SUPREME COURT OF THE UNITED STATES

No. 01–714

UTAH, ET AL., APPELLANTS *v.* DONALD L. EVANS, SECRETARY OF COMMERCE, ET AL.

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

[June 20, 2002]

JUSTICE THOMAS, with whom JUSTICE KENNEDY joins, concurring in part and dissenting in part.

Conducting a census to count over 200 million people is an enormously complicated and difficult undertaking. To facilitate the task, statisticians have created various methods to supplement the door-to-door inquiries associated with the "actual Enumeration" and "counting [of] the whole number of persons in each State" required by the Constitution. Art. I, §2, cl. 3; Amdt. 14, §2. Today we consider whether 13 U. S. C. §195 prohibits the use of one of these methods—hot-deck imputation—for apportionment purposes, and if not, whether its use is permissible under the Constitution. In accordance with our decision in *Franklin* v. *Massachusetts,* 505 U. S. 788 (1992), I believe that we have jurisdiction to consider these questions concerning the year 2000 census. For essentially the same reasons given by the Court, I agree that imputation is not prohibited by 13 U. S. C. §195.

I cannot agree, however, with the Court's resolution of the constitutional question. The Constitution apportions power among the States based on their respective populations; consequently, changes in population shift the balance of power among them. Mindful of the importance of calculating the population, the Framers chose their language with precision, requiring an "actual Enumeration,"

U. S. Const., Art. I, §2, cl. 3. They opted for this language even though they were well aware that estimation methods and inferences could be used to calculate population. If the language of the Census Clause leaves any room for doubt, the historical context, debates accompanying ratification, and subsequent early Census Acts confirm that the use of estimation techniques—such as "hot-deck imputation," sampling, and the like—do not comply with the Constitution.

I

The use of the statistical technique known as hot-deck imputation increased the final year 2000 census count by 1,172,144 people, representing 0.42 percent of the Nation's total population. U. S. Dept. of Commerce, Economics and Statistics Admin., Census 2000 Informational Memorandum No. 110, App. 443. Utilization of this method in the year 2000 census had important consequences for two States in particular, North Carolina and Utah: North Carolina gained one Representative and Utah lost one Representative as a result of hot-deck imputation. See *ante*, at 3.

While the Court has aptly described the process of "hot-deck imputation," several facts about this method are worth noting at the outset. The Census Bureau refers to hot-deck imputation procedures as "estimation." U. S. Dept. of Commerce, Decennial Statistical Studies Division, Census 2000 Procedures and Operations, Memorandum Series Q–34 (hereinafter Memorandum Series), App. 153, 156. It used this form of "estimation" for three different categories of units: (1) those units classified as occupied but with no population count (household size imputation), (2) those units that are unclassified (either occupied or vacant) but that "we know exist" (occupancy imputation), and (3) those units that are unclassified and are "either occupied, vacant, or delete" (status imputation). Memo-

randum Series B–17, *id.,* at 194–195. The "status imputation" category is the most troubling, because, as explained by the Department of Commerce, it refers to households "for which we know nothing," *id.,* at 195, and therefore which may not even exist.

The Census Bureau explains that "[f]or estimation purposes, six categories are defined" because each of the preceding types of units are divided into two groups: single unit addresses and multiunit addresses. *Ibid.* The Bureau calls the six categories "estimation categories," and permits only certain types of units for each category to be used as "donors." *Ibid.* The Bureau then uses these donor units, for which data has already been obtained, to impute characteristics to a neighboring unit that falls within the above categories.

Whether this "estimation" technique passes constitutional muster depends on an evaluation of the language of the Census Clause and its original understanding.[1]

II

The Framers constitutionalized the requirement that a census be conducted every decade. U. S. Const., Art. I, §2, cl. 3. In so doing, they chose their words with precision. Chief Justice Marshall instructed that "[a]s men whose intentions require no concealment, generally employ the words which most directly and aptly express the ideas they

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[1] We gave some consideration to a similar question in *Department of Commerce* v. *United States House of Representatives,* 525 U. S. 316 (1999), when considering a challenge to the Department of Commerce's decision to use statistical sampling in the decennial census for apportionment purposes. There was no need, however, to decide the constitutional question in that case because we held that 13 U. S. C. §195 "prohibits the use of sampling in calculating the population for purposes of apportionment." 525 U. S., at 340. Both JUSTICE STEVENS and JUSTICE SCALIA, however, weighed in on the matter. See *id.,* at 362–364 (STEVENS, J., dissenting); *id.,* at 346–349 (SCALIA, J., concurring in part).

intend to convey, the enlightened patriots who framed our constitution, and the people who adopted it, must be understood to have employed words in their natural sense, and to have intended what they have said." *Gibbons* v. *Ogden,* 9 Wheat. 1, 188 (1824). We should be guided, therefore, by the Census Clause's "original meaning, for '[t]he Constitution is a written instrument. As such its meaning does not alter. That which it meant when adopted, it means now.'" *McIntyre* v. *Ohio Elections Comm'n,* 514 U. S. 334, 359 (1995) (THOMAS, J., concurring in judgment) (quoting *South Carolina* v. *United States*, 199 U. S. 437, 448 (1905)).

Article I, §2, cl. 3, as modified by §2 of the Fourteenth Amendment, provides: "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." The Census Clause specifies that this "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." Art. I, §2, cl. 3.[2]

The Constitution describes the process both as "counting the whole numbers of persons" and as an "actual Enumeration." Dictionary definitions contemporaneous with the ratification of the Constitution inform our understanding. "Actual" was defined at the time of the founding as "really done: In *Metaphysics*, that is actual, or in act, which has a real being or existence, and is opposite to

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[2] The "actual Enumeration" was originally to be used both for apportionment of Members of the House of Representatives and for direct taxation. Adoption of the Sixteenth Amendment, however, removed the requirement of apportionment for direct taxes. U. S. Const., Amdt. 16 ("The Congress shall have power to lay and collect taxes on incomes, from whatever source derived, without apportionment among the several States, and without regard to any census or enumeration").

Potential." N. Bailey, An Universal Etymological English Dictionary (26th ed. 1789); see also T. Sheridan, A Complete Dictionary of the English Language (6th ed. 1796) (defining "actual" as "[r]eally in act, not merely potential; in act, not purely in speculation"). Sheridan defined "[e]numeration" as "[t]he act of numbering or counting over" and "[t]o enumerate" as "to reckon up singly; to count over distinctly." See also 1 S. Johnson, A Dictionary of the English Language 658 (4th rev. ed. 1773) (defining "enumerate" as "[t]o reckon up singly; to count over distinctly; to number"; and "enumeration" as "[t]he act of numbering or counting over; number told out"). "Count" was defined as "to number; to tell." *Id.,* at 435.[3] See also 1 N. Webster, An American Dictionary of the English Language (1828) ("To number; to tell or name one by one, or by small numbers, for ascertaining the whole number of units in a collection").

As JUSTICE SCALIA explained in *Department of Commerce* v. *United States House of Representatives,* 525 U. S. 316, 346–347 (1999) (opinion concurring in part), dictionary definitions contemporaneous with the founding "demonstrate that an 'enumeration' requires an actual counting, and not just an estimation of number." "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." *Id.,* at 347.[4] Nor can it be said that these definitions encompass estimates by imputation.[5]

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[3] The word "count" did not appear in the original version of Art. I, §2, cl. 3. It did, however, appear in the definitions of "enumeration."

[4] The parenthetical reflects the fact that JUSTICE SCALIA was construing a statutory provision so as to avoid serious constitutional doubt. See *House of Representatives, supra,* at 346 (opinion concurring in part).

[5] Moreover, while the Court states that the Constitution "uses a gen-

In addition, at the time of the founding, "conjecture" and "estimation" were often contrasted with the actual enumeration that was to take place pursuant to the Census Clause. During debate over the first Census Act, James Madison made such a distinction, noting that the census would provide an "exact number of every division" as compared to "assertions and conjectures." 2 The Founders' Constitution 139 (P. Kurland & R. Lerner eds. 1987) (hereinafter Founders' Constitution). Similarly, when describing a document containing the results of the first census, Thomas Jefferson noted the difference between the returns that were "actual" and those that were added in red ink by "conjectur[e]." 8 The Writings of Thomas Jefferson 229 (A. Lipscomb ed. 1903). George Mason, at one point, observed that he "doubted much whether the conjectural rule which was to precede the census, would be as just, as it would be rendered by an actual census." Founders' Constitution 108.[6]

Historians and commentators after the founding also distinguished actual enumerations from conjectures, demonstrating that there was a common understanding of these terms. For instance, an 1835 book about statistics

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eral word, 'enumeration,' that refers to a counting process without describing the count's methodological details," *ante*, at 18, the meaning of "enumeration" has not materially changed since the time of the founding. To "enumerate" is now defined as "to ascertain the number of: count," and also "to specify one after another: list." See Webster's Ninth New Collegiate Dictionary 416 (1988). "Enumeration" meant at the time of the founding, as it does now, to count individually and specifically and simply does not admit of various counting methodologies.

[6] By "conjectural rule," we can presume that he meant to refer to the population estimates used by the Constitutional Convention to determine the number of Representatives of Congress from each State prior to the first census. See H. Alterman, Counting People: The Census in History 188 (1969) (hereinafter Alterman).

in the United States explains that "[t]he number of inhabitants in this country, prior to its separation from Great Britain, rests principally on conjectural estimates." T. Pitkin, A Statistical View of the Commerce of the United States of America 582 (hereinafter Pitkin); see also Brief for Appellants 40–41. Prior to the revolution, when the British Board of Trade called upon the Governors to provide an account of their populations, some Colonies made "actual enumerations," such as Connecticut in 1756 and in 1774, while others made estimates "founded upon the number of taxable polls, or the number of the militia." Pitkin 582–583. A widely cited 1800 article published in England by John Rickman after the first United States census also used the term "actual enumeration" several times to describe the count that "must always be under the real number," noting at the same time that this "method (fraught with trouble and expence) attempts an accuracy not necessary, or indeed attainable, in a fluctuating subject." John Rickman's Article on the Desirability of Taking A Census, reprinted in D. Glass, Numbering the People 111 (1973) (hereinafter Glass). See also Brief for Appellants 47. Discussion of an "actual enumeration" can be contrasted to his subsequent proposal for England, which included estimation methods resembling both sampling and imputation since Rickman deemed it appropriate to make "general inferences" from modern registers to make up for deficient registers. Glass 111–112.

To be sure, the Census Clause enables Congress to prescribe the "Manner" in which the enumeration is taken. The Court suggests that "enumeration" implies the breadth of Congress' methodological authority, rather than its constraints. See *ante*, at 18. But while Congress may dictate the manner in which the census is conducted,[7]

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[7] As described *infra*, at 16–17, Congress has implemented this power

it does not have unbridled discretion. For the purposes of apportionment, it must follow the Constitution's command of an "actual Enumeration." Madison made this point clear during debate of the first Census Act when he noted the difficulties "attendant on the taking the census, in the way required by the constitution, and which we are obliged to perform." Founders' Constitution 139.

The Court also places undue weight on the penultimate version of the Clause, the iteration that was given to the Committee of Detail and Committee of Style. See *ante*, at 18–19. Whatever may be said of the earlier version, the Court rejected a similar reliance in *Nixon* v. *United States,* 506 U. S. 224, 231 (1993), because "we must presume that the Committee's reorganization or rephrasing accurately captured what the Framers meant in their unadorned language." Carrying the majority's "argument to its logical conclusion would constrain us to say that the *second to last draft* would govern in every instance where the Committee of Style added an arguable substantive word. Such a result is at odds with the fact that the Convention passed the Committee's version, and with the well-established rule that the plain language of the enacted text is the best indicator of intent." *Id.,* at 231–232.

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in a variety of ways, such as by authorizing marshals to "cause the number of the inhabitants to be taken" and to appoint as many assistants as necessary, establishing the timeframe within which the census is to be completed, and setting methods of payment for assistants. Act of Mar. 1, 1790, §1, reprinted in C. Wright, History and Growth of the United States Census (prepared for the Senate Committee on the Census), S. Doc. No. 194, 56th Cong., 1st Sess., 925 (1900) (hereinafter Wright). In recent years, the Bureau through its delegated power has adopted a number of measures to reduce error, including "an extensive advertising campaign, a more easily completed census questionnaire, and increased use of automation, which among other things facilitated the development of accurate maps and geographic files for the 1990 census." *Wisconsin* v. *City of New York,* 517 U. S. 1, 8 (1996).

Rather than rely on the draft, I focus on the words of the adopted Constitution.

III

The original understanding can be discerned not only by examining the text but also by considering the "meaning and intention of the convention which framed and proposed it for adoption and ratification to the conventions of the people of and in the several states." *Rhode Island* v. *Massachusetts,* 12 Pet. 657, 721 (1838). The history of census taking in the Colonies and elsewhere, discussions surrounding the ratification of the Census Clause, and the early statutes implementing the Clause provide insight into its meaning.

A

Census taking is an age-old practice. With only a few exceptions, however, before the 19th century most countries conducted partial enumerations that were supplemented by estimates of the unenumerated portion of the population. Wolfe, Population Censuses Before 1790, 27 J. Am. Statistical Assn. 357 (1932) (hereinafter Wolfe). The contentious history of censuses, partial or otherwise, has long influenced decisions about whether to undertake them. See *id.,* at 358 ("The Biblical account of the Lord's wrath at the taking of [the 'census' taken by David] remained an argument against census taking even as late as the eighteenth century").[8] It is a history rampant with manipulation for political and fiscal gains. See generally

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[8] This traditional religious objection to census taking was based on the "sin of David, who brought a plague upon Israel by 'numbering' the people (2 Sam. 24:1–25, 1 Chron. 21:1–30)." P. Cohen, A Calculating People 256, n. 24 (1982) (hereinafter Cohen). Some colonial governors apparently blamed their inability to administer censuses on this fear, although it is unclear to what extent this actually reflected public sentiment. *Ibid.*

id., at 359–370; Alterman 43, 54; Glass 19–20.

At times, political resistance to censuses precluded their taking. Suspicion of government and opposition on religious grounds, for example, prevented a general census in France during the 18th century. Wolfe 367; see also Alterman 49. And in England, while "estimates and conjectures" as to changes in the population were frequently made in the 18th century, a 1753 proposal to provide for a general enumeration was rejected by Parliament, because it was thought that a census might reveal England's "weakness to her enemies," and that it might be followed by "some public misfortune or epidemical distemper." Wolfe 368 (internal quotation marks omitted).[9]

England was in part responsible for the first colonial censuses, as the British Board of Trade required population counts so that it could properly administer the Colonies. D. Halacy, Census: 190 Years of Counting America 29 (1980) (hereinafter Halacy). The Colonies had their own encounters with various population counting methods. Prior to 1790, there were at least 38 population counts taken in the Colonies. See Alterman 165. According to one historian, however, there was "reason to suspect, [that the censuses were] often intentionally misleading, when officials, on the one hand of the boastful, or on the other hand of the timid type, thought to serve some interest by exaggeration or by understatement." F. Dexter, Estimates of Population in the American Colonies, in Proceedings of the American Antiquarian Society 22 (1887) (hereinafter Dexter).

Many Americans resisted census-taking efforts. Ac-

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[9] The 1753 bill contemplated by the British Parliament received a great deal of publicity and attention. Glass 17. The proposal provided that overseers would "go from house to house in their parishes, recording the numbers of persons actually dwelling in each house during the twelve preceeding hours." *Id.,* at 18.

cording to an 1887 inventory of the Colonies' attempts at population estimates, "Connecticut pursued in her colonial history the policy of hiding her strength in quietness; so far as might not be inconsistent with general truthfulness, she preferred to make no exhibit of her actual condition." *Id.,* at 31.[10] A 1712 census in New York "met with so much opposition, from superstitious fear of its breeding sickness, that only partial returns were obtained." *Id.,* at 34 (citations omitted). See also Century 3. In New Jersey, the population counts of the mid-18th century apparently comprised "such guesses as the Royal Governors could make, for the satisfaction of their superiors." Dexter 36. In 1766, Benjamin Franklin "supposed that there might be about 160,000 whites in Pennsylvania . . . but he did not profess to speak with accuracy, and was under a bias which led him, perhaps unconsciously, into cautious understatement." *Id.,* at 38. Georgia was apparently "singularly misrepresented, being overestimated in the Federal Convention of 1787 at nearly half as much again as her real amount of population, while the rest of the colonies were underestimated considerably,—the total of the Convention's figures falling short of the reality by more than half a million." *Id.,* at 49.

The Framers also had experience with various statistical techniques. For example, Thomas Jefferson, who as Secretary of State would later be charged with running the first official national census, had a great interest in mathematics and numbers. See Halacy 33; Cohen 112–

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[10] See also Dept. of Commerce and Labor, A Century of Population Growth: From the First Census of the United States to the Twelfth, 1790–1900, p. 4 (1909) (hereinafter Century) ("The people of Massachusetts and Connecticut manifested considerable opposition to census taking, seeing no advantage in it to themselves, and fearing that in some way the information obtained would be used by the British authorities to their disadvantage").

113. In 1782, Jefferson estimated Virginia's population and his calculation exhibited an awareness that statistical estimation techniques could be used to calculate population. Virginia had been unable to manage a full census for the Continental Congress; eight counties had failed to turn in any census data. J. Cassedy, Demography in Early America: Beginnings of the Statistical Mind, 1600–1800, p. 228 (1969) (hereinafter Cassedy). Jefferson had to extrapolate from incomplete tax returns, militia muster rolls, and other data. Nonetheless, he produced an estimate of 567,614. *Ibid.* First, he listed certain known facts, including data about Virginia's population in all but eight counties. In the eight counties for which information was not available, he knew that there had been 3,161 men in the militia in 1779 and 1780. He then listed five assumptions, such as "[t]he number of people under 16 years of age was equal to the number 16 years and over," on which he based his final estimate. Alterman 168–169.

Another elaborate effort at population calculation was undertaken by the Governor of Massachusetts in 1763, who estimated his Colony's population in three ways. First, he made an estimate from a return to the General Court of "'rateable polls'" of males over 16 eligible to vote. He added an estimate of males who were too poor to pay the poll tax, and then added similar numbers of females. He made another estimate by multiplying the militia returns by four. He calculated a third estimate from the number of houses. Since many believed that houses averaged five occupants and others "preferred five and a half," he used both numbers. After giving the British Board of Trade several numbers, however, he concluded that the "actual population was none of these figures" and the population was in fact higher. Cassedy 73. In any event, "[s]ince all of the returns used in the estimates had been made for tax purposes, it was understood that they would be well on the low side." *Ibid.*

The Framers were quite familiar not only with various census-taking methods but also with impediments to their successful completion. The Continental Congress had already used population estimates to make decisions about taxation, and such efforts were met with resistance. In 1775, the Continental Congress had ascertained population estimates for the Colonies in order to apportion the taxes and costs of the Revolutionary War. Pitkin 583. See also Halacy 30–31 ("Debts incurred in the Revolutionary War hastened the ordering of a standard form of census. A census of the colonies had been ordered, but some of them never complied, and the rest did so in different ways"). New Hampshire in particular complained that the estimate of its population for the purposes of calculating Revolutionary War costs was too high. Pitkin 583. It had "caused an actual enumeration to be . . . made, by which it appeared, that the number of her inhabitants" was 20,000 lower than the estimate. *Ibid.* See also Brief for Appellants 47. New Hampshire petitioned the Continental Congress to change the amount of taxation. New Hampshire's effort was in vain, because Congress "refused to alter her proportion of her taxes on that account." *Ibid.* See also 10 New Hampshire Provincial and State Papers 580 (reprint 1973) ("[T]he [proportion of taxes assigned New Hampshire by Congress in 1781] is too high by a very considerable sum, that by our numbers which were taken in the year 1775 by the selectmen of the several Towns & Parishes & Return made under Oath . . . this proportion will appear much too large").

B

The Framers knew that the calculation of populations could be and often were skewed for political or financial purposes. Debate about apportionment and the census consequently focused for the most part on creating a standard that would limit political chicanery. While the

Framers did not extensively discuss the method of census taking, many expressed the desire to bind or "shackle" the legislature so that neither future Congresses nor the States would be able to let their biases influence the manner of apportionment. See Founders' Constitution 103–104. As Madison explained:

> "In one respect, the establishment of a common measure for representation and taxation will have a very salutary effect. As the accuracy of the census to be obtained by the Congress will necessarily depend, in a considerable degree, on the disposition, if not on the co-operation of the States, it is of great importance that the States should feel as little bias as possible to swell or to reduce the amount of their numbers. Were their share of representation alone to be governed by this rule, they would have an interest in exaggerating their inhabitants. Were the rule to decide their share of taxation alone, a contrary temptation would prevail. By extending the rule to both objects, the States will have opposite interests which will control and balance each other and produce the requisite impartiality." The Federalist No. 54, pp. 340–341 (C. Rossiter ed. 1961).

Alexander Hamilton likewise noted, in a discussion about the proportion of taxes that "[a]n actual census or enumeration of the people must furnish the rule, a circumstance which effectually shuts the door to partiality or oppression." *Id.,* No. 36, at 220.

Discussion revealed a keen awareness that absent some fixed standard, the numbers were bound to be subject to political manipulation. While Governor Morris appears to have been one of the strongest opponents of "fettering the Legislature too much," he at least recognized that if the mode for taking the census was "unfixt the Legislature may use such a mode as will defeat the object: and per-

petuate the inequality." Founders' Constitution 102. He believed, however, that "[i]f we can't agree on a rule that will be just at this time, how can we expect to find one that will be just in all times to come." *Id.,* at 104. Edmund Randolph, on the other hand, noted that if dangers suggested by Governor Morris were "real, of advantage being taken of the Legislature in pressing moments, it was an additional reason, for tying their hands in such a manner that they could not sacrifice their trust to momentary considerations." *Id.,* at 103.

During debate of a proposal "to take a periodical census," George Mason noted that he "did not object to the conjectural ratio which was to prevail in the outset" for apportionment, prior to the census, but "considered a Revision from time to time according to some permanent & precise standard as essential to . . . fair representation." *Id.,* at 102–103. "From the nature of man," Mason observed, "we may be sure, that those who have power in their hands will not give it up while they can retain it. On the Contrary we know they will always when they can rather increase it." *Id.,* at 103.

Some who initially believed that the Congress should have discretion changed their minds after listening to the arguments by Randolph, Mason, and others. Sherman, for example, "was at first for leaving the matter wholly to the discretion of the Legislature; but he had been convinced by the observations of (Mr. Randolph & Mr. Mason) that the *periods* & the *rule* of revising the Representation ought to be fixt by the Constitution." *Id.,* at 104. Ghorum perceptively noted that "[i]f the Convention who are comparatively so little biased by local views are so much perplexed, How can it be expected that the Legislature hereafter under the full biass of those views, will be able to settle a standard." *Ibid.* On the other hand, Reid continued to believe that "the Legislature ought not to be too much shackled." *Ibid.* He also thought that "[it] would make

the Constitution like Religious Creeds, embarrassing to those bound to conform to them & more likely to produce dissatisfaction and Scism, than harmony and union." *Ibid.*

While debate continued, with various iterations of the clause considered, it was clear that the principle concern was that the Constitution establish a standard resistant to manipulation. As Justice Story later observed, "apportion[ing] representatives among the states according to their relative numbers . . . had the recommendation of great simplicity and uniformity in its operation, of being generally acceptable to the people, and of being less liable to fraud and evasion, than any other, which could be devised." Commentaries on the Constitution of the United States §327, p. 238 (R. Rotunda & J. Nowak eds. 1987).

C

We have long relied on contemporaneous constructions of the Constitution when interpreting its provisions, for "early congressional enactments 'provid[e] "contemporaneous and weighty evidence" of the Constitution's meaning.'" *Printz* v. *United States,* 521 U. S. 898, 905 (1997) (citations omitted). See also *Myers* v. *United States,* 272 U. S. 52, 175 (1926) ("This Court has repeatedly laid down the principle that a contemporaneous legislative exposition of the Constitution when the founders of our Government and framers of our Constitution were actively participating in public affairs, acquiesced in for a long term of years, fixes the construction to be given its provisions") (collecting cases). Accordingly, I turn next to the early Census Acts, which provide significant additional evidence that the Framers meant what they said in adopting the words "actual Enumeration."

From the first census, Congress directed that the census be taken by actually counting the people. *House of Representatives*, 525 U. S., at 335. Congress enacted a series of requirements for how to accomplish the counting; none

mention the use of sampling or any other statistical technique or method of estimation. Rather, the first Census Act described, among other things, how many census takers (or deputies) could be used, their pay, the consequences of falsifying papers, what address to attribute to persons who had more than one address, and how to count those who did not have an address. Congress ordered the first census to begin on August 2, 1790, and to be completed within nine months. Century 45. Marshals and their assistants were required to "take an oath or affirmation" to "'truly cause to be made, a just and perfect enumeration and description of all persons resident within [their] district[s].'" Act of Mar. 1, 1790, §1, reprinted in Wright 925.

The Act required marshals to aggregate the numbers, but there was no provision allowing the marshals to estimate or extrapolate in order to fill in missing data. The Act provided that the "assistants" could, for a particular family, use data given by one member of that family. But the information could be taken only from persons over age 16, and these persons were required to give the assistant "a true account." §6, *id.,* at 926. No other method of counting appears to have been permissible. And failure to make a return or falsifying a return triggered heavy monetary penalties and the threat of prosecution. §§2, 3, *ibid.* In 1810, Congress added an express statement that "'the said enumeration shall be made by an actual inquiry at every dwelling-house, or of the head of every family within each district, and not otherwise.'" *House of Representatives, supra*, at 335 (citing Act of Mar. 26, 1810, §1, 2 Stat. 565–566). The provision requiring census takers to visit personally each home appeared in statutes governing the next 14 censuses. See 525 U. S., at 335–336, and n. 5 (surveying Census Acts).

There was widespread awareness that the early censuses were not entirely accurate. The enumerators con-

fronted many problems, including confusion regarding which houses belonged to which districts, danger on the roads, the unwillingness of citizens to give the required information, superstition, and a fear from some that the census was connected to taxation. Century 45–46. For example, in a 1791 letter from George Washington to Governor Morris dated before the first census was complete, Washington noted the difference between the "enumeration" and an estimate he had previously given, and acknowledged that the official census would not be accurate:

> "In one of my letters to you the account which I gave of the number of inhabitants which would probably be found in the United States on enumeration, was too large. The estimate was then founded on the ideas held out by the Gentlemen in Congress of the population of their several States, each of whom (as was very natural) looking thro' a magnifying glass would speak of the greatest extent, to which there was any probability of their numbers reaching. Returns of the Census have already been made from several of the States and a tolerably just estimate has been formed now in others, by which it appears that we shall hardly reach four millions; but one thing is certain our *real* numbers will exceed, greatly, the official returns of them." 31 Writings of George Washington 329 (J. Fitzpatrick ed. 1931).

Apparently concerned about the effect that the results of the first census would have on foreign opinion, Jefferson, in a 1791 letter sending the results abroad, explained: "I enclose you a copy of our census, which, so far as it is written in black ink, is founded on actual returns, what is in red ink being conjectured, but very near the truth. Making very small allowance for omissions, which we know to have been very great, we may safely say we are

above four millions." 8 Writings of Thomas Jefferson, at 229. While perhaps disappointed with the results of the census, he noted the difference between the returns that were "actual" and those that were added in red ink by "conjectur[e]." *Ibid.*[11] There is no suggestion, however, that his additional "conjectures" were used for apportionment. See T. Woolsey, The First Century of the Republic 221 (1876); Alterman 205. "Despite its deficiencies, the census provided the factual base about the American people which officials and scholars needed." Cassedy 220. Thus, while the Court asserts that there was a "strong constitutional interest in accuracy," *ante*, at 22, the stronger suggestion is that the Framers placed a higher value on preventing political manipulation.

IV

The text, history, and a review of the original understanding of the Census Clause confirm that an actual enumeration means an actual count, without estimation. While more sophisticated statistical techniques may be available today than at the time of the founding, the Framers had a great deal of familiarity with alternative methods of calculating population. They decided to constitutionalize the arduous task of an actual enumeration. I am persuaded that much like the earlier methods of estimation, hot-deck imputation—a modern statistical technique that the Census Bureau refers to as "estimation"—is not constitutionally permissible.

In recent decades, decisions regarding whether, and

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[11] It was later believed that the disappointment was "largely due to the exaggerated estimates of colonial population." Wright 17. See also Alterman 205 ("Many census historians believe, as Washington hinted . . . that the disappointment was due to the exaggerated hopes born of a newly won independence, as well as to the unrealistic estimates of the colonial population").

what kind of, imputation and other statistical methods should be utilized have changed from administration to administration. Departing from past practice, imputation was first used in the 1960 census. The Bureau has used some form of it in every decennial census since then. Plaintiffs' Statement of Undisputed Facts, App. 44; Response to Plaintiffs' Statement of Material Facts, *id.,* at 222. In the 1970 census, about 900,000 persons were imputed to the apportionment count through household size and occupancy imputation. The Census Bureau also used a form of estimation that combined imputation and sampling. Declaration of Howard Hogan, *id.,* at 268–269 (hereinafter Hogan). In 1980, the use of imputation shifted one seat in the House of Representatives from Indiana to Florida, *id.,* at 46, 224, making the year 2000 census at least the second time that its use has changed apportionment.[12]

At the earliest, status imputation was used in the year 1990 census, although there is some dispute as to whether it was even used then. *Id.,* at 45–46, n. 4; but see *id.,* at 223 (stating that "the 1990 imputation procedures continued the prior practice of using household size imputation and occupancy imputation but added status imputation"). Regardless, it apparently had no impact on apportionment. See *id.,* at 45–46, n. 4. In the year 1990 census, the Secretary specifically decided against using a different form of estimation. The "Secretary's administrative decision declining to make an adjustment observed that '[t]he imputation scheme used . . . [was] based on a series of assumptions that are mostly guesswork.'" Brief for Federal Petitioners in *Wisconsin* v. *City of New York,* O. T.

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[12]The Bureau states it "no longer has data available to determine whether count imputation affected apportionment in the 1960 or the 1970 Censuses." App. 224.

1995, Nos. 94–1614 etc., p. 8. The Secretary even noted that "large-scale statistical adjustment of the census through [this method] would 'abandon a two hundred year tradition of how we actually count people,'" and that "statistical adjustment of the 1990 census might open the door to political tampering in the future." *Wisconsin* v. *City of New York,* 517 U. S. 1, 10–12 (1996).

Though different in kind, our recent history of experimentation with census-taking methods bears similarity to the various preratification estimates and enumerations. While I would not speculate about the Bureau's decision-making process, it is quite evident that the Framers, aware that the use of any estimation left the door open to political abuse, adopted the words "actual Enumeration" to preclude the availability of methods that permit political manipulation.

Additionally, hot-deck imputation is properly understood as an estimation, which by definition cannot be an actual counting of persons. The Court contends that imputation does not differ in principle from other traditional methods of counting, such as questioning of "'neighbors, landlords, postal workers, or other proxies'" about the number of inhabitants in a particular place. *Ante,* at 21. But that point is flawed in several important respects. To begin with, from the first census, such information was taken through an actual inquiry of a family member who was over the age of 16. Act of Mar. 1, 1790, §6, reprinted in Wright 926. That household member was "obliged to render to such assistant of the division, a true account, if required, to the best of his or her knowledge, of all and every person belonging to such family respectively . . . on pain of forfeiting twenty dollars, to be sued for and recovered by such assistant." *Ibid.* Estimation was not allowed and family members who were caught providing false information were subject to fines.

Questioning neighbors was not permitted until 1880 and

even then census data could only be based on information provided by those "living nearest to such place of abode." Act of Mar. 3, 1879, §8, *id.,* at 937. Again, family members or agents of families were required by law "to render a true account" and those who "willfully fail[ed] or refuse[d]" were "guilty of a misdemeanor" and required to "pay a sum not exceeding one hundred dollars." §14, *id.,* at 938. That process is far different from a computation where data about one "donor" house, that appears on "Census Burea[u] records," Hogan, App. 255, compiled far away from the actual residence, is used to estimate data about another. With "status imputation," for example, the Census Bureau is willing to impute data even though it categorizes these households as "Donees" "for which we know nothing." Memorandum Series B–17, *id.,* at 195. While subsequent Acts may permit other forms of proxy, they do not assist with our analysis of the original understanding. Nor are we called upon to judge their constitutionality here. 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.

The Court's further reflection that "the Bureau's only choice is to disregard the information it has, using a figure of zero, or to use imputation in an effort to achieve greater accuracy," *ante*, at 22, makes no difference as to whether it is constitutionally permissible. Even if hot-deck imputation produces more accurate results (and we do not have the means to answer that question), the Framers well understood that some Americans would go uncounted. Accuracy is not the dispositive factor in the constitutional consideration. Despite their awareness that estimation techniques could be used to supplement data, the Framers chose instead to require an "actual Enumeration" or "counting of whole persons." Disappointment following the first census did not prompt a change in this view or in

the text. A zero must remain a zero under the dictates of the Constitution.

The Court takes the position that "enumeration" may be incompatible with gross statistical estimates, but concludes that such gross estimates are not at stake here. See *ante*, at 20. I derive little comfort from the fact that the Court has drawn a constitutional line at "'gross statistical estimates.'" *Ibid.* The Court neglects to explain the boundaries of such gross estimates, begging the question of how "gross" must "gross" be? The Court nonchalantly comments that the Census Bureau used the method "sparingly," see *ante*, at 21, and that the "inference involves a tiny percent of the population," *ante,* at 24. But the consequences are far from trivial. One State's representation in Congress is reduced while another's is fortified. If the use of hot-deck imputation in the next Census shifts the balance of power in "only" two or three seats, will the Court continue to defend the method? Today, we deal with hot-deck imputation. But if history is our guide, surely other statistical methods will be employed in future censuses and there will be similar challenges. By accepting one method of estimation as constitutionally permissible, the Court has opened the door, and we will be continually called to judge whether one form of estimation is more acceptable than another.[13]

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After much debate and faced with a long history of political manipulation, the Framers decided to make the taking of an "actual Enumeration" a constitutional requirement. While other nations had attempted population

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[13] See *House of Representatives*, 525 U. S., at 349 (SCALIA, J., concurring in part) ("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").

counts, none had made the count itself an important method of maintaining democracy by mandating it through a founding document. As a leading French statistician noted: "The United States presents in its history a phenomenon that has no parallel—that of a people who initiated the statistics of their country on the very day that they formed their government, and who regulated, in the same instrument, the census of their citizens, their civil and political rights, and the destiny of their people." Alterman 164. Well familiar with methods of estimation, the Framers chose to make an "actual Enumeration" part of our constitutional structure. Today, the Court undermines their decision, leaving the basis of our representative government vulnerable to political manipulation.

For the reasons stated above, I respectfully dissent from Part IV of the Court's opinion and would reverse the judgment of the District Court.