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## “Who Counts?” “Sez Who?”

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**“WHO COUNTS?” “SEZ WHO?”\***

SANFORD LEVINSON\*\*

INTRODUCTION: WHY THE TITLE?

When Professor Joel Goldstein called to offer me the opportunity to deliver the 2013 Childress Lecture, I was, of course, immensely flattered, albeit immediately intimidated when he added that it would include the participation as well of a daunting group of commentators. That did not, of course, prevent me from accepting, though it did lead to writing a paper that was far too long to be delivered as a single lecture.

For better or worse, I quickly decided upon the title, “Who Counts?”, though I have subsequently modified it, for reasons that should become clear later in this Essay, by including the great American question, “Sez Who?” One reason for the initial title is that both Professor Paul Finkelman and I were participating at the time in a *New York Times* online debate<sup>1</sup> on what *The Times* accurately labeled “The Constitution’s Immoral Compromise” of counting each slave only as the equivalent of three-fifths of a free person in computing the population that would serve as the basis for determining the number of members each state would get in the House of Representatives (and,

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\* Prepared for delivery (in a truncated form) as the 2013 Childress Lecture at Saint Louis University School of Law on November 1, 2013. I am immensely grateful not only to Joel Goldstein and his colleagues for the invitation to deliver this Lecture, but also for the invitations (and acceptances) of a remarkable array of people who, not surprisingly, offered their own challenging and perceptive comments during the panels afterward. I am also grateful to Gregory Deschler and his colleagues on the *Saint Louis University Law Journal* for their hospitality and attentiveness to every need. In addition to my gratitude to Professor Goldstein for issuing the initial invitation, I have also benefited greatly from his detailed comments on an earlier draft of this Essay. And, as is a constant with anything I write and publish, I am also grateful to Mark Graber and Jack Balkin for their advice. I appreciate as well helpful feedback from Bob Mnookin. My discussion of the contemporary controversies over identifying members of American Indian tribes reflects my opportunity to present my ideas to a seminar at the University of Arkansas School of Law taught by Dean Stacy L. Leeds. Her seminar included some members of American Indian tribal councils who provided especially helpful perspectives on the issue.

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1. *The Constitution’s Immoral Compromise*, Room for Debate, N.Y. TIMES, (Feb. 26, 2013), <http://www.nytimes.com/roomfordebate/2013/02/26/the-constitutions-immoral-compromise>.

of course, the Electoral College also). It can truly be said that one of the dominant questions before the delegates in Philadelphia was “who counts” (and, of course, how much they count). It has become almost a cliché that communities are human constructs rather than recognitions of what philosophers might call “natural kinds,”<sup>2</sup> and much of the “American project” has always involved often acrimonious delineation of highly particularistic communities.<sup>3</sup>

“Who counts” and, in addition, who *feels* that one is in fact “counted” as a member of a community, are basic questions of politics and, indeed, of almost all social organization. Perhaps readers can remember—maybe ruefully—childhood “clubs” that depended as much on who was excluded as who was let in and, concomitantly, who felt the pleasures of inclusion as against the sting of exclusion. To put it mildly, the topic is an ambitious one, and this Lecture only skims the surface of its potential riches. So, as I thought about what I might want to discuss as the Childress lecturer, especially in the presence of other distinguished scholars, it occurred to me that an essential topic of the American past, present, and future is precisely “who counts” as part of the “We the People” in whose name the framers ostensibly spoke and drafted their constitutional text in 1787 and under whose aegis we continue to live today. I shall, however, roam beyond the United States at times, and beyond “standard-form” political institutions to illustrate the ubiquity of the question and the complexity of proposed solutions.

### I. ACCOUNTING FOR SLAVERY

Given that this Lecture had its origins, in a sense, in the reality of a continuing debate over the Constitution’s Three-fifths Clause, it is appropriate to begin with a further exploration of the paradoxes contained within that debate. Although one should remember that almost all of the states countenanced slavery as of 1787, the big winners were the states heavily dependent on chattel slavery, such as Virginia and South Carolina.<sup>4</sup> Many

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2. See Alexander Bird & Emma Tobin, *Natural Kinds*, in STAN. ENCYCLOPEDIA OF PHIL. (Edward N. Zalta ed., 2012), <http://plato.stanford.edu/archives/win2012/entries/natural-kinds/> (“To say that a kind is natural is to say that it corresponds to a grouping or ordering that does not depend on humans.”).

3. An essential book on different forms of American community is ROGERS M. SMITH, *CIVIC IDEALS: CONFLICTING VISIONS OF CITIZENSHIP IN U.S. HISTORY* 14 (1997).

4. See, e.g., the results of the 1790 census regarding the numbers of slaves in the various states. DEP’T OF COMMERCE & LABOR, *A CENTURY OF POPULATION GROWTH: FROM THE FIRST CENSUS OF THE UNITED STATES TO THE TWELFTH 1790–1900* 132 (1909), available at <http://www2.census.gov/prod2/decennial/documents/00165897ch14.pdf>. Only Massachusetts, Vermont, and Maine were free of slaves. *Id.* New Hampshire, for example, had 157 slaves. *Id.* Leading the pack, though, were Virginia with 292,627 slaves, with South Carolina second with 107,094 slaves. *Id.*

historians ascribe Thomas Jefferson's election in 1800 to the three-fifths bonus as reflected in the Electoral College.<sup>5</sup> Had the slaves not been counted as part of the relevant population, all American history might well have taken a radically different course, including, of course, the genuine possibility that there would have been no Constitution at all and the consequent creation of at least two, perhaps three, separate countries.

One might say that slaves counted, but only as three-fifths of non-slaves. But we immediately must confront a paradox surrounding this particular episode in American history: Anti-slavery forces properly argued that slaves *should not count at all*, whereas one can be certain that slave owners would have been delighted to have them count as the equivalent of five ordinary people. The reason is obvious: No one suggested that slaves would be able to vote. Nor, almost as significantly, could anyone seriously have suggested that slaves would be "virtually represented." Such representation was evoked with regard to women or children, non-voting citizens who would, however, ostensibly be protected by others—fathers, brothers, and husbands—who would, it was argued, have both the psychological predisposition and moral obligation to take their interests into account when voting or otherwise engaging in politics.<sup>6</sup>

No such claims were made with regard to slaves and their masters. What it meant to be a *chattel* slave was precisely that one was another's property, entitled to no more solicitude, save that determined by naked self-interest, than other live chattels such as cattle or horses. A wise owner does not mistreat or starve his horses, for example, for they are usually productive assets. But not all owners were wise, and some, at least, no doubt derived sadistic pleasure from demonstrating the absolute dominion that "ownership" is thought to bring.<sup>7</sup> So the debate had literally nothing to do with protecting the interests of those who were enslaved. Instead, it concerned only the ability of the actual electorate (and ruling elites) in a given state to benefit from the presence in

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5. See GARRY WILLS, "NEGRO PRESIDENT": JEFFERSON AND THE SLAVE POWER 1–4 (2003) (demonstrating the importance of the three-fifths compromise to providing Jefferson the marginal eight electoral votes by which he defeated John Adams).

6. See, e.g., the forthright advice by an early 20th century Minnesota legislator that women "attach themselves to some man who will represent them in public affairs." *Voting Rights for Women: Pro- and Anti- Suffrage*, EDSITEMENT!, <http://edsitement.neh.gov/lesson-plan/voting-rights-women-pro-and-anti-suffrage>, (last visited Dec. 27, 2013). Of course, "attachment" was already present with regard to one's father or brothers, who were also expected to act with suitable male chivalry.

7. A range of possibilities with regard to slave owners is well developed in *12 Years a Slave*, though, importantly, none is willing to recognize the elemental injustice involved in chattel slavery. John Ridley, *12 Years a Slave: Best Adapted Screenplay* 47–49, 64, 75 (2012). See also MARK V. TUSHNET, *SLAVE LAW IN THE AMERICAN SOUTH: STATE V. MANN IN HISTORY AND LITERATURE* 1 (2003) (history of canonical North Carolina case establishing absolute dominion of slave owners).

their states of totally non-represented non-voters because of the enhanced political power counting them as “three-fifths persons” would provide these elites. They might “count” as part of the “apportionment census,”<sup>8</sup> but no one imagined that they would, in fact, “count” as part of the community whose opinions or interests would ever be taken into account. To count them served the exclusive interest of slave owners (and their states), not at all the people purportedly “counted.”

The paradox of “representing” slaves is underscored by the full text of the relevant constitutional text:

Representatives and direct Taxes shall be apportioned among the several States which may be included within this Union, according to their respective Numbers, which shall be determined by adding to the whole Number of free Persons, including those bound to Service for a Term of Years, and *excluding Indians not taxed*, three fifths of all other Persons.<sup>9</sup>

Not only does it take care to include as full members of the “apportionment community” indentured servants, who continued to constitute a significant percentage of the labor force in 1787,<sup>10</sup> it also excludes completely “Indians not taxed,” who are truly treated as non-persons. Perhaps this simply echoes the extent to which the “compromise” is not only about apportionment, but also about the ability of Congress to use its newly authorized taxing powers, which also included a three-fifths clause. After all, slaves could in theory be taxed as part of the chattel property of their owners, and counting them as only being worth three-fifths the notional value of other capital assets would be a boon to the would-be taxpayers.<sup>11</sup>

Given that “non-assimilated” Indians were not taxed at all inasmuch as they were viewed as members of separate nations, albeit “domestic dependent” on the solicitude of the national government,<sup>12</sup> they were, similarly, to be excluded from the census. We should also acknowledge the strong possibility that many, perhaps almost all, of the “Indians not taxed” had no desire at all to be included within the American community even in such a minimal way of

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8. See Calvin H. Johnson, *Apportionment of Direct Taxes: The Foul-up in the Core of the Constitution*, 7 WM. & MARY BILL RTS. J. 1, 3, 3 n.1, 13 (1998).

9. U.S. CONST. art. I, § 2, cl. 3, *amended* by U.S. CONST. amend. XIV, § 2 (emphasis added).

10. See Mary Sarah Bilder, *The Struggle over Immigration: Indentured Servants, Slaves, and Articles of Commerce*, 61 MO. L. REV. 743, 748, 750, 781 (1996).

11. As a matter of fact, this aspect of the three-fifths compromise ended up playing no real role in American public finance. See, e.g., Johnson, *supra* note 8, at 26; see also Bruce Ackerman, *Taxation and the Constitution*, 99 COLUM. L. REV. 1, 4–6, 27–28 (1999) (arguing that “direct taxes” turned out to be almost completely unimportant in public finance, which, by definition, meant that the three-fifths tax clause also became irrelevant).

12. See, e.g., *Cherokee Nation v. Georgia*, 30 U.S. (5 Pet.) 1, 2 (1831); *Worcester v. Georgia*, 31 U.S. (6 Pet.) 515, 583 (1832), *abrogated* by *Nevada v. Hicks*, 533 U.S. 353 (2001).

being counted as part of its census inasmuch as they viewed the "Americans" as an occupying army whose claim to power rested on force rather than right.<sup>13</sup> To be "counted" against one's will as part of an alien community would certainly have not been perceived as an act of friendship.<sup>14</sup> Indeed, "Indians" are not identified as such in the first six U.S. censuses taken by the United States between 1790–1840.<sup>15</sup> Only beginning with the 1900 census were Indians living on reservations identified by the census.<sup>16</sup>

Of course, the subject "who counts" also specially resonates in St. Louis; the splendid new downtown building of Saint Louis University School of Law is literally only blocks from what has come to be called by many the "Dred Scott Courthouse"; as we all know, the lawsuit brought by Scott eventuated in the declaration by the United States Supreme Court that *no* descendant of slaves, even if formally free, could be accounted as a member of the *national* American political/legal community,<sup>17</sup> even if their bodies could continue to contribute to the enhanced political power, at least at the national level, of whites oppressing them. Interestingly enough, it appeared that even the *Dred Scott* majority accepted the reality that free blacks could be counted as part of a given *state's* political community and even allowed to vote within those

13. John Marshall basically agreed in *Johnson v. M'Intosh*, 21 U.S. (8 Wheat.) 543, 584, 589 (1823).

14. Indeed, Chief Justice Taney wrote as follows in *Dred Scott*, concerning "the Indian race," which "formed no part of the colonial communities, and never amalgamated with them in social connections or in government" and who remained

[A] free and independent people, associated together in nations or tribes, and governed by their own laws. Many of these political communities were situated in territories to which the white race claimed the ultimate right of dominion. But that claim was acknowledged to be subject to the right of the Indians to occupy it as long as they thought proper, and neither the English nor colonial Governments claimed or exercised any dominion over the tribe or nation by whom it was occupied, nor claimed the right to the possession of the territory, until the tribe or nation consented to cede it. These Indian Governments were regarded and treated as foreign Governments, as much so as if an ocean had separated the red man from the white; and their freedom has constantly been acknowledged, from the time of the first emigration to the English colonies to the present day, by the different Governments which succeeded each other. Treaties have been negotiated with them, and their alliance sought for in war; and the people who compose these Indian political communities have always been treated as foreigners not living under our Government.

*Dred Scott v. Sandford*, 60 U.S. (19 How.) 393, 403–04 (1857), *superseded by constitutional amendment*, U.S. Const. amend. XIV. As to the nature of Indian "consent" to various treaties, see MICHAEL PAUL ROGIN, *FATHERS AND CHILDREN: ANDREW JACKSON AND THE SUBJUGATION OF THE AMERICAN INDIAN* XX (Transaction Publishers 2d ed. 1995) (1975); STUART BANNER, *HOW THE INDIANS LOST THEIR LAND: LAW AND POWER ON THE FRONTIER* 127, 129 (2005).

15. *American Indians in the Federal Decennial Census, 1790–1930*, U.S. NAT'L ARCHIVES & RECORDS ADMIN., <http://www.archives.gov/research/census/native-americans/1790-1930.html> (last visited Dec. 27, 2013).

16. *Id.*

17. *Dred Scott*, 60 U.S. at 403, 407, 411.

states,<sup>18</sup> but that was irrelevant so far as computing the more embracing national community of rightsholders. (At the very least, this underscores the complexity of answering the question “who counts” and invites the follow-up question “sez who.”)

The Fourteenth Amendment overruled this aspect of *Dred Scott*, and the Fifteenth Amendment ostensibly made it illegal for states to deny at least African-American *males* the right to vote in elections. It is, of course, a historical truth that many feminists opposed both the Fourteenth and, especially, the Fifteenth Amendments precisely because one could view them as underscoring the proposition that women, albeit citizens, did *not* count as potential members of the American political community, save to the degree they were virtually represented or enjoyed certain limited rights as citizens.<sup>19</sup> It would take another half-century for the Nineteenth Amendment to guarantee women the right to vote and whatever recognition the suffrage brings as a member of the community that “counts.”

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18. *See id.* at 405.

[A person] may have all of the rights and privileges of the citizen of a State, and yet not be entitled to the rights and privileges of a citizen in any other State. For, previous to the adoption of the Constitution of the United States, every State had the undoubted right to confer on whomsoever it pleased the character of citizen, and to endow him with all its rights. But this character of course was confined to the boundaries of the State, and gave him no rights or privileges in other States beyond those secured to him by the laws of nations and the comity of States. Nor have the several States surrendered the power of conferring these rights and privileges by adopting the Constitution of the United States. Each State may still confer them upon an alien, or any one it thinks proper, or upon any class or description of persons; yet he would not be a citizen in the sense in which that word is used in the Constitution of the United States, nor entitled to sue as such in one of its courts, nor to the privileges and immunities of a citizen in the other States. The rights which he would acquire would be restricted to the State which gave them.

*Id.*

19. Thus the text of Section 2 of the Fourteenth Amendment explicitly states, in relevant part:

But when the right to vote at any election for the choice of electors for President and Vice President of the United States, Representatives in Congress, the Executive and Judicial officers of a State, or the members of the Legislature thereof, is denied to any of the *male* inhabitants of such State, being . . . citizens of the United States, or in any way abridged, except for participation in rebellion, or other crime, the basis of representation therein shall be reduced in the proportion which the number of such *male* citizens shall bear to the whole number of *male* citizens twenty-one years of age in such State.

U.S. CONST. amend. XIV, § 2 (emphasis added). *See also* another Missouri case, *Minor v. Happersett*, 88 U.S. (21 Wall.) 162, 165, 178 (1874) (women’s right to vote not guaranteed by the privileges or immunities clause of the Fourteenth Amendment); *Bradwell v. Illinois*, 83 U. S. (16 Wall.) 130, 130, 133, 139 (1872) (women not guaranteed the right to practice law if states wish to exclude them from the legal profession).

## II. SO WHO COUNTS AS AN "INDIAN"?

Although Taney took great care to distinguish between American Indians and those we today call African-Americans, noting, for example, that at least some of the former *could* become American citizens,<sup>20</sup> he took great care to limit the category of those who could count as Indian. Key in this regard is his altogether fascinating earlier opinion in *United States v. Rogers* rejecting the proposition that a white person could become an Indian.<sup>21</sup> For Taney, it is fair to say, race was everything, trumping all other concerns. Indeed, Kenneth Prewitt, a distinguished political scientist and former director of the United States Census Bureau, has recently suggested that our fixation with *racial* identity may truly be part of what constitutes American exceptionalism.<sup>22</sup> "America [is] the only country in the world firmly wedded to an eighteenth-century racial taxonomy," he writes, that continues to structure a great deal of our public discussion and public policy.<sup>23</sup> This taxonomy, by which one is assigned—counted as—a member of only one of the then-five constitutive races<sup>24</sup> is on full display in Taney's decision.

As described by Taney, "William S. Rogers, a white man," had been indicted for the murder of one "Jacob Nicholson, also a white man, in the country now occupied and allotted by the laws of the United States to the Cherokee Indians."<sup>25</sup> Rogers claimed that he had in effect emigrated "to the Cherokee country, and made it his home," becoming, along the way, "a citizen of the Cherokee nation" as determined, of course, by the Cherokee nation itself.<sup>26</sup> His status as a Cherokee citizen would mean that that Rogers would be exempt from the jurisdiction of the United States, because Congress had passed a criminal law that included a proviso that it would not "include punishment for 'crimes committed by one Indian against the person or property of another Indian.'"<sup>27</sup> Because Nicholson "had in like manner become a Cherokee Indian," Rogers claimed that the United States court was without jurisdiction to try him.<sup>28</sup> Perhaps you will permit me to add as an aside that one

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20. *Dred Scott*, 60 U.S. at 404 ("But they may, without doubt, like the subjects of any other foreign Government, be naturalized by the authority of Congress, and become citizens of a State, and of the United States; and if an individual should leave his nation or tribe, and take up his abode among the white population, he would be entitled to all the rights and privileges which would belong to an emigrant from any other foreign people.").

21. *United States v. Rogers*, 45 U.S. (4 How.) 567, 572–73 (1846).

22. KENNETH PREWITT, *WHAT IS YOUR RACE?: THE CENSUS AND OUR FLAWED EFFORTS TO CLASSIFY AMERICANS* 8 (2013).

23. *Id.*

24. *See id.* at 14–17.

25. *Rogers*, 45 U.S. at 571.

26. *Id.*

27. *Id.* at 567.

28. *Id.* at 571.



reason I love law is that the facts of cases are so endlessly fascinating. One does not need to engage in exotic hypotheticals. The world itself is so remarkably interesting!

In any event, Taney (and the Court) did not buy Rogers's argument. "[W]e think it very clear, that a white man who at mature age is adopted in an Indian tribe does not thereby become an Indian, and was not intended to be embraced in the exception above mentioned."<sup>29</sup> For Taney—and is this surprising?—we are dealing with what a later generation would learn to call “essentialism,” and part of “being an Indian” is presumably skin color, as evidenced in the controversial name of the professional football team of our Nation's capital.<sup>30</sup> Presumably, once white, *always* white, at least for purposes of the particular federal statute. (I am not aware what Taney's views would have been with regard to a free black who “emigrated” to the Cherokee Nation.) Even if one stipulates that Rogers “by such adoption [became] entitled to certain privileges in the tribe, and [made] himself amenable to their laws and usages,”<sup>31</sup> that is basically irrelevant.

Yet he is not an Indian; and the exception is confined to those who by the usages and customs of the Indians are regarded as belonging to their race. *It does not speak of members of a tribe, but of the race generally,— of the family of Indians; and it intended to leave them both, as regarded their own tribe, and other tribes also, to be governed by Indian usages and customs. . . .*<sup>32</sup>

Rogers, however, “was still a white man, of the white race, and therefore not within the exception in the act of Congress.”<sup>33</sup> Presumably, the Cherokee viewed their identity as “political” as well as “racial,” with a concomitant right attaching to the Cherokee Nation, like any other political entity, to welcome newcomers even if they were initially *not* part of the Nation. One theorist of British parliamentary sovereignty famously declared that “[i]t is a fundamental principle with English lawyers, that Parliament can do everything but make a woman a man, and a man a woman.”<sup>34</sup> It similarly appears that the Cherokee Nation, even if one deems it to have at least some attributes of “sovereignty,” cannot, according to Taney, change a white man into an Indian.

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29. *Id.* at 572–73. Imagine if the sentence instead read: “We think it very clear that an Italian who at mature age is granted citizenship in the United States does not thereby become an American.”

30. See, e.g., Maureen Dowd, *Call an Audible, Dan*, N.Y. TIMES, Oct. 9, 2013, at A29 (joining with those calling on Dan Snyder, the owner of the “Washington Redskins,” to change the name that increasing numbers of people find offensive).

31. *Rogers*, 45 U.S. at 573.

32. *Id.* (emphasis added).

33. *Id.*

34. ALBERT VENN DICEY, INTRODUCTION TO THE STUDY OF THE LAW OF THE CONSTITUTION 41 (8th ed., 1915) (quoting DeLolme).

Questions as to "who counts as an Indian" have scarcely disappeared. Indeed, they have taken on special import in a number of the over-500 registered American Indian tribes<sup>35</sup> in the United States inasmuch as they are attempting to *disenroll* some of their putative membership. That is, the specific question is *not* who is within the broad category of "American Indian," a question similar, perhaps, to deciding who precisely in the modern world counts as a "European" or "African"—in the latter context think especially of the status of Afrikaners in South Africa—but, rather, who count as members of very specific tribes. For whatever reason—though one may strongly suspect that access to revenues generated by casinos on Indian reservations is at least part of the explanation—persons who have thought that they are members in good standing of given tribes have been faced with attempts by tribal leaders to remove them from the rolls on grounds that they do not, after all, meet the prerequisites for being considered a "genuine" X.<sup>36</sup> That is, it is even possible, I presume, that one might be regarded as "an Indian" by, say, the United States Census, but that no particular tribe would offer a home. One California tribe, the Chukchansi, has been described as terminating the membership of "almost 75% of their tribe."<sup>37</sup> An article tellingly titled "Disenrollment Has Been the Scourge of Tribes Since the Advent of Casino Gaming" details efforts within the "tiny Sauk-Suiattle" tribe located in the State of Washington to "disenroll 306 members—allegedly because they are part-Filipino."<sup>38</sup> A spokesperson for those challenging their disenrollment describes this as "ethnic cleansing pure and simple," an effort "to wash the Filipino blood out of the Nooksack Tribe."<sup>39</sup> One potential victim of disenrollment has described the process as "genocide."<sup>40</sup> Those who defend disenrollment no doubt offer different analyses and descriptions.

Quite obviously, the same set of questions has been endlessly presented in American social and legal experience with regard to other forms of racial identity. Was, for example, Homer Plessy *really* an African-American and therefore subject to being banished to the railway car reserved for that race? He

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35. As of 2012, there were apparently 566 officially recognized American Tribes in the United States. *List of Federally Recognized Tribes*, WIKIPEDIA, [http://en.wikipedia.org/wiki/List\\_of\\_federally\\_recognized\\_tribes](http://en.wikipedia.org/wiki/List_of_federally_recognized_tribes) (last visited Jan. 7, 2014).

36. See, e.g., James Dao, *In California, Indian Tribes With Casino Money Eject Thousands of Members*, N.Y. TIMES, Dec. 13, 2011, at A20.

37. Matt Driscoll, Comment of the Day, *Disenrollment Has Been the Scourge of Tribes Since the Advent of Casino Gaming*, SEATTLE WEEKLY (Mar. 25, 2013), <http://www.seattleweekly.com/news/thedailyweekly/943055-129/commentoftheday>.

38. *Id.*

39. *Id.*

40. Gale Courey Toensing, *Nooksack Indian Tribe in Disenrollment Fight*, INDIAN COUNTRY TODAY MEDIA NETWORK.COM (Apr. 11, 2013), <http://indiancountrytodaymedianetwork.com/2013/04/11/nooksack-indian-tribe-disenrollment-fight-148742>.

seems to have been what New Orleansians, who had exquisitely calibrated ways of measuring racial identity, called an “octoroon,” that is, like Sally Hemings, Thomas Jefferson’s inamorata,<sup>41</sup> a person with a single black grandparent, and therefore, under the infamous “single drop of blood” rule, “black,” even if it appears that his appearance would have led many onlookers to ascribe a different racial identity. That is, he might well have been able to “pass” into whiteness had that been his desire.<sup>42</sup> Or consider a notorious set of citizenship cases from the 1920s, which turned on whether a “high caste” Brahmin from India or an immigrant from Japan were “white” and therefore eligible for citizenship under American naturalization laws that, at the time, limited citizenship only to whites and a small category of black immigrants from Africa.<sup>43</sup> The answer in both cases was no.

One must also recall in this context Justice John Paul Stevens’s dissent in *Fullilove v. Klutznick*, involving the operation of a federal-level affirmative action law directed to “citizens of the United States who are Negroes, Spanish-speaking, Orientals, Indians, Eskimos, and Aleuts.”<sup>44</sup> One of Justice Stevens’s arguments concerned the difficulty, if not near-impossibility, of defining with confidence those who count and those who do not with regard to the ethnic or racial groups in question.<sup>45</sup> Stevens described “the very attempt to define with precision a beneficiary’s qualifying racial characteristics [as] repugnant to our constitutional ideals.”<sup>46</sup> It should already be crystal clear, though, this is an utterly false statement, at least with regard to the enacted tradition of American constitutional doctrine; *nothing* is more American, so to speak, than a near obsession with precise definition of racial characteristics in determining who counts as an X. In any event, Justice Stevens went on to suggest, with what was undoubtedly self-conscious provocation, that “[i]f the National Government is to make a serious effort to define racial classes by criteria that

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41. See ANNETTE GORDON-REED, *THE HEMINGS OF MONTICELLO* 16–17 (2009).

42. RANDALL KENNEDY, *INTERRACIAL INTIMACIES: SEX, MARRIAGE, IDENTITY, AND ADOPTION* 281–338 (2003) [hereinafter *INTERRACIAL INTIMACIES*]; Randall Kennedy, *Racial Passing*, 62 OHIO ST. L.J. 1145, 1145 (2001); see generally, PHILIP ROTH, *THE HUMAN STAIN* (2000); see also GORDON-REED, *supra* note 41, at 586–605 (noting that many of Sally Heming’s (and, presumably, Thomas Jefferson’s) descendants chose to “pass” even as others maintained conscious affiliation with the African-American community).

43. See *United States v. Thind*, 261 U.S. 204, 206, 215 (1923) (“a high caste Hindu of full Indian blood”); *Ozawa v. United States*, 260 U.S. 178, 184, 198 (1922) (“clearly of a race which is not Caucasian”), both cases discussed in Justin Driver, *Recognizing Race*, 112 COLUM. L. REV. 404, 412–13 (2012); see also IAN HANEY LÓPEZ, *WHITE BY LAW: THE LEGAL CONSTRUCTION OF RACE* 56–77 (rev. & updated 10th anniversary ed., 2006) (discussing *Ozawa* and *Thind*).

44. *Fullilove v. Klutznick*, 448 U.S. 448, 535 (1980) (Stevens, J., dissenting).

45. *Id.* at 535–36. It would presumably be far easier to identify those who are “Spanish-speaking,” but then one must explain why they deserve special preference.

46. *Id.* at 534 n.5.

can be administered objectively, it must study precedents such as the First Regulation to the Reichs Citizenship Law of November 14, 1935 . . . ."<sup>47</sup>

Indeed, let me confess that I believed that the collapse of affirmative action as a policy would not be the result of the force of the philosophical or political arguments against using it to rectify past injustice in America or to achieve necessary diversity in a variety of institutional settings, including, very importantly, the military. I am in basic agreement with most of the arguments on behalf of "affirmative action" that are well set out by Randall Kennedy in his recent book *For Discrimination*.<sup>48</sup> Rather, I thought that the collapse would be the result of the distinctly practical problems in defining who qualifies—who counts—which, as anyone who has ever been involved in actually administering such programs knows, can be quite excruciating.

### III. ILLEGAL ALIENS AND OTHER "FILLER PEOPLE"

A particularly volatile question at present involves so-called "illegal aliens," i.e., the millions of people who are in this country either having entered it illegally or, quite commonly, overstayed their visas after a fully legal entry (and who, obviously, can be distinguished from the Rehnquistian community of "quasi citizens"<sup>49</sup>). Do they "count"? Quite obviously they are not part of the electorate. Indeed, neither are altogether lawful resident aliens, though, as a matter of fact, it is not self-evident why resident aliens should be deprived of a right to take part in decisions that clearly affect their lives.<sup>50</sup> After all, some states prior to 1926 *did* allow resident aliens in the process of becoming U.S. citizens to vote, and even now a few communities in the U.S. do allow non-citizen suffrage in local elections.<sup>51</sup>

But consider the fact that illegal aliens, however defined, *are* counted as part of the national census and, more importantly, are included in the so-called "apportionment population" that defines how many representatives (and,

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47. *Id.*

48. RANDALL KENNEDY, *FOR DISCRIMINATION: RACE, AFFIRMATIVE ACTION, AND THE LAW* (2013).

49. See, e.g., John P. Feldmeier, *United States v. Verdugo-Urquidez: Constitutional Alchemy of the Fourth Amendment*, 20 CAP. U. L. REV. 521, 536–37 (1991).

50. I earlier explored some of these questions in *Suffrage and Community: Who Should Vote?*, 41 FLA. L. REV. 545 (1989). Some localities allow resident aliens to vote in local elections. David C. Earnest, *Noncitizen Voting Rights: A Survey of an Emerging Democratic Norm*, Am. Pol. Sci. Ass'n, Aug. 29, 2003, available at [http://ww2.odu.edu/~dearnest/pdfs/Earnest\\_APSA\\_2003.pdf](http://ww2.odu.edu/~dearnest/pdfs/Earnest_APSA_2003.pdf). The California Assembly has recently passed a bill that would allow resident aliens to serve on juries, though Governor Jerry Brown vetoed the measure. Jennifer Medina, *Veto Halts Bill for Jury Duty by Noncitizens*, N.Y. Times, Oct. 8, 2013, at A1.

51. Jamin B. Raskin, *Legal Aliens, Local Citizens: The Historical, Constitutional and Theoretical Meanings of Alien Suffrage*, 141 U. PA. L. REV. 1391, 1397 (1993); see also Earnest, *supra* note 50.

recall, votes in the Electoral College) states are entitled to. This is produced, roughly, by dividing the entire “apportionment population” by 385, the number of members of the House of Representatives remaining after 50 members are set aside to ensure each state has their constitutionally guaranteed minimum.<sup>52</sup> Interestingly enough, the “apportionment population” does not include the populations of the District of Columbia or Puerto Rico, even though they are composed overwhelmingly of United States citizens.<sup>53</sup> As geographical entities, however, they are not represented in Congress,<sup>54</sup> which apparently makes all the difference. Even though voters in the District of Columbia, thanks to the Twenty-third Amendment, can choose three electors who will in turn elect the President, that is apparently irrelevant so far as computing the “apportionment population” is concerned.<sup>55</sup> It should not occasion surprise, incidentally, that many District of Columbia license plates include the motto “Taxation without Representation,”<sup>56</sup> which is simply the ability to be “counted” when decisions to tax are made by a legislature.

A report by the Department of Homeland Security estimated that in January 2010 there were approximately 10.8 million illegal aliens in the United States, with approximately 2.6 million and 1.8 million residing in California and Texas, respectively.<sup>57</sup> Given that each state is awarded a congressional

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52. *Congressional Apportionment: How It's Calculated*, U. S. CENSUS BUREAU, <http://www.census.gov/population/apportionment/about/how.html> (last updated Feb. 4, 2013).

53. *Congressional Apportionment: Frequently Asked Questions*, U. S. CENSUS BUREAU, <http://www.census.gov/population/apportionment/about/faq.html> (last updated Feb. 4, 2013).

54. *Id.*

55. *Id.*; U.S. CONST. amend. XXIII, § 1.

56. See, e.g., Tim Craig, *Obama to Use D.C. 'Taxation without Representation' License Plates*, WASH. POST (Jan. 15, 2013), [http://www.washingtonpost.com/local/dc-politics/obama-to-use-dc-taxation-without-representation-license-plates/2013/01/15/f91b09ac-5f5b-11e2-9940-6fc488f3fecdd\\_story.html](http://www.washingtonpost.com/local/dc-politics/obama-to-use-dc-taxation-without-representation-license-plates/2013/01/15/f91b09ac-5f5b-11e2-9940-6fc488f3fecdd_story.html).

57. MICHAEL HOEFER ET AL., ESTIMATES OF THE UNAUTHORIZED IMMIGRANT POPULATION RESIDING IN THE UNITED STATES: JANUARY 2010, U.S. DEP'T OF HOMELAND SEC., 4 tbl.4 (Feb. 2011), available at [http://www.dhs.gov/xlibrary/assets/statistics/publications/ois\\_ill\\_pe\\_2010.pdf](http://www.dhs.gov/xlibrary/assets/statistics/publications/ois_ill_pe_2010.pdf). Two authors, writing in the *Wall Street Journal* in 2009, suggesting that counting illegal aliens in the 2010 census would be unconstitutional, offered strikingly different numbers:

According to the latest American Community Survey [produced by the Bureau of the Census], California has 5,622,422 noncitizens in its population of 36,264,467. Based on our round-number projection of a decade-end population in that state of 37,000,000 (including 5,750,000 noncitizens), California would have 57 members in the newly reapportioned U.S. House of Representatives.

However, with noncitizens not included for purposes of reapportionment, California would have 48 House seats (based on an estimated 308 million total population in 2010 with 283 million citizens, or 650,000 citizens per House seat). Using a similar projection, Texas would have 38 House members with noncitizens included. With only citizens counted, it would be entitled to 34 members.

district for roughly each 700,000 residents (i.e., *not* citizens, let alone voting-eligible citizens<sup>58</sup>), this means that California gets at least three "extra" representatives (and electoral votes) and Texas two, thanks to their illegal residents.

It is not a "self-evident truth," so to speak, that illegal aliens *should* be counted as part of the "apportionment population." The reason is surely *not* because they do not possess genuine interests that might well be taken into account by truly disinterested "representatives." They most certainly do. But I think it is fair to suggest that the dominant theory of representation in this country, often articulated by public officials themselves, is that their job is to respond to, perhaps even to mirror, the preferences of *voting* constituents.<sup>59</sup> Even if members of Congress in fact deviate from this model on occasion, it is rare indeed to find members proudly proclaiming that they will vote on the basis of what they think best for the country even if this runs contrary to the wishes of the constituents on whom they depend for re-election.

This mode of self-presentation (and, often, actual behavior that might be explained by an instinct for political self-preservation as well) may be defended on the basis of an overtly normative theory of representation or, more practically, simply by reference to a "rational choice" model that focuses on the incentives that organize blocs of potential voters (or contributors) can provide to officials to take their particular interests into account. If Yale Professor David Mayhew is correct that most members of Congress are motivated above all by the desire to be re-elected,<sup>60</sup> then it is exceedingly difficult to explain why those we call "representatives" would ever take into

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John S. Baker & Elliott Stonecipher, *Our Unconstitutional Census*, WALL ST. J., Aug. 10, 2009, at A11. It should be glaringly obvious—and a central theme of this Lecture—that the precise numbers offered by the American Community Survey cannot be taken seriously, even if one grants that their numbers are, broadly speaking, more accurate than those of the Department of Homeland Security, simply given inevitable barriers in the way to conducting any census, let alone one that requires people who are in this country illegally to admit their status. It would be like reading a survey that allegedly determined that 22,132,469—not one more, not one less—persons had committed adultery last year. Surely most Americans—or at least those who have learned from NATE SILVER, *THE SIGNAL AND THE NOISE: WHY SO MANY PREDICTIONS FAIL—BUT SOME DON'T* (2012), about margins of error in public opinion polling—know that even the best-conducted surveys can strive only for relative accuracy, which means, by definition, that another iteration of the same poll could end up with quite different results. That being said, it remains a powerful point to be able to say, with a certain degree of confidence, that there are probably at least five million undocumented aliens in California, a number considerably higher than the estimate produced by the Department of Homeland Security.

58. Joseph Fishkin, *Weightless Votes*, 121 YALE L. J. 1888, 1890–91 (2012).

59. See, e.g., Barbara Sinclair, *An Effective Congress and Effective Members: What Does it Take?*, 29 AM. POL. SCI. ASS'N 435 (Sept. 1996), available at [http://www.congresslink.org/print\\_expert\\_effectivecongress.htm](http://www.congresslink.org/print_expert_effectivecongress.htm).

60. DAVID R. MAYHEW, *CONGRESS: THE ELECTORAL CONNECTION* 13–19 (1974).

account the interests of non-voters, especially if, in contrast to teenagers, there is no likelihood that they might become voters in the relatively near future. Moreover, illegal aliens may be a classic “discrete and insular minorit[y]”<sup>61</sup> who are often the objects of fear and discrimination by the voting population and public officials mirroring those views. That is, active hostility replaces a sometimes benign indifference.<sup>62</sup> As may be true more often than we would like to believe, the courts are no more eager to protect such minorities than are other political institutions.<sup>63</sup>

Similar concerns might be raised with regard to American citizens who are disqualified from voting, as is the case with convicted felons in many American states. It is a sad play on words to say, for example, that the prisoners herded together in Huntsville, Texas, or other centers of incarceration in the United States are “represented” by the legislators who prevail in elections.<sup>64</sup> They “count” only to provide extra political power to privileged voters (many in Huntsville who have become dependent on what might well be called the “prison-industrial complex”). Had the Supreme Court, in the past fifty years, ever deigned to explain what it really meant by the adage one-person/one-vote, perhaps one could even say that such counts are

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61. *United States v. Carolene Prods. Co.*, 304 U.S. 144, 153 n.4 (1938). See J. M. Balkin, *The Footnote*, 83 NW. U. L. REV. 275, 281 (1989) (describing the significance of footnote four in *Carolene Products*).

62. Professor Cohen raises a fascinating question in her contribution to this symposium. “Somebody is doing *some* work to represent the interests of undocumented immigrants,” she writes. Elizabeth F. Cohen, *Dilemmas of Representation, Citizenship, and Semi-citizenship*, 58 ST. LOUIS U. L.J. 1047, 1065 (2014). “Otherwise they wouldn’t be getting drivers licenses in some states, being regularized by infrequent but important amnesties, and receiving various other benefits. This is not to say that their semi-citizenship constitutes a fully just arrangement. It is simply an observation that representation occurs in the absence of the franchise.” *Id.* (citations omitted). Presumably, one could offer similar observations about almost any formally excluded group inasmuch as there may be some people within the political system who, for whatever reason, take up their cause. Consider, e.g., abolitionists and slaves, or members of the American Civil Liberties Union who defend the rights of Jehovah’s Witnesses. If it is important to be reminded of such realities, it surely cannot be sufficient to become complacent, and Professor Cohen herself reminds us that what she aptly terms “semi-citizenship” may rarely “constitute[] a fully just arrangement.” *Id.* And she concludes her article by noting that “the most successful instances of trusteeship described in this article are those that move toward or end in the enfranchisement of different semi-citizens.” *Id.* at 1069.

63. See, e.g., L.A. Powe, Jr., *Does Footnote Four Describe?*, 11 CONST. COMMENT. 197, 197–98 (1994).

64. See, e.g., Peter Wagner, *Breaking the Census: Redistricting in an Era of Mass Incarceration*, 38 WM. MITCHELL L. REV. 1241, 1241 (2012) (demonstrating the importance not only of “who counts,” but also *where* they are counted).

unconstitutional, but the Court has consistently given us a large number of near-arbitrary decisions in lieu of genuinely coherent opinions.<sup>65</sup>

In any event, we might legitimately compare the "illegal alien" and "disenfranchised felons" bonuses, in their practical political effects, to the three-fifths bonus, at least in some states and legislative districts. Indeed, given that both illegal aliens and disenfranchised felons are counted as whole persons, it might be even more appropriately compared to the "segregation bonus" that reinforced the post-1877 power of Southern states, returned to white supremacy, even more than had been the case previously; each former slave might now be counted as a whole person.<sup>66</sup> But particularly by the turn of the 20th century, the great majority of former slaves were denied the right to vote in the formerly Confederate states, with dreadful consequences not only for the affected African-Americans but for the American political system as a whole.<sup>67</sup> Congress was for decades significantly controlled by congressional Southern Democrats determined to prevent any national programs from aiding African-Americans (who were in no serious sense "constituents").<sup>68</sup>

The text of the Fifteenth Amendment had become what James Madison dismissively termed (referring, of course, to other parts of the Constitution) a "parchment barrier."<sup>69</sup> As Justice Holmes asserted in the too-little-studied case *Giles v. Harris*,<sup>70</sup> one could scarcely expect the Supreme Court, without the resources, as Hamilton put it, of "sword or the purse,"<sup>71</sup> to enforce the Amendment in the teeth of systematic state opposition, including ruthless violence directed against those African-Americans who wished to participate in the political process,<sup>72</sup> coupled with no apparent will on the part of Congress or the executive to re-engage in the arduous task of Reconstruction, i.e.,

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65. Sanford Levinson, *One Person, One Vote: A Mantra in Need of Meaning*, 80 N.C. L. REV. 1269 (2002). The most thorough judicial discussion can be found in Judge Kozinski's concurring and dissenting opinion in *Garza v. Cnty. of Los Angeles*, 918 F.2d 763, 779–88 (9th Cir. 1990), *cert. denied*, 498 U.S. 1028 (1991).

66. See J. MORGAN KOUSSER, *THE SHAPING OF SOUTHERN POLITICS: SUFFRAGE RESTRICTION AND THE ESTABLISHMENT OF THE ONE-PARTY SOUTH, 1880–1910* (2d ed. 1975) (describing efforts to restrict the voting rights of former slaves).

67. *Id.* at 42–44.

68. IRA KATZNELSON, *FEAR ITSELF: THE NEW DEAL AND THE ORIGINS OF OUR TIME* 15–16 (2013).

69. See THE FEDERALIST NO. 48, at 245–46 (James Madison) (Lawrence Goldman ed., 2008).

70. 189 U.S. 475, 488 (1903); see Richard H. Pildes, *Democracy, Anti-Democracy, and the Canon*, 17 CONST. COMMENT. 295, 296–97 (2000) (discussing the impact of *Giles* and attempts to "airbrush" the case from the constitutional canon).

71. THE FEDERALIST NO. 78, *supra* note 69, at 380 (Alexander Hamilton).

72. See, e.g., DOUGLAS R. EGERTON, *THE WARS OF RECONSTRUCTION: THE BRIEF, VIOLENT HISTORY OF AMERICA'S MOST PROGRESSIVE ERA* 284–320 (2014).



genuine “regime change.”<sup>73</sup> Never has an ostensibly defeated adversary enjoyed such political fruits that typically go only to the victorious.

It took a war to rid the country of slavery; it would take a mighty post-World War II movement, including the violence it elicited and concomitant belated response by both President and Congress, to make the Fifteenth Amendment a genuine reality in American constitutional politics and therefore to allow, say, Alabama and Mississippi African-Americans truly to count as part of the polity. Part of that reality was the Voting Rights Act of 1965,<sup>74</sup> now under relentless assault by a Supreme Court that can be described as either ignorant of, or simply indifferent to, the history of the United States with regard to this aspect of determining “who counts” as anything more than the mere subject of enumeration.<sup>75</sup> With regard to the ability of even adult citizens to vote, one cannot be confident that contemporary states are fully willing to let every person count as a full participant in the community.<sup>76</sup>

College students, for example, have been especially subject to explicit legal efforts denying them the right to vote in college towns, as delineated in a *New York Times* editorial aptly titled “Keeping Students from the Polls.”<sup>77</sup> It quoted the Republican Speaker of the New Hampshire House of Representatives, who described students as “foolish” because they “vote their feelings” instead of being guided, as older adults presumably are, by stern logic and the lessons of experience.<sup>78</sup> “‘Voting as a liberal,’ he said, ‘that’s what kids do.’”<sup>79</sup> The relevant response, even more than attempting to persuade them that liberal views are mistakes, which, of course, might take years, is to say that their votes simply will not count in any venue besides that of their original home. This response to student voters, incidentally, underlines the importance of specific voting systems in determining what it means to “count” or, concomitantly, *not* count.

The United States is in a minority at least of major countries around the world that elects officials almost exclusively by geographical area (as well as determination of winners by First Past The Post (“FPTP”)), rather than

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73. *Id.*

74. *See, e.g.*, 3 BRUCE ACKERMAN, *WE THE PEOPLE: THE CIVIL RIGHTS REVOLUTION* 160–173 (2014) (underscoring the centrality of the Voting Rights Act to the Civil Rights Revolution).

75. *See, e.g.*, *Shelby Cnty. v. Holder*, 133 S. Ct. 2612, 2628–29 (2013).

76. *See, e.g.*, Richard L. Hasen, *Race or Party?: How Courts Should Think About Republican Efforts to Make It Harder to Vote in North Carolina and Elsewhere*, 127 *HARV. L. REV. F.* 58, 60–61, 65 (2014) (outlining several contemporary attempts by state legislatures to exclude certain groups from electoral participation).

77. Editorial, *Keeping Students from the Polls*, *N.Y. TIMES*, Dec. 27, 2011, at A18.

78. *Id.*

79. *Id.*

prevailing in a run-off),<sup>80</sup> which is, among other things, why partisan gerrymandering especially afflicts American politics. This is "American exceptionalism" with a vengeance. If, on the other hand, we adopted a system of nation-wide proportional representation or, even better, like Germany or New Zealand, mixed systems of geography-based and state- or nation-wide proportional representation,<sup>81</sup> then it would be a matter of near indifference whether students voted in, say, Hanover, New Hampshire, the home of Dartmouth College, or some other locale within the state, save, of course, for issues of local importance.

As a practical matter, geographical representation guarantees that de facto permanent minorities, whether identified by race, ethnicity, or, just as importantly, ideology, will not effectively "count" within the electorate even if they get to cast ballots in the general election.<sup>82</sup> The "real" elections will, as we increasingly see, take place in political *primaries* rather than the often basically meaningless general elections.<sup>83</sup> It is glaringly obvious that "representatives" have no genuine incentives to respond to the needs of illegal aliens unless, as is sometimes the case, their voting constituents believe, for whatever reason, that those needs should be met.<sup>84</sup> But, increasingly, it is hard to believe that representatives in most congressional districts within our polarized political system have any incentive to respond to the views of voting citizens who can

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80. See the valuable compilation of electoral systems around the world at *Table of Electoral Systems Worldwide*, INT'L INST. FOR DEMOCRACY & ELECTORAL ASSISTANCE, <http://www.idea.int/esd/world.cfm> (last updated Oct. 14, 2010). See also Nils-Christian Bormann & Matt Golder, *Democratic Electoral Systems Around the World, 1946–2011*, 32 ELECTORAL STUD. 360, 364 (2013), available at <https://files.nyu.edu/mrg217/public/es3.pdf>.

81. The New Zealand system of MMP (mixed member proportional representation) is explained at *The MMP Voting System: Mixed Member Proportional*, ELECTORAL COMM'N., [http://www.mmpreview.org.nz/sites/all/themes/referendum/resources/Fact-Sheet\\_MMP.pdf](http://www.mmpreview.org.nz/sites/all/themes/referendum/resources/Fact-Sheet_MMP.pdf) (last visited Jan. 8, 2014). On Germany, see Leon Mangasarian, *How Germany's Election System Works: What to Watch for Today*, BLOOMBERG (Sept. 21, 2013, 10:01 PM), <http://www.bloomberg.com/news/2013-09-21/how-germany-s-election-system-works-what-to-watch-for-today.html>.

82. See James Thomas Tucker, *Redefining American Democracy: Do Alternative Voting Systems Capture the True Meaning of "Representation"?*, 7 MICH. J. RACE & L. 357, 385–86 (2002) (concluding that geographic representation has come to contradict the basic principle that "all powers of government must be derived from the consent of the governed" and that some form of proportional representation would remedy the failings of geographic representation); James Thomas Tucker, *Affirmative Action and [Mis]representation: Part II—Deconstructing the Obstructionist Vision of the Right to Vote*, 43 HOW. L.J. 405, 470 (2000) (noting that, under the United States' winner-take-all elections, votes for losing candidates are essentially "wasted").

83. Burt Neuborne, *Felix Frankfurter's Revenge: An Accidental Democracy Built by Judges*, 35 N.Y.U. REV. L. & SOC. CHANGE 602, 645 (2011) (arguing, among other things, that the Supreme Court's history of allowing major political parties to "rig" the candidate selection process in gerrymandered districts often renders general elections "meaningless").

84. See *supra* notes 49–68 and accompanying text.

easily be described as members of a permanent minority who will never genuinely provide an electoral threat.

It is important, to be sure, that one's vote "be counted" rather than torn up, but it often turns out that merely having one's vote tabulated does not come close to providing a sense that one truly "counts" as someone, for example, whom a so-called "representative" truly has to care about. This also captures the distinctly different senses of "being counted," which include, but are not limited to, being part of an enumeration or even of the formal electorate. Instead, one must be treated as if one has certain dignitary-legal rights that allow persons to feel psychologically that "they count" as part of a relevant moral, and not only numerical, community. To be told, in effect, that one "counts" only to serve the interests of others is one definition of "humiliation." It is relevant that Bruce Ackerman, in his recent book *The Civil Rights Revolution*, locates the meaning of *Brown v. Board of Education*<sup>85</sup> above all as signaling an attack on what Senator Hubert Humphrey, speaking ten years later in behalf of the Civil Rights Act of 1964, called the "monstrous humiliations and inconveniences that racial discrimination imposes on our Negro fellow citizens."<sup>86</sup>

Some years ago, Sam Issacharoff and Alex Aleinikoff coined the marvelous but disturbing term "filler people" to refer to hapless minorities who are placed in legislative districts for the purpose of fulfilling the Supreme Court's mechanistic mandate of "equal population" but who are otherwise expected to play no genuine role in selecting public officials.<sup>87</sup> As someone who is such a "filler person" in my congressional district that includes part of Austin, I in no way at all feel that the invariably conservative Republican

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85. *Brown v. Bd. of Educ.*, 347 U.S. 483 (1954).

86. ACKERMAN, *supra* note 74, at 136.

87. T. Alexander Alienikoff & Samuel Issacharoff, *Race and Redistricting: Drawing Constitutional Lines After Shaw v. Reno*, 92 MICH. L. REV. 588, 601, 631 (1993). Pamela Karlan explains:

The term "filler people," which Sam Issacharoff coined, refers to the fact that because one person, one vote requires that all districts have the same population, while the need to avoid "packing" means that most deliberately drawn majority-nonwhite districts are somewhere between fifty-one and sixty-five percent nonwhite, a substantial number of other people (usually members of the white majority, but sometimes members of other racial or ethnic groups) must be assigned to these districts in order to top off the total population at a constitutionally acceptable level.

Pamela S. Karlan, *John Hart Ely and the Problem of Gerrymandering: The Lion in Winter*, 114 YALE L. J. 1329, 1342 n. 61 (2005). Although the term "filler people" might have initially been used in the context of "racial gerrymandering," it is obviously applicable to *all* instances of gerrymandering, where the point of artful gerrymanderers is to fill a given district with just enough reliable voters from their own party to guarantee electoral success, while at the same time not "wasting" such voters by "packing" an excess number in those districts. Better to distribute them in other districts while using members of the opposition party as the hapless "filler people."

winner is my "representative."<sup>88</sup> To be reduced to the status of a "filler person" is to underscore the extent to which one does *not* count, save in an almost irrelevant literal sense. Election day, in fact, exemplifies one's humiliation at the hands of legislative redistricters determined to assure that those with certain political views will not count as part of the "real" electorate even as they are counted as part of the formal electorate.

No doubt one can find ruthless examples by Democrats trying to make sure that only a minimum of Republicans will "count" as more than "filler people." The overall phenomenon is surely bi-partisan, even though, as a contingent result of the 2010 elections, it was members of the Republican Party who achieved "one-party" control of a number of states insofar as both the legislature and governor shared the same partisan interests, and they were thus able to take better advantage than Democrats of the decennial reapportionment follies.<sup>89</sup> This helps to explain, for example, why the House of Representatives has a 33-seat Republican majority even though Democrats nationally received approximately 1.7 million more votes than Republican candidates.<sup>90</sup> The most dramatic single example of the consequences of partisan gerrymandering is surely Pennsylvania. The very same day that saw President Obama carrying Pennsylvania by 52% of the total vote, and Democratic Senator Bob Casey winning re-election with more than 53%, also observed Republican victories in thirteen out of the eighteen congressional districts.<sup>91</sup> So much for the proposition that all votes, as a practical matter, count equally. As Jonathan Still argued in a brilliant article several decades ago, the only voting systems that come close to meeting a norm of equality of voting power are those adopting

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88. Indeed, as I wrote in the original draft of my Lecture, quoted by Professor Finkelman: I can say that I don't even know my Congressman's name. Why should I? In no way do I feel "represented" by him. I do not genuinely count, except in the most unhelpfully literal sense, and this is precisely what was intended by Texas Republicans who engaged in ruthlessly partisan gerrymandering consciously designed to make Austin the largest city in the country without a 'representative' it can genuinely call its own.

Paul Finkelman, *Who Counted, Who Voted, and Who Could They Vote for*, 58 ST. LOUIS U. L.J. 1071, 1072 (2014).

89. See, e.g., Hasen, *supra* note 76, at 62 (quoting the state of Texas's open admission that redistricting measures were aimed at minimizing the Democratic votes that actually count).

90. See FEDERAL ELECTIONS 2012: ELECTION RESULTS FOR THE U.S. PRESIDENT, THE U.S. SENATE AND THE U.S. HOUSE OF REPRESENTATIVES, FED. ELEC. COMM'N 3, 11 (July 2013), available at <http://www.fec.gov/pubrec/fe2012/federaelections2012.pdf> (showing 60,252,696 votes for House Democratic candidates and 58,541,130 votes for House Republican candidates).

91. 2012 *Pennsylvania Presidential Results*, POLITICO, <http://www.politico.com/2012-election/results/president/pennsylvania/> (last updated Nov. 19, 2012, 2:48 PM); 2012 *Pennsylvania Senate Results*, POLITICO, <http://www.politico.com/2012-election/results/senate/pennsylvania/> (last updated Nov. 19, 2012, 2:48 PM); 2012 *Pennsylvania House Results*, POLITICO, <http://www.politico.com/2012-election/results/house/pennsylvania/> (last updated Nov. 19, 2012, 2:48 PM).

proportional representation,<sup>92</sup> a voting system with very little support in the United States.

With due respect, one of the most surely obtuse paragraphs in the history of the *United States Reports* is the following from Justice White's plurality opinion in *Davis v. Bandemer*, which, as a practical matter, gave carte blanche to state legislatures to engage in ruthlessly partisan gerrymanders:

[T]he mere fact that a particular apportionment scheme makes it more difficult for a particular group in a particular district to elect the representatives of its choice does not render that scheme constitutionally infirm. This conviction, in turn, stems from a perception that the power to influence the political process is not limited to winning elections. *An individual or a group of individuals who votes for a losing candidate is usually deemed to be adequately represented by the winning candidate and to have as much opportunity to influence that candidate as other voters in the district.* We cannot presume in such a situation, without actual proof to the contrary, that the candidate elected will entirely ignore the interests of those voters. This is true even in a safe district where the losing group loses election after election.<sup>93</sup>

If one is truly “adequately represented” by *whoever* is elected, then it is hard to understand the effort put into electing one candidate over another. This is Burke's “trustee” theory of representation with a vengeance,<sup>94</sup> in which we may have little or no say in choosing (or firing) our trustee but should, nonetheless, feel that our interests are being “adequately” taken into account. Even if one implausibly assumes that Justice White's “perception” made a modicum of sense a quarter-century ago, it surely makes none today. One can be certain, though, that this empirical disconnect would have no effect on the

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92. Jonathan W. Still, *Political Equality and Election Systems*, 91 ETHICS 375, 384–85 (1981).

93. 478 U.S. 109, 131–32 (1986) (emphasis added).

94. See Edmund Burke, *Mr. Burke's Speech to the Electors of Bristol*, in 3 THE WORKS AND CORRESPONDENCE OF THE RIGHT HONOURABLE EDMUND BURKE 232, 236–37 (1852). Professor Cohen, in her valuable contribution, suggests that this Childress Essay “speaks primarily of the delegate model of representation and tacitly defends this model of representation,” as against the “trustee” model of representation. Cohen, *supra* note 62, at 1057–58. To the extent this is true, it is not because I necessarily reject the normative attractiveness of the trusteeship model. At the very least, a workable republican form of government depends on the ability of ordinary citizens, let alone their leaders, to discipline their own selfish egoistic preferences on behalf of some kind of commitment to the “public interest.” This point is well made in a recent book by HÉLÈNE LANDEMORE, *DEMOCRATIC REASON: POLITICS, COLLECTIVE INTELLIGENCE, AND THE RULE OF THE MANY* 192 (2013) (“[O]ne can expect that [citizens] will go beyond their own self-interest and toward the good of the community as a whole”). The central problem may be the ability of self-interested groups of citizens, perhaps those identified as “factions” by James Madison, see THE FEDERALIST No. 10, *supra* note 69, at 49 (James Madison), to play a decisive role in electoral politics and thus generate “representatives” who feel constrained to mirror the preferences of their most avid supporters. Full discussion of this point could obviously take a book of its own.

current Supreme Court, which often "deems" things to be true that lack any foundation in demonstrable reality.

My illustrations so far have been taken from what might be described as standard-form American politics of the kind that lend themselves to litigation and, with some frequency, important decisions by the United States Supreme Court. There are full-scale courses taught at a number of law schools on election law or, perhaps sarcastically, "the law of democracy," that include copious references to many decisions of the Supreme Court. But I am interested in far more than the constitutional law of the United States.

#### IV. WHY LOOK BEYOND THE UNITED STATES?

There were other, less Constitution or United States-oriented, stimuli that encouraged me to choose "Who Counts?" as my title. In March of 2013, the conservative economist Tyler Cowen wrote a remarkable column in *The New York Times* critical of one aspect of the debate about immigration policy currently roiling the country, which is how we compute the costs and benefits attached to any particular policy.<sup>95</sup> What was especially striking, given the common pose of economists as descriptive positivists unconcerned with normative questions, was Professor Cowen's identification of the problem as raising "an overriding moral issue":

Imagine that it is your professional duty to report a cost-benefit analysis of liberalizing immigration policy. You wouldn't dream of producing a study that counted "men only" or "whites only," at least not without specific, clearly stated reasons for dividing the data.

So why report cost-benefit results only for United States citizens or residents, as is sometimes done in analyses of both international trade and migration? *The nation-state is a good practical institution, but it does not provide the final moral delineation of which people count and which do not.*<sup>96</sup>

As already suggested, many of our great debates, as with *Dred Scott* and subsequent amendments dealing with suffrage, have properly concerned "who counts" as a part of "We the People," and the answers might differ, for example, depending on whether we are determining who can participate in popular decision-making by voting, or who can claim certain rights even if, like women in 1868 or resident aliens and children today, they cannot vote.<sup>97</sup> Cowen's striking comment, however, reminds us that it is less than a self-evident truth that the *only* people whose welfare we—that is, members of the

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95. Tyler Cowen, *A Profession with an Egalitarian Core*, N.Y. TIMES, Mar. 17, 2013, at BU4.

96. *Id.* (emphasis added).

97. See Note, *The Meaning(s) of "The People" in the Constitution*, 126 HARV. L. REV. 1078, 1088 (2013) (identifying several competing definitions of "The People" that have been recognized by the Supreme Court).

American political community—should focus on are our fellow Americans. To be sure, perhaps the Constitution allows us to be stunningly parochial in our accounting, but, as Cowen correctly notes, there are serious moral issues attached to any such position.

Consider in this context a recent comment by Glenn Greenwald, whose politics are presumably quite different from Cowen's but who makes a basically similar point. In an exchange with Bill Keller in *The New York Times*, Greenwald writes that in deciding what classified information newspapers should publish or agree to keep secret, he would not "give added weight to the lives of innocent Americans as compared to the lives of innocent non-Americans, nor would [he] feel any special fealty to the U.S. government as opposed to other governments when deciding what to publish."<sup>98</sup> Perhaps one should recall in this context Samuel Johnson's famous comment that "Patriotism is the last refuge of a scoundrel," even as we should be reminded that in the fourth edition of his famous dictionary, he defined a patriot as "[o]ne whose ruling passion is the love of his country."<sup>99</sup> But, of course, that leaves open the question of whether "his country"—or *any* country (and its citizens or residents)—deserves to be the object of unconditional commitment to the exclusion of outsiders. To decide "who counts" and on what basis, raises obviously fundamental questions of both political theory and the most practical of political considerations.

Quite obviously, a number of important legal doctrines turn on whether one is a U.S. national or an alien, including, perhaps most importantly for millions of the latter, the possibility of being deported.<sup>100</sup> But it is worth noting as well the contemporary importance of doctrines where "being counted" as a member of the rights-bearing community increasingly depends on whether one is physically within the United States. This is most dramatic with regard to the claimed "right" of the United States to engage in targeted assassinations via drone strikes, even of American citizens in foreign lands who are deemed sufficiently adverse to the interests of the United States.<sup>101</sup>

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98. Bill Keller, *Is Glenn Greenwald the Future of News?*, N.Y. TIMES (Oct. 27, 2013), [http://www.nytimes.com/2013/10/28/opinion/a-conversation-in-lieu-of-a-column.html?pagewanted=all&\\_r=0](http://www.nytimes.com/2013/10/28/opinion/a-conversation-in-lieu-of-a-column.html?pagewanted=all&_r=0).

99. 2 JAMES BOSWELL, *THE LIFE OF SAMUEL JOHNSON*, LL.D. 158 (Heritage Press 1963); SAMUEL JOHNSON, *A DICTIONARY OF THE ENGLISH LANGUAGE* 527 (abr. 4th ed., Barnes & Noble Books 1994).

100. See Linda S. Bosniak, *Membership, Equality, and the Difference That Alienage Makes*, 69 N.Y.U. L. REV. 1047, 1050–51 (1994) (noting the importance of citizenship or alienage for immigrants in accessing government benefits or engaging in political processes); Julia Preston, *Number of Illegal Immigrants in U.S. May Be on Rise Again, Estimates Say*, N.Y. TIMES, Sept. 24, 2013, at A16.

101. For a discussion of the controversy surrounding the killing by the United States in Yemen of Anwar Al-Awlaki, see Feisal G. Mohamed, *A Farewell to Due Process: The*

This is "most dramatic" because of the literal presence of issues involving life or death. But consider also in this context recent debates over the gathering of "metadata"—or, indeed, the direct tapping of phone conversations.<sup>102</sup> These appear to turn on whether the objects of coverage are, for example, Germans in Germany or Brazilians in Brazil. The unspoken premise seems to be that foreigners living abroad have no rights—or, at least, no rights under the United States Constitution—that American officials are bound to respect. As Chief Justice Rehnquist put it in *United States v. Verdugo-Urquidez*, a case dealing with whether Fourth Amendment constraints operate with regard to warrantless searches by members of the U.S. Drug Enforcement Agency at all, that Amendment applies only to those "who are part of a national community or who have otherwise developed sufficient connection with this country to be considered part of that community."<sup>103</sup> Outsiders are out of luck. Their interests, at least legally speaking, are of no account.

Indeed, one of the remarkable aspects of this claim is that it extends to the highest status members of these countries, including their Chancellors or Presidents.<sup>104</sup> It may be incredibly dumb—at least if there is a prospect of getting caught—to listen in on ostensibly private cell phone conversations of these leaders, but, presumably, they have no greater privacy rights vis-à-vis American eavesdropping than any other member of their polity, which is to say none at all. To suggest the opposite, Eric Posner has suggested, is to adopt a "sneaking cosmopolitanism" on the part of the Supreme Court by which the judiciary begins enforcing particularistic *American* rights even with regard to foreigners living abroad.<sup>105</sup> Generally speaking, though, only members of the

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*Assassination of Anwar Al-Awlaki*, Huffington Post (Oct. 3, 2011, 7:00 PM), [http://www.huffingtonpost.com/feisal-g-mohamed/anwar-al-awlaki-killed\\_b\\_989485.html](http://www.huffingtonpost.com/feisal-g-mohamed/anwar-al-awlaki-killed_b_989485.html).

102. See, e.g., RACHEL LEVINSON-WALDMAN, BRENNAN CTR. FOR JUSTICE, WHAT THE GOVERNMENT DOES WITH AMERICANS' DATA 9 (2013), available at <http://www.brennancenter.org/publication/what-government-does-americans-data>.

103. *United States v. Verdugo-Urquidez*, 494 U.S. 259, 265 (1990).

104. See, e.g., Mark Mazetti and David E. Sanger, *Tap on Merkel Provides Peek at Vast Spy Net*, N.Y. Times, Oct. 30, 2013, at A1 (detailing wiretapping of German Chancellor Angela Merkel); Alison Smale, *Anger Growing Among Allies on U.S. Spying*, N.Y. Times, Oct. 24, 2013, at A1 (noting anger of Brazilian President). But see RICHARD A. CLARKE ET AL., LIBERTY AND SECURITY IN A CHANGING WORLD: REPORT AND RECOMMENDATIONS OF THE PRESIDENT'S REVIEW GROUP ON INTELLIGENCE AND COMMUNICATIONS TECHNOLOGIES 151–62 (Dec. 12, 2013), available at [http://www.whitehouse.gov/sites/default/files/docs/2013-12-12\\_rg\\_final\\_report.pdf](http://www.whitehouse.gov/sites/default/files/docs/2013-12-12_rg_final_report.pdf) (discussing privacy protections to be granted "non-U.S. persons"); *id.* at 170–73 (discussing "Recommendation 19," dealing with procedures for surveillance of "foreign leaders").

105. Eric A. Posner, *Boumediene and the Uncertain March of Judicial Cosmopolitanism* 16 (Univ. of Chi. Pub. Law & Legal Theory, Working Paper No. 228, 2008), available at <http://law.uchicago.edu/files/files/pl228.pdf>. I owe this reference to Anna Su, *Speech Beyond*



“national demos,” which “consists of American citizens at home and abroad, plus various quasi-citizens such as lawful permanent residents,” should be viewed as part of the rights-bearing community (though Congress, of course, can choose to extend certain protections to whomever it wishes).<sup>106</sup>

Can we possibly be surprised to discover a great deal of resentment at the discovery by citizens of countries ostensibly closely allied with the United States that they simply “don’t count” when it comes time to identify “the people” who are protected by the Fourth Amendment or the “person[s]” protected against arbitrary deprivation of life, liberty, or property by the Fourteenth Amendment?<sup>107</sup> This is, obviously, not a question of whether the United States census should include Germans, but, as suggested by Cowen and Greenwald, whether they should “count” as members of a transnational community with whom we are inevitably intertwined and whose interests we are truly obliged to take into account. And, of course, even if we determine that disregarding their rights-claims—or those of the U.S. national Al-Awlaki—is the *legally* correct determination, it remains questionable, as Cowen suggests, whether Americans should applaud a government that speaks in their name while adopting a policy of basically blithe indifference to the moral rights of foreigners. As any legal positivist would argue, that one has a legal right to do something does not in the least determine that one ought to exercise that right.<sup>108</sup>

Once one begins looking around and asking “who counts?” the examples are almost endless. In fact, just a week before my visit to St. Louis, the Constitutional Court of the Dominican Republic in effect declared that hundreds of thousands of persons of Haitian descent, many of them born within the Dominican Republic, could not become citizens of the Dominican Republic.<sup>109</sup> Approximately 200,000 people seem potentially affected by this decision, which has been condemned by human rights activists.<sup>110</sup> “We the People” of the Dominican Republic apparently do not include many natives

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Borders: Extraterritoriality and the First Amendment (2013) (unpublished paper) (on file with author).

106. *Id.*

107. I am grateful to Professor Philip Heymann for making this point in conversation. For one illustration of what turns out to be U.S. untrustworthiness with regard to a willingness to breach privacy, see James Glanz, *U.S. Can Spy on Britons Despite Pact, Memo Says*, N.Y. Times, Nov. 21, 2013, at A20.

108. This is one of the issues on which Professors H.L.A. Hart and Ronald Dworkin certainly agreed. See H.L.A. HART, *THE CONCEPT OF LAW* 210–11 (3d ed., 2012) (discussing the importance of separating law and morality); RONALD DWORKIN, *TAKING RIGHTS SERIOUSLY* 191 (17th prt. 1999) (1977) (pointing out that enjoyment of a right does not depend on its contribution to social welfare).

109. See Randal C. Archibold, *Dominicans of Haitian Descent Cast Into Legal Limbo by Court*, N.Y. TIMES, Oct. 24, 2013, at A1.

110. *Id.*

whom the Dominican Republic state prefers to count as being "really" Haitian. Whether or not they will continue to be formally counted in the next census in the Dominican Republic (perhaps as "resident aliens"), they surely believe that they have suffered a stunning blow to their dignitary interest in "counting," not to mention the more practical problems attached to living in a country that refuses to countenance the possibility of naturalization. Certain countries ranging from Switzerland and Germany to Japan have historically been extremely hesitant to allow naturalization, though Germany in 2000 broadened its policy to take account of especially Turkish "guest workers" who had put down deep roots within that country.<sup>111</sup> But we know that the concept of "sovereignty" has historically entailed not only control of one's borders, but also plenary authority to determine who is eligible for entrance into the community. This, after all, is the point of *Dred Scott*.<sup>112</sup>

#### V. WHO IS A JEW?

As it happens, I am very interested in Israel and the operation of the so-called "Law of Return," which grants automatic citizenship to any Jew who emigrates to that country.<sup>113</sup> Putting entirely to one side the extremely important issues surrounding the extent to which Israel should be viewed as a "Jewish state" instead of a "binational" one, composed (at least) of Jews and Arabs who must learn to live in peace with one another in a quite small area of land—which raises the question of who should count as a "genuine Israeli"—there remains the vital question, "Who is a Jew?" Although it might take on

111. See Marc Morjé Howard, *The Causes and Consequences of Germany's New Citizenship Law*, 17 GERMAN POLITICS 41, 41, 44, 54 (2008).

112. See also *New York v. Miln*, 36 U.S. 102, 110 (1837), which has copious references to such sovereign power. See also *Chae Chan Ping v. United States (The Chinese Exclusion Case)*, 130 U.S. 581, 609 (1889), which upholds shockingly unjust treatment of a Chinese resident of the United States seeking re-entry after a visit in China on the basis of the inherent sovereign power of the United States to break its word both to the individual litigant and to China more broadly by virtue of Congress's passage of the Chinese Exclusion Act.

113. The initial "Law of Return" passed at the initiation of the State of Israel was amended in 1970 to provide explicitly that "[f]or the purposes of this Law, 'Jew' means a person who was born of a Jewish mother or has become converted to Judaism and who is not a member of another religion." Law of Return amend. 2, § 4B, 5730-1970, SH No. 586 p. 34 (Isr.) [hereinafter Law of Return], available at <http://mfa.gov.il/MFA/MFA-Archive/1950-1959/Pages/Law%20of%20Return%205710-1950.aspx>. Germany also had a similar law. See ROGERS BRUBAKER, CITIZENSHIP AND NATIONHOOD IN FRANCE AND GERMANY 170 (1992) (noting that the West German "constitutional definition of ethnic German refugees as 'Germans' . . . has become, in effect, a 'law of return' for ethnic German immigrants from Eastern Europe and the Soviet Union"). Brubaker notes the insistence of Germany historically in rejecting the notion of *jus soli*, by which "who counts" as a citizen is determined simply by place of birth, see, e.g., U.S. CONST. amend. XIV, § 1, in favor of *jus sanguinis*, in which "who counts" is determined by the extent to which one shares the favored ethno-national blood line. BRUBAKER, *supra*, at 81.

heightened importance because of the existence of Israel and its Law of Return, it would be significant even were there no State of Israel. What is an important political/legal question in that country is an important sociological and institutional question for many other Jews around the world.

First, the politics: “Who counts” as a member of the Jewish community translates into an entitlement to immigrate to Israel and, quite remarkably, be treated as a full citizen literally from the day of arrival with intention to remain. As a matter of empirical fact, one can be completely non-observant or atheistic in one’s theological beliefs, but remain a Jew according to Jewish (and Israeli) law if born to a Jewish mother.<sup>114</sup> As a matter of fact, “who counts” under the Israeli “law of return” is considerably trickier inasmuch as descendants of Jews, including “a child and a grandchild of a Jew, the spouse of a Jew, [and] the spouse of a child of a Jew” are also authorized to claim a right of entry “except for a person who has been a Jew and has voluntarily changed his religion.”<sup>115</sup> This presumably is what allowed many Russian “Jews,” who had no Jewish education or tradition of observing traditional Jewish law (and, quite possibly, no belief in God) to emigrate if they could establish the requisite lineage, so long, of course, as they had never formally adhered to another religion. It is worth noting, incidentally, that the Reform wing of American Judaism has since 1983 rejected the exclusive emphasis on matrilineal heritage and treats as Jewish anyone born to a Jewish father and “raised as a Jew and [who] receives a Jewish education and celebrates appropriate life cycle events, such as receiving a Hebrew name and becoming bar or bat mitzvah. This also assumes that the child is being raised exclusively as a Jew and not practicing another religion.”<sup>116</sup> It is worth noting that at least some children are being raised as members of two religious faiths, one of which is Judaism.<sup>117</sup> Does the requirement of “exclusivity” make them ineligible for Israeli citizenship?

Hovering over any answer to the previous question is the status of “Jews for Jesus,” if born to a Jewish mother. Are *they* entitled to entry? The answer, as a matter of positive Israeli law, is no. There may be relatively few theological propositions indelibly linked to “being Jewish,” but rejection of the

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114. Law of Return, *supra* note 113.

115. *Id.* § 4A(a).

116. *Patrilineal Descent*, REFORM JUDAISM, <http://www.reformjudaism.org/ask-rabbi-topic/patrilineal-descent> (last visited Jan. 3, 2014).

117. See, e.g., Susan Katz Miller, Op-Ed., *Being ‘Partly Jewish’*, N.Y. TIMES, Nov. 1, 2013, at A23. Her op-ed begins as follows:

In the course of a year, my family celebrates Yom Kippur, Rosh Hashana, Sukkot, Simhat Torah, Hanukkah, Passover and many Shabbats. We also celebrate All Saints’ Day and All Souls, Advent, Christmas, Lent and Easter. We are part of a growing movement to raise interfaith children with both family religions.

*Id.*

claims of Jesus to be the Messiah is one of them, at least from the perspective of established leaders of those recognized as speaking for the "Jewish community."<sup>118</sup> An atheist obviously has no trouble rejecting Christian Messianism. What, however, about Brother Daniel, who was "born Jewish," that is, the son of a Jewish mother, but later converted to Catholicism, as was the case, incidentally, with Aaron Lustiger,<sup>119</sup> who at his death was Cardinal Joseph Lustiger, Archbishop of Paris? Perhaps for obvious reasons, Cardinal Lustiger was delighted to remain in Paris, but Brother Daniel attempted to move to Israel under the Law of Return. His case is well described at the Jewish Virtual Library in an entry on "Who is a Jew":

Brother Daniel (born Oswald Rufeisen), a Jew who converted to Christianity during the Holocaust and had become a Carmelite Monk. During his youth, Rufeisen was active in a Zionist youth movement and fled to Vilna, Lithuania at the start of World War II. There he worked as a slave laborer and escaped to Mir where he worked for the police as a translator. Rufeisen took advantage of his position and smuggled arms to his Jewish friends and helped drive the police out from Mir before it was liquidated, saving nearly 300 Jews. Rufeisen hid in the forest and later a convent, where he decided to convert to Christianity. In 1962, Rufeisen, now Brother Daniel, applied to immigrate to Israel and, after being denied, he appealed to the Supreme Court. The Supreme Court ruled that despite the fact he was born to a Jewish mother, he had since converted and should not be recognized as a Jew by the State of Israel.<sup>120</sup>

It would be truly bizarre if Brother Daniel, because of his heroism during World War II, had been named a "righteous Gentile" by Yad Vashem, the central museum devoted to the Holocaust in Jerusalem, given that that he apparently had not converted when he performed at least some of his wonderful acts.<sup>121</sup>

As one might expect, the "Brother Daniel case" was scarcely the last episode involving defining who counted as a Jew within Israel. There were, for example, hosts of refugees from the former Soviet Union—and, before that, Ethiopia<sup>122</sup>—whose Jewish bona fides (whatever one might think might

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118. See, e.g., James D. Davis, *Campaign Disturbs Jewish Leaders*, Sun Sentinel (Nov. 4, 2003), [http://articles.sun-sentinel.com/2003-11-04/news/0311040018\\_1\\_jewish-groups-jewish-leaders-jewish-federation](http://articles.sun-sentinel.com/2003-11-04/news/0311040018_1_jewish-groups-jewish-leaders-jewish-federation).

119. John Tagliabue, *Jean-Marie Lustiger, French Cardinal, Dies at 80*, N.Y. TIMES, Aug. 6, 2007, at B7.

120. Rebecca Weiner, *Judaism: Who Is a Jew?* JEWISH VIRTUAL LIBRARY, <http://www.jewishvirtuallibrary.org/jsource/Judaism/whojew1.html> (last visited Jan. 1, 2014). See also H CJ 72/62 Rufeisen v. Minister of the Interior, 16 PD 2428 [1962] (Isr.).

121. See Weiner, *supra* note 120.

122. Isabel Kershner, *Second-Generation Ethiopians in Israel March Toward Dream of Acceptance*, N.Y. TIMES, June 10, 2012, at 12.

establish them) were dubious but whose welcome was politically necessary.<sup>123</sup> And, unlike the case with refugees from Ethiopia, the immigrant community from the former Soviet Union has had significant—and some would say deleterious—consequences for the development of Israeli politics and the possibility of achieving a long-term resolution of the antagonism between the Arab and Jewish communities in Israel and Palestine. There might be few better examples of what Benedict Anderson famously called “imagined communities,”<sup>124</sup> which only underlines the extent to which “peoplehood” is truly a socially and politically constructed category. And this suggests that power—and not simply debate—will account for the decisions that are actually made.

#### VI. ON “ESSENTIALLY CONTESTED CONCEPTS”: DO FETUSES AND ORCAS COUNT, AND WHY OR WHY NOT?

It is worth noting that what remains probably the most profoundly divisive issue in American politics centrally requires one to determine “who counts.” Thus, whatever other questions are raised by the issue of abortion, the most fundamental is whether—or perhaps when—an embryo becomes a “person” who is, under the Constitution (or simply most philosophical systems), entitled to some degree of protection.<sup>125</sup> Consider in this context the Life at Conception Act of 2013, introduced by sixteen Republican senators, which provides that “[t]he terms ‘human person’ and ‘human being’ include each member of the species *homo sapiens* at all stages of life, including the moment of fertilization, cloning, or other moment at which an individual member of the human species comes into being.”<sup>126</sup> An obvious question is whether these “persons” are to count in the “reapportionment census,” especially if they are being carried by American citizens who will presumably pass along their status as members of the American political community to the newborns at birth. If one agrees with the sponsors of the Life at Conception Act (which perhaps should be renamed the “Personhood at Conception Act”), it seems easier to defend including these not-yet-fully-emerged-but-nonetheless-legal-persons within the apportionment census than to defend including illegal aliens.

Consider as well in this context two recent, albeit so far unsuccessful, lawsuits that have been filed in behalf of non-humans. The first, reported in a *New York Times* story tellingly titled *The Humanity of Nonhumans*, describes

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123. See, e.g., Masha Zur Glozman, *The Million Russians That Changed Israel to Its Core*, HAARETZ (Jan. 4, 2013, 9:03 AM), <http://www.haaretz.com/weekend/week-s-end/the-million-russians-that-changed-israel-to-its-core.premium-1.491885>.

124. BENEDICT ANDERSON, *IMAGINED COMMUNITIES* 5–6 (rev. ed., 1991).

125. John T. Noonan, Jr., *An Almost Absolute Value in History*, in *THE MORALITY OF ABORTION: LEGAL AND HISTORICAL PERSPECTIVES* 1 (1970).

126. Life at Conception Act, S. 583, 113th Cong. § 3(1) (2013).

claims for writs of habeas corpus filed by the Nonhuman Rights Project "on behalf of four captive chimpanzees."<sup>127</sup> The lawyers relied "heavily on science," particularly with regard to "what research says about the lives, thinking ability and self-awareness of chimpanzees."<sup>128</sup> The article also referred to a conference held at Yale on December 6–8, 2013 on "Personhood Beyond the Human," which, by definition, invites us to expand our ordinary categories of "who counts" as a "person."<sup>129</sup> Quite obviously, such an expansion raises extremely complicated questions of philosophy, not to mention politics. It can occasion no surprise not only that the New York State trial judge quickly dismissed the suit, though noting that the lawyers' "impassioned representations to the Court are quite impressive," but also that the Project has immediately announced that it is appealing the decision to the next rung of the state judiciary.<sup>130</sup>

One might also mull over a lawsuit filed by People for the Ethical Treatment of Animals claiming that orcas kept at SeaWorld and other such venues have a claim under the Thirteenth Amendment's seemingly near-absolute ban on slavery.<sup>131</sup> After all, the text of the Amendment categorically prohibits "slavery" and "involuntary servitude, except as a punishment for crime whereof the party shall have been duly convicted."<sup>132</sup> Is it dispositive

127. James Gorman, *The Humanity of Nonhumans*, N.Y. TIMES, Dec. 10, 2013, at D1.

128. *Id.*

129. *Id.* at D5.

130. *Nonhuman Rights Project Advances to New York Appellate Courts in Three Chimpanzee Rights Cases*, YAHOO FIN. (Dec. 10, 2013, 3:22 PM), <http://finance.yahoo.com/news/nonhuman-rights-project-advances-york-202245109.html>.

131. See David Crary & Julie Watson, *PETA Lawsuit Seeks to Expand Animal Rights*, YAHOO NEWS (Oct. 25, 2011, 6:22 PM), <http://news.yahoo.com/peta-lawsuit-seeks-expand-animal-rights-222219887.html> ("People for the Ethical Treatment of Animals [PETA] is accusing the SeaWorld parks of keeping five star-performer whales in conditions that violate the 13th Amendment ban on slavery."). According to the lawyer for PETA: "By any definition, these orcas are slaves—kidnapped from their homes, kept confined, denied everything that's natural to them and forced to perform tricks for SeaWorld's profit." *Id.* Moreover, "[t]he males have their sperm collected, the females are artificially inseminated and forced to bear young which are sometimes shipped away." *Id.* Not surprisingly, SeaWorld sees things quite differently, calling the use of the Thirteenth Amendment "baseless and in many ways offensive." *Id.* In addition to the differences between keeping whales and human beings in captivity, the company explained that its treatment of the whales could not be like slavery because "SeaWorld is among the world's most respected zoological institutions . . . There is no higher priority than the welfare of the animals entrusted to our care and no facility sets higher standards in husbandry, veterinary care and enrichment." *Id.* Those who have produced the film *Blackfish* would certainly disagree. See *Blackfish* (Official Movie Site), MAGNOLIA PICTURES, <http://www.magnolia.com/blackfish/> (last visited Jan. 1, 2014). In any event, Harvard Professor Laurence Tribe has stated that "[p]eople may well look back at this lawsuit and see in it a perceptive glimpse into a future of greater compassion for species other than our own." Crary & Watson, *supra*.

132. U.S. CONST. amend. XIII, § 1.

that the orcas in question do not, at least at present, meet the criteria we use for “persons,” a word, after all, that makes no appearance in the Thirteenth Amendment? One can scarcely ignore the existence of persons making serious and sophisticated arguments for “animal rights,” which, at the end of the day, is an appeal that we count animals as part of *our* community of sentient beings capable not only of feeling pain, but even, in the “higher echelons,” of entering into genuine relationships that trigger recognizable emotional bonds (and griefs).<sup>133</sup> If we *did* regard orcas as beings with rights, we could scarcely deny that they are in fact being kept in conditions of slavery, even if one concedes, arguendo, that their conditions of confinement could in fact be worse than they are. Indeed, even if one rejected 18th and early 19th century notions of “slavery” that saw “chattel slavery” as only one form of illegitimate domination worthy of being labeled “slavery,” one would have little difficulty analogizing orcas to *chattel* slaves as opposed, say, to *wage* slaves.<sup>134</sup> One might well believe that adherents of such views are as marginal today as, say, devotees of Garrisonian abolition were in 1830, but that hardly counts as evidence that their arguments are foolish. I suspect that almost all of us worry about which views we now possess will be dismissed with contempt by future generations.

So consider a quite stunning quotation from one of the great political scientists and democratic theorists of the 20th century, the late Yale Professor Robert Dahl. It comes from his 1970 book *After the Revolution?: Authority in a Good Society*, written, as the date suggests, in the aftermath of various important political movements attacking the socio-political status quo both in the United States and abroad.<sup>135</sup> “[H]ow to decide who legitimately make up ‘the people,’” he wrote, “is a problem almost totally neglected by all the great political philosophers who write about democracy.”<sup>136</sup> Writing four decades later, Professor Jason Frank suggests that “the problem haunts all theories of democracy . . . . [I]t is not a question the people can procedurally decide because the very question subverts the premises of its resolution.”<sup>137</sup> As Frank notes in a brilliant analysis of Frederick Douglass, America has always

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133. See, e.g., ANIMAL RIGHTS: CURRENT DEBATES AND NEW DIRECTIONS (Cass R. Sunstein & Martha C. Nussbaum eds., 2004). See also Gregory Berns, Op-Ed., *Dogs Are People, Too*, N.Y. TIMES, Oct. 6, 2013, at 5 (“The ability to experience positive emotions, like love and attachment, would mean that dogs have a level of sentience comparable to that of a human child.”).

134. See Jack M. Balkin & Sanford Levinson, *The Dangerous Thirteenth Amendment*, 112 COLUM. L. REV. 1459, 1462 (2012) (contending that original notions of “slavery” extended to *all* illegitimate domination and not only to chattel slavery).

135. ROBERT A. DAHL, *AFTER THE REVOLUTION?: AUTHORITY IN A GOOD SOCIETY* (1970).

136. *Id.* at 60, quoted in JASON FRANK, *CONSTITUENT MOMENTS: ENACTING THE PEOPLE IN POSTREVOLUTIONARY AMERICA 2* (2010).

137. FRANK, *supra* note 136.

confronted the reality of marginalized, even, as Ralph Ellison so memorably put it, "invisible" men, who have demanded entry into the group of "We the People"—even as many of those "People" resisted, sometimes with force of arms, any such efforts.<sup>138</sup> Frank quotes political theorist Danielle Allen, who writes, "Democratic politics . . . cannot take shape until 'the people' is imaginable."<sup>139</sup> The development of the requisite imagination, though, is not an anodyne process simply of analysis. It may be the result instead not only of mass movements but even of violence. After all, just as Dr. Johnson noted the clarifying effects of knowing that one is to be hung in the morning,<sup>140</sup> being hit by a two-by-four may also do wonders with regard to recognizing the existence of someone one otherwise wishes to ignore (and refuse to count).

We must also recognize, though, that even if we could, as if by magic, agree on who constituted any given community, that would only reinforce the implausibility of claims by presumptive outsiders that *they* should actually be treated as if inside. As Linda Bosniak, an astute student of issues surrounding citizenship, puts it, "To the extent that we express our ideals of justice and democratic belonging by way of the concept of citizenship, we need to be particularly sensitive to the questions of exclusion implicated in the discussion."<sup>141</sup> Every "inside(r)" structurally relies on an "outside(r)," who, especially if we are devotees of Carl Schmitt, becomes potentially transformed into a mortal enemy (or, at least, subject to our ceaseless listening in to all conversations).<sup>142</sup> This is precisely what made Cowen's and Greenwald's moral critiques of conventional cost-benefit analysis so powerful.

But it turns out that the identity of "the people," or even "a people," as with, for example, given ethnic groups or American Indian tribes, is what political theorists have learned to call an "essentially contested concept," which by definition is proved impervious to definitive resolution.<sup>143</sup> Consider the laconic comment by the Canadian Supreme Court, in its landmark decision examining the legitimacy, under the Canadian constitution, of claims by Quebec that it might possess a unilateral right of secession.<sup>144</sup> The basis of such a claim is the ostensible right of "self-determination by the people of

138. *Id.* at 209–36; RALPH ELLISON, *INVISIBLE MAN* 3 (Modern Library ed. 1992).

139. FRANK, *supra* note 136, at 238.

140. SAMUEL JOHNSON SOUND BITE PAGE, <http://www.samueljohnson.com/apocryph.html> (last visited Jan. 7, 2014).

141. LINDA BOSNIAK, *THE CITIZEN AND THE ALIEN: DILEMMAS OF CONTEMPORARY MEMBERSHIP* 1 (2006).

142. *See* CARL SCHMITT, *THE CONCEPT OF THE POLITICAL* 26–27 (2007).

143. *See* W. B. Gallie, *Essentially Contested Concepts*, 56 *PROCEEDINGS OF THE ARISTOTELIAN SOCIETY* 167, 169 (1955–56); WILLIAM E. CONNOLLY, *Essentially Contested Concepts in Politics*, in *THE TERMS OF POLITICAL DISCOURSE* 9–44 (1974).

144. In the Matter of a Reference by the Governor in Council concerning certain questions relating to the secession of Quebec from Canada, [1998] 2 S.C.R. 217, para. 2 (Can.).



Quebec,” to which the Court responded that “the precise meaning of the term ‘people’ remains somewhat uncertain.”<sup>145</sup> And one reason for the contestation is that the particular concept often has a valence, usually positive, though sometimes negative, so that classification as a member of some community X is thought to be either a high compliment or the assignment of a stigmatic identity. But, quite obviously, another reason for contestation is that the deepest considerations of practical politics, as well as abstract intellectual concerns, may be implicated by any answer. Claims of self-determination, if accepted, can easily create havoc in the international political system, not to mention the lives of people on the ground who are viewed as not being within the particular community of “selves” entitled to craft their own futures.<sup>146</sup> Such questions are almost stunningly obvious when we consider claims by Frederick Douglass and other African-American leaders to be considered as part of “We the People.”<sup>147</sup>

But consider also some of the responses in the 1840s to the so-called “Dorr Rebellion” in Rhode Island, which turned precisely on who would count as a member of the state electorate. Dorr and his followers, speaking in the language of the Declaration of Independence and the importance of government by consent of the governed—not to mention the right to establish new forms of government to replace those that were oppressive—objected to the highly restricted electorate established by the 1663 Charter under which Rhode Island continued to operate into the 1840s.<sup>148</sup> Those without property simply did not count when determining who would lead Rhode Island.<sup>149</sup> It did not help that they not only failed to possess enough wealth, but many were also Catholic immigrants (who had become citizens under U.S. naturalization law).<sup>150</sup> Thus free-suffrage activists were denounced by Aurilla Moffitt, the wife of a Providence stable-keeper (who herself was, of course, deprived of the suffrage because of her sex), for in effect delivering the state “to the tender mercies of Roman Catholic foreigners who [could] be bought and sold by their employers” and who were, in addition, at “the beck and call of their priests.”<sup>151</sup> If one agreed with such descriptions, why indeed should such persons “count” as part of the Republican political order presumably privileged by the Constitution? Such an order rested on sturdily independent citizens, and she

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145. *Id.* at para. 92, 123.

146. *See, e.g.*, James Ker-Lindsay, *Preventing the Emergence of Self-Determination as a Norm of Secession: An Assessment of the Kosovo ‘Unique Case’ Argument*, 65 EUR.-ASIA STUD. 837 (2013).

147. FRANK, *supra* note 136, at 209–36.

148. ERIK J. CHAPUT, *THE PEOPLE’S MARTYR: THOMAS WILSON DORR AND HIS 1842 RHODE ISLAND REBELLION* 2–3, 30–31 (2013).

149. *Id.* at 30.

150. *Id.*

151. *Id.* at 81.

expressed quite traditional concerns that such independence was lacking on the part of those in conditions of subordination to employers or submissive to the claims of an authoritarian priesthood (an exemplification of the kind of foreign "potentate" whose authority had to be "repudiated" by anyone becoming a naturalized citizen).<sup>152</sup>

Many Dorrites, including Dorr himself, were anti-slavery and supported black suffrage, though, alas, the drafters of the so-called "People's Constitution," including Dorr, ultimately concluded that political prudence—as in Philadelphia in 1787—counseled submitting to the perception that most Rhode Islanders were too racist to accept such a radical proposal.<sup>153</sup>

But this submission to perceived racist imperatives—which, incidentally, led most Abolitionists to oppose the People's Constitution—was not enough to protect the Dorrites against nationwide condemnation from those concerned to bolster what became known as the Slavocracy, whether because of a belief in the virtues of slavery or, more likely, to maintain the Union by honoring the original deal struck in Philadelphia. Thus the *Madisonian*, described as the house organ of the administration of President John Tyler (who would support the Confederacy two decades later), savaged Dorr's "doctrine" of "numbers" that would, if taken fully seriously, "at once convert the numberless blacks of the South into voters, who would vote down the southern state governments at their pleasures."<sup>154</sup>

It is worth noting, incidentally, that the Southern slaves were not "numberless" in the sense, say, that grains of sand or stars in the skies are. One source, for example, states that there were exactly 2,481,390 slaves in the American South in 1840.<sup>155</sup> Given that the white population (plus the population of free blacks) was considerably less than twice this amount, this was more than enough to make even a hint of "one person/one vote" thoroughly subversive. According to Henry Clay, for example, the capacious answer given by Dorrites to the question "who counts" would "overturn all social organization, make Revolution, [which should be] the extreme and last resort of an oppressed people—the constant occurrence of human life, and the standing order of the day."<sup>156</sup> After all, as he told an audience in Richmond, Indiana while defending his own continued ownership of slaves, if slaves became free, they might follow Dorrite doctrine and start arguing that "an undefined majority have at their pleasure, the right to subvert an existing government, and institute a new one in its place," leading, Clay suggested, to

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152. See, e.g., SANFORD LEVINSON, *CONSTITUTIONAL FAITH* 193 (2d ed. 2011).

153. CHAPUT, *supra* note 148, at 59.

154. *Id.* at 146.

155. Jenny Bourne, *Slavery in the United States*, EH.NET (Oct. 19, 2013), <http://eh.net/encyclopedias/slavery-in-the-united-states/>.

156. CHAPUT, *supra* note 148, at 146–47.

the “complete subjection to the blacks.”<sup>157</sup> One might note, incidentally, that just such a doctrine of the right of a majority “to subvert an existing government” whenever necessary to achieve public happiness is enunciated in the Declaration of Independence<sup>158</sup> and, perhaps equally importantly, in *Federalist No. 40*, where Madison defends the disregard by the delegates to the Philadelphia Convention of the limits imposed by the Articles of Confederation.<sup>159</sup>

One implication of this argument is that it remains crucially important to define who is part of “the people,” “the public,” or any potential voting majority in order to make certain that stability and the existing social order will be maintained. Madison, after all, emphasized that the delegates to the Convention were drawn from “patriotic and respectable citizen[s],”<sup>160</sup> and not the wider body of his countrymen, for whom he expressed often undisguised contempt.<sup>161</sup> Professor Frank tellingly quotes another Founder, John Adams, dismissing a popular Boston mob as only “a motley rabble of saucy boys, negroes and mulattoes, Irish Teagues, and outlandish jacktars.”<sup>162</sup> Surely no right-thinking civic could believe that such a motley crew could actually “count.”

So one implication of the question “who counts” suggests that we begin with a “candidate” for a particular designation—American, Jew, Indian, African-American, or, beyond that, “human being” or even “member of the trans-species community of ‘right-bearing beings’”—and attempt to construct a conceptual apparatus that will allow us to determine the answer. In spite of the obvious fact that there are shelves of books—and, no doubt, many seminars in college catalogues, especially given by philosophers—devoted to developing such concepts, one can still wonder if that is simply a fool’s errand. The “essence” of “essentially contested concepts,” after all, is that there is no prospect for genuine closure to arguments about what they “really mean.”

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157. *Id.* at 147.

158. THE DECLARATION OF INDEPENDENCE para. 2 (U.S. 1776):

[W]hensoever any Form of Government becomes destructive of these Ends, it is the Right of the People to alter or to abolish it, and to institute new Government, laying its Foundation on such Principles, and organizing its Powers in such Form, as to them shall seem most likely to effect their Safety and Happiness.

159. THE FEDERALIST NO. 40, at 291 (James Madison) (Floating Press 2011):

[I]n all great changes of established governments, forms ought to give way to substance; . . . a rigid adherence in such cases to the former, would render nominal and nugatory the transcendent and precious right of the people to “abolish or alter their governments as to them shall seem most likely to effect their safety and happiness . . . .”

160. *Id.*

161. See GARRY WILLS, JAMES MADISON 31 (2002).

162. FRANK, *supra* note 136, at 96.

There is *only* endless argumentation, not least because there is no agreed-upon set of facts that are determinative.

Recall DeLolme's singular limitation of parliamentary sovereignty, the ostensibly unbreachable division between male and female.<sup>163</sup> Even today there are surely some people who believe that one's chromosomes provide a definitive answer to the question whether one is male or female, and it is altogether likely that even fifty years ago that would have been regarded as a knockdown argument with regard to gender identity. Today many, perhaps most, of us—i.e., readers of law review articles like this one—have a considerably more complex set of understandings. Not only are chromosomes more complicated than we once thought—the world, it turns out, is not divided neatly between XX's and XY's—but we realize as well that the self-identity of many persons is not imposed by chromosomal realities. So "who counts" as a member of a sex- or gender- or identity-related group is now a matter of profound debate. Just as we now accept the terms "multi-racial" and "bi-sexual," with regard to sexual orientation, perhaps we will one day equally accept "multi-sexual" or "multi-gender" with regard to sexual identity. In any event, we find ourselves, even with regard to categories of sexuality and gender, in the realm of "imagined communities" rather than what philosophers would call simple "natural kinds" to which imagination must simply submit on pain of being deemed irrational.

Just as we almost certainly will *never* agree on exactly what constitutes "democracy," for example—or, to take an example closer to the heart of law students and professors, what is the "real meaning" of "equal protection"<sup>164</sup>—perhaps we must recognize the futility of attempting to arrive at a single definition of the terms I have already raised. Perhaps the best we can do is to say that some person (or being) A is an X for certain purposes, but not for others. This is, after all, one implication of the Equal Protection Clause itself: If persons "similarly situated" are entitled to "equal treatment," then it is entailed that persons "dissimilarly situated" in some relevant respect can receive differential treatment. Context is all.

Law students are often (rightly) confused by very specific legal rules or doctrines that seem to be in tension, if not outright contradiction, with other rules or doctrines. I sometimes refer to these as the "irregular verbs" within the law; as with such verbs, which must simply be memorized inasmuch as they do not follow standard forms of conjugation, students must memorize certain specific legal rules rather than remain confident that they can always deduce the correct answers by reference to some broad legal concept. Consider that

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163. See *supra* note 34.

164. See, e.g., DOUGLAS RAE ET AL., EQUALITIES 133 (1981) (demonstrating the existence of 108 logically possible meanings of "equality").

resident aliens are constitutionally entitled to serve as lawyers,<sup>165</sup> but not as school teachers.<sup>166</sup> There is no good theory that explains the difference, only a set of Supreme Court decisions in which, to be altogether accurate, one or two “swing justices” appear to see differences that are less than obvious to the rest of us (including the majority of their colleagues).

As law professors (and students), we are often critical of what we are tempted to describe as irrational features of the law; I certainly do not hesitate to denounce much of the Supreme Court’s redistricting jurisprudence as incoherent. But perhaps we should all be more charitable, and not only because “to err is human.” Such charity may be the implication of Justice Holmes’s reminder that the “life of the law” is “experience,” rather than “logic,”<sup>167</sup> and, of course, that applies to far more than simply the life of the law. It is true of life writ large, however frustrating that might be to system- and closure-seeking academics. And experience is inevitably messy and in many ways fundamentally illogical, at least if we try to reduce our behavior to overarching philosophical systems with neatly rank-ordered priorities.

But, of course, one can scarcely stop here by throwing up our hands in recognition of the complexity of the world. Decisions *must* be made with regard to all of the questions posed above: Who *is* (and is not) a “genuine American,” for whatever purposes; who *is* (or is not) a Jew, an Indian, an African-American, or a male or female, or a “person”? Even if there are those who believe, I think wrongly, that we should move toward a culture and law of “color-blindness” that would rule out of order any and all references to racial or ethnic identity, one can obviously make no sense of a demand directed to institutional religions that they simply drop any inquiry as to whether a proposed congregant—or rabbi, priest, or imam—is “truly” a member of the faith community. Would we, for example, really deny the Catholic Church a right to excommunicate persons it deems as having betrayed essential attributes of the faith? Those who disclaim the importance of “color” as a determinant attribute surely cannot coherently mean that one must reject any and all attributive aspects of identity. They themselves turn out to share the American fixation on color, even if they insist that they want to efface its relevance. Instead we inevitably return, perhaps like moths to the flame, to the equally frustrating question, what attributes count—or should count—in determining “who counts”?

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165. *In re Griffiths*, 413 U.S. 717, 718 (1973).

166. *Ambach v. Norwich*, 441 U.S. 68, 69–72 (1979).

167. OLIVER WENDELL HOLMES, JR., *THE COMMON LAW* 3 (The Belknap Press of Harvard Univ. Press 2009) (1881).

## VII. ENTER INSTITUTIONS—AND THE PROBLEM OF “SEZ WHO?”

When presented with frustrating questions, it is always tempting to believe that the answer lies in accepting some given *institution* or other external authority as the legitimate source of a definitive answer. Indeed, even the first part of this lecture has scarcely been able to avoid reference to institutional decisions, whether of the Supreme Court in the *Rogers* case or the State of Israel with regard to eligibility under the Law of Return. And it is telling that the 1970 amendment to that law included a laconic “definition” that purported to settle the question of “who counts” as a Jew. This is, after all, one appeal of dictionaries. What counts as the meaning of a particular term in a statute or the Constitution? For Justice Scalia, especially, the purported answer often lies in turning to a literally authoritative dictionary.<sup>168</sup>

Perhaps far more to the point is the claim by the Supreme Court of the United States itself that disputes as to legal meanings are to be settled by reference to its own decisions. Over the past half-century especially, the Court has strongly insisted on its status as the “ultimate interpreter” of the Constitution, dismissing, often with near contempt, the proposition that other institutions, including the Congress of the United States, are entitled to their determinations of what the essentially contestable language of the Constitution might mean.<sup>169</sup> Many people might be grateful; I dare say that law students are often comforted by the perception that one can determine the meaning of Equal Protection of the Law simply by reading an “authoritative” decision of the Supreme Court, even if it garnered only five votes and provoked vehement dissent.<sup>170</sup>

I have analogized this view of the Supreme Court to the role played by the Papacy within (at least “official”) Roman Catholicism. What historically distinguishes Catholicism from Protestantism, after all, is not only the different emphasis placed on tradition as against the text of the Christian Bible, but also the equally important differences of belief regarding institutional authority. For so-called “dissenting Protestants” especially, the notion of “the priesthood of all believers” places interpretive authority in each and every member of the faith community.<sup>171</sup> That is obviously altogether different from the tenets of the Catholic Church, where authority lies in the teaching magisterium of the Church, as instantiated in the Vatican and, ultimately, a Pope who is authorized to issue ostensibly “infallible” pronouncements when speaking *ex cathedra* on

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168. See, e.g., Antonin Scalia & Brian A. Garner, *Reading Law: The Interpretation of Legal Texts* 36–37 (2012).

169. See, e.g., *Bd. of Trs. of the Univ. of Ala. v. Garrett*, 531 U.S. 356, 356, 365 (2001) (explaining that the Supreme Court, not Congress, had responsibility to define the substance of Constitutional guarantees).

170. See, e.g., *id.* at 377–79 (Breyer, J., dissenting).

171. See LEVINSON, *supra* note 152, at 24.

matters of faith and morals.<sup>172</sup> What this last question points to is that one answer to the question “who counts” lies in referring to one or another external authority—often an institution whose authority is self-legitimizing, as it were, rather than the demonstrated capacities of any particular members at the time.

In any event, one might hope that some suitable institution will be given—or seize—the right to determine “who counts” as an X. That is, *it* will do the counting for the rest of us, whose task now is simply to accept whatever count ensues.<sup>173</sup> The institutional Catholic Church, through its power not only to baptize but, equally important in this context, also to negate one’s claimed Catholic identification through the process of excommunication, can determine “who counts” as a Catholic. If someone who is excommunicated asks “sez who?” the answer is obvious and, for most people, dispositive. One may view a specific excommunication as unjust, as with the stripping of citizenship from a dissident, but it is hard to argue that established institutional authorities are legally inefficacious whenever they behave unjustly. It was, for example, difficult to proclaim that Mstislav Rostropovich, the great Russian cellist, continued to be a Soviet citizen (as distinguished from a “Russian”) when the then-existing Soviet state in effect expelled him from the community in 1978.<sup>174</sup>

Protestant churches obviously have more difficulty in this regard; boundaries are far more permeable, and that is even more true with regard, say, to what we sometimes refer to as racial or ethnic “communities.” Dismissive terms like “oreo” or “banana” are used to denigrate the authenticity of identities and thus the legitimacy of membership in the community for whom the person using such terms claims to speak.<sup>175</sup> Missourians might be especially familiar with the term “RINO” (Republican in Name Only) inasmuch as that has apparently been applied to former Republican Senator John Danforth by his more “purist” conservative Republican critics.<sup>176</sup> Recall Jason Frank’s comment that deciding who belongs to a given people “is not a question the people can procedurally decide because the very question subverts

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172. *Id.* See also *id.* at 47.

173. This, of course, could be described as the basic issue underlying *Bush v. Gore*, 531 U.S. 98, 102–03 (2000), i.e., the willingness to accept the recount underway by Florida officials as determinative. The Supreme Court, of course, shut the recount down and in effect declared that George W. Bush had won the election regardless of what any recount might show. *Id.* at 110–11.

174. See, e.g., Allan Kozinn, *Mstislav Rostropovich, Cellist and Conductor, Dies at 80*, N.Y. TIMES (Apr. 27, 2007), <http://www.nytimes.com/2007/04/27/arts/music/27cnd-Rostropovichcnd.html?pagewanted=all>.

175. See, e.g., Randall Kennedy, *Response to Sanford Levinson: Who Counts?—The Politics of Racial Membership and Excommunication*, 58 ST. LOUIS U. L.J. 989, 995 (2014).

176. See, e.g., Wes Vernon, *Time for a RINO Hunt?*, RENEW AMERICA (Feb. 5, 2006), <http://www.renewamerica.com/columns/vernon/060205> (identifying Senator John Danforth as a “RINO” and describing his actions as part of an anti-conservative crusade).

the premises of its resolution.”<sup>177</sup> The very asking of the question can create intellectual vertigo or what Wittgenstein notably called “mental cramps.”<sup>178</sup> Perhaps a good example of such a “cramped” consciousness is provided by one Elisha Potter, Jr., a militant opponent of Thomas Dorr’s Suffrage Association and its capacious conception of who comprised “the people” of that state. After beginning by noting the obvious absurdity that according to the tenets of the Association the people—or, more accurately, those persons actually regarded as having some say within a community and therefore truly “counting”—might “include[] women as well as men,” as well as “persons under twenty one years,” he goes on to the crux of the matter: Once one “refuse[s] to recognize the authority of the freeholders and those who now constitute the legal voters and undertake to define for yourselves who the people are, there is no knowing where to stop and no possibility of agreeing upon any other limitation.”<sup>179</sup> At some level, Potter is right: How *does* one decide “where to stop” and what “limitation[s]” will distinguish logically possible from actually communally acceptable definitions unless one relies on some existing institutions, in that case the body of participants authorized to participate in the polity existing in Rhode Island and Providence Plantations by the Crown in 1663? Note well that they had the authority to amend the Charter; there was no suggestion that a court should decide the merits of the issue. The point, though, is that unless and until those authorized to act in fact took relevant action, the answer to the question “who counts” was settled, at least in the absence of “reformation” or “revolution.”

Among other things, this means that we should look well beyond courts or highly institutional religions with regard to determining “who counts.” Just as examples of the problem appear ubiquitous once one starts thinking about it, so this is true of institutions that claim to assuage our confusion by providing firm, definitive answers. Sometimes the institutions will be explicitly “legal” ones. Other times they will be more “ordinary” institutions that, nonetheless, *must* make decisions as to “who counts” in their everyday operations. Consider, for example, the decision by the Conservative Jewish synagogue Temple Beth Hillel-Beth El, outside of Philadelphia, to adopt a policy of accepting as “household” members religiously intermarried couples.<sup>180</sup> Each

177. FRANK, *supra* note 136.

178. See RUSSELL NIELI, WITTGENSTEIN: FROM MYSTICISM TO ORDINARY LANGUAGE: A STUDY OF VIENNESE POSITIVISM AND THE THOUGHT OF LUDWIG WITTGENSTEIN 202 (1987) (referring to essentially therapeutic nature of philosophy in clearing up such “cramps” or similar “mental discomforts”).

179. CHAPUT, *supra* note 148, at 70.

180. Naomi Zeveloff, *Conservative Synagogues Crack Open Door to Intermarried Families: Movement Seeks Balance Between Tradition and Greater Openness*, JEWISH DAILY FORWARD (Aug. 31, 2011), <http://forward.com/articles/142112/conservative-synagogues-crack-open-door-to-intermarried-families/>.



member of such households is entitled to vote on synagogue issues, including, presumably, whom to hire as a rabbi or what traditional rituals should be adhered to or modified, which means that non-Jews will have the right to cast a vote. Perhaps unsurprisingly, this policy runs counter to that of the United Synagogue of Conservative Judaism, the umbrella group for Conservative congregations in America, which represents the movement's congregations and opposes membership rights for non-Jews.<sup>181</sup> Even in the case of Temple Hillel-Beth El, though, membership rights will apparently not include the right to serve in positions of leadership. Reform Judaism has been more latitudinarian, beginning, of course, with the rejection of exclusive reliance on matrilineal descent.<sup>182</sup> Given the fact that most intermarried couples who affiliate with Jewish institutions are likely to do so with Reform temples, the issue of joint membership has become almost routine. And, in a 2007 essay, Rabbi Kerry Olitzky, the head of the Jewish Outreach Institute, explicitly defended the importance of including a vote along with more abstract membership:

If we consider the history of the United States, what really delivers citizenship status to people is voting rights. The Jewish community is not the same as a democratic state, yet that is what gives us more flexibility to make changes. Consider women's suffrage or the civil rights movement. At their core were voting rights. And it wasn't until women or African American citizens were given the right to vote that real equality became a possibility for either group. It is the same with those who come from other faith communities and live in our midst. Until we offer them full voting rights in our institutions, no matter what we do, they will still be considered—and feel like—second-class citizens....<sup>183</sup>

It is hard to better Rabbi Olitzky's argument that "being counted" makes one feel that "one counts" in the full dignitary sense. But, I presume, many readers will still share a sense of perplexity at how one defines a "Jewish" (or, for that matter, any other) community.

So take what is perhaps the most fundamental example of institutional "counting," which is establishing an accurate—or at least popularly accepted and thus legitimate—number of people living within the United States. After all, the Constitution requires the national government to "enumerate" the population of the United States every ten years,<sup>184</sup> and we have established a Census Bureau to carry out the prescribed task. So to find the answer to the question "who counts" as a member of the American community, one

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181. *Id.*

182. *Id.*

183. Kerry M. Olitzky, *Non-Jewish Partners Deserve a Vote*, WASHINGTON JEWISH WEEK (Oct. 10, 2007, 8:59 PM), <http://joi.org/bloglinks/Non-Jewish%20partners%20deserve%20a%20vote.htm>.

184. U.S. CONST. art. I, § 2, cl. 3.

presumably turns to the Census Bureau, which tabulated the total number of persons resident within the United States on April 1, 2010 as 308,745,538.<sup>185</sup> These presumptively comprise the 2010 "We the People" who are part of a common enterprise. Again, it is important to note that one should be dubious about the sanctity of the specific number; indeed, there are many important controversies, both technical and political, about "undercounts," especially of certain minorities or the homeless. Even more to the point, are earlier-mentioned controversies about what some might describe as an "overcount" simply by virtue of simultaneously counting illegal immigrants at all and concomitantly denying their membership in "We the People" by actively trying to deport millions of them.<sup>186</sup> Still, the Census Bureau does provide us a count, ideally, of every human being within the geographical territory of the United States on April 1, and nothing more than that completely contingent fact is suggested by being lumped together. In any case, no one has (yet) suggested that we simply ignore those figures as tainted and accept some others as legally authoritative.

Although the most important single task of the Census Bureau is to compute a single set of final numbers establishing the populations of the nation at large and then the constituent sub-polities, both state and local, it also plays a crucial role in computing as well the numbers of *group* members within all of these polities. As David Kertzer and Dominique Arel put it in introducing a fascinating collection of essays on census-taking around the world, "The census . . . emerged as the most visible, and arguably the most politically important, means by which states statistically depict *collective* identities."<sup>187</sup> Thus one can find a helpful map, constructed by the U.S. Census, indicating the percentage of Hispanics by state after the 2000 census.<sup>188</sup> The only problem—should one say "of course"—is that deciding who is Hispanic or any of the other myriad of racial and ethnic categories used in American discourse and, just as importantly, American public policy, generates the most severe

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185. LINDSEY M. HOWDEN & JULIE A. MEYER, U.S. CENSUS BUREAU, U.S. DEP'T OF COMMERCE, AGE AND SEX COMPOSITION: 2010 2 (2011), *available at* <http://www.census.gov/prod/cen2010/briefs/c2010br-03.pdf>.

186. *See, e.g.*, PETER SKERRY, COUNTING ON THE CENSUS?: RACE, GROUP IDENTITY, AND THE EVASION OF POLITICS 97 (2000); on specific political ramifications of an accurate count see, e.g., Corrie MacLaggan, A Growing County Fights for Every Resident to Be Counted, N.Y. TIMES, Sept. 5, 2013, <http://www.nytimes.com/2013/09/06/us/a-growing-county-fights-for-every-resident-to-be-counted.html?pagewanted=all> (discussing the efforts of Hidalgo County, Texas to increase its enumeration).

187. CENSUS AND IDENTITY: THE POLITICS OF RACE, ETHNICITY, AND LANGUAGE IN NATIONAL CENSUSES 3 (David I. Kertzer & Dominique Arel eds., 2002) (emphasis added) [hereinafter CENSUS AND IDENTITY].

188. U.S. CENSUS BUREAU, U.S. DEP'T OF COMMERCE, PERCENT HISPANIC BY STATE: 2000, *available at* [http://www.census.gov/geo/maps-data/maps/pdfs/thematic/pct\\_hisp\\_2000.pdf](http://www.census.gov/geo/maps-data/maps/pdfs/thematic/pct_hisp_2000.pdf).

cases of mental cramps.<sup>189</sup> This is, after all, the point of Justice Stevens's anguished dissent in *Fullilove*.<sup>190</sup> And, Professor—and former Census Director—Prewitt is often scathing with regard to the “incoherent” categories that we use when determining race and ethnicity within the United States.<sup>191</sup>

Moreover, the questions asked in any given census, including the opportunity set of possible definitions, do “much more than simply reflect social reality.”<sup>192</sup> Instead, they play “a key role in the construction of that reality.”<sup>193</sup> Kertzer and Arel well describe “the census [as] a cauldron of racial construction.”<sup>194</sup> Although learned debates are—and, historically always have been—held about the “science” of racial and ethnic identity, it should be obvious that such efforts, if not entirely bogus, are inevitably doomed to failure precisely because real political stakes are often attached to what the numbers are purported to demonstrate. Moreover, and perhaps more ominously, the introduction of various classifications by census bureaus has often worked to create social divisions where previously they were dampened, if not absent. People who previously imagined themselves as “part of the complex web of relationships, practices, and beliefs they shared now became something quite different. An identifiable, distinct culture was distinguished,” allowing people not only to band together, but also (inevitably?) to begin viewing others as Others.<sup>195</sup>

James Scott has noted the importance of census-taking to colonial administrators, who have their own interest in strategies of dividing and conquering. What he terms the “artificial inventions” of census takers “can end by becoming categories that organize people’s daily experiences precisely because they are embedded in state-created institutions that structure that experience.”<sup>196</sup> Thus, a sufficiently powerful state can use categories instantiated in census-taking “not merely [as] means to make their environment legible; they are an authoritative tune to which most of the population must dance.”<sup>197</sup>

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189. See, e.g., Mireya Navarro, *For Many Latinos, Racial Identity Is More Culture Than Color*, N.Y. Times, Jan. 14, 2012, at A11 (discussing the struggles that many Latino immigrants have with identifying as a single, generalized race on the U.S. Census and in society).

190. *Fullilove v. Klutznick*, 448 U.S. 448, 535 (1980) (Stevens, J., dissenting).

191. PREWITT, *supra* note 22, at 7 (quoting Ian Haney López, *Race on the 2010 Census: Hispanics & the Shrinking White Majority*, 134 DAEDALUS 42, 50 (2005)).

192. CENSUS AND IDENTITY, *supra* note 187, at 2.

193. *Id.*

194. *Id.* at 11.

195. *Id.* at 32.

196. *Id.* at 33 (quoting JAMES C. SCOTT, *SEEING LIKE A STATE: HOW CERTAIN SCHEMES TO IMPROVE THE HUMAN CONDITION HAVE FAILED* 83 (1998)).

197. CENSUS AND IDENTITY, *supra* note 187, at 33 (quoting SCOTT, *supra* note 196).

It is unsurprising that it is no small matter for a country to be able to conduct a popularly accepted census. Thus an article about the near-impossibility of conducting a census in contemporary Pakistan notes the myriad difficulties, including violence, that stand in the way.<sup>198</sup> There has been no national census since 1998.<sup>199</sup> The year 2011 was supposed to be the "Population Year," but it did not turn out that way, not least because of the opposition of "major parties [that] draw their power from rural constituencies."<sup>200</sup> Were a new census to highlight "the extent of the country's urbanization, a census would lead to the creation of new urban constituencies."<sup>201</sup> Another ethnically divided country, Lebanon, "did not have a census for more than three decades after independence for fear the results would reveal certain demographic changes that would undermine the existing system created to balance different religious interests."<sup>202</sup> The "demographic changes" referred to are not anything so banal as former farmers who have moved to the cities, but rather, the actual numbers (and percentages) of Muslims and Maronite Christians, who had agreed to a power-sharing agreement in the 1943 constitution.<sup>203</sup> The notion of "balance" is surely not based on a "one-group/one-vote" principle, but rather, dividing up the offices by reference to the actual membership of the groups in question.

But even states that can, more-or-less successfully, conduct censuses run into problems of determining how to identify specific groups. Thus Melissa Nobles, in a valuable article on "[r]acial categorization and censuses," includes useful discussions and appendices on the remarkable array of different terms and categories that census takers were expected to apply in the United States and Brazil.<sup>204</sup> The year 1880 required census takers in the U.S. to distinguish among those residents who were "White; Black; Mulatto; Chinese; [and] Indian."<sup>205</sup> Ten years later the categories were "White; Black; Mulatto;

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198. Huma Yusuf, *In Pakistan, a Census Count Turns Into a Body Count*, N.Y. TIMES (Nov. 3, 2011, 9:58 AM), <http://latitude.blogs.nytimes.com/2011/11/03/in-pakistan-a-census-count-turns-into-a-body-count/>.

199. *Id.*

200. *Id.*

201. *Id.*

202. David Abramson, *Identity Counts: The Soviet Legacy and the Census in Uzbekistan*, in CENSUS AND IDENTITY, *supra* note 187, at 176, 198 n.14.

203. Michael Cook, *The Myth of Disappearing Lebanese Christians*, MERCATORNET (Feb. 20, 2013), [http://www.mercatornet.com/articles/view/the\\_myth\\_of\\_disappearing\\_lebanese\\_christians](http://www.mercatornet.com/articles/view/the_myth_of_disappearing_lebanese_christians).

204. See Melissa Nobles, *Racial Categorization and Censuses*, in CENSUS AND IDENTITY, *supra* note 187, at 43, 43–70.

205. *Id.* at 67 tbl.2.1. It is not clear whether "Indian" refers to "American Indians" or Southeast Asians, given the earlier-quoted statement that not until the 1900 census were efforts made to delineate the number of American Indians in the population. See *supra* notes 15–16 and accompanying text.

Quadroon; Octoroon; Chinese; Japanese; Indian.”<sup>206</sup> By 1930, “quadroons” and “octoroons” were dropped from the list, but “Filipino; Hindu; Korean,” plus the opportunity to “write in” a different, presumably individually-chosen identity, had been added.<sup>207</sup>

One way of escaping some of the dilemmas attached to requiring hapless census takers to discern the specific identities of individuals is to allow what has come to be called “self-identification.” For example, “I am a Jew, an Hispanic, a male, a \_\_\_ because that is what I say I am, and who are you to tell me that I am not?” This is the ultimate response to “sez who?”—“Sez me! (or, for the linguistically fastidious, “Sez I!”). This may be a particularly attractive option to those with an individualist or libertarian bent. Thus Randall Kennedy wrote in 2003:

A well-ordered multiracial society ought to allow its members free entry into and exit from racial categories, even if the choices they make clash with traditional understandings of who is “black” and who is “white,” and even if, despite making such choices in good faith, individuals mislead observers who rely on conventional racial signaling.<sup>208</sup>

The words “good faith” may be crucial. Thus Kennedy devotes roughly four pages to the saga of Paul and Phillip Malone, two Boston firemen who claimed their right to participate in an affirmative action program on the grounds, true or not, that they had discovered that their “maternal great-grandmother” was black (whatever exactly *that* means).<sup>209</sup> Should Boston be allowed to police these racial borders, so to speak, or is it sufficient that the Malones had rather suddenly discovered their African-American heritage in circumstances where that provided them a potential boon?

And consider the fact that “the number of Americans of Slovak, Croat, and French Canadian ancestry more than doubled between the 1980 and 1990 censuses, while the number of Cajuns increased sixty-fold—all four categories which were not listed in 1980, but were in 1990.”<sup>210</sup> Such a list served as an invitation either to create or acknowledge previously repressed identities. A key issue in contemporary “census politics” involves the demand that people be allowed to identify themselves as “multiracial,” neither X nor Y, at least if these are thought to be mutually exclusive identities, but rather both. Such an option has been vigorously fought by African-American organizations that, probably rightly, see the acceptance of such a category as working contrary to

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206. Nobles, *supra* note 204, at 67 tbl.2.1.

207. *See id.*

208. INTERRACIAL INTIMACIES, *supra* note 42, at 333. I am grateful to Charles Fried for bringing this passage to my attention.

209. *Id.* at 334–38.

210. David I. Kertzer & Dominique Arel, *Census, Identity Formation, and the Struggle for Political Power*, in CENSUS AND IDENTITY, *supra* note 187, at 1, 18.

their political or economic interests. No doubt they were relieved when President Obama apparently chose "African-American" as his identity in the 2010 census instead of "biracial," as the son of a white mother.<sup>211</sup> Or consider whether the 2020 census will include "transgender" or some other similar category as an option. A society devoted to ensuring the "blessings of liberty" might well find attractive the notion that those of us who make up "We the People" should be given *carte blanche* in announcing what kind of people we are. Yet it is telling that only the most utopian would suggest adopting this kind of libertarian latitudinarianism with regard to the most basic question of the census: "[A]re you a citizen or non-citizen of the United States?" For the answer to *that* question, we continue to look to authoritative institutions, though not the Census, to supply the one correct answer.

It should not be surprising, then, that debates over "disenrollment" within American Indian tribes include not only abstract discussions about the nature of identity, but also specific references to *who* has the authority to issue a conclusive answer. "Who counts?" turns into the question, "Sez who?" Consider the debate over who is a member of the Nooksack Tribe. In May 2013, Nooksack Tribal Chief Judge Raquel Montoya-Lewis held that those protesting their disenrollment had no legal right to injunctive relief.<sup>212</sup> She emphasized the broad discretion granted the tribal council with regard to decisions about tribal membership.<sup>213</sup> Thus the doctrine of sovereign immunity protected the sued tribal officials unless their actions "exceed . . . official duties in a manner that verges on bad faith, not simply by making technical errors of law."<sup>214</sup> Part of the controversy involves how to determine whether a given person meets the criteria of having "one-fourth Indian blood and any degree of Nooksack tribal ancestry."<sup>215</sup> Tribal officials are apparently supporting a proposed amendment that would strike the relevant clause from the tribal constitution.<sup>216</sup> Tribal member Bernita Madera is described as "one of many who support" the "efforts to remove people who never should have been granted tribal membership in the first place."<sup>217</sup> The spirit of Elijah

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211. See Abigail Thernstrom, *Obama's Census Identity: The President Chooses an Old-Time Racial Classification*, WALL ST. J. (April 16, 2010, 12:01 AM), <http://online.wsj.com/article/SB10001424052702303720604575169783989253108.html>.

212. John Stark, *Tribal Judge Refuses to Block Disenrollment of 306 Nooksacks*, BELLINGHAM HERALD (May 22, 2013), <http://www.bellinghamherald.com/2013/05/22/3018656/judge-refuses-to-block-disenrollment.html>.

213. *Id.*

214. *Id.*

215. *Id.*

216. *Id.*

217. Stark, *supra* note 212.

Potter, and his anxieties about the implications of accepting radical notions associated with the Suffrage Association,<sup>218</sup> live on.

One can only wonder if the litigation will ultimately make its way into the federal judiciary, perhaps even the Supreme Court, and lead to further consideration of the implications of its famous 1978 decision in *Santa Clara Pueblo v. Martinez*.<sup>219</sup> In that case, one of the few “Indian rights cases” to inch into the canon of general constitutional law by virtue of its testing what we mean by “Equal Protection of the Law,” the Court in effect upheld the Pueblo’s right to deny membership to children of a woman who married outside the Pueblo even though children of men who married exogenously could transfer such membership.<sup>220</sup> The Court, through Justice Marshall, emphasized that “[a] tribe’s right to define its own membership for tribal purposes has long been recognized as central to its existence as an independent political community.”<sup>221</sup> To be sure, under American law, the tribe’s “right” is not protected against being overridden by congressional statute.<sup>222</sup> At best, Indian tribes are only “semi-sovereign” nations, not truly comparable, say, to the United States or any other “sovereign nation” that, at least as a matter of law, answers to no higher authority when deciding “who counts.” But, in the absence of such a statute, the Pueblo *does* have authority.

If one acknowledges such authority in the United States, the Catholic Church, a group of rabbis in Israel, or the United Synagogue of Conservative Congregations—all of which are fully capable of making undoubtedly unjust decisions—then the obvious question is why we would grant American Indian tribes less authority to violate our own sense of propriety in essentially contested matters. How and why does it become *our* business to say who is a Nooksack, a Catholic, or a Jew, or even an American, unless, of course, we claim some individual linkage to the community in question? And, in particular, what business is it of *ours* to deny institutional authority, which in some cases may trace back centuries or even millennia, as a means of resolving what otherwise would be truly insoluble questions? Those of us who are Jewish may have a personal reason to get involved in debates about “who counts” as a Jew or who should be allowed membership (and a vote) within a congregation, just as Catholics may similarly feel personally affected by whether local bishops will deny them communion or even threaten excommunication for failure to adhere to what the bishop (or, perhaps, even the Pope) believes is an essential tenet of the faith. But why, precisely, should I care, or, even more to the point, claim any rights to intervene, if a public figure

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218. CHAPUT, *supra* note 148, at 70.

219. *Santa Clara Pueblo v. Martinez*, 436 U.S. 49 (1978).

220. *Id.* at 51, 72.

221. *Id.* at 72 n.32.

222. *Id.* at 72.

is denied communion because of his insufficient militance on preventing abortions? Thus Raymond Burke, the former Catholic archbishop of St. Louis, announced that he would deny communion to both John Kerry and Rudolph Giuliani.<sup>223</sup> I certainly have views about this, but should I claim any right to call upon the state to intervene in lieu of recognizing the institutional autonomy of the Catholic Church operating through its designated authorities?

This is most definitely not to say that we should casually defer to institutional authority, even if its lineage goes a long way back. *Brown v. Board of Education*, after all, was surely correct in its basic insight that segregation humiliated African-Americans by telling them that they had to remain separated from those who were truly full members of the community.<sup>224</sup> One can similarly endorse Justice O'Connor's "endorsement test" in the area of Establishment of Religion, whatever its difficulty of application, by virtue of its recognition that the impact of apparent state endorsement of a particular sectarian view is to lessen the belief on the part of those outside the relevant community that they indeed fully count.<sup>225</sup> Federalism is, after all, a particular theory of state autonomy in determining "who counts" as members of given communities and in what ways, and one of the overriding lessons particularly of post-World War II American constitutionalism is the importance of limiting such autonomy in the name of "national" (or, for some, even more transcendent) values.<sup>226</sup> But, for better or often for worse, we do not—and probably should not—expect all non-state institutions to feel bound to those values.

#### VIII. ON INSTITUTIONAL MISTRUST

Were I to stop here, one might well be tempted to see this talk as moving toward some kind of at least limited "happy ending," even if it recognizes that particular individuals may well be unhappy at the identities assigned to them by institutional counters. Alas, I do not think that things are, relatively speaking, so simple. Begin only by asking why we generally shift, with some exceptions, from self-identification to institutional identification. The answer, quite obviously, is that we are faced with a set of essentially contested questions that, by definition, produce quite different answers. The response is to recognize the wisdom of Thomas Hobbes, that most scary of all English-speaking political philosophers, who recognized that perhaps the most basic task of the sovereign is to provide a set of unchallengeable definitions to what otherwise would remain questions generating not only intellectual contestation,

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223. *Bishop Would Deny Communion to Giuliani*, NEWSOK, Oct. 4, 2007, <http://newsok.com/bishop-would-deny-communion-to-giuliani/article/3140138>.

224. *Brown v. Bd. of Educ.*, 347 U.S. 483, 494–95 (1954).

225. *See Lynch v. Donnelly*, 465 U.S. 668, 688–89 (1984) (O'Connor, J., concurring).

226. I am grateful to Joel Goldstein for enabling me to see this point.



but also, as he fully experienced, civil war.<sup>227</sup> There is more than a trace of Hobbes in Justice Scalia, who fears the potential for anarchy in the absence of the ability to rely on authoritative language.<sup>228</sup>

But note that Justice Scalia has also been one of the most consistent critics, over his now almost three decades on the Court, of claims to judicial authority itself. He has written acidly about any notion of a “living Constitution” that by definition relies on the wisdom of judges in effect to “update” the meanings of what Robert Jackson once notably referred to as the “majestic generalities” of the Constitution, though he elsewhere also referred, perhaps less inspirationally, to the “cryptic words of the Fourteenth Amendment.”<sup>229</sup> I have recently suggested that one can profitably distinguish two quite different aspects of the United States Constitution: one that I call the Constitution of Settlement, the other the Constitution of Conversation.<sup>230</sup> To simplify somewhat, the first refers to the hard-wired institutional features of the Constitution—think only of the fact that we have two Houses of Congress, with members serving different terms of office and, in the Senate, each state having an equal number of votes.<sup>231</sup> Among other things, these aspects of the Constitution, which I have come to believe are in fact the document’s most important clauses, are never litigated because there is really nothing to argue about in terms of what they “mean” or how they should be “interpreted.”

Instead, what comprises the docket, so to speak, of both professors and judges is the Constitution of Conversation, those parts of the document that are in fact litigated, perhaps endlessly, and present myriad challenges of “meaning” and “interpretation.”<sup>232</sup> Not surprisingly, the Constitution of Conversation, perhaps by definition, involves those parts of the Constitution that themselves can be described as “essentially contested concepts,” such as “Equal Protection of the Laws” or “Free Exercise of Religion,” both of which, also unsurprisingly, inevitably raise questions about “who counts.” So why not count on judges, say, to supply definitive answers, à la the Hobbesian sovereign? Indeed, as noted earlier, the Court has on several occasions over the past half-century claimed just such a role. Though he has taken part and joined some opinions that can be described as offering a “juricentric” view of the

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227. See especially SHELDON S. WOLIN, *POLITICS AND VISION: CONTINUITY AND INNOVATION IN WESTERN POLITICAL THOUGHT* 214–56 (expanded ed. 2004), for the most brilliant explication of Hobbes as the author of the determinative political lexicon.

228. See Michael Herz, *Textualism and Taboo: Interpretation and Deference for Justice Scalia*, 12 *CARDOZO L. REV.* 1663, 1677–78 (1991).

229. See, e.g., SANFORD LEVINSON, *FRAMED: AMERICA’S FIFTY-ONE CONSTITUTIONS AND THE CRISIS OF GOVERNANCE* 15 (2012) [hereinafter *FRAMED*].

230. *Id.* at 19.

231. *Id.* at 23, 25–26.

232. *Id.* at 27.

Constitution,<sup>233</sup> Justice Scalia is probably more well known for his attacks on the willingness of his colleagues to offer what he regards as merely their own personal views as the “meaning” of the law. In some cases, Scalia would defer almost completely to decisions of the legislature, especially, it appears, state legislatures.<sup>234</sup> (About Congress, he demonstrates far more concern.<sup>235</sup>) In his “deferential” phase, though, he exhibits reticence about substituting his views for those of another, presumably more authoritative, institution. When he *does* assert judicial authority, he is apt to take refuge in arguments drawn from purported “plain meaning” of the text<sup>236</sup> or ostensibly clear historically derived interpretations.<sup>237</sup> But he always remains, at least rhetorically, the justice who once denounced the reality of judicial “balancing” as basically horrific.<sup>238</sup>

What Justice Scalia instantiates, and I do not necessarily mean this to be critical, is the ever-diminishing basic trust in the United States in established institutions, one of whose central functions is to authoritatively determine “who counts” (in what circumstances and with what weight) and other freighted questions central to our political system. After all, as suggested above, the Court’s systematic critique of state claims to autonomy rested not only on abstract theories of the Constitution, but also, and perhaps far more importantly, on the perception that one could simply not trust those who controlled state government to give adequate weight—to count fairly—the interests of their entire citizenry, let alone their non-citizen population. For many the most important moment of dis-establishing state autonomy was *Roe v. Wade*,<sup>239</sup> invalidating the existing laws concerning abortion in all fifty of the states. Yet the country has scarcely accepted the Court as the “last word” on when protectable “life” begins, whatever the hopes expressed in the plurality opinion by Justices Souter, Kennedy, and O’Connor in *Planned Parenthood of Southeastern Pennsylvania v. Casey*.<sup>240</sup> In that sense—and many opponents of *Roe* would say other senses as well—there is a comparison to *Dred Scott*, the

233. Robert C. Post & Reva B. Siegel, *Protecting the Constitution from the People: Juricentric Restrictions on Section Five Power*, 78 IND. L. J. 1, 2 (2003).

234. See *Emp’t Div. v. Smith*, 494 U.S. 872, 890 (1990); *Arizona v. United States*, 132 S. Ct. 2492, 2522 (2012) (Scalia, J., concurring in part and dissenting in part).

235. See, e.g., *Shelby Cnty. v. Holder*, 133 S. Ct. 2612, 2631 (2013); *Printz v. United States*, 521 U.S. 898, 935 (1997); *Nat’l Fed’n of Indep. Bus. v. Sebelius*, 132 S. Ct. 2566, 2676 (2012) (Scalia, J., dissenting). *But see* *United States v. Windsor*, 133 S. Ct. 2675, 2710 (2013) (Scalia, J., dissenting).

236. See, e.g., *Crawford v. Washington*, 541 U.S. 36, 51 (2004) (analyzing the Confrontation Clause textually).

237. See, e.g., *District of Columbia v. Heller*, 554 U.S. 570, 598–99 (2008).

238. “[I]t is horrible to contemplate that federal judges will regularly balance against the importance of general laws the significance of religious practice.” *Employment Division*, 494 U.S. at 889–90 n.5.

239. *Roe v. Wade*, 410 U.S. 113, 163 (1973).

240. *Planned Parenthood of Southern Pennsylvania v. Casey*, 505 U.S. 833, 851 (1992).

authority of which as “law of the land” was vigorously rejected by Abraham Lincoln (much to the consternation of Senator Stephen Douglas).<sup>241</sup> It took a war, and 750,000 deaths, to determine, as a constitutional matter, “who counts” as a member of the American and state political communities.<sup>242</sup>

The Court’s own “juricentrism,” expressed across a wide swath of issues, scarcely seems to have prevailed among the public at large, as perhaps revealed in a July 2013 Gallup poll<sup>243</sup> determining that more Americans (46%) “disapprove” of the way that the Supreme Court “is handling its job” than approve (43%). Even if this difference is well within the famous margin of error, and even if “disapproval” is accompanied with what political scientists call sufficient “diffuse support” to lead even critics to mutter that, nonetheless, when the Supreme Court speaks, the rest of us must listen and obey,<sup>244</sup> this cannot be good news for devotees of the Supreme Court. What would be truly interesting is knowing what Justices Scalia and Ginsburg might have told the pollster, given their own well-publicized criticisms of the Court and, therefore, of their colleagues.<sup>245</sup>

Deference to the Court scarcely seems to have been replaced by affection and esteem for the other two branches of the national government. For October 2013, a summary of polls reveals that approximately 8% of Americans “approve” of the Congress, while almost 83% “disapprove.”<sup>246</sup> The President’s ratings, depending on any given poll, are certainly better than his congressional counterparts,<sup>247</sup> but are not better than those of the Court. Only the American military retains the confidence of most of the American public,<sup>248</sup> a fact (or factoid) that might provoke justified ambivalence. One might refer as well to the other institutions mentioned in my talk today and suggest that they, too, are suffering from their own crises of authority. The Catholic Church faces threats not only from traditional Protestant rivals, but also from dissidents within the

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241. See Abraham Lincoln, Speech on the Dred Scott Decision (June 26, 1857).

242. See U.S. CONST. amend. XIV, § 1.

243. *Supreme Court*, GALLUP, <http://www.gallup.com/poll/4732/supreme-court.aspx> (last visited Jan. 18, 2014).

244. See, e.g., James L. Gibson, Paper Delivered at the Countermajoritarian Conference, University of Texas Law School: Public Reverence for the United States Supreme Court: Is the Court Invincible? (March 29–30, 2012), available at <http://www.utexas.edu/law/magazine/wp/wp-content/uploads/countermajoritarian/Gibson-paper2.pdf>.

245. See, e.g., Adam Liptak, *Court Is ‘One of Most Activist,’ Ginsburg Says, Vowing to Stay*, N.Y. Times, Aug. 25, 2013, at A1, 17.

246. *Congressional Job Approval*, REAL CLEAR POLITICS, [http://www.realclearpolitics.com/epolls/other/congressional\\_job\\_approval-903.html](http://www.realclearpolitics.com/epolls/other/congressional_job_approval-903.html) (last visited Jan. 18, 2014).

247. The most recent Gallup poll at the time of this writing indicates a 41% approval rating, which represents a significant drop from earlier measures. *Presidential Approval Ratings—Barack Obama*, GALLUP, <http://www.gallup.com/poll/116479/barack-obama-presidential-job-approval.aspx> (last visited Jan. 18, 2014).

248. See, e.g., FRAMED, *supra* note 229, at 3.

Church, even if it retains the ultimate ability to excommunicate those who cross certain "red lines." Just as President Obama proved less than fully resolute with regard to his own "red line" involving the use of chemical weapons in Syria, however, so it remains to be seen if Pope Francis, who seems to be striving to set a new tone for the Papacy following the more militant Pope Benedict XVI, will be so quick to count dissidents out of the Church. One can wonder if contemporary councils within and among the many recognized tribes within the United States will easily be able to maintain their authority over the would-be members of those tribes. The United States certainly retains formal authority to decide who is, and who is not, a citizen, but it is crystal clear that it does not have sufficient authority—or perhaps even raw power—to expel those who "don't count" as official members of the American community even to the extent that resident aliens most certainly do. (Perhaps it would be as if excommunicated Catholics insisted on attending services and taking communion.) Nor can one confidently predict the future with regard to addressing the complexities of how we decide who qualifies for "affirmative action" and who, on the contrary, can be legitimately excluded.

In any event, I hope I have adequately demonstrated that the question "who counts"—inevitably accompanied by the "sez who" questions: "who does the counting on the basis of what authority?"—is central not only to academic political theorists, but also, and probably more importantly, to anyone concerned with the actualities of American—or any other—politics and, finally, to persons particularly interested in the role of law and legal institutions in providing authoritative answers. Our futures as a political community may depend on finding widely shared answers to both.

