MR. JUSTICE DOUGLAS.

While I join the opinion of the Court, a brief historical resume of the relation between the Bill of Rights and the first section of the Fourteenth Amendment seems pertinent. Since the adoption of that Amendment, ten justices have felt that it protects from infringement by the States the privileges, protections, and safeguards granted by the Bill of Rights. Page 372 U. S. 346

Justice Field, the first Justice Harlan, and probably Justice Brewer, took that position in *O'Neil v. Vermont*, 144 U. S. 323, 144 U. S. 362-363, 144 U. S. 370-371, as did Justices BLACK, DOUGLAS, Murphy and Rutledge in *Adamson v. California*, 332 U. S. 46, 332 U. S. 71-72, 124. *And see Poe v. Ullman*, 367 U. S. 497, 367 U. S. 515-522 (dissenting opinion). That view was also expressed by Justices Bradley and Swayne in the *Slaughter-House Cases*, 16 Wall. 36, 83 U. S. 118-119, 83 U. S. 122, and seemingly was accepted by Justice Clifford when he dissented with Justice Field in *Walker v. Sauvinet*, 92 U. S. 90, 92 U. S. 90, 92 U. S. 92. [Footnote 2/1] Unfortunately, it has never commanded a Court. Yet, happily, all constitutional questions are always open. *Erie R. Co. v. Tompkins*, 304 U. S. 64. And what we do today does not foreclose the matter.

My Brother HARLAN is of the view that a guarantee of the Bill of Rights that is made applicable to the States by reason of the Fourteenth Amendment is a lesser version of that same guarantee as applied to the Federal Government. [Footnote 2/2] Mr. Justice Jackson shared that view. [Footnote 2/3] Page 372 U. S. 347

But that view has not prevailed, [Footnote 2/4] and rights protected against state invasion by the Due Process Clause of the Fourteenth Amendment are not watered-dow versions of what the Bill of Rights guarantees. [Footnote 2/1]

Justices Bradley, Swayne and Field emphasized that the first eight Amendments granted citizens of the United States certain privileges and immunities that were protected from abridgment by the States by the Fourteenth Amendment. *See Slaughter-House Cases, supra*, at 83 U. S. 118-119; *O'Neil v. Vermont, supra*, at 144 U. S. 363. Justices Harlan and Brewer accepted the same theory in the *O'Neil* case (*see id.* at 144 U. S. 370-371), though Justice Harlan indicated that all "persons," not merely "citizens," were given this protection. *Ibid.* In *Twining v. New Jersey*, 211 U. S. 78, 211 U. S. 117, Justice Harlan's position was made clear:

"In my judgment, immunity from self-incrimination is protected against hostile state action not only by . . . [the Privileges and Immunities Clause], but [also] by . . . [the Due Process Clause]."

Justice Brewer, in joining the opinion of the Court, abandoned the view that the entire Bill of Rights applies to the States in *Maxwell v. Dow*, 176 U. S. 581.

[Footnote 2/2]

See Roth v. United States, 354 U. S. 476, 354 U. S. 501, 506; *Smith v. California*, 361 U. S. 147, 361 U. S. 169.

[Footnote 2/3]

Beauharnais v. Illinois, 343 U. S. 250, 343 U. S. 288. *Cf.* the opinions of Justices Holmes and Brandeis in *Gitlow v. New York*,268 U. S. 652, 268 U. S. 672, and *Whitney v. California*, 274 U. S. 357, 274 U. S. 372.

[Footnote 2/4]

The cases are collected by MR. JUSTICE BLACK in *Speiser v. Randall*, 357 U. S. 513, 357 U. S. 530. *And see Eaton v. Price*, 364 U. S. 263, 364 U. S. 274-276.