No. 17-1091

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IN THE SUPREME COURT OF
THE UNITED STATES

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Tyson TIMBS
Petitioner

v.

STATE OF INDIANA
Respondent

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BRIEF FOR PETITIONER

———————☆———————

Elijah Rowland & Matthew Seeley
Counsel of Record
Lake Oswego High School
Room 213
Lake Oswego, Oregon, 97034

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QUESTION PRESENTED:

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Whether the Eighth Amendment's Excessive Fines Clause should be incorporated through the Due Process Clause of the Fourteenth Amendment or the Privileges or Immunities Clause of the 14th Amendment?

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The Eighth Amendment's Excessive Fines Clause should be incorporated to the states under the Privileges or Immunities Clause of the Fourteenth Amendment. A textual analysis of the Fourteenth Amendment reveals that the Privileges or Immunities Clause restricts state governments from infringing upon substantive rights enumerated in the Bill of Rights, including the Excessive Fines clause of the Eighth Amendment. A historical analysis of the Fourteenth Amendment reveals that the Amendment intended to protect the rights of freedmen against invasion by state governments, incorporating the Bill of Rights to the states through both the Privileges or Immunities Clause and the Due Process Clause. The *Slaughterhouse Cases* have been interpreted to limit incorporation under the Privileges or Immunities Clause, but this interpretation, stemming from cases such as *Maxwell v. Dow*, is incorrect. The *Slaughterhouse Cases*, in fact, allow for incorporation under the Privileges or Immunities Clause. The Due Process Clause of the Fourteenth Amendment should not incorporate the Excessive Fines clause of the Eighth Amendment, because the Excessive Fines clause enumerates a substantive, not procedural, right. The idea of "substantive due process," is, in the words of Justice Clarence Thomas, "a legal fiction." *McDonald v. Chicago,* Ill., 130 U.S. 3020, 3062. The Privileges or Immunities Clause is the proper legal pathway to incorporating substantive rights.

–☆– ARGUMENT –☆–

I. THE TEXT AND INTENT OF THE 14TH AMENDMENT'S PRIVILEGES OR IMMUNITIES CLAUSE ALLOW FOR THE INCORPORATION OF THE BILL OF RIGHTS

The text of the second clause of the Fourteenth Amendment, § 1, "No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States," is phrased such that, setting aside any precedent and taking a strictly textual approach, it may have only one meaning: states have no power to infringe upon the "privileges or immunities" granted to US citizens. U.S. Const. amend. XIV, § 1. The phrase "No State shall" implies a limitation on state power to create law, just as Article 1 of the Constitution states that "No State shall ... pass any Bill of Attainder, ex post facto Law, or Law impairing the Obligation of Contracts." U.S. Const. art. I, § 10. If the Constitution in Article 1 places limitations on state legislation using "No State shall," the use of identical language in the Fourteenth Amendment must operate under the same principle. The incorporation of rights is, at its core, a question of whether or not the federal government has the power to limit state power to create law, specifically law that infringes upon the rights guaranteed by the Bill of Rights. Thus, from a textual standpoint, the question of whether the Privileges or Immunities Clause has the power to incorporate rights comes down to a simple distinction: can the protections of the Bill of Rights—specifically, in this case, can the Excessive Fines clause of the Eighth Amendment—be considered a "privilege or immunity of citizens of the United States"? If so, the text of the Privileges or Immunities Clause proves that the clause has the power to incorporate these protections, the Excessive Fines clause in particular, to the states.

How might we determine whether or not the Excessive Fines clause falls under the categorization of “privileges or immunities?” We begin to answer this question by examining the historical background of the phrase, “privileges or immunities,” in order to ascertain the intent behind its use and, thus, its meaning.

In the 1860’s, the United States experienced the bloodiest conflict ever fought on American soil: the Civil War. The war was “fought principally over the question of slavery.” *McDonald v. Chicago,* Ill., 130 U.S. 3020, 3059. After the war’s conclusion, the era of Reconstruction began, in which the Southern states, which had seceded from the Union at the beginning of the conflict, were allowed to rejoin the United States. At the same time, however, the United States Congress passed three Amendments to the Constitution -- the Thirteenth, Fourteenth, Fifteenth Amendments -- with the intention of protecting slaves, now freedmen, from persecution by state legislatures.

The Thirteenth Amendment, the first to be ratified, directly combatted the ideologies and institutions which led to the Civil War. It reads, “Neither slavery nor involuntary servitude, except as a punishment for crime whereof the party shall have been duly convicted, shall exist within the United States, or any place subject to their jurisdiction.” U.S. Const. amend. XIII, § 1. The Thirteenth Amendment resolved the core conflicts of the Civil War, unequivocally decreeing that slavery shall never exist in the United States ever again.

Yet a ban on slavery could not possibly account for all the myriad of inequalities facing Southern African-Americans. The Southern states, while limited from instituting the practice of slavery, continued to take actions to limit the rights and liberties of the now-freedmen. Relevant to the case at hand, many Southern states used excessive fines to prevent freedmen from attaining the rights of other American citizens: “Economic sanctions were a common feature of the Black Codes, with southern States using fines and forfeitures to subjugate African Americans and protect the status quo.” Brief for Petitioner, Timbs 19-20. The *Dred Scott* decision of 1857 was also still relevant, which declared that African-Americans could not be citizens of the United States. *Scott v. Sandford*, 60 U.S. 393, 394 (“A free negro of the African race, whose ancestors were brought to this country and sold as slaves, is not a ‘citizen’ within the meaning of the Constitution of the United States”). Clearly, a new legal framework was necessary that would protect the rights of the freedmen against the injustices they faced at the hands of the states. This legal framework would come in the form of the Fourteenth Amendment.

In 1866, the Joint Committee on Reconstruction, in determining if and under what circumstance Confederate states should be re-admitted into the Union, advised for the passage of the 14th Amendment in the wake of the substantial civil rights abuses of the states against African-Americans. The Committee found that “adequate security for future peace and safety. . . can only be found in such changes of the organic law as shall determine the *civil rights and privileges* of *all citizens in all parts of the republic*” S.Rep. No. 112, 39th Cong., 1st Sess., p. 15 (1866) (emphasis added). Justice Thomas, in his concurrence to *Chicago v. McDonald,* contextualizes this statement, writing that “At the time of Reconstruction, the terms ‘privileges’ and ‘immunities’ had an

established meaning as synonyms for ‘rights,’ stemming from pre-colonial English law all the way up through pre-Civil War case law. *Id.* 3063. Therefore, the Committee on Reconstruction felt that the rights of all US citizens (which would, of course, include the freedmen under the new Fourteenth Amendment) must be protected from state infringement to ensure “future peace and safety.”

It is important to note that at this time, the 1833 case *Barron v. Baltimore* remained an important source of precedent, a case that unequivocally posited that “The constitution was ordained and established… for their own government”—that is, the federal government—“and not for the government of the individual states.” *Barron Tiernan v. Mayor of Baltimore*, 32 U.S. 234, 247. In 1866, however, the primary author of the Fourteenth Amendment, John Bingham, laid out a clear vision for a constitutional amendment that would supersede the ruling of *Barron*, an amendment which would serve as, "an express grant of power in Congress to enforce by penal enactment these great canons of the supreme law, securing to all the citizens in every State all the privileges and immunities of citizens…" 39th Cong. Globe 1089-1090 (1866). Further, Senator Jacob Howard, who submitted the final draft of the Fourteenth Amendment, defined its "great object [as to] restrain the power of the States and compel them at all times to respect these great fundamental guarantees." 39th Cong. Globe 2766. A power which the States abused, which historical evidence proves, was the ability to charge “excessive fines;” thus, protecting United States citizens from these federally illegal punishments must have been included in the minds of the drafters of the Fourteenth Amendment.

The public of the Reconstruction Era understood the synonymity of “privileges,” “immunities,” and “rights.” *See* N. Webster, An American Dictionary of the English Language 1140 (defining "right" as "[p]rivilege or immunity granted by authority").
So what type of rights does the phrase, “priviliges or immunities,” apply to, and does this include the Excessive Fines clause? To understand this point, it will be helpful to consider the only other instance in which the phrase is used in the Constitution: Article IV. This clause states that “The Citizens of each State shall be entitled to all Privileges and Immunities of Citizens in *the several States*.” U.S. Const. art. 4, § 2, cl. 1 (emphasis added). Note that § 1 of the Fourteenth Amendment instead protects “the privileges and immunities of citizens of *the United States*.” Id. (emphasis added). The distinction between privileges or immunities of citizens of the *several states* and those of citizens of the *United States* was important. *See* 39th Cong. Globe 1088 (1866) and *Id.* 3072 (“Of particular importance, the first draft [unratified] granted Congress the "power to make all laws . . . necessary and proper to secure" the "citizens of each State all privileges and immunities of *citizens in the several States*," rather than… the privileges or immunities of *citizens of the United States.”*) (emphasis added). The distinction was understood by the public of the Antebellum Era. *See* Lash, “The Origins of the Privileges or Immunities Clause, Part I: Privileges or Immunities as an Antebellum Term of Art” (“as of Reconstruction, Article IV’s… ‘privileges and immunities of citizens in the several states’ was broadly understood as providing sojourning citizens equal access to a limited set of state-conferred rights. The ‘privileges and immunities of citizens of the United States,’ on the other hand, was an accepted term of art which referred to those rights conferred upon United States citizens by the Constitution itself.”) We can conclude, then, that the rights conferred by the Fourteenth Amendment’s Privileges or Immunities Clause are

those that are enumerated in the Constitution. This, too, aligns with Bingham's statements before the Congress on the purpose of the Fourteenth Amendment: to "secur[e] to all the citizens in every State all the privileges and immunities of citizens" of the United States, those granted by the Constitution. *Id*. 1089-1090.Therefore, the intent of the Fourteenth Amendment was to provide the federal government the power to restrain the states from passing laws that would abridge the protections of United States citizens enumerated in the Constitution; i.e., the protections of the Bill of Rights, and more specifically, the protection against "excessive fines."

II. THE SLAUGHTERHOUSE CASES MISAPPLY *CORFIELD V. CORYELL* AND FAIL TO RECOGNIZE THAT THE BILL OF RIGHTS ARE PRIVILEGES GRANTED BY UNITED STATES CITIZENSHIP

We cannot, with a clear conscience, ignore the elephant in the room when it comes to the Privileges or Immunities Clause: the *Slaughterhouse Cases* of 1873. This particular ruling seizes on a turn of phrase in Clause 1 of § 1 of the Fourteenth Amendment, which states that that "All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States *and of the State wherein they reside*." *Id*. § 1 (emphasis added). The ruling argues that "the distinction between citizenship of the United States and citizenship of a State is clearly recognized and established". *Slaughterhouse Cases*, 83 U.S. 36, 73. Since the Privileges or Immunities Clause protects those rights of "citizens of the United States," the clause only limits State power over federal rights, rather than rights under the jurisdiction of the States. This remains in accordance with the antebellum understanding of the clause.

The *Slaughterhouse* ruling then, however, attempts to define which rights are federal and which are protected by the States, and it is in this line of reasoning which the ruling goes awry. *Slaughterhouse* quotes the 1823 case of *Corfield v. Coryell*, which stated that "the privileges and immunities of citizens of the several States"—that is, rights conferred and protected by the States, in keeping with the antebellum understanding of the phrase, "several states"— "[are] those privileges and immunities which are fundamental; which belong of right to the citizens of all free governments, and which have at all times been enjoyed by citizens of the several States which compose this Union;" *Corfield v. Coryell*, 4 Wash C. C. 371. *Slaughterhouse* consequently argues that "The description, when taken to include others not named, but which are of the same general character, embraces nearly every civil right for the establishment and protection of which organized government is instituted," a conclusion which places an enormous category of rights, including the Bill of Rights, under State and not federal jurisdiction, rendering the Privileges or Immunities Clause inapplicable to those rights. *Slaughterhouse Cases*, 83 U.S. 36, 76.

This cannot possibly be taken as an accurate reading of *Corfield*. The Anti-Federalists, in their calls for a Bill of Rights, argued that without an enumeration of certain fundamental rights, the federal government would become oppressive. Can we, with any sort of confidence, then say that the rights of the first eight amendments "belong of right to the citizens of all free governments?" *Id.* 76. Can we, with any sort of confidence, argue that the Bill of Rights "embraces nearly every civil right for the establishment and protection of which organized government is instituted?" *Id.* 76.

Clearly, we cannot, as these rights were added to the Constitution *after* its drafting. If they were fundamental rights, those which *Corfield* and *Slaughterhouse* place under State protection, why would they need to be included in a federal Constitution? The Bill of Rights does not prescribe rights presumed to be "privileges and immunities of citizens of the several States," they prescribe rights presumed to be "privileges and immunities of citizens of the United States," and thus are protected from State infringement by the Fourteenth Amendment.

The Constitution enumerates rights, specifically the Bill of Rights, that are fundamental to our identity as American citizens. If these were evident as rights of "citizens of all free governments," the Bill of Rights would not have been necessary. Justice Thomas, in his concurrence in *Chicago v. McDonald*, extends this idea, noting that, "*Corfield* listed the 'elective franchise' as one of the privileges and immunities of 'citizens of the several states,' yet Congress and the States still found it necessary to adopt the Fifteenth Amendment—which protects '[t]he right of citizens of the United States to vote'—two years after the Fourteenth Amendment's passage." *Id.* 3085. Clearly, the protections enumerated in the Constitution are rights of United States citizens, rather than rights retained under state citizenship. The need to protect these rights is evident in the passage of the Fourteenth Amendment, which was specifically tailored to exert federal authority over the protection rights that fall under its jurisdiction, limiting the power of the States to actively infringe upon the rights of United States citizens.

So, when *Slaughterhouse* asks, "Was it the purpose of the fourteenth amendment, by the simple declaration that no State should make or enforce any law which shall abridge the privileges and immunities of citizens of the United States, to transfer the security and protection of all the civil rights which we have mentioned, from the States to the Federal government," the answer is an unequivocal yes, as Bingham stated when presenting the Amendment to Congress. *Id*. 77. *See* 39th Cong. Globe 1088 (1866) ("to arm the Congress of the United States, by the consent of the people of the United States, with the power to enforce the bill of rights as it stands in the Constitution today"). When *Slaughterhouse* bemoans the idea that the Fourteenth Amendment "radically changes the whole theory of the relations of the State and Federal governments to each other and of both these governments to the people," it omits the fact that to protect the oppressed freedmen of the South, such a radical change was entirely necessary; it would be near-idiotic to fight a bloody Civil War to free the slaves from bondage, then refuse to create laws to protect those newly freed slaves under a fear of the changes being "too radical." *Id.* 78.

We conclude that Slaughterhouse's main argument—that the enumerated rights of the first eight amendments are "fundamental" and "belong of right to the citizens of all free governments," fall under State protection, and as such are not "privileges or immunities of Citizens of the United States"—is fundamentally flawed and should be overturned. *Id.* 77.

III. SLAUGHTERHOUSE DOES NOT DISALLOW INCORPORATION OF THE BILL OF RIGHTS THROUGH PRIVILEGES OR IMMUNITIES

The *Slaughterhouse Cases* do, however, note that such a limited interpretation of the Privileges or Immunities Clause does not exclude all rights from protection under the clause, and "venture to suggest some which owe their existence to the Federal government, its national character, its Constitution, or its laws." *Id.* 79. The ruling then includes a list of "privilige[s]," noting that "The right to peaceably assemble and petition for redress of grievances, the privilege of the writ of habeas corpus, are rights of the citizen guaranteed by the Federal Constitution," and that "One of these privileges is conferred by the very article under consideration. It is that a citizen of the United States can, of his own volition, become a citizen of any State of the Union by a *bona fide* residence therein, with the same rights as other citizens of that State." *Id.* 79. Thus, the *Slaughterhouse Cases* allow for the possibility of incorporation under the Privileges or Immunities Clause. The ruling even goes as far as to list the rights to peaceably assemble, to petition, and habeas corpus as federal rights that could be considered Privileges or Immunities and incorporated under the Fourteenth Amendment. This is in line with the idea that the Bill of Rights, in some part, expresses rights that "owe their existence to the Federal Constitution," and thus fall under federal jurisdiction.

The idea that *Slaughterhouse* places direct limits on the incorporation of rights under the Privileges or Immunities Clause is, in fact, false. This argument only came into being in 1900, in the case of *Maxwell v. Dow*. In a deceptively simple but consequential remark, the ruling in *Maxwell* states that "a right such as is claimed [in the case in question] was not mentioned" in the *Slaughterhouse* list mentioned above, "and we may suppose it was regarded as pertaining to the State, and not covered by the amendment." *Maxwell v. Dow*. 176 U.S. 581, 591. The ruling argues that the list of rights enumerated in *Slaughterhouse* as potential privileges or immunities protected by the Fourteenth Amendment is an "exhaustive" list; that it catalogs *all* rights that could potentially be enforced under the Privileges or Immunities Clause.

This, in all respects, is completely illogical.The list of rights in the *Slaughterhouse* ruling was never intended to be exhaustive; rather, it was intended to illustrate the type of rights that could fall under the umbrella of Privileges or Immunities. This intent is evident from the wording of the *Slaughterhouse* ruling itself, which states, "we venture to suggest some [privileges and immunities] which owe their existence to the Federal government, its national character, its Constitution, or its laws." *Id.* 79. The use of the words "venture," "suggest," and "some" paint a clear picture of the ruling's intent. The list contains "sugges[tions]" as to rights that could fall under the "privileges or immunities" definition. The list does not contain all such rights, it contains "some" of them. The ruling does not enumerate such rights, making the list a definitive one, it "ventures to suggest" them, a more restrained phrasing that emphasizes the *illustrative* nature of the list.

So, in fact, the *Slaughterhouse Cases* do not forbid the incorporation of the Bill of Rights under the Privileges or Immunities Clause of the Fourteenth Amendment. By including three Bill of Rights protections in its illustrative list of privileges or immunities the *Slaughterhouse Cases* seem to encourage the idea of incorporating some, if not all, of

the Bill of Rights. The text and the historical intent of the Fourteenth Amendment complete this line of reasoning, leading to the conclusion that the Privileges or Immunities Clause has the authority to incorporate the Bill of Rights, and thus, the Excessive Fines Clause of the Eighth Amendment.

IV. SINCE THE EXCESSIVE FINES CLAUSE IS A SUBSTANTIVE BILL OF RIGHTS PROTECTION, IT IS INCORPORATED AS A PRIVILEGE OR IMMUNITY OF UNITED STATES CITIZENS; DUE PROCESS DOES NOT APPLY TO THIS CASE AND THE PRECEDENT OF SUBSTANTIVE DUE PROCESS IS NOT BINDING

Having proven that the Privileges or Immunities Clause of the Fourteenth Amendment has the authority to incorporate enumerated federal rights, which includes the Excessive Fines Clause of the Eighth Amendment, our focus now turns to the Due Process Clause of the Fourteenth Amendment, which reads, “nor shall any person be deprived of life, liberty, or property without due process of law.” U.S. Const. amend. XIV, § 1. Ever since *Maxwell*, the incorporation of the Bill of Rights has been left to the Due Process Clause. For some rights, this makes sense; for example, the Fifth Amendment’s Takings Clause, which reads, “nor shall private property be taken for public use, without just compensation,” establishes a legal procedure by which a person may be “deprived of ... property.” U.S. Const. amend. V, § 1. *Id*. § 1. Thus, the Due Process Clause applies in this case, and restricts the ability of a State to deprive any person of private property without following the necessary procedure. Rights such as the Takings Clause, which limit governmental power by establishing unavoidable legal procedures that the federal government must follow, are known as procedural rights, and undoubtedly should be incorporated under the Due Process Clause.

We have established, however, that the Privileges or Immunities Clause also has the power to incorporate Bill of Rights protections to the states. Why, then, should it be said that the Eighth Amendment protection against “excessive fines” should be incorporated under the Due Process Clause rather than Privileges or Immunities Clause?

In fact, why should any substantive right be incorporated under the Due Process Clause?

The federal government cannot charge excessive fines as a punishment for a federal crime; the Excessive Fines Clause of the 8th Amendment forbids it. Similarly, there is no admissible process by which the federal government may impose excessive fines as punishment. Note the important difference between this reasoning and the reasoning for applying the Due Process Clause to the Takings Clause of the Fifth Amendment: the Takings Clause establishes an admissible process for taking away private property, and thus allows for “due process of law” before taking action. But if there is no admissible process for a right to be taken away, how could the Due Process Clause possibly apply to the incorporation of the Excessive Fines clause?

The Due Process Clause uses the word “without” to describe the need for due process, but notice that the verb at the beginning of the clause, “be deprived,” is never negated. The Due Process Clause only applies to rights that *can* be taken away, rights that *can* “be deprived,” as long as due process of law is followed. “Without” the inclusion of the

legal procedure, the right cannot be deprived, but *with* the inclusion of due process, the right can. Textually, the construction of the due process clause limits its applicability to those rights which contain legal processes that allow for their deprivation.

Substantive rights, of course, do not include legal processes that allow for their deprivation, and thus cannot be considered under the jurisdiction of the Due Process Clause at all. Where do they fall, in terms of jurisdiction? Naturally, under the Privileges or Immunities Clause, which makes no distinction as to the necessity of an admissible legal process for a right to be abridged. The "privileges and immunities of citizens of the United States," including the Excessive Fines clause of the Eighth Amendment, cannot be abridged at all by the federal government, and, via the Privileges and Immunities Clause, are also immune to abridgement by state law.

Ever since *Gitlow v. New York*, which incorporated the First Amendment right to freedom of speech under the Due Process Clause, the Supreme Court has used "substantive due process" to incorporate substantive rights (most recently in *Chicago v. McDonald,* which incorporated the Second Amendment right to bear arms under the Due Process Clause). We acknowledge that there is a large body of common-law precedent to support the idea that this "substantive due process" argument should be used to incorporate the excessive fines clause of the Eighth Amendment, as well, in keeping with the principle of *stare decisis*.

But, as Justice Thomas writes in his concurrence to *Chicago v. McDonald*, "*stare decisis* is only an 'adjunct' of our duty as judges to decide by our best lights what the Constitution means" *McDonald v. Chicago*, Ill., 130 U.S. 3063. Taking a step back, the format and the text of the Fourteenth Amendment suggests a meaning far different from that established by precedent: the Due Process Clause has the power to incorporate *procedural* Bill of Rights protections, while the Privileges or Immunities Clause has the power to incorporate *substantive* Bill of Rights protections. Nowhere in the Constitution exists the idea of "substantive due process," and thus, we declare it, as Justice Thomas did, "a legal fiction." *McDonald v. Chicago*, Ill., 130 U.S. 3062.

Therefore, the Eighth Amendment protection against "excessive fines" falls squarely under the purview of the Privileges or Immunities Clause, and is incorporated to the states under that provision. The Due Process Clause is in no way applicable.

–☆– CONCLUSION –☆–

In conclusion, the Excessive Fines clause of the Eighth Amendment should be incorporated to the states under the Privileges or Immunities Clause of the Fourteenth Amendment. The text of the Fourteenth Amendment, coupled with the historical context of its passage, make it clear that the Privileges or Immunities Clause incorporates substantive federal rights enumerated in the Bill or Rights, a category which includes the Eighth Amendment's Excessive Fines clause. The *Slaughterhouse Cases* are incorrect in their interpretation that *Corfield v. Coryell* places almost all civil rights under the jurisdiction of the state governments. However, the *Slaughterhouse Cases* do not disallow the incorporation of the Bill of Rights under the Privileges or Immunities Clause; this idea is posited in *Maxwell v. Dow*, a 1900 case that ruled, incorrectly, that a list of

potential “privileges or immunities” in the *Slaughterhouse* ruling was exhaustive. Clearly, the list in question is an illustrative list, and thus the Privileges or Immunities Clause may still be used to incorporate the Bill of Rights. The Due Process Clause would be an incorrect provision through which to incorporate the Excessive Fines clause, as this clause protects a substantive right, not a procedural one; the text of the Due Process Clause restricts its power of incorporation to procedural rights. The precedent of substantive due process, used since *Gitlow v. New York* to incorporate substantive rights, is not based in any textual provision of the Constitution, and thus should be considered, in the words of Justice Thomas, a “legal fiction.” Thus, the Privileges or Immunities Clause is the section of the Fourteenth Amendment that incorporates the Excessive Fines clause of the Eighth Amendment.