Adamson v. California

Justice Frankfurter and Black opinions

Mr. Justice FRANKFURTER (concurring).

Less than 10 years ago, Mr. Justice Cardozo announced as settled constitutional law that while the Fifth Amendment, 'which is not directed to the States, but solely to the federal government,' provides that no person shall be compelled in any criminal case to be a witnss against himself, the process of law assured by the Fourteenth Amendment does not require such immunity from self-crimination: 'in prosecutions by a state, the exemption will fail if the state elects to end it.' Palko v. Connecticut, [302 U.S. 319](http://caselaw.lp.findlaw.com/cgi-bin/getcase.pl?navby=case&court=us&vol=302&invol=319) , 322, 324, 150, 151. Mr. Justice Cardozo spoke for the Court, consisting of Mr. Chief Justice Hughes, and McReynolds, Brandeis, Sutherland, Stone, Roberts, Black, JJ. ( Mr. Justice Butler dissented.) The matter no longer called for discussion; a reference to Twining v. New Jersey, [211 U.S. 78](http://caselaw.lp.findlaw.com/cgi-bin/getcase.pl?court=us&vol=211&invol=78) , decided 30 years before the Palko case, sufficed.

Decisions of this Court do not have equal intrinsic authority. The Twining case shows the judicial process at its best-comprehensive briefs and powerful arguments on both sides, followed by long deliberation, resulting in an opinion by Mr. Justice Moody which at once gained and has ever since retained recognition as one of the outstanding opinions in the history of the Court. After [332 U.S. 46 , 60]   enjoying unquestioned prestige for 40 years, the Twining case should not now be diluted, even unwittingly, either in its judicial philosophy or in its particulars. As the surest way of keeping the Twining case intact, I would affirm this case on its authority.

The circumstances of this case present a minor variant from what was before the Court in Twining v. United States, supra. The attempt to inflate the difference into constitutional significance was adequately dealt with by Mr. Justice Traynor in the court below. People v. Adamson, 27 Cal.2d 478, 165 P.2d 3. The matter lies within a very narrow compass. The point is made that a defendant who has a vulnerable record would, by taking the stand, subject himself to having his credibility impeached thereby. See Raffel v. United States, [271 U.S. 494, 496](http://caselaw.lp.findlaw.com/cgi-bin/getcase.pl?court=us&vol=271&invol=494#496) , 497, 567. Accordingly, under California law, he is confronted with the dilemma, whether to testify and perchance have his bad record prejudice him in the minds of the jury, or to subject himself to the unfavorable inference which the jury might draw from his silence. And so, it is argued, if he chooses the latter alternative, the jury ought not to be allowed to attribute his silence to a consciousness of guilt when it might be due merely to a desire to escape damaging cross-examination.

This does not create an issue different from that settled in the Twining case ( [211 U.S. 78](http://caselaw.lp.findlaw.com/cgi-bin/getcase.pl?court=us&vol=211&invol=78) ). Only a technical rule of law would exclude from consideration that which is relevant, as a matter of fair reasoning, to the solution of a problem. Sensible and justminded men, in important affairs of life, deem it significant that a man remains silent when confronted with serious and responsible evidence against himself which it is within his power to contradict. The notion that to allow jurors to do that which sensible and rightminded men do every day violates the 'immutable principles of justice' as conceived by a civilized society is to trivialize the importance of 'due process.' Nor does it [332 U.S. 46 , 61]   make any difference in drawing significance from silence under such circumstances that an accused may deem it more advantageous to remain silent than to speak, on the nice calculation that by taking the witness stand he may expose himself to having his credibility impugned by reason of his criminal record. Silence under such circumstances is still significant. A person in that situation may express to the jury, through appropriate requests to charge, why he prefers to keep silent. A man who has done one wrong may prove his innocence on a totally different charge. To deny that the jury can be trusted to make such discrimination is to show little confidence in the jury system. The prosecution is frequently compelled to rely on the testimony of shady characters whose credibility is bound to be the chief target of the defense. It is a common practice in criminal trials to draw out of a vulnerable witness' mouth his vulnerability, ad then con vince the jury that nevertheless he is telling the truth in this particular case. This is also a common experience for defendants.

For historical reasons a limited immunity from the common duty to testify was written into the Federal Bill of Rights, and I am prepared to agree that, as part of that immunity, comment on the failure of an accused to take the witness stand is forbidden in federal prosecutions. It is so, of course, by explicit act of Congress. 20 Stat. 30, 28 U.S.C.A. 632; see Bruno v. United States, [308 U.S. 287](http://caselaw.lp.findlaw.com/cgi-bin/getcase.pl?navby=case&court=us&vol=308&invol=287) . But to suggest that such a limitation can be drawn out of 'due process' in its protection of ultimate decency in a civilized society is to suggest that the Due Process Clause fastened fetters of unreason upon the States. This opinion is concerned solely with a discussion of the Due Process Clause of the Fourteenth Amendment. I put to one side the Privileges or Immunities Clause of that Amendment. For the mischievous uses to which that clause would lend itself if its scope were not confined to that given it by all but [332 U.S. 46 , 62]   one of the decisions beginning with the Slaughter-House Cases, 16 Wall 36, see the deviation in Colgate v. Harvey, [296 U.S. 404, 56](http://caselaw.lp.findlaw.com/cgi-bin/getcase.pl?court=us&vol=296&invol=404#56) S. Ct. 252, 102 A.L.R. 54, overruled by Madden v. Kentucky, [309 U.S. 83](http://caselaw.lp.findlaw.com/cgi-bin/getcase.pl?navby=case&court=us&vol=309&invol=83) , 125 A.L.R. 1383.

Between the incorporation of the Fourteenth Amendment into the Constitution and the beginning of the present membership of the Court-a period of 70 years-the scope of that Amendment was passed upon by 43 judges. Of all these judges, only one, who may respectfully be called an eccentric exception, ever indicated the belief that the Fourteenth Amendment was a shorthand summary of the first eight Amendments theretofore limiting only the Federal Government, and that due process incorporated those eight Amendments as restrictions upon the powers of the States. Among these judges were not only those who would have to be included among the greatest in the history of the Court, but-it is especially relevant to note-they included those whose services in the cause of human rights and the spirit of freedom are the most conspicuous in our history. It is not invidious to single out Miller, Davis, Bradley, Waite, Matthews, Gray, Fuller, Holmes, Brandeis, Stone and Cardozo (to speak only of the dead) as judges who were alert in safeguarding and promoting the interests of liberty and human dignity through law. But they were also judges mindful of the relation of our federal system to a propgressively democratic society and therefore duly regardful of the scope of authority that was left to the States even after the Civil War. And so they did not find that the Fourteenth Amendment, concerned as it was with matters fundamental to the pursuit of justice, fastened upon the States procedural arrangements which, in the language of Mr. Justice Cardozo, only those who are 'narrow or provincial' would deem essential to 'a fair and enlightened system of justice.' Palko v. Connecticut, [302 U.S. 319, 325](http://caselaw.lp.findlaw.com/cgi-bin/getcase.pl?navby=case&court=us&vol=302&invol=319#325) , 151, 152. To suggest that it is inconsistent with a truly free [332 U.S. 46 , 63]   society to begin prosecutions without an indictment, to try petty civil cases without the paraphernalia of a common law jury, to take into consideration that one who has full opportunity to make a defense remains silent is, in de Tocqueville's phrase, to confound the familiar with the necessary.

The short answer to the suggestion that the provision of the Fourteenth Amendment, which ordains 'nor shall any State deprive any person of life, liberty, or property, without due process of law,' was a way of saying that every State must thereafter initiate prosecutions through indictment by a grand jury, must have a trial by a jury of 12 in criminal cases, and must have trial by such a jury in common law suits where the amount in controversy exceeds $20, is that it is a strange way of saying it. It would be extraordinarily strange for a Consttution to convey such specific commands in such a roundabout and inexplicit way. After all, an amendment to the Constitution should be read in a "sense most obvious to the common understanding at the time of its adoption.' \* \* \* For it was for public adoption that it was proposed.' See Mr. Justice Holmes in Eisner v. Macomber, [252 U.S. 189, 220](http://caselaw.lp.findlaw.com/cgi-bin/getcase.pl?court=us&vol=252&invol=189#220) , 197, 9 A.L.R. 1570. Those reading the Engligh language with the meaning which it ordinarily conveys, those conversant with the political and legal history of the concept of due process, those sensitive to the relations of the States to the central government as well as the relation of some of the provisions of the Bill of Rights to the process of justice, would hardly recognize the Fourteenth Amendment as a cover for the various explicit provisions of the first eight Amendments. Some of these are enduring reflections of experience with human nature, while some express the restricted views of Eighteenth-Century England regarding the best methods for the ascertainment of facts. The notion that the Fourteenth Amendment was a covert way of imposing upon the [332 U.S. 46 , 64]   States all the rules which it seemed important to Eighteenth Century statesmen to write into the Federal Amendments, was rejected by judges who were themselves witnesses of the process by which the Fourteenth Amendment became part of the Constitution. Arguments that may now be adduced to prove that the first eight Amendments were concealed within the historic phrasing1 of the Fourteenth Amendment were not unknown at the time of its adoption. A surer estimate of their bearing was possible for judges at the time than distorting distance is likely to vouchsafe. Any evidence of design or purpose not contemporaneously known could hardly have influenced those who ratified the Amendment. Remarks of a particular proponent of the Amendment, no matter how influential, are not to be deemed part of the Amendment. What was submitted for ratification was his proposal, not his speech. Thus, at the time of the ratification of the Fourteenth Amendment the constitutions of nearly half of the ratifying States did not have the rigorous requirements of the Fifth Amendment for instituting criminal proceedings through a grand jury. It could hardly have occurred to these States that by ratifying the Amendment they uprooted their established methods for prosecuting crime and fastened upon themselves a new prosecutorial system.

Indeed, the suggestion that the Fourteenth Amendment incorporates the first eight Amendments as such is not unambiguously urged. Even the boldest innovator would shrink from suggesting to more than half the States that [332 U.S. 46 , 65]   they may no longer initiate prosecutions without indictment by grand jury, or that thereafter all the States of the Union must furnish a jury of 12 for every case involving a claim above $20. There is suggested merely a selective incorporation of the first eight Amendments into the Fourteenth Amendment. Some are in and some are out, but we are left in the dark as to which are in and which are out. Nor are we given the calculus for determining which go in and which stay out. If the basis of selection is merely that those provisions of the first eight Amendments are incorporated which commend themselves to individual justices as indispensable to the dignity and happiness of a free man, we are thrown back to a merely subjective test. The protection against unreasonable search and seizure might have primacy for one judge, while trial by a jury of 12 for every claim above $20 might appear to aother as a n ultimate need in a free society. In the history of thought 'natural law' has a much longer and much better founded meaning and justification than such subjective selection of the first eight Amendments for incorporation into the Fourteenth. If all that is meant is that due process contains within itself certain minimal standards which are 'of the very essence of a scheme of ordered liberty,' Palko v. Connecticut, [302 U.S. 319, 325](http://caselaw.lp.findlaw.com/cgi-bin/getcase.pl?navby=case&court=us&vol=302&invol=319#325) , 58 S. Ct. 149, 151, 152, putting upon this Court the duty of applying these standards from time to time, then we have merely arrived at the insight which our predecessors long ago expressed. We are called upon to apply to the difficult issues of our own day the wisdom afforded by the great opinions in this field, such as those in Davidson v. New Orleans, [96 U.S. 97](http://caselaw.lp.findlaw.com/cgi-bin/getcase.pl?court=us&vol=96&invol=97) ; Missouri v. Lewis, [101 U.S. 22](http://caselaw.lp.findlaw.com/cgi-bin/getcase.pl?court=us&vol=101&invol=22) ; Hurtado v. California, [110 U.S. 516, 292](http://caselaw.lp.findlaw.com/cgi-bin/getcase.pl?court=us&vol=110&invol=516#292) ; Holden v. Hardy, [169 U.S. 366](http://caselaw.lp.findlaw.com/cgi-bin/getcase.pl?court=us&vol=169&invol=366) ; Twining v. New Jersey, [211 U.S. 78](http://caselaw.lp.findlaw.com/cgi-bin/getcase.pl?court=us&vol=211&invol=78) , and Palko v. Connecticut, [302 U.S. 319](http://caselaw.lp.findlaw.com/cgi-bin/getcase.pl?navby=case&court=us&vol=302&invol=319) . This guidance bids us to be duly mindful of the heritage of the past, with its great lessons of how liberties are won and [332 U.S. 46 , 66]   how they are lost. As judges charged with the delicate task of subjecting the government of a continent to the Rule of Law we must be particularly mindful that it is 'a constitution we are expounding,' so that it should not be imprisoned in what are merely legal forms even though they have the sanction of the Eighteenth Century.

It may not be amiss to restate the pervasive function of the Fourteenth Amendment in exacting from the States observance of basic liberties. See Malinski v. New York, [324 U.S. 401](http://caselaw.lp.findlaw.com/cgi-bin/getcase.pl?navby=case&court=us&vol=324&invol=401) , 412 et seq., 786; Louisiana v. Resweber, [329 U.S. 459](http://caselaw.lp.findlaw.com/cgi-bin/getcase.pl?navby=case&court=us&vol=329&invol=459) , 466 et seq., 377. The Amendment neither comprehends the specific provisions by which the founders deemed it appropriate to restrict the federal government nor is it confined to them. The Due Process Clause of the Fourteenth Amendment has an independent potency, precisely as does the Due Procee Clause of the Fifth Amendment in relation to the Federal Government. It ought not to require argument to reject the notion that due process of law meant one thing in the Fifth Amendment and another in the Fourteenth. The Fifth Amendment specifically prohibits prosecution of an 'infamous crime' except upon indictment; it forbids double jeopardy; it bars compelling a person to be a witness against himself in any criminal case; it precludes deprivation of 'life, liberty, or property, without due process of law.' Are Madison and his contemporaries in the framing of the Bill of Rights to be charged with writing into it a meaningless clause? To consider 'due process of law' as merely a shorthand statement of other specific clauses in the same amendment is to attribute to the authors and proponents of this Amendment ignorance of, or indifference to, a historic conception which was one of the great instruments in the arsenal of constitutional freedom which the Bill of Rights was to protect and strengthen. [332 U.S. 46 , 67]   A construction which gives to due process no independent function but turns it into a summary of the specific provisions of the Bill of Rights would, as has been noted, tear up by the roots much of the fabric of law in the several States, and would deprive the States of opportunity for reforms in legal process designed for extending the area of freedom. It would assume that no other abuses would reveal themselves in the course of time than those which had become manifest in 1791. Such a view not only disregards the historic meaning of 'due process.' It leads inevitably to a warped construction of specific provisions of the Bill of Rights to bring within their scope conduct clearly condemned by due process but not easily fitting into the pigeon-holes of the specific provisions. It seems pretty late in the day to suggest tat a phras e so laden with historic meaning should be given an improvised content consisting of some but not all of the provisions of the first eight Amendments, selected on an undefined basis, with improvisation of content for the provisions so selected.

And so, when, as in a case like the present, a conviction in a State court is here for review under a claim that a right protected by the Due Process Clause of the Fourteenth Amendment has been denied, the issue is not whether an infraction of one of the specific provisions of the first eight Amendments is disclosed by the record. The relevant question is whether the criminal proceedings which resulted in conviction deprived the accused of the due process of law to which the United States Constitution entitled him. Judicial review of that guaranty of the Fourteenth Amendment inescapably imposes upon this Court an exercise of judgment upon the whole course of the proceedings in order to ascertain whether they offend those canons of decency and fairness which express the notions of justice of English-speaking peoples even toward [332 U.S. 46 , 68]   those charged with the most heinous offenses. These standards of justice are not authoritatively formulated anywhere as though they were prescriptions in a pharmacopoeia. But neither does the application of the Due Process Clause imply that judges are wholly at large. The judicial judgment in applying the Due Process Clause must move within the limits of accepted notions of justice and is not to be based upon the idiosyncrasies of a merely personal judgment. The fact that judges among themselves may differ whether in a particular case a trial offends accepted notions of justice is not disproof that general rather than idiosyncratic standards are applied. An important safeguard against such merely individual judgment is an alert deference to the judgment of the State court under review.

Mr. Justice BLACK, dissenting.

The appellant was tried for murder in a California state court. He did not take the stand as a witness in his own behalf. The prosecuting attorney, under purported authority of a California statute, Cal.Penal Code, 1323 (Hillyer-Lake 1945), argued to the jury that an inference of guilt could be drawn because of appellant's failure to deny evidence offered against him. The appellant's contention in the state court and here has been that the statute denies him a right guaranteed by the Federal Constitution. The argument is that (1) permitting comment upon his failure to testify has the effect of compelling him to testify so as to violate that provision of the Bill of Rights contained in the Fifth Amendment that 'No person \* \* \* shall be compelled in any criminal case to be a witness against himself'; and (2) although this provision of the Fifth Amendment originally applied only as a restraint upon federal courts, Barron v. Baltimore, 7 Pet. 243, the Fourteenth Amendment was intended to, and did make the prohibition against compelled testimony applicable to trials in state courts. [332 U.S. 46 , 69]   The Court refuses to meet and decide the appellant's first contention. But while the Court's opinion, as I read it, strongly implies that the Fifth Amendment does not, of itself, bar comment upon failure to testify in federal courts, the Court nevertheless assumes that it does in order to reach the second constitutional question involved in appellant's case. I must consider the case on the same assumption that the Court does. For the discussion of the second contention turns out to be a decision which reaches far beyond the relatively narrow issues on which this case might have turned.

This decision reasserts a constitutional theory spelled out in Twining v. New Jersey, [211 U.S. 78](http://caselaw.lp.findlaw.com/cgi-bin/getcase.pl?court=us&vol=211&invol=78) , that this Court is endowed by the Constitution with boundless power under 'natural law' periodically to expand and contract constitutional standards to conform to the Court's conception of what at a particular time constitutes 'civilized decency' and 'fundamental principles of liberty and justice.'1 Invoking this Twining rule, the Court concludes that although comment upon testimony in a federal court would violate the Fifth Amendment, identical comment in a state court does not violate today's fashion in civilized decency and fundamentals and is therefore not prohibited by the Federal Constitution as amended.

The Twining case was the first, as it isthe only d ecision of this Court, which has squarely held that states were free, notwithstanding to Fifth and Fourteenth Amendments, to extort evidence from one accused of crime. [2](http://caselaw.lp.findlaw.com/scripts/getcase.pl?court=us&vol=332&invol=46" \l "f2) I [332 U.S. 46 , 70]   agree that if Twining be reaffirmed, the result reached might appropriately follow. But I would not reaffirm the Twining decision. I think that decision and the 'natural law' theory of the Constitution upon which it relies, degrade the constitutional safeguards of the Bill of Rights and simultaneously appropriate for this Court a broad power which we are not authorized by the Constitution to exercise. Furthermore, the Twining decision rested on previous cases and broad hypotheses which have been undercut by intervening decisions of this Court. See Corwin, The Supreme Court's Construction of the Self-Incrimination Clause, 29 Mich.L. Rev. 1, 191, 202. My reasons for believing that the Twining decision should not be revitalized can best be understood by reference to the constitutional, judicial, and general history that preceded and followed the case. That reference must be abbreviated far more than is justified but for the necessary limitations of opinion-writing.

The first 10 amendments were proposed and adopted largely because of fear that Government might unduly interfere with prized individual liberties. The people wanted and demanded a Bill of Rights written into their Constitution. The amendments embodying the Bill of Rights were intended to curb all branches of the Federal Government in the fields touched by the amendments-Legislative, Executive, and Judicial. The Fifth, Sixth, and Eighth Amendments were pointedly aimed at confining exercise of power by courts and judges within precise boundaries, particularly in the procedure used for the trial of criminal cases. [3](http://caselaw.lp.findlaw.com/scripts/getcase.pl?court=us&vol=332&invol=46" \l "f3) Past history provided strong reasons [332 U.S. 46 , 71]   for the apprehensions which brought these procedural amendments into being and attest the wisdom of their adoption. For the fears of arbitrary court action sprang largely from the past use of courts in the imposition of criminal punishments to suppress speech, press, and religion. Hence the constitutional limitations of courts' powers were, in the view of the Founders, essential supplements to the First Amendment, which was itself designed to protect the widest scope for all people to believe and to express the most divergent political, religious, and other views.

But these limitations were not expressly imposed upon state court action. In 1833, Barron v. Baltimore, supra, was decided by this Court. It specifically held inapplicable to the states that provision of the Fifth Amendment which declares: 'nor shall private property be taken for public use, without just compensation.' In deciding the particular point raised, the Court there said that it could not hold that the first eight amendments applied to the states. This was the controlling constitutional rule whenthe Fourte enth Amendment was proposed in 1866.4

My study of the historical events that culminated in the Fourteenth Amendment, and the expressions of those who sponsored and favored, as well as those who opposed its submission and passage, persuades me that one of the chief objects that the provisions of the Amendment's first section, separately, and as a whole, were intended to accomplish was to make the Bill of Rights, applicable to the [332 U.S. 46 , 72]   states. [5](http://caselaw.lp.findlaw.com/scripts/getcase.pl?court=us&vol=332&invol=46" \l "f5) With full knowledge of the import of the Barron decision, the framers and backers of the Fourteenth Amendment proclaimed its purpose to be to overturn the constitutional rule that case had announced. This historical purpose has never received full consideration or exposition in any opinion of this Court interpreting the Amendment.

In construing other constitutional provisions, this Court has almost uniformly followed the precept of Ex parte Bain, [121 U.S. 1, 12](http://caselaw.lp.findlaw.com/cgi-bin/getcase.pl?court=us&vol=121&invol=1#12) , 787, that 'It is never to be forgotten that in the construction of the language of the Constitution \* \* \*, as indeed in all other instances where construction becomes necessary, we are to place ourselves as nearly as possible in the condition of the men who framed that instrument.' See also Everson v. Board of Education, [330 U.S. 1](http://caselaw.lp.findlaw.com/cgi-bin/getcase.pl?navby=case&court=us&vol=330&invol=1) , 67 S. Ct. 504; Thornhill v. Alabama, [310 U.S. 88](http://caselaw.lp.findlaw.com/cgi-bin/getcase.pl?navby=case&court=us&vol=310&invol=88) , 95, 102, 740, 744; Knowlton v. Moore, [178 U.S. 41, 89](http://caselaw.lp.findlaw.com/cgi-bin/getcase.pl?court=us&vol=178&invol=41#89) , 106, 766, 772; Reynolds v. United States, [98 U.S. 145, 162](http://caselaw.lp.findlaw.com/cgi-bin/getcase.pl?court=us&vol=98&invol=145#162) ; Barron v. Baltimore, supra, 7 Pet. at pages 250, 251; Cohens v. Virginia, 6 Wheat. 264, 416-420.

Investigation of the cases relied upon in Twining v. New Jersey to support the conclusion there reached that neither the Fifth Amendment's prohibition of compelled testimony, nor any of the Bill of Rights, applies to the States, reveals an unexplained departure from this salutary [332 U.S. 46 , 73]   practice. Neither the briefs nor opinions in any of these cases, except Maxwell v. Dow, [176 U.S. 581](http://caselaw.lp.findlaw.com/cgi-bin/getcase.pl?court=us&vol=176&invol=581) , make reference to the legislative and contemporary history for the purpose of demonstrating that those who conceived, shaped, and brought about the adoption of the Fourteenth Amendment intended it to nullify this Court's decision in Barron v. Baltimore, supra, and thereby to make the Bill of Rights applicable to the States. In Maxwell v. Dow, supra, the issue turned on whether the Bill of Rights guarantee of a jury trial was, by the Fourteenth Amendment, extended to trials in state courts. In that case counsel for appellant did cite from the speech of Senator Howard, Appendix, infra, [332 U.S. 104](http://caselaw.lp.findlaw.com/cgi-bin/getcase.pl?navby=case&court=us&vol=332&invol=104) , which so emphatically stated the understanding of the framers of the Amendment-the Committee on Reconstruction for which he spoke-that the Bill of Rights was to be made applicable to the states by the Amendment's first section. The Court's opinion in Maxwell v. Dow, supra, [176 U.S. 601](http://caselaw.lp.findlaw.com/cgi-bin/getcase.pl?court=us&vol=176&invol=601) , acknowledged that counsel had 'cited from the speech of one of the Senators,' but indicated that it was not advised what other speeches were made in the Senate or in the House. The Court considered, moreover, that'What indi vidual Senators or Representatives may have urged in debate, in regard to the meaning to be given to a proposed constitutional amendment, or bill, or resolution, does not furnish a firm ground for its proper construction, nor is it important as explanatory of the grounds upon which the members voted in adopting it.' 176 U.S. at pages 601, 602, 20 S.Ct. at page 456.

In the Twining case itself, the Court was cited to a then recent book, Guthrie, Fourteenth Amendment to the Constitution (1898). A few pages of that work recited some of the legislative background of the Amendment, emphasizing the speech of Senator Howard. But Guthrie did not emphasize the speeches of Congressman Bingham, nor the part he played in the framing and adoption of the first section of the Fourteenth Amendment. Yet Congress- [332 U.S. 46 , 74]   man Bingham may, without extravagance, be called the Madison of the first section of the Fourteenth Amendment. In the Twining opinion the Court explicitly declined to give weight to the historical demonstration that the first section of the Amendment was intended to apply to the states the several protections of the Bill of Rights. It held that that question was 'no longer open' because of previous decisions of this Court which, however, had not appraised the historical evidence on that subject. 211 U. S. at page 98, 29 S.Ct. at page 19. The Court admitted that its action had resulted in giving 'much less effect to the 14th Amendment than some of the public men active in framing it' had intended it to have. 211 U.S. at page 96, 29 S.Ct. at page 18. With particular reference to the guarantee against compelled testimony, the Court stated that 'Much might be said in favor of the view that the privilege was guaranteed against state impairment as a privilege and immunity of national citizenship, but, as has been shown, the decisions of this court have foreclosed that view.' 211 U.S. at page 113, 29 S.Ct. at page 25. Thus the Court declined and again today declines, to appraise the relevant historical evidence of the intended scope of the first section of the Amendment. Instead it relied upon previous cases, none of which had analyzed the evidence showing that one purpose of those who framed, advocated, and adopted the Amendment had been to make the Bill of Rights applicable to the States. None of the cases relied upon by the Court today made such an analysis.

For this reason, I am attaching to this dissent, an appendix which contains a resume , by no means complete, of the Amendment's history. In my judgment that history conclusively demonstrates that the language of the first section of the Fourteenth Amendment, taken as a whole, was thought by those responsible for its submission to the people, and by those who opposed its submission, sufficiently explicit to guarantee that thereafter no state [332 U.S. 46 , 75]   could deprive its citizens of the privileges and protections of the Bill of Rights. Whether this Court ever will, or whether it now should, in the light of past decisions, give full effect to what the Amendment was intended to accomplish is not necessarily essential to a decision here. However that may be, our prior decisions, including Twining, do not prevent our carrying out that purpose, at least to the extent of making applicable to the states, not a mere part, as the Court has, but the full protection of the Fifth Amendment's provision against compelling evidence from an accused to convict him of crime. And I further contend that the 'natural law' formula which the Court uses to reach its conclusion in this case should be abandoned as an incongruous excrescence on our Constitution. I believe that formula to be itself a violation of our Constitution, in that it subtly conveys to courts, at the expense of legislatures, ultimate power over public policies in fields where no specific provision of the Constitution limits legislative power. And my belief seems to be in accord with the views expressed by this Court, at least for the firs two decad es after the Fourteenth Amendment was adopted.

In 1872, four years after the Amendment was adopted, the Slaughter- House cases came to this Court. 16 Wall. 36. The Court was not presented in that case with the evidence which showed that the special sponsors of the Amendment in the House and Senate had expressly explained one of its principal purposes to be to change the Constitution as construed in Barron v. Baltimore, supra, and make the Bill of Rights applicable to the states. [6](http://caselaw.lp.findlaw.com/scripts/getcase.pl?court=us&vol=332&invol=46" \l "f6) Nor [332 U.S. 46 , 76]   was there reason to do so. For the state law under consideration in the Slaughter-House cases was only challenged as one which authorized a monopoly, and the brief for the challenger properly conceded that there was 'no direct constitutional provision against a monopoly.'7 [332 U.S. 46 , 77]   The argument did not invoke any specific provision of the Bill of Rights, but urged that the state monopoly statute violated 'the natural right of a person' to do business and engage in his trade or vocation. On this basis, it was contended that 'bulwarks that have been erected around the investments of capital are impregnable against state legislation.' These natural law arguments, so suggestive of the premises on which the present due process formula rest, were flatly rejected by a majority of the Court in the Slaughter-House cases. What the Court did hold was that the privileges and immunities clause of the Fourteenth Amendment only protected from state invasion such rights as a person has because he is a citizen of the United States. The Court enumerated some, but refused to enumerate all of these national rights. The majority of the Court emphatically declined the invitation of counsel to hold that the Fourteenth Amendment subjected all state regulatory legislation to continuous censorship by this Court in order for it to determine whether it collided with this Court's opinion of 'natural' right and justice. In effect, the Slaughter-House cases rejected the very [332 U.S. 46 , 78]   natural justice formula the Court today embraces. The Court did not meet the question of whether the safeguards of the Bill of Rights were protected against state invasion by the Fourteenth Amendment. And it specifically did not say as the Court now does, that particular provisions of the Bill of Rights could be breached by states in part, but not breached in other respects, according to this Court's notions of 'civilized standards,' 'canons of decency,' and 'fundamental justice.'

Later, but prior to the Twining case, this Court decided that the following were not 'privileges or immunities' of national citizenship, so as to make them immune against state invasion: the Eighth Amendment's prohibition against cruel and unusual punishment, In re Kemmler, [136 U.S. 436](http://caselaw.lp.findlaw.com/cgi-bin/getcase.pl?court=us&vol=136&invol=436) ; the Seventh Amendment's guarantee of a jury trial in civil cases, Walker v. Sauvinet, [92 U.S. 90](http://caselaw.lp.findlaw.com/cgi-bin/getcase.pl?court=us&vol=92&invol=90) ; the Second Amendment's 'right of the people to keep and bear arms \* \* \*,' Presser v. Illinois, [116 U.S. 252, 584](http://caselaw.lp.findlaw.com/cgi-bin/getcase.pl?court=us&vol=116&invol=252#584) ; the Fifth and Sixth Amendments' requirements for indictment in capital or other infamous crimes, and for trial by jury in criminal prosecutions, Maxwell v. Dow, [176 U.S. 581](http://caselaw.lp.findlaw.com/cgi-bin/getcase.pl?court=us&vol=176&invol=581) . While it can be argued that these cases implied that no one of the provisions of the Bill of Rights was made applicable to the states as attributes of national citizenship, no one of them expressly so decided. In fact, the Court in Maxwell v. Dow, supra, 176 U.S. at pages 597, 598, 20 S.Ct. at page 455, concluded no more than that 'the privileges and immunities of citizens of the United States do not necessarily include all the rights protected by the first eight amendments to the Federal Constitution against the powers of the Federal government.' Cf. Palko v. Connecticut, [302 U.S. 319, 329](http://caselaw.lp.findlaw.com/cgi-bin/getcase.pl?navby=case&court=us&vol=302&invol=319#329) , 153.

After the Slaughter-House decision, the Court also said that states could, despite the 'due process' clause of the Fourteenth Amendment, take private property without just compensation, Davidson v. New Orleans, 96 U. S. [332 U.S. 46 , 79]   97, 105; Pumpelly v. Green Bay & Mississippi Canal Co., 13 Wall. 166, 176, 177; abridge th freedom o f assembly guaranteed by the First Amendment, United States v. Cruikshank, [92 U.S. 542](http://caselaw.lp.findlaw.com/cgi-bin/getcase.pl?court=us&vol=92&invol=542) ; see also Prudential Ins. Co. v. Cheek, [259 U.S. 530, 543](http://caselaw.lp.findlaw.com/cgi-bin/getcase.pl?court=us&vol=259&invol=530#543) , 522, 27 A.L.R. 27; Patterson v. Colorado, [205 U.S. 454, 10](http://caselaw.lp.findlaw.com/cgi-bin/getcase.pl?court=us&vol=205&invol=454#10) Ann.Cas. 689; cf. Gitlow v. New York, [268 U.S. 652, 666](http://caselaw.lp.findlaw.com/cgi-bin/getcase.pl?court=us&vol=268&invol=652#666) , 629 (freedom of speech); prosecute for crime by information rather than indictment, Hurtado v. People of California, [110 U.S. 516, 292](http://caselaw.lp.findlaw.com/cgi-bin/getcase.pl?court=us&vol=110&invol=516#292) ; regulate the price for storage of grain in warehouses and elevators, Munn v. Illinois, [94 U.S. 113](http://caselaw.lp.findlaw.com/cgi-bin/getcase.pl?court=us&vol=94&invol=113) . But this Court also held in a number of cases that colored people must, because of the Fourteenth Amendment, be accorded equal protection of the laws. See, e.g., Strauder v. West Virginia, [100 U.S. 303](http://caselaw.lp.findlaw.com/cgi-bin/getcase.pl?court=us&vol=100&invol=303) ; cf. Virginia v. Rives, [100 U.S. 313](http://caselaw.lp.findlaw.com/cgi-bin/getcase.pl?court=us&vol=100&invol=313) ; see also Yick Wo. v. Hopkins, [118 U.S. 356](http://caselaw.lp.findlaw.com/cgi-bin/getcase.pl?court=us&vol=118&invol=356) .

Thus, up to and for some years after 1873, when Munn v. Illinois, supra, was decided, this Court steadfastly declined to invalidate states' legislative regulation of property rights or business practices under the Fourteenth Amendment unless there were racial discrimination involved in the state law challenged. The first significant breach in this policy came in 1889, in Chicago, M. & St. P.R. Co. v. Minnesota, [134 U.S. 418, 702](http://caselaw.lp.findlaw.com/cgi-bin/getcase.pl?court=us&vol=134&invol=418#702) .8 A state's railroad rate regulatory statute was there stricken as violative of the due process clause of the Fourteenth Amendment. This was accomplished by reference to a due process formula which did not necessarily operate so as to protect the Bill of Rights' personal liberty safeguards, but which gave a new and hitherto undiscovered scope for the Court's use of the due process clause to protect property rights under natural law concepts. And in 1896, in Chicago, B. & Q.R. Co. v. Chicago, [166 U.S. 226](http://caselaw.lp.findlaw.com/cgi-bin/getcase.pl?court=us&vol=166&invol=226) , [332 U.S. 46 , 80]   this Court, in effect, overruled Davidson v. New Orleans, supra, by holding, under the new due process-natural law formula, that the Fourteenth Amendment forbade a state from taking private property for public use without payment of just compensation. [9](http://caselaw.lp.findlaw.com/scripts/getcase.pl?court=us&vol=332&invol=46" \l "f9)

Following the pattern of the new doctrine formalized in the foregoing decisions, the Court in 1896 applied the due process clause to strike down a state statute which had forbidden certain types of contracts. Allgeyer v. Louisiana, [165 U.S. 578](http://caselaw.lp.findlaw.com/cgi-bin/getcase.pl?court=us&vol=165&invol=578) Cf. Hoope ston Canning Co. v. Cullen, [318 U.S. 313](http://caselaw.lp.findlaw.com/cgi-bin/getcase.pl?navby=case&court=us&vol=318&invol=313) , 316, 318, 319, 604, 605, 606, 145 A.L.R. 1113. In doing so, it substantially adopted the rejected argument of counsel in the Slaughter-House cases, that the Fourteenth Amendment guarantees the liberty of all persons under 'natural law' to engage in their chosen business or vocation. In the Allgeyer opinion, 165 U.S. at page 589, 17 S.Ct. at page 431, the Court quoted with approval the concurring opinion of Mr. Justice Bradley in a second Slaughter-House case; Butchers' Unions Co. v. Crescent City Co ., [111 U.S. 746, 762](http://caselaw.lp.findlaw.com/cgi-bin/getcase.pl?court=us&vol=111&invol=746#762) , 764, 765, 656, 657, 658, which closely fol- [332 U.S. 46 , 81]   lowed one phase of the argument of his dissent in the original Slaughter- House cases-not that phase which argued that the Bill of Rights was applicable to the States. And in 1905, three years before the Twining case, Lochner v. New York, [198 U.S. 45, 3](http://caselaw.lp.findlaw.com/cgi-bin/getcase.pl?court=us&vol=198&invol=45#3) Ann.Cas. 1133, followed the argument used in Allgeyer to hold that the due process clause was violated by a state statute which limited the employment of bakery workers to 60 hours per week and 10 hours per day.

The foregoing constitutional doctrine, judicially created and adopted by expanding the previously accepted meaning of 'due process,' marked a complete departure from the Slaughter-House philosophy of judicial tolerance of state regulation of business activities. Conversely, the new formula contracted the effectiveness of the Fourteenth Amendment as a protection from state infringement of individual liberties enumerated in the Bill of Rights. Thus the Court's second-thought interpretation of the Amendment was an about face from the Slaughter-House interpretation and represented a failure to carry out the avowed purpose of the Amendment's sponsors. [10](http://caselaw.lp.findlaw.com/scripts/getcase.pl?court=us&vol=332&invol=46" \l "f10) This reversal is dramatized by the fact that the Hurtado case, which had rejected the due process clause as an instru- [332 U.S. 46 , 82]   ment for preserving Bill of Rights liberties and privileges, was cited as authority for expanding the scope of that clause so as to permit this Court to invalidate all state regulatory legislation it believed to be contrary to 'fundamental' principles.

The Twining decision, rejecting the compelled testimony clause of the Fifth Amendment, and indeed rejecting all the Bill of Rights, is the end product of one phase of this philosophy. At the same time, that decision consolidated the power of the Court assumed in past cases by laying broader foundations for the Court to invalidate state and even federal regulatory legislation. For the Twining decision, giving separate consideration to 'due process' and 'privileges or immunities,' went all the way to say that the 'privileges or immunities' clause of the Fourteenth Amendment 'did not forbid the states to abridge the personal rights enumerated in the first eight Amendments \* \* \*.' Twining v. New Jersey, supra, 211 U.S. at page 99, 29 S.Ct. at page 19. And in order to be certain, so far as possible, to leave this Court wholly free to reject all the Bill of Rights as specific restraints upon state actions, the decision declared that even if this Court should decide that the due process clause forbids the states to infringe personal liberties guaranteed by the Bill of Rights, it would do so, not 'because those rights are enumerated in the first eight Amendments, but because they are of such a nature that they are included in the conception of due process of law.' [211 U.S. 78, 20](http://caselaw.lp.findlaw.com/cgi-bin/getcase.pl?court=us&vol=211&invol=78#20) .

At the same time that the Twining decision held that the states need not conform to the specific provisions of the Bill of Rights, it consolidated the power that the Court had assumed under the due process clause by laying even broader foundations for the Court to invalidate state and even federal regulatory legislation. For under the Twining formula, which includes nonregard for the first eight amendments, what are 'fundamental rights' and in accord with 'canons of decency,' as the Court [332 U.S. 46 , 83]   said in Twining, and today reaffirms, is to be independently 'ascertained from time to time by judicial action \* \* \*.' 211 U.S. at page 101, 29 S.Ct. at page 20; 'what is due process of law depends on circumstances.' Moyer v. Peabody, [212 U.S. 78, 84](http://caselaw.lp.findlaw.com/cgi-bin/getcase.pl?court=us&vol=212&invol=78#84) , 236. Thus the power of legislatures became what this Court would declare it to be at a particular time independently of the specific guarantees of the Bill of Rights such as the right to freedom of speech, religion and assembly, the right to just compensation for property taken for a public purpose, the right to jury trial or the right to be secure against unreasonable searches and seizures. Neither the contraction of the Bill of Rights safeguards11 nor the invalidation of regulatory laws12 by this Court's appraisal of 'circumstances' would readily be classified as the most satisfactory contribution of this Court to the nation. In 1912, four years after the Twining case was decided, a book written by Mr. Charles Wallace Collins gave the history of this Court's interpretation and application of the Fourteenth Amendment up to that time. It is not necessary for one fully to agree with all he said in [332 U.S. 46 , 84]   order to appreciate the sentiment of the following comment concerning the disappointments caused by this Court's interpretation of the Amendment. ' \* \* \* It was aimed at restraining and checking the powers of wealth and privilege. It was to be a charter of liberty for human rights against property rights. The transformation has been rapid and complete. It operates today to protect the rights of property to the detriment of the rights of man. It has become the Magna Charta of accumulated and organized capital.' Collins, The Fourteenth Amendment and the States, (1912) 137, 138. That this feeling was shared, at least in part, by members of this Court is revealed by the vigorous dissents that have been written in almost every case where the Twining and Hurtado doctrines have been applied to invalidate state regulatory laws. [13](http://caselaw.lp.findlaw.com/scripts/getcase.pl?court=us&vol=332&invol=46" \l "f13)

Later decisions of this Court have completely undermined the phase of the Twining doctrine which broadly precluded reliance on the Bill of Rights to determine what is and what is not a 'fundamental' right. Later cases have also made the Hurtado case an inadequate support for this phase of the Twining formula. For despite Hurtado and Twining, this Court has now held that the Fourteenth Amendment protects from state invasion the following 'fundamental' rights safeguarded by the Bill of Rights: right to counsel in criminal cases, Powell v. Alabama, [287 U.S. 45, 67](http://caselaw.lp.findlaw.com/cgi-bin/getcase.pl?court=us&vol=287&invol=45#67) , 63, 84 A.L.R. 527, limiting the Hurtado case; see also Betts v. Brady, [316 U.S. 455](http://caselaw.lp.findlaw.com/cgi-bin/getcase.pl?navby=case&court=us&vol=316&invol=455) , and De Meerleer v. Michigan, [329 U.S. 663](http://caselaw.lp.findlaw.com/cgi-bin/getcase.pl?navby=case&court=us&vol=329&invol=663) ; freedom of assembly, De Jonge v. Oregon, [299 U.S. 353, 364](http://caselaw.lp.findlaw.com/cgi-bin/getcase.pl?court=us&vol=299&invol=353#364) , 259; at the very least, certain types of cruel and unusual punishment and former jeopardy, State of Louisiana ex rel. Francis v. Resweber, [329 U.S. 459](http://caselaw.lp.findlaw.com/cgi-bin/getcase.pl?navby=case&court=us&vol=329&invol=459) ; the right of an accused in a criminal case to be in- [332 U.S. 46 , 85]   formed of the charge against him, see Snyder v. Massachusetts, [291 U.S. 97, 105](http://caselaw.lp.findlaw.com/cgi-bin/getcase.pl?court=us&vol=291&invol=97#105) , 332, 90 A.L.R. 575; the right to receive just compensation on account of taking private property for public use, Chicago, B. & Q.R. Co. v. Chicago, [166 U.S. 226](http://caselaw.lp.findlaw.com/cgi-bin/getcase.pl?court=us&vol=166&invol=226) . And the Court has now through the Fourteenth Amendment literally and emphatically applied the First Amendment to the States in its very terms. Everson v. Board of Education, [330 U.S. 1](http://caselaw.lp.findlaw.com/cgi-bin/getcase.pl?navby=case&court=us&vol=330&invol=1) ; West Virginia State Board of Education v. Barnette, [319 U.S. 624, 639](http://caselaw.lp.findlaw.com/cgi-bin/getcase.pl?navby=case&court=us&vol=319&invol=624#639) , 1186, 147 A.L.R. 674; Bridges v. California, [314 U.S. 252, 268](http://caselaw.lp.findlaw.com/cgi-bin/getcase.pl?navby=case&court=us&vol=314&invol=252#268) , 196, 159 A.L.R. 1346.

In Palko v. Connecticut, supra, a case which involved former jeopardy only, this Court re-examined the path it had traveled in interpreting the Fourteenth Amendment since the Twining opinion was written. In Twining the Court had declared that none of the rights enumerated in the first eight amendments were protected against state invasion because they were incorporated in the Bill of Rights. But the Court in Palko, supra, 302 U.S. at page 323, 58 S.Ct. at pages 150, 151, answered a contention that all eight applied with the more guarded statement, similar to that the Court had used in Maxwell v. Dow, supra, 176 U.S. at page 597, 20 S.Ct. at page 455, that 'there is no such general rule.' Implicit in this statement, and in the cases decided in the interim between Twining and Palko and since, is the understanding that some of the eight amendments do apply by their very terms. Thus the Court said in the Palko case that the Fourteenth Amendment may make it unlawful for a state to abridge by its statutes the 'freedom of speech which the First Amendment safeguards against encroachment by the Congress \* \* \* or the like freedom of the press \* \* \*or the free exercise of religion \* \* \*, or the right of peaceable assembly \* \* \* or the right of one accused of crime to the benefit of counsel \* \* \*. In these and other situations immunities that are valid as against the federal government by force of the specific pledges of particular amendments have been found to e implicit in the concept of ordered [332 U.S. 46 , 86]   liberty, and thus, through the Fourteenth Amendment, become valid as against the states.' 302 U.S. at pages 324, 325, 58 S.Ct. at pages 151, 152. The Court went on to describe the Amendments made applicable to the States as 'the privileges and immunities that have been taken over from the earlier articles of the Federal Bill of Rights and brought within the Fourteenth Amendment by a process of absorption.' 302 U. S. at page 326, 58 S.Ct. at page 152. In the Twining case fundamental liberties were things apart from the Bill of Rights. Now it appears that at least some of the provisions of the Bill of Rights in their very terms satisfy the Court as sound and meaningful expressions of fundamental liberty. If the Fifth Amendment's protection against self- incrimination be such an expression of fundamental liberty, I ask, and have not found a satisfactory answer, why the Court today should consider that it should be 'absorbed' in part but not in full? Cf. Warren, The New Liberty under the Fourteenth Amendment, 39 Harv.L.Rev. 431, 458-461 (1925). Nothing in the Palko opinion requires that when the Court decides that a Bill of Rights' provision is to be applied to the States, it is to be applied piecemeal. Nothing in the Palko opinion recommends that the Court apply part of an amendment's established meaning and discard that part which does not suit the current style of fundamentals.

The Court's opinion in Twining, and the dissent in that case, made it clear that the Court intended to leave the states wholly free to compel confessions, so far as the Federal Constitution is concerned. Twining v. New Jersey, supra, see particularly 211 U.S. at pages 111-114, 125, 126, 29 S.Ct. at pages 24-26, 30. Yet in a series of cases since Twining this Court has held that the Fourteenth Amendment does bar all American courts, state or federal, from convicting people of crime on coerced confessions. Chambers v. Florida, [309 U.S. 227](http://caselaw.lp.findlaw.com/cgi-bin/getcase.pl?navby=case&court=us&vol=309&invol=227) ; Ashcraft v. Tennessee, [322 U.S. 143](http://caselaw.lp.findlaw.com/cgi-bin/getcase.pl?navby=case&court=us&vol=322&invol=143) , 154, 155, 926, 927, and cases cited. Federal courts cannot do so because of the Fifth Amend- [332 U.S. 46 , 87]   ment. Bram v. United States, [168 U.S. 532, 542](http://caselaw.lp.findlaw.com/cgi-bin/getcase.pl?court=us&vol=168&invol=532#542) , 562, 563, 186, 194. And state courts cannot do so because the principles of the Fifth Amendment are made applicable to the States through the Fourteenth by one formula or another. And taking note of these cases, the Court is careful to point out in its decision today that coerced confessions violate the Federal Constitution if secured 'by fear of hurt, torture or exhaustion.' Nor can a state, according to today's decision, constitutionally compel an accused to testify against himself by 'any other type of coercion that falls within the scope of due process.' Thus the Court itself destroys or at least drastically curtails the very Twining decision it purports to reaffirm. It repudiates the foundation of that opinion, which presented much argument to show that compelling a man to testify against himself does not 'violate' a 'fundamental' right or privilege.

It seems rather plain to me why the Court today does not attempt to justify all of the broad Twining discussion. That opinion carries its own refutation on what may be called the factual issue the Court resolved. The opinion itself shows, without resort to the powerful argument in the dissent of Mr. Justice Harlan, that outside of Star Chamber practices and influences, the 'English-speaking' peoples have for centuries abhorred and feared the practice of compelling people to convict themselves of crime. I shall not attempt to narrate the reasons. They are well known and those interested can read them in both the majority and dissenting opinions in the Twining case, in Boyd v. United States, [116 U.S. 616](http://caselaw.lp.findlaw.com/cgi-bin/getcase.pl?court=us&vol=116&invol=616) , and in the cases cited in notes 8, 9, 10, and 11 of Ashcraft v. Tennessee, supra. Nor does the history of the practice of compellig testimon y in this country, relied on in the Twining opinion support the degraded rank which that opinion gave the Fifth Amendment's privilege against compulsory self-incrimination. I think the history there recited by the Court belies its conclusion. [332 U.S. 46 , 88]   The Court in Twining evidently was forced to resort for its degradation of the privilege to the fact that Governor Winthrop in trying Mrs. Ann Hutchison in 1637 was evidently 'not aware of any privilege against self-incrimination or conscious of any duty to respect it.' 211 U. S. at pages 103, 104, 29 S.Ct. at page 21. Of course not. [14](http://caselaw.lp.findlaw.com/scripts/getcase.pl?court=us&vol=332&invol=46" \l "f14) Mrs. Hutchison was tried, if trial it can be called, for holding unorthodox religious views. [15](http://caselaw.lp.findlaw.com/scripts/getcase.pl?court=us&vol=332&invol=46" \l "f15) People with a consuming belief that their religious convictions must be forced on others rarely ever believe that the unorthodox have any rights which should or can be rightfully respected. As a result of her trial and compelled admissions, Mrs. Hutchison was found guilty of unorthodoxy and banished from Massachusetts. The lamentable experience of Mrs. Hutchison and others, contributed to the overwhelming sentiment that demanded adoption [332 U.S. 46 , 89]   of a Constitutional Bill of Rights. The founders of this Government wanted no more such 'trials' and punishments as Mrs. Hutchison had to undergo. They wanted to erect barriers that would bar legislators from passing laws that encroached on the domain of belief, and that would, among other things, strip courts and all public officers of a power to compel people to testify against themselves. See Pittman, supra at 789.

I cannot consider the Bill of Rights to be an outworn 18th Century 'strait jacket' as the Twining opinion did. Its provisions may be thought outdated abstractions by some. And it is true that they were designed to meet ancient evils. But they are the same kind of human evils that have emerged from century to century wherever excessive power is sought by the few at the expense of the many. In my judgment the people of no nation can lose their liberty so long as a Bill of Rights like ours survives and its basic purposes are conscientiously interpreted, enforced and respected so as to afford continuous protection against old, as well as new, devices and practices which might thwart those purposes. I fear to see the consequences of the Court's practice of substituting its own concepts of decency and fundamental justice for the language of the Bill of Rights as its point of departure in interpreting and enforcing that Bill of Rights. If the choice must be between the selective process of the Palk decision applying some of the Bill of Rights to the States, or the Twining rule applying none of them, I would choose the Palko selective process. But rather than accept either of these choices. I would follow what I believe was the original purpose of the Fourteenth Amendment-to extend to all the people of the nation the complete protection of the Bill of Rights. To hold that this Court can determine what, if any, provisions of the Bill of Rights will be enforced, and if so to what degree, is to frustrate the great design of a written Constitution. [332 U.S. 46 , 90]   Conceding the possibility that this Court is now wise enough to improve on the Bill of Rights by substituting natural law concepts for the Bill of Rights. I think the possibility is entirely too speculative to agree to take that course. I would therefore hold in this case that the full protection of the Fifth Amendment's proscription against compelled testimony must be afforded by California. This I would do because of reliance upon the original purpose of the Fourteenth Amendment.

It is an illusory apprehension that literal application of some or all of the provisions of the Bill of Rights to the States would unwisely increase the sum total of the powers of this Court to invalidate state legislation. The Federal Government has not been harmfully burdened by the requirement that enforcement of federal laws affecting civil liberty comform literally to the Bill of Rights. Who would advocate its repeal? It must be conceded, of course, that the natural-law-due-process formula, which the Court today reaffirms, has been interpreted to limit substantially this Court's power to prevent state violations of the individual civil liberties guaranteed by the Bill of Rights. 16 But this formula also has been used in the past and can be used in the future, to license this Court, in considering regulatory legislation, to roam at large in the broad expanses of policy an morals and to trespass, all too freely, on the legislative domain of the States as well as the Federal Government.

Since Marbury v. Madison, 1 Cranch 137, was decided, the practice has been firmly established for better or worse, that courts can strike down legislative enactments which violate the Constitution. This process, of course, involves interpretation, and since words can have many meanings, interpretation obviously may result in contraction or extension of the original purpose of a consti- [332 U.S. 46 , 91]   tutional provision thereby affecting policy. But to pass upon the constitutionality of statutes by looking to the particular standards enumerated in the Bill of Rights and other parts of the Constitution is one thing;17 to invalidate statutes because of application of 'natural law' deemed to be above and undefined by the Constitution is another. [18](http://caselaw.lp.findlaw.com/scripts/getcase.pl?court=us&vol=332&invol=46" \l "f18) 'In the one instance, courts proceeding within [332 U.S. 46 , 92]   clearly marked constitutional boundaries seek to execute policies written into the Constitution; in the other they roam at will in the limitless area of their own beliefs as to reasonableness and actually select policies, a responsibility which the Constitution entrusts to the legislative representatives of the people.' Federal Power Commission v. Natural Gas Pipeline Co., [315 U.S. 575](http://caselaw.lp.findlaw.com/cgi-bin/getcase.pl?navby=case&court=us&vol=315&invol=575) , 599, 601, n. 4, 749, 750.

Mr. Justice DOUGLAS joins in this opinion.