Constitutionalizing Individual Mobility – A Comparative Approach to Same-sex Marriage-recognition in the United States and Europe

Modern societies experience a constant increase in individual mobility. People cross state and country borders on a daily basis, be it for work, or for private purposes. The main condition for the increase is the enhanced co-operation between sovereign states, and the decrease in state borders and other legal frontiers. Today, there are two regions where individual mobility is at its heights. First, the European Union, second, the United States. In the U.S., restrictions on interstate borders and the right of free movement itself are established by Art. 4 of the 1777 articles of Confederation, and have been guaranteed ever since. Enhanced co-operation and freedom of movement between EU member states, just as the Union itself, is rather recent as a phenomenon. It starts with the creation of the Internal Market in 1956, and culminates by EU citizenship, as created by the 1992 Maastricht Treaty.

EU legal doctrine understands freedom of movement as an enforceable individual right, rooted in EU citizenship (Art. 20 f. TFEU) and the fundamental freedoms (Art. 28 ff. TFEU). The U.S. faces much higher numbers of mobility, but lacks any EU-like institutional framework. Most importantly, U.S. doctrine has so far ignored the core principle of the EU free movement doctrine: The link between individual mobility, and the concepts of vested rights and mutual recognition. Although the plain meaning of the Full Faith and Credit Clause (Art. IV sec. 1) provides for the protection of Public Acts and Records, the provision has been interpreted restrictively, thus reducing it to a safeguard of judicial effectivity. In consequence, a US citizen whose domicile changes from one state to another presumably loses any legal status he acquired in his former state of residency marital property. Migration thus invalidates name or birth certificates, licenses of any kind. If, in comparison, a comparable migration occurs within the European Union, any legal status will have to be safeguarded in principle (see ECJ, C-353/06 (Grunkin and Paul)).

Hence, while mobility has grown to be a fully fledged individual right in the EU, the US rather seems to consider it a de facto phenomenon that does not deserve any regulation.

My research departs from this finding to retrace the historical development of individual mobility in the U.S. I find two reasons for the discrepancy. *First*, the U.S. has always granted a greater degree of regulatory independence to states than the EU. The reduced reading of Full Faith and Credit is one among several mechanisms to maintain this autonomy. *Second*, while the EU has used it ever since to integrate national markets through guest workers, freedom of movement in the US used to be employed not to maintain, but to *escape* state regulation. The main evidence stems from the times of the the separate but equal doctrine, when a northbound journey meant a path towards freedom to those who suffered from segregation.