵² Read as a whole, the Act gives Congress “virtually unlimited discretion in conducting” the census.⁵³ As a result, Congress has delegated to the Secretary of Commerce the responsibility of taking the census, and in doing so the Secretary of Commerce employs the assistance of the Census Bureau.⁵⁴

The amended Census Act also contains a timeline for reapportionment that requires census results be tabulated and reported to the President within nine months of the census date.⁵⁵ Upon receipt of this report, the President must provide Congress an additional report that shows the population of each state and how many representatives it is entitled.⁵⁶ Pursuant to the Act, the Clerk of the House of Representatives then sends the governor of each state a certificate identifying the number of representatives it will be entitled to in the next Congressional term.⁵⁷

of errors in the census methods, including not counting individuals who were not found at their residence, counting individuals who are not supposed to be counted, or double-counting some individuals. *Id.* at 6.

49. *Id.* at 23.

50. *Id.* The Court held that the “Secretary of Commerce, to whom Congress has delegated its constitutional authority over the census, determined that in light of the constitutional purpose of the census, an ‘actual Enumeration’ would best be achieved without . . . statistical adjustment of the results of the initial enumeration.” *Id.* at 24.

51. 13 U.S.C. § 195 (1990). Sampling can be used to gather data on other characteristics of the United States population (citizenship, ethnicity, income, housing, marital status) so long as an actual enumeration is conducted in regards to apportionment. Coleman & Bentz, *supra* note 26, at 16-16.

52. See 13 U.S.C. § 195 (1990).

53. *City of New York*, 517 U.S. at 19.

54. *Utah v. Evans*, 182 F. Supp. 2d 1165, 1168 (D. Utah 2001), *aff'd*, 536 U.S. 452 (2002) (quoting 13 U.S.C. §§ 21, 141(a)).

55. 13 U.S.C. § 141(b).

56. 2 U.S.C. § 2a(a).

57. 2 U.S.C. § 2a(b). The reports furnished to the governors by the Secretary of Commerce contain population data by geographic units and also provides the basis for constitutional redistricting. Coleman & Bentz, *supra* note 26, at 16-14. This census information is also used as the sole basis from which federal programs allocate their funds to the states. *Id.*

D. *The Census Clause of the Constitution*

The Constitution states that

Representatives and direct Taxes shall be apportioned among the several States which may be included within this Union, according to their respective Numbers 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 . . . each state shall have at Least one Representative.⁵⁸

The Fourteenth Amendment expanded this clause, stating “Representatives shall be apportioned among the several States according to their respective numbers, counting the whole number of persons in each State, excluding Indians not taxed.”⁵⁹ It is the “actual enumeration” language of the Constitution that has proved most problematic.

In the 1992 case of *United States Department of Commerce v. Montana*, Montana voters brought a suit challenging the constitutionality of the Census Act’s method of “equal proportions” for determining the number of representatives allocated to each state.⁶⁰ The Supreme Court held that this method did not violate the constitutional requirement that apportionment of representatives among states be done according to their respective numbers.⁶¹ The majority held that “[t]he decision to adopt the method of equal proportions was made by Congress after decades of experience, experimentation, and debate about the substance of the constitutional requirement” and therefore Congress has the power to apply the method of “equal proportions.”⁶²

The 1999 case of *U.S. Department of Commerce v. U.S. House of Representatives* involved a group of citizens bringing suit against the federal agencies and officials who conduct the census, challenging their planned use of sampling in the 2000 Census.⁶³ The Census Bureau’s proposed plan was for census employees to personally visit a portion of the households that did not respond to the mail-back form and to use that information to estimate information about the remaining nonresponders in that census tract.⁶⁴ The

58. U.S. CONST. art. I, § 2, cl. 3.

59. U.S. CONST. amend. XIV, § 2.

60. *United States Dep’t of Commerce v. Montana*, 503 U.S. 442, 446 (1992). In the 1990 Census the state of Montana lost one of its two seats, thereby cutting its delegation in half. *Id.* at 445. The state then challenged the “equal proportions” method on the grounds that it “does not achieve the greatest possible equality in the number of individuals per representative.” *Id.* at 446.

61. *Id.* at 465.

62. *Id.*

63. *United States Dep’t of Commerce v. United States House of Representatives*, 525 U.S. 316, 320 (1999). The Bureau was attempting to correct for the traditional “undercount,” which are households that despite the Bureau’s best efforts still remain uncouncted. *Id.* “Some identifiable groups—including certain minorities, children, and renters—have historically had substantially higher undercount rates than the population as a whole.” *Id.* at 322-23.

64. *Id.* The maximum number of units which could be estimated per given tract was set at 10%. *Id.* at 322-24.

Bureau planned on randomly selecting certain census blocks to survey in-person to find discrepancies, and use that information to adjust national census numbers to account for the undercount.⁶⁵ The Court granted standing in *House of Representatives* because the plaintiffs were able to prove they had lost a seat in the House and would suffer a dilution in their voting strength.⁶⁶ “[I]t is certainly not necessary for this Court to wait until the census has been conducted to consider the issues presented here, because such a pause would result in extreme—possibly irreparable—hardship.”⁶⁷ As to the merits, the Court held that the Census Act prohibited the use of statistical sampling, whether as either a supplement or substitute for traditional methods of enumeration used for calculating the population.⁶⁸ “[W]e conclude that the Census Act prohibits the proposed uses of statistical sampling in calculating the population for purposes of apportionment.”⁶⁹

III. FACTUAL AND PROCEDURAL BACKGROUND

In 2000, the Census Bureau’s first attempt to gather data was through a questionnaire that was delivered by mail to homes in mid-March, 2000.⁷⁰ These surveys were to be completed by the households and returned by mail to the Bureau.⁷¹ The Census Bureau estimated that 61% of the mail-out surveys would be returned.⁷² Approximately one-sixth of mail-out questionnaires contained a “long form” that contained more detailed questions about the residents’ employment, commuting patterns, education, disability, and citizenship.⁷³ In cases where either the mail-out questionnaire

65. *Id.* at 325.

66. *Id.* at 334.

67. *Id.* at 332.

68. *Id.* at 343.

69. *Id.*

70. The Census Bureau developed a master address file containing the mailing address of every housing unit in the United States, which was compiled based on data from the U.S. Postal Service and the address list compiled in the 1990 Census. *Utah v. Evans*, 182 F. Supp. 2d 1165, 1169; *see also* Anderson & Fienberg, *supra* note 6, at 676. The 2000 census involved more than 147 million paper questionnaires with 1.5 billion pages of printed material. Appellee’s Brief at 14, *Utah v. Evans*, 536 U.S. 452 (2002) (No. 01-714).

71. *Evans*, 182 F. Supp. 2d at 1169.

72. The actual return rate for the short forms was 67%, with a 55% rate for the long forms. Anderson & Fienberg, *supra* note 6, at 678. In 1990 the Census Bureau estimated a 65% response rate. *Id.* Prior to 1964, census employees personally visited each housing unit to make a count but this proved impracticable in later years. Thomas R. Lee, *The Original Understanding of the Census Clause: Statistical Estimates and the Constitutional Requirement of an “Actual Enumeration.”* 77 WASH. L. REV. 1, 6 (2002); *see also* United States Dep’t of Commerce v. United States House of Representatives, 525 U.S. 316, 337 (1999) (citing Census Act of Aug. 31, 1964, 78 Stat. 737).

73. *See* Anderson & Fienberg, *supra*, note 6, at 676-77. The “short form” that went to the remaining five-sixths of the population contained only six questions per person living in the household and one question as to whether the home was owned or rented. The long form questionnaires sparked a debate over the privacy rights of those filling out the forms. *Id.*

was not returned, there was missing information, information was contradictory or conflicting, or there was a mistake, a census employee was deployed to visit the address to fill in the gaps or correct the mistakes.⁷⁴

No matter the procedure used, there will still be some households which go uncounted (the undercount) due to a variety of factors including citizens' reluctance to respond to the mail-out questionnaires and errors in address files.⁷⁵ In 2000, the Census Bureau, for the first time, began using "hot-deck imputation" to clear up conflicting responses and gain missing information.⁷⁶ The "hot-deck imputation" method provided a last resort to fill in the gaps.⁷⁷ This method "imputes the relevant information by inferring that the address or unit about which [data] is uncertain has the same population characteristics as those of a 'nearby sample or donor' address."⁷⁸ The donor address is the "geographically closest neighbor of the same type (i.e., apartment or single family dwelling) that did not return a census questionnaire' by mail," ensuring the information was personally collected by a census employee.⁷⁹ For example, if no information could be gained about the residents of 4003 Elm Street, the Bureau would take the information from the house nearest 4003 Elm that required an in-person visit (for example 4009 Elm) and assume that 4003 Elm has the same number of residents as 4009. The alternative argued by Utah was to assume there are no residents at 4003 Elm and enter a zero value.⁸⁰ Nationally 1.2 million people (0.4% of the population) were imputed through this "hot-deck imputation" process in 2000, though the geographic distribution of imputed persons was uneven.⁸¹

The Secretary of Commerce provided President Clinton the Census 2000 data on December 28, 2000 and this information was given to the Clerk of the House of Representatives January 4, 2001.⁸² The state of Utah was informed that its number of representatives would remain unchanged on January 16, 2001, and learned shortly thereafter (after release of the

74. *Utah v. Evans*, 536 U.S. 452, 477 (2002). Up to six attempts were made per household before imputation was used. *Id.* The imputation phase was begun in late April and completed by June 27, 2000. Anderson & Fienberg, *supra* note 6, at 678. The 1980 Census did not use any sampling methods due to a fear of their legality, but did use imputation to fill in incomplete non-apportionment related data. Appellee's Brief at 6, *Utah v. Evans*, 536 U.S. 452 (2002) (No. 01-714). The 1990 Census did not take any samples and employed imputation only in the final editing stage. *Id.* at 8.

75. *Lee*, *supra* note 72, at 9.

76. *Utah v. Evans*, 182 F. Supp. 2d 1165, 1170 (D. Utah 2001), *aff'd*, 536 U.S. 452 (2002). There are three types of imputation that can be used: status imputation which estimates whether or not there really is a housing unit physically at an address, occupancy imputation which estimates whether a unit is occupied or vacant, and household size imputation which estimates how many people actually live there. *Id.* at 1169-70.

77. Gearan, *supra* note 13, at A5.

78. *Evans*, 536 U.S. at 458.

79. *Id.* (quoting Appellants Brief at 7-8, *Utah v. Evans*, 536 U.S. 452 (2002) (01-714)).

80. *Id.*

81. *Id.*

82. *Evans*, 182 F. Supp. 2d at 1169.

technical data) how close they had come to gaining an additional House seat.⁸³

As a result of the census data, North Carolina gained the 435th and last seat, bringing their total to thirteen, a gain of one seat.⁸⁴ Utah would have gained this last seat with 857 more residents.⁸⁵ It is interesting, but not entirely explainable, that North Carolina gained four times as many households through imputation than Utah.⁸⁶ All told a total of 12 seats in the House shifted as a result of the 2000 Census.⁸⁷ North Carolina and Utah both agreed that “but for” the use of the imputation process, Utah would have gained the last House seat⁸⁸ (bringing their total to four) and North Carolina would have undergone no change (remaining at 12).⁸⁹

The case that is the subject of this note, *Utah v. Evans*, was Utah’s second challenge to the results of the 2000 Census.⁹⁰ Utah argued in an earlier challenge, also titled *Utah v. Evans*, that excluding Church of Latter Day Saints (LDS) missionaries who lived abroad from the census count violated various federal statutes and the Constitution.⁹¹ Utah claimed that the LDS missionaries have stronger ties to their home states than the overseas federal employees who are counted, thus the missionaries should be counted just like federal employees.⁹² If the missionaries were counted, Utah would have gained the necessary residents to pry the last available seat away from North Carolina.⁹³ The U.S. District Court found that Utah had standing in this challenge, but held that inclusion of federal government

83. *Id.*; see also Anderson & Fienberg, *supra* note 6, at 686-87.

84. See *Apportionment Table*, *supra* note 7.

85. Gearan, *supra* note 13, at A5.

86. Foy, *supra* note 9, at A5. In 1990 the situation was reversed, Utah had a higher rate of imputation than North Carolina. Brief of Amici Curiae Brennan Center for Justice at 24, *Utah v. Evans*, 536 U.S. 452 (2002) (No. 01-714).

87. See *Apportionment Table*, *supra* note 7. New York and Pennsylvania each lost two Congressional seats. *Id.* Connecticut, Illinois, Indiana, Michigan, Mississippi, Ohio, Oklahoma, and Wisconsin each lost one Congressional seat. *Id.* Arizona, Florida, Georgia, and Texas each gained two Congressional seats. *Id.* California, Colorado, Nevada, and North Carolina each gained one Congressional seat. *Id.* All other states remained unchanged. *Id.*

88. *Evans*, 182 F. Supp. 2d at 1170.

89. See *Apportionment Table*, *supra* note 7.

90. See *Utah v. Evans*, 143 F. Supp. 2d 1290 (D. Utah 2001). Unless otherwise specified *Utah v. Evans* in this note deals with the case challenging imputation.

91. *Id.* at 1293. The number of LDS missionaries living abroad on Census Day (April 1, 2000) totaled 24,251. *Id.* at 1298. Forty-six percent (11,159) of these missionaries were from Utah. *Id.*

92. Tony Mauro, *Brothers Follow Father's Footsteps to the Supreme Court*, TEXAS LAWYER, November 26, 2001, at 16.

93. *Evans*, 143 F. Supp. 2d at 1298. Utah argued that the Census Bureau should “enumerate, out of the entire universe of non-federal-employee Americans abroad on April 1, 2000, only LDS missionaries, a course of action which would overwhelmingly favor Utah vis-à-vis all forty-nine other states.” *Id.* The Court was not impressed by this request, and found that it would be contrary to the goal of the Census which is to “to achieve a fair apportionment for the entire country.” *Id.* (quoting *United States Dep’t of Comm. v. Montana*, 503 U.S. 442, 464 (1992)).

employees did not mandate the inclusion of a religious denomination's missionaries living abroad, and denied Utah's claim for relief.⁹⁴

Once Utah sued the Secretary of Commerce in this second action (challenging the "hot-deck imputation procedures"), the U.S. government, at President Bush's advisement, sided with North Carolina and hoped the Supreme Court would not get involved.⁹⁵ The U.S. government did however concede, as had North Carolina, that if the imputation procedure were thrown out in court and the imputed values were replaced with zeros, Utah would be awarded the last seat and no other state's allotment of Representatives would be affected.⁹⁶

As for the remedy sought, Utah sought an injunction to compel the government to issue a new census report that had different results that were achieved by taking out all the imputed data and replacing it with zero values.⁹⁷ In the district court the government argued that Utah's claim lacked standing because the district court did not have the power to affect the results as they already had been sent from the Clerk of the House to the respective states.⁹⁸ However, the district court disagreed and found that Utah did have standing and that its claims were justiciable based on the holding in *Franklin*.⁹⁹ The district court assumed the grievance was redressible and "if the President transmits revised reapportionment calculations to Congress, the Clerk of the House of Representatives would submit a new certificate to the states."¹⁰⁰

Substantively, Utah argued to the district court that the census procedures were unconstitutional for two separate and distinct reasons: they violated both the Federal Census Act and the Census Clause of the Constitution.¹⁰¹ The district court first addressed the argument that the Bureau's imputation method violated the Census Act's prohibition on sampling for purposes of an apportionment count.¹⁰² Utah argued that sampling and imputation were essentially the same process, wherein a portion of the whole population is estimated using a sample.¹⁰³ The district court disagreed and found against Utah holding that sampling and imputation are separate, different, and distinct; in their view sampling uses a set of units to represent the whole population while imputation is a "procedure for determining a plausible value for missing data."¹⁰⁴ The

94. *Id.* at 1301.

95. *See* Gearan, *supra* note 13, at A5.

96. *See* Foy, *supra* note 9, at A5.

97. *Utah v. Evans*, 536 U.S. 452, 459 (2002).

98. *Utah v. Evans*, 182 F. Supp. 2d 1165, 1171 (D. Utah 2001), *aff'd*, 536 U.S. 452 (2002). It was agreed by both parties that injunctive relief could be sought to prohibit the use of imputation in the 2010 census, although the parties differed as to what could be done regarding the injunction sought to remedy the effects of Census 2000. *Id.*

99. *Id.* at 1171 (citing *Franklin v. Massachusetts*, 505 U.S. 788 (1992)).

100. *Id.* at 1172.

101. *See id.*

102. *Id.* at 1174.

103. *Id.* at 1175.

104. *Id.* at 1176. The Court seemed persuaded by the language in *Wisconsin v. City of New York* that stated "so long as the Secretary's conduct of the census is 'consistent with the constitutional

IV. ANALYSIS

A. Justice Breyer's Majority Opinion

The majority opinion of the U.S. Supreme Court was written by Justice Breyer, who was joined in the opinion by Justices Stevens, Souter, Ginsburg, and Chief Justice Rehnquist.¹¹⁴ The issue for decision was framed as “whether the Census Bureau’s use in the year 2000 census of a methodology called ‘hot-deck imputation’ either (1) violates a statutory provision forbidding use of ‘the statistical method known as ‘sampling’ or (2) is inconsistent with the Constitution’s statement that an ‘actual Enumeration’ be made.”¹¹⁵

As to the standing issue, the U.S. government argued that the federal courts, and thereby the Supreme Court, lacked the power to hear this case.¹¹⁶ Their argument was that the Court did not have the power to change the allocation of House seats two years after the results had been certified, and that the Court did not “have the power to ‘redress’ the ‘injury’ that the defendant allegedly ‘caused’ the plaintiff.”¹¹⁷

In deciding the standing issue the Court wrote “[w]e can find no significant difference between the plaintiff in *Franklin* and the plaintiff (Utah) here. Both brought their lawsuits after the census was complete. Both claimed that the Census Bureau followed legally improper counting methods.”¹¹⁸ In essence, the Court disagreed with the government’s argument and adopted a more flexible approach to the standing requirements.¹¹⁹ In the Court’s view, corrections to the census are always permitted so long as a new report could be issued and the President could submit the new results to the Clerk of the House.¹²⁰ Therefore, in this case there was no bar to redress.¹²¹

The government also argued that Public Law 105-119, Title II, § 209 (b), 111 Stat. 2481, barred the bringing of this challenge because it provided that “‘any person aggrieved by the use of any [unlawful] statistical method’ [may] bring ‘a civil action’ for declaratory or injunctive ‘relief against the use of such method’”—thus requiring all suits to be brought before the

114. *Id.* at 456.

115. *Id.* at 457.

116. *Id.* at 459. Neither side denied the fact that the federal courts had the power to order the Secretary of Commerce to adjust the numbers already reported and to recertify the results; the argument stemmed over what authority the courts had to force the President to certify a new allocation of U.S. House seats. *Id.* at 460-61.

117. *Id.* at 459 (citing *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 561 (1992)); *see also* *Allen v. Wright*, 468 U.S. 737, 751 (1984). North Carolina argued in their brief that the only way that the reapportionment in this case could be remedied was through implementation of a different system in the next census or by an act of Congress adopted before the next census. Appellee’s Brief at 25, *Utah v. Evans*, 536 U.S. 452 (2002) (No. 01-714).

118. *Evans*, 536 U.S. at 460.

119. *See id.* at 462-64.

120. *Id.* at 463-64.

121. *Id.* at 462.

district court next analyzed Utah's argument that the Constitution requires an "actual enumeration" (a headcount) of U.S. residents as opposed to some other form of sampling or estimation.¹⁰⁵ Utah maintained that the Framers of the U.S. Constitution understood the difference between an actual enumeration and a sample, and chose the term enumeration for a specific reason.¹⁰⁶ The district court held against Utah on this issue as well, stating that the Census Bureau's procedures were "reasonably consistent with the accomplishment of an actual enumeration of the population."¹⁰⁷ Judge Greene dissented at the district court level based on a theory that imputation violated the Census Act.¹⁰⁸ Judge Greene advocated a plain reading of the statute, which would demonstrate that sampling is clearly prohibited.¹⁰⁹ To Judge Greene, the essence of imputation is that, deep down, it really is sampling.¹¹⁰ He points out in his dissent that the Census Bureau itself has, in some instances, defined sampling very broadly as "whenever the information on a portion of a population is used to infer information on the population as a whole," which would seem to encompass the challenged imputation.¹¹¹

As a procedural matter, appeals in reapportionment cases "skip the Circuit Courts of Appeals and go directly to the Supreme Court" through a process that gives the Supreme Court less discretion to decline review.¹¹² Thus, *Utah v. Evans* arrived at the Supreme Court and oral argument took place March 27, 2002.¹¹³

language and constitutional goal of equal representation,' it is within the limits of the Constitution." *Wisconsin v. City of New York*, 517 U.S. 1, 19-20 (1996).

105. *Evans*, 182 F. Supp. 2d at 1178.

106. *Id.* at 1178-79; see also Justice Thomas's view on this argument, *infra* notes 169-90 and accompanying text.

107. *Evans*, 182 F. Supp. 2d at 1179.

108. *Id.* at 1180 (Greene, J., dissenting).

109. *Id.* at 1181 (Greene, J., dissenting).

110. *Id.* Judge Greene stated that "[m]anifestly, 'sampling' and 'imputation' in substance and effect are indistinguishable because both use a portion of the population to infer information concerning segments of the population in order to arrive at final figures concerning the population as a whole." *Id.* at 1183 (Greene, J., dissenting).

111. *Id.* at 1181 (Greene, J., dissenting) (quoting United States Department of Commerce Bureau of Census, Report to Congress—The Plan for Census 2000, at 23 (revised Aug. 1997)). The report itself states that "[t]he Census Bureau also has used a form of statistical estimation to adjust or correct its actual headcount." *Id.* at 1182 n.2 (quoting The Plan for Census 2000).

112. Mauro, *supra* note 92, at 16.

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

completion of the census.¹²² The Court disagreed, and again chose to construe this limitation on their jurisdiction narrowly; holding that this statute does not bar a post census challenge and that the Court will consider lawsuits brought “soon enough after completion of the census.”¹²³ Thus, Utah had standing.¹²⁴

As to Utah’s first challenge, based on the Census Act, it hinged on interpretations of the words ‘sampling’ and ‘imputation.’¹²⁵ An example using a library was used both in oral argument and in the majority opinion to explain the differences between ‘sampling’ and ‘imputation.’¹²⁶ Imagine a librarian wants to determine how many books are in a library.¹²⁷ If they count the books on every tenth shelf and extrapolate these results to the entire library (multiply by ten), this would be sampling.¹²⁸ If, however, the librarian is counting the books one-by-one and finds a shelf that is empty (where all the books have been checked out) and fills in data for that shelf by giving it the same value as the shelf above or below it, this would be akin to imputation.¹²⁹

The government emphasized in their argument these key differences between sampling and imputation, which justified using the “hot-deck imputation” method.¹³⁰ As to the nature of the enterprise, the government argued that sampling is an overall approach which relies on data collected from a part to estimate a whole.¹³¹ In contrast, imputation was presented as “a method of *processing* data (giving a value to missing data)” that is not an overall approach to counting.¹³² Regarding methodology, the government argued that “sampling focuses on using statistically valid sample-selection techniques to determine what data to collect,”¹³³ while imputation does not rely on that same sample selection methodology.¹³⁴ As to their immediate objectives, the government argued that “sampling seeks immediately to extrapolate the sample’s relevant population characteristics to the whole

122. *Id.*

123. *Id.* at 463.

124. *Id.* at 464.

125. *Id.* at 464-66.

126. *Id.* at 465. This analogy was presented by U.S. Solicitor General Theodore Olson during oral argument for the government. Transcript of Oral Argument at 24-26, *Utah v. Evans*, 536 U.S. 452 (2002) (No. 01-714).

127. *Id.*

128. *Id.*

129. *Id.*

130. See generally Appellee’s Brief, *Utah v. Evans*, 536 U.S. 452 (2002) (No. 01-714).

131. *Evans*, 536 U.S. at 466.

132. *Id.* Sampling is defined in the dictionary as “[a] portion, piece, or segment that is representative of a whole . . . [or, a] set of elements drawn from and analyzed to estimate the characteristics of a population.” AMERICAN HERITAGE COLLEGE DICTIONARY (4th ed. 2000).

133. *Evans*, 536 U.S. at 466.

134. *Id.*

population” while imputation attempts to determine the characteristics of the missing information.¹³⁵ Thus, imputation “was used to assure that an individual unit (not a ‘subset’), chosen nonrandomly, will resemble other individuals (not a ‘whole’) selected by the fortuitous unavailability of data.”¹³⁶ The government’s overall argument was that the term “sampling” suggested a term of art with a technical meaning and imputation does not fit within that meaning.¹³⁷

In contrast, Utah argued that imputation was just a masked version of sampling and that “Congress did not have imputation in mind in 1958 when it wrote that law” or it would have been outlawed as well.¹³⁸ Further, imputation is just as much a method of sampling as the procedure that was struck down in *House of Representatives*.¹³⁹ If anything, Utah felt that the sampling in *House of Representatives* was even more statistically valid than the “hot-deck imputation” process used in 2000.¹⁴⁰ In their brief, Utah argued that “random sampling is significantly more reliable and accurate, as a scientific matter, than non-random methods such as hot-deck imputation.”¹⁴¹ In Utah’s eyes, the Census Bureau interpreted its own statute to mean whatever it wanted, allowing the new imputation procedure to be valid.¹⁴²

When analyzing this statutory question, the Court distinguished the case at hand from *House of Representatives*.¹⁴³ In *House of Representatives* the Court felt that the Bureau planned at the outset to sample and extrapolate characteristics of the population based on the sample.¹⁴⁴ Thus, there was a deliberate decision in advance to take a sample, while in this case there was

135. *Id.*

136. *Id.* at 467. The reasons behind using sampling and imputation are different. Sampling saves money by counting a subset, imputation saves no money and may in fact cost more in an effort to not place a zero value for the missing information. *Id.* at 469-70.

137. *Id.* at 467-68. The Court quotes a textbook as saying “‘sample, as it is used in the [statistics] literature . . . means a subset of the population that is used to gain information about the entire population’” and that sampling is “‘a method of selecting a fraction of the population in a way that the selected sample represents the population.’” *Id.* (quoting G. HENRY, PRACTICAL SAMPLING 11 (1990); P. SUKHATME, SAMPLING THEORY OF SURVEYS WITH APPLICATIONS I (1954)). The government argued that all definitions of sampling have the following in common: 1) the sample must be a fraction of the subset or part of the population that the sample is intended to represent and 2) that the sample is chosen according to some method to ensure that it will be a valid model of the larger population. *Id.*

138. *Id.* at 468.

139. See Appellant’s Brief at 15, *Utah v. Evans*, 536 U.S. 452 (2002) (No. 01-714).

140. *Id.* at 15. Utah argued that even if there is ambiguity it should be resolved in such a way that would avoid serious constitutional problems. *Id.*

141. *Id.* at 34.

142. *Evans*, 536 U.S. at 471.

143. *Id.* at 471-72. The Court believed that “the Bureau’s . . . deliberate decision taken in advance to find an appropriate sample . . . and the quantitative figures at issue . . . all taken together distinguish [the procedure in *House of Representatives*]—in degree if not in kind—from the imputation here at issue.” *Id.* at 471.

144. *Id.* at 471. The Bureau would sample certain census blocks and extrapolate these results to the global census count. *Id.* In *House of Representatives*, 10% of a tract would have been extrapolated or sampled, while in this case only .4% of the population nationwide was determined by imputation. *Id.*

no intent to sample.¹⁴⁵ In a sense, the Court attempted to determine the mindset of the Census Bureau before the census process actually began.

As for the Constitutional issue, Utah argued that the words “actual enumeration” required the Bureau to do an in-person headcount—to seek out each individual resident and count them.¹⁴⁶ There was quite a difference between how Utah and the government defined the term “enumeration.” Each side presented various definitions in their briefs and at oral argument. Definitions that were offered included an “act of numbering or counting over”¹⁴⁷ or “numbering or summing up.”¹⁴⁸ The government argued that when the Framers were deciding on the language to use “[w]hat was at issue . . . were fundamental principles of representation itself . . . not the secondary matter of exactly how census data was to be compiled,” thus they argued the Framers were mostly concerned with accuracy.¹⁴⁹ In their view, had the Framers been concerned with the actual compilation of the census, they would have written a detailed methodology on how to conduct the census into the Constitution.¹⁵⁰

Ultimately, the Supreme Court concluded that “the use of ‘hot-deck imputation’” did not violate the “actual enumeration” language of the Constitution.¹⁵¹ The Court was convinced that enumeration referred to a counting process, and the modifier “actual” in the Constitution was only used to show that this would take effect for the third session of Congress, as the allocation of Representatives for the first two Congressional sessions were done by a mere guess.¹⁵²

It is interesting that the holding in this case turns on an interpretation of the words “actual enumeration” more than 200 years after they were written.¹⁵³ The Court may have been persuaded by the government’s argument that the words “actual enumeration” were merely a stylistic change

145. *Id.*

146. Appellant’s Brief at 35, *Utah v. Evans*, 536 U.S. 452 (2002) (No. 01-714).

147. *Evans*, 536 U.S. at 475 (citing 1 S. JOHNSON, A DICTIONARY OF THE ENGLISH LANGUAGE 658 (4th rev. ed. 1773)).

148. *Id.* (citing N. BAILEY, AN ETYMOLOGICAL ENGLISH DICTIONARY (26th ed. 1789)). “Amicus urges this Court to reject an interpretation of the Constitution that forever precludes the Census Bureau from using all tools at its disposal accurately to count the population and that therefore ensures that systematic biases in the headcount will continue to be reflected through misrepresentation in Congress.” Brief of Amicus Curiae of Brennan Center for Justice at 1, *Utah v. Evans*, 536 U.S. 452 (2002) (No. 01-714).

149. *Evans*, 536 U.S. at 478.

150. *Id.* at 479.

151. *Id.* at 457.

152. *Id.* at 474.

153. The dictionary defines “actual” to mean “[e]xisting and not merely potential or possible; being, existing, or acting at the present moment; current.” AMERICAN HERITAGE DICTIONARY FOR THE ENGLISH LANGUAGE 18 (4th ed. 2000).

in the Constitution made later in the drafting.¹⁵⁴ Just as the word “enumeration” was chosen to mean an individual counting, the word “actual” seems to have been chosen because it strengthened the word enumeration. Had the Framers wanted to allow for a sample of the population, they were free to include the word ‘sample’ in the language of the clause, yet they chose not to. The Court attempts to read the clause not as “actual enumeration” but as “which number [of inhabitants] shall . . . be taken in such manner as [Congress] shall direct,” which is similar to an earlier draft, one that was never ratified.¹⁵⁵

It is also of note that Chief Justice Rehnquist joined the more liberal members of the Court in this decision while he sided with his more conservative colleagues in *House of Representatives*.¹⁵⁶ Maybe Chief Justice Rehnquist feared that if the Court ordered President Bush to do something he might refuse (change the result), a situation similar to that of President Nixon refusing to turn over the Watergate tapes might have arisen.¹⁵⁷

B. Justice O'Connor's Dissenting Opinion

In her dissenting opinion, Justice O'Connor disagreed with the Court's holding regarding whether the imputation process is contrary to the language of the Census Act, but concurred as to the rest of the majority's decision.¹⁵⁸ Justice O'Connor wrote the majority opinion in *House of Representatives* in which the Court struck down the Census Bureau's proposed use of sampling in 1990, and took a similar stance in this case.¹⁵⁹ As to the definition of sampling, Justice O'Connor stated that “‘sampling’ occurs whenever the information on a portion of a population is used to infer information on the population as a whole . . . , [although] [a]mong professional statisticians, the term ‘sample’ is reserved for instances when the selection of the smaller population is based on the methodology of their science.”¹⁶⁰ This, in her opinion, clearly makes imputation a subset of sampling.¹⁶¹ The donor groups used to provide the data to be imputed were subsets of subsets, and thus produced an estimate.¹⁶² Therefore, this process was just as artificial as

154. *United States Dep't of Commerce v. United States House of Representatives*, 525 U.S. 316, 363 (1999) (Stevens, J., dissenting).

155. *Evans*, 536 U.S. at 474. This was the original phrase of the clause. *Id.*

156. *Id.* at 456; *House of Representatives*, 525 U.S. at 320.

157. *See generally* *United States v. Nixon*, 481 U.S. 683 (1974) (holding that President Nixon must comply with the special prosecutor's request for tape recordings made between the President and his advisors that may concern matters relevant to the Watergate investigation).

158. *Evans*, 536 U.S. at 479-80 (O'Connor, J., dissenting).

159. *House of Representatives*, 525 U.S. at 316.

160. *Evans*, 536 U.S. at 482 (O'Connor, J., dissenting) (quoting U.S. Dep't of Commerce, *Report to Congress—The Plan for Census 2000*, at 23 (Aug. 1997)).

161. *Id.*

162. *Id.* at 482 (O'Connor, J., dissenting).

any other type of nonrandom sampling, including what had been proposed in *House of Representatives*.¹⁶³

Justice O'Connor was also careful to point out that the decision "to impute or not impute," no matter who makes it, could be "a source of possible manipulation" and therefore a clear message needs to be sent as to what constitutes sampling.¹⁶⁴ She argued that the Court should not throw the baby out with the bath water; just because the alternative to imputation is to use a zero value is no reason to use an otherwise flawed method.¹⁶⁵ Further, "phantom households" could be counted through imputation that may actually be businesses, storage units, or typographical errors on the master address lists, all of which could lead to over-counting.¹⁶⁶

In an interview after oral arguments, Justice O'Connor stated, "[a]s I understand it, [the method] has the effect of counting non-households as households or some households twice I was concerned because it seems to be a method that amounts to what we said couldn't be done [in *House of Representatives*], but on a smaller scale."¹⁶⁷ Thus, Justice O'Connor was of the opinion that Congress did not have imputation in mind when it drafted or amended the Census Act, and therefore dissented based on her view that the "hot-deck imputation" process stands at odds with the language of the Census Act, prohibiting sampling.¹⁶⁸

C. Justice Thomas's Dissenting Opinion

Justice Thomas dissented on the issue of whether the imputation process was a violation of the constitutional requirement of an 'actual enumeration,' and concurred with all other parts of the decision.¹⁶⁹ Justice Thomas felt that the Framers knew what they were doing when drafting the Constitution and referred several times to the 18th Century Definition of "actual enumeration" in his opinion.¹⁷⁰

163. *Id.* at 483-84 (O'Connor, J., dissenting). This process is distinguishable in degree only. *Id.* (O'Connor, J., dissenting).

164. *Id.* at 487 (O'Connor, J., dissenting).

165. *Id.* at 488 (O'Connor, J., dissenting).

166. Foy, *supra* note 9 at 5A. In their brief, Utah argued that "[w]hile it is supposed to consist entirely of residential addresses, the Master Address File is known to contain addresses for businesses, storage units, and other erroneously included information." Appellant's Brief at 8, *Utah v. Evans*, 536 U.S. 452 (2002) (No. 01-714).

167. Charles Lane, *O'Connor Hints She May Side with Utah in Census Case*, WASH. POST, March 28, 2002, at A13.

168. *Evans*, 536 U.S. at 480 (O'Connor, J., dissenting).

169. *Id.* at 488-89 (Thomas, J., dissenting). Justice Kennedy joined in Justice Thomas's dissent. *Id.* (Thomas, J., dissenting).

170. *Id.* at 488-97 (Thomas, J., dissenting). Thomas argues that words need to be employed in their "natural sense" and be used as they were intended. *Id.* at 491 (Thomas, J., dissenting).

According to Justice Thomas, the Framers knew they were asking for an individualized count.¹⁷¹ By the time the Constitution was ratified the words ‘actual enumeration’ were widely used in both the United States and Britain.¹⁷² The ratified version of the Constitution contains the terms “actual enumeration,” and to Justice Thomas the other drafts, no matter what they say, do not matter – not even as legislative history.¹⁷³ Justice Thomas cited writings of several prominent figures of the constitutional era to show that citizens at that time understood the difference between an enumeration and an estimate.¹⁷⁴

Justice Thomas cited commentators demonstrating that the Framers would have been historically familiar with the word “census.”¹⁷⁵ Further, the concept of an “actual count” appears clear, as there is evidence that the Framers feared a complete enumeration would be expensive and troublesome, yet still chose this process over sampling in spite of its drawbacks.¹⁷⁶ Many British academics discussed taking partial enumerations and supplementing them with estimates.¹⁷⁷ Discussions also took place over whether “an actual enumeration generally would be more accurate than a gross estimate, [as] an enumeration itself was not perfect and would result in an inevitable undercount.”¹⁷⁸ George Washington was concerned that a complete enumeration of the population would yield a larger result than an estimate previously offered, demonstrating his understanding of the differing concepts.¹⁷⁹

Justice Thomas also argued that it is clear the Framers wanted to force the existence of an actual enumeration so as to minimize the risk of political manipulation in the apportionment of seats.¹⁸⁰ The Framers were careful when crafting their language as they knew that “changes in population shift the balance of power among them.”¹⁸¹ The Framers “chose their words with

171. *Id.* (Thomas, J., dissenting).

172. *Lee, supra* note 72, at 20.

173. *Evans*, 536 U.S. at 495 (Thomas, J., dissenting).

174. *Id.* at 494 (Thomas, J., dissenting). “Historians and commentators after the founding also distinguished actual enumerations from conjectures, demonstrating that there was a common understanding of these terms.” *Id.* (Thomas, J., dissenting).

175. *Id.* at 494-95 (Thomas, J., dissenting); *see also Lee, supra* note 72, at 33 (citing John Rickman, *Thoughts on the Utility and Facility of Ascertaining the Population*, THE COMMERCIAL AND AGRICULTURAL MAGAZINE 391 (June 1800), for the idea that the word ‘census’ comes from the “Census of Roman Citizens” which was done “by collecting them in their respective municipia, and firmly enumerating all who made their appearance”).

176. *Lee, supra* note 72, at 46-47. When describing the Articles of Confederation the comment was made that “New Hampshire complained that her [estimated] number was too high; and in 1782, caused an actual enumeration to be made.” *Id.* at 42 (citing TIMOTHY PITKIN, A STATISTICAL VIEW OF THE COMMERCE OF THE UNITED STATES OF AMERICA 582 (1835)).

177. *Id.* at 37-39 (citing D.V. GLASS, NUMBERING THE PEOPLE: THE EIGHTEENTH-CENTURY POPULATION CONTROVERSY AND THE DEVELOPMENT OF CENSUS AND VITAL STATISTICS IN BRITAIN (1973)).

178. *Id.* at 38.

179. *Id.* at 41.

180. *Evans*, 536 U.S. at 489 (Thomas, J., dissenting).

181. *Id.* (Thomas, J., dissenting).

precision” and the Framers ““must be understood to have employed words in their natural sense, and to have intended what they have said.””¹⁸²

The evidence of word usage by the Framers is hard to ignore. During the Constitutional era “enumerate” was defined as counting distinctly while “actual” meant something that was really done.¹⁸³ Conjecture and estimation were terms contrasted with actual enumeration.¹⁸⁴ At the time of the constitutional convention some colonies were making actual enumerations, while others were making estimates.¹⁸⁵ Thus, the differences must have been clear.¹⁸⁶ The founders may have wanted to “shackle” the legislature so that future sessions of Congress could not change the process to their benefit, thereby choosing the language of the Constitution that would need to be obeyed.¹⁸⁷

“Because hot-deck imputation is an estimation procedure that includes persons not ‘actually’ counted, its use to adjust the census for apportionment purposes runs afoul of the Constitution.”¹⁸⁸ Congress has discretion to decide on the manner of conducting the census, yet this is not total discretion, and they must at least follow the Constitution.¹⁸⁹ Thus, in the eyes of Justice Thomas, conducting an “actual enumeration” remains a constitutional requirement that was not satisfied by the Bureau’s hot-deck imputation process in Census 2000.¹⁹⁰

D. Justice Scalia’s Dissenting Opinion

Justice Scalia disagreed with the majority’s determination that Utah had standing to bring its challenge.¹⁹¹ This is the same decision reached by Justice Scalia in the *Franklin* case.¹⁹² Justice Scalia was caught up in the procedural nuisances of the Census Act, and found that Utah did not demonstrate that federal courts have the power to redress the injury that had taken place.¹⁹³ Even if the court ordered a new report, Justice Scalia argued, Utah would not be redressed unless the President gave the new report to

182. *Id.* at 491 (Thomas, J., dissenting) (quoting *Gibbons v. Ogden*, 22 U.S. 1, 188 (1824)).

183. *Evans*, 536 U.S. at 492 (Thomas, J., dissenting) (quoting S. JOHNSON, A DICTIONARY OF THE ENGLISH LANGUAGE 658 (4th rev. ed. 1773)).

184. *Id.* (Thomas, J., dissenting).

185. *Id.* at 498 (Thomas, J., dissenting).

186. *Id.* at 500 (Thomas, J., dissenting).

187. *Id.* at 500-01 (Thomas, J., dissenting).

188. *Id.* at 508-09 (Thomas, J., dissenting).

189. *Id.* at 494 (Thomas, J., dissenting).

190. *Id.* at 509 (Thomas, J., dissenting).

191. *Id.* at 511 (Scalia, J., dissenting).

192. *See id.* at 510-11 (Scalia, J., dissenting) (citing *Franklin v. Massachusetts*, 505 U.S. 788, 823-29 (1992)).

193. *Id.* at 510-12 (Scalia, J., dissenting).

Congress.¹⁹⁴ Justice Scalia believed that he could not assume the President would comply with the Court's decision, nor did the Court have the power to direct the President to do an act unless the President was sued. In this instance only the Secretary of Commerce was sued.¹⁹⁵ For Scalia, the only other way that Utah could redress its injury would be for Congress to pass a law giving North Carolina's seat to Utah.¹⁹⁶ Thus, Scalia refused to reach the merits of the case and found Utah had no standing to bring their challenge.¹⁹⁷

V. IMPACT

The judicial landscape of apportionment cases looks uncertain after *Utah v. Evans*. With the Court split 5-3 (one justice did not reach the merits) in favor of a broad interpretation of both the Census Act and enumeration clause, it would seem that the Census Bureau is at liberty to use procedures that border on sampling, so long as they are disguised in non-sampling terms such as imputation.¹⁹⁸ In the *Utah v. Evans* scenario, the "hot-deck imputation" process was even less reliable than a random sampling of the population.¹⁹⁹ The arbitrary use of the geographically closest residence leaves too much room for error. It leads one to question how many businesses were imputed with residents when no one lived there. Yet the Court was eager to accept this new process, and one cannot help but wonder what else the Census Bureau, or the Supreme Court, will allow.

The *Utah v. Evans* decision will also affect the way the Census Bureau integrates new technology into its procedures. Technology would seem to be even more dangerous to use with the census, as it could easily lead to manipulation and non-enumeration counting techniques. Consider that forty years ago all U.S. residents were counted in person, yet today the majority of the data is gathered through mail-back forms; it is likely the information gathered in 2040 could be done electronically.

If the Census Bureau is placed in a situation where they need to cut costs, the decision in *Utah v. Evans* paves the way for the Bureau to revert to procedures that do not produce an "actual enumeration."²⁰⁰ With proper

194. *Id.* at 511 (Scalia, J., dissenting). Scalia feels that the President would be free to refuse to issue a new reapportionment statement to Congress. *Id.* (Scalia, J., dissenting).

195. *Id.* (Scalia, J., dissenting).

196. *Id.* at 512 (Scalia, J., dissenting).

197. *Id.* at 513-14 (Scalia, J., dissenting).

198. Justices Rehnquist, Breyer, Stevens, Souter, and Ginsburg all turned a blind eye and allowed the imputation process to remain. *See generally id.* Justices O'Connor, Thomas, and Kennedy all dissented, either because they felt that the Constitution or the Census Act had been violated. *See id.* Justice Scalia's view as to the merits is still a mystery as he felt Utah lacked standing to bring the case. *See id.* at 510-515 (Scalia, J., dissenting). Rehnquist sides with the more liberal members of the Court and against the Republican administration. *See id.* at 456. However, Rehnquist came down on the side of his more conservative colleagues in the *House of Representatives* case three years earlier. *See generally* United States Dep't of Commerce v. United States House of Representatives, 525 U.S. 316 (1999).

199. Appellant's Brief at 38, *Utah v. Evans*, 536 U.S. 452 (2002) (No. 01-714).

200. *See supra* notes 6 and 31 and accompanying text for a discussion of the costs of the Census and the number of people the Census Bureau employs.

approval, the Census Bureau could employ a few dozen statisticians to make the census count, doing away with the 900,000 employees it took to complete Census 2000.²⁰¹ This decision also affects other uses of Census data, including funding for federal programs and the drawing of legislative districts at both the state and local levels.

It is clear that despite the Bureau's best efforts, there has always been an undercount.²⁰² Had Utah been successful in its challenge, the Bureau would have been forced to decide on other methods to remedy this problem.²⁰³ The Court was possibly persuaded by the fact that the use of sampling techniques was in some ways inevitable, as the Bureau continues to strive to achieve greater accuracy. *Utah v. Evans* provided an easy out, a way of dealing with changing times that was quicker than amending the Census Act or the Constitution.

The courts must also be aware that the manipulation of census procedures is now easier.²⁰⁴ Just as the party in power does its best to stay in power by redistricting, the Census Bureau may, with the Supreme Court's blessing, now protect the administration in power when deciding on what process to use in their counting. By running the numbers with and without imputation, the government could now assure the option that guarantees the best chance of remaining in power is chosen.²⁰⁵

The number of lawsuits arising from the census will now increase, as the *Utah v. Evans* decision did nothing to clarify the Census Act or the "actual enumeration" clause of the Constitution.²⁰⁶ Thus, reapportionment issues that deal with sampling will be litigated on a case-by-case basis. The Court has set no bright line rules, and because reapportionment cases take a more direct route to the Supreme Court, more of the Court's time will be spent dispensing with challenges similar to this one.

Citizens, especially those in Utah, may be reluctant to participate in a process they view either as unfair or unconstitutional. If people are lethargic

201. See *supra* note 6 and accompanying text for the number and type of employees used in conducting the Census.

202. See *supra* note 63 and accompanying text for a discussion of the undercount.

203. See generally Gearan, *supra* note 13.

204. There did not appear to be any partisan manipulation involved in the *Utah v. Evans* case as the Republican controlled executive branch sided with the State of North Carolina which had five Democrats and eight Republican House members in 2000, while Utah had two Republican House members and one Democrat. U.S. Congress, *Member Directory*, at <http://www.access.gpo.gov/congress/browse-cd-02.html> (last visited Jan. 24, 2003).

205. In the case of the 2000 census, the alternative was to insert zero values for the data that had been imputed. To some this appeared contrary to the spirit of completing an accurate census, but would not have created a controversy. See *supra* notes 96-97, 165, and accompanying text for a discussion of how assigning a zero value is the alternative to using imputation.

206. It is hard to read the decisions in *House of Representatives* and *Evans* and glean any bright-line rules regarding when sampling is allowed. It is even harder to conceive of clearer language than "actual enumeration" that could have been used by the Framers to achieve what they wanted, a "headcount." Appellant's Brief at 37, *Utah v. Evans*, 536 U.S. 452 (2002) (No. 01-714).

about voting because they are dissatisfied with their elected representatives, it is safe to assume that dissatisfaction with the census may lead to decreased cooperation.²⁰⁷ However, the 2000 Presidential election may have helped convince citizens that their vote counts, and by analogy the close race between Utah and North Carolina for the 435th seat in the House of Representatives may demonstrate to citizens the importance of returning their census forms.

VI. CONCLUSION

Unfortunately, it looks as though the Supreme Court has begun to tread a slippery slope. By turning their back on the decision in *House of Representatives*, the Court has invited the Census Bureau to delve deeper into processes that are not an “actual count” and walk the line towards a sample. The Court either failed to realize the long term effects of their decision or was afraid to challenge the President to correct the Bureau’s error. Regardless, the procedures for taking the census will never be the same. The Census Bureau may now attempt to stretch the decision in *Evans* even further in 2010 to include other forms of “sampling in disguise.”

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207. See *supra* note 72 and accompanying text for the percentage of persons who returned their Census form in the year 2000.

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