Census 2000: Why the Majority in *Department of Commerce v. United States House of Representatives* Was Correct in Rejecting Statistical Sampling

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NOTES

Census 2000: Why the Majority in Department of Commerce v. United States House of Representatives Was Correct in Rejecting Statistical Sampling

I. Introduction

From the time that James Madison and Alexander Hamilton first discussed the structural foundations of our government, large and small states have continuously debated an assortment of issues. One of the most critical of these is whether large states should have more representation in Congress than smaller states. When the constitutional delegates first met in Philadelphia, they quickly addressed this question. The states with large populations, of course, wanted representation to be based on population, while the small states wanted each state to have the same number of representatives. James Madison proposed The Virginia Plan, which included two houses of Congress, both based on population.1 The New Jersey Plan offered one house with one vote per state.2 The large and small states reached middle ground by enacting The Connecticut Compromise, which proposed one house based on population and one house based on equal representation.3 Consequently, Rhode Island has as many votes in the Senate as Texas. Because of The Connecticut Compromise, the population-based debate over the Senate died. The fight over the number of representatives per state in the House of Representatives, however, continued.

The first census, taken in 1790, determined how many representatives each state would have.4 These numbers have been adjusted every ten years based on new population figures accumulated from the most recent census. Because population determines how many representatives a state will have in the House of Representatives, the actual method by which population is calculated becomes critically important.

The requirement of a census is set out in Article 1, section 2, of the U.S. Constitution, which states that "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 Fourteenth Amendment adds, "Representatives shall be apportioned among the

2. See id.
3. See id.
5. U.S. Const. art I, § 2, cl. 3.

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several states according to their respective numbers, counting the whole number of persons in each state, excluding Indians not taxed. In other words, each person in the United States is to be counted every ten years. As the population of a state enlarges or diminishes in proportion to other states, so do the number of congressional representatives for that state. With more representatives, a state receives more votes. Consequently, every state wants to count as many people as possible.

U.S. Marshals and their assistants conducted the first census. The census takers asked just six questions. President Washington then presented the census report to Congress so it could draft an apportionment bill. Washington used the presidential veto power for the first time in April 1792 to reject a bill that would have established the House of Representatives number at 120. Eventually, a bill survived that determined the size to be 105, with one representative per 33,000 people.

Since 1790, every census has been plagued with errors, has been surrounded by controversy, and has cost more money than planned. The simple, obvious reason for the complexity of the census is that it is impossible to count every person in the United States. Whether the government can actually determine the population without literally counting each person is a question frequently debated by statisticians and legislators.

Each census includes errors and omissions that result in inaccurate numbers. The people not counted — the undercounted — are the focus of many discussions. The undercount typically affects immigrants, minorities, renters, and those most likely to have frequent address changes and those who fail to mail back census forms. Experts concerned about the undercount have suggested the method of "[s]tatistical sampling," which is "best understood as using information derived from a portion of a population to infer information on the population as a whole." Statistical sampling provides for a segment of people in one area to be counted and then allows for an estimation of the number of those who cannot be reached by enumerators. Despite urging by some experts, the Supreme Court recently found statistical sampling to be inconsistent with the Census Act.

This note explains that the Supreme Court's decision in Department of Commerce v. United States House of Representatives is the correct statutory decision and argues that the Census Bureau should abandon statistical sampling for apportionment purposes and concentrate, instead, on a traditional headcount because sampling is

7. See ANDERSON, supra note 4, at 13.
8. Information elicited during the first census included: (1) name of head of family, (2) number of free white males over sixteen, (3) number of free white males under 16, (4) number of free white females, (5) number of other free persons, and (6) number of slaves. See id. at 14.
9. See id. at 15.
10. See id. at 16.
not feasible. This note also illustrates that the Supreme Court's decision is necessary for Oklahoma to avoid violating its own constitutional census provisions.

II. History of the Census Act and Statistical Sampling

The original and primary purpose of the census is to apportion representatives according to the number of people in each state. Obviously, then, each of the state governments has an interest in seeing that every person is counted. The federal government has an interest that goes beyond the states' interest in apportionment. From the beginning, government officials discussed the use of census figures for more than apportionment purposes. James Madison wanted the census to include more than a few questions because he recognized that the census could be used to determine employment, possible military strength, and other information useful to the new nation. The Senate rejected Madison's idea because it "considered it 'a waste of trouble and supplying materials for idle people to make a book.'"

By the beginning of the 1900s, the census data was used not only for political purposes but for social and economic purposes as well. In 1902, Congress created a permanent agency to compile and organize census data. With the creation of this agency came the ability to gather information not only during the decennial census, but to gather information in years apart from the decennial census.

Today, political leaders generally agree that census information is needed for more than apportionment purposes. It is easy to understand why census numbers compiled for purposes other than apportionment need not be as accurate as those numbers used for apportionment. With this concept in mind, Congress has allowed statistical sampling in the past for non-apportionment data.

The Census Act gives the Secretary of Commerce (Secretary) power to conduct the census. The Secretary is responsible for conducting the census through the Census Bureau and for reporting the census numbers to Congress. After the Secretary first asked Congress to allow statistical sampling for some non-apportionment purposes, Congress responded by creating section 195 of the Census Act, which allows the Secretary the use of statistical sampling for certain information such as employment and housing figures.

16. See ANDERSON, supra note 4, at 14. Madison favored categories of race, sex, age, and occupation. See id. He wanted to use census figures to predict the economy and population distribution. See id. Congress agreed with him on race, sex, and age categories but refused to use an occupation category. See id.
17. Id.
18. See id. at 85.
19. One argument for the creation of a permanent agency, instead of the temporary census office created every ten years, was that "Congress and the public were demanding so much data that the Census Office de facto existed for seven to eight years of the decade." Id. at 86.
20. See id.
22. See id. § 195.
The Census Act specifically mentions sampling in the two sections debated in Department of Commerce — 141 and 195. Section 141(a) states, "The Secretary shall . . . take a decennial census of population . . . 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." This section seems to give discretion to the Secretary to conduct the census in a number of ways, but when read with section 195, this latitude seems limited.

Section 195 reads, "Except for the determination of population for purposes of apportionment of Representatives in Congress among the several States, the Secretary shall, if he considers it feasible, authorize the use of the statistical method known as 'sampling' in carrying out the provisions of this title." Sections 141(a) and 195 have been continually debated and litigated. Since no court had interpreted those sections, however, the Census Bureau and other agencies continued to consider statistical sampling as part of the decennial census for apportionment purposes.

Many nongovernmental agencies compile scientific and statistical data for the purpose of advising Census Bureau officials. One such entity is the National Academy of Sciences (Academy). The Decennial Census Improvement Act of 1991 instructed the Academy to study possible census methods that would be the most accurate and that would reduce the undercount. The Academy's report suggested that the undercount cannot be reduced by continuing to use actual enumeration methods. The Academy also proposed various types of statistical sampling.

The National Research Council (NRC) also compiles scientific and statistical data for purposes of advising Census Bureau officials. In a comprehensive report to the Census Bureau regarding a plan for the 2000 census, the NRC expressed its favor with statistical sampling and said sampling is compatible with "constituton, legislative and judicial history . . . so long as that process includes a reasonable effort to reach all inhabitants."
The NRC's report offered several conclusions. The first of these asserted that it was "fruitless to continue trying to count every last person with traditional census methods of physical enumeration. Simply providing additional funds to enable the Census Bureau to carry out the 2000 census using traditional methods, as it has in previous censuses, will not lead to improved coverage or data quality." The second conclusion called for a replacement of statistical estimates with traditional enumeration for those not counted, which promised to improve accuracy. The NRC acknowledged the apparent clarity of section 195 of the Census Act but went on to say that courts have reconciled it with the more liberal provisions of section 141(a) because courts have held that the Census Bureau may use sampling with other enumeration methods.

Using the information and data gathered and studied from the Academy and the NRC, the Secretary made a decision to supplement traditional enumeration methods with statistical sampling for the 2000 Census. After the Secretary announced his plan to use statistical sampling, Congress displayed its disapproval by passing a bill to amend the Census Act and forbid statistical sampling. President Clinton vetoed the bill, and Congress enacted a statute that required the Secretary to explain his plan, specifically, how the Census Bureau would use statistical sampling. Once the Secretary completed his report, Congress passed the 1998 Appropriations Act, which authorized the Secretary to use necessary sampling and provided aggrieved parties judicial review of the census procedures. The enactment of this statute eventually led to Department of Commerce v. United States House of Representatives.

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many people were not counted or were counted twice, a list of the characteristics of the households that did not respond by mail, and a report of the population before the census is conducted. See id.

29. Id. at 3.

30. See id. The other two conclusions, not particularly at issue in this note, were: a review of census procedures could decrease costs without decreasing accuracy, and the census should include the long questionnaire form because there is not time before the census to evaluate the cost and effectiveness of using another questionnaire. See id.

31. See NATIONAL RESEARCH COUNCIL, supra note 28, at 241.


33. See United States House of Representatives v. United States Dept of Commerce, 11 F. Supp. 2d 76, 82 (D.D.C. 1998) (citing Supplemental Appropriations & Recessions Act, H.R. 1469, 105th Cong., 1st Sess. (1997)). The revised text would have read the following: "Notwithstanding any other provision of law, no sampling or any other statistical procedure, including any statistical adjustment, may be used in any determination of population for purposes of the apportionment of Representatives in Congress among the several states." Id.


36. See id.

III. Case Law Prior to Department of Commerce v. United States

House of Representatives

It is no surprise that there have been more census cases ligated than there have been censuses conducted. Early decisions focused on state legislatures and redistricting formulas, while modern decisions have focused on the Census Bureau and sampling procedures.

A. Early Census Decisions

In our federal government's early days, reapportionment was a legislative rather than a judicial matter. Because the Constitution vested Congress with the power to apportion representatives, the courts routinely refused to interfere with that power. In 1946, the Supreme Court held in Colegrove v. Green that the legislature is responsible for reapportionment. In Colegrove, voters brought suit because their congressional districts were notably different in size and population from most other districts in their state. The Supreme Court dismissed the complaint because it did not want to tamper with the political process of reapportionment. The Court reasoned that the proper remedy for malapportioned districts was with Congress or with voters.41

However, in 1962, the Supreme Court in Baker v. Carr allowed arguments regarding a state reapportionment statute. The Supreme Court held that it had subject matter jurisdiction and that appellants could challenge their state's apportionment statute. The Baker decision allowed other voters to challenge state apportionment statutes, which eventually inundated the courts with census cases.

In the 1980s, the judicial system had fifty-four pending lawsuits charging the Census Bureau with unconstitutional or improper counting methods, setting the

38. 328 U.S. 549 (1946).
39. See id. at 554.
40. See id. at 550-51.
41. See id. at 554. The Colegrove Court reasoned, the Constitution has conferred upon Congress exclusive authority to secure fair representation by the States in the popular House and left to that House determination whether States have fulfilled their responsibility. If Congress failed in exercising its powers, whereby standards of fairness are offended, the remedy ultimately lies with the people.
Id.
42. 369 U.S. 186 (1962).
43. See id. at 197-98.
44. Baker rested on whether the state reapportionment statute violated the Fourteenth Amendment. See id. at 188. For a discussion of whether the Fourteenth Amendment creates a fundamental right to accurate census information, see generally Sheldon T. Bradshaw, Death, Taxes, and Census Litigation: Do the Equal Protection and Apportionment Clauses Guarantee a Constitutional Right to Census Accuracy? 64 GEO. WASH. L. REV. 379 (1996).
stage for numerous census decisions preceding *Department of Commerce*. In the last ten years, several important decisions have addressed ways that districts may be redrawn and the extent of the Secretary’s discretion under the Census Act.\(^{46}\)

**B. Modern Census Decision: Wisconsin v. City of New York**

In 1987, the Secretary decided not to adjust the census numbers to compensate for the undercount. In reaching his decision, the Secretary concluded that while the national number may be more accurate with adjustment than with a traditional headcount, the local numbers, and, thus, apportionment numbers, would not be improved by adjustment.\(^{47}\) The following year, the plaintiffs in *Wisconsin v. City of New York*\(^{48}\) brought suit contending the Secretary’s decision was unconstitutional and contrary to the Census Act.\(^{49}\) The district court held the Secretary’s decision was constitutionally and statutorily consistent with the Census Act. Respondents appealed, and the Second Circuit Court of Appeals reversed.\(^{50}\) The Supreme Court consolidated the writs of certiorari filed by the states of Wisconsin and Oklahoma.\(^{51}\) Oklahoma’s reason for intervening in *Wisconsin* was to prevent census numbers from being adjusted because Oklahoma’s constitution did not allow for more than one apportionment every ten years.\(^{52}\)

The Supreme Court in *Wisconsin* decided that the U.S. Constitution gives Congress almost unlimited discretion in conducting the census.\(^{53}\) The state of Oklahoma wanted the Supreme Court to focus on what the Secretary can and cannot do under the Census Act.\(^{54}\) Much of the state of Oklahoma’s argument in that case was based on whether section 195 prohibited statistical sampling for apportionment purposes.\(^{55}\) Although that question was not directly at issue, the state of Oklahoma argued in *Wisconsin* that section 195 barred statistical sampling


\(^{47}\) See Wisconsin v. City of New York, 517 U.S. 1, 10 (1996).


\(^{49}\) The plaintiffs agreed to delay action if the Secretary would reconsider his decision. After reconsideration, the Secretary, in 1991, announced the 1990 figures would not be adjusted. The plaintiffs again filed an action. See Wisconsin, 517 U.S. at 10.

\(^{50}\) City of New York v. Department of Commerce, 34 F.3d 114 (2d Cir. 1994). The lower court held the effect on respondents warranted heightened scrutiny because a fundamental right — the right to vote — was at issue. The Supreme Court held that the Secretary’s decision was not subject to heightened scrutiny. See Wisconsin, 517 U.S. at 4.

\(^{51}\) See Wisconsin, 517 U.S. at 13.

\(^{52}\) See infra text accompanying notes 142-52.

\(^{53}\) Wisconsin, 517 U.S. at 19.


\(^{55}\) See id.
in apportionment.56 The respondents accused the states of Wisconsin and
Oklahoma of "smuggling additional questions into [the] case after [the Court]
grant[ed] certiorari."57 Because the Supreme Court in Wisconsin did not address
whether the Secretary could use statistical sampling, the Court invited subsequent
litigation to settle the issue.58

The Supreme Court declined to address Oklahoma's argument59 that the
Secretary could not use statistical sampling. The Court explained, "We do not here
decide the precise bounds of the authority delegated to the Secretary through the
Census Act. . . . [A]lthough Oklahoma argues that Congress has constrained the
Secretary's discretion to statistically adjust the decennial census . . . we need not
decide that question in order to resolve this action."60

After Wisconsin, the 1998 Appropriations Act directed the Census Bureau to
propose a census plan.61 The Act provided that any person aggrieved or injured
by the plan or by statistical sampling could bring suit in a district court and that
the suit could be appealed to the Supreme Court.62 Two cases prompted the
Supreme Court to, again, review the Secretary's authority to use statistical sampling
for apportionment purposes. One case, Glavin v. Clinton,63 was brought in a
district court of Virginia. The other, United States House of Representatives v.
Department of Commerce,64 was brought in the D.C. District Court.

56. See id.
available in 1995 WL 731717.
58. In its brief to the Supreme Court, Oklahoma said:
The text is clear and the legislative history is clear. Section 195 originally prohibited
sampling for apportionment and it still does. Here, the litigation debate between the
Executive Branch members and those favoring adjustment has focused primarily on
whether the Secretary's administrative decision was constitutionally flawed. Oklahoma,
on the other hand, contends adjustment is prohibited and the Secretary had no authority
to decide other than as he did. The real question should be, if [section] 195 means what
its plain language says, is the statute unconstitutional?
Petitioner's Brief at *17, Wisconsin v. City of New York, 517 U.S. 1 (1996) (No. 94-1614), available
in 1995 WL 668011.
59. For a summary of Oklahoma's other argument in Wisconsin, see infra text accompanying notes
142-52.
60. Wisconsin, 517 U.S. at 20 n.11.
61. The Census Bureau, in devising its 2000 census plan, relied on data from the Academy. See
Census Improvement Act, which directed the Academy to study methods of enumeration to be used in
2000 and to evaluate statistical sampling. See id.
62. See Glavin, 19 F. Supp. 2d at 547. The Glavin court also noted that
[section 209(b)] of the Appropriations Act provides a cause of action to "[a]ny person
aggrieved by the use of any statistical method in violation of the Constitution or any other
provision of law (other than this Act) in connection with the 2000 or any later decennial
census, to determine the population for purposes of the apportionment or redistricting
members in Congress.
Id.
The outcome of the two cases was surprisingly similar. Both courts held that the Census Act does not allow statistical sampling for apportionment purposes. Both courts also passed on the constitutional issue and decided the cases on a statutory basis using the two sections of the Census Act — sections 141 and 195. The Glavin court directed its attention to the statutory decision while the United States House of Representatives court focused more on the ripeness and standing issues.

IV. Statement of Glavin v. Clinton

In Glavin, various residents brought an action to prevent the Census Bureau from using statistical sampling in the 2000 Census. The plaintiffs claimed that statistical sampling would dilute their voting strength. All plaintiffs were from states that could potentially lose a congressional seat if the Census Bureau adjusted census numbers using statistical sampling. The plaintiffs asked the court to decide both the statutory question of whether the Census Act allowed statistical sampling for apportionment purposes and the constitutionality of statistical sampling.

The Glavin court held that the Census Act does not permit the Census Bureau to use statistical sampling for congressional reapportionment. The court ordered a permanent injunction on statistical sampling for apportionment purposes.

The court's ruling was based on an interpretation of the statute; therefore, there was no need to address the constitutional issue. The court focused on sections 141(a) and 195 of the Census Act, the two sections specifically addressing statistical sampling. The Glavin court asserted:

66. See Glavin, 19 F. Supp. 2d at 553; House of Representatives, 11 F. Supp. 2d at 104.
68. Plaintiffs included residents of several states. Also named as plaintiffs were several minority organizations including: "National Korean American Service & Education Consortium, Inc.; Organization of Chinese Americans, Inc.; ... Search to Involve Filipino Americans, Inc. [sic]; United Cambodian Community, Inc.; League of United Latin American Citizens; California League of United Latin American Citizens; National Association of Latino Elected and Appointed Officials, Inc." and others. Glavin, 19 F. Supp. 2d at 544.
69. See id. at 545. The defendants argued that the case was not ripe because Congress had not taken conclusive legislative action on the issue of statistical sampling. The court quickly dismissed this argument, citing section 209(c)(2) of the Appropriations Act, which, the court said, makes the statistical sampling question ripe: "Congress may always moot out a controversy by passing new legislation, but that fact does not shield agency action from judicial review." Id. at 547.
70. See id. at 553.
71. See id.
72. See id. at 551. "[I]f a case can be decided on either of two grounds, one involving a constitutional question, the other a question of statutory construction or general law, the Court will decide only the latter." Id. (quoting Ashwander v. TVA, 279 U.S. 288, 347 (1936)).
73. For the text of the provisions, see supra text accompanying notes 22-25.
Congress has spoken precisely to the question of statistical sampling by the Department and, in plain language, prohibited the use of this methodology to derive the population used for purposes of congressional apportionment. Thus, the Department's decision to use statistical sampling to create the census population for congressional apportionment purposes, is not authorized by the governing statute.74

The court spent relatively little discussion on the interpretation of sections 141(a) and 195 and concluded, "the only plausible interpretation of the plain language and structure of the Act is that section 195 prohibits sampling for apportionment and section 141 allows it for all other purposes."75 The court further concluded that the Secretary may only do an actual headcount since Congress prohibited sampling for apportionment purposes.76

The court reasoned that because a specific statute prevails over a general statute,77 the Census Act must be interpreted to give meaning to both sections 141(a) and 195.78 The court explained, "Reading the general authorization for sampling in [s]ection 141 as some how negating the prohibition of sampling for congressional apportionment in [s]ection 195 would render the language of [s]ection 195 meaningless."79 Section 195, instead of negating section 141, adds the specific conditions under which the Secretary may use statistical sampling. Using this reasoning, the court concluded that the specific section 195 controls the general section 141(a) preventing statistical sampling.80 The court, accordingly, enjoined defendants from using statistical sampling in the 2000 census.81

The House of Representatives82 court addressed ripeness, standing, and statutory interpretation of the Census Act. Regarding whether the plaintiff had standing and whether the court was the appropriate forum to resolve the legislative issue of statistical sampling, the court said, "By enacting section 209 of the 1998 Appropriations Act, both Congress and the President have invited the courts to resolve this issue. This direct invitation 'significantly lessens the risk of unwanted conflict with the Legislative Branch when that plaintiff brings suit.'"83 The House of Representatives court specifically stated that it was called upon to address whether,

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74. Glavin, 19 F. Supp. 2d at 551.
75. Id. at 552-53.
76. See id. at 553.
77. See id. at 552; see also Fourco Glass Co. v. Transmirra Prods. Corp., 353 U.S. 222, 228-29 (1957) (holding a specific matter in one statute will not be controlled by general language in another statute if the two statutes are within the same act).
78. See Glavin, 19 F. Supp. 2d at 552.
79. Id.
80. See id. at 552.
81. See id.
83. Id. at 94-95.
within statutory and constitutional bounds, the Secretary may use statistical sampling. 84

V. Statement of United States House of Representatives v. United States
Department of Commerce

The plaintiffs alleged that statistical sampling caused them injury because their voting strength would not be as strong as with a traditional headcount. 85 Under the Constitution and the Census Act, Congress receives census totals and uses those to reapportion the number of representatives. The plaintiffs claimed that statistical sampling would deny Congress the census information required by the Census Act and the Constitution. Without correct census information, the plaintiffs maintained that Congress could not adequately apportion representatives, and, therefore, their voting strength would be diminished. 86

The House of Representatives court, like the Glavin court, held that the Census Act prohibits statistical sampling for apportionment purposes. As with Glavin, the House of Representatives court observed that the decision could rest on statutory interpretation and found there was no need to address the constitutional issue. 87 In addressing the statutory interpretation of the Census Act, the court first noted that it was to resolve the question not answered in Wisconsin v. City of New York: whether the Secretary has discretion to use statistical sampling for apportionment purposes without violating the Census Act. 88

Relying on the 1998 Supreme Court decision in Federal Election Commission v. Akins, 89 the court declared, "[A] plaintiff suffers an 'injury in fact' when the plaintiff fails to receive information which must be publicly disclosed pursuant to a statute." 90 The House of Representatives court decided, as in the Akins case, that the House of Representatives would suffer an injury because not receiving correct census information would make it impossible for Congress to carry out its Constitutional function of reapportionment. 91

84. See id. at 97.
85. The plaintiffs had to prove the three elements of Article III standing. First, a plaintiff must have suffered a judicial injury. Second, a connection must exist between the injury to the plaintiff and the asserted conduct. In the present case, that statistical sampling would cause voter dilution. Third, the injury could be corrected by the court. See id. at 83-85.
86. See id. at 85.
87. See Department of Commerce v. United States House of Representatives, 525 U.S. 316, 343-44 (1999) (citing Spector Motor Service, Inc. v. McLaughlin, 323 U.S. 101, 105 (1944) ("If there is one doctrine more deeply rooted than any other in the process of constitutional adjudication, it is that we ought not to pass on questions of constitutionality . . . unless such adjudication is unavoidable.") and Ashwander v. TVA, 297 U.S. 288, 347 (1936) ("[I]f a case can be decided on either of two grounds, one involving a constitutional question, the other a question of statutory construction or general law, the Court will decide only the latter").
90. House of Representatives, 11 F. Supp. 2d at 85.
91. See id. at 86-87. The second alleged injury was that the House of Representatives had an
The House of Representatives court then turned to the Census Act and acknowledged that sections 141(a) and 195 were the only provisions that addressed statistical sampling. The court pointed out that during the two censuses after the 1976 amendments, the Secretary did not use statistical sampling because he felt it was prohibited for apportionment purposes. The court also noted that the purpose of the 1976 amendments was to allow a mid-decade census for use of data other than apportionment purposes.

Prior to the 1976 Census Act, section 195 read, "Except for the determination of population for apportionment purposes, the Secretary may, where he deems it appropriate, authorize the use of the statistical method known as 'sampling' in carrying out the provisions of this title." In 1976, section 195 was amended to read, "Except for the determination of population for purposes of apportionment of Representatives in Congress among the several States, the Secretary shall, if he considers it feasible, authorize the use of the statutory method known as 'sampling' in carrying out the provisions of this title."

The defendants spent considerable time emphasizing that Congress changed "may" to "shall." The defendants argued that this change in wording indicated a stronger endorsement for the Secretary to use statistical sampling. The court did not embrace the defendants' interpretation of section 195 based on the plain language of the statute, and the court reiterated that Congress could easily change language in a statute to clarify meaning when it explained, "It is a cardinal principle of statutory interpretation that dramatic departures from past practices should not be read into statutes without a definitive signal from Congress." Both Glavin and House of Representatives were appealed to the Supreme Court.

VI. Supreme Court Decision: Department of Commerce v. United States House of Representatives

The Court consolidated Glavin and House of Representatives for argument because both cases rested on the statutory interpretation of the Census Act and because both cases involved plaintiffs who challenged the Secretary's decision to use statistical sampling in the 2000 census. The Court affirmed Glavin and dismissed...
House of Representatives. On appeal, the consolidated case name was Department of Commerce v. United States House of Representatives.98

The Supreme Court affirmed the lower court holding in Glavin and held that the Census Act prohibits statistical sampling for apportionment purposes.99 The Supreme Court's decision in Department of Commerce rested on the interpretations of sections 141(a) and 195 of the Census Act.100 The briefs filed in the case devoted considerable time to the undercount, defining the parties affected and explaining what can be done to remedy the problem; however, the Supreme Court spent little time with the undercount, focusing more on the statutes and constitutional provisions.101

Justice Breyer dissented, focusing on the interpretation of section 195. He asserted that section 195 allows a difference between statistical sampling as a supplement to traditional enumeration and as a substitute for traditional enumeration.102 Breyer seemed to focus more than the majority on the policy reason for statistical sampling: achieving a more accurate count of the population. He explained, "Section 195 of the Census Act, at least in my view, could not have been intended as a prohibition as absolute as to stop the Census Bureau from imputing the existence of a living family behind the closed doors of an apparently occupied house, should that family refuse to answer the bell."103

Justices Stevens, Souter, and Ginsburg also dissented in part, agreeing that the Census Act gives the Secretary discretion to use statistical sampling for any purpose, including apportionment.104 The dissenting Justices suggested section 195 is a mandate for the Secretary to use sampling with two limitations: "[H]e need not do so when determining the population for apportionment purposes, and he need not do so unless he considers it feasible."105 The Justices further stated, "[T]he text of both provisions is perfectly clear: They authorize sampling in both the decennial

99. See id. at 343-44.
100. See id. at 322 (citing 13 U.S.C. §§ 141(a), 195).
101. The attorney for appellees explained actual enumeration as an objective standard and statistical sampling as subjective. A Supreme Court Justice constructed a hypothetical situation in which an enumerator went to a household that did not respond by mail but he knew from talking to the neighbors it was occupied; the people living in the apartment were undocumented aliens and did not want to talk to enumerators. Later, the attorney said it may be more accurate to write down that one person lives there instead of zero. The Justice asked whether under the objective standard or actual enumeration the enumerator could write down a number for that apartment. The attorney said no. See Oral Argument at *48-50, Department of Commerce v. United States House of Representatives, 525 U.S. 316 (1999), available in 1998 WL 827383. The appellee attorney responded, "We argue that the 100 percent head count is the only permissible means of apportioning the population in 2001." Id. at *61. A Justice countered, "Has there ever been a 100 percent head count?" Id.
103. Id. at 355.
104. See id. at 358-59.
105. Id. at 358.
and the mid-decade census, but they only command its use when the determination is not for apportionment purposes.\textsuperscript{106}

\textbf{VII. Analysis}

In holding that the Census Act does not allow statistical sampling for apportionment purposes, the Supreme Court made the correct statutory decision in \textit{Department of Commerce}. Due to the Court's decision and the infeasibility of statistical sampling, the Census Bureau should forever abandon consideration of sampling for the decennial census. Furthermore, the Supreme Court decision is necessary for Oklahoma to avoid the constitutional dilemma of redistricting with initial census numbers and redistricting again with adjusted numbers from statistical sampling.

\textit{A. The Majority of the Supreme Court Made the Correct Statutory Decision}

Because the Supreme Court did not interpret sections 141(a) and 195 of the Census Act in \textit{Wisconsin}, the issue had to be resolved in \textit{Department of Commerce}. Section 141(a) reads, "The Secretary shall . . . take a decennial census of population . . . 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."\textsuperscript{107} On its face, this section creates three requirements. First, it directs the Secretary to conduct a census every ten years. Second, the section gives the Secretary discretion to use sampling and special surveys to obtain population numbers. Third, the section allows the Secretary to gather information other than mere population numbers.

If section 141(a) of the Census Act were the only provision mentioning sampling for the census, the decision in \textit{Department of Commerce} would have been a simple one. Section 195, however, complicates the Secretary's power to conduct the census. Section 195 reads, "Except for the determination of population 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."\textsuperscript{108} This section seems to give the Secretary discretion to use sampling for determining population for anything other than apportionment numbers. The two sections of the Census Act that mention statistical sampling seem to contradict one another: section 141(a) allows for sampling, while section 195 refuses to employ it for apportionment purposes.

The Supreme Court addressed how to interpret seemingly conflicting provisions of a statute in \textit{Fourco Glass Co. v. Transmirra Products Corp.}\textsuperscript{109} The issue in \textit{Fourco Glass} was whether one provision in a statute could control a situation or

\textsuperscript{106} \textit{Id.} The Justices also said that the 1976 amendments, which the majority deemed insignificant, are important in determining Congress' intent to give the Secretary discretion. \textit{See id.} at 358-62.

\textsuperscript{107} 13 U.S.C. \S 141(a) (1976).

\textsuperscript{108} \textit{Id.} \S 195.

\textsuperscript{109} 353 U.S. 222 (1957).
whether two conflicting provisions must be reconciled.\textsuperscript{110} In analyzing the provisions, the Court found that one provision was specific and one general and that the specific provision controlled.\textsuperscript{111} The Court reasoned that a general provision "will not be held to apply to a matter specifically dealt with in another part of the same enactment."\textsuperscript{112}

Applying the Supreme Court's holding in \textit{Fourco Glass} to provisions 141(a) and 195, section 195 is the more specific. Section 141(a) mentions the decennial census but does not address apportionment as does section 195. Section 195 adds the express prohibition on sampling for apportionment purposes. If section 141(a) were the only provision applicable to statistical sampling, the Secretary could use his discretion. However, according to the Supreme Court's interpretation in \textit{Fourco Glass}, section 195 must control because it is a specific provision. Therefore, a statutory interpretation of sections 141(a) and 195 seems to leave little doubt that statistical sampling is prohibited for apportionment purposes. The majority of the Supreme Court reached the same conclusion, although each Justice arrived differently.

That so many Justices wrote separate opinions illustrates the complex and controversial nature of statistical sampling. Justice O'Connor delivered the majority opinion, which concluded that section 195 prohibits sampling for apportionment purposes. She arrived at her conclusion through statutory and historical reasoning. Justice O'Connor explained that sections 141(a) and 195 do not necessarily contradict each other; section 195 merely adds specific prohibitions on the general authority given to the Secretary in section 141(a).\textsuperscript{113}

The portion of the majority's opinion regarding the purpose of the 1976 amendments drew much criticism. The majority reasoned that Congress did not radically change the meaning of section 195 because there were no controversial discussions at the time of its enactment.\textsuperscript{114} The majority said, "That the 1976 changes to sections 141(a) and 195 were not the focus of partisan debate . . . is almost certainly due to the fact that Members of Congress voting on the bill read the text of the statute, as we do, to prohibit the use of sampling in determining the population for apportionment purposes."\textsuperscript{115} While this reasoning has some validity, Justice Scalia, wisely, was critical of it.

Justice Scalia's concern was trying to find legislative intent based on what legislators do or do not say.\textsuperscript{116} Some could argue that surely there would have

\textsuperscript{110} See id. at 228.
\textsuperscript{111} See id.
\textsuperscript{112} Id.
\textsuperscript{113} See Department of Commerce v. United States House of Representatives, 525 U.S. 316, 338 (1999).
\textsuperscript{114} See id. at 342-40
\textsuperscript{115} Id. at 343. The majority further said, "Moreover, it is hard to imagine that, having explicitly prohibited the use of sampling for apportionment purposes in 1957, Congress would have decided to reverse course on such an important issue by enacting only a subtle change in phraseology." Id.
\textsuperscript{116} See id. at 344.
been a greater debate if it were clear to the legislators that the bill before them could possibly change the way the Census Bureau conducted the census. However, Scalia was correct in questioning this method of statutory interpretation.

Justice Stevens, writing for the dissent,117 focused more on policy than on statutory interpretation. He was earnest in his theory that the Census Act allows statistical sampling. His strongest argument is the policy argument that there must be some compensation for the undercount. He wrote, "Since it is perfectly clear that the use of sampling will make the census more accurate than an admittedly futile attempt to count every individual by personal inspection, interview, or written interrogatory, the proposed method is a legitimate means of making the 'actual Enumeration' that the Constitution commands."118 Stevens is unpersuasive, in part, because he is so confident. For as long as the census has been conducted, there have been disagreements about how to actually count people, and for as long as the Census Act has been in effect, there have been disagreements about what the provisions mean. Yet Justice Stevens portrayed this as an uncomplicated decision. He further asserts, "The Census Act . . . unambiguously authorizes the Secretary of Commerce to use sampling procedures when taking the decennial census. That this authorization is constitutional is equally clear."119 He further states, when discussing sections 195 and 141(a), "The text of both provisions is perfectly clear."120 Stevens is also critical of the majority when it reasoned that what the legislators did not say can be considered in determining the purpose of the amendments. He undercuts his own argument by explaining that because the first census debate did not include a discussion of the method of counting people, the Framers did not consider it important.121 In spite of the legitimate policy reason Justice Stevens asserted, the majority disagreed that policy considerations should outweigh statutory interpretation.

Aside from the statutory interpretation, prior case law, legislative history, or policy, the most persuasive argument against statistical sampling for apportionment purposes comes from Justice Scalia. He reasoned that statistical sampling should not be allowed because no one really knows if it is consistent with the Census Act and the Constitution. Justice Scalia is correct in explaining,

Even if one is not entirely persuaded by the foregoing arguments . . . I think it must be acknowledged that the statutory intent to permit use of sampling for apportionment purposes is at least not clear. In these circumstances, it is our practice to construe the text in such fashion as to avoid serious constitutional doubt . . . It is in my view unquestionably doubtful whether the constitutional requirement of an "actual Enumeration," . . . is satisfied by statistical sampling.122

117. Souter, Ginsburg, and Breyer joined Stevens in part. See id. at 357.
118. Id. at 364 (emphasis added).
119. Id. at 357 (emphasis added).
120. Id. at 358 (emphasis added).
121. See id. at 363.
122. Id. at 346.
Aside from whether statistical sampling for apportionment purposes is consistent with the Census Act or the Constitution, statistical sampling is simply not feasible. Even at the Census Bureau few officials agree on its effectiveness. 123

B. The Census Bureau Should Focus on Traditional Headcount Because Sampling Is Not Feasible

In the twenty decennial censuses since 1790, traditional headcount has been used for apportionment purposes, even though statistical sampling has been considered since 1957. 124 For all of the studies of sampling procedures, no one even knows if or how it would work. Even the Director of the Census Bureau (Director) and the Secretary of the Census Bureau (Secretary) disagreed before the 1990 census. 125 The Secretary’s concern about sampling is well founded. Supporting his decision not to use sampling in 1990, the Secretary explained that he did not want to “abandon a two hundred year tradition of how we actually count people.” 126 He further said in order to abandon the traditional enumeration, “[I]t was necessary to be ‘certain that it would make the census better and the distribution of the population more accurate.’” 127 If the top officials of the Census Bureau disagree, that is a good indication that there are problems with statistical sampling.

Some may say that the Secretary cannot make a reasonably informed decision because he is not a statistician. The Director, who favored statistical sampling and adjustment, explained to the Secretary, “[A]djustment is an issue about which reasonable men and women and the best statisticians and demographers can disagree.” 128 In 1980, the Census Bureau refused to use statistical sampling for apportionment purposes because it believed continuing the precedent of traditional headcount was necessary and that the 1976 amendments did not change the prohibition of statistical sampling for apportionment purposes. 129 Also in 1980, the Solicitor General asserted that section 195 prohibited statistical sampling for apportionment purposes. 130

The Secretary based his decision not to adjust previous census numbers on the distributive accuracy verses numerical accuracy. 131 After all, the distributive accuracy is what determines apportionment. The Wisconsin Court explained that if the undercount were ten million, adding ten million to the total population would improve numerical accuracy. 132 However, the Court explained that adding ten

123. See supra text accompanying notes 109-11.

124. In 1957, the Secretary requested that Congress allow statistical sampling for some census information. See Department of Commerce, 525 U.S. at 336.

125. See Wisconsin v. City of New York, 517 U.S. 1, 10 (1996).

126. Id. at 11.

127. Id.

128. Id. at 23-24.

129. See Department of Commerce, 525 U.S. at 340.

130. See id.


132. See id. at 11 n.6.
million to one state would devastate distributive accuracy. Justice Breyer explained, "Apportionment demands comparable accuracy State by State. A count that reflected evenly distributed error . . . would produce the same congressional apportionment as a perfectly accurate count; a count that is less comparatively accurate could make matters worse."133 Although no census has ever been perfectly accurate, the Wisconsin Court noted, "[T]he Census Bureau made an extraordinary effort to conduct an accurate enumeration, and was successful in counting 98.4 percent of the population."134

Another significant problem with statistical sampling is that there can be no practice. Counting the people in the United States is such an enormous task, several different enumerations cannot take place to determine which one is more effective. Each census presumably attempts to improve upon the last, but there are still no experiments. The data collected in each decennial census must be used. As Justice Scalia in Department of Commerce acknowledged, "[W]e will never be able to assess the relative accuracy of the sampling system used for the 2000 census by comparing it to the results of a headcount, for there will have been no headcount."135

Considering all the limitations of statistical sampling, the Census Bureau should focus on traditional methods of enumeration instead of statistical sampling, involving the states in advertisements and other basic information to educate people about the importance of participating in the census. Statistical sampling is also not feasible because of its unknown impact on states. Each state has constitutional provisions or laws that determine how reapportionment will be conducted. Oklahoma's constitution does not allow for reapportionment if statistical sampling is used in the census.

C. Supreme Court Decision's Impact on Oklahoma

Oklahoma is one of several states that will lose a congressional seat after the 2000 census according to a December 1998 report from the Election Data Services (EDS).136 The report listed Oklahoma, Connecticut, Mississippi, Ohio, and Washington as states that would lose one seat each, while New York and Pennsylvania would each lose two.137 The states that would gain at least one seat — under Census Bureau's estimates — are Arizona, Nevada, Texas, California, Florida, Georgia, and Montana.138 Oklahoma could lose a seat despite its population increase because other states' populations are increasing faster than Oklahoma's.

This loss would reduce Oklahoma's six congressional districts to five, which would, of course, diminish Oklahoma's power in Congress. In 1990, Oklahoma was

133. See Department of Commerce, 525 U.S. at 353.
134. Wisconsin, 517 U.S. at 20.
135. Department of Commerce, 525 U.S. at 353 (Scalia, J., concurring).
136. See Chris Castoe, House Seat Loss Projected: Study Says Census Gain Won't Save All 6 Districts, DAILY OKLAHOMAN (Oklahoma City), Jan. 1, 1999, at 1.
137. See id.
138. See id.
expected to lose its sixth congressional seat, but the state managed to keep the seat.\footnote{139}

It would seem that Oklahoma would favor a traditional headcount because the state has fewer of the people who are likely to make up the undercount, but the state did not address this reason in its brief to the Supreme Court in Wisconsin.

Oklahoma's challenge to the lower court's decision in Wisconsin was that statistical sampling was inconsistent with Oklahoma's Constitution. The relevant constitutional section provides that the Oklahoma legislature must reapportion districts within ninety days of the legislative session after each decennial census.\footnote{140}

Since the Oklahoma Constitution has not been revised to allow more time for reapportionment or to allow for revised plans if the Secretary decided to use sampling procedures, the Supreme Court's decision in Department of Commerce is beneficial for Oklahoma to avoid constitutional problems.

Another problem with statistical sampling is that if census numbers are adjusted, then census figures would be initially released to the states, and then some time later the new, adjusted numbers would be released. At least every two years in Oklahoma, elections are held for state and federal representatives. These representatives come from districts that must be redrawn based on numbers from the decennial census.

After the 1990 census figures were released to the states, Oklahoma spent over one million dollars redistricting for state and federal offices.\footnote{141} The state redistricted in conformity with the Oklahoma Constitution, which mandates that the state legislature complete the redistricting process within ninety days after the legislature convenes.\footnote{142}

Oklahoma's redistricting effort in 1990 illustrates the problem of readjustment numbers becoming available after the initial numbers are released. George Humphreys, research director for the Oklahoma House of Representatives, explained during the Wisconsin litigation that the census figures were available in February 1991. During the three months that followed, a research team developed various redistricting plans and submitted them to the legislature.\footnote{143}

\footnote{139. See id.}
\footnote{140. The provision reads,}
\footnote{\text{The apportionment of the Legislature shall be accomplished by the Legislature according to the provisions of this article, within ninety (90) days after the convening of the first regular session of the Legislature following each Federal Decennial Census. If the Legislature shall fail or refuse to make such apportionment within the time provided herein, then such apportionment shall be accomplished by an Apportionment Commission composed of the Attorney General, Superintendent of Public Instruction and the State Treasurer of the State of Oklahoma according to the provisions of this article.}}

\footnote{142. See OKLA. CONST. art. V, § 11A.}
After reapportionment, candidates for November 1992 elections had to file for candidacy in July 1992. Humphreys explained that if the Secretary had adjusted the census data, there would not have been time to redistrict based on the adjusted figures. By that time, the legislature would have also adjourned until the next February, after the 1992 elections were over. Humphreys further explained, "A statistical adjustment would, in all probability, subject the Oklahoma congressional apportionment plan to litigation. The adjustment would create inequalities in district populations that would make the 1991 plan subject to a court challenge if an alternative plan could not be presented to a court with lower population variations." It is clear that the Supreme Court's decision in Department of Commerce is necessary for Oklahoma to avoid constitutional problems unless Oklahoma amends its Constitution to allow for readjustment after statistical sampling is used.

VIII. Conclusion

Many policy reasons for statistical sampling are legitimate. The glaring errors in every census since its beginning reveal that the census is not as accurate as it should be. The statistical reports of a growing undercount trouble anyone concerned that not all Americans are participating in the political process. Nevertheless, ignoring statutory language to achieve policy goals, however worthy, is not justifiable. The census must be conducted according to the Constitution and the Census Act. When analyzing the relevant provision of the Census Act, the Supreme Court was correct in holding that statistical sampling cannot be used for apportionment purposes.

The 2000 census will most likely, once again, give proponents of statistical sampling new numbers to fuel the arguments against a traditional headcount. Regardless of the final numbers, when preparing for the 2010 census, the Bureau need not turn the next nine years into an internal and public debate on the fairness of actual enumeration.

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144. See id. at *106. Humphreys added, "Congressional reapportionment was achieved with remarkable accuracy: Five Congress districts in Oklahoma have identical populations, the sixth district has one more person than the other five." Id. at *104a.

145. Id. at *107a-08a. There was also a constitutional issue of whether the Oklahoma Constitution allowed for redistricting more than 90 days after the legislature convened. Id.