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ESSAY: STILL FURTHER ADVENTURES OF THE NINE-LIVED CAT: A REBUTTAL TO RAOUL BERGER'S REPLY ON APPLICATION OF THE BILL OF RIGHTS TO THE STATES.

MICHAEL KENT CURTIS *

BIO:

* Partner; Smith, Patterson, Follin, Curtis, James & Harkavy, Greensboro, North Carolina. A.B. 1964, University of the South; J.D. 1969, North Carolina (Chapel Hill). © Copyright 1984 by Michael Kent Curtis.

SUMMARY: ... Raoul Berger says the objective of the fourteenth amendment was narrow. ... Occasionally he seems to admit that the privileges or immunities clause of the fourteenth amendment protected absolute, fundamental, substantive rights that states could not abridge -- the fundamental rights of life, liberty, and property. ... The statement is used by Berger to show that the privileges or immunities clause of the fourteenth amendment did not apply the Bill of Rights to the states. ... Lawrence insisted that the seventh amendment guarantee to a jury trial was included within fifth amendment due process and also was encompassed in the due process clause of the fourteenth amendment as well as in the privileges and immunities clause. ... In what may be an effort to deal with the apparent meaning of the phrase "full and equal benefit of all laws and proceedings for the security of person and property," a phrase Republicans read as broad enough to encompass Bill of Rights liberties, Berger points out that the phrase "civil rights or immunities" was eliminated from the Civil Rights Bill to obviate "a construction going beyond the *specific rights* named in the section," a "*latitudinarian construction not intended*."

HIGHLIGHT:

Recently, there has been much debate over the meaning of the fourteenth amendment. One group of commentators, typified by Raoul Berger, argues that the fourteenth amendment was intended only to prohibit discrimination in a narrow class of rights. Others, such as author Michael Curtis, argue that the fourteenth amendment was intended to guarantee a far broader class of rights against state infringement. In this Article, Mr. Curtis examines the legislative history

of the fourteenth amendment and the meaning of terms such as "privileges or immunities" as they were defined by Blackstone. He responds to Raoul Berger's earlier criticisms of his position, and concludes that both the legislative history and a fresh look at Blackstone's Commentaries indicate that the Congress intended to incorporate the guarantees of the Bill of Rights in the fourteenth amendment.

[*517] Raoul Berger says the objective of the fourteenth amendment was narrow. n1 It was designed only to prohibit discrimination among citizens of a state in a narrow class of "fundamental" rights. n2 Berger even says that the due process clause could not be violated by a nondiscriminatory state law. n3 Occasionally he seems to admit that the privileges or immunities clause of the fourteenth amendment protected absolute, fundamental, substantive rights that states could not abridge -- the fundamental rights of life, liberty, and property. Berger suggests, however, that these broad phrases should be read narrowly and be limited, more or less, to the right to testify, sue, contract, and hold property. n4 There are extremely serious problems with Berger's analysis of the fourteenth amendment, problems highlighted by Berger's latest response to my [*518] criticism of his work. n5

Berger's claim that the fourteenth amendment is identical to the Civil Rights Bill n6 and his claim that the Bill merely prohibited discrimination in certain fundamental rights a state chose to accord its citizens n7 makes the due process and privileges or immunities clauses superfluous. If the purpose of section 1 of the fourteenth amendment were only to prohibit discrimination in certain fundamental rights, then to say "[N]o state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty or property without due process of law" is a very odd way of saying so. By this reading the "privileges or immunities of citizens of the United States" that no state could abridge would be determined by local law, and the privileges could be abridged as long as the deprivation was not discriminatory.

Beyond linguistic problems, there are a number of serious objections to Berger's analysis. Two of the three members of the Joint Committee that reported the

fourteenth amendment to Congress indicated that it was designed to make the states obey the commands of the Bill of Rights. n8 During the debates a number of their colleagues said that the amendment was designed to secure all rights of citizens of the United States -- statements that are consistent with application of the guarantees of the Bill of Rights to the states. n9 These statements must be read in light of the widespread Republican belief that states already were required to obey the guarantees of the Bill of Rights prior to the passage of the fourteenth amendment and that on this issue, as on the issue of black citizenship, the fourteenth amendment was declaratory. n10

Because of a long history of denial of individual liberties in the South before the Civil War, there were strong policy reasons for Republicans explicitly to impose the guarantees of the Bill of Rights on the states. n11 After the fourteenth amendment was passed, and before the Supreme Court eviscerated the privileges or immunities clause, a number of leading Republicans indicated that they believed the amendment made the Bill of Rights applicable to [*519] the states. n12 A common description of section 1 during the campaign of 1866 was that it would protect all rights of citizens. n13

In the face of *direct* evidence from the leading supporters of the fourteenth amendment that they intended to apply the Bill of Rights to the states, Berger relies on two very questionable inferences. The first is that the privileges or immunities clause should be read in light of article IV, section 2 to protect what Berger considers a narrow class of rights defined by the Civil Rights Bill. n14 The second is that the Civil Rights Bill should be treated as an exact equivalent to section 1 of the fourteenth amendment, thus, supposedly, disproving an intent to apply the Bill of Rights to the states -- because, Berger believes, the Act left states free to grant or withhold any rights as long as they did not discriminate. n15

I. PRIVILEGES OR IMMUNITIES

Leading Republicans read article IV, section 2 to protect the absolute, fundamental rights of citizens to life, liberty or property. n16 I have criticized Berger for focusing on some of the *incidents* of these great fundamental rights that were set out in the Civil Rights Bill (*e.g.*, the right to testify; the right to purchase and sell property), instead of the *overarching* principles from which they were derived. n17 If leading Republicans read the privileges and immunities clauses of article IV, section 2 and of section 1 of the fourteenth amendment to protect rights to personal security, personal liberty, and private property, this expression was broad enough to encompass rights in the Bill of Rights.

Berger finds my analysis wrong because it ignores the "Blackstonian confines" that he believes shaped the meaning of the privileges or immunities clause of the fourteenth amendment. He cites remarks by James Wilson, Chairman of the House Judiciary Committee and notes:

Resort to "overarching" principles does not expand "life, liberty or property" beyond the Blackstonian confines to which Wilson directed the framers' attention. The right to locomotion without restraint does not secure free speech; protection of life and limb does not guarantee against excessive bail for a murderer; the right to own property does not insure trial by jury in a suit concerning more than twenty dollars. n18

Wilson had argued that the federal government could legislate to protect [*520] the great fundamental rights of citizens. He stated that these "must be as comprehensive as those which belong to Englishmen. Blackstone *classifies* them under three articles," n19 as follows:

1. The right of personal security; which, he says, "Consists in person's legal and uninterrupted enjoyment of his life, his limbs, his body, his health and his reputation."
2. The right of personal liberty; and this, he says, "Consists in the power of locomotion, of changing situation, or moving one's person to whatever place one's own inclination may direct, without imprisonment or restraint, unless by due course of law."
3. The right of personal property; which he defines to be, "The free use, enjoyment, and disposal of all his acquisitions, without any control or diminution save only by the laws of the land." n20

Since Berger insists that the absolute rights of an individual -- the right to *erty* -- must be interpreted according to Blackstone, a careful examination of Blackstone is in order. Blackstone notes:

The absolute rights of every Englishman (which, taken in a political and extensive sense, are usually called their liberties,) as they are founded on nature and reason, so they are coeval with our form of government. . . . [T]he balance of our rights and liberties has settled to its proper level; *and their fundamental articles have been from time to time asserted in parliament, as often they were thought to be in danger.* n21

Blackstone then cites the Magna Carta, the Petition of Right, the Habeas Corpus Act, the English Bill of Rights, and the Act of Settlement. n22 The Magna

Carta, of course, was the origin of our due process clause n23 and was read by colonists to protect trial by jury. n24 The Petition of Right listed rights such as due process, the right to habeas corpus, and the right not to have troops quartered in private homes. n25 The English Bill of Rights provided that "excessive bail ought not to be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted," that jurors should be duly impanelled, that subjects had the right to petition the King for redress of grievances and that all commitments and prosecutions for such petitionings were illegal, and that "Protestants" had a right to have arms for their defense as allowed by law. n26

After listing such documents as the Magna Carta, the Habeas Corpus Act, the Petition of Right, and the Bill of Rights, Blackstone says:

[*521] Thus much for the *declaration* of our rights and liberties. The rights themselves thus defined by these several statutes, consist in a number of private *immunities*; which will appear, from what has been premised, to be indeed no other, than either that *residuum* of natural liberty, which is not required by the laws of society to be sacrificed to public convenience; or else those civil *privileges*, which society hath engaged to provide, in lieu of the natural liberties so given up by individuals. These therefore were formerly, either by inheritance or purchase, the rights of all mankind; but . . . they at present may be said to remain, in a peculiar and emphatical manner, the right of the people of England. *And these may be reduced to three principal or primary articles; the right of personal security, the right of personal liberty, and the right of private property; because, as there is no other known method of compulsion, or of abridging man's natural free will, but by an infringement or diminution of one or other of these important rights, the preservation of these, inviolate, may justly be said to include the preservation of our civil immunities in their largest and most extensive sense.* n27

Blackstone wrote that there are absolute rights of Englishmen and that their fundamental articles from time to time have been asserted in Parliament. He then runs down some of the great acts of Parliament that were precursors to the American Bill of Rights and that represent the declaration of rights and liberties of Englishmen. These he says consist of "immunities" and "privileges." These various immunities and privileges can be reduced to three primary articles: personal security, personal liberty, and the right to private property -- because an infringement of any of the important rights set out in any of the great acts of Parliament could not be accomplished without some invasion of one of the three fundamental rights. For

Blackstone the absolute rights of Englishmen encompass all their liberties. Rather than excluding the liberties in the Bill of Rights, Blackstone's three primary articles include the Bill of Rights and may include far more. In short, Berger's reliance on the Blackstonian heritage to exclude Bill of Rights liberties is misplaced.

Mr. Berger also relies on Representative Lawrence's statement that "all privileges" in article IV, section 2, had been construed to mean "some" privileges. n28 The statement is used by Berger to show that the privileges or immunities clause of the fourteenth amendment did not apply the Bill of Rights to the states. So Lawrence's statement, too, should be carefully examined.

In his defense of the Civil Rights Bill, Representative Lawrence noted that there was a national citizenship. And "citizenship implies certain rights which are to be protected, and imposes the duty of allegiance and obedience to the laws." n29 He notes that the Continental Congress of 1774 in their Declaration [*522] of Rights declared:

That the inhabitants of the English colonies of North America, by the immutable laws of nature, the principles of the English Constitution, and the several charters or compacts, have the following rights: "Resolve that they are entitled to life, liberty, and property, and that they have never ceded any sovereign Power whatever right to dispose of either without their consent." n30

Lawrence noted that citizens have certain absolute rights including personal security, personal property, and liberty and that the Bill of Rights of the national constitution declared that no person should be deprived of life, liberty, or property without just compensation:

Without further authority I may assume, then, that there are certain absolute rights which pertain to every citizen, which are *inherent, and of which a state cannot constitutionally deprive him.* . . . Every citizen, therefore, has the absolute right to live, the right of personal security, personal liberty, and the right to acquire and enjoy property. These are rights of citizenship. As necessary incidents of these absolute rights, there are others, as the right to make and enforce contracts, to purchase, hold, and enjoy property, and to share the *benefit of laws for the security of person and property.* . . . n31

I maintain that Congress may by law secure the citizens of the nation in the enjoyment of their inherent right of life, liberty, and property, and the means essential to that end, by penal enactments to enforce the observance of the provisions of the Constitution,

article four, section 2, and the equal civil rights which it recognizes or by implication affirms to exist among citizens of the same State. Congress has the incidental power to enforce and protect the equal enjoyment in the States of civil rights which are inherent in national citizenship. The Constitution declares these civil rights to be inherent in every citizen, and Congress has power to enforce the declaration. If it has not, then the Declaration of Rights is in vain, and we have a Government powerless to secure and protect rights which the Constitution solemnly declares every citizen shall have. n32

Lawrence concluded that the privileges referred to in the Constitution "are such as are fundamental civil rights, not political rights nor those dependent on local law." n33

Leading Republicans such as Congressman Bingham and James Wilson, Chairman of the Judiciary Committee, had read article IV to protect rights in the Bill of Rights such as freedom of speech, freedom of religion, and due process of law, a reading shared by others. n34 The gloss put on article IV was that it protected absolute, fundamental rights of American citizens to life, liberty, [*523] and property. A reading of Blackstone and Lawrence tends to confirm, rather than deny, the impression that leading Republicans construed article IV, section 2 to protect the basic liberties of American citizens including guarantees such as those set out in the Bill of Rights.

As a consequence of his limited reading of the rights secured by the fourteenth amendment, Berger insists that the amendment does not secure free speech, or protect against excessive bail, or ensure the right to a jury trial in a suit concerning more than twenty dollars. n35 Regarding the due process clause, Berger cites a speech (made after the amendment was ratified) by William Lawrence of Ohio, "a leading legal theorist in the 39th Congress," n36 and quotes Lawrence's quotation from Alexander Hamilton to prove a restricted reading of due process of law. n37 An examination of Lawrence's speech in full shows that Berger's reliance is misplaced.

In the speech that Berger cites to support a limited reading of due process of law, Lawrence complained about an act of Congress that failed to provide for a jury trial in certain eminent domain proceedings. Lawrence insisted that the seventh amendment guarantee to a jury trial was included within fifth amendment due process and also was encompassed in the due process clause of the fourteenth amendment as well as in the privileges and immunities clause. n38

Although Berger argues that the fourteenth amendment only protects a limited class of rights and does not

ensure "trial by jury in a suit concerning more than twenty dollars," n39 William Lawrence, in the page of his speech Berger cites in his article, disagreed with this analysis. Lawrence noted:

Now let us see what *security for property* our own great Constitution has provided. The fifth article of amendments provides that --

"No person . . . shall be . . . deprived of life, liberty, or property without due process of law, nor shall private property be taken without just compensation."

In article seven it is provided that --

"In suits at common law where the value in controversy shall exceed twenty dollars the right of trial by jury shall be preserved."

The fourteenth article of amendments contains a provision as follows:

"Nor shall any State deprive any person of life, liberty or property without due process of law."

And by this same article "the privileges and immunities of citizens" are protected so that they cannot be abridged by State authority. And now what mean all these sacred guarantees? n40

Lawrence concluded that:

[*524] [W]here the power of eminent domain is to be exercised under State authority . . . a trial at law by a common law jury is now [a] matter of constitutional right. I know doubts have been entertained on this subject prior to the adoption of the fourteenth article of amendments to the Constitution But since the adoption of the fourteenth article, it may well be maintained that a common law jury trial is secured. n41

Lawrence seems to have disagreed with the original interpretation that the seventh amendment did not limit the states: "The true original interpretation of the Constitution ought to have been that the right of trial by jury was preserved by it." n42

Many of the guarantees contained in the Bill of Rights are "process" guarantees. Prior to the framing of the fourteenth amendment, in *Murray's Lessee v. Hoboken Land and Improvement Co.*, n43 the Court suggested that the procedural guarantees set out in the Constitution were part of the process required by the due process clause. n44 Lawrence cited the same case as authority for the proposition that "Congress cannot arbitrarily by law declare that to be due process of law which is not so at common law." n45

Berger's analysis is deficient in two ways. First, since the framers believed that the rights of citizens of the United States that justified passage of the Civil Rights Bill were absolute, these rights cannot be viewed as merely encompassing a right against discrimination. As to these rights, at least, states cannot grant or withhold them as they please. Second, Berger's conclusion that these absolute fundamental rights clearly excluded Bill of Rights liberties is simply wrong.

II. THE CIVIL RIGHTS BILL

In addition to his argument founded on article IV, section 2, Berger, by citing the Civil Rights Bill, also seeks to overcome direct evidence that the framers did intend to apply the Bill of Rights to the states. The crux of Berger's argument is that the Civil Rights Bill specified certain rights such as equal right to make and enforce contracts, to sue, be parties, give evidence, etc., and that, therefore, the Civil Rights Bill and the fourteenth amendment were designed to protect against discrimination only in these rights. Bill of Rights liberties were not to be protected. n46 The Civil Rights Bill had been justified on the theory that the Congress had the power to protect citizens of the United States in their fundamental rights to life, liberty, and property, or their fundamental rights to personal liberty, personal security, and private [*525] property. n47 In support of this argument, Berger notes that the framers relied on Blackstone. The principle advocated by Republicans in support of the passage of the Civil Rights Bill was that the federal government had the power to protect its citizens from state interference with their fundamental rights. n48

Initially the Civil Rights Bill had provided that "[t]here shall be no discrimination in civil rights or immunities among citizens of the United States." n49 Berger takes great comfort from the fact that the phrase "no discrimination in civil rights or immunities" was eliminated. This proves to Berger that only a limited category of enumerated rights was to be protected and these, he believes, excluded the rights in the Bill of Rights. n50

The first problem with this analysis is that the controversy over "no discrimination in civil rights or immunities" was centered on rights under state law such as suffrage, not federal constitutional rights such as those in the Bill of Rights. n51 The elimination of the phrase was designed to ensure that certain rights under state law -- such as suffrage -- were not included in the Civil Rights Bill. Since there was no controversy about Bill of Rights liberties, the elimination of the phrase proves nothing about rights in the Bill of Rights.

Bingham had objected that the phrase "civil rights or immunities" embraced every right, state or federal, belonging to any citizen, and had urged that it be deleted. Even with its deletion, he insisted that a constitutional amendment would be required to empower Congress to pass the Civil Rights Bill. n52 Wilson denied that the phrase encompassed rights belonging to citizens of the United States and all rights conferred on any citizen of a state:

He knows, as every man knows, that this Bill refers to those rights which belong to man as citizens of the United States and none other; when he talks of setting aside the school laws and jury laws and franchise laws of the States by the Bill now under consideration he steps beyond what he must know to be the rule of construction. n53

Wilson then said that the rights of citizens of the United States that Congress could require the states to respect included rights in the Bill of Rights. n54 The fourteenth amendment provided that no state could abridge the "privileges or immunities of citizens of the United States." So the substitution of "privileges" of citizens of the United States for "civil rights" merely emphasizes the [*526] framers' intent to apply all the guarantees of the federal constitution to the states.

The second problem with Berger's use of the Civil Rights Bill is that the language of the Bill indicates that Republicans believed rights referred to in it included Bill of Rights liberties. The Civil Rights Act made all persons born in the United States citizens and provided that such citizens,

without regard to race, color or previous condition of slavery . . . shall have the same right, in every State and territory of the United States, to make and enforce contracts, to sue, be parties, give evidence, to inherit, purchase, lease, sell, hold, and convey real and personal property, and to full and equal benefit of all laws and proceedings for the security of person and property, as is enjoyed by white citizens n55

Rights in the Bill of Rights had been described as provisions for the security of person and property both before and after the adoption of the fourteenth amendment. n56 That the Civil Rights Bill contained a phrase broad enough to include protection of Bill of Rights liberties further supports the argument that the absolute fundamental rights from which Republicans derived the power to pass the Bill were sufficiently broad to encompass liberties in the Bill of Rights. n57

Similar language had appeared in the Freedman's Bureau Bill. The Freedman's Bureau Bill also had originally referred to full and equal benefit to all laws and proceedings for the security of person and

property. The Bill was amended in the House to provide, among other things, for "the full and equal benefit of all laws and proceedings for the security of person and estate, including the constitutional right of bearing arms." n58 The addition of the phrase, "including the constitutional right of bearing arms" (secured by the second amendment) shows that Republicans read the phrase "full and equal benefit of all laws and proceedings for the security of person and estate" as sufficiently broad to encompass constitutional rights in the Bill of Rights. Senator Trumbull, speaking of the addition of the phrase, "including the constitutional right of bearing arms," to "full and equal benefit of all laws and proceedings for the security of person and estate" said that this amendment did not change the meaning of the section. n59

In what may be an effort to deal with the apparent meaning of the phrase "full and equal benefit of all laws and proceedings for the security of person and property," a phrase Republicans read as broad enough to encompass Bill of Rights liberties, Berger points out that the phrase "civil rights or immunities" was eliminated from the Civil Rights Bill to obviate "a construction going beyond the *specific rights* named in the section," a "*latitudinarian* [*527] *construction not intended*." n60

On the issue under consideration this fact proves very little. What is significant is that the phrase "full and equal benefit of all laws and proceedings for the security of person and property" was not deleted and remained in the Bill.

When he spoke about the deletion of the general terms relating to civil rights, Wilson noted that he did not consider the change material. He further noted that some congressmen had been concerned that the Bill could be construed to affect the right of suffrage. Consequently the general terms were struck out and the Bill was left with "the rights specified in the section." n61 These rights, as a reading of the Bill shows, continued to include the full and equal benefit of all laws and proceedings for the security of person and property as is enjoyed by white citizens.

In another attempt to show that the fourteenth amendment did not include rights in the Bill of Rights, Berger cites Congressman Thayer's statement that "the rights enumerated in the [Civil Rights Bill] preclude[d]" extension of the general words "beyond the particulars which had been enumerated." n62 Thayer's remarks are of no help to Berger, however, because his statements were made in response to assertions that the Civil Rights Bill's protection of "civil rights and immunities" included the state law right to vote. Thayer denied the claim. He noted that

the words were "civil rights and immunities," not political privileges. Then he noted that the matter was "put beyond all doubt by the subsequent particular definition of the general language which has been just used." n63 "[E]numeration precludes any possibility that the general words which have been used extend beyond the particulars which have been enumerated." n64 The general words referred to were the words "civil rights or immunities." After arguing again that suffrage was not included, Thayer said:

Why should not these fundamental rights and immunities which are common to the humblest citizen of every free State, be extended to these citizens? Why should they be deprived of the right to make and enforce contracts, of the right to sue, of the right to be parties, and give evidence in courts of justice, of the right to inherit, purchase, lease, hold, and convey real and personal property? *And why should they not have full and equal benefit of all laws and proceedings for the security of person and property?* n65

Berger's presentation might lead a reader to believe that the specific rights Thayer was talking about excluded the rights to "full and equal benefit of all laws and proceedings for the security of person and property." A reading of Thayer's remarks in context, however, makes clear that the general phrase he [*528] discussed was "civil rights and immunities" and that the particular rights that he believed limited the general phrase included "the full and equal benefit of laws and proceedings for the security of person and property." Thayer believed that Congress had the power to pass the Civil Rights Bill because of its power to enforce guarantees contained in the Bill of Rights:

If, then, the freemen are now citizens, or if we have the constitutional power to make them such, they are clearly entitled to those guarantees of the Constitution of the United States which are intended for the protection of all citizens.

They are entitled to the benefit of that guarantee of the Constitution which secures to every citizen the enjoyment of life, liberty, and property and no just reason exists why they should not enjoy the protection of that guarantee of the Constitution. n66

Sometimes a congressman or senator seems to describe the Civil Rights Bill as securing equal rights to blacks and not limiting state law in any other way -- as if it merely encompassed equal protection. Berger cites Congressman Shellabarger as saying that the Bill did not confer or define any rights and only secured equality in those civil rights the state chose to confer on any race. Exactly what Shellabarger thought on the incorporation issue is unclear. But his statement on the

Civil Rights Bill was qualified more carefully than the excerpt cited by Berger:

But, sir, except so far as [the bill] confers citizenship, it neither confers nor defines nor regulates any right whatever. Its whole effect is not to confer or regulate rights, but to require that whatever of these enumerated rights and obligations are imposed by State laws shall be for and upon all citizens alike without distinctions based on race or former condition in slavery. n67

The Civil Rights Act, of course, made all persons born in the United States and subject to its jurisdiction citizens of the United States and gave such citizens the full and equal benefit of all laws and provisions for the security of person and property as enjoyed by white citizens. Berger relies on Congressman Shellabarger's statement that the Civil Rights Bill merely secured equality in certain rights that the states chose to confer to prove the fourteenth amendment only did the same thing. But Shellabarger believed such a reading of the fourteenth amendment was incorrect. n68

[*529] Senator Trumbull, as Berger notes, made some remarks that can be read as indicating that the Civil Rights Bill only guaranteed equality. n69 He also described "[t]he great fundamental rights, [which are] set forth in [the CivilRights] [B]ill" as "the right to go and come at pleasure, *the right to enforce rights in the courts*, to make contracts, and to inherit and dispose of property." n70 The ambiguity of the quoted portion, of course, is that it fails to indicate *what* rights could be enforced in the courts. While Trumbull sometimes described the Civil Rights Bill as simply prohibiting discrimination, he also said that the law could be justified under the power of the federal government to ensure freedom to blacks:

[A]nd it is perhaps difficult to draw the precise line, to say where freedom ceases and slavery begins, but a law that does not allow a colored person to go from one county to another is certainly a law in derogation of the rights of a freeman. A law that . . . does not allow him to teach, does not allow him to preach, is certainly a law in violation of the rights of a freeman, and being so may properly be declared void. n71

In addition to saying that the Bill would have no operation in a state where the laws were equal, as Berger notes, Trumbull also made more careful statements describing the effect of the Bill: "Each State, *so that it does not abridge the great fundamental rights belonging, under the constitution, to all citizens*, may grant or withhold such civil rights as it pleases. . . ." n72

Berger has trapped himself in a series of contradictions. If, as he argues, the fourteenth

amendment is absolutely the same as the Civil Rights Bill, n73 and since he believes the "Act merely was to secure blacks against discrimination [*530] not to displace undiscriminatory state law," n74 then, it seems clear, the fourteenth amendment did not protect *any* absolute rights which states could not abridge. In addition to being completely inconsistent with the language of the fourteenth amendment, this approach collides with the way leading proponents of the fourteenth amendment and the Civil Rights Bill describe the amendment and the overarching principles from which they derived the power to pass the Bill -- the absolute rights of "personal security," "personal liberty," and "the right to acquire and enjoy property." n75 As Senator Trumbull noted, in arguing for the Civil Rights Bill, "these are declared to be inalienable rights, belonging to every citizen of the United States . . . no matter where he may be." n76 If, however, the states could eliminate such rights as long as they did it for all of their citizens, the rights would not be inalienable. Again, Congressman Wilson, Chairman of the Judiciary Committee and manager of the Civil Rights Bill in the House, noted that the rights of personal security, personal liberty, and the right to acquire property were "inalienable." "The great fundamental rights are the inalienable possession of both Englishmen and Americans." n77 Again, Wilson described the "right of personal security, the right of personal liberty, and the right to acquire and enjoy property" as absolute rights. n78 Bingham also referred to "absolute" rights. n79 Representative Lawrence noted "that there are certain absolute rights which pertain to every citizen, which are inherent, and of which a State cannot constitutionally deprive him." n80 Senator Howard believed the fourteenth amendment embodied the fundamental rights in the Bill of Rights and the states were not free to deny them. n81 The views of Congressman Bingham were the same. n82

If one treats as leading proponents the Chairman of the Judiciary Committee and manager of the Civil Rights Bill in the Senate, the Chairman of the Judiciary Committee and manager of the Civil Rights Bill in the House, the author of section 1 of the fourteenth amendment, and the Senator who presented on behalf of the Joint Committee to the Senate, then four of the five leading proponents of either the Civil Rights Bill or the fourteenth amendment clearly adhered to the concept of absolute rights of citizens of the United States that states could not abridge. For that reason, Berger's attempt to use the Civil Rights Bill to prove that no absolute rights were guaranteed by the fourteenth amendment must fail. If absolute rights were guaranteed by the fourteenth amendment, then statements Berger has combined from several

congressmen indicating that the Civil Rights Bill and the fourteenth amendment were exactly the same, together with a statement from two other congressmen [*531] that the Bill merely prohibited discrimination and left states free to grant or deny any rights they wished, n83 even if taken at face value, are inconsistent with the statements of leading proponents. For that reason such statements cannot be regarded as controlling.

If it is conceded that the fourteenth amendment was designed to secure absolute and fundamental rights of citizens of the United States, then the inquiry moves to what Republicans considered those rights to be. The overwhelming evidence from the 38th and 39th Congresses indicates that Republicans viewed rights in the Bill of Rights as rights of the citizens of the United States that states could not (or in a few cases should not) deny. n84 There is also evidence that leading Republicans read article IV, section 2 to embody such rights. n85 Under scrutiny, Berger's argument collapses.

III. BERGER'S TREATMENT OF "THE FURTHER ADVENTURES OF THE NINE-LIVED CAT"

Berger's treatment of my own efforts to understand the fourteenth amendment are based on serious misunderstandings and misconstructions.

First, he dismisses a lengthy article by Crosskey on the fourteenth amendment and the Bill of Rights with virtually no consideration of the article because of negative reviews of Crosskey's book *Politics and the Constitution* n86 and because of mistakes allegedly made by Crosskey in the book. The earlier book can be used to dismiss a later article because "a leopard [can't] change his spots." n87 Berger carries this extraordinary *ad hominem* argument to remarkable lengths by dismissing those who rely on anything Crosskey has written. To do so "speaks volumes" about one's "own scholarship." n88

Most of Berger's criticisms of my own work seem to be at least as misdirected as his dismissal of me for citing Professor Crosskey. I hope that a few examples will be sufficient to encourage any interested reader to compare the text of my article with Berger's criticisms of it. For example, Berger says that I do not answer "the question, '[W]hy did [the framers] not "explicitly" write the Bill of Rights into the [fourteenth] amendment?'" n89 In my article, I noted:

Mr. Berger asks why "the Bill of Rights" was not explicitly written into the fourteenth amendment, as due process and citizenship were. The reason, of course, is that the rights in the Bill of Rights make up some, and the most important, but not all of the rights of citizens of the United States. n90

[*532] Berger also criticizes me for citing Professor Soifer's article, n91 *Protecting Civil Rights: A Critique of Raoul Berger's History*, in my 1980 article criticizing his book and failing to cite in my 1980 article his 1981 reply. n92

He suggests that I have grossly misread cases. One question I considered in my most recent reply to Berger was "simply as a matter of language, whether the words 'privileges or immunities' could reasonably be read to include the rights in the Bill of Rights." n93 I recognized, of course, that the Supreme Court never has held that the privileges or immunities clause applied the Bill of Rights to the states. n94 Still, I thought it was significant that the Justices, when called upon to come up with a short collective description of the rights in the Bill of Rights, often use the words "privileges" and "immunities." It seemed to me that the Justices' use the words in this way (even in the presence of holdings that the privileges or immunities clause did not apply the Bill of Rights to the states) was evidence that the phrase was a reasonable way for a legislature to describe rights in the Bill of Rights. Here is how berger deals with this argument, made "simply as a matter of language":

Curtis cites other cases for the proposition that the "privileges or immunities" clause encompassed "the rights in the Bill of Rights," overlooking that in 1873 the *Slaughter-House Cases* gutted the clause and that *Adamson v. California* rejected Justice Black's attempt to read the Bill of Rights into the fourteenth amendment. n95

Again Mr. Berger notes:

Curtis avers that Bingham "did not agree that *Barron v. Baltimore* had been correctly decided" *because he* "believed the states were required to obey the Bill of Rights *by the oath* state officers took to support the Constitution." This is a pretty example of circular reasoning, of assuming the answer. n96

By inserting a "because" not contained in the text Berger converts a sentence into a circular argument. What I wrote was:

To understand Bingham's views it is important to remember that in 1866 he did not agree that *Barron v. Baltimore* had been correctly decided, that he personally believed the states were required to obey the Bill of Rights *by the oath* state officers took to support the Constitution, and that he thought there was, in any case, no way to enforce the obligation of this oath. n97

[*533] These arguments by Berger show, I believe, a serious misunderstanding of the article that he was criticizing.

IV. CONCLUSION

Faced with clear direct evidence that the framers of the fourteenth amendment intended to apply the Bill of Rights to the states, Berger seeks refuge in inferences about article IV, section 2 and about the Civil Rights Bill. Subjected to scrutiny, however, even this indirect evidence relied on by Berger does not support his case, and tends, indeed, to support the opposite conclusion. Some wise person has noted that raising the right questions is just as important as giving the right answers. The questions Berger has raised about the relation between the fourteenth amendment, the Civil Rights Bill, and the Bill of Rights are interesting and significant ones. He has advanced our understanding of the subject by asking them even though his answers, almost without exception, are wrong.

FOOTNOTES:

n1 R. BERGER, *GOVERNMENT BY JUDICIARY* 37 (1977) [hereinafter cited as BERGER]; Berger, *Incorporation of the Bill of Rights: A Reply to Michael Curtis' Response*, 44 OHIO ST. L.J. (1983) [hereinafter cited as Berger, *A Reply*] For a thoughtful analysis of the legitimacy issue, see, L. LUSKY, *BY WHAT RIGHT* (1975).

n2 Berger, *A Reply*, *supra* note 1, at 3.

n3 *Id.* at 5.

n4 *Id.* at 13-15.

n5 *Id.* The reply was a response to Curtis, *Further Adventures of the Nine-Lived Cat: A Response to Mr. Berger on Incorporation of the Bill of Rights*, 43 OHIO ST. L.J. 89 (1982) [hereinafter cited as Curtis, *Further Adventures*], which in turn responded to Berger's *Incorporation of the Bill of Rights in the Fourteenth Amendment: A Nine-Lived Cat*, 42 OHIO ST. L.J. 435 (1981) [hereinafter cited as Berger, *Incorporation*], which in turn responded to Curtis, *The Bill of Rights as a Limitation on State Authority: A Reply to Professor Berger*, 16 WAKE FOREST L. REV. 45 (1980) [hereinafter cited as Curtis, *The Bill of Rights*], which in turn responded to R. BERGER, *GOVERNMENT BY JUDICIARY* (1977).

n6 The Civil Rights Act of 1866, ch. 31, 14 Stat. 27 (1866) (codified as amended at 42 U.S.C. § 1981 (1976)).

n7 Berger, *A Reply*, *supra* note 1, at 4-5.

n8 CONG. GLOBE, 39th Cong., 1st Sess. 2542 (1866) (Rep. Bingham); 2765-66 (Sen. Howard) [hereinafter cited for this Congress and session as GLOBE]. See *also id.* at 1034 (Rep. Bingham).

n9 *Id.* at 3038 (Sen. Yates); 3167 (Rep. Windom); 3201 (Rep. Orth); app. 210 (Rep. Bundy); app. 256 (Rep. Baker).

n10 See, e.g., *id.* at 340 (Sen. Cowan); 1075 (Sen. Trumbull); 1183 (Sen. Pomeroy); 1628-29 (Rep. Hart); app. 67 (Rep. Garfield); 1837 (Rep. Lawrence). See *also* Curtis, *The Fourteenth Amendment and the Bill of Rights*, 14 CONN. L. REV. 237, 251-56 (1982) [hereinafter cited as Curtis, *The Fourteenth Amendment*].

n11 Curtis, *The Fourteenth Amendment*, *supra* note 10, at 242-44, 251-52.

n12 Curtis, *Further Adventures*, *supra* note 5, at 115-19.

n13 Curtis, *The Fourteenth Amendment*, *supra* note 10, at 281-92.

n14 Berger, *A Reply*, *supra* note 1, at 8.

n15 *Id.* at 5.

n16 GLOBE, *supra* note 8, at 157-58, 430, 1088 (Rep. Bingham); 1118 (Rep. Wilson); 1757 (Sen. Trumbull); 1833 (Rep. Lawrence). For a discussion of Bingham's views, see Curtis, *The Fourteenth Amendment*, *supra* note 10, at 259-61. For a discussion of Wilson's views, see Curtis, *Further Adventures* *supra* note 5, at 98-100.

n17 Curtis, *Further Adventures*, *supra* note 5, at 96.

n18 Berger, *A Reply*, *supra* note 1, at 15. GLOBE, *supra* note 8, at 1118 (Rep. Wilson).

n19 GLOBE, *supra* note 8, at 1118 (emphasis added).

n20 *Id.* at 1118 (quoting 1 W. BLACKSTONE, *COMMENTARIES*, *129-38).

n21 1 W. BLACKSTONE, COMMENTARIES, *123.

n22 *Id.* at *127-28.

n23 B. SCHWARTZ, THE GREAT RIGHTS OF MANKIND 7 (1977).

n24 2 L. WROTH & H. ZOBEL, LEGAL PAPERS OF JOHN ADAMS 200-02 (1965).

n25 B. SCHWARTZ, THE BILL OF RIGHTS: A DOCUMENTARY HISTORY 17-19, 20-21 (1971).

n26 *Id.* at 40-41, 42-43.

n27 BLACKSTONE, *supra* note 21, at *129 (emphasis added). My law partner Charles Lloyd directed my attention to Blackstone's use of "privileges" and "immunities."

n28 Berger, *A Reply*, *supra* note 1, at 8. The statement on which Berger relies is taken from Lawrence's defense of the Civil Rights Bill, a defense from which I quote at length below. *See infra* text accompanying notes 30-33.

n29 GLOBE, *supra* note 8, at 1832 (Rep. Lawrence).

n30 *Id.* at 1833.

n31 *Id.* at 1833 (emphasis added).

n32 *Id.* at 1835.

n33 *Id.* at 1836.

n34 *Id.* at 1263 (Rep. Broomall); 1629 (Rep. Hart); CONG. GLOBE, 38th Cong., 1st Sess. 1202 (1864) (Rep. Wilson); CONG. GLOBE, 35th Cong., 2d Sess. 984 (1859) (Rep. Bingham).

n35 Berger, *A Reply*, *supra* note 1, at 15.

n36 *Id.* at 8.

n37 *Id.* at 5 n.38. *See infra* text accompanying note 44.

n38 CONG. GLOBE, 41st Cong., 3d Sess. 1244-45 (1871).

n39 *See* Berger, *A Reply*, *supra* note 1, at 15.

n40 CONG. GLOBE, 41st Cong., 3d Sess. 1245 (1871).

n41 *Id.*

n42 *Id.*

n43 59 U.S. (18 How.) 272 (1856).

n44 *Id.* at 277. *See* Crosskey, Charles Fairman, "Legislative History," and the Constitutional Limitations on State Authority, 22 U. CHI. L. REV. 1, 6-7 (1954).

n45 CONG. GLOBE, 41st Cong., 3d Sess. 1245 (1871).

n46 Berger, *A Reply*, *supra* note 1, at 3-10, 14-16.

n47 *See supra* note 16.

n48 Berger, *A Reply*, *supra* note 1, at 14 n.124. GLOBE, *supra* note 8, at 1294 (Rep. Wilson); 1153, 1270 (Rep. Thayer). Wilson and Thayer believed that Congress could legislate to enforce the right to life, liberty, and property under the fifth amendment. Bingham had argued that a constitutional amendment was required before Congress could have legislative authority to enforce the guarantees of the Bill of Rights in the states. *Id.* at 1291-92 (Rep. Bingham).

n49 GLOBE, *supra* note 8, at 1291.

n50 Berger, *A Reply*, *supra* note 1, at 8.

n51 GLOBE, *supra* note 8, at 1366 (Rep. Wilson), 1151 (Rep. Thayer).

n52 *See supra* note 48.

n53 GLOBE, *supra* note 8, at 1294 (Rep. Wilson).

n54 Curtis, *The Fourteenth Amendment*, *supra* note 9, at 273 (citing GLOBE, *supra* note 8, at 1291-92).

n55 Act. of Apr. 9, 1866, 14 Stat. 27 (codified at 42 U.S.C. § 1981 (1976)).

n56 Curtis, *Further Adventures*, *supra* note 5, at 105 & 124. *See* Curtis, *The Fourteenth Amendment*, *supra* note 10, at 271.

n57 *See* Curtis, *The Fourteenth Amendment*, *supra* note 10, at 271-72.

n58 GLOBE, *supra* note 8, at 743. *See id.* at 654 & 1292.

n59 *Id.* at 743.

n60 Berger, *A Reply*, *supra* note 1, at 8 (emphasis added).

n61 GLOBE, *supra* note 8, at 1366.

n62 Berger, *A Reply*, *supra* note 1, at 8 (citing GLOBE, *supra* note 8, at 1151).

n63 GLOBE, *supra* note 8, at 1151 (Rep. Thayer).

n64 *Id.*

n65 *Id.* (emphasis added).

n66 *Id.* at 1153.

n67 *Id.* at 1293 (Rep. Shellabarger) (emphasis added).

n68 Shellabarger noted in proceedings in memoriam of Chief Justice Waite:

When, therefore, Waite's great opinions construing these Amendments came, one in Minor's case, in 1874, holding that the "Fourteenth Amendment does not add to the privileges and immunities of American citizens, but simply adds guaranties for the protection of privileges theretofore existing," and especially when the great opinion appeared, in 1876, in Cruikshank's case, also holding that the "Fourteenth Amendment adds nothing to the rights of one citizen against another," and that when the framers of the Fourteenth Amendment inserted therein the provisions creating national citizenship, prohibiting the abridgment of the privileges thereof, and prohibiting the States from depriving any person of life, liberty, or property, or of the equal protection of the laws, and giving to Congress power to enforce these provisions, *such framers did not mean to add anything to the rights of American citizens save the right to be dealt with as equals; that these framers did not design to enable Congress to legislate affirmatively and directly for the protection of civil rights, but only to use corrective and restraining legislation as against the States; then many of the framers of these Amendments received information regarding their intentions which was new, and was not calculated to allay the apprehensions with which they saw Chief Justice Waite go upon the bench.*

Still I am bound to say now, *when the lapse of years has matured men's views and cooled their feelings regarding the results of the late war, and succeeding decisions have explained and*

supplemented these earlier decisions, and have guarded against what was believed to be their erroneous tendencies, that I am inclined to think the judgment of history will be that he has been, in the main, steadily right regarding these Amendments; especially in view of the restraining effect of the later decisions.

I am inclined to think that the position in which is now left the power of the National Government in providing for the defence of the civil and political rights of the people as members of the Nation, especially as that position is defined in such cases as *Ex parte Virginia*, *Ex parte Siebold*, Strauder against West Virginia, and other later and kindred decisions, is safe and is conservative of our institutions .

...

Supreme Court Proceedings *In Memoriam, Morrison R. Waite*, 126 U.S. 585, 600-01 (1877) (emphasis added) (quoting *United States v. Cruikshank*, 92 U.S. 542, 544 (1875); *Minor v. Happersett*, 88 U.S. (21 Wall.) 162, 171 (1874)).

n69 GLOBE, *supra* note 8, at 476 & 1761. Trumbull suggested that the Civil Rights Bill would not apply in states that secured equal rights. *Id.* at 600.

n70 *Id.* at 475.

n71 *Id.* at 475.

n72 *Id.* at 1760 (emphasis added).

n73 Berger, *A Reply*, *supra* note 1, at 3-5.

n74 *Id.* at 5.

n75 *E.g.*, GLOBE, *supra* note 8, at 1118 (Rep. Wilson); 1757 (Sen. Trumbull); 2765-66 (Sen. Howard).

n76 *Id.* at 1757 (Sen. Trumbull).

n77 *Id.* at 1118 (Rep. Wilson).

n78 *Id.* at 1117 (Rep. Wilson).

n79 *Id.* at 157-58 (Rep. Bingham).

n80 *Id.* at 1833 (Rep. Lawrence).

n81 *Id.* at 2765-66 (Sen. Howard).

n82 *Id.* at 2542 (Rep. Bingham).

n83 Berger, *A Reply*, *supra* note 1, at 3-5.

n84 Curtis, *The Fourteenth Amendment*, *supra* note 10, at 242-56.

n85 See GLOBE, *supra* note 8, at 1153, 1270 (Rep. Thayer).

n86 W. CROSSKEY, *POLITICS AND THE CONSTITUTION* (1953).

n87 Berger, *A Reply*, *supra* note 1, at 1.

n88 *Id.* at 3.

n89 *Id.* at 13.

n90 Curtis, *Further Adventures*, *supra* note 5, at 120 (citation omitted).

n91 Soifer, *Protecting Civil Rights: A Critique of Raoul Berger's History*, 54 N.Y.U.L. REV. 651 (1979).

n92 Berger, *A Reply*, *supra* note 1, at 2 n.11. For what little significance it may have, Mr. Berger is also wrong when he says I have "nowhere . . . mentioned" Fairman's reply to Crosskey. *Id.* at 2. See Curtis, *The Fourteenth Amendment*, *supra* note 10, at 298 n.331.

n93 Curtis, *Further Adventures*, *supra* note 5, at 92.

n94 *Id.* at 92. See also Curtis, *The Bill of Rights*, *supra* note 5, at 48-49.

n95 Berger, *A Reply*, *supra* note 1, at 10 (citations omitted).

n96 *Id.* at 13 (quoting Curtis, *Further Adventures*, *supra* note 5, at 109) (emphasis to "because he" added) (citation omitted).

n97 Curtis, *Further Adventures*, *supra* note 5, at 109-10 (citations omitted).