

CONFUCIAN ORIGINALISM: TRADITION IN KOREAN AND AMERICAN LAW

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In both South Korea and the United States, traditional attitudes and religious cultural norms have influenced the development of constitutional law and the expansion of constitutional rights. In South Korea, many of these customs and attitudes can be traced back to traditional ways of thinking rooted in patriarchy and Confucianism. In America, Christian cultural norms have affected developments in American family law and constitutional jurisprudence. In addition to political and cultural factors, methods of interpretation have been the key to results in major cases decided by appellate courts. Judges applying originalism as a method of interpretation have been more likely to reach outcomes that preserve tradition while judges employing the living constitution approach have decided cases in ways that challenge tradition.

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Part I of this Article demonstrates that in South Korea, the Traditionalist lobby opposed increasing women's rights and opposed expanding the permissibility of marriage to same-surname couples, yet feminists and other progressives succeeded in reforming Korean law. Part II examines issues disputed among conservative Christians and gay rights' activists in contemporary America and compares and contrasts the effect of traditional customs on the development of Korean family law with the effect of Christian cultural norms on the development of American law. In both South Korea and the United States, traditional values have often conflicted with (i) international and foreign law, (ii) evolving understandings of scientific facts, (iii) modernization and (iv) government's inability to enforce public morality. Progressive thinkers have seized on these factors to win legal battles and modernize Korean family law. In America, it is less clear whether and to what extent these factors present significant challenges to traditionalist values. This uncertainty is in part due

to how radical the American experiment in progressivism has become, as will be discussed below.

Part III of this Article analyzes these factors in the context of legal theory and methods of constitutional interpretation including “originalism” and the “living constitution” approach. Part IV recommends, based on the American experience, that Korean judges exercise judicial restraint with regard to interpreting a document as fundamental as a Constitution. This Article presents a critique of judicial power in the United States, arguing that judges have overstepped their bounds and attempted to transform society in a manner that is inconsistent with the democratic principles that should guide a constitutional republic. This Article examines judicial activism in connection with gay marriage and suggests that Koreans may want to view the American example with caution, lest they enable judges to fundamentally transform the most important institution in the history of human civilization, the nuclear family, in a manner which

is contrary to the will of the people, against the religious teachings of all major faiths and against the traditions of Korean culture. A change as fundamental as expanding the definition of marriage to include same-sex unions should be debated among the people and enacted by the people's representatives in the legislature, if so decided, and should not be imposed upon the people by judges.