bility of the Bill of Rights.[17] It was not until 1887 that a litigant contended that, although the Bill of Rights had not limited the states, nonetheless, to the extent that they secured and recognized the fundamental rights of man, they were privileges and immunities of citizens of the United States and were now protected against state abridgment by the Fourteenth Amendment.[18] This case the Court decided on other grounds, but in a series of subsequent cases it confronted the argument and rejected it,[19] though over the dissent of the elder Justice Harlan, who argued that the Fourteenth Amendment in effect incorporated the Bill of Rights and made them effective restraints on the states.[20] Until 1947, this dissent made no headway,[21]

---

[17] Walker v. Sauvinet, 92 U.S. 90 (1876); United States v. Cruikshank, 92 U.S. 542 (1876); Hurtado v. California, 110 U.S. 516 (1884); Presser v. Illinois, 116 U.S. 252 (1886). In *Hurtado*, in which the Court held that indictment by information rather than by grand jury did not offend due process, the elder Justice Harlan entered a long dissent arguing that due process preserved the fundamental rules of procedural justice as they had existed in the past, but he made no reference to the possibility that the Fourteenth Amendment due process clause embodied the grand jury indictment guarantee of the Fifth Amendment.

[18] Spies v. Illinois, 123 U.S. 131 (1887).

[19] *In re* Kemmler, 136 U.S. 436 (1890); McElvaine v. Brush, 142 U.S. 155 (1891); O'Neil v. Vermont, 144 U.S. 323 (1892).

[20] In O'Neil v. Vermont, 144 U.S. 323, 370 (1892), Justice Harlan, with Justice Brewer concurring, argued "that since the adoption of the Fourteenth Amendment, no one of the fundamental rights of life, liberty or property, recognized and guaranteed by the Constitution of the United States, can be denied or abridged by a State in respect to any person within its jurisdiction. These rights are, principally, enumerated in the earlier Amendments of the Constitution." Justice Field took the same position. Id. at 337. Thus, he said: "While therefore, the ten Amendments, as limitations on power, and so far as they accomplish their purpose and find their fruition in such limitations, are applicable only to the Federal government and not to the States, yet, so far as they declare or recognize the rights of persons, they are rights belonging to them as citizens of the United States under the Constitution; and the Fourteenth Amendment, as to all such rights, places a limit upon state power by ordaining that no State shall make or enforce any law which shall abridge them." Id. at 363. Justice Harlan reasserted this view in Maxwell v. Dow, 176 U.S. 581, 605 (1900) (dissenting opinion), and in Twining v. New Jersey, 211 U.S. 78, 114 (1908) (dissenting opinion). Justice Field was no longer on the Court and Justice Brewer did not in either case join Justice Harlan as he had done in *O'Neil*.

[21] Cf. Palko v. Connecticut, 302 U.S. 319, 323 (1937), in which Justice Cardozo for the Court, including Justice Black, said: "We have said that in appellant's view the Fourteenth Amendment is to be taken as embodying the prohibitions of the Fifth. His thesis is even broader. Whatever would be a violation of the original bill of rights (Amendments I to VIII) if done by the Federal Government is now equally unlawful by force of the Fourteenth Amendment if done by a state. There is no such general rule." *See* Frankfurter, *Memorandum on 'Incorporation,' of the Bill of Rights Into the Due Process Clause of the Fourteenth Amendment*, 78 HARV. L. REV. 746 (1965). According to Justice Douglas' calculations, ten Justices had believed that the Fourteenth Amendment incorporated the Bill of Rights, but a majority of the Court at any one particular time had never been of that view. Gideon v. Wainwright, 372 U.S. 335, 345–47 (1963) (concurring opinion). *See also* Malloy v. Hogan, 378 U.S. 1, 4 n.2 (1964). It must be said, however, that many of these Justices were not consistent in asserting this view. Justice Goldberg probably should be added to the list. Pointer v. Texas, 380 U.S. 400, 410–14 (1965) (concurring opinion).