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CONSTITUTIONAL LAW - PRIVILEGES AND IMMUNITIES OF FEDERAL CITIZENSHIP - DISCRIMINATORY TAX ON OUT-OF-STATE BANK DEPOSITS - COLGATE v. HARVEY OVERRULED

C. Eugene Gressman
University of Michigan Law School

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CONSTITUTIONAL LAW — PRIVILEGES AND IMMUNITIES OF FEDERAL CITIZENSHIP — DISCRIMINATORY TAX ON OUT-OF-STATE BANK DEPOSITS — COLGATE v. HARVEY OVERRULED — A Kentucky statute [1] imposed on its citizens an annual ad valorem tax on their bank deposits outside the state at the rate of fifty cents per $100 and at the same time imposed on their bank deposits within the state a similar tax at the rate of ten cents per $100. Decedent, a resident and citizen of Kentucky, died in 1929. On several prior tax assessment dates, he had large funds on deposit in New York banks which he failed to report for taxation purposes. The state brought suit against the executor to recover the tax, interest, and penalties. The Kentucky Court of Appeals overruled the executor's contentions that the classification was void under the due process or equal protection clauses and that it violated the privileges or immunities of national citizenship.[2] On appeal to the United States Supreme Court, *held*, that the classification was reasonable due to the difficulty and expense of collecting the tax on out-of-state deposits and that no privilege or immunity of national citizenship was violated. *Colgate v. Harvey* [3] was specifically overruled, it being held that the right to carry out an incident to a trade, business, or calling, such as deposit of money in banks, was not a privilege of national citizenship. Justices Roberts and McReynolds dissented. *Madden v. Kentucky*, (U. S. 1940) 60 S. Ct. 406.

The eighty words contained in the first section of the Fourteenth Amendment are among the most significant ever written in American history.[4] Composed in a post-bellum period of idealism, retribution, and bitter party battles, these words had a meaning in 1868 far different from that ascribed to them today.[5] The main purpose of the framers was to give Congress the power to enforce all civil liberties, especially those enumerated in the first eight amendments.[6] Their basic theory ran as follows: (1) national citizenship was synony-

[1] Ky. Stat. Ann. (Carroll, 1930), §§ 4019, 4019a-1, 4019a-10.

[2] Commonwealth v. Madden's Exr., 265 Ky. 684, 97 S. W. (2d) 561 (1936), noted in 26 KY. L. REV. 71 (1937) and on another point in 31 ILL. L. REV. 825 (1937); Madden's Exr. v. Commonwealth, 277 Ky. 343, 126 S. W. (2d) 463 (1939).

[3] 296 U. S. 404, 56 S. Ct. 252 (1935), noted in 34 MICH. L. REV. 1034 (1936).

[4] "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. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

[5] The second, third, and fourth sections of the amendment were passed mainly to punish the South. One of the most potent factors leading to the adoption of the amendment as a whole was the desire of the Republican Party to firmly establish and maintain control of the government by centralizing the powers in the first section in the federal government. COLLINS, THE FOURTEENTH AMENDMENT AND THE STATES 7-20 (1912).

[6] Rep. Bingham of Ohio, the recognized author of the first section, and other proponents of the amendment constantly reiterated this purpose in the congressional debates. Bingham, in CONG. GLOBE, 39th Cong., 1st sess., part 2, pp. 1090 ff. (1866);

mous with state citizenship; [7] (2) the states had always been bound to respect the privileges of national citizenship, among which were the fundamental rights of life, liberty, and property; [8] (3) the states through legislation often had interfered with these privileges; [9] (4) the federal government had no effective power to remedy such violations; (5) therefore, the Constitution must be amended to give it this power. This, then, was the reasoning behind the insertion of the privileges and immunities clause.[10] The due process clause was inserted to supplement the privileges and immunities clause with procedural safeguards and to prevent any possible loophole for the states because of doubts as to the exact status of the negro.[11] But these well-laid plans floundered on the rocks of judicial construction in the *Slaughterhouse Cases*.[12] A slim majority, indulging in a "parade of the imaginary horribles" that would follow the granting of so much power to the federal government,[13] drew a sharp distinction between fed-

Howard, ibid., part 3, pp. 2765-2766. See also FLACK, THE ADOPTION OF THE FOURTEENTH AMENDMENT 55-97 (1908); Boudin, "Truth and Fiction About the Fourteenth Amendment," 16 N. Y. UNIV. L. Q. REV. 19 at 34-35 and 68-71, especially note 14 on p. 35 (1938).

[7] Graham, "The 'Conspiracy Theory' of the Fourteenth Amendment," 47 YALE L. J. 371 at 387 (1938). Rep. Bingham also interpreted those privileges and immunities to which "citizens of each state" were entitled under the comity clause of article 4, section two, to be the "privileges and immunities of citizens *of the United States*." Thus the clause to him read: "Citizens of each State shall be entitled to all privileges and immunities of citizens (*of the United States*) in the several states." Ibid., 400. This is one possible view of the dictum of Justice Washington in Corfield v. Coryell, (C. C. Pa. 1823) 4 Wash. C. C. 371, 6 F. Cas. 546, No. 3,230. However, this view has not been followed; the clause is interpreted to protect the citizen of another state from discriminatory denial of "fundamental" rights which a state grants to its own citizens, but it does not prevent the state taking away any "fundamental" rights from its own citizens. Paul v. Virginia, 8 Wall. (75 U. S.) 168 (1869). See also McGovney, "Privileges or Immunities Clause—Fourteenth Amendment," 4 IOWA L. BULL. 219 at 229 (1918).

[8] This view was also derived from Justice Washington's dictum in Corfield v. Coryell, (C. C. Pa. 1823) 4 Wash. C. C. 371, 6 F. Cas. 546, No. 3,230.

[9] Frequent reference was made in Congressional debates to the discriminatory legislation passed by the southern states against the negroes—the so-called "black laws." See FLACK, THE ADOPTION OF THE FOURTEENTH AMENDMENT 96 (1908).

[10] The fifth section of the Fourteenth Amendment, it should be noted, empowered Congress to enforce by appropriate legislation the limitations set forth in the first section.

[11] The framers were not sure that the free negroes would be considered citizens, and inasmuch as Bingham thought of the due process clause and the comity clause in article 4, section two, as guaranteeing the same rights, one applying to "persons" and the other to "citizens," he thought he was giving double protection to them by using both these words in the Fourteenth Amendment. Graham, "The 'Conspiracy Theory' of the Fourteenth Amendment," 47 YALE L. J. 371 at 400 (1938).

[12] 16 Wall. (83 U. S.) 36 (1873).

[13] This fear of extending national judicial and congressional power over states to an unknown degree has been expressed in many subsequent cases. Thus, see discussion of Justice Stone in Hague v. Committee for Industrial Organization, 307 U. S. 496 at 520, note 1, 59 S. Ct. 954 (1939). But this argument has little if any weight in view of the fact that the identical extension of judicial power has taken place under the due process clause.

eral and state citizenship and held that the privileges and immunities clause protected only those rights peculiar to citizens of the United States—those interests "growing out of the relationship between the citizen and the national government, created by the Constitution and federal laws." [14] A militant minority asserted the "fundamental" rights doctrine of the framers, but to no avail. In case after case the Court adhered to its emasculating interpretation of the clause, methodically striking down all attempts to incorporate therein the Bill of Rights.[15] The result was to make the clause an honorable but useless vestige and a redundant protection. Under the prevailing interpretation, one must (1) prove national citizenship, which excludes corporations,[16] and (2) show violation of the privileges and immunities clause by proving an invasion of a right accruing to the individual, as a national citizen, by a direct provision or by implication from some other part of the Constitution or from a federal statute.[17] It is this second requirement that makes the clause superfluous, for if a violation of some other section or law must be shown, enough in itself to invalidate the state legislation, what advantage is there in pointing out that there has also been a violation of the privileges and immunities clause? [18] The clause would

[14] Justice Stone, dissenting, in Colgate v. Harvey, 296 U. S. 404 at 444, 56 S. Ct. 252 (1935). That such a distinction between national and state citizenship was not intended by the framers is shown by the speeches on the floor of Congress after the Slaughterhouse Cases. Senator Howe of Wisconsin stated that if the privileges and immunities clause only protected the rights of citizens of the United States, then it was the idlest piece of verbiage that could possibly be constructed. CONG. REC. 43d Cong. 1st sess., pt. 5, pp. 4147-4152 (1874), quoted in FLACK, THE ADOPTION OF THE FOURTEENTH AMENDMENT 268-269 (1908).

[15] Walker v. Sauvinet, 92 U. S. 90 (1875); Presser v. Illinois, 116 U. S. 252, 6 S. Ct. 580 (1886); O'Neil v. Vermont, 144 U. S. 323, 12 S. Ct. 693 (1892); Twining v. New Jersey, 211 U. S. 78, 29 S. Ct. 14 (1908). All the cases that have ever arisen under the privileges and immunities clause are to be found in Justice Stone's dissent in Colgate v. Harvey, 296 U. S. 404 at 445, note 2, 56 S. Ct. 252 (1935), and in his opinion in Hague v. Committee for Industrial Organization, 307 U. S. 496 at 520, note 1, 59 S. Ct. 954 (1939).

[16] Western Turf Assn. v. Greenberg, 204 U. S. 359, 27 S. Ct. 384 (1907); Orient Ins. Co. v. Daggs, 172 U. S. 557, 19 S. Ct. 281 (1899).

[17] Presser v. Illinois, 116 U. S. 252 at 266, 6 S. Ct. 580 (1886); Cox v. Texas, 202 U. S. 446 at 451, 26 S. Ct. 671 (1906).

[18] The result has been that the privileges and immunities clause is relied on when counsel cannot point out some other constitutional guaranty or federal law that has been violated; this has caused an almost unbroken line of decisions upholding the state statutes. Thus the courts have had to point out that it is not a privilege of a citizen of the United States to buy junk without making inquiries as to its antecedents, Rosenthal v. New York, 226 U. S. 260, 33 S. Ct. 27 (1912); use the American flag on a beer bottle label, Halter v. Nebraska, 205 U. S. 34 at 42, 27 S. Ct. 419 (1907); to be hanged instead of electrocuted when one is sentenced to capital punishment, In re Kemmler, 136 U. S. 436, 10 S. Ct. 930 (1890); play baseball on Sunday with an admission charge, State v. Hogreiver, 152 Ind. 652, 53 N. E. 921 (1899); be free of a miscegenation statute in choosing one's spouse, Ex parte Kinney, (C. C. Va. 1879) 14 F. Cas. 602, No. 7,825; be immune from a state statute abolishing Greek letter fraternities in a state university, Waugh v. Board of Trustees, 237 U. S. 589, 35 S. Ct. 720 (1915).

have had real substance, much like the due process clause has today, had the framers' intention been followed; then a violation could have been shown by proving that the state law abridges some right that the Court had construed to be a "fundamental" privilege or immunity. Furthermore, if a violation of some other federal law or constitutional guaranty must be shown, the supremacy clause of the Constitution [19] in conjunction with such law or guaranty gives broader protection than the privileges and immunities clause, for it applies to all persons, thus avoiding the necessity of proving national citizenship and giving protection to corporations. Thus did the privileges and immunities clause lie dormant for sixty-two years. In the meantime, the Court found reason to abandon its early conservative position in the *Slaughterhouse Cases* and in the interests of private property rights to take a greatly enlarged view of its supervisory powers over state legislation; but it seized upon the due process clause to accomplish this and, in so doing, it did all and more than the framers meant to do with the privileges and immunities clause.[20] Then suddenly, in 1935, the latter clause was dusted off and applied in a surprising fashion in *Colgate v. Harvey* [21] to hold unconstitutional a Vermont statute imposing a discriminatory tax on loans made outside the state. The precise nature of this decision has never quite been understood. Some have thought it represented a resurrection of the original "fundamental" rights doctrine of the framers and that it meant that no discrimination, however reasonable, may be made against loans in other states, on the ground that the business of making loans is a fundamental privilege of national citizenship.[22] Or perhaps the Court meant only that unreasonable discriminatory taxation was prohibited, in which case the discussion under the privileges and immunities clause would become so much verbiage, since the equal protection clause gives even more relief.[23] Others have emphasized the majority's discussion of the concept of national unity and solidarity and claim that the Court only meant to revive "fundamental" rights "inherent in the citizens of a *national* government rather than . . . those which belong of right to citizens of all *free* governments." [24] The fog surrounding this clause was not dispelled by

[19] Art. 6, § 2.

[20] For an excellent discussion of this growth of the due process clause, see Borchard, "The Supreme Court and Private Rights," 47 YALE L. J. 1051 (1938). See also 7 BROOKLYN L. REV. 490 (1938).

[21] 296 U. S. 404, 56 S. Ct. 252 (1935).

[22] Howard, "The Privileges and Immunities of Federal Citizenship and Colgate v. Harvey," 87 UNIV. PA. L. REV. 262 (1939); 11 IND. L. J. 390 (1936).

[23] This interpretation is given credence by the discussion of Justice Stone in the dissent to the case and also by a later reference to the case in Whitfield v. Ohio, 297 U. S. 431 at 437, 56 S. Ct. 532 (1936). Noteworthy also is the fact that the majority relied heavily on Crandall v. Nevada, 6 Wall. (73 U. S.) 35 (1868), where, prior to the Fourteenth Amendment, the privilege of passing freely from state to state to approach the national capital was upheld. As Justice Stone pointed out, Colgate v. Harvey, 296 U. S. 404 at 443-444, 56 S. Ct. 252 (1935), such privilege would be protected today under the commerce clause, thus making the privileges and immunities protection superfluous.

[24] 49 HARV. L. REV. 935 at 939 (1936). See also 34 MICH. L. REV. 1034 (1939).

Justice Robert's opinion in *Hague v. Committee for Industrial Organization*,[25] where he asserted that the right to assemble to discuss the National Labor Relations Act was a privilege of national citizenship guaranteed by the Constitution; just whence this privilege was derived was not stated, unless it be either a deeply veiled implication or a step back to the "fundamental" rights theory in an attempt to narrow the due process clause.[26] As Justice Stone pointed out, the due process clause alone was enough to dispose of the case, and in view of the peculiar split of the Court, the privileges and immunities discussion can hardly be said to be an authoritative pronouncement. In light of this background, the principal case assumes its importance. In overruling *Colgate v. Harvey*, it has set at rest any fears that might have materialized from that case; the states are free once again to levy reasonable discriminatory taxes on out-of-state loans or bank deposits with only the equal protection and due process clauses to hurdle. More important, the principal case has, for all practical purposes, stored away the privileges and immunities clause on the historical shelf once more. To set aside a state statute, one must point to an abridgment of the Federal Constitution or laws and, having done that, the privileges and immunities clause pales into insignificance; the core of the clause has been transferred to the due process clause, which has expanded far beyond the size the privileges and immunities clause could ever have attained and which has recently taken over almost verbatim the "fundamental" rights doctrine in the field of civil liberties.[27] However unsound historically the present situation may be, it is perhaps better to continue the prevailing interpretations of these two clauses, limiting or expanding the flexible due process clause to meet the changing mores. The only alternative would be to upset the concepts developed slowly over nearly three-quarters of a century and to start out anew to remake the two clauses along whatever lines the Court happened to think proper.

C. Eugene Gressman

[25] 307 U. S. 496, 59 S. Ct. 954 (1939), commented on in 38 MICH. L. REV. 57 (1939).

[26] One possible explanation of the view expressed is that Justice Roberts was swayed by a technical jurisdictional stumbling block which, it was argued, stood in the way of granting relief under the due process clause. See 39 COL. L. REV. 1237 at 1242 (1939). It is also interesting to note that somewhat the same views were expressed in the dictum of Waite, C. J., in United States v. Cruikshank, 92 U. S. 542 at 552 (1875), and by Justice Brandeis, dissenting, in Gilbert v. Minnesota, 254 U. S. 325 at 337, 41 S. Ct. 125 (1920).

[27] See Justice Cardozo's distinction between immunities that are and are not "of the very essence of a scheme of ordered liberty" in connection with the due process clause in Palko v. Connecticut, 302 U. S. 319 at 325, 58 S. Ct. 149 (1937).