

(Free download) The Fourteenth Amendment and the Bill of Rights

# The Fourteenth Amendment and the Bill of Rights

*Raoul Berger*

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**Raoul Berger : The Fourteenth Amendment and the Bill of Rights** before purchasing it in order to gauge whether or not it would be worth my time, and all praised The Fourteenth Amendment and the Bill of Rights:

15 of 16 people found the following review helpful. Berger Explodes The Incorporation Doctrine By Brian Raoul Berger had already exploded the "incorporation doctrine" in his GOVERNMENT BY JUDICIARY. But critics tried to answer his arguments and scholarly conclusions throughout the 1980s. Here, Berger addresses his critics' arguments and, again, demonstrates that the intended meaning of the Fourteenth Amendment was not to "incorporate" provisions of the Bill of Rights and thereby make them applicable as limitations against the states. Instead, the amendment had a much more limited scope and meaning. The theory of "selective incorporation" via the due process clause is quickly exploded by Berger. Shooting fish in a barrel came to mind, as the historical evidence is clear that "due process of law" is a procedural protection intended to protect defendants accused of a crime from arbitrary punishment. "Substantive due process" is a legal fantasy, Berger demonstrates. Indeed, few historians and academics will, with a straight face, defend substantive due process based on original intent. Justice Black's theory of "total incorporation" via the "privileges or immunities" clause, however, is the main meat of Berger's book. The Bingham and Howard statements in the 39th Congress are given great attention by Berger. He explodes them both; Bingham was a confused, contradictory thinker on this subject, and Howard's brief statement played no influence. Berger lays out all the evidence from the framing and ratification debates demonstrating that "privileges or immunities" are terms of art borrowed from Article IV, and that their meaning is clearly tied to the specified rights in the Civil Rights Act of

1866. Incorporation was simply never imagined by the framers and ratifiers. For "incorporation doctrine" scholars, and for those interested in the Fourteenth Amendment, this Berger classic is a must-read. Thoroughly researched, heavily cited, and well written, this book is a great supplemental to Berger's *Government by Judiciary*. 17 of 21 people found the following review helpful. Cold hard logic

By D. F. Dieteman  
Berger was politically a liberal, meaning that he favored centralized government control of the lives of the citizenry. He was an honest liberal, however, and, based on his sound scholarship, rejected the self-defeating notion of a constitution which is "living," i.e. a written law which is not law, but whim. Predictably, Berger was reviled by his fellow liberals. This is despite the fact that he was praised highly for books on impeachment and executive privilege which, by mere coincidence, were published when Nixon was being run out of Washington. Born in Russia, brought to the U.S. as a boy, Berger did not publish a book until age 68. His work on the 14th Amendment is a masterpiece of American legal scholarship. 8 of 26 people found the following review helpful. A valiant, but unsuccessful attempt

By M. Golkar  
As the title indicates, this book is yet another examination of the meaning of the 14th Amendment, with a specific focus on the so-called "incorporation" theory which holds that the Amendment makes the Bill of Rights applicable to the states. Berger is a well-known proponent of "original understanding" in constitutional interpretation, and his view is that the 14th Amendment was meant to have a very narrow meaning, that modern judicial exegesis of the Equal Protection and Due Process Clauses is without historical foundation, and that the Amendment was not meant to apply the Bill of Rights to the states. His most developed arguments on the historical evidence are given in a previous work, *"Government by Judiciary,"* which is quite possibly the most excoriated book in the history of constitutional law. The present book is partly a response to some of Berger's critics and then a rehashing of some of the historical evidence. Though one is forced to feel some sympathy for Berger, who has always come across as somewhat of a maverick scholar, his works usually end up being somewhat historically myopic, failing to look at events in their proper overall context. This book is no exception. A better place to look for an examination of the 14th Amendment and incorporation is Akhil Amar's *"The Bill of Rights,"* a more subtle and challenging treatment of the subject.

Book by Berger, Raoul