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 STEVENS with whom JUSTICE SOUTER and JUSTICE GINSBURG join as to Parts I and II, and with whom JUSTICE BREYER joins as to Parts II and III, dissenting.

The Census Act, 13 U. S. C. §1 *et seq.*, unambiguously authorizes the Secretary of Commerce to use sampling procedures when taking the decennial census. That this authorization is constitutional is equally clear. Moreover, because I am satisfied that at least one of the plaintiffs in each of these cases has standing, I would reverse both District Court judgments.

I

The Census Act, as amended in 1976, contains two provisions that relate to sampling. The first is an unlim-

ited authorization; the second is a limited mandate.

The unlimited authorization is contained in §141(a). As its text plainly states, that section gives the Secretary of Commerce unqualified authority to use sampling procedures when taking the decennial census, the census used to apportion the House of Representatives. It reads as follows:

> "(a) The Secretary shall, in the year 1980 and every 10 years thereafter, take a decennial census of population as of the first day of April of such year, which date shall be known as the 'decennial census date', in such form and content as he may determine, including the use of sampling procedures and special surveys." 13 U. S. C. §141(a).

The limited mandate is contained in §195. That section commands the Secretary to use sampling, subject to two limitations: he need not do so when determining the population for apportionment purposes, and he need not do so unless he considers it feasible. The command reads as follows:

> "Except for the determination of population for purposes of apportionment of Representatives in Congress among the several States, the Secretary shall, if he considers it feasible, authorize the use of the statistical method known as 'sampling' in carrying out the provisions of this title." 13 U. S. C. §195.

Although §195 does not command the Secretary to use sampling in the determination of population for apportionment purposes, neither does it prohibit such sampling. Not a word in §195 qualifies the unlimited grant of authority in §141(a). Even if its text were ambiguous, §195 should be construed consistently with §141(a). Moreover, since §141(a) refers specifically to the decennial census, whereas §195 refers to the use of sampling in both

the mid-decade and the decennial censuses, the former more specific provision would prevail over the latter if there were any conflict between the two. See *Edmond* v. *United States*, 520 U. S. 651, 657 (1997). In my judgment, however, the text of both provisions is perfectly clear: They authorize sampling in both the decennial and the mid-decade census, but they only command its use when the determination is not for apportionment purposes.

A comparison of the text of these provisions with their predecessors in the 1957 Census Act further demonstrates that in 1976 Congress specifically intended to authorize the use of sampling for the purpose of apportioning the House of Representatives. Prior to 1976, the Census Act contained neither an unlimited authorization to use sampling nor a limited mandate to do so. Instead, the 1957 Act merely provided that the Secretary "may" use sampling for any purpose except apportionment. 13 U. S. C. §195 (1958 ed.). In other words, it contained a limited authorization that was coextensive with the present limited mandate. The 1976 amendments made two changes, each of which is significant. First, Congress added §141(a), which unambiguously told the Secretary to take the decennial census "in such form and content as he may determine, including the use of sampling procedures and special surveys." Second, Congress changed §195 by replacing the word "may" with the word "shall." Both amendments unambiguously endorsed the use of sampling. The amendment to §141 gave the Secretary authority that he did not previously possess, and the amendment to §195 changed a limited authorization into a limited command.

The primary purpose of the 1976 enactment was to provide for a mid-decade census to be used for various purposes other than apportionment. Section 141(a), however, is concerned only with the decennial census. The comment in the Senate Report on the new language in

§141(a) states that this provision was intended "to encourage the use of sampling and surveys in the taking of the decennial census." S. Rep. No. 94–1256, p. 4 (1976). Given that there is only one decennial census, and that it is the only census that is used for apportionment purposes, the import of this comment in the Senate Report could not be more clear. See *ibid.* ("It is for the purpose of apportioning Representatives that the United States Constitution establishes a decennial census of population").

Nevertheless, in an unusual *tour de force,* the Court concludes that the amendments made no change in the scope of the Secretary's authority: Both before and after 1976 he could use sampling for any census-related purpose, other than apportionment. The plurality finds an omission in the legislative history of the 1976 enactment more probative of congressional intent than either the plain text of the statute itself or the pertinent comment in the Senate Report. For the plurality, it is incredible that such an important change in the law would not be discussed in the floor debates. See *ante,* at 25.[1] It appears, however, that even though other provisions of the legislation were controversial,[2] no one objected to this change.

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[1]To its credit, and unlike the District Court, the Court does not rely on our reference to the watchdog that did not bark in *Chisom* v. *Roemer,* 501 U. S. 380, 396, and n. 23 (1991). In that case, unlike these cases, there was neither a change in the relevant text of the statute nor a reference to the purported change in the Committee Reports. The change in these cases is clearly identified in both the statutory text and the Senate Report.

[2]The only contentious issue in the floor debates involved the penalty provisions for noncompliance. See 122 Cong. Rec. 9796, 9800 (1976); *id.,* at 35171, 33305. Indeed, the Conference Report comparing the House and Senate bills and announcing the harmonized final version confirms that substitutions were only necessary with regard to penalties for failure to answer questions and to ensure that no one would be

That the use of sampling has since become a partisan issue sheds no light on the views of the legislators who enacted the authorization to use sampling in 1976.[3] Indeed, the bill was reported out of the House Committee by a unanimous vote, both the House and Senate versions easily passed, and the Conference was unanimous in recommending the revised legislation.[4] Surely we must presume that the legislators who voted for the bill were familiar with its text as well as the several references to sampling in the Committee Reports.[5] Given the general

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compelled to disclose information regarding religious affiliation. See Joint Explanatory Statement of the Conference Committee, H. R. Conf. Rep. No. 94–1719, pp. 14–15 (1976); see also 122 Cong. Rec. 33305 (1976) ("The differences between the Senate and the House of Representatives on this measure . . . centered on the question of penalties for refusal or neglect to cooperate with the censuses. . . . The managers on the part of the Senate also receded in the case of a House amendment providing that a person may not be compelled to disclose information regarding his religious beliefs or membership in a religious body").

[3] Many did object to the use of the mid-decade census statistics for congressional apportionment and districting. See *id.*, at 9792 ("The bill presently contains a specific prohibition against the use of mid-decade statistics for purposes of apportionment or for the use in challenging any existing districting plan"). In a supplement to H. R. Rep. No. 94–944, two Republican Congressmen insisted that limits on the frequency of reapportionment were necessary to ensure stability. Supplemental Views on H. R. 11337, H. R. Rep. No. 94–944, pp. 17–18 (1976); see also 122 Cong. Rec. 9794–9796, 9799–9802 (1976).

[4] See *id.*, at 9792, 33305, 32253.

[5] Although the comment on page 4 of the Senate Report quoted *supra*, at 3–4 is the only specific reference to the use of sampling in the decennial census, several other statements reflect the general understanding that sampling should be used whenever possible. Consider, for example, this comment following the succinct and accurate explanation of the amendment to §195 in the Conference Report: "The section, as amended, strengthens the congressional intent that, whenever possible, sampling shall be used." H. R. Conf. Rep. No. 94–1719, at 13; see also H. R. Rep. No. 94–944, at 6 ("Section 7 revises section 195 of title 13 which presently authorizes, but does not require, the use of sampling.

agreement on the proposition that "sampling and surveys" should be encouraged because they can both save money and increase the reliability of the population count, it is not at all surprising that no one objected to what was perceived as an obviously desirable change in the law.[6]

What is surprising is that the Court's interpretation of the 1976 amendment to §141 drains it of any meaning.[7] If the Court is correct, prior to 1976 the Secretary could have used sampling for any census-related purpose except apportionment, and after 1976 he retained precisely the same authority. Why, one must wonder, did Congress make this textual change in 1976?[8] The substantial revision of §141 cannot fairly be dismissed as "only a subtle change in phraseology." *Ante*, at 26. Indeed, it "tests the limits of reason to suggest" that this change had no purpose at all. *Id*. at 25.

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This clarifies congressional intent that, wherever possible, sampling shall be used").

[6] See H. R. Rep. No. 94–944, at 1; 122 Cong. Rec. 35171 (1976) (statement of Rep. Schroeder) ("Support for this bill has come from virtually every sector of American society"); see also Statement by President Gerald R. Ford on Signing H. R. 11337 into Law, October 18, 1976, 12 Weekly Comp. of Pres. Doc. 1535 (1976) ("[I]t will provide us with better data, of greater consistency, at a reduced cost").

[7] In its response to this dissent, the Court acknowledges that the "subtle change in phraseology" in §195 transformed a provision that simply permitted sampling into one that required sampling for non-apportionment purposes. *Ante*, at 26. But it fails to acknowledge that this change removed the only textual basis for its conclusion that §195 prohibits the use of statistical sampling for apportionment purposes. An exception from the grant of discretionary authority in the pre-1976 version of §195 may fairly be read to prohibit sampling, but that reasoning does not apply to an exception from a mandatory provision.

[8] See *Stone* v. *INS*, 514 U. S. 386, 397 (1995) ("When Congress acts to amend a statute, we presume it intends its amendment to have real and substantial effect").

II

Appellees have argued that the reference in Article I of the Constitution to the apportionment of Representatives and to direct taxes on the basis of an "actual Enumeration" precludes the use of sampling procedures to supplement data obtained through more traditional census methods. U. S. Const., Art 1, §2, cl. 3. There is no merit to their argument.

In 1787, when the Constitution was being drafted, the Framers negotiated the number of Representatives allocated to each State because it was not feasible to conduct a census.[9] See *Department of Commerce* v. *Montana*, 503 U. S. 442, 448, and n. 15 (1992). They provided, however, that an "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." U. S. Const., Art. 1, §2, cl. 3. The paramount constitutional principle codified in this clause was the rule of periodic reapportionment by means of a decennial census. The words "actual Enumeration" require post-1787 apportionments to be based on actual population counts, rather than mere speculation or bare estimate, but they do not purport to limit the authority of Congress to direct the "Manner" in which such counts should be made.

The July 1787 debate over future reapportionment of seats in the House of Representatives did not include any dispute about proposed methods of determining the population. Rather, the key questions were whether the rule of

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[9]Article I, §2, cl. 3, provides that "until such enumeration shall be made, the State of New Hampshire shall be entitled to chuse three, Massachusetts eight, Rhode-Island and Providence Plantations one, Connecticut five, New-York six, New Jersey four, Pennsylvania eight, Delaware one, Maryland six, Virginia ten, North Carolina five, South Carolina five, and Georgia three."

reapportionment would be constitutionally fixed and whether subsequent allocations of seats would be based on population or property. See 1 Records of the Federal Convention of 1787, pp. 57–71, 542, 559–562, 566–570, 578–579, 579–580, 586, 594 (M. Farrand ed. 1911); see also Declaration of Jack N. Rakove, App. 387 ("What was at issue . . . were fundamental principles of representation itself . . . not the secondary matter of exactly how census data was to be compiled"); J. Rakove, Original Meanings: Politics and Ideas in the Making of the New Constitution 70–74 (1996). The Committee of Style, charged with delivering a polished final version of the Constitution, added the term "actual Enumeration" to the draft reported to the Convention on September 12, 1787— five days before adjournment. 2 Records, *supra*, at 590–591. This stylistic change did not limit Congress's authority to determine the "Manner" of conducting the census.

The census is intended to serve "the constitutional goal of equal representation." *Franklin* v. *Massachusetts*, 505 U. S. 788, 804 (1992). That goal is best served by the use of a "Manner" that is most likely to be complete and accurate. As we repeatedly emphasized in our recent decision in *Wisconsin* v. *City of New York*, 517 U. S. 1, 3 (1996), our construction of that authorization must respect "the wide discretion bestowed by the Constitution upon Congress." Methodological improvements have been employed to ease the administrative burden of the census and increase the accuracy of the data collected. The "mailout-mailback" procedure now considered a traditional method of enumeration was itself an innovation of the 1970 census.[10] Requiring a face-to-face headcount would yield absurd results: For example, enumerators unable to gain entry to

[10] See M. Anderson, The American Census: A Social History 210–211 (1988).

a large and clearly occupied apartment complex would be required to note zero occupants. For this reason, the 1970 census introduced the Postal Vacancy Check– a form of sampling not challenged here– which uses sample households to impute population figures that have been designated vacant but appear to be occupied.[11] 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.

III

I agree with the Court's discussion of the standing of the plaintiffs in No. 98–564. I am also convinced that the House of Representatives has standing to challenge the validity of the process that will determine the size of each State's Congressional delegation. See *Powell* v. *McCormack*, 395 U. S. 486, 548 (1969) ("Unquestionably, Congress has an interest in preserving its institutional integrity"). As the District Court in No. 98–404 correctly held, the House has a concrete and particularized "institutional interest in preventing its unlawful composition" that satisfies the injury in fact requirement of Article III. 11 F. Supp. 2d 76, 86 (DC 1998). Accordingly, I respectfully dissent in both cases. I would reverse both judgments on the merits.

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[11] See U. S. Dept. of Commerce, Bureau of Census, Effect of Special Procedures to Improve Coverage in the 1970 Census (Dec. 1974).