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# "CLAUSE AND EFFECT": AN IMAGINED CONVERSATION WITH SANFORD LEVINSON

*Lief Carter**

LC: Good to hear from you. I'm honored to join such good company for Farber, Frickey, and Sherry. Please send the details.

SL: There is no written description. The basic idea is to select your least favorite clause of the current US constitution and, in 1000 words, explain why you would love to see it expunged. It should be something you think has significance for current governance; you get no points by condemning the fugitive slave clause.[1]

LC: That assignment for a pragmatic post-modernist like me is harder than you think. You remember that part in my Pergamon book where I show how significant clauses in the Constitution have been interpreted in both short runs and long, in quite contradictory ways.[2] "Clause and effect" views of constitutional law fail to make sense of two hundred years of constitutional history. Reality is so completely socially constructed that any one clause out of context is just a string of words. Any suspect clause that "has significance for our current governance," could go anywhere and hence shouldn't be expunged.

SL: When will you postmodernists learn to stop hiding behind that social construction line? Of course we construct. Please get on with doing a little social construction for us.

LC: I'm not hiding, and I am constructing. I believe that legal language, like all language, has no intrinsic meaning out of context. Even if I could defend the proposition that a certain clause has done the most damage "so far," I could never show that such a clause could not support a different and highly desirable construction in the future. Legal language is just a discipline

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1. Professor Levinson's first statement is his e-mailed response to my request for details. All other "SLs" are purely my own invention. I could never hope to replicate Sandy's fine blend of articulate probing and gentle civility.

2. See Lief H. Carter, *Contemporary Constitutional Lawmaking: The Supreme Court and the Art of Politics* 22-23 (Pergamon Press, 1985).

we impose to define the nature of our disagreements in trustworthy enough ways that we don't go out and kill each other.

SL: You take the Stanley Fish position?

LC: Yes, but just the hook, not the line and sinker. The hook of course is that legal rules in their very ambiguity play a role in forming a kind of wisdom that transcends the rules. (Remember Fish's exasperated basketball coach in "Fish Vs. Fiss"?) But unlike Fish, I think current anti-foundationalist thought only marks our transition from one foundationalist paradigm to another. Fish says we will continue to pretend we achieve foundationalist determinacy. My line (and sinker, though I don't particularly like the metaphor) is that liberalism has struggled for three centuries to construct a foundational, natural law-like belief in the natural reality of substantive indeterminacy, and hence a political commitment to the desirability of skepticism, mystery, and tolerance.

SL: Yes, I know the pragmatic line and sinker: If it does work, it's "true." You're about to tell me that you can therefore take any constitutional clause and argue coherently both for and against expunging it. So try expunging the due process clause (or for that matter the equal protection clause) of the 14th Amendment.

LC: Pieces of expunge cake! Without such clauses, would the late 19th century courts have been able to confine Fourteenth Amendment privileges and immunities to the right to travel, especially in light of Article IV privileges and immunities? We might have incorporated basic rights far earlier than we did, and confronted the evils of Reconstruction and its aftermath much sooner. And the equal protection clause is pure legal gobbledygook, since all laws backed by sanctions inescapably discriminate and create inequalities—laws against murder treat those who murder differently than those who don't, and so on.

SL: Would you care to justify the fugitive slave clause?

LC: Sure, but remember I'm mainly trying to argue against clause and effect. As a tool for defining differences—for focusing moral thought and for prodding us down that bloody road toward our aspirations (to focus our "constitutional faith," to plagiarize a bit)—it may well have been necessary to enshrine the devil of slavery in our constitution in order to have something to drive out of the temple.

SL: Well, I agree it would not make sense to expunge, say, the Cain and Abel story from the Bible because we're offended by it.

LC: Right. Such biblical and constitutional clauses "work," or rather we find all sorts of ways of using such tools to produce work that we value. And the "we" in this sentence matters. *Social* construction of reality means that the only point in my saying what I would expunge would be to construct something useful for you and our audience.

SL: So you're writing this article like a Socratic dialogue to dramatize that truth is not "there" apart from social life. So let me play along and guess: You will expunge that which is least susceptible of doing work, right?

LC: Yes, but not necessarily by expunging that which is inherently confusing. As I said, the equal protection clause is inherently confusing. And the truistic 10th amendment has done work, at least for Bill Rehnquist and George Will and more than a century of police powers fans. I can only argue for expunging (because they do no work) some part of the Constitution which we constitutional students and scholars find useless, e.g., have the hardest time remembering.

SL: You mean the least litigated clauses?

LC: Nope. We'll never know if we might have had a president under 35. And the story, which I heard first from Mark Tushnet, about the 18 year old guru televangelist cum presidential candidate who claims according to his religion, protected by the First Amendment (which amends the 35 year old clause), that he is reincarnated and really a wise 70 year old, still works for me in class. I propose instead that our readers take the following short closed-book test and submit their results to Suzanna Sherry. Whichever question gets the most wrong answers becomes our socially constructed expunge winner. Here's the test:

1. After a putatively disabled President declares in writing that he is not disabled, what is the minimum possible number of days he must wait before resuming the powers of his office without confronting constitutionally approved congressional opposition?
2. Who counts the votes of the electoral college and who supervises the counting?
3. Define the constitutional meaning of "Corruption of Blood." In what context, if any, is corruption of blood permissible?
4. True or false: The President may convene both houses of Congress together but cannot convene only one house.
5. What is the maximum permissible geographical size of the District of Columbia?

6. True or false: A vote of one fifth or more of the total members of either house is sufficient to . . . . well, you get the idea.

SL: But the rule here is to expunge what you think has the most negative significance for modern government. How can you argue that the least known and most trivial clauses are the most damaging clauses?

LC: I'd like to argue that these clauses trivialize and "demoralize" the Constitution. But I don't really believe that. I have to fall back on the performance problem you've created for me. You've given me a 1000 words and you have not permitted me to add anything, only expunge. Social construction being indeterminate as it is, I wouldn't dare just take out, say the references that support the death penalty without adding a prohibition. Take the word "life" out of the due process clause? If you want to pin me down, I'd delete separate election of the president and have him or her serve at the pleasure of the Congress, parliamentary style, but I can't begin to defend that coherently in 1000 words, or do it without adding new clauses.

SL: Aha! So rules do have effects.

LC: Then how come I'm already way over my 1000 word limit?