BYU Law Review

Volume 1990 | Issue 2 Article 6

5-1-1990

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Recommended Citation

Raoul Berger, *The Fourteenth Amendment and the Bill of Rights*, 1990 BYU L. Rev. 673 (1990).
Available at: https://digitalcommons.law.byu.edu/lawreview/vol1990/iss2/6

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BOOK REVIEW

THE FOURTEENTH AMENDMENT AND THE BILL OF RIGHTS.

By Raoul Berger.* Norman, Okla.: Univ. of Okla. Press. 1989. Pp. x, 160.

*Reviewed by Charles E. Rice***

President Bush responded to *Texas v. Johnson*[1] by proposing a constitutional amendment to allow punishment of "physical desecration" of the United States flag. Bush reasoned that such an amendment was the necessary remedy to the Court's misinterpretation of the first amendment. Opponents of the flag amendment argued that we should not tamper with the Bill of Rights. Both sides, however, overlooked a prior question: whether the state of Texas is bound to abide by the first amendment at all.

If a random poll were taken asking 100 Americans to "define the incorporation doctrine," the answers would be varied, perhaps amusing, and probably almost all wrong. Though the term is unknown to the public at large, the incorporation doctrine affects everybody. The Supreme Court's application of the Bill of Rights against the states through the fourteenth amendment affects areas as diverse as defamation, school prayer, search and seizure, self-incrimination, capital punishment, pornography and homosexual activity. When the Court ruled that Pittsburgh may not display a Christian nativity scene in the

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1. 109 S. Ct. 2533 (1989).

county courthouse, but that an 18-foot menorah may be displayed on the steps of the city-county building, a block away, because the symbol of Hanukkah was part of a display that included secular symbols such as a christmas tree and a sign saluting liberty, the underlying assumption of the decision was the incorporation doctrine.[2] Similarly, the Court recently held that the state of Missouri may constitutionally deny the services of public employees and the use of public facilities for the performance of abortions not necessary to save the life of the mother despite *Roe v. Wade*.[3] But *Roe v. Wade* would never have been decided except for the incorporation doctrine.

In *Barron v. Baltimore*,[4] the Supreme Court held that the Bill of Rights had no application to the states. Thus, Baltimore was not bound by the fifth amendment command that, "private property [shall not] be taken for public use without just compensation."[5]

Under the original view, federal courts had no jurisdiction to enforce any of the guarantees of the Bill of Rights against the states. The Bill of Rights was intended by the First Congress and the states to protect against invasion of the specified rights by the federal government. For protection of those rights against state governments, the people looked primarily to their state constitutions and the state courts. This situation prevailed in 1868 when the fourteenth amendment was adopted. That amendment provides, in section 1, that "[n]o State 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; nor deny to any person within its jurisdiction the equal protection of the laws."[6]

The Supreme Court, beginning in the 1920s, has gradually adopted the theory that the due process clause of the fourteenth amendment intended a "selective incorporation" of the provisions of the Bill of Rights. Now a Bill of Rights provision will be held by the Court to be incorporated into the due process clause and thus applied strictly against the states, if, in the Court's view, the right is a "fundamental right,"[7] or "is among those

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2. *See* County of Allegheny v. ACLU, 109 S. Ct. 3086 (1989).
3. Webster v. Reproductive Health Services, Inc., 109 S. Ct. 3040, 3052 (1989).
4. 32 U.S. (7 Pet.) 243 (1833).
5. U.S. CONST. amend. V.
6. U.S. CONST. amend. XIV, § 1.
7. Gideon v. Wainwright, 372 U.S. 335, 340 (1963).

'fundamental principles of liberty and justice which lie at the base of all our civil and political institutions.' "[8]

The ninth and tenth amendments, by their terms, are not subject to incorporation,[9] but nearly all of the remaining provisions of the Bill of Rights[10] have been incorporated into the fourteenth amendment and applied against the states. In the view of the Supreme Court today, therefore, "[t]he Fourteenth Amendment has rendered the legislatures of the states as incompetent as Congress to enact" laws in violation of, for example, the Establishment Clause of the first amendment.[11]

The Court has also interpreted the Bill of Rights to include rights not specified therein. The Court has discovered these rights through its own interpretations and has applied them against the states. Thus, in 1965, the court discovered a right of reproductive privacy in the "penumbras, formed by emanations from" the Bill of Rights.[12] This ruling was the precursor of *Roe v. Wade*[13] in which the Supreme Court held that an unborn child is not a person for purposes of the fourteenth amendment and that the right of privacy prevents the states from effectively prohibiting abortion.

The incorporation doctrine is established dogma. But is it right? The question persists primarily because of the efforts of Professor Raoul Berger.

Unless the Supreme Court has implied authority to act as a "continuing constitutional convention,"[14] with power to amend the Constitution by decree, the Court's interpretation of the fourteenth amendment ought to have some basis in the intent of that amendment as proposed by Congress and ratified by the states. In numerous articles and in several books,[15] Professor

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8. Duncan v. Louisiana, 391 U.S. 145, 148 (1968) (quoting Powell v. Alabama, 287 U.S. 45, 67 (1932)).

9. *But see* Barnett, *Reconceiving the Ninth Amendment*, 74 CORNELL L. REV. 1, 41-42 (1988).

10. U.S. CONST. amend. I-VIII.

11. School Dist. v. Schempp, 374 U.S. 203, 215-16 (1963) (citing Cantwell v. Connecticut, 310 U.S. 296, 303 (1940)).

12. Griswold v. Connecticut, 381 U.S. 479, 484 (1965).

13. 410 U.S. 113 (1973).

14. R. BERGER, GOVERNMENT BY JUDICIARY: THE TRANSFORMATION OF THE FOURTEENTH AMENDMENT 2 (1977) (footnote omitted).

15. *Id.*; R. BERGER, FEDERALISM: THE FOUNDER'S DESIGN (1987); R. BERGER, DEATH PENALTIES: THE SUPREME COURT'S OBSTACLE COURSE (1982); Berger, *Incorporation of the Bill of Rights in the Fourteenth Amendment*, 42 OHIO ST. L.J. 435 (1981); Berger, *Government by Judiciary: Judge Gibbon's Argument Ad Hominem*, 59 B.U.L. REV. 783

Berger has explored various departures of the Supreme Court from the intent of the fourteenth amendment and of the original Constitution with respect to the relation of the federal judiciary to the states and to Congress. In *The Fourteenth Amendment and the Bill of Rights*, Professor Berger focuses on the incorporation doctrine itself, framing his case largely as a refutation of the pro-incorporation arguments of Michael Curtis.[16]

In the book's introduction, Professor Berger describes the original exemption of the states from the obligation to comply with the Bill of Rights. He describes the Supreme Court's rejection of Justice Black's argument that the fourteenth amendment removed that exemption by "wholesale incorporation" of the Bill of Rights. Despite this rejection, the Court "achieved the result through the doctrine of 'selective incorporation.' It did not root it in the 'original intention' of the framers, however, but conjured it out of the 'principle[s] of justice' " which it found in the due process clause.[17] According to Louis Henkin, this selective incorporation theory "finds no support in the language of the amendment, or in the history of its adoption," and it is truly "more difficult to justify than Justice Black's position that the Bill of Rights was wholly incorporated."[18] Berger argues that

> the framers did their own selective incorporation. Out of the Bill of Rights they selected and incorporated the due process clause in the fourteenth amendment; and under the long-established rule that mention of A excludes the unmentioned B, reinforced by the Joint Committee's rejection of the just compensation clause of the Bill of Rights, they thus barred attribution to them of an intention to license selective incorporation of other items of the Bill of Rights.[19]

After the Civil War, some southern states enacted Black Codes which imposed severe restrictions on the freed slaves, keeping them in a condition worse, in some respects, than slav-

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(1979).

16. *See* M. CURTIS, NO STATE SHALL ABRIDGE THE FOURTEENTH AMENDMENT AND THE BILL OF RIGHTS (1986); Curtis, *Further Adventures of the Nine-Lives Cat: A Response to Mr. Berger on Incorporation of the Bill of Rights*, 43 OHIO STATE L.J. 89 (1982); Curtis, *The Bill of Rights as a Limitation on State Authority: A Reply to Professor Berger*, 16 WAKE FOREST L. REV. 45 (1980).

17. R. BERGER, THE FOURTEENTH AMENDMENT AND THE BILL OF RIGHTS 9 (1989).

18. Henkin, *"Selective Incorporation" in the Fourteenth Amendment*, 73 YALE L.J. 74, 77 (1963).

19. R. BERGER, *supra* note 17, at 76 (citations omitted).

ery. The Civil Rights Act of 1866 was enacted to outlaw those restrictions. Section 1 of the Act provided:

> [a]ll . . . citizens of every race and color, without regard to any previous condition of slavery or involuntary servitude, except as a punishment for crime whereof the party shall have been duly convicted, shall have the same right, in every State and Territory in the United States, to make and enforce contracts, to sue, be parties, and 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, and shall be subject to like punishment, pains, and penalties, and to none other, any law, statute, ordinance, regulations, or custom, to the contrary notwithstanding.[20]

Professor Berger argues that the fourteenth amendment, proposed by the same Thirty-ninth Congress that passed the 1866 Act, was intended to remove all doubt as to the constitutionality of the Act. Some members of Congress apparently also wanted to ensure by the amendment that no future Congress could repeal the 1866 Act. Berger stresses the "all but unanimous agreement"[21] in that Congress that the 1866 Act and the reach of the fourteenth amendment were identical.

The legislative history supports Berger's conclusion that neither the fourteenth amendment nor the 1866 Act was intended to protect any "fundamental rights" beyond those enumerated in the Act:

> The very spelling out in the Civil Rights Act of rights that were to be free from *discrimination* precludes an attribution to the framers of a doctrine of 'absolute' rights that were beyond State power to withdraw them from *all*. To the contrary, the assurances by Trumbull, Shellabarger, Thayer, and Wilson that when States granted certain rights they had to be available to all indicates that whether to grant or withdraw them was left in the States' discretion, a far cry from 'inalienable' rights.[22]

The "privileges or immunities" clause was intended to be the main substantive provision of the fourteenth amendment. "Privileges and immunities" had been protected in article IV of

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20. Civil Rights Act, ch. 31 § 1, 14 Stat. 27 (1866) (current version at 42 U.S.C. §§ 1981-1983, 1985 (1988)).

21. R. BERGER, *supra* note 17, at 68.

22. *Id.* at 118 (emphasis in original).

the Articles of Confederation and in article IV, section 2, of the Constitution. Berger argues that the limited scope of the Civil Rights Act and of the fourteenth amendment is belied neither by the history of the "privileges and immunities" concept nor by the interpretation of article IV, section 2, by Justice Bushrod Washington in *Corfield v. Coryell*.[23] Obviously, "the 'privileges or immunities' of article IV did not embrace the as yet unborn Bill of Rights."[24]

With the privileges or immunities clause expected to be the main source of substantive protection in the fourteenth amendment, the due process and equal protection clauses were intended to play only supporting roles. Thus, the equal protection clause, Berger argues,

> embodied the [1866] act's prohibition of discrimination with respect to the rights there specified—privileges or immunities. And the due process clause afforded access to the courts for protection of those rights. . . . Instead of employing the negative 'No discrimination' of the [Civil Rights] Bill, the amendment offered to blacks the same described rights as whites enjoyed, accompanied by enforcement.[25]

The Civil Rights Act of 1866

> was fueled by the Black Codes' attempt to return the emancipated slaves to serfdom, accompanied by a campaign of flogging, murder, and terrorism. When the framers and Ratifiers spoke of equal protection it was against such violence that they meant to protect the helpless blacks. To enable the freedmen to exist, they granted them the right to contract for their labor, to own property, to go freely from place to place—denied them by the Codes—and to sue for enforcement of these rights.[26]

If the fourteenth amendment were intended to impose the Bill of Rights on the states, it would have required a change in the laws of many states with respect to the necessity of indictments, the size of criminal juries, the right to jury trial in civil

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23. 6 F. Cas. 546 (C.C.E.D. Pa. 1823) (No. 3,230). *Corfield* upheld a New Jersey statute making it unlawful for any non-inhabitant of that state to 'gather clams, oysters or shells' in the waters of that state. *Corfield* involved the issue, not of privileges and immunities of citizens of the United States, but of citizens of the several states. Justice Washington of the Supreme Court decided this case on circuit.

24. R. BERGER, *supra* note 17, at 100.

25. *Id.* at 69-70. Incidentally, as Berger notes, "[i]t is hardly deniable that the equal protection clause referred to state-wide, not national, 'equality.' " *Id.* at 125.

26. *Id.* at 144.

cases, and other matters. Yet, as Berger notes, citing the studies of Charles Fairman[27] and James Bond,[28] there is no evidence that the states considered it to have any of those effects.[29]

Berger uses as guides to the interpretation of the amendment's intent the prevailing contemporary opinion on the issues of state sovereignty and "abolitionism vs. racism." He accuses Curtis of laboring under the illusion that the fourteenth amendment was produced by "the anti-slavery crusade."[30] As Berger notes, "unfortunately, a northerner could oppose slavery and yet remain a racist."[31] Berger continues, "[l]ike others who share his current sentiments, [Curtis] refuses to see that the North's readiness to protect blacks from the South's attempt to reimpose the shackles of serfdom did not mean that the North was ready to surrender control of its own administration of other local, internal affairs."[32] Berger criticizes Curtis' reliance on the expressed views of radical Republicans to support his case for incorporation.

Perhaps Berger's most telling point is that the proponents of incorporation have the burden of proving that the statements on which they rely represented the views of the majority of Congress. As Berger demonstrates, that burden has not been met:

> Curtis erroneously shifts the burden of proof. He would require critics of incorporation to prove the negative—that the terms do not include the Bill of Rights—before he proves the intention to incorporate it. Since application of the Bill of Rights to the States drastically curtails the right of the Northern States to control their own internal affairs, that purpose has to be proved, not assumed. What Chief Justice Marshall said of such 'extraordinary' intervention remains true today: had the 1866 framers contemplated it 'they would have declared their purpose in plain and intelligible language.'[33]

Dismissing the "conflicting utterances" of Representative John Bingham,[34] upon which Justice Black and Michael Curtis

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27. Fairman, *Does the Fourteenth Amendment Incorporate the Bill of Rights?*, 2 STAN. L. REV. 5 (1949).

28. Bond, *The Original Understanding of the Fourteenth Amendment in Illinois, Ohio and Pennsylvania*, 18 AKRON L. REV. 435 (1985).

29. R. BERGER, *supra* note 15, at 37-42.

30. *Id.* at 55.

31. *Id.* at 56.

32. *Id.* at 61.

33. *Id.* at 83.

34. See *id.* at 128-35, where Berger quotes several inaccurate statements by Bing-

relied in arguing for incorporation, Berger argues that it is unsound to assume that the framers of the fourteenth amendment overruled a decision as important as *Barron v. Baltimore sub silento*.

Section 5 gave the explicit power to enforce the fourteenth amendment to Congress rather than to the courts.

> It is not said that the *judicial power* of the general government shall extend to enforcing the prohibitions and protecting the rights and immunities guaranteed. It is not said [that] that branch of the government shall be authorized to declare void any action of a state in violation of the prohibitions. It is the power of Congress which has been enlarged. *Congress* is authorized to *enforce* the prohibitions by appropriate legislation.[35]

It remains fair to ask, however, whether even Professor Berger would contend that a judicial enforcement role was totally excluded. Suppose, after the adoption of the fourteenth amendment, Congress had repealed the Civil Rights Act of 1866 and suppose a state had reenacted its Black Code. Could not the Supreme Court have applied the fourteenth amendment to hold that state law unconstitutional? There is probably no definitive historical answer. Professor Berger apparently believes that the power to enforce the fourteenth amendment was vested exclusively in Congress.[36] He is supported by the fact that the framers of the fourteenth amendment distrusted the courts as a result of the pro-slavery decisions of *Dred Scott*[37] and cases upholding the fugitive slave laws.[38]

In any event, apart from the judicial role in its enforcement, it should be clear that the history of the fourteenth amendment lends no support to the "ratchet theory" enunciated by Justice Brennan for the Court in *Katzenbach v. Morgan*.[39] Under this theory, while section 5 gives Congress discretion to enforce the amendment, it

> does not grant Congress power to exercise discretion in the other direction and to enact 'statutes so as in effect to dilute

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ham, including his assertion that the Bill of Rights itself contains a privileges and immunities clause.

35. *Ex parte* Virginia, 100 U.S. 339, 345 (1879) (emphasis in original).
36. *See* R. BERGER, *supra* note 14, at 221-29.
37. Scott v. Sanford, 60 U.S. (19 How.) 393 (1856).
38. *See* Prigg v. Pennsylvania, 41 U.S. (16 Pet.) 539 (1842).
39. 384 U.S. 641, 651 n.10 (1966).

> equal protection and due process decisions of this Court.' We emphasize that Congress' power under section 5 is limited to adopting measures to enforce the guarantees of the amendment; section 5 grants Congress no power to restrict, abrogate, or dilute these guarantees. Thus, for example, an enactment authorizing the States to establish racially segregated systems of eduction would not be—as required by section 5—a measure 'to enforce' the Equal Protection Clause since that clause of its own force prohibits such state laws.[40]

This "rachet theory," however, would turn the fourteenth amendment on its head and make of Congress merely a ratifying and implementing agent for Supreme Court decisions. To ascribe such a purpose to the framers whose intention in approving the Reconstruction amendments was to overrule *Dred Scott*[41] and who distrusted the judiciary, is unwarranted.[42] The ratchet theory, of course, is founded on Supreme Court dicta, since Congress has not forced a decision on it by enacting a law directly contrary to a Supreme Court decision protective of liberty under the fourteenth amendment. A statute directly overturning *Roe v. Wade* by affirming the personhood of the unborn child would present such a challenge. However, Congress has been so deferential to the Supreme Court's asserted role as arbiter of the meaning of the fourteenth amendment that the effect is the same as if the ratchet theory were itself part of the amendment.

One reason for the general acquiescence in the incorporation doctrine is a misconception that a retreat from that doctrine would leave personal rights unprotected by law. State courts, however, have increasingly applied state constitutions, in recent years, providing even greater protection to personal rights than is provided by the Supreme Court under the incorporation doctrine. Justice Brennan noted this process in his 1986 James Madison Lecture.[43] If Professor Berger's approach to the fourteenth amendment were followed, further protection for personal rights could be based on the privileges or immunities

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40. *Id.*

41. 60 U.S. (19 How.) at 393.

42. *See* R. BERGER, *supra* note 14, at 221-29.

43. Brennan, *The Bill of Rights: State Constitution (sic) as Guardians of Individual Rights*, N.Y. ST. B.J., May 1987, 17-19; *see also* Collins & Galie, *Models of Post-Incorporation Judicial Review: 1985 Survey of State Constitutional Individual Rights Decisions*, 55 U. CIN. L. REV. 317, 317 (1986); Collins, *Reliance on State Constitutions: Some Random Thoughts*, 54 MISS. L.J. 371 (1984).

clause of the fourteenth amendment, which has lain dormant since the *Slaughterhouse Cases*.[44]

With respect to one case, *Brown v. Board of Education*,[45] Professor Berger pulls back from a rigid enforcement of what he sees as the intent of the fourteenth amendment:

> Doubtless I shall be charged with inconsistency because I wrote that it would be 'probably impossible to undo the past in the face of the expectations that the segregation decisions . . . have aroused in our black citizens—expectations confirmed by every decent instinct. . . .' But the rank discrimination against blacks cannot be equated with equal application of the procedural safeguards of the Bill of Rights which, if they be applicable to the States, protect whites and blacks alike. To leave electronic wire-tapping returned to the States, for instance, is not of the same order as a return Jim Crowism. The latter would be met with wide-spread resistance, an altogether unlikely consequence were wire-tapping returned to the States.[46]

There is reason to conclude, however, that the fourteenth amendment was not intended to outlaw racially segregated public schools.[47] If one accepted that conclusion and also found that public education today is sufficiently similar to that of 1868 to be governed by the intent of the fourteenth amendment, one could still argue that officially imposed racial segregation in schools (or elsewhere) is void because it is inherently unjust to an "intolerable degree," so as to violate the supra-constitutional standard of the natural law.[48] The courts today would not likely be receptive to such a higher law argument.[49] Professor Berger, however, would evidently disagree with a natural law solution to the segregation problem.

While his lonely crusade for constitutional integrity has won Professor Berger no converts on the Supreme Court, he remains undiminished in his persistence.

> It is difficult for me, to regard the precedents of the last 40 years as more sacrosanct than those of the prior 135 years dur-

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44. 83 U.S. (16 Wall.) 36 (1873).

45. 347 U.S. 483 (1954).

46. R. BERGER, *supra* note 17, at 150 n.22 (citations omitted).

47. *See* Bickel, *The Original Understanding and the Segregation Decision*, 69 HARV. L. REV. 1 (1955).

48. *See* Corwin, *The Higher Background of Constitutional Law*, 42 HARV. L. REV. 149, 365 (1928).

49. *See* Rice, *Some Reasons for a Restoration of Natural Law Jurisprudence, 24* WAKE FOREST L. REV. 539 (1989).

> ing which, as Louis Henkin reminded us, the exemption of the States from the Bill of Rights had been 'the consistent, often reaffirmed, and almost unanimous jurisprudence of the Court.' Adverse possession does not run against the government, still less against the sovereign people; usurpation is not legitimated by inertia. . . .
>
> Finally, *Erie Ry. Co. v. Tompkins* reversed the 100-year-old course of *Swift v. Tyson*, about which many 'expectations' of the commercial and financial communities had gathered in the course of a century, because, in the words of Justice Brandeis, quoting Justice Holmes, it was 'an unconstitutional assumption of power by courts of the United States which no lapse of time or respectable array of opinion should make us hesitate to correct.' Celebration of the Bicentennial of the Constitution calls on us to exhibit no less hardihood and to respect its integrity, i.e., its 'original meaning.'[50]

The incorporation doctrine is perhaps the major obstacle to a restoration of the healthy diversity which ought to characterize a federal system. If that doctrine were to be abandoned, the way would be opened for a more effective role for state constitutional law within the more flexible federal limits that would be provided by a revitalization of the "privileges or immunities" clause and an application of the due process and equal protection standards as they were intended to operate. The incorporation doctrine is so clearly at odds with a sound federalism that sooner or later (but probably later) it will be seen for what it is and discarded. The main architect of that development, if it ever comes, will be Raoul Berger. In the meantime, in this age of politically oriented "advocacy scholarship" somebody, at some law school, ought to endow a Raoul Berger Chair of Constitutional Integrity.

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50. R. BERGER, *supra* note 17, at 149-50 (footnotes omitted).