

발 간 등 록 번 호

33-9750040-000070-01

헌법이론과 실무
2015-A-9

외국인의 평등권

- 우리나라와 미국의 논의를 중심으로 -



Constitutional Research Institute



헌법재판소
헌법재판연구원



외국인의 평등권

- 우리나라와 미국의 논의를 중심으로 -

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I. 서론

1. 연구의 의의 및 필요성

2. 연구의 범위와 논의전개 방향

6 2

(II).

(III).

(IV).

(V).

II. 헌법상 외국인의 지위

1. 외국인의 개념, 범위 및 유형

2 1 “ ” ‘ , , ‘ , , . 1) ‘ , . 2) . , , , . 3) , , . 4) , , , .

1) “ ” , 2 2 “ ” “ ” . 2) , , 2 , 2014, 244. 3) , 19 (2008), 115-138. 4) , - 2011.09.29, 2007 1083 (25 4) , 13 , , 2012, 402-435, 427-428; , 16 2 (2010), 11-12; - , 16 2 (2010), 125.

.5)

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.6)

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1948. 5. 11.

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1948. 7. 17.

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5) 2000. 8. 31. 97 12, 12-2, 167, 175.

6)

9 (2006), 65-86, 70;

, 2003, 921.

7) 1996.11.12, 96 1221 .

8) , , , 2014, 101. ,

9)

10)

.11)

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- 9) 17-1, 879, 890-891(2004. 11. 12. 2004 4044 2005. 6. 30. 2003 114,).
- 10) () 2 . 1948 (6), 74-80. 11
- 11) 43 2 (1998), 235-248, 244. 1998. 9. 18. 98 25825 “ (1998 , 2521), 2001. 11. 29. 29. 99 494, 13-2, 714, 723-724). “ ” (2001. 11. 2006. 3. 30. 2003 806, 18-1 , 381, 390.

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 , (90),
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.12)

2. 국제법과 조약에 의해 보장되는 외국인의 지위

6 2 “
 .” .13)
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 FTA
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 15 .14)
 7 ,
 11 , , ,

12) , 7 (2010), 312-314.

13) , , I,

, 2010, 154-155.

14) (4), 408.

.15)

.16) 6 2

.17)

.18)

3. 외국인의 기본권의 주체 인정 여부

가. 논의의 실익

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.19)

.20)

15) (4), 408.

16) , , 20 , 2009, 112.

17) , 9 , , 2014, 223.

18) , : 2011.9.29, 2007 1083 · 2009 230 · 352

, 17 3 (2011), 65.

19) (2), 191; (2), 248-251;

, 2010, 315-319; , , , 2013, 326-330; (

16), 63-113 .

20) (17), 227.

나. 견해의 대립

(1) 기본권 주체성을 긍정하는 견해

21)

22)

23)

21) (19), 316-319; (), , 2007, 63; , 2 , , 2012, 371-372.

22) (16), 91-93.

23) (21), 491, 506, 517, 530; (21), 385.

.24)

.25) ,

.26)

.27)

.28)

.29)

.30)

.31)

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- 24) (21), 517, 530.
 - 25) (19), 623, 631, 680; (19), 316-318.
 - 26) (19), 317; , , 2013, 333; , , 2013, 237;
 , , 2011, 584; (21), 383.
 - 27) (21), 385-386.
 - 28) (26), 236. 2005
 - 29) (21), 385-386; (26), 236. V.2. .
 - 30) (21), 384.
 - 31) (21), 63.

.32)

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.37)

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32) (2), 250-251.

33) (2), 251.

34) (2), 251.

35) (26), 332; (19), 316; (21), 384.

36) (16), 86-87.

37) (16), 63.

.38)

.39)

(2) 기본권 주체성을 부인하는 견해

2 ‘

6 2

.40)

.41)

38) (21), 384.

39) (12), 319-320.

40) , , 10 (1974), 16~17.

41) , - 2011.09.29, 2007

1083 (25 4)

-, 13 , , 2012, 402-435 .

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37 2

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(3) 헌법재판소의 입장

42) ‘ (

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43)

1948

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(‘ ’)

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44)

45)

42) 1994. 12. 29. 93 120, 6-2, 477.

43) ‘ ’ (4), 120.

44) 2001. 11. 29. 99 494, 13-2, 714, 724.

45) 1980 , 1993 11 2003 8

2004
2007

46) ‘ ‘ ,
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.47) ,

.48)

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49)

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70 (2002), 7-46;
11 1 (2011), 187-207; 2007. 8.

30. 2004 670, 19-2, 297, 308-311 .
46) 2007. 8. 30. 2004 670, 19-2, 297.
47)

(3), 127;

48) 2007. 8. 30. 2004 670, 19-2, 297, 303.
49) 2011. 9. 29. 2007 1083 , 180 , 1453. 2011. 9. 29. 2009 351,
23-2 , 659 2
2007 1083

50) 2011. 9. 29. 2007 1083 , 180, 1453, 1455.

51) 2014. 8. 28. 2013 359, 215, 1423. 27

(F-4)

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,52)

2007 1083

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52)

53)

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(4) 검토

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, (10 1), (11 1)

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53) 2012. 8. 23. 2008 430, 24-2 , 567.

54)

1 “ , 12 . ” , 1 ‘ ’ 2 . 9 1 (2013), 34.

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55) (19), 13.
56) (26), 15.

.57)

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58)

.59)

57)

Marbury v. Madison, 5 U.S. 137 (1803)

58) “

59) (19), 327.

. Gerald L. Neuman, Strangers to the Constitution: Immigrants, Borders, and Fundamental Law, Princeton University Press, 1996, 61.

(12), 316-319.

(4), 120.

() ,

.60)

.61)

.62)

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60) (21), 63.

61) (2), 246.

62) , 2 1 (2005), 53.

.63)

.64)

() , 6 2

.65)

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.66)

.67)

63) (17), 221.

64) , ‘ , ‘ , - 2012. 8. 23.

2008 430 -, 14 1 (2013), 221-248.

65) (2), 191.

66) (21), 342; ,

, 憲法 規範力 法秩序 : 許營博士停年紀念論文集, , 2002, 40-54, 48.

67) (17), 223~226.

10 2 “ ” ,
‘ ’ ‘ ’ ,
68) ‘ ’
‘ ’

10 1 . ‘
69)

70)
71)

68) (64), 228.
69)

1 1
2 1
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70) (64), 229.
(26), 428;

71) (21), 519.
(21), 515;
(19), 379.

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 . 10 2 , ,
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다. 미국의 논의

(citizens) (persons)
 , .72) ,
 73)
 . 14 5
 (1), ,
 (4),
 (5),
 (5),
 (5),
 (5),
 (6) .74)

72) Ronald D. Rotunda & John E. Nowak, *Treatise on Constitutional Law: Substance and Procedure*, 4th ed., 2012 Supplement, West, 2012, 390.

73) Louis Henkin, *The Constitution as Compact and as Conscience: Individual Rights Abroad and at our Gates*, *William and Mary Law Review* 27 (1985)

74) 3B Am. Jur. 2d *Aliens and Citizens* §1848. 14 (right to
 (privileges and immunities), 15 , 19 , 24 , 26
 vote) 1 7 ,
 9 , 2

5 14 .75) , 5 14
, ,
.76)
5 ,
.77)
, ,
.78) (permanent residence)
, ,
.79)
, ,
(right to vote) ,
. (citizenship)
.80) ,
.81)

라. 소결

75) 3B Am. Jur. 2d Aliens and Citizens §1851.
Zadvydas v. Davis, 533 U.S. 678 (2001)

76) 3B Am. Jur. 2d Aliens and Citizens §1851.

77) 3B Am. Jur. 2d Aliens and Citizens §1853.

78) 3B Am. Jur. 2d Aliens and Citizens §1846.

79) 3B Am. Jur. 2d Aliens and Citizens §1847.

80) Kathleen M. Sullivan and Noah Feldman, *Constitutional Law*, Foundation Press, 2013, 756.

81)

. 3B Am. Jur. 2d Aliens and Citizens §1845.

people) , (citizen) (person) (the
10
(the people) .82)

.83)

,84)

82)

(bills of attainder)

1 9 3
1 10 1 ,

3 2 2
1; art. III, §2, cl. 3; Louis Henkin(73), 14.

. U.S. Const. art. I, §9, cl.3; art. I, §10, cl.

57), 52; Louis Henkin(73), 14.

83) Mathews v. Diaz, 426 U.S. 67 (1976), 78.

84)

. Gerald L. Neuman(

(everyone)

.85)

.86)

.87)

(European Convention Human Rights)

. David Cole, Are Foreign Nationals Entitled to the Same Constitutional Rights As Citizens?, Thomas Jefferson Law Review 25 (2003), 373-374.

85) David Cole(84), 374.

86) (4), 15-16.

87) 2011. 9. 29. 2009 351, 23-2 , 659, 669; 2011. 9. 29. 2007 1083 , 180, 1453, 1460.

Ⅲ. 외국인의 평등권 주체성 문제

1. 평등권의 의미

가. 인권과 평등권

.88)

88) (26) 287.

나. 평등권과 평등원칙

11 1 “ ”

,
,95) 11 1
,96)

다. 우리 헌법재판소와 미 연방대법원이 바라보는 평등

“ ,

95) 11 1 , ‘ ’ ‘
, ? , 19 1 , 2013;
, 37 2

,
37 2

(92), 16-22 .
96) “ ‘ , , ,
, 11 1 ‘ ,

.” 1989. 1. 25. 88 7, 1, 1, 2.

”97)

11 1

, ‘ (similarly situated)

,98)

,99)

‘ , “

”100)

Yick Wo v. Hopkins

,101)

97) 2001. 6. 28. , 99 516, 13-1, 1393, 1406.

98) , 8 (1997), 2.

99) Rostker v. Goldberg, 10 S. Ct. 2646, 2659 (1981) (“

F.S. Royster Guano Co. v. Virginia, 253 U.S. 412, 415 (1920) (“

1204 (1981) (“

”; Michael M. v. Superior Court, 101 S. Ct. 1200,

100) 1995. 10. 26. 92 45, 7-2, 397, 408.

101) (98), 6-7.

2. 외국인 차별문제가 갖는 특징

가. 기본권 주체성의 인정 여부와 평등권 주체성의 관계

.102)

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.103)

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나. 비교집단의 설정

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.104)

102)

(4), 423.

103) 2007. 6. 28. 2004 643, 19-1, 843.

104) (21), 565.

105)

105) 2007. 8. 30. 2004 670, 19-2, 297.

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(10).

(10),

(11),

(14)

.106)

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.107) ,

106)

(66), 50.

107)

[1]

[2013.10.10.] [1

(12)

24788 , 2013.10.10.,

[1]

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(H-2)

(F-4)

3. 외국인의 평등권 주체 인정 여부

.108)

28 2. (F-4)
 r
 23 3
 108) (17), 227.

2 2 ()

가. 우리나라의 경우

(1) 긍정설

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,¹⁰⁹⁾

,¹¹⁰⁾

,¹¹¹⁾

,¹¹²⁾

,¹¹³⁾

(2) 부정설

, ‘ ’

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6 2

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,¹¹⁴⁾

109) (19), 398.
110) (26), 476; (19), 398.
111) (2), 345.
112) (2), 346.
113) (2), 346.
114) (40), 16-17.

(3) 헌법재판소의 입장

,115)

,116)

25 4

,117)

4

76 1

118)

27

119)

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- 115) 2001. 11. 29. 99 494, 13-2, 714, 724.
 116) , , , 19(2010), 288.
 117) 2011. 9. 29. 2007 1083 , 180, 1453, 1466-1469.
 118) 2014. 4. 24. 2011 474 , 26-1 , 117.
 119) 2014. 8. 28. 2013 359, 215, 1423.

(4) 검토

120) 2007. 8. 30. 2004 670, 19-2, 297.

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.121) ,

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122) ,

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121) “

...” 2014. 4. 24. 2011 474 , 26-1 , 117, 124; “

...”

.” 2014. 8. 28. 2013 359, 215 , 1423,

1424-1425.

122) “

.” 2007. 6. 28. 2004 644 , 19-1, 859, 882; “

.” 2007. 6. 28. 2004 643, 19-1, 843, 851.

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.123)

.124)

123) (21), 562-563; (92), 33-35.
124) (17), 283.

,125)

126)

나. 미국의 경우

14 “ ”

(equal protection clause)¹²⁷⁾

(any person)

14

1886 Yick Wo v. Hopkins

“ 14 ...

125) (21), 385.

126) (17), 283.

127) 14

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14

5

Sharpe, 347 U.S. 497 (1954); Ronald D. Rotunda & John E. Nowak(72), 403. . Bolling v.

.”128)

.129)

.130)

Plyler v. Doe ,

“ 14

.”131)

(equal protection)

.132) IV.

(differently situated) .133)

다. 소결

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128) 118 U.S. 356, 369 (1886).

129) Louis Henkin(73), 16.

130) 3B Am. Jur. 2d Aliens and Citizens §1855.

131) Plyler v. Doe, 457 U.S. 202 (1982), 215.

132) Louis Henkin(73), 16-17.

133) David Cole(84), 381.

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134)

135) ,

.136)

.137)

.138)

14 5

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- 134) (17), 227.
135) (21), 393.
136) (26), 336.
137) (19), 439.
138) (2), 346.

.139)

139) (17), 172.

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,140)

,141)

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,142)

140) (21), 385.
141) (17), 227.
142) (19), 437.

IV. 외국인차별에 대한 평등심사기준

.143)

1. 일반적인 평등심사기준

가. 우리나라의 경우

.144)

(1) 자의금지 원칙에 의한 심사

143) Linda Bosniak, Membership, Equality, and the Difference That Alienage Makes, New York University Law Review 69 (1994), 1101.

144) 2003. 12. 18. 2002 593, 15-2 , 637, 653.

.145)

.146) ,

.147)

.148)

.149)

(2) 비례의 원칙에 의한 심사

1999

-
- 145) 2009. 4. 30. 2007 290, 21-1 , 360, 369.
 - 146) 2003. 1. 30. 2001 64, 15-1, 48, 59.
 - 147) 2003. 3. 27. 2002 573, 15-1, 319, 336.
 - 148) 1997. 1. 16. 90 110 , 9-1, 90, 115.
 - 149) 2001. 11. 29. 99 494, 13-2, 714, 728. ‘ , ’

(92), 141.

” “
” .150)

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” .151)

32 6

.152)

나. 미국의 경우

150) 1999. 12. 23. 98 363, 11-2, 770, 787.

, 2006, 97-127.

151) 2001. 2. 22. 2000 25, 13-1, 386, 403.

152) 2001. 2. 22. 2000 25, 13-1, 386, 405

.153)

154)

(1) 합리성심사

(legitimate)

(rationally)

(minimal level of review)

.155)

.156)

.157)

.158)

153) , : 19 , , 2008, 3.
154)

(150), 116-118.
155) Ronald D. Rotunda & John E. Nowak(72), 16.

156) (153), 12; Erwin Chemerinsky, Constitutional law : principles and policies, 4th ed., New York, NY: Aspen Publishers, 2011, 553.

157) , , 2012, 87;
Ronald D. Rotunda & John E. Nowak(72), 16.

158) Erwin Chemerinsky(156), 552.

.159)

,160) 3

.161)

.162)

.163)

(2) 엄격심사

(suspect classification)

(compelling)

159) (153), 11.

160) (153), 189.

161) Erwin Chemerinsky(156), 694.

162) Gayle Lynne Pettinga, Rational Basis with Bite: Intermediate Scrutiny by Any Other Name, Indiana Law Journal 62 (1987), 779.

rational basis with bite, rational basis with teeth

(heightened scrutiny)

163) Erwin Chemerinsky(156), 553.

(necessary),

(narrowly tailored)

(the least restrictive)

(least discriminatory alternative)

,
.164)

, (national origin) () ,

(affirmative action) ,

, .165)

(fundamental rights)

’(discrete and insular minority)

,
.166)

.167) (immutability)

(political powerless)

(stereotypes)

.168)

164) Erwin Chemerinsky(156), 554.

165)

(157), 149-178 .

166) United States v. Carolene Products Co., 304 U.S. 144, 153 n.4 (1938).

167) (157), 335.

168) Erwin Chemerinsky(156), 688-689; (157), 113.

(3) 중간심사

1960

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.169)
(important) ,
(substantially related) . , “
(necessary fit)” ,
,
.170)
(illegitimacy)
171)

.172) ,

169) Ronald D. Rotunda & John E. Nowak(72), 19.
170) (157), 97.
171) Plyler v. Doe, 457 U.S. 202 (1982). Plyler
(fundamental rights) ,
(suspect classification) ,
. , 4

172) Erwin Chemerinsky(156), 795; ,
Kenji Yoshino, why the Court can strike down marriage restrictions under rational basis

.173)

2. 외국인 차별에 대한 평등심사기준

가. 우리나라의 경우

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.174)

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.175)

review, New York University Review of Law and Social Change 37 (2013), 333.

173) Erwin Chemerinsky(156), 553, 687.

174) , 3 1

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2011.9.29, 2007 1083 · 2009 230 · 352)

: 2011.9.29, 2007 1083 · 2009 230 · 352

17 3 (2011)

175)

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(2000 64)

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13-1, 1017, 1119.

2001. 5. 31. 99 18 ,

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176) 2001. 11. 29. 99 494, 13-2, 714, 726, 728-730.

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,177)

.178)

.179)

177) 2001. 11. 29. 99 494, 13-2, 714, 726, 729-730.
178) ,

179) 2007. 8. 30. 2004 670, 19-2, 297, 313. (54), 28.

나. 미국의 경우

(1) 논의의 배경

(alien) (citizen) (national)
.180)
“national of the
United States”) .181)
(citizen) (citizenship)
(alien), (national), (citizen), (noncitizen) 4
, ‘ , ‘ , , ‘ ,
, .182) ,
.183) , ,
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()
(federalism)
.184)
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10 , ,
6 2 .
6 2 ,

180) 8 U.S.C. 1101(a)(3).

181) 8 U.S.C. 1101(a)(21); 8 U.S.C. 1101(a)(22).

182) , , , 2007, 15-17.

183)

, , 25 (2007), 72.

184) Erwin Chemerinsky(156), 3.

(supremacy clause)

.185)

(preemption)

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8

”(“establish a uniform rule of naturalization”)

,186)

(plenary power)

.187)

(plenary power doctrine)

.188)

.189)

.190)

185) Erwin Chemerinsky(156), 4.

186) (commerce power) (plenary power doctrine)

. Paul Brest et al, Processes of Constitutional Decision-Making: Cases and Materials, Aspen Publishers, 2012, 1157.

187) T. Alexander Aleinikoff, Citizens, Aliens, Membership and the Constitution, 7 Constitutional Commentary, 10; Gerald M. Rosberg, The Protection of Aliens from Discriminatory Treatment by the National Government, the Supreme Court Review (1977), 294. (plenary power doctrine)

. Linda Bosniak(143), 1091.

188) Linda Bosniak(143), 1059.

189) Linda Bosniak(143), 1091.

190) . Ronald D. Rotunda & John E. Nowak(72), 395; 8 U.S.C. 1152(a).

(detention) / (deportation)

(公海)

() (Preemption)

6

.191)

.192)

.193)

(express preemption) (implied preemption)

.194)

(field preemption)

.195)

191) T. Alexander Aleinikoff(187), 10.

. Gerald L. Neuman(57), 13.

192) Erwin Chemerinsky(156), 402.

193) Erwin Chemerinsky(156), 402.

(156), 405.

194) Erwin Chemerinsky(156), 404.

195) Erwin Chemerinsky(156), 404.

. Erwin Chemerinsky(156), 419.

.196)

.197)

.198)

Toll v. Moreno 199)

14
clause)

6 2

(supremacy

.200)

Arizona v. United States²⁰¹⁾

196) Erwin Chemerinsky(156), 413.

197) Erwin Chemerinsky(156), 412.

198)

, Toll v. Moreno

. Paul Brest et

al(186), 1170.

199) Toll v. Moreno, 458 U.S. 1 (1982).

200) Toll v. Moreno, 458 U.S. 1, 10 (1982).

201) Arizona v. United States, 567 U.S. ____ (2012).

.202)

()

1952

(Immigration and Nationality Act of 1952)

203)

.204)

(Civil Rights Acts)²⁰⁵⁾

,206)

,207)

202) Geoffrey R. Stone et al, Constitutional law, Aspen Publishers, 2009, 693.

203) (immigrant or resident alien)

5

(nonimmigrant or non-resident alien)

. Gerald M. Rosberg(187), 277.

(182), 53.

204) 3B Am. Jur. 2d Aliens and Citizens §1842.

205) (civil rights) 10

1964

1866

1991

206) 42 U.S.C. 1981.

207)

1964

7

. Espinoza v. Farah Mfg. Co., 414 U.S. 86, 95 (1973); Graham v.

Richardson, 403 U.S. 365,371-72 (1971)(Linda Bosniak(143), 1100).

, 208)
 (Immigration Reform and Control
 Act of 1986)
 ,
 ,209)
 . , 3
 ,
 ,
 ,210) , (National
 Labor Relations Act)
 ,211)
 ,212)
 ,213)

1996 (Welfare Reform Act)²¹⁴⁾

(qualified aliens)²¹⁵⁾

,216)

208) ,
 . 3B Am. Jur. 2d Aliens and Citizens §1860.

209) 8 U.S.C. 1324a(a)(1).

210) 8 U.S.C. 1324b.

211)

. 29 U.S.C. 152(3).

212) 3B Am. Jur. 2d Aliens and Citizens §1912.

213) 3B Am. Jur. 2d Aliens and Citizens §1911.

214) the Personal Responsibility and Work Opportunity Reconciliation Act of 1996 ,
 1996

215)

. 8 U.S.C. 1641(b).

216) , (Secretary of State) (Attorney General)

Security Income) 218) (Supplemental Nutrition Assistance Program)²¹⁹⁾ (Supplemental Nutrition Assistance Program)²¹⁷⁾

.220)

(2) 외국인 차별에 대한 심사기준 및 주요 법리

.221)

.222)

.223)

()

1)

1886 Yick Wo v. Hopkins

. 8 U.S.C. 1643(c).

. 8 U.S.C. 1641(c).

217) 8 U.S.C. 1611.

218)

. <http://www.ssa.gov/ssi/>

219) (Food Stamp) , 2008

SNAP

. [http://www.fns.usda.gov/snap/supplemental-](http://www.fns.usda.gov/snap/supplemental-nutrition-assistance-program-snap)

nutrition-assistance-program-snap

220) (qualified aliens) (Supplemental Security Income) (Supplemental Nutrition Assistance Program)

. 8 U.S.C. 1612.

221) Erwin Chemerinsky(156), 554, 791-793.

222) Erwin Chemerinsky(156), 788.

223) Erwin Chemerinsky(156), 788.

‘ (persons) 1948
 ,
 .224)
 ‘ (‘special public interest’)
 . ‘ (public interest doctrine)
 ,
 .225)
 ,
 “ ”
 .226) 1948 Takahashi v. Fish & Game Commission 227)
 “ ”

1971 Graham v. Richardson
 228)
 15
 Takahashi
 “ ”

224) Ronald D. Rotunda & John E. Nowak(72), 407. (Anti-alien laws)

(police power)

. Paul Brest et al(186), 1158.

225) Ronald D. Rotunda & John E. Nowak(72), 408.

226) Ronald D. Rotunda & John E. Nowak(72), 408~409.

227) 334 U.S. 410 (1948).

228) 403 U.S. 365 (1971). Graham

. Gerald M. Rosberg(187), 275.

.229)

“

(suspect),

”230)

231)

232)

2)

.233)

Foley v. Connelie

6 3

.234)

229) *Graham v. Richardson*, 403 U.S. 365, 374 (1971).
 230) *Graham v. Richardson*, 403 U.S. 365, 372 (1971).
 231) *In re Griffiths*, 413 U.S. 717 (1973).
 232) *Sugarman v. Dougall*, 413 U.S. 634 (1973).
 233) Erwin Chemerinsky(156), 793.
 234) *Foley v. Connelie*, 435 U.S. 291 (1978).

,

,

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,235)

,

(right to govern)

,236)

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,237)

238)

(suspect), Foley v. Connelie “ (governmental function)”

,

,239)

“ (governmental function)”

,

,

,

Brown v. Board of Education

,

235) Foley v. Connelie, 435 U.S. 291 (1978), 294-295.
 236) Foley v. Connelie, 435 U.S. 291 (1978), 297.
 237) Foley v. Connelie, 435 U.S. 291 (1978), 300.
 238) Ambach v. Norwick, 441 U.S. 68 (1979).
 239) Ronald D. Rotunda & John E. Nowak(72), 416.

, Bernal v. Fainter

.240)

Foley

’(‘political function’)

(process of democratic self-government)

.241)

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(process of democratic

self-determination)

.242)

.243)

government”)

”(“heart of representative

.244)

240) Bernal v. Fainter, 467 U.S. 216 (1984).

241) Bernal v. Fainter, 467 U.S. 216 (1984), 220.

242) Bernal v. Fainter, 467 U.S. 216 (1984), 221.

243) Bernal v. Fainter, 467 U.S. 216 (1984), 223-224.

244) Bernal v. Fainter, 467 U.S. 216 (1984), 225-228.

.245)

.246)

.247)

5

248)

Mathews v. Diaz

.249)

.250)

245) Erwin Chemerinsky(156), 793.

246) Ronald D. Rotunda & John E. Nowak(72), 420.

247) Ronald D. Rotunda & John E. Nowak(72), 421.

(1976)

Commission)

Hampton v. Mow Sun Wong. 426 U.S. 88

(Civil Service

248)

5
. Paul Brest et al(186), 1172-1173.

65

65

249) Mathews v. Diaz, 426 U.S. 67 (1976).

250) Mathews v. Diaz, 426 U.S. 67 (1976), 79-83.

Gerald M. Rosberg(187), 284.

,
,
,251)

Graham v. Richardson

Nyquist v. Mauclet

,
,252)

Graham

,
,253)

()

,254)

,255)

251) 3B Am. Jur. 2d Aliens and Citizens §1856.

252) 432 U.S. 1 (1977), 7-8.

253) 432 U.S. 1 (1977), 9.

254) Gerald M. Rosberg(187), 304; Erwin Chemerinsky(156), 791.

255) Erwin Chemerinsky(156), 791; Foley

,256)

16

(Rehnquist)

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,257)

14

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,258)

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,259)

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,

, ‘ ,

,260)

,

. Foley v. Connelie, 435 U.S. 291 (1978), 294.

256) Erwin Chemerinsky(156), 791.

257) Jennifer Huffman, Justice Rehnquist and Alienage as a Suspect Classification, Georgetown Immigration Law Journal 7 (1993), 845.

258) Jennifer Huffman(257), 849-850.

. Jennifer Huffman(256), 859.

259) Linda Bosniak(143), 1113-1114.

260) Linda Bosniak(143), 1114.

.261)

.262)

()

.263)

.264)

.265)

.266)

'(political function)

.267)

(self-governance)

.268)

261) Gerald M. Rosberg(187), 277.

262) Gerald M. Rosberg(187), 314, 321.

263) Ronald D. Rotunda & John E. Nowak(72), 404-407.

264) Ronald D. Rotunda & John E. Nowak(72), 404.

265) The Constitution of the United States of America: Analysis and Interpretation, <http://beta.congress.gov/constitution-annotated#>

266) Ronald D. Rotunda & John E. Nowak(72), 404.

267) Ronald D. Rotunda & John E. Nowak(72), 404.

268) Ronald D. Rotunda & John E. Nowak(72), 404, 420.

269)

270)

271)

(arbitrary and invidious) 272)

(non-resident aliens)

(resident alien) 273)

274)

269) The Constitution of the United States of America: Analysis and Interpretation, <http://beta.congress.gov/constitution-annotated#> ; Ronald D. Rotunda & John E. Nowak(72), 405.

270) Ronald D. Rotunda & John E. Nowak(72), 406.

271) 3B Am. Jur. 2d Aliens and Citizens §1855.

272) Ronald D. Rotunda & John E. Nowak(72), 406.

273) Gerald M. Rosberg(187), 312-313. (nonimmigrant aliens)

274) Neal K. Katyal and Laurence H. Tribe, Waging War, Deciding Guilt: Trying the Military Tribunals, 111 Yale Law Journal 1259 (2002), 1300-1301, Paul Brest et al(186), 1174 . Gerald M. Rosberg(187), 312.

275)

276)

3. 소결

3

(national

origin)

277)

278)

275) David Cole, *Enemy Aliens*, 54 *Stan. L. Rev.* 953 (2002), Paul Brest et al(186), 1174 .
 276) Calvin R. Massey, *American Constitutional Law: Powers and Liberties*, Fourth Edition, Aspen Publishers (2012), 771.
 277) Ronald D. Rotunda & John E. Nowak(72), 421.
 278) Ronald D. Rotunda & John E. Nowak(72), 421.

1)

279)

280)

2)

279) Ronald D. Rotunda & John E. Nowak(72), 407.
280) Ronald D. Rotunda & John E. Nowak(72), 407.

3)

.281)

(Immigration Power)

(plenary power)

.282)

(membership)²⁸³⁾

281) 2005.3.31. 2003 87, 17-1, 437, 450-451.

282) Linda Bosniak(143), 1092.

283) (membership)

42 (2014), 96.

,284)

4)

11 1

,285)

,286)

,287) ,

,288)

,289)

284) Linda Bosniak(143), 1094.

285)

11 1

2010. 11. 25. 2006 328, 22-2 , 446, 454.

286) Gerald M. Rosberg(187), 300.

287) Erwin Chemerinsky(156), 791; (183), 79.

288) Geoffrey R. Stone et al(202), 686-687.

289) Erwin Chemerinsky(156), 791.

290)

5)

291)

(arbitrary and invidious)

6)

290) (150), 120.
291)

2013
, 2014, 279; http://www.hikorea.go.kr/pt/InfoDetailR_kr.pt?catSeq =&category Id=1&parentId=19&showMenuId=18

V. 외국인차별 관련 판례 및 논의 비교분석

1. 서

292)

2. 영역별 외국인 차별에 대한 미국의 논의 및 우리나라와의 비교

가. 입국 및 강제출국절차상 차별

292) 2011. 9. 29. 2007 1083 , 180 , 1453; 2011. 9. 29. 2009 351, 23-2 , 659.

293)

294)

()

.295)

.296)

297)

293) (19), 317; (26), 333; (26), 237; (26), 584; (21), 383; , 18 3 (2012), 15 .
 294) 2011. 9. 29. 2009 351, 23-2 , 659, 669; 2011. 9. 29. 2007 1083 , 180 , 1453, 1460(“

.”); 2014. 6. 26. 2011 502, 213 , 1076, 1077(“

.”)

295) International Covenant on Civil and Political Rights, Article 12.

1. Everyone lawfully within the territory of a State shall, within that territory, have the right to liberty of movement and freedom to choose his residence.
2. Everyone shall be free to leave any country, including his own.
3. The above-mentioned rights shall not be subject to any restrictions except those which are provided by law, are necessary to protect national security, public order (ordre public), public health or morals or the rights and freedoms of others, and are consistent with the other rights recognized in the present Covenant.
4. No one shall be arbitrarily deprived of the right to enter his own country.

296) *Zadvydas v. Davis*, 533 U.S. 678 (2001).

297) ① ,

②

.298)

.299)

.300)

.301)

.302)

2001 9.11

(individual fairness)

.303) Demore v. Kim

(aggravated felony)

(removal)³⁰⁴⁾

298) 46 .

299) Craig R. Ducat, Constitutional Interpretation, 9th ed., Cengage Learning, 2009, 123. Zadydas v. Davis, 533 U.S. 678 (2001)

. Paul Brest et al(186), 1174.

300) Linda Bosniak(143), 1093.

301) Linda Bosniak(143), 1126.

302) Paul Brest et al(186), 1174-1175.

303) Craig R. Ducat(299), 123.

304)

(deportation)

(exclusion)

, 1996
and Immigrant Responsibility Act of 1996)

1997.4.1

(Illegal Immigration Reform
(removal)

Mathews v. Diaz .305)
(preventive detention)

.306)

2

(Court of Appeals for the Second Circuit) Azizi v. Thornburgh

2

2

, 2

2

2

.307)

<http://www.dhs.gov/>

305) Demore v. Kim, 538 U.S. 510 (2003), 521.

306) David Cole(84), 386.

307) Azizi v. Thornburgh, 908 F.2d 1130 (2d Cir. 1990), 1132-1134.

Azizi

308)

7~8

2

3

308)

2008 430, 24-2 , 573.

2012. 8. 23.

나. 고용 및 직업상의 차별

14 5

.310)

309)
310)

(64), 230-238

7 (Title VII of the Civil Rights Acts of 1964)

(Immigration Reform and Control Act of 1986)

,311)

,312)

, Sugarman

313)

311) Sugarman v. Dougall, 413 U.S. 634 (1973); Bernal v. Fainter, 467 U.S. 216 (1984); In re Griffiths, 413 U.S. 717, 718 (1973).

312) Foley v. Connelie, 435 U.S. 291 (1978); Ambach v. Norwick, 441 U.S. 68, 75 (1979).

313)

.” Sugarman v. Dougall, 413 U.S. 634, 635 (1973).

(heart of representative government)

314)

Foley

315)

314) Sugarman v. Dougall, 413 U.S. 634, 647 (1973).
315) Foley v. Connelie, 435 U.S. 291 (1978), 296.

Ambach

11

316)

317)

318)

(common occupations of

the community)

319)

320)

316) *Ambach v. Norwick*, 441 U.S. 68, 75 (1979).
 317) *Ambach v. Norwick*, 441 U.S. 68, 75 (1979).
 318) *Ambach v. Norwick*, 441 U.S. 68, 76-79 (1979).
 319) *Sugarman v. Dougall*, 413 U.S. 634, 641 (1973).
 320) 18 1 2 .

321)

322)

1

321) 10 5 ;
 322) 26 3 1

23 3 .
 25 2 1 . 2002

2008

(2
) (28
(32 2 ,
)
2),

.323)

27

.324)

()

323) 2007. 8. 30. 2004 670, 19-2, 297, 314-315.

5

, 4

324)

2014. 8. 28. 2013 359, 215, 1425, 1426. ,

다. 정치적 권리에 관한 차별

325)

326)

19 22

327)

328)

1

329) 1928

330)

331)

325) , 2 1 (2005), 33.
326) Gerald L. Neuman(57), 63.
327) Jamin B. Raskin, *Legal Aliens, Local Citizens: The Historical, Constitutional and Theoretical Meanings of Alien Suffrage* (1993), 1391-1470, 1397.
328) Gerald L. Neuman(57), 70.
329) Jamin B. Raskin(327), 1395.
330) Gerald L. Neuman(57), 70.
331) *Sugarman v. Dougall*, 413 U.S. 634, 648-649 (1973).

.332)

.333)

.334) 2004

,335) 2005

336)

337)

.338)

332) Gerald L. Neuman(57), 70.

333) Gerald L. Neuman(57), 70-71.

334) 22 2 ; 31 1 ; 17 2 .

335) 5 1 2 19

336) 15 2 3 10 3

337)

(62), 54;

12), 316-319.

338) , 2 1 (2005); ,
, 32 (2008); (62).

339)

3

19

340)

55; ,
339) ,
340)

2005 11 , 10-11.
32 (2008), 28, 41.

(62),

32 (2008), 38-40.

60 1 1
2012

341)

라. 복지혜택에서의 차별

Mathews v. Diaz

341) 2011. 9. 29. 2009 351, 23-2, 659, 669; 2011. 9. 29. 2007 1083 ,
180 , 1453, 1460; 2014. 6. 26. 2011 502, 213 , 1076, 1077.

.342)

5

.343)

(immigration power)

.344)

342) Mathews v. Diaz, 426 U.S. 67 (1976), 80; Kathleen M. Sullivan and Noah Feldman(80), 761.

343) Linda Bosniak(143), 1066.

344) Gerald M. Rosberg(187), 334; T. Alexander Aleinikoff, Federal Regulation of Aliens and the Constitution, 83 Am. J. Int'l L. 862, 865 (1989) (Linda Bosniak(143), 1066).

Graham 345)

.346) ,

.347) Diaz Graham

(suspect

class)

.348)

.349)

Nyquist v. Mauclet³⁵⁰⁾

345) Graham v. Richardson, 403 U.S. 365 (1971).

346) Graham v. Richardson, 403 U.S. 365 (1971), 378.

347) Linda Bosniak(143), 1102.

348) Gerald M. Rosberg(187), 294.

349) Linda Bosniak(143), 1105.

350) 432 U.S. 1 (1977).

5 4 3

Burger

Powell

(suspect class)

Rehnquist

(discrete and insular minority)

351) 8 .
352) ,
(2012), 13.
353) 31

8

.354) ,

355)

.356)

,

.

,

.

.357)

,358)

,

,

.

354)

2011 3

355) ,

,

.

(

352), 13.

356) (352), 7.

357)

(3), 127;

(4), 130.

358)

“

.

...”

“

”

,

2007. 8. 30. 2004 670,

19-2, 297, 304.

3. 소결

359) Linda Bosniak(143), 1057.
360) (4), 108-109.

361)

361) Linda Bosniak(143), 1146-1147.

VI. 결론

1. 2007 100

2013 1,576,034 ,362)

,

.

,363)

,

.

.

,

.

.

2.

,364)

.

,365)

,

362) 2013 . , 2014, 278; (45), 190.
363) (4), 107.
364) (4), 122.
365) (54), 3-38.

3.

68

1

10 1

4.

1

5.

6.

, , .
.
.
,
.

참 고 문 헌

[단행본]

- 김민준, 『헌법소원제도론』, 2013.
- 김민준 (주), 『헌법소원제도론』, 2007.
- 김민준, 『헌법소원제도론』, 2010.
- 김민준, 『헌법소원제도론』 : 19, 2008.
- 김민준, 『헌법소원제도론』 20, 2009.
- 김민준, 『헌법소원제도론』, 2012.
- 김민준 I, 『헌법소원제도론』, 2010.
- 김민준, 『헌법소원제도론』, 2014.
- 김민준, 『헌법소원제도론』, 2013.
- 김민준, 『헌법소원제도론』, 2013.
- 김민준, 『헌법소원제도론』, 2005.
- 김민준 : 『헌법소원제도론』, 2010.
- 김민준, 『헌법소원제도론』, 2011.
- 김민준, 『헌법소원제도론』, 2007.
- 김민준 9, 『헌법소원제도론』, 2014.
- 김민준, 『헌법소원제도론』, 2013.
- 김민준 2, 『헌법소원제도론』, 2012.
- 김민준, 『헌법소원제도론』, 2014.
- American Jurisprudence, Second Edition, Volume 3B Aliens and Citizens.
- Brest, Paul et al, Processes of Constitutional Decision-Making: Cases and Materials, Aspen Publishers, 2012.
- Chemerinsky, Erwin, Constitutional law: principles and policies, 4th ed., Aspen Publishers, 2011.
- Ducat, Craig R., Constitutional Interpretation, 9th ed., Cengage Learning, 2009.

Massey, Calvin R., American Constitutional Law: Powers and Liberties, Fourth Edition, Aspen Publishers (2012).

Neuman, Gerald L., Strangers to the Constitution: Immigrants, Borders, and Fundamental Law, Princeton University Press, 1996.

Rotunda, Ronald D. & John E. Nowak, Treatise on Constitutional Law: Substance and Procedure, 4th ed., West, 2012.

Stone, Geoffrey R., et al, Constitutional law, Aspen Publishers, 2009.

Sullivan, Kathleen M. and Noah Feldman, Constitutional Law, Foundation Press, 2013, 756.

[논문]

, ‘ ’ ‘ ’ - 2012.
8. 23. 2008 430 -, 14 1 (2013),
221-248.

, -
-, 17 2 , ,
2006, 97-127.

, , 70 (2002), 7-46.

, , 7 (2010), 291-321.

, , 16 2 (2010), 1-41.

, , 9 4 (2008), 109-133.

, , 11 1 (2011),
187-207.

, ‘ ’ ‘ ’ ?, 19 1 , 2013.

, - ,
9 1 (2013), 3-38.

, , 9 (2006), 65-86.

, , 25 (2007), 69-98.

, , 10 (1974), 12-17.

, , 18 3 (2012),

1-42.

, - , 42

(2014), 95-124.

, , 8 (1997), 1-49.

, , 5 2 (2005), 39-77.

, ,

(2012), 1-120.

, , 2 1

(2005), 45-66.

, ,

19(2010), 285-314.

, : 2011.9.29, 2007 1083 · 2009

230 · 352 , 17 3 (2011), 55-78.

, , 32 (2008), 23-45.

, , 2005 11 (2005), 6-17.

, ,

, , 2003.

, , 134 (2013), 374-389.

, - , 16

2 (2010), 105-146.

, , 43

2 (1998), 235-248.

, , 2 1 (2005),

33-44.

, , 憲法 規範力 法秩序 :

許營博士停年紀念論文集, , 2002, 40-54.

, - 2011.09.29, 2007

1083 (25 4

) - , 13 , ,

2012, 402-435.

(2008), 115-138.

Aleinikoff, T. Alexander, *Citizens, Aliens, Membership and the Constitution*, *Constitutional Commentary* 7 (1990), 9-34.

Bosniak, Linda, *Membership, Equality, and the Difference That Alienage Makes*, *New York University Law Review* 69 (1994), 1047-1149.

B. Raskin, Jamin, *Legal Aliens, Local Citizens: The Historical, Constitutional and Theoretical Meanings of Alien Suffrage* (1993), *University of Pennsylvania Law Review*, 1391-1470.

Cole, David, *Are Foreign Nationals Entitled to the Same Constitutional Rights As Citizens?*, *Thomas Jefferson Law Review* 25 (2003), 367-388.

Henkin, Louis, *The Constitution as Compact and as Conscience: Individual Rights Abroad and at our Gates*, *William and Mary Law Review* 27 (1985), 11-34.

Huffman, Jennifer, *Justice Rehnquist and Alienage as a Suspect Classification*, *Georgetown Immigration Law Journal* 7 (1993), 845-864.

M. Rosberg, Gerald, *Aliens and Equal Protection: Why Not The Right to Vote?*, *Michigan Law Review* 75 (1977), 1092-1136.

M. Rosberg, Gerald, *The Protection of Aliens from Discriminatory Treatment by the National Government*, *the Supreme Court Review* (1977), 275-339.

Pettinga, Gayle Lynne, *Rational Basis with Bite: Intermediate Scrutiny by Any Other Name*, *Indiana Law Journal* 62 (1987), 779-803.

Yoshino, Kenji, *Why the Court Can Strike Down Marriage Restrictions under Rational Basis Review*, *New York University Review of Law and Social Change* 37 (2013), 331-337.

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