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BRIDGES AND BALLOTS: COMMENT ON LEVINSON

CHAD FLANDERS*

In 2006, the nation of Hungary opened internet voting on what to name a bridge it was then constructing. This being the internet, early voting went heavily for martial arts legend Chuck Norris.¹ Then Stephen Colbert got involved. According to Wikipedia:

American satirist Stephen Colbert discussed the [Reuters news] story on his comedy program *The Colbert Report*, instructing his viewers to visit the polling website and vote for him instead of [Chuck] Norris. The next day the number of votes for him had grown 230 times, and he now asked his viewers to follow a link from his own “Colbert Nation” website, to avoid “all that illegible Hungarian”. Colbert’s site also indirectly offered techniques for “stuffing the ballot box” . . . as users of their forums created several automated scripts to cast multiple votes for Colbert . . .²

Colbert ultimately won the poll, garnering a vote total that was many times the number of actual citizens in Hungary.³ Colbert’s bid to have the bridge named after him, however, was thwarted by the requirements (announced on the show by the Hungarian ambassador to the United States) that the bridge be named after someone who spoke Hungarian, and who was deceased.⁴ Colbert ended up with only a cash prize, which he subsequently attempted to use to bribe the ambassador (it did not work).⁵

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1. Balazs Penz, *Chuck Norris Bridge? Budapest Votes to Name Landmark (Updated 3)*, BLOOMBERG (Aug. 1, 2006, 3:47 PM), <http://www.bloomberg.com/apps/news?pid=newsarchive&sid=aDplGNo9mHCM>.

2. *Megyeri Bridge: Naming Poll*, WIKIPEDIA, http://en.wikipedia.org/wiki/Megyeri_Bridge#Naming_poll (last visited Jan. 1, 2014).

3. *Id.*

4. See *The Colbert Report: Hungarian Bridge-Andras Simonyi* (Comedy Central television broadcast Sept. 14, 2006), available at <http://www.colbertnation.com/the-colbert-report-videos/75462/september-14-2006/andras-simonyi>.

5. *Id.*

There are many ways to take this incident, and one must be careful not to take it too seriously (as apparently some indignant Hungarian politicians did). But it does raise, at least from one angle, the question: “who counts?” Or more particularly, who should count in the voting to name a bridge in Hungary? Bracket for the moment that Colbert initially exhorted his viewers to commit voter fraud, to which Colbert is quite opposed when it happens or is alleged to happen in the United States (Colbert later tried unsuccessfully “to call off the dogs”⁶). The problem with Colbert’s intervention goes deeper. It is the problem of Americans being allowed to determine the name of a bridge in Hungary. Only Hungarians should be eligible to select the name; it should not be named according to an international consensus. Even if non-Hungarians *could* have voted in the naming of the bridge (because of the way the poll was distributed and regulated), they should not have.

“Who counts”⁷ in naming a Hungarian bridge? Who should count? The answer seems pretty obvious (or obvious to me): Hungarians. Americans and other non-Hungarians voting for Chuck Norris or Stephen Colbert should not count. One can only imagine that it was with tongue firmly in cheek that a blog poster commented:

For the Hungarian officials to name the bridge after Stephen Colbert would be a testament to global unity. They opened up the voting to the world, and the world answered. The people of Hungary should be proud to, with this one small step, be among the pioneers breaking down the social barriers that keep the cultures of the world apart.⁸

If nationalism is appropriate anywhere, it should be in the naming of cultural artifacts, such as bridges, or towns, or monuments.⁹ Imagine if we had a poll to rename the Washington Monument.¹⁰ Surely it would be obvious that only American votes should count in the naming. Colbert would rightly be outraged

6. See *The Colbert Report: Stephen Colbert Salutes Hungary* (Comedy Central television broadcast Aug. 22, 2006), available at <http://www.colbertnation.com/the-colbert-report-videos/73378/august-22-2006/stephen-colbert-salutes-hungary>.

7. Sanford Levinson, “Who Counts?” “Sez Who?”, 58 ST. LOUIS U. L.J. 937, 937 (2014).

8. Tom, Comment to *The Stephen Colbert Bridge—Voting is Over!*, NO FACT ZONE (Sept. 11, 2006, 2:39 PM), <http://www.nofactzone.net/2006/09/08/the-stephen-colbert-bridge-voting-is-over/>.

9. See SANFORD LEVINSON, WRITTEN IN STONE: PUBLIC MONUMENTS IN CHANGING SOCIETIES 87 (1998) [hereinafter WRITTEN IN STONE] (“[P]ublic namings, whether of monumental heroes or simple street sites, ‘represent a kind of collective recognition’” (quoting Kirk Savage, *The Politics of Memory: Black Emancipation and the Civil War Monument*, in COMMORATIONS: THE POLITICS OF NATIONAL IDENTITY 135–36 (John R. Gillis ed., 1994))).

10. *Id.* at 43 (discussing the way the Washington Monument and its name represent a national identity and “celebrate [George] Washington” as a “national liberator,” and “the founding father of a new Union”).

if non-Americans hijacked the polling, especially if they committed fraud in the process.

I had written this far in my response when I remembered that Professor Levinson had actually written about Hungarian monuments in a book of his, a neglected gem entitled *Written in Stone*¹¹ (if nothing else, let my response to his lecture be a testament to his enormously improbable range and depth as a scholar). In the book, Levinson says something that is in substantial accord, I think, with my resolution of the Hungarian vote controversy: he says that in constructing and naming monuments that reflect in part a nation's "national consciousness," governments are entitled to be non-neutral.¹² Our monuments do not have to be written in a kind of moral Esperanto. But if this is so, then in naming monuments governments might also be entitled to be non-neutral in who gets to vote for the name. A justifiably non-neutral output might justify being non-neutral in the input.

I.

Consider another place where international votes are thought to risk hijacking the meaning of some national monument, where the question of "who counts" is also prominent. In the death penalty context, the Supreme Court has increasingly looked to international authorities (laws and court decisions) to factor into its "survey" of the "objective indicia" that go into interpreting the Constitution's prohibition on cruel and unusual punishments.¹³ In counting noses, it now routinely includes foreign noses in the count. As Justice Kennedy summarized in his opinion in *Roper v. Simmons*, "[A]t least from the time of the Court's decision in *Trop [v. Dulles]* the Court has referred to the laws of other countries and to international authorities as instructive for its interpretation of the Eighth Amendment's prohibition of 'cruel and unusual punishments.'"¹⁴ One might here, like the blogger who wrote about the Colbert poll, praise the Court in "open[ing] up" its Constitution "to the world" and "breaking down the social barriers that keep the cultures of the world apart." Indeed, many have praised the Court, and sincerely.¹⁵

11. See *id.* at 4–10.

12. See *id.* at 10–11 (discussing how changes in political leadership also generally result in the desire to change public spaces, or monuments). See, e.g., *id.* at 4–10 (describing a Hungarian monument that underwent many physical alterations as the Hungarian political regime changed, but nonetheless remained "a central public symbol of the Hungarian nation" reflecting Hungarian "national identity and historical progress.").

13. See *Roper v. Simmons*, 543 U.S. 551, 564, 575 (2005); *Atkins v. Virginia*, 536 U.S. 304, 316–17 n.21 (2002).

14. *Roper*, 543 U.S. at 575 (citing *Trop v. Dulles*, 365 U.S. 86, 102–03 (1958) (plurality opinion)).

15. See also *infra* Part III, where I take Justice Kennedy's position as exemplary of what Jed Rubenfeld has called "international constitutionalism."

Is outrage appropriate in this context? Justice Scalia, dissenting in *Roper*, rejected “out of hand” the idea that “American [constitutional] law should conform to the laws of the rest of the world.”¹⁶ Georgetown Professor Nicholas Rosenkranz proposed, not tongue in cheek, an “American Amendment” that would limit judges in what sources they could consult in interpreting our Constitution.¹⁷ Only indicia of American beliefs and attitudes should count in interpreting our Constitution. “[T]he notion that [American Constitutional] evolution may be brought about by changes in foreign law violates basic premises of democratic self-governance,” Rosenkranz wrote.¹⁸ No votes for Hungarian bridges that are not from Hungarians; no objective indicia of evolving American Constitutional standards that are not American.

Who or what “counts” when we interpret the Eighth Amendment to our Constitution depends crucially on how we understand what we are doing when we interpret a Constitution.¹⁹ The debate about international sources in Constitutional interpretation is so fierce because it involves competing visions of the Constitution. Is the Constitution trying to get something right, or is it about who we are? The vision of Justice Kennedy, I think it is fair to say, is that we have an affirmative obligation to bring our Constitution into conformity with the right standards of human decency and of human dignity, and if international sources help us to do this better, then we should of course feel free to consult them and even let them guide us. In this, I think Justice Kennedy makes himself the most Dworkinian of all the justices.²⁰

Justice Scalia, at least on paper, is more concerned with the ability of “We the People” to be able democratically to go in whatever direction we want to.²¹ International sources are just not relevant to this project; indeed, allowing them to make a difference misses the whole point of the project. How can we let others (or even the moral law) determine who we are? Only “We the People” can do that. If we want to go to hell, we should be able to, and if we want to name our bridge after Chuck Norris, we should be able to do that too.

16. *Roper*, 543 U.S. at 624 (Scalia, J., dissenting).

17. Nicholas Quinn Rosenkranz, *An American Amendment*, 32 HARV. J.L. & PUB. POL’Y 475, 479–82 (2009).

18. *Id.* at 476.

19. As a general point, when asking “who counts?” we should also always be asking “why are we counting?” The question “who counts” always implicitly includes a reference to for what purpose are we counting.

20. See *Roper*, 543 U.S. at 578 (Kennedy, J.) (“It is proper that we acknowledge the overwhelming weight of international opinion against the juvenile death penalty The opinion of the world community, while not controlling our outcome, does provide respected and significant confirmation for our own conclusions.”). For an argument that Kennedy’s jurisprudence resembles Ronald Dworkin’s method, see FRANK J. COLLUCI, *JUSTICE KENNEDY’S JURISPRUDENCE: THE FULL AND NECESSARY MEANING OF LIBERTY* 8–37 (2009).

21. *United States v. Windsor*, 133 S. Ct. 2675, 2698 (2013) (Scalia, J., dissenting).

To help see Scalia's point, imagine how strange it would be to have a commission set up to decide what the "right" name of the bridge would be, where the commission would consult international sources, and debate at length the true nature of the bridge. It almost does not make any sense. At best, we could only consult our tradition and our history to see what a good bridge name might be, as well as the text of any relevant laws relating to the naming of bridges.²²

Ironically, however, the name of the Hungarian bridge *was* ultimately determined by an independent committee, and they decided to give the bridge a bland place name (something that roughly translates into "this is a bridge between this place and that place"²³), rather than to name it after a figure from Hungarian history, or (even worse) a foreign celebrity. The place name they gave it had not even made it to the second round of the polling.²⁴ One might nonetheless still praise the committee for protecting, in Justice Thomas's words, Colbert voters from imposing "foreign moods, fads, or fashions" on the Hungarians.²⁵ But the rule of the committee seems like a second-best, designed-to-forestall-a-worse result, where independent committee review was required to strike down an exceedingly silly name.

I find myself siding with Justice Scalia on this debate as to "who counts." A Constitution is in many ways like a bridge: a monument to a particular community, a community that counts among its number something short of "the whole world." Naming the bridge, like interpreting a constitution, is an exercise in discovering who we are, and what we think, not necessarily in discovering the true, the good, or the beautiful (I will have more to say on this in Part III²⁶). But if I side with Scalia on this point, things become more complicated when we get to the question of how to define the national "we."

22. See, e.g., OR. DEP'T OF TRANSP., BRIDGE NAMING RULES, <http://www.oregon.gov/ODOT/HWY/BRIDGE/docs/brnaming.pdf> (last updated May 2010); *Name the Bridge*, TRIMET, <http://www.trimet.org/namethebridge/> (last visited Jan. 1, 2014) (listing finalists in bridge naming competition in Oregon, all of which refer to the history and/or geography of the area).

23. *Megyeri Bridge*, BRIDGES OF BUDAPEST, http://www.bridgesofbudapest.com/bridge/megyeri_bridge (last visited Jan. 1, 2014) ("Since it connects Káposztásmegyer and Békásmegyer, the Hungarian Committee of Geographical Names decided for the name Megyeri Bridge.").

24. *Id.*

25. *Foster v. Florida*, 537 U.S. 990, 990 n.* (2002).

26. See also Chad Flanders, *Toward a Theory of Persuasive Authority*, 62 OKLA. L. REV. 55 (2009).

II.

If we wanted to find out what we Americans think about something, what would we do? Take a poll, probably.²⁷ But how would we word the questions to that poll, and how would the poll be administered? Would there be limits on who could participate in the poll, and if so, what would they be?²⁸ In the death penalty context, Thurgood Marshall famously proposed that we should find out whether there was a national consensus for or against the death penalty by having people take a sort of deliberate poll:²⁹ they should be informed about the statistics on deterrence (which are famously inconclusive³⁰), and about the alternatives to the death penalty (when told that life without parole is an option rather than death, support for the death penalty drops significantly³¹). Would this be the best way of getting at what we think about the death penalty? Justice Marshall backtracked a little when, in the aftermath of the *Furman* decision, well over a majority of states reintroduced the death penalty:³² clear evidence that there was a “national consensus” in support of the death penalty.³³

Or was there? Marshall could have responded that the supposed consensus was not real because it was knee-jerk and unreflective.³⁴ Subsequent Justices have rejected some legislative decisions as not representative of a national consensus on capital punishment for similar reasons.³⁵ There is a deep question here, about who we are, and what we should count when we are counting. Cass

27. See generally NATE SILVER, *THE SIGNAL AND THE NOISE: WHY SO MANY PREDICTIONS FAIL—BUT SOME DON’T* (2012) (discussing how to analyze and weigh different polls).

28. See also Chad Flanders, *What Is the Value of Participation?*, 66 OKLA. L. REV. 53 (2013).

29. *Furman v. Georgia*, 408 U.S. 238, 361 (1972) (Marshall, J., concurring) (“[W]hether or not a punishment is cruel and unusual depends . . . on whether people who were *fully* informed as to the purposes of the penalty and its liabilities would find the penalty shocking, unjust, and unacceptable.”) (emphasis added).

30. See Hans Zeisel, *The Deterrent Effect of the Death Penalty: Facts and Faiths*, 1976 SUP. CT. REV. 317, 317 (1976).

31. See Michael L. Radelet & Ronald L. Akers, *Deterrence and the Death Penalty: The Views of the Experts*, 87 J. CRIM. L. & CRIMINOLOGY 1, 3 (1996).

32. See REBECCA STEFOFF, *FURMAN V. GEORGIA: DEBATING THE DEATH PENALTY* 102 (2008) (“Florida was the first state to reintroduce the death penalty, enacting its new law five months after the *Furman* decision. Within four years, another thirty-four states and the federal government also had new capital-punishment laws in place.”).

33. *Gregg v. Georgia*, 428 U.S. 153, 232 (1976) (Marshall, J., dissenting) (“I would be less than candid if I did not acknowledge that these developments have a significant bearing on a realistic assessment of the moral acceptability of the death penalty to the American people.”).

34. As he did, in fact. See *id.* (“But if the constitutionality of the death penalty turns, as I have urged, on the opinion of an *informed* citizenry, then even the enactment of new death statutes cannot be viewed as conclusive.”).

35. See cases cited *infra* note 43.

Sunstein and others have written that we have preferences, but also preferences about those preferences.³⁶ The original vote for the Hungarian bridge (that is, before it was hijacked by Colbert Nation) might be seen as a sort of preference poll: just a “gut” feeling about what the bridge should be named. Maybe if they reflected on their preferences, or deliberated together about them, they would come out with something different (besides Chuck Norris, who apparently is a bit of a Hungarian folk hero).

We have no requirement of reflection or deliberation when we hold an election, even for President. A recurring poll question in election years is, which candidate would you feel like having a beer with? It even has a name, the “Beer Primary.”³⁷ Winning the Beer Primary was thought to have been what gave George W. Bush his edge over John Kerry, and what might have harmed Mitt Romney, a teetotaler, against a President who held a “beer summit” in his first term.³⁸ The beer question could only be relevant and telling if an election is something like a preference poll, where what matters is what is in our gut (Do you like this guy? Would you have a beer with him?) rather than any more rational basis for voting.³⁹

Does that mean voting for a president does not represent what we think, because it is just, in the words of Levinson, a “mindless plebiscite empowering what are often demagogic, even Caesarist, leaders”?⁴⁰ That does not follow. The fact is, an election as preference poll is one way to slice who we are as a nation.⁴¹ But not the only way, and that is part of the problem: we can be defined by how we vote, how we respond to polls, how we think after we have deliberated, who represents us, what laws our representatives pass, etc. Or consider a more classic variation of the question: are we fifty states, or are we a nation?⁴² Who, or what, counts?

36. Cass R. Sunstein, *Preferences and Politics*, 20 PHIL. & PUB. AFF. 3, 15–16 (1991) (“[P]olitical decisions might vindicate what might be called metapreferences or second-order preferences. People have wishes about their wishes, and sometimes they try to vindicate those second-order wishes, including considered judgments about what is best, through law.”).

37. Dean Barnett, *Battlefield Earth and Other Faves*, WKLY. STANDARD (May 21, 2007), <http://www.weeklystandard.com/Content/Public/Articles/000/000/013/639vjbhg.asp?pg=1>.

38. Garance Franke-Ruta, *Obama's Backyard Summit*, WASH. POST (July 30, 2009, 7:25 PM), <http://voices.washingtonpost.com/44/2009/07/obamas-backyard-summit.html>.

39. See Chad Flanders, *What Do We Want in a Presidential Primary? An Election Law Perspective*, 44 U. MICH. J.L. REFORM 901 (2011) (discussing the role of deliberation in the presidential primaries and elections generally).

40. SANFORD LEVINSON, FRAMED 129 (2012).

41. See Flanders, *supra* note 28, at 59.

42. See Joseph Fishkin, *The Dignity of the South*, 123 YALE L.J. ONLINE 175, 185 (2013), <http://yalelawjournal.org/2013/06/08/fishkin.html>.

Justice Scalia's repeated refrain (in a series of dissenting opinions⁴³) that the Supreme Court cherry-picks the data in death penalty cases to prove there is a national consensus against a particular punishment would have greater valence if there were a set of right data we could, without any controversy, point to as evidence of the national consensus that really picks out who "we" are. But there are none.⁴⁴ The national consensus that the Court fabricates (it could not do otherwise) is just another "imagined community."⁴⁵ Of course, Hungary is an "imagined community" too—as well as every nation, religion, family, and baseball team. If we can say who we are not and who should not count, that does not mean that we can say who we are with anything approaching certainty.

III.

Early on in his lecture, Professor Levinson quotes the economist Tyler Cowen as saying that "[t]he nation-state is a good practical institution, but it does not provide the final moral delineation of which people count and which do not."⁴⁶ Cowen's claim hangs over Levinson's essay as a sort of rebuke (or at least that is how I read it). Why isn't the default answer to "who counts?" that "everybody counts"? Why do we keep on asking this question? Why does it keep popping up? But not everybody counts in voting on a bridge in Hungary, nor should they, and in this case the nation-state does provide the final moral delineation of who counts, or something very much close to it: Hungarians should count in voting for their bridge because, well, they are Hungarians.

In an incredible vignette (which in many ways brings us back to the example I started with), Jed Rubenfeld recounts his experience advising Kosovo as it was drafting a new constitution.⁴⁷ Early on, he makes a startling discovery: the committee designing the new constitution had no Kosovar members on it.⁴⁸ Rubenfeld makes inquiries, and finds out to his surprise that

43. See *Atkins v. Virginia*, 536 U.S. 304, 347–48 (2002) (Scalia, J., dissenting) (arguing that data used to determine national consensus reflects the views of the Court, not necessarily the views of the American people, and therefore cannot be relied on with certainty); see also *Roper v. Simmons*, 543 U.S. 551, 608 (2005) (Scalia, J., dissenting).

44. I expand on this claim in an unpublished essay. See Chad Flanders, *The Epistemology of Evolving Standards* 5, 25 (Jan. 7, 2014) (unpublished manuscript) (on file with author).

45. See BENEDICT ANDERSON, *IMAGINED COMMUNITIES* 6 (rev. ed. 1991) (describing a nation as "an imagined political community—and imagined as both inherently limited and sovereign").

46. Levinson, *supra* note 7, at 957 (referencing Tyler Cowen, *A Profession with an Egalitarian Core*, N.Y. TIMES, Mar. 17, 2013, at BU4).

47. Jed Rubenfeld, *Unilateralism and Constitutionalism*, 79 N.Y.U. L. REV. 1971, 1992 (2004).

48. *Id.*

the exclusion of Kosovars was not an oversight, but deliberate.⁴⁹ Involving Kosovars in the process would lead to unnecessary factionalism, the other members of the committee informed him; besides, the committee members had already made a fact-finding trip to Kosovo.⁵⁰ They knew all they needed to know.⁵¹

If there is something here that strikes us as off, it is that it seems to us rather obvious that Kosovars should have at least some role in creating their founding document, and to exclude them—moreover to deliberately exclude them—means that their document is less legitimate, in large part because it is less their own. The constitution is after all theirs, why should anyone else tell them what should be in it? Even if the members who draft the constitution are informed about what Kosovars might want, this is still not enough, and no amount of additional information can make up for it: it must be the case that the Kosovars do the constitution-making. So too might we think that a bridge that is named by an international committee is not really the Hungarians' own, and to the extent that it is not, the bridge's name would be less legitimate. So too might we think that in interpreting our own constitution, we should look to our own evolving standards of decency, and not the world's.

Rubinfeld puts the contrast as between a belief in “international constitutionalism,” where the process of constitution-making is the process of trying to get something right (protecting human rights, establishing the rule of law), and “democratic constitutionalism,” where

a constitution is not to be conceptualized as something prior to or outside of democratic politics. On the contrary, a nation's constitution ought to be made through national democratic processes, because the business of the constitution is to allow people to make their own fundamental law—to decide for themselves on the enduring legal and political commitments that will govern the polity in the future.⁵²

The contrast is evident in the difference between Justice Kennedy's internationalist approach to deciding death penalty cases and Justice Scalia's. Indeed, Ernest Young uses Rubinfeld's anecdote precisely in this way: to draw the distinction between the two different ways of interpreting the Eighth Amendment.⁵³

In his concluding remarks at the Childress Lecture, Professor Levinson indicated that if there were to be a second constitutional convention (something

49. *Id.*

50. *Id.*

51. *Id.*

52. Rubinfeld, *supra* note 47, at 1993.

53. See Ernest A. Young, *Foreign Law and the Denominator Problem*, 119 HARV. L. REV. 148, 161–62 (2005).

for which he devoutly wishes⁵⁴) it might be good to have some international members.⁵⁵ In this, he reveals at least a more than passing sympathy with Justice Kennedy's vision, and more broadly with the vision of international constitutionalism. Levinson suggested a lottery to pick some members of the convention, to which international members might be eligible.⁵⁶ This may be a slight concession (most of the members presumably would be American and so would usually outvote the foreign members), but it shows something philosophically significant: there may be something to the project of making a constitution for Levinson that aims not merely at figuring out what we think, or who we are, but at getting the *right answer*. It is not quite no-Kosovars-in-designing-a-constitution-for-Kosovo, but it is close; they are points on a continuum. Once we admit that international members may not just have useful information, but be an actual part of making a national constitution, we are loosening our grip on the connection between constitutions and nations. We are saying that nations may matter less than we previously thought.

But why should nations matter at all? After all, in Part II I concluded that the nation is in many ways a fiction, something hard to define or rather, too easy to define in too many ways. It seems hard to justify making a nation matter if it is, in the end, mostly imaginary.

At the same time, even if we may not be able to fully articulate or even justify our attachment to the imaginary communities to which we belong, it is worth attending to how much our lives are devoted to them. Nations, families, religions, and clubs, are all in a sense moral fictions, relying on boundaries that are not strictly speaking rational; indeed, in a sense they are at bottom arbitrary. Moreover, all of these communities are defined, in part, by what they exclude. We know who is in by knowing who is not in; we know who we are because we are not them and they are not us. We know we count because they do not. We are born in these things, belong to them, and define ourselves by being in them and by not being in other things: we are "encumbered selves," in Michael Sandel's fine phrase, encumbered by some attachments and not by others.⁵⁷

This may explain why it is easier to exclude people from voting in the Hungarian bridge election rather than make up any defensible criteria for Hungarian inclusion (Just Hungarians who live in Hungary? Hungarians anywhere? Only Hungarians who drive over bridges? Can there be honorary Hungarians?). Of course, we may give a pass to the Hungarian bridge vote

54. See SANFORD LEVINSON, *OUR UNDEMOCRATIC CONSTITUTION* (2006).

55. Sanford Levinson, Second Panel, *Richard J. Childress Memorial Lecture: Who Counts?*, ST. LOUIS U. L.J. 1:31:52–1:34:06 (Nov. 1, 2013), <http://www.slu.edu/school-of-law-home/news-and-events/videos-and-podcasts/childress-lecture>.

56. *Id.*

57. See MICHAEL J. SANDEL, *LIBERALISM AND THE LIMITS OF JUSTICE* xiii (2d ed. 1998).

because it seems so little is at stake: it is just a bridge, let them name it.⁵⁸ It does show, however, how even in trivial cases, the good of belonging can present itself. We acknowledge this good when we see something wrong in taking even just a little piece of the Hungarian national consciousness from them, and replacing it with the name of an American celebrity, chosen by mostly Americans.

But do greater consequences, involving non-trivial cases like capital punishment (where our Constitution may in a very literal sense be a “covenant with death”), mean that we should rely less on our community or should we rely more? Certainly it would be wrong to make an idol of our community: to make our faith in it so total that we could not allow ourselves to separate from that community.⁵⁹ But neither should we reduce our choices to either exiting or being loyal.⁶⁰ The doctrine of “evolving standards of decency,” after all, holds out the possibility that we might reach the right answer on our own, that we are evolving towards something and not just shifting from one position to another, with no direction, no growth.⁶¹

In his dissent in the recent *Windsor* decision,⁶² Justice Scalia chides the majority for taking away an issue that might have been solved by democratic decision-making. He writes, with more than a little rhetorical excess, that the Court might have “covered ourselves with honor today, by promising all sides of this debate that it was theirs to settle and that we would respect their resolution.”⁶³ If we side with democratic constitutionalism, then we side with the idea that we, the people, might eventually cover ourselves in honor, not only by getting at what we believe, but by getting at the truth by ourselves, if there is indeed a truth to be found.

58. Levinson’s book, however, provides several examples where much more is at stake in the naming of a monument, and he suggests that this may be the norm rather than the exception. See, e.g., *WRITTEN IN STONE*, *supra* note 9, at 36 (“[N]othing less than the national culture is at stake, especially insofar as material representations of such events, such as monuments or even street names and the like . . . are thought to play some role in inculcating particular understandings of society within future generations.”). For a local example, see Bill McClellan, *The Short Memory of St. Louis*, ST. LOUIS POST-DISPATCH (Oct. 13, 2013, 12:15 AM), http://www.stltoday.com/news/local/columns/bill-mcclellan/mcclellan-the-short-memory-of-st-louis/article_45aefc2-1c24-5a68-a23f-3b1369102161.html. I am indebted to Tim McFarlin for the citation.

59. See Jack M. Balkin, *Idolatry and Faith: The Jurisprudence of Sanford Levinson*, 38 TULSA L. REV. 553, 563 (2003) (discussing the dangers of idolatry).

60. See Albert O. Hirschman, *Exit, Voice, and the State*, 31 WORLD POL. 90, 106 (1978).

61. See Flanders, *supra* note 44, at 15.

62. *United States v. Windsor*, 133 S. Ct. 2675, 2697–98 (2013) (Scalia, J., dissenting).

63. *Id.* at 2711.

