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# To Count and be Counted: A Response to Professor Levinson

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**TO COUNT AND BE COUNTED:  
A RESPONSE TO PROFESSOR LEVINSON**

MARCIA L. MCCORMICK\*

INTRODUCTION

The title of Professor Levinson's lecture, "Who Counts?" "Sez Who?,"<sup>1</sup> and his exposition of that topic are especially provocative. The question is a moving target, asking at one turn, who is counted and for what purpose, then moving to whose needs or interests matter, and finally to who does the deciding about either the "who" or the "counting." All of these are questions that, as he notes, are dodged on a regular basis by scholars and policy makers alike.

Levinson illustrates how, over time, our concept of identity has shifted from innate and immutable to at least partially fluid and constructed—and illuminates the problem of indeterminacy of the essentially contested concepts that make up all of the questions in this area. This indeterminacy is contrasted with the inevitability of needing to draw lines to create a functioning community.

In the end, Professor Levinson focuses on mediating institutions as the solution to this latter problem—not necessarily a solution to who *ought* to decide, but rather the practical solution to who *does* decide. And some of the mediating bodies he focuses on are government bodies. They may be problematic in the way they shape community, but they are minimally problematic because they are accountable; institutions he describes as self-justifying or at least somewhat democratically legitimate. And in this way, without solving the problem of who should be the counters and who the counted, the paper leaves us feeling less hopeless than we might otherwise.

I want to expand on these illustrations in a few ways: to deepen the discussion of identity and its effects; to consider less formal, less politically

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1. Sanford Levinson, "Who Counts?" "Sez Who?," 58 ST. LOUIS U. L.J. 937 (2014).

legitimate mediating institutions, to consider more fully what people want to matter for—in their own eyes and some community’s; and then finally what an alternate view of community might be. I think that a deeper framing of this question shows how fundamental these matters are, how vital it is that we work to answer them, and in the end how inseparable the “who” is from the “counting.”

### I. IDENTITY: FORMATION AND EFFECTS

Let me start with identity. Identity is complicated, of course, and multifaceted. I will use my own as an example. Most would describe my identity in terms of race and sex. If I asked other people what my identity was, they would say I was a white woman. As I’ll discuss below, this is just a small part of my identity, but it is one that is highly visible.

The initial question that could be asked in response is, what is race and what is sex? What makes me at least appear to be white and female? And how is that different from saying that I am black and female, black and male, or white and male, for example? To answer questions about these identities, we have generally resorted to the same sources: genes, biological or phenotypical generalities, and finally cultural constructs.<sup>2</sup> For race, the scientific community has reached a fairly broad consensus that there is as much genetic and biological diversity within so-called racial groups and maybe more, as there is between them.<sup>3</sup> Sex is more strongly linked to genetics and biological and phenotypical generalities, but there is much more variation among humans than our culture tends to recognize.<sup>4</sup> And the boundaries of these identities are especially contested when links between biological concepts of identity and behavior are explored. There are some works that purport to link race with behavioral characteristics,<sup>5</sup> but they are not generally accepted as valid in the

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2. ANN MORNING, *THE NATURE OF RACE: HOW SCIENTISTS THINK AND TEACH ABOUT HUMAN DIFFERENCE* 29 (2011). Interestingly, race appears to have arisen as a popular concept that was later embraced by scientists. *Id.* at 25–26; *see also* CATHARINE A. MACKINNON, *SEXUAL HARASSMENT OF WORKING WOMEN: A CASE OF SEX DISCRIMINATION* 149–58 (1979).

3. *See* Lynn B. Jorde & Stephen P. Wooding, *Genetic Variation, Classification, and “Race”*, 36 *NATURE GENETICS* S28, S32 (2004); *see also* *Is Race “Real”?*, SOC. SCI. RES. COUNCIL, <http://raceandgenomics.ssrc.org/> (last visited Nov. 22, 2013) (providing a forum for scientists to discuss the state of the science on race).

4. *See* HANNE BLANK, *STRAIGHT: THE SURPRISINGLY SHORT HISTORY OF HETEROSEXUALITY* (2012); JUDITH BUTLER, *BODIES THAT MATTER: ON THE DISCURSIVE LIMITS OF SEX* (1993); JUDITH BUTLER, *UNDOING GENDER* (2004); MACKINNON, *supra* note 2.

5. *E.g.*, RICHARD J. HERRNSTEIN & CHARLES MURRAY, *THE BELL CURVE: INTELLIGENCE AND CLASS STRUCTURE IN AMERICAN LIFE* (1994); J. PHILIPPE RUSHTON, *RACE, EVOLUTION, AND BEHAVIOR: A LIFE HISTORY PERSPECTIVE* (Charles Darwin Res. Inst. 3d ed. 2000) (1995).

scientific community.<sup>6</sup> Much like the link between biology and sex, and perhaps because of it, the link between sex and behavior is considered to be stronger; nonetheless, scientists debate whether “sex” encompasses only the biological differences that are true for all or nearly all women, or also differences in behavior that are believed to be linked to sex.<sup>7</sup>

To some extent, asking about identity is a quest for essentialism, which is the notion that members of a group share at least one defining quality or essence that is internal to the person and fixed.<sup>8</sup> And to ask about one aspect of identity is to pretend that parts of identity can be separated as discrete from other parts, when in reality, identities are intertwined in a way that makes lived experiences significantly different among members of what looks like one group.<sup>9</sup> An alternative approach is that groups are made by categorizing things as a matter of social invention alone.<sup>10</sup> Social meanings can change through an evolutionary process over time, or suddenly as an act of will. Race is at the very least largely a social construct,<sup>11</sup> and much of what we think of as sex turns out also to be socially constructed.<sup>12</sup> This is not to say that the thing that

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6. See Leonard Lieberman, *How “Caucasoids” Got Such Big Crania and Why They Shrank: From Morton to Rushton*, 42 CURRENT ANTHROPOLOGY 69, 80 (2001).

7. Compare LOUANN BRIZENDINE, *THE FEMALE BRAIN* 8 (2006) (arguing that the different behaviors of women and men are linked to neurological differences), with CORDELIA FINE, *DELUSIONS OF GENDER: HOW OUR MINDS, SOCIETY, AND NEUROSEXISM CREATE DIFFERENCE*, at xxiv–xxv (2010) (pointing out the weaknesses in research linking behavior to neurological differences and arguing that researchers’ biases make them construct findings to support those differences), and REBECCA M. JORDAN-YOUNG, *BRAIN STORM: THE FLAWS IN THE SCIENCE OF SEX DIFFERENCES*, at xii–xiii (2010) (same). We also have a separate term for cultural and behavioral aspects of sex performance—gender. We don’t have a similar term for race.

8. See MORNING, *supra* note 2, at 12.

9. See Kimberle Crenshaw, *Demarginalizing the Intersection of Race and Sex: A Black Feminist Critique of Antidiscrimination Doctrine, Feminist Theory and Antiracist Politics*, 1989 U. CHI. LEGAL F. 139 (1989); Kimberle Crenshaw, *Mapping the Margins: Intersectionality, Identity Politics, and Violence Against Women of Color*, 43 STAN. L. REV. 1241 (1991). See generally RACE-ING JUSTICE EN-GENDERING POWER: ESSAYS ON ANITA HILL, CLARENCE THOMAS, AND THE CONSTRUCTION OF SOCIAL REALITY (Toni Morrison ed., 1992) (describing the interplay between race and sex in the controversy surrounding the appointment of Clarence Thomas and the allegations that he sexually harassed Anita Hill).

10. IAN HACKING, *THE SOCIAL CONSTRUCTION OF WHAT?* (1999); see also AM. SOCIOLOGICAL ASS’N, *THE IMPORTANCE OF COLLECTING DATA AND DOING SOCIAL SCIENTIFIC RESEARCH ON RACE* (2003), available at [http://www2.asanet.org/media/asa\\_race\\_statement.pdf](http://www2.asanet.org/media/asa_race_statement.pdf).

11. MORNING, *supra* note 2, at 32, 36. That is not to say that scientists across disciplines have reached consensus that race is purely a social construct with no biological basis. *Id.* at 36–38, 47–48. Some disciplines have reached that consensus, however. *Id.* at 32.

12. See MACKINNON, *supra* note 2, at 152–58.

defines the group is not “real”—in fact, there are real social consequences for these categorizations.<sup>13</sup>

The state of the art tells us that identity is a complicated negotiation between society and the individual.<sup>14</sup> To some extent, individuals can label themselves,<sup>15</sup> and to some extent, society or some outsider is the labeler of a person’s race or sex.<sup>16</sup> Although individuals can self-label, that ability is limited by what outsiders will accept, which in turn is limited by what popular notions of identity characteristics are. So a person with very dark skin, dark eyes, and extremely curly hair may self-identify as white, but outsiders may not accept that label, given the phenotypical generalities that we associate with blackness and whiteness as racial concepts.

Moreover, the process of identifying does not involve a process of full communication. A perceiver does not withhold judgment about an individual’s identity until after asking that individual about his or her identity. In fact, the question may not get asked at all unless an individual occupies ambiguous territory. Thus, an individual cannot necessarily control how he or she will be labeled by others. Even more important, once the external label is affixed to a person, and if not easily visible then otherwise known to an observer, the label and public attitudes towards that identity shape an individual’s behavior in ways we tend to think are unrelated to identity. For example, study after study has shown the way that, when a person is a member of a stigmatized group, that person performs a task like math or problem solving more poorly when the person believes the audience knows their group identity than he or she does if

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13. WILLIAM I. THOMAS & DOROTHY SWAINE THOMAS, *THE CHILD IN AMERICA: BEHAVIOR PROBLEMS AND PROGRAMS* 571–72 (1928), *quoted in* MORNING, *supra* note 2, at 14. *See also generally* AM. SOCIOLOGICAL ASS’N, *supra* note 10 (arguing that even though racial categories are socially constructed, their social effect is real and must be studied in order to be changed).

14. *See* ANTHONY ELLIOTT, *CONCEPTS OF THE SELF* (2007); *HANDBOOK OF SELF AND IDENTITY* (Mark Leary & June Price Tangney eds., 2003); *IDENTITY: A READER* (Paul du Gay et al. eds., 2000).

15. I do not mean to suggest here that people experience their identity as making a choice. Most people describe the significant portions of their identity in terms of who they *are*, rather than what they might choose to do. Most people generally do not feel as if they have chosen a race or sex, for example, but consider those innate and immutable characteristics they were born with. This framing has been explicitly adopted by our antidiscrimination norm, which generally requires assimilation where an identity characteristic can be changed, but protects identity characterizations that are immutable. *See* KENJI YOSHINO, *COVERING: THE HIDDEN ASSAULT ON OUR CIVIL RIGHTS* (2006); *see also* DEVON W. CARBADO & MITU GULATI, *ACTING WHITE? RETHINKING RACE IN “POST-RACIAL” AMERICA* (2013).

16. *See* Sheldon Stryker & Peter J. Burke, *The Past, Present, and Future of an Identity Theory*, 63 *SOC. PSYCHOL. Q.* 284, 289–90 (2000) (discussing identity generally).

he or she believes the audience does not know that identity.<sup>17</sup> One's racial or sex identity in context can profoundly affect one's sense of belonging in an environment like school, work, a neighborhood, or even to a political community, which in turn affects their abilities to participate and achieve there.<sup>18</sup>

Identity is linked to access to social goods, like education and work; to physical goods, like housing and wealth; and to measures of well-being, like health status and health outcomes. One process of counting shows us that there are gaps in achievement, security, pay, and wealth that track identity characteristics like sex and race very closely.<sup>19</sup> And of course these disparities make some people's lives significantly more difficult and unpleasant.

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17. See, e.g., Karla Hoff & Priyanka Pandey, *Discrimination, Social Identity, and Durable Inequalities*, 96 AM. ECON. REV. 206, 211 (2006). This phenomenon is known as "stereotype threat" and was most thoroughly first documented by Claude M. Steele & Joshua Aronson, *Stereotype Threat and the Intellectual Test Performance of African Americans*, 69 J. PERSONALITY & SOC. PSYCHOL. 797 (1995). Since that time, many more studies have been published on the phenomenon. See Hannah-Hanh D. Nguyen & Ann Marie Ryan, *Does Stereotype Threat Affect Test Performance of Minorities and Women? A Meta-Analysis of Experimental Evidence*, 93 J. APPLIED PSYCHOL. 1314 (2008).

18. See Gregory M. Walton & Geoffrey L. Cohen, *A Question of Belonging: Race, Social Fit, and Achievement*, 92 J. PERSONALITY & SOC. PSYCHOL. 82, 94 (2007).

19. See MARIKO LIN CHANG, *SHORTCHANGED: WHY WOMEN HAVE LESS WEALTH AND WHAT CAN BE DONE ABOUT IT* 20, 35–36 (2010) (documenting the wealth gap, that women own about thirty-six cents for every dollar of wealth owned by men, and exploring the causes); JODY FEDER & LINDA LEVINE, *CONG. RES. SERV., PAY EQUITY LEGISLATION 1* (2010), available at [http://digitalcommons.ilr.cornell.edu/cgi/viewcontent.cgi?article=1768&context=key\\_workplace](http://digitalcommons.ilr.cornell.edu/cgi/viewcontent.cgi?article=1768&context=key_workplace) (according to the U.S. Census Bureau, in 2008 full-time working women had a median annual salary of \$35,745, while men had a median salary of \$46,367); PAUL TAYLOR ET AL., *PEW RES. CTR., TWENTY-TO-ONE: WEALTH GAPS RISE TO RECORD HIGHS BETWEEN WHITES, BLACKS AND HISPANICS* 13–14 (2011), available at [http://www.pewsocialtrends.org/files/2011/07/SDT-Wealth-Report\\_7-26-11\\_FINAL.pdf](http://www.pewsocialtrends.org/files/2011/07/SDT-Wealth-Report_7-26-11_FINAL.pdf) (according to the Pew Research Center, in 2009 the median net worth of white households was \$113,149, while the median net worth of Asian, Hispanic, and black households was \$78,066, \$6,325 and \$5,677 respectively); Samuel R. Bagenstos, *The Structural Turn and the Limits of Antidiscrimination Law*, 94 CALIF. L. REV. 1, 2 & n.5, 5–6 (2006) (explaining that inequalities among races, such as wealth and educational opportunities, still exist today despite Americans' increasingly egalitarian attitudes toward race); R. Richard Banks et al., *Discrimination and Implicit Bias in a Racially Unequal Society*, 94 CALIF. L. REV. 1169, 1171, 1184 (2006) (citing the U.S. Census Bureau's statistics that the average white family earns 1.5 times as much income and has several times as much wealth, as the average black family); Nancy M. Carter & Christine Silva, *Women in Management: Delusions of Progress*, HARV. BUS. REV., March 2010, at 19 (summarizing a study of women in management and finding that among graduates of elite MBA programs, "women continue to lag men at every single career stage, right from their first professional jobs"); Guy-Uriel E. Charles, *Toward a New Civil Rights Framework*, 30 HARV. J.L. & GENDER 353, 353 (2007) ("African Americans, Latinos, and Native Americans lag behind Whites and sometimes Asian Americans on almost all relevant socio-economic indicators."); Rachel F. Moran, *Whatever Happened to Racism?*, 79 ST.

So labeling someone—counting them as a member of a group—is an exercise of power that has real effects on that person’s own behavior and on the social goods that person has access to. Including them in a favored group boosts achievement and access to social goods. Excluding them, or including them in a disfavored group, hurts individual achievement and limits access to such social goods.

Let me expand on the process of how the counting happens, how that power is exercised, and also explain in greater detail some of the effects on a person of being counted. Once again, I’ll draw on science. Our perception of the world is framed in fundamental ways by our beliefs and our experiences, and that framing reinforces our beliefs in a recursive fashion.<sup>20</sup> According to cognitive psychology research, this is how the natural process of cognition works. We encounter things in infinite variations. If we had to fully process the impact of each variation we encountered, we would be paralyzed into inaction.<sup>21</sup> Accordingly, in order to act in the world, we generalize about people and objects after a few encounters, use those generalizations to define categories, and subsequently use those categories to quickly sort what and whom we encounter without reflection.<sup>22</sup> Our categories define for us what we have encountered and help us predict how that thing will act or be acted upon.<sup>23</sup> This sorting function makes the world seem more predictable and allows us to make judgments quickly, both of which allow us to act where otherwise we would be paralyzed.

Although this process is important to a person’s ability to function, relying on categories or creating group identities has far-reaching consequences both for the person doing the counting and for the person being counted. When we have assigned an object or person to a group, we lose our ability to view that object or person independently; we perceive the object or person as more like

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JOHN’S L. REV. 899, 900 (2005) (despite declining racism and increasing interracial contact, significant gaps in educational attainment, earnings, and wealth still exist between white and non-white Americans).

20. See generally Susan T. Fiske, *Social Cognition and Social Perception*, 44 ANN. REV. PSYCHOL. 155, 156 (1993) (summarizing research in a number of areas of cognitive psychology, all of which observed some aspect of this recursive process).

21. See Eleanor Rosch, *Human Categorization*, in 1 STUDIES IN CROSS-CULTURAL PSYCHOLOGY 1, 1–2 (Neil Warren ed., 1977) (“Since no organism can cope with infinite diversity, one of the most basic functions of all organisms is the cutting up of the environment into classifications by which non-identical stimuli can be treated as equivalent.”).

22. Eleanor Rosch, *Principles of Categorization*, in COGNITION AND CATEGORIZATION 27, 28 (Eleanor Rosch & Barbara B. Lloyd eds., 1978).

23. Linda Hamilton Krieger, *The Content of Our Categories: A Cognitive Bias Approach to Discrimination and Equal Employment Opportunity*, 47 STAN. L. REV. 1161, 1188–89 (1995).

the others within that group and less like those outside of that group.<sup>24</sup> The same effects happen when the process is used for people. Even when the group identity is arbitrary, where, for example, people are randomly assigned to teams, people view members of their own group (the in-group) as more like themselves, and others (the out-group) as more different from them than if the others had no group identity.<sup>25</sup> We are not just counters of others, we also identify ourselves to groups, and that process has similarly important consequences. People who identify as part of a group have great difficulty perceiving differences among members of the out-group even when they are given information about the individuals in the out-group identical to what they are given about individuals in their own in-group.<sup>26</sup> In other words, identifying as a member of a group interferes with a person's ability to interpret information about members of both the in-group and the out-group.

One consequence of these cognitive structures is that, when we count people as members of a group, we tend to stereotype, or create a cognitive

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24. See Donald T. Campbell, *Enhancement of Contrast as Composite Habit*, 53 J. ABNORMAL & SOC. PSYCHOL. 350, 355 (1956) (finding that when nonsense syllables were linked to a spot on a spatial continuum, participants tended to judge them as more different from each other than if no syllables were linked to any spot); Krieger, *supra* note 23, at 1186 (describing two studies and citing Henri Tajfel & A.L. Wilkes, *Classification and Quantitative Judgment*, 54 BRIT. J. PSYCHOL. 101, 104 (1963) (when lines were grouped, participants judged the comparative length of those lines as more similar when they compared lines within the same group and more different from each other when they compared a line to one in the other group than the same people did when they compared the length of lines not assigned to any group)); Henri Tajfel, *Cognitive Aspects of Prejudice*, 25 J. SOC. ISSUES 79, 83–86 (1969) (describing the above experiment in more detail).

25. Marilyn B. Brewer, *In-Group Favoritism: The Subtle Side of Intergroup Discrimination*, in CODES OF CONDUCT: BEHAVIORAL RESEARCH INTO BUSINESS ETHICS 160, 161–62 (David M. Messick & Ann E. Tenbrunsel eds., 1996); Ann Locksley et al., *Social Categorization and Discriminatory Behavior: Extinguishing the Minimal Intergroup Discrimination Effect*, 39 J. PERSONALITY & SOC. PSYCHOL. 773, 776–83 (1980); David A. Wilder, *Perceiving Persons as a Group: Categorization and Intergroup Relations*, in COGNITIVE PROCESSES IN STEREOTYPING AND INTERGROUP BEHAVIOR 213, 217 (David L. Hamilton ed., 1981).

26. David L. Hamilton & Tina K. Trolier, *Stereotypes and Stereotyping: An Overview of the Cognitive Approach*, in PREJUDICE, DISCRIMINATION, AND RACISM 127, 131 (John F. Dovidio & Samuel L. Gaertner eds., 1986). Numerous studies that support this assertion are summarized in Patricia W. Linville & Gregory W. Fischer, *Stereotyping and Perceived Distributions of Social Characteristics: An Application to Ingroup–Outgroup Perception*, in PREJUDICE, DISCRIMINATION, AND RACISM, *supra* at 165, 168–73. Some of these studies involved asking members of student groups to rate the similarity of members of their own and other groups and to assess the traits of members of their own and different groups; asking people to assess how likely someone in their group would fit a stereotype and how likely someone outside of their group would; and asking people with a particular opinion to rate the similarity of people with the same or a different opinion. *Id.*



shortcut that links personal traits with salient characteristics in order to simplify the task of perceiving, processing, and retaining information about people.<sup>27</sup> Once set, these cognitive shortcuts influence our judgment continuously to “bias[ ] in predictable ways the perception, interpretation, encoding, retention, and recall of information about other people.”<sup>28</sup> In other words, they create expectations that transform the way we perceive others, remember things about others, and interpret motivations for the actions of others.<sup>29</sup> We tend to remember the things a person actually did only if those actions fit our stereotypes of that person; we tend to believe that we remember a person doing things consistent with the stereotypes even if the person never did them; and we tend to forget the things that a person did that did not conform to those stereotypes.<sup>30</sup> We interpret actions based on stereotypes by tending to assume that a person who acts consistently with a stereotype acted because of innate characteristics (i.e., that they will usually act this way because they are this type of person), but a person who acts inconsistently with a stereotype acted because of transitional or situational factors (i.e., that they do not usually act this way because they are not this type of person).<sup>31</sup>

In practical terms, this means that labels for race and sex will carry with them assumptions about what a person is like and how he or she will behave in any given situation. Upon deciding that I am a white woman, an outside observer might also assume things about my intelligence, competence, strength, vulnerability, trustworthiness, dangerousness, sexual availability, sexual orientation, and more. Whatever is lumped into the category of white

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27. Krieger, *supra* note 23, at 1187–88; Barbara F. Reskin, *The Proximate Causes of Employment Discrimination*, 29 CONTEMP. SOC. 319, 321–22 (2000). While this description of stereotypes may sound very benign, in a society with power imbalances such as ours, stereotypes may perpetuate and even aggravate those power imbalances.

28. Krieger, *supra* note 23, at 1188. Just as for salience, which defines groupness in the first place, we decide what behaviors to attribute to particular groups either consciously or through exposure to culture. David L. Hamilton, *A Cognitive-Attributional Analysis of Stereotyping*, in 12 ADVANCES IN EXPERIMENTAL SOCIAL PSYCHOLOGY 53, 64 (Leonard Berkowitz ed., 1979).

29. See Krieger, *supra* note 23, at 1201–03 (explaining that cognitive shortcuts cause us to encode behaviors as traits that affect subsequent judgments and create a preexisting stereotype).

30. *Id.* at 1207–09 (summarizing research on stereotypes and memory); see also Nancy Cantor & Walter Mischel, *Traits as Prototypes: Effects on Recognition Memory*, 35 J. PERSONALITY & SOC. PSYCHOL. 38, 41–45 (1977).

31. Krieger, *supra* note 23, at 1204–07. A good example of this kind of attribution bias is given by Joan C. Williams, *The Social Psychology of Stereotyping: Using Social Science to Litigate Gender Discrimination Cases and Defang the “Cluelessness” Defense*, 7 EMP. RTS. & EMP. POL’Y J. 401, 433–34 (2003). Because women with children are presumed to innately prioritize their children over their jobs, when a woman with children is late to work, her boss is likely to assume that her innate characteristic of prioritizing childcare responsibilities was the cause. Because men are presumed to put work first, a man late for work may be assumed to have been caught in traffic, a transitional cause.

woman would be attributed to me. Counting a person as a member of a group, thus, can silence that person or hide ways that person differs from stereotypes or generalizations about the group. Inclusion itself can disempower.

Although the process of sorting happens largely below the level of full consciousness, this process is not uncontrollable. First of all, individuals define what characteristics will be salient to define a group in any given context. Defining salience may be something most of us have not given much thought to, instead absorbing information about what characteristics matter to others, and consequently should to us, from exposure to the culture we live in.<sup>32</sup> At the same time, however, judgments of salience and the resulting cognitive processes do not function entirely automatically and can be changed by conscious effort.<sup>33</sup>

## II. WE ARE THE MEDIATING INSTITUTIONS

As the description of cognitive structures in the prior section shows, we are each counters, each exercising some power over others by adopting particular categories and by sorting people into them. Because we may perceive ourselves as somewhat passive in that process, simply absorbing cultural categories, and then allowing them to operate at a level below fully self-aware consciousness, we may not feel like we are exercising power. Yet we are—which brings me to my second subject—less legitimate mediating institutions than those Professor Levinson identifies. It turns out that we are each counters and counted, exercising some level of power and subject to the exercise of power by others. And clearly being counted matters—it shapes our behavior, it shapes others' behavior towards us, and it has far-reaching, real-world effects.

As Professor Levinson's essay frames the issues, we might usually think about counting in terms of minority groups' efforts to be considered true members of the political community. Those politics of belonging, however, are only one aspect of why this question is important for minority groups. The

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32. See HOWARD J. EHRLICH, *THE SOCIAL PSYCHOLOGY OF PREJUDICE* 35 (1973) ("Stereotypes about ethnic groups appear as a part of the social heritage of society. They are transmitted across generations as a component of the accumulated knowledge of society."); Richard Nisbett et al, *Culture and Systems of Thought: Holistic Versus Analytic Cognition*, 108 *PSYCHOL. REV.* 291, 291–92 (2001) (describing their review of the literature on how societies differ in systems of thought and drawing conclusions about how those differences influence cognitive processes).

33. Irene V. Blair, *The Malleability of Automatic Stereotypes and Prejudice*, 6 *PERSONALITY & SOC. PSYCHOL. REV.* 242, 244–47, 255–56 (2002); Ann C. McGinley, *Viva La Evolucion!: Recognizing Unconscious Motive in Title VII*, 9 *CORNELL J.L. & PUB. POL'Y* 415, 430–32 (2000); see also JACK MEZIROW, *TRANSFORMATIVE DIMENSIONS OF ADULT LEARNING* (1991); Jack Mezirow, *Transformation Theory of Adult Learning*, in *IN DEFENSE OF THE LIFEWORLD: CRITICAL PERSPECTIVES ON ADULT LEARNING* 39 (Michael R. Welton ed., 1995).

converse of belonging matters as much, and maybe sometimes more, for the group. The formal entitlement to exercise this power of counting is an important attribute of sovereignty and community. Professor Torres' remarks about Indian Tribes demonstrated this point well.<sup>34</sup> When the federal government denies Tribes the right to include, or more recently exclude, individuals from membership, they are not being treated as sovereign nations.<sup>35</sup> Professor Kennedy's remarks spoke a similar refrain.<sup>36</sup> Although the black community is not separately sovereign within the United States, or even necessarily perfectly defined or cohesive, various groups have exercised power and sought to exercise power on its behalf in the face of oppression by both governments and less formal groups of white individuals.<sup>37</sup> Just as the right to exclude is an important attribute of sovereignty,<sup>38</sup> and perhaps the most important of property rights,<sup>39</sup> the right to exclude someone from the black community is likewise an important recognition of power in—or concession of power to—that group.

Indian Tribes and black people are not the only ones who have had a troubled history related to belonging to the political community of the United States. As Professor Levinson notes, women of all colors have been excluded from the political community by not being given the right themselves to vote until the early twentieth century.<sup>40</sup> That exclusion was important, but it does not consider the whole story. To consider sex and belonging more fully, I would like to employ a feminist strategy to think more about the ways that we organize ourselves for everyday life and consider belonging in a broader context.

Professor Levinson has focused on how we organize ourselves into a political community of government and governed. Political belonging is, of course, fundamental, but not necessarily what most people think of when they think about being counted. Perhaps this is privilege talking, the privilege of

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34. Gerald Torres, *American Blood: Who Is Counting and For What?*, 58 ST. LOUIS U. L.J. 1017, 1018, 1021–22, 1036 (2014).

35. See *Chae Chan Ping v. United States (The Chinese Exclusion Case)*, 130 U.S. 581, 603–04 (1889) (discussing the power to exclude as a characteristic of sovereignty).

36. Randall Kennedy, *Response to Sanford Levinson: Who Counts?—The Politics of Racial Membership and Excommunication*, 58 ST. LOUIS U. L.J. 989, 989, 997 (2014).

37. An example of the exercise of this power would be efforts by the National Association for the Advancement of Colored People (NAACP), and its Legal Defense and Educational Fund. See *NAACP: 100 Years of History*, NAACP, <http://www.naacp.org/pages/naacp-history> (last viewed Dec. 12, 2013) (providing a brief description of the efforts of the NAACP).

38. *Chae Chan Ping*, 130 U.S. at 603–04.

39. See Thomas W. Merrill, *Property and the Right to Exclude*, 77 NEB. L. REV. 730, 734–35, 740 (1998) (arguing that the right to exclude is the very definition of property).

40. Levinson, *supra* note 1, at 942, 976.

someone who has always lived in what I will loosely term a “functional, stable, government and political system,” but most people do not seem to see themselves as political actors. For example, people do not vote, particularly in local and state elections, where they likely have the most power and where government has the most impact on them.<sup>41</sup> By and large, they do not research issues or candidates, or participate in other aspects of political life.<sup>42</sup> This lack of political identity may be partly responsible for both the rise of the Tea Party and Occupy Movement, and the backlash against the Affordable Care Act and the National Security Agency’s surveillance. If people do not think of their government, do not think they are affected by government, or at least not positively, then they might react strongly when they notice that government is actually affecting them.

In any event, other mediating institutions, mediating institutions that are not accountable in any political sense to a community, feel like much more powerful gatekeepers to the social goods that are necessary to allow us to be fully functioning members of the community: educational institutions, the entities that employ us for wages, the social institutions that allow us to connect and build relationships, and the legal actors who perpetuate the system of laws that define borders, distribute benefits and burdens, preserve or penalize relationships, and reward or punish conduct. I am sure I am leaving things out here.<sup>43</sup> But my intent is to highlight how access to power other than

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41. See ROBERT D. PUTNAM, *BOWLING ALONE: THE COLLAPSE AND REVIVAL OF AMERICAN COMMUNITY* 31–35 (2000) (describing a reduction in voting for the President primarily, but also mentioning similar declines in local elections); Zoltan L. Hajnal & Paul G. Lewis, *Municipal Institutions and Voter Turnout in Local Elections*, 38 *URB. AFF. REV.* 645, 645–46 (2003) (summarizing research suggesting that turnout for state and local elections is only half what it is for federal elections).

42. See PUTNAM, *supra* note 41, at 37–47 (describing a decline in political engagement more broadly).

43. One powerful set of institutions that I am purposely leaving out is the mainstream women’s movements. The most successful women’s movements have represented the interests of wealthier white women and focused on issues most relevant to them. For example, prominent woman suffragists explicitly used whiteness as a rallying cry in an effort to gain support for women’s suffrage from white men. See, e.g., NELL IRVIN PAINTER, *SOJOURNER TRUTH: A LIFE, A SYMBOL* 230–32 (1996). Most recently, tension between issues most popularized as feminist issues by the media and critique by women of color has shown the pervasive effects of power differences among women and within groups. See, e.g., Michelle Goldberg, *Feminism’s Toxic Twitter Wars*, *THE NATION*, Feb. 17, 2014, at 12, available at <http://www.thenation.com/article/178140/feminisms-toxic-twitter-wars>; Jessica Grose, *Is “Toxic” Online Culture Paralyzing Feminism?*, *SLATE* (Jan. 31, 2014, 1:28 PM), [http://www.slate.com/blogs/xx\\_factor/2014/01/31/\\_toxic\\_twitter\\_wars\\_is\\_online\\_culture\\_paralyzing\\_feminism.html](http://www.slate.com/blogs/xx_factor/2014/01/31/_toxic_twitter_wars_is_online_culture_paralyzing_feminism.html); Suey Park & David J. Leonard, *In Defense of Twitter Feminism*, *MODEL VIEW CULTURE* (Feb. 3, 2014), <http://modelviewculture.com/pieces/in-defense-of-twitter-feminism>; see also Arit John & Allie Jones, *The Incomplete Guide to Feminist Infighting*, *THE WIRE* (Jan. 29, 2014, 6:22 PM), <http://www.the>

political power is mediated by institutions that have no legitimacy in a political theory sense, and which are not necessarily even formal institutions, but rather the sum of many individual choices.

The law of the United States and most western countries has embodied a distinction between what is public and properly the focus of government attention, and what is private not properly the focus of government attention but left to individual arrangement, usually heavily shaped by tradition.<sup>44</sup> This distinction is somewhat of a false one, however, because the power of the state has been arrayed behind the actor who wielded power in that so-called private relationship.<sup>45</sup> Consider the family. Before the twentieth century, the power of the state aligned behind the male head of household, allowing him sole right to control property of his own and his wife, allowing him sole right to contract, and allowing him sole decision-making authority over children.<sup>46</sup> Professor Hasday's contribution describes how this public/private distinction—carried out through the law of coverture—lives on in family law even after the Married Women's Property Acts abolished coverture.<sup>47</sup>

This public/private distinction is a foundational principle of our government still, but it obscures the way that government and our system of laws support one private party at the expense of another. For example, property owners are supported by a web of laws that protect their use of property to create or amass more property.<sup>48</sup> Corporations and other employers are

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wire.com/politics/2014/01/incomplete-guide-feminist-infighting/357509/. These issues are important and complex, and they deserve more than being an item on a list of mediating institutions. Dealing with them thoroughly is beyond the scope of this Essay, and so I chose not to bring them up in the text.

44. See BARBARA ARNEIL, *POLITICS & FEMINISM* 28–42 (1999) (describing the roots of the public/private distinction in Plato's works); *id.* at 43–76 (critiquing that distinction).

45. See CATHARINE A. MACKINNON, *TOWARD A FEMINIST THEORY OF THE STATE* 244–45 (1989).

46. See MICHAEL GROSSBERG, *GOVERNING THE HEARTH: LAW AND THE FAMILY IN NINETEENTH-CENTURY AMERICA* 234–307 (1985) (describing the legal structures favoring fathers and the incursions into those rules); Claudia Zaher, *When a Woman's Marital Status Determined Her Legal Status: A Research Guide on the Common Law Doctrine of Coverture*, 94 *LAW LIBR. J.* 459 (2002) (summarizing the law of coverture and providing a bibliography of other sources on the subject).

47. See also JILL ELAINE HASDAY, *FAMILY LAW REIMAGINED* (forthcoming June 2014).

48. A foundational example of such a law can be found in the Fifth Amendment, which prohibits the taking of property without due process of law or just compensation. U.S. CONST. amend. V. The protection of property rights is so deeply embedded in legal theory that it is sometimes difficult to see. One example might be the influence of Law and Economics; its focus on efficiency privileges property concepts over concepts that are not thought easily quantifiable. See William M. Landes & Richard A. Posner, *The Influence of Economics on Law: A Quantitative Study* 36 *J.L. & ECON.* 385, 385–88, 391 (1993) (measuring the influence of economics on law only through 1990).

protected in this way from claims by employees, under the rationale that government should not interfere with managerial prerogatives related to capital.<sup>49</sup> Those with property or who earn incomes have gained part of the value of their property or income as a result of public investment that has added value or helped to create it.<sup>50</sup> Similarly, those who abuse their intimate partners or children are protected by a system of laws and legal actors that minimize harm when it occurs within a relationship, and which protect access and control those abusers have to those partners or children.<sup>51</sup>

Corporations, businesses, and property owners have formal kinds of power, enforced by a system of laws, even if the power they exercise is not as

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49. See JAMES B. ATLESON, VALUES AND ASSUMPTIONS IN AMERICAN LABOR LAW 136–42 (1983) (emphasizing the deference that courts have given managerial prerogatives in the context of employer responses to protected employee activity). The employment-at-will doctrine also embodies this value. See Clyde W. Summers, *Employment at Will in the United States: The Divine Right of Employers*, 3 U. PA. J. LAB. & EMP. L. 65, 65, 68 (2000) (explaining that the at-will doctrine relies on a principle of limited government intervention).

50. This point was made by President Obama in a campaign speech in Roanoke, Virginia on July 13, 2012:

If you were successful, somebody along the line gave you some help. There was a great teacher somewhere in your life. Somebody helped to create this unbelievable American system that we have that allowed you to thrive. Somebody invested in roads and bridges. If you've got a business—you didn't build that. Somebody else made that happen. The Internet didn't get invented on its own. Government research created the Internet so that all the companies could make money off the Internet.

The point is, is [sic] that when we succeed, we succeed because of our individual initiative, but also because we do things together. There are some things, just like fighting fires, we don't do on our own.

President Barack Obama, Remarks by the President at a Campaign Event in Roanoke, Virginia (July 13, 2012), available at OFF. PRESS SEC'Y, WHITE HOUSE, <http://www.whitehouse.gov/the-press-office/2012/07/13/remarks-president-campaign-event-roanoke-virginia>. Investments in infrastructure, security, and economic stability are necessary conditions for individual businesses to succeed.

51. There are many examples of these legal and practical structures. See, e.g., Katie M. Edwards et al., *Rape Myths: History, Individual and Institutional-Level Presence, and Implications for Change*, 65 SEX ROLES 761 (2011); Jessica Klarfeld, *A Striking Disconnect: Marital Rape Law's Failure to Keep Up with Domestic Violence Law*, 48 AM. CRIM. L. REV. 1819 (2011) (describing the history of the marital rape exemption and remaining statutory limitations on sexual violence committed by a spouse); Emily J. Sack, *Is Domestic Violence a Crime?: Intimate Partner Rape as Allegory*, 24 ST. JOHN'S J. LEGAL COMMENT. 535 (2010) (arguing that despite widespread legal policies criminalizing domestic violence, the law has not been implemented); Nancy Ver Steegh, *Differentiating Types of Domestic Violence: Implications for Child Custody*, 65 LA. L. REV. 1379 (2005) (discussing domestic violence and surveying custody practices); Jennifer Wriggins, *Interspousal Tort Immunity and Insurance "Family Member Exclusions": Shared Assumptions, Relational and Liberal Feminist Challenges*, 17 WIS. WOMEN'S L.J. 251 (2002) (arguing that insurance policies created de facto interspousal immunities).

democratically legitimate as the power exercised by elected officials. However, the operation of this power is sometimes diffuse. A corporation acts through its officers and employees; property owners are part of a community of other owners. When taken in the aggregate, though, decisions by all of these people have large effects on access to social goods like jobs, education, and housing. When these private parties count others as belonging or not belonging—at work, in this neighborhood, at this school—we can see widespread patterns of exclusion for members of disfavored groups.<sup>52</sup>

Because of these effects, many so-called private institutions ought to be the focus of our concern in looking at mediating institutions that determine who counts. Just to give an example of some concerns women might have were we to decide what institutions should be publicly accountable, consider a recent collection of essays on feminist constitutionalism.<sup>53</sup> The chapters focus on the gendered division of household labor,<sup>54</sup> marriage,<sup>55</sup> abortion and the right to bear children,<sup>56</sup> pregnancy,<sup>57</sup> domestic violence,<sup>58</sup> and multicultural women and aspects of multiple identities,<sup>59</sup> among others. Some of these issues are

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52. Examples of these effects could be the widespread residential racial segregation, *see* Kyle Vanhemert, *The Best Map Ever Made of America's Racial Segregation*, WIRED (Aug. 26, 2013, 6:30 AM), <http://www.wired.com/design/2013/08/how-segregated-is-your-city-this-eye-opening-map-shows-you/>; educational racial segregation, RICHARD ROTHSTEIN, ECON. POL'Y INST., FOR PUBLIC SCHOOLS, SEGREGATION THEN, SEGREGATION SINCE: EDUCATION AND THE UNFINISHED MARCH 2 (Aug. 27, 2013); and gender segregation in the workforce, Ariane Hegewisch et al., Inst. for Women's Pol'y Res., *Separate and Not Equal? Gender Segregation in the Labor Market and the Gender Wage Gap* (IWPR Briefing Paper C377, Sept. 2010).

53. *See* FEMINIST CONSTITUTIONALISM: GLOBAL PERSPECTIVES (Beverly Baines et al. eds., 2012) [hereinafter FEMINIST CONSTITUTIONALISM].

54. Jennifer Nedelsky, *The Gendered Division of Household Labor: An Issue of Constitutional Rights*, in FEMINIST CONSTITUTIONALISM, *supra* note 53, at 15.

55. Beverly Baines, *Polygamy and Feminist Constitutionalism*, in FEMINIST CONSTITUTIONALISM, *supra* note 53, at 452; Mary Anne Case, *Feminist Fundamentalism and the Constitutionalization of Marriage*, in FEMINIST CONSTITUTIONALISM, *supra* note 53, at 48; Pascale Fournier, *On God, Promises, and Money: Islamic Divorce at the Crossroads of Gender and the Law*, in FEMINIST CONSTITUTIONALISM, *supra* note 53, at 433.

56. Rosalind Dixon & Martha C. Nussbaum, *Abortion, Dignity, and a Capabilities Approach*, in FEMINIST CONSTITUTIONALISM, *supra* note 53, at 64; Nicole Huberfeld, *Federal Spending and Compulsory Maternity*, in FEMINIST CONSTITUTIONALISM, *supra* note 53, at 281; Rachel Rebouché, *Challenges for Contemporary Reproductive Rights Advocacy: The South African Example*, in FEMINIST CONSTITUTIONALISM, *supra* note 53, at 298.

57. Jennifer S. Hendricks, *Pregnancy, Equality, and U.S. Constitutional Law*, in FEMINIST CONSTITUTIONALISM, *supra* note 53, at 263.

58. Puja Kapai, *Minority Women: A Struggle for Equal Protection against Domestic Violence*, in FEMINIST CONSTITUTIONALISM, *supra* note 53, at 336.

59. Hilal Elver, *Secular Constitutionalism and Muslim Women's Rights: The Turkish Headscarf Controversy and Its Impact on the European Court of Human Rights*, in FEMINIST CONSTITUTIONALISM, *supra* note 53, at 413; Kerri A. Froc, *Will "Watertight Compartments"*

part of constitutional cases in the United States currently, but are conceived of only as negative rights women (and more often couples) might have from government intervention, rather than a positive right to exercise agency or be supported in these areas despite opposition or indifference by other private actors.<sup>60</sup> Other areas of concern might be access to quality education, jobs with sufficient pay to support a family, public health, the environment, security from the police or armed civilians, and food safety. If women count, then concerns for their needs and injuries count.<sup>61</sup>

Being counted in one domain can have effects in another. Consider Cynthia Estlund's book *Working Together*.<sup>62</sup> In it, she makes a powerful case about the importance of the workplace to democratic participation. The workplace is the single place that workers are likely to encounter people of different cultures, religions, races, and ethnicities.<sup>63</sup> Workers are able to work together across these lines, fostering connectedness and cooperation.<sup>64</sup> These interpersonal ties and practice at cooperation can set the foundation for democratic participation and effective governance.<sup>65</sup> Accordingly, Estlund's focus is on making the workplace a more cooperative and democratic place.<sup>66</sup> Counting women as workers, therefore, has effects on their counting in political life. In short, when private parties decide who counts and for what, they police the boundaries not only of groups, but of the material and social benefits those groups may enjoy.

### III. WHAT PEOPLE WANT TO MATTER FOR

To this point, this Essay has mostly focused on what it means to count and how counting is accomplished by each of us. That focus on how we are

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*Sink Women's Charter Rights? The Need for a New Theoretical Approach to Women's Multiple Rights Claims under the Canadian Charter of Rights and Freedoms*, in FEMINIST CONSTITUTIONALISM, *supra* note 53, at 132; Vrinda Narain, *Critical Multiculturalism*, in FEMINIST CONSTITUTIONALISM, *supra* note 53, at 377; Susan Williams, *Democratic Theory, Feminist Theory, and Constitutionalism: The Challenge of Multiculturalism*, in FEMINIST CONSTITUTIONALISM, *supra* note 53, at 393.

60. This concept was described first by ISAAH BERLIN, *Two Concepts of Liberty*, in FOUR ESSAYS ON LIBERTY 118, 164–65 (1969); *cf.* Stephen Gardbaum, *The Myth and the Reality of American Constitutional Exceptionalism*, 107 MICH. L. REV. 391 (2008) (describing ways that somewhat positive rights are built into the system so that the U.S. is less exceptional than it might initially appear).

61. *See generally* MACKINNON, *supra* note 45, at 244.

62. CYNTHIA ESTLUND, *WORKING TOGETHER: HOW WORKPLACE BONDS STRENGTHEN A DIVERSE DEMOCRACY* (2003).

63. *Id.* at 7–12.

64. *See id.* at 60–101.

65. *See id.* at 103–39.

66. *See id.* at 141–76.



counters yet not accountable brings me to my third point, which is what people want to matter for. This relates back to a great extent to the question of identity that I started with. I began by asserting that an outsider might identify me by my race and sex. I might also define my identity in terms of race and sex, although I have more information, so my definition might not perfectly match what an outsider would label me as. And after hearing me speak and knowing my last name, an outsider would probably add additional labels to my identity, like Irish-American in the middle to upper socioeconomic class. But I might just as likely define my identity in terms of what I do, what I like, what I am connected to—whether I have to earn a living, how I do so, what I own or exercise control over, who exercises control over me, what relationships both by kinship and by choice are important to me and what are not, who and what I support materially and emotionally, the education I have received, the geography of my upbringing, and as Professor Levinson discusses by focusing on religion, my view of life, the universe, and everything.

These aspects of identity are at least as fundamental and have at least as far-ranging practical effects as my race and my sex. They are also intertwined. Whether I have to earn a living and what I do is directly related to what I might own or exercise control over, and both are related to whether others privilege the relationships I find important or whether I feel that I am developing or supporting those relationships appropriately. Moreover, each is intertwined with the construction of my race and my sex. Because I am a white woman, people generally may not expect that I need to work to support a family, and that may impact their view of me as a worker. Conversely, because I am a white, middle-class woman, I had access to quality education, which helped me have a career that allows me to support a family.

This is not to detract from Professor Levinson's focus. We need and want to count for civil rights like voting, but that is not enough. We must count for other needs too, like the ability to share in rights of property, to contract, to have access to education and to jobs (formal and in practice) and professions, to be safe in our environments, and to be able to develop relationships and have those protected. These are all rights of belonging.

And we also need to count *for each other*. We need to be allowed and expected to support each other in formal ways like jury service, military service, and civil service, or in functional ways like sharing resources with those who need them, and risks with those who have them through things like food stamps, social security, Medicare, Medicaid, and other insurance programs. These are all duties of belonging that give us the rights to share in the benefits. This sharing in duties and benefits is what a community does.

#### IV. WHAT IS/UGHT TO BE THE NATURE OF COMMUNITY

This brings me to my last point about community. We tend to define community in atomistic terms as an aggregation of individuals with independent thoughts, motives, and actions. Professor Levinson's essay seems to posit a world like this, a world of individuals seeking power or entry into a community and individuals exercising power to include or exclude. My description of the way we are counters of others and, consequently, our collective role as operating as mediating institutions, could be seen as describing community the same way. But I want to insert a caution here. That description of community seems problematic as a starting point both philosophically and empirically.

It is true that we are each trapped in our own heads, so to speak, and there is much we cannot share except imperfectly. In that sense, it is true that we are independent and isolated. Additionally, most of us have some capability of action that does not depend on the will or even cooperation of anyone else. But we are also fundamentally interdependent. We are relational creatures—social, seeking relationships for a variety of reasons, and we generally cooperate with each other to reach all kinds of goals. Even the most powerful depend on a system created with others to protect, perpetuate, or exercise that power. So viewing communities as nothing more than an agglomeration of independent actors acting only on self-interest seems incomplete as an empirical matter.

And as a philosophical matter, this view of community locks us into certain assumptions and hides certain truths from us—truths about the inevitability of the hierarchy we have and where power is being exercised. For example, we see current distributions as natural, the product of individual effort, not created or facilitated by state power, and yet, in reality, they could not exist this way without that backing.

Thus, part of the challenge in deciding who counts is to delineate what the end product of that counting is. But perhaps if we defined community by shared commitments, untethered to geography or identity, we could get a more accurate picture of what community is, and we could create some accountability in our currently unaccountable mediating institutions. Defining a community by shared commitments might also allow people to count themselves in or even partway in instead of counting others in or out and counting them in or out completely. A community formed that way would not necessarily have the power of excluding some, though, and so it may not have power many see as important to sovereignty. And it is difficult to see how such a community could replace our current political communities, anchored to physical space and resources.

CONCLUSION

To conclude, let me return to the fundamental question of who counts. This is an important question about power, inclusion, and exclusion. The answer is likewise important—we do. We are capable of being counted as members of a number of groups, and we are capable of counting others as members of those groups. Our counting has consequences. It can empower those counted in or silence them by counting them in; it can disempower those counted out, or preserve some small power for those counted in. When we realize that we are both counted and counters, we can begin to see the ways in which it is true, and that realization may open up the opportunities we have to count differently.

