

SCALIA, J., concurring

**SUPREME COURT OF THE UNITED STATES**

Nos. 98–404 AND 98–564

DEPARTMENT OF COMMERCE, ET AL., APPELLANTS  
98–404 v.  
UNITED STATES HOUSE OF REPRESENTATIVES  
ET AL.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR  
THE DISTRICT OF COLUMBIA

WILLIAM JEFFERSON CLINTON, PRESIDENT OF  
THE UNITED STATES, ET AL., APPELLANTS  
98–564 v.  
MATTHEW GLAVIN ET AL.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR  
THE EASTERN DISTRICT OF VIRGINIA

[January 25, 1999]

JUSTICE SCALIA, with whom JUSTICE THOMAS joins, and  
with whom THE CHIEF JUSTICE and JUSTICE KENNEDY join  
as to Part II, concurring in part.

I

I join the opinion of the Court, excluding, of course, its resort in Part III–B to what was said by individual legislators and committees of legislators– or more precisely (and worse yet), what was *not* said by individual legislators and committees of legislators. I write separately to respond at somewhat greater length to JUSTICE STEVENS’ analysis of 13 U. S. C. §141(a), to add several additional points of textual analysis, and to invoke the doctrine of constitutional doubt, which is a major factor in my decision.

II

Section 141(a) requires the Secretary to conduct a “decennial census of population . . . in such form and content

as he may determine, including the use of sampling procedures and special surveys.” JUSTICE STEVENS reasons that a reading of §195 that would prohibit sampling for apportionment purposes contradicts this provision. It seems to me there is no conflict at all. The phrase “decennial census of population” in §141(a) refers to far more than the “tabulation of total population by States . . . as required for the apportionment of Representatives in Congress among the several States . . . .” §141(b). See U. S. Const., Art. I, § 2. It also includes a “a census of population, housing, and matters relating to population and housing.” §141(g). The authorization of sampling techniques in the “decennial census of population” is not necessarily an authorization of such techniques in *all aspects* of the decennial census— any more than it is necessarily an authorization of *all sampling techniques* (for example, those that would violate the Fourth Amendment). One looks to the remainder of the law to determine what techniques, and what aspects of the decennial census, the authorization covers.

If, for example, it were utterly clear and universally agreed that the Constitution prohibits sampling in those aspects of the census related to apportionment, it would be strange to contend that, by authorizing the Secretary of Commerce to use sampling in his census work, §141(a) “contradicts” the Constitution. The use of sampling it authorizes is *lawful* use of sampling, and if this does not include the apportionment aspect then the authorization obviously does not extend that far. I think the situation the same with regard to the legal impediment imposed by §195. JUSTICE STEVENS would be correct that the Court is not interpreting §195 “consistently with 141(a),” *post*, at 2, if the latter provision specifically authorized sampling in “all aspects of the decennial census.” But since it does not, the Court’s interpretation is entirely harmonious.

JUSTICE STEVENS’ interpretation of this statute creates a palpable absurdity within §195 itself. The “shall” of that

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provision is subject to not one exception, but two. The first, which is at issue here, is introduced by “Except.” The second is contained within the phrase “if he considers it feasible.” The Secretary is under no *command* to authorize sampling if he does not consider it feasible. Is it even thinkable that he *may* (though he *need not*) authorize sampling if he does *not* consider it feasible? The clear implication of “shall,” as applied to this exception, is that where the exception applies he *shall not*. It would be strange to draw the different implication of “may” when the word is applied to the other exception.

And finally, JUSTICE STEVENS’ interpretation creates a statute in which Congress swallows a camel and strains out a gnat. Section 181 of the statute requires the Secretary to compile annual and biennial “interim current data”— a useful but hardly indispensable function. The Secretary is authorized to use sampling in the performance of this function *only* if he determines that it will produce “current, comprehensive, and reliable data.” §181(a). The statute JUSTICE STEVENS creates is one in which Congress carefully circumscribes the Secretary’s discretion to use sampling in compiling “interim current data,” but leaves it entirely up to the Secretary whether he will use sampling for the purpose most important (and closest to the Congress’s heart): the apportionment of Representatives.

Even if one is not entirely persuaded by the foregoing arguments, and the more substantial analysis contained in the opinion of the Court, 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. See, e.g., *Edward J. DeBartolo Corp. v. Florida Gulf Coast Building & Constr. Trades Council*, 485 U. S. 568, 575 (1988). It is in my view unquestionably doubtful whether

the constitutional requirement of an “actual Enumeration,” Art. I, §2, cl. 3, is satisfied by statistical sampling.

Dictionaries roughly contemporaneous with the ratification of the Constitution demonstrate that an “enumeration” requires an actual counting, and not just an estimation of number. Noah Webster’s 1828 American Dictionary of the English Language defines “enumerate” as “[t]o count or tell, number by number; to reckon or mention a number of things, each separately”; and defines “enumeration” as “[t]he act of counting or telling a number, by naming each particular,” and “[a]n account of a number of things, in which mention is made of every particular article.” Samuel Johnson’s 1773 Dictionary of the English Language 658 (4th ed.) defines “enumerate” as “To reckon up singly; to count over distinctly; to number”; and “enumeration” as “The act of numbering or counting over; number told out.” Thomas Sheridan’s 1796 Complete Dictionary of the English Language (6th ed.) defines “enumerate” as “[t]o reckon up singly; to count over distinctly”; and “enumeration” as “[t]he act of numbering or counting over.” The notion of counting “singly,” “separately,” “number by number,” “distinctly,” which runs through these definitions is incompatible (or at least *arguably* incompatible, which is all that needs to be established) with gross statistical estimates.

One must also be impressed by the facts recited in the opinion of the Court, *ante*, at 17: that the Census Acts of 1790 and 1800 required a listing of persons by family name, and the Census Acts of 1810 through 1950 required census enumerators to visit each home in person. This demonstrates a longstanding tradition of Congress’s forbidding the use of estimation techniques in conducting the apportionment census. Could it be that all these Congresses were unaware that (in the words of JUSTICE STEVENS’ dissent) estimation techniques “will make the census more accurate than an admittedly futile attempt to

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count every individual by personal inspection, interview, or written interrogatory”? *Post*, at 8–9. There were difficult-to-reach inhabitants in the early 1800’s, just as there are today— indeed, perhaps a greater proportion of them, since the society was overwhelmingly composed of farmers, and largely of frontiersmen. And though there were no professional statisticians, it must have been known that various methods of estimating unreachable people would be more accurate than assuming that *all* unreachable people did not exist. (Thomas Jefferson’s 1782 estimate of the population of Virginia based upon limited data and specific demographic assumptions is thought to have been accurate by a margin of one-to-two percent. H. Alterman, *Counting People: The Census in History* 168–170 (1969).) Yet such methods of estimation have not been used for over two centuries. The stronger the case the dissents make for the irrationality of that course, the more likely it seems that the early Congresses, and every Congress before the present one, thought that estimations were not permissible. See, e.g., *Printz v. United States*, 521 U. S. 898, 905 (1997) (historical evidence that “earlier Congresses avoided use of [the] highly attractive power [to compel state executive officers to administer federal programs]” gave us “reason to believe that the power was thought not to exist”).

JUSTICE STEVENS reasons from the *purpose* of the census clause: “The census is intended to serve the constitutional goal of equal representation. . . . That goal is best served by the use of a ‘Manner’ that is most likely to be complete and accurate.” *Post*, at 8 (internal quotation marks and citation omitted). That is true enough, and would prove the point if either (1) *every* estimate is more accurate than a headcount, or (2) Congress could be relied upon to permit *only* those estimates that are more accurate than headcounts. It is metaphysically certain that the first proposition is false, and morally certain that the

second is. To give Congress the power, under the guise of regulating the “Manner” by which the census is taken, to select among various estimation techniques having credible (or even incredible) “expert” support, is to give the party controlling Congress the power to distort representation in its own favor. In other words, genuine enumeration may not be the most accurate way of determining population, but it may be the most accurate way of determining population with minimal possibility of partisan manipulation. The prospect of this Court’s reviewing estimation techniques in the future, to determine which of them *so obviously* creates a distortion that it cannot be allowed, is not a happy one. (I foresee the new specialty of “Census Law.”) Indeed, it is doubtful whether—separation-of-powers considerations aside— the Court would even have available the raw material to conduct such review effectively. As pointed out by the appellants in the present cases, we 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*.

For reasons of text and tradition, fully compatible with a constitutional purpose that is entirely sensible, a strong case can be made that an apportionment census conducted with the use of “sampling techniques” is not the “actual Enumeration” that the Constitution requires. (Appellant Commerce Department itself once argued that case in the courts. See, *e.g.*, *Young v. Klutznick*, 497 F. Supp. 1318, 1332 (ED Mich. 1980), *rev’d* 652 F. 2d 617 (CA6 1981).) And since that is so, the statute before us, which certainly *need not* be interpreted to permit such a census, ought not be interpreted to do so.