

From “Our Constitution”, “Our People”, to “Our Justices”: Constructing A Non-Citizen “People”

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Abstract

The prevailing theories of qualified subject of constitutional rights usually assume that citizen, as the members of the state, shall be the standard subject of constitutional rights and be guaranteed all the rights in the Constitution. These theories disagree only on of which rights the guarantee is extended to non-citizens. This Article first critically reviews the text of the Constitution and other relevant constitutional and political scientific theories to refute the assumption that the guarantee of constitutional rights must be tied to the citizen/non-citizen distinction. Specifically, this Article traces back the development of the two early models of citizenship, the republic model and the liberal model, and reasons that, in terms of constructing the deserving subject of constitutional rights, both models were after the ideal of inclusion, as opposed to exclusion. Furthermore, this Article argues that the Constitution actually leaves room for the judiciary’s (as opposed to the political departments’) flexible construction of the subject of constitutional rights. To review the current legal system of citizenship and immigration law, this Article then examines related congressional acts and regulations, such as the Nationality Act, the Immigration Act and the Act of Household Registration, and discovers that the execution of this binary citizen/non-citizen distinction turned out to be an unexpected multi-level distinction over a broad spectrum, which also leads to differentiated standards of judicial review. In this specturm of multi-level distinction, individuals are excluded, in whole or in part, from the protection of constitutional rights merely for a violation or noncompliance of immigration laws

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and regulations. Subsequently, this Article first analyzes the relevant J.Y. Interpretations to describe the us-them distinction adopted by the Justices and then by looking into the process of Justices' nomination and appointment, discusses whether the Justices themselves are also subject to this us-them distinction and how this might affect their performance of the constitutional duty. Finally, this Article concludes with how to construct a more diverse yet localized membership under the Constitution.

Keywords: constitutional subject, immigration law, citizenship, judicial review, immigration power, us versus them