

The Influence of the States in Constitutional Change: A Comparison of American and Korean Approaches to Constitutional Amendment

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Abstract

This paper addresses the role of the states in the U.S. Constitution's amendment process for purposes of comparison with the Korean Constitution. A fundamental difference arises in the democratic nature of constitutional amendment in the two systems. The Korean constitution provides for approval of constitutional amendments by a simple majority in a nationwide referendum. While this process nevertheless restricts majoritarianism by requiring approval first by a two-thirds vote of the National Assembly, it is still more democratic than the U.S. Constitution, which ultimately requires approval of any formal change in the constitutional text by three-quarters of the 50 states. This paper explains why the Framers of the U.S. Constitution chose to make their document difficult, rather than easy, to amend, to provide perspective on proposals in Korea for new means of constitutional amendment.

Another feature of difference, and the focus of this paper, is the role of mediating institutions. Under the Korean system, the only institutions that stand between majority will and the Constitution is the National Assembly. The proposal of the amendment itself need come from only the President or a majority of the Assembly, both of which are directly elected by the people. The only check on majoritarianism is the two-thirds requirement of Assembly approval, but the Assembly itself still represents the people. The Assembly presumably will assent to an amendment if it believes that two-thirds of the people desire it, or perhaps even somewhere between a majority and two-thirds. In the U.S. Constitution, by contrast, the states as states play an indispensable role. One-third of the states, acting through the Senate, can prevent an amendment from even emerging from Washington, D.C. for approval, and then simply one-quarter of the states can block final ratification of an amendment. This paper explains why the Framers used the institution of the states to raise the barriers to constitutional amendment.

KEY WORDS: constitutions, amendments, constitutional change, federalism

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I.

The Constitution of Korea sets out its process for amendment in Chapter X. Article 128 allows either a majority of the National Assembly or the President to submit a proposal for a constitutional amendment. Article 130 creates a two-step approval process for an amendment: first, by a two-thirds vote of the National Assembly, and second, by a majority vote in a national referendum.¹⁾

The U.S. process is quite different. Article V of the U.S. Constitution creates two different paths for constitutional amendment. Under the first approach, two-thirds of both the House of Representatives and the Senate must vote to propose an amendment to the Constitution. Once approved by Congress, the text must receive the approval of three-fourths of the state legislatures. The United States has amended its Constitution 27 times using this process.

Article V's alternative approach creates a far more radical possibility. Two-thirds of the states may call for a constitutional convention "for proposing amendments." The convention's amendments also must receive the approval of three-quarters of the state legislatures before they become part of the Constitution. The United States has never had a constitutional convention after the 1787 Philadelphia Convention, which proposed the existing document.

The amendment of the U.S. Constitution differs from its Korean counterpart in a singular respect: the role of the states. The Korean Constitution has no analogue to the states within the U.S. political system. Indeed, the Korean political system addresses the division of authority between the national government in Seoul and subdivisions in Article

1) DAEHANMINKUK HUNBEOB [HUNBEOB] [CONSTITUTION] art. 129, 130 (S. Kor) (Article 129 requires that the President must make the proposed amendment public for 20 days and Article 130 requires a vote by the National Assembly within 60 of this public announcement).

117(1): “local governments shall deal with administrative matters pertaining to the welfare of local residents, manage properties, and may enact provisions relating to local autonomy.” Article 117, however, makes clear that local governments can only undertake these decisions “within the limits of Acts and subordinate statutes.” Article 117(2) then makes clear that Seoul will control all forms of subnational authority: “the types of local governments shall be determined by Act,” by which the Korean Constitution means acts of the National Assembly. Under Korean constitutional law, regional governments appear to have no formal independent status.²⁾

By contrast, the states under the U.S. Constitution have an absolute veto over any amendments. The state-based amendment system begins even before an amendment leaves Washington, D.C. Article V requires that a proposal receive two-thirds approval from the Senate, the element in the government designed to represent state interests. Thus, the seventeen smallest states could band together to stop any constitutional amendment from emerging from Congress. The original Constitution of 1787 strongly linked the Senate to the function of representing state interests by giving state legislatures the right to choose Senators.³⁾ The Seventeenth Amendment weakened the relationship by mandating popular election of Senators by the people of the state.⁴⁾ Nevertheless, the Senate will prove far more sensitive to the interests of the states, a fact recognized by the Constitution’s prohibition on removing each state’s representation by two Senators without its consent.

Even if Congress were to seek to amend the Constitution, even by the two-third supermajorities required by Article V, it cannot. No proposal can survive unless approved by three-quarters of the states. This gives one-quarter of the states, currently 13 states, the ability to block any changes to the Constitution. According to the 2010 census, the smallest 13 states have a

2) JONGCHEOL KIM, *KOREAN GOVERNMENT AND THE CONSTITUTION: TEXT, CASES AND MATERIALS* 71 (KOREAN LEGISLATION RESEARCH INSTITUTE 2013).

3) On the Constitution’s distinction between the use of “people” and “legislature” of a state, see Saikrishna Prakash & John Yoo, *People Do Not Equal Legislature*, 39 Harv. J. L. & Pub. Pol’y 351 (2016).

4) See generally RALPH ROSSUM, *FEDERALISM, THE SUPREME COURT, AND THE SEVENTEENTH AMENDMENT: THE IRONY OF CONSTITUTIONAL DEMOCRACY* (2001).

population of 13,752,618 out of a national population of 312,913,872. For comparison purposes, the 2010 census reported that California had a population of 37,252,895. According to this data, Article V allows 4.395 percent of the U.S. population to prevent any formal textual change to the Constitution. Another way to see the anti-majoritarian nature of the amending process is to see how it discriminates against high population states. According to the 2010 census, the eight largest states – California, Texas, Florida, New York, Illinois, Pennsylvania, Ohio, and Michigan – have just short of 50 percent of the population.

This counter-majoritarian outcome does not result solely from changes in the U.S. population in the modern age. The population of the states has always experienced wide variations. In the 1790 Census, for example, the one quarter smallest states at the time of the Founding – Delaware, Georgia, New Hampshire, and Rhode Island – held only 8.98 percent of the entire population of the nation at the time.

Contemporary American constitutional scholars have criticized the Constitution for its difficulty in amendment. As Sanford Levinson has argued, the possibility of imperfection required an amendment process that could propose corrections.⁵⁾ Indeed, two of the most creative professors in the United States have proposed more democratic means for constitutional change. Professor Bruce Ackerman of Yale Law School has argued that the United States has responded to this problem through “constitutional moments” in which broad majorities of the American people change fundamental political structures.⁶⁾ The first two of these moments – the Founding and the Civil War – produced the Constitution and Bill of Rights in the former case, and the Reconstruction Amendments in the latter. No one would dispute the central importance of the series of constitutional amendments that reframed the American system of governance in both of those moments. But the third constitutional moment, the New Deal expansion of the administrative state over the other two branches of the

5) See Sanford Levinson, *The Political Implications of Amending Clauses*, 13 constitutional commentary 107, (1995); Sanford Levinson, Introduction: Imperfection and Amenability, in *RESPONDING TO IMPERFECTION: THE THEORY AND PRACTICE OF CONSTITUTIONAL AMENDMENT* 3-4 (Sanford Levinson ed., 1995).

6) See generally BRUCE ACKERMAN, *WE THE PEOPLE: FOUNDATIONS* (1991).

federal government, and the lifting of limits on national power versus the states, produced no changes in the constitutional text. Ackerman's theory leaves constitutional changes such as the New Deal always open for reversal by similar majorities, because the political system never renders the new settlement permanent through a constitutional text.

Professor Akhil Amar, also of Yale Law School, proposes an even more radical resolution of the conflict between democracy and the Constitution's amendment process. Amar argues that the sovereignty of the American people requires the existence of a means to amend the Constitution outside of the supermajority process of Article V.⁷⁾ According to Amar, the Constitution's first three words, "We the People," make clear that popular sovereignty provides the legitimacy for the Constitution itself. Therefore, the people must have the ability to directly amend the Constitution through direct referendum. "Article V cannot be seen as exclusively regulating popular sovereignty, for its provisions cannot guarantee that a deliberate majority will prevail," Amar writes. "A minority of small states could conceivably block ratification under Article V even in the face of overwhelming and deliberate majority support for an amendment."⁸⁾ Therefore, "a better reading of the Constitution would infer that Article V's regulation of the amending process must be supplemented with procedures" such as a referendum or convention called for by a simple majority.

These theories of non-textual sources of amendment have sparked criticism from those who defend the Constitution's restriction of amendment to the supermajority process set out in Article V. Professor Henry Monaghan of Columbia Law School, for example, criticizes these arguments for departing from the clear historical record, which supplies no evidence that the Framing generation believed that the people could amend the Constitution outside of the Article V process.⁹⁾ Instead, Monaghan emphasizes, the Framers conceived a mixed government that was partially

7) See Akhil Amar, *Philadelphia Revisited: Amending the Constitution Outside Article V*, 55 U. Chi. L. Rev. 1043 (1988).

8) *Id.* at 1060.

9) Henry Monaghan, *We the People[s], Original Understanding, and Constitutional Amendment*, 96 Colum. L. Rev. 121, 128 (1996).

national and partially federal. The very design of Congress reflects this hybrid nature, with half of the legislative power exercised by the popularly-elected House, and the other half in the hands of the Senate, where the states enjoyed equality in seats. This structure arose out of political necessity, due to the refusal of the small states at the Philadelphia Convention to approve the Virginia's Plan's elevation of majoritarianism as the Constitution's guiding principle. Creating a mechanism of constitutional amendment that would sidestep the states entirely in favor of popular sovereignty would undermine the delicate balance between national and federal set by the original constitutional bargain.

II.

This Part explains why the Framers chose to accept such a significant role for the states in the constitutional amendment process, a role where their power exceeded any other mechanism in the Constitution. In one respect, Article V is more democratic than the system that prevailed before under the Articles of Confederation. Under Article XIII of the Confederation, "nor shall any alteration at any time hereafter be made in any of [the articles], unless such alteration be agreed to in a Congress of the United States, and be afterwards confirmed by the legislatures of every State."¹⁰ The Framers clearly intended to move away from the Articles state-centric unanimity rule, which had given any single state the right to block a constitutional amendment. "The plan now to be formed will certainly be defective, as the Confederation has been found on trial to be." George Mason declared during the Constitutional Convention's consideration of the Virginia Plan, which called for an amendment process but did not specify a mechanism. "Amendments therefore will be necessary, and it will be better to provide for them, in an easy, regular and Constitutional way than to trust to chance and violence."¹¹

On the other hand, the Framers did not accept a purely majoritarian approach. They could have adopted a system similar to that of Korea's

10) ARTICLES OF CONFEDERATION of 1781, art. XIII, para. 1.

11) MAX FARRAND, THE RECORDS OF THE FEDERAL CONVENTION OF 1787 (1911).

today, or even that of U.S. states that use an initiative or referendum process, such as California. In both systems, a constitutional amendment goes to the people for approval by a simple majority vote. The main difference between Korea and more populist forms of amendment in the U.S. states is that the National Assembly stands as a mediating institution between the people and consideration of the amendment, while in California a small minority of the people can directly place a proposal on a statewide ballot for popular approval. Indeed, the first draft of the Virginia Plan had “resolved that provision ought to be made for the amendment of the Articles of Union whensoever it shall seem necessary, and that the assent of the National Legislature ought not to be required thereto.”

The drafters of the American Constitution rejected a majoritarian approach. No significant delegate to the Philadelphia Convention made the case for amending the Constitution through a system of direct democracy. Instead, the leading voice for majoritarian constitutional change came from outside the federal or state conventions – it came, in fact, from Paris in the person of Thomas Jefferson. We can take Thomas Jefferson’s general attitude toward constitutional change from his Nov. 13, 1787 letter to William Stephens Smith, the son-in-law of John Adams and Abigail Adams, and a member of the U.S. legation in London. Though he wrote after the submission of the draft Constitution to the states, Jefferson served as U.S. representative to France during the constitutional convention and did not participate in any of the ratification proceedings. In the letter, Jefferson thanks Smith for sending him a copy of the proposed Constitution. “There are very good articles in it: and very bad,” Jefferson wrote.¹²⁾ “I do not know which preponderate.” Jefferson then criticized the British press and government for characterizing the state of affairs in America as one of anarchy, we thought could only describe the recent Shays’ Rebellion in Massachusetts. And even Shays’ uprising wasn’t a terrible thing. “God forbid we should ever by 20 years without such a rebellion,” he wrote. And then Jefferson wrote:

12) *From Thomas Jefferson to William Stephens Smith, 13 November 1787*, FOUNDERS ONLINE: NATIONAL ARCHIVE, <http://founders.archives.gov/documents/Jefferson/01-12-02-0348>.

We have had 13. states independant 11. years. There has been one rebellion. That comes to one rebellion in a century and a half for each state. What country before ever existed a century and half without a rebellion? And what country can preserve it's liberties if their rulers are not warned from time to time that their people preserve the spirit of resistance? Let them take arms. The remedy is to set them right as to facts, pardon and pacify them. What signify a few lives lost in a century or two? The tree of liberty must be refreshed from time to time with the blood of patriots and tyrants. It is it's natural manure."¹³⁾

From this passage, scholars have understood Jefferson to argue that each generation should have its own Constitution.

Jefferson's democratic attitude toward constitutional change became public in two documents. The first was his draft constitution for the state of Virginia in June 1776. Jefferson proposed "none of these fundamental laws and principles of government shall be repealed or altered, but by the personal consent of the people," who would meet when called by the legislature.¹⁴⁾ Any change would have to receive two-thirds approval of the people. In a second document, Jefferson's widely read 1783 *Notes on the State of Virginia*, Jefferson appended a draft Constitution for Virginia with a different amending mechanism. He proposed that two of the three branches of government, by a two-thirds vote of its members, could call a convention "necessary for altering this Constitution or correcting breaches in it."¹⁵⁾ Apparently, the convention could then act by simple majority and would have all of the powers of the original Virginia constitutional convention, which indicates that this new convention could make any changes it wished or even offer a wholly new constitution.

While not purely majoritarian, Jefferson's proposals contrasted with the

13) *Id.*

14) Draft Constitution for Virginia, June 1776, in Jefferson: Public and Private Papers 10, 19 (1990).

15) III. *Jefferson's Draft of a Constitution for Virginia, [May-June 1783]*, FOUNDERS ONLINE: NATIONAL ARCHIVES, <http://founders.archives.gov/documents/Jefferson/01-06-02-0255-0004> (last visited Dec. 20, 2018).

Article V process set out in the 1787 Constitution. Jefferson's system excludes the role of any subordinate governments that would be equivalent to the role of the states in Article V. In his 1776 version, Jefferson would have the legislature call for amendments for two-thirds popular approval. In his more widely-disseminated 1783 version, two of the three branches would call for amendments, but then the people could act by simply majority. Article V placed far stricter limits on the amendment process – in no case could a majority of the people adopt a constitutional change; only a super-majority of the states could do so, which themselves did not apportion population equally. Jefferson's proposal, however, also did not allow for the people themselves to directly call for a convention or to amend the Constitution until the state legislature first called for it.

Jefferson's more populist view conflicted with the more state-centric process set out in the draft Constitution. Madison sent a draft to the Constitution to Jefferson, who replied in a letter on December 20, 1787. Jefferson praised the Constitution for "framing a government which should go on of itself peaceably, without needing continual recurrence to the state legislatures."¹⁶ But he did not have high praise for the amendment process. He wrote to Madison:

I do not pretend to decide what would be the best method of procuring the establishment of the manifold good things in this constitution, and of getting rid of the bad. Whether by adopting it in hopes of future amendment, or, after it has been duly weighed & canvassed by the people, after seeing the parts they generally dislike, & those they generally approve, to say to them "We see now what you wish. Send together your deputies again, let them frame a constitution for you omitting what you have condemned, & establishing the powers you approve. Even these will be a great addition to the energy of your government."¹⁷

16) *To James Madison from Thomas Jefferson, 20 December 1787*, FOUNDERS ONLINE: NATIONAL ARCHIVES, <http://founders.archives.gov/documents/Madison/01-10-02-0210> (last visited Dec. 20, 2018)..

17) *Id.*

In the next letter, Jefferson even expressed the hope that the first nine states would approve the Constitution, and hence bring it into being, but then the next four states would reject it. "The former will secure it finally; while the latter will oblige them to offer a declaration of rights in order to complete the union. We shall thus have all it's good, and cure it's principal defect."¹⁸⁾ Jefferson was already contemplating constitutional amendment, but without using the amendment process itself. Rather, he seems to suggest that a minority of states could hold hostage their consent on the condition that the text be amended.

So well-appreciated were Jefferson's thoughts, even though he was not even present in the United States during the drafting or ratification of the Constitution, that Madison directly responded to the *Notes on Virginia* in Federalist 49, published on Feb. 2, 1788. In addressing how to cure breaches of the separation of powers, Madison conceded that the people should hold the ultimate power to rewrite the Constitution:

As the people are the only legitimate fountain of power, and it is from them that the constitutional charter, under which the several branches of government hold their power, is derived, it seems strictly consonant to the republican theory, to recur to the same original authority, not only whenever it may be necessary to enlarge, diminish, or new-model the powers of the government, but also whenever any one of the departments may commit encroachments on the chartered authorities of the others.¹⁹⁾

Madison agreed with Jefferson that "a constitutional road to the decision of the people, ought to be marked out, and kept open, for certain great and extraordinary occasions."

Madison, however, rejected Jefferson's approach because it made constitutional amendment too easy and would make constitutional change too frequent. "There appear to be insuperable objections against the

18) *To James Madison from Thomas Jefferson, 6 February 1788*, FOUNDERS ONLINE: NATIONAL ARCHIVES, <http://founders.archives.gov/documents/Madison/01-10-02-0277> (last visited Dec. 20, 2018).

19) THE FEDERALIST No. 49, at 339 (Jacob E. Cooke ed., 1961).

proposed recurrence to the people," he declared in Federalist 49. "It may be considered as an objection inherent in the principle," he continued, "that as every appeal to the people would carry an implication of some defect in the government, frequent appeals would, in a great measure, deprive the government of that veneration which time bestows on everything, and without which perhaps the wisest and freest governments would not possess the requisite stability."²⁰⁾ Here, Madison diverged from Jefferson's view that each generation might have its own constitution, because the cost would be not just instability, but a lack of "veneration" for the Constitution that would accrue over time. In a nation of philosophers, Madison impishly suggested, such veneration would be unnecessary because they would arrive at the correct rules "by the voice of enlightened reason." But in the real world, a history of approval and acceptance would lend "the strength of opinion" to the government. If the Constitution became too easily changed, its mutability would deprive it of the respect necessary for government to succeed. Stability requires a constitution that does not change as readily as statutory law.

Madison opposed a more popular form of constitutional amendment on a second ground: that it would aggravate, rather than temper, political controversy. "A frequent reference of constitutional questions to the decision of the whole society," Madison warned, would create "the danger of disturbing the public tranquility by interesting too strongly the public passions."²¹⁾ In his other, more well-studied contributions to the Federalist, Madison worried that the spirit of partisan politics, which he called "faction," would lead to despotic government. Experience during the revolutionary period, Madison believed, revealed the dangers of unrestrained democracy. In the period between the Declaration of Independence and the Constitutional Convention, many states had adopted new constitutions that gave virtually untrammled power to popularly-elected assemblies.²²⁾ Assemblies generally selected executive of limited authorities and controlled courts that lacked judicial review. Without checks, faction-dominated assemblies would change the laws and

20) *Id.* at 340.

21) *Id.*

22) See GORDON WOOD, CREATION OF THE AMERICAN REPUBLIC, 1776-1787, at 393-425 (1969).

institutions to favor their interests, such as relieving borrowers of their debts or infringing on the rights of property owners. These state constitutions, Madison observed, had so far not been even subject to the worst of democratic excess because they had been “formed in the midst of a danger which repressed the passions most unfriendly to order and concord.” But now that the revolution had ended, “the spirit of party” could expect to escape the restraints imposed by the danger of the British.

But a third, even greater, objection arose for Madison. Jefferson’s more popular form of amendment, Madison argued, “would not answer the purpose of maintaining the constitutional equilibrium of the government.”²³⁾ The great threat to liberty posed by republican government is the “aggrandizement of the legislative, at the expense of other departments.” But since legislators were more numerous and closer to the people than the executive and judicial branches, they would tend to prevail in any constitutional conflicts. But worse yet, Madison predicted, legislators would probably dominate any constitutional convention. “The same influence which had gained them an election into the legislature, would gain them a seat in the convention.” With Members of Congress in charge of any convention, constitutional amendment would only favor the expansion of legislative power. Even if supporters of the executive and judicial branches could prevail, they would still be acting out of partisanship, not the public good. Madison’s closing to Federalist 49 aptly summarize his reasons for opposing more popular means for constitutional amendment:

The passions, therefore, not the reason, of the public, would sit in judgment. But it is the reason of the public alone, that ought to control and regulate the government. The passions ought to be controlled and regulated by the government.

For Madison, the participation of the states in the amendment process would prevent regular changes to the Constitution. He hoped that this would instill public veneration for the Constitution, reduce faction and

23) FEDERALIST No. 49, *supra* note, at XXX.

partisanship, and bolster political stability in the young Republic. Mechanisms to slow down the amendment process and demand supermajorities, he thought, did not counter democracy. Rather, they made sure that the people acted out of reason, rather than passion.

III.

While Madison made some of the classic arguments against easy constitutional change, Federalist No. 49 does not explain why the Framers chose the states to serve as the brake on majoritarianism. The Constitution could have tempered the popular will by increasing the vote requirements in Congress from two-thirds to three-quarters of the House and Senate, requiring presidential or even judicial approval, or creating timing delays before approval. Instead, the Constitution established approval by two-thirds of the House and Senate and three-quarters of the states as the primary limitation on constitutional change.

Because Korea does not have regional and local governments with the same independents as states within the U.S. system, it is worth examining why the states would play such a central role in the amendment process and in the constitutional order generally. While federalism had declined in importance after the New Deal Revolution, more recent Supreme Court cases have reinvigorated the states. Not so long ago, in *Garcia v. San Antonio Transportation Authority*, it appeared that the “Second Death of Federalism” had taken place.²⁴⁾ But in a series of cases beginning in 1992 with *New York v. United States*,²⁵⁾ which held that the federal government could not “commandeer” state officials, and culminating most recently in *Shelby County v. Holder*,²⁶⁾ which released the Southern states from the pre-clearance burdens of the Voting Rights Act of 1965, the Court has attempted to protect spheres of state autonomy from federal control. These efforts have taken three forms: the identification of subjects that remain within the primary control of the states; guaranteeing the institutional

24) William W. Van Alstyne, *The Second Death of Federalism*, 83 Mich. L. Rev. 1709 (1985).

25) *New York v. United States*, 505 U.S. 144 (1986).

26) *Shelby County v. Holder*, 570 U.S. 2 (2013).

independence of the states; and placing clearer limits on the enumerated powers of the federal government.

Modern scholars have suggested several instrumental benefits flow from the U.S. system of federalism. Federalism creates a decentralized decisionmaking system that responds more effectively to local interests and preferences. Different regions in a nation will have different circumstances, such as their climate, geography, demography, economics, and history that will require different policies. Landlocked states, for example, will have different needs in the area of water policy than coastal states. States like California that cycle between drought and floods will have different approaches to land and forest management than states on the East Coast, which experience most consistent, year-round rainfall. State government will sit closer to the people and can more accurately and flexibly shape policies to these local conditions. Citizens will hold state officers accountable more easily because their government is closer and more easily monitored. "It is a known fact in human nature that its affections are commonly weak in proportion to the distance or diffusiveness of the object," Alexander Hamilton wrote in *The Federalist*. "Upon the same principle that a man is more attached to his family than to his neighborhood, to his neighborhood than to the community at large, the people of each State would be apt to feel a stronger byass towards their local governments than the government of the Union."

Economists have found that under certain conditions, smaller governments can provide a more efficient allocation of resources that maximizes the well-being of their citizens.²⁷⁾ State governments, in this model, compete for households and businesses by enacting different sets of policies.²⁸⁾ In the long run, this competition generates social welfare for the entire nation as states adopt more efficient practices. Indeed, for much of American history, states played the primary role in developing economic

27) See Charles Tiebout, *A Pure Theory of Local Expenditures*, 64 J. Pol. Eco. 416 (1956).

28) See, e.g., Robert P. Inman & Daniel L. Rubinfeld, *Making Sense of the Antitrust State Action Doctrine: Balancing Political Participation and Economic Efficiency in Regulatory Federalism*, 75 Tex. L. Rev. 1203 (1997); Daniel L. Rubinfeld, *The Economics of the Local Public Sector*, in 2 *Alan Auerbach & Martin Feldstein, Handbook of Public Economics* 571-645 (1987).

programs that enhanced their residents' welfare.²⁹⁾ Another dimension of this competition is that federalism allows for the satisfaction of diverse public policy preferences within a single nation. States can offer varied combinations of benefits and taxes – California, for example, mandates high levels of environmental protection but also high taxes and regulation; Texas, on the other hand, has generally lower levels of regulation and tax, but higher economic growth. States are akin to firms in a marketplace offering a product (here, a mix of policies and taxes), and citizens play the role of customers who purchase the product by choosing their state of residence. Federalism here leads to overall welfare by allowing citizens to maximize their utility in their choice of residence.

Federalism can even play a role in more effectively implementing policies in those areas governed by the central government. As observed earlier, states offer a diversity of policies in the areas under their control, which can take advantage of better knowledge of local conditions. But even though the national government may have control of a certain subject, it may still wish to allow the states to set their own policies. Such experimentation will provide more accurate knowledge on the consequences of policy choices, which can inform eventual adoption of a national standard. In the United States, for example, the reform of the welfare system in 1996 followed years of state experimentation on conditioning benefits payments at the state level on work or education requirements. In 2009, the Obama administration modeled parts of its Affordable Care Act on the health care experiments of the states, most notably that of Massachusetts. Under this decentralized approach to policy development, a state policy that proves a poor choice will have consequences limited only to that state. A policy that meets with success, however, can find itself adopted by other states and, ultimately, the national government. This is the insight at the root of Justice Brandeis' oft-quoted description of the state as a "laboratory" of democracy.³⁰⁾

Despite these varied instrumental functions of federalism, the constitutional amendment question underscores an even graver purpose.

29) See, e.g., Harry N. Scheiber, *Federalism and the American economic Order, 1789-1910*, 10 *Law & Society* 57 (1975).

30) *New State Ice Co. v. Liebmann*, 285 U.S. 262, 311 (1932) (Brandeis, J., dissenting).

The Framers did not seek to protect state autonomy for its own sake; they expected the states to serve as the primary bulwark against a despotic central government. The Framers feared that national politicians would expand beyond their enumerated powers not necessarily to benefit a discrete interest group or social class, but to expand the authority of the institution of which they were a part. Reserving to the states the right to make policy on matters most directly related to daily life would reinforce the loyalty of citizens toward their states. This would strengthen the support for state governments, who would naturally suspect any expansion of national power. Take, for example, Alexander Hamilton's explanation for state control over "the ordinary administration of criminal and civil justice."³¹⁾ States should not retain that power because they were necessarily more effective at law enforcement than the central government. Instead, according to Hamilton, "[t]his of all others is the most powerful, most universal, and most attractive source of popular obedience and attachment."³²⁾ Effectively protecting life, liberty, and property, he wrote in Federalist 17, "contributes more than any other circumstance to impressing upon the minds of the people affection, esteem and reverence towards the government." Effective state administration of the issues most near and dear to the people would create a loyalty to the states, which could then serve as a restraint on the central government. "This great cement of society which will diffuse itself almost wholly through the channels of the particular [state] governments," Hamilton wrote, "would ensure them so decided an empire over their respective citizens, as to render them at all times a complete counterpoise and not unfrequently dangerous rivals to the power of the Union."³³⁾

Hamilton's view of the role of the states runs counter to some leading American constitutional theories on federalism. Scholars such as Herbert Wechsler and Jesse Choper argued that judicial review need not extend to the balance of powers between the federal and state governments because the national political process would protect state interests.³⁴⁾ Under their

31) FEDERALIST No. 17, at 107 (Jacob E. Cooke ed., 1961).

32) *Id.*

33) *Id.* at 107-08.

34) See, e.g., Herbert Wechsler, *The Political Safeguards of Federalism: The Role of the States in*

theory, in fact, it is not clear why the states exist, as the political process itself would take into account the interests of individual voters as well. The designers of the U.S. Constitution, however, did not see such a clear dichotomy between federalism and individual rights. The original Constitution, for example, has individual rights such as the Ex Post Facto and Habeas Corpus Clauses. Conversely, the Bill of Rights contains structural provisions that seek to preserve the balance between the federal and state governments, such as the recognition of the role of institutions such as churches, militias, and juries, and the Ninth and Tenth Amendment, which reinforce the limitations on the powers of the federal government. Indeed, the text of the Bill of Rights itself does not define rights in the context of individuals, but instead defines limits on the federal government's powers. Thus, the Bill of Rights does not speak of an individual's freedom of speech or religion, but instead declares that "Congress shall make no law respecting" speech or religion. Other rights seem majoritarian, in the sense that they preserve the right of the people against the government, rather than the rights of the individual against the majority – such as the rights of speech, assembly, and petition, to bear arms, and against unreasonable searches.³⁵⁾

Thus, the American Constitution elevates the rights of states because it understands them as limitations on the federal government in the interests of the individual. Although limiting the power of the federal government in this way would produce inefficiencies, the Framers believed that this cost was necessary in order to guard against potential tyranny by a federal government filled with self-interested, ambitious politicians. As separate political units, states can oppose the exercise of power by the national government, which would prove difficult if states were – as they are in much of the industrialized world – subordinate units of the national government itself, rather than semi-independent sovereigns.

Two consequences for the stability of a political order may flow from this dispersion of authority. First, it may reduce the stakes in the contest to

the Composition and Selection of the National Government, 54 Colum. L. Rev. 543 (1954); JESSE CHOPER, *JUDICIAL REVIEW AND THE NATIONAL POLITICAL PROCESS: A FUNCTIONAL RECONSIDERATION OF THE ROLE OF THE SUPREME COURT* (1980).

35) See generally, Akhil Amar, *The Bill of Rights as a Constitution*, 100 Yale L.J. 1131 (1991).

control national politics. If all power flows from the national capital, then electoral politics may adopt a winner-take-all mentality, as control of the national government would effectively give a party the authority to set all policies. A federal system, in which the states exercise significant authority and are independently elected, reduces the sweepstakes nature of elections. If a party loses at the national level, it can still retreat to state governments, where it can promote its alternate policies, show their benefits, and retool itself for future rounds of national elections. Second, the states can serve as a farm team for the preparation and training of future national officials. State officials with more governing experience should perform better once they move to the nation's capital, while also remaining sensitive to local concerns the long-term political stability of the federal system.

But it should be clear that the Framers did not expect national-state relations to run smoothly all the time. Indeed, the writers of *The Federalist* seemed to believe that the federal government and the states would constantly joust for the support of the American people, and thus checking each other's power. By allowing, or even encouraging, the federal and state governments to check each other, the Framers' Constitution seeks to create an area of liberty that cannot be regulated by either government. Dividing political power between the two levels of government would be even more effective when combined with the separation of powers. As James Madison wrote in *Federalist 51*, "In the compound republic of America, the power surrendered by the people, is first divided between two distinct and separate departments," here the federal and state governments, "and then the portion allotted to each, subdivided among distinct and separate departments," in other words, the legislative, executive, and judicial branches.³⁶ "Hence a double security arises to the rights of the people. The different governments will control each other; at the same time that each will be controlled by itself."

Of course, the Framers of the Bill of Rights and of the Reconstruction Amendments expected that constitutionalizing individual rights, and enforcing them through judicial review, would protect individual freedom. But they also expected the federal and state governments to create new

36) FEDERALIST No. 51, at 351 (James Madison) (Jacob E. Cooke ed., 1961).

rights as they competed for the political support of the people. In addition, freedom would also flourish in the wake of the inefficiencies that the Framers built into the federal system itself. The nation's governments would not be able to regulate every issue because, even if they could overcome their internal separation of powers, their efforts would come into external conflict with each other. This outcome is somewhat at odds with the public choice approach to federalism, which promotes efficiency in developing public policies. Instead, in some cases, federalism can prevent the national government from enacting policies that produce national benefits that outweigh the costs. The Framers believed this deliberate inefficiency to be necessary in order to protect liberty.

Lessons for Constitutional Amendment in Korea

When comparing the U.S. and Korean approaches, some immediate differences emerge. As a unitary state, Korea has no sovereign regional governments comparable to the role of states in the American constitutional system, which severely constrain the opportunities for change. On the other hand, it has direct popular approval of constitutional amendments, following approval by a supermajority of the national legislature. In this respect, Korea enjoys a more majoritarian system for amending its Constitution than the United States.

This approach has costs and benefits along different spectrums. It is useful here to compare to the analysis of rules versus standards developed by law and economists. As these scholars have shown, these two types of norms can make an important difference in the operation of a regulatory system.³⁷⁾ A typical example of a rule is a strict speed limit, such as a ban on driving on the interstate highways faster than 55 miles per hour. Government could also regulate speed with a less precise standard, such as a law that prohibits unreasonably fast driving. Choosing between the two strikes different trade-offs between accuracy and economy and before and after the

37) See, e.g., Adrian Vermeule, *Interpretive Choice*, 75 N.Y.U. L. Rev. 74, 91 n.68 (2000) (collecting sources); Cass R. Sunstein, *Problems with Rules*, 83 Calif. L. Rev. 953 (1995); Louis Kaplow, *Rules versus Standards: An Economic Analysis*, 42 Duke L.J. 557 (1992); RICHARD A. EPSTEIN, *SIMPLE RULES FOR A COMPLEX WORLD* 30-36 (1995).

fact evaluation of the circumstances. Rules are clear and easy to apply—anyone driving 56 mph has violated the law regardless of the reason. These clear rules reduce the costs to the legal system of determining violations, create greater certainty and predictability for private citizens, and demand less information to implement.

Rules have their downsides too. Future decision-makers cannot carefully apply the legal norm to all relevant facts. A strict 55 mph rule does not allow judges to take into consideration the flow of traffic or an emergency, nor does the rule punish an elderly driver who should not be behind the wheel but drives 54 mph. With a rule, a court will only consider whether a radar gun accurately measured if a car exceeded 55 mph. Because of their absolute nature, rules either sweep in too many people or too few people: they are inevitably overinclusive or underinclusive. As a result, rules will produce higher error rates because they cannot take into account the totality of the circumstances of each case.

Standards bear the opposite trade-off between economy and error. Acting reasonably under all of the circumstances—a classic example of a standard—allows future decision-makers to consider all of the facts when determining guilt. A reasonableness standard, for example, would allow a court to take into account that a speeder caught driving at 70 mph was driving all alone, in the countryside, during bright daylight hours, in dry conditions. A standard will reduce error costs and increase accuracy by allowing decision-makers to apply the norm to all of the facts. But it will also increase decision costs and require more information. A judge cannot simply read the printout of the radar gun to decide a case. Instead, he or she must hear from the driver, the police officer, and witnesses and determine the road and weather conditions. Then the judge performs a balancing act to decide whether the speeder's conduct was unreasonable. While speeders might welcome such an approach, a standard may increase costs for all drivers because "reasonableness" will create less predictability and more uncertainty over the line between legal and illegal conduct.

Standards differ from rules in another important respect here: the discretion given to future officials. Rules give more authority to the original legislator and narrow the power of those who enforce the rule later. In our speeding example, the writers of the strict 55 mph limit rule have granted future judges little ability to narrow or broaden the application of the law—

they must fine everyone who drives faster than 55 mph, no matter the excuse. By contrast, standards delegate more authority from the original legislator to officials in the future. A judge applying a standard of reasonableness will exercise a great deal of discretion in applying the law to an individual case. Of course, every system of criminal justice will bear some amount of inherent human discretion at the time of law enforcement. A police officer can simply choose not to arrest those who are clearly in violation of the speed limit, or a judge who believes that the law convicts too many speeders may just acquit defendants without reason. But at the level of comparative institutional analysis, a system of clear rules will reduce the level of discretion – at the time of law enforcement – in comparison to a system built upon standards.

Choosing between a standard or a rule will depend, in part, on our judgment about the quality of future decision-making. If legislators, for example, believe that the officials who will implement policy are mediocre, they will want to use a rule. The rule will reduce errors by removing discretion from the second-rate officials and keep authority with the higher-quality legislators. Or, if the legislators have superior information relevant to the decision, they will want to keep authority for themselves and choose a rule. For example, legislators might know that emotional appeals by speeders for exceptions (e.g., “I was in a hurry because I was late for an important appointment”) tend to persuade sympathetic, overworked judges and actually encourage speeding and increase accident rates. Legislators should use standards, by contrast, when the opposite conditions hold. If a future decision-maker will have access to superior information and has more experience and better technical qualifications, legislators should use a standard.

Neither rules nor standards are perfect for all situations. One will outperform the other depending on the facets of a particular problem. When applied to the question of constitutional amendment, the rules versus standards analysis reveals important consequences to Korea’s more majoritarian system. On the one hand, the ease of amendment creates a Korean Constitution more responsive to popular wishes and better able to update its rules to account for changes in circumstances. It is less likely that contemporary government will err in reaching the right outcomes. An older Constitution might create constraints for the best options to address

situations unanticipated at the time of its drafting. In other words, the ease of amendment bears closer similarity to a standard. It allows contemporary Korean society to change the law more quickly to reach a more reasonable outcome in addressing future governing challenges.

But as with standards, Korea's majoritarian process will raise decision costs. Every presidential administration may well consider changing the Constitution every time it address important policy issues, and it may well consume great political and public resource in doing so. If the Constitution makes itself easy to change, then the winners in any election may also be tempted to change the rules of the political game to benefit themselves or their party on a permanent basis. Consuming time and resources on reviewing constitutional rules more frequently will raise the decision costs of important government decisions.

By contrast, a constitution that is difficult to change, such as the American Constitution, will comparatively reduce decision costs. It does not reduce them to zero, but if the law is fixed and there is little value to re-considering constitutional rules due to the high costs of amendment, political actors will accept the political rules of the game and reach quicker decisions. These decisions, however, may make more errors because contemporary decisionmakers will have less freedom to shape laws to address current problems. This is even more likely to be the case with the U.S. Constitution, which imposes a fixed limit on national powers, which may exclude powers necessary for a 21st century policy.

Also consider the effect of the majoritarian rule on current versus past decisionmakers. In the U.S. system, the Constitution places great faith in the choices made by the Founders in 1787-88. Creating a successive supermajority process establishes that their designs will remain hardwired into the Constitution well into the 21st century. Such a difficult system also expresses a distrust of future decisionmakers and a belief that left to their own devices, they will make more rather than less errors. Making it harder to change the Constitution essentially robs them of discretion and prevents them from exercising the full powers of government, regardless of circumstances. A system with a constitution that is easier to change places greater faith in contemporary or future decisionmakers to reach better decisions than those of the past.

Nonetheless, Korea's existing system has provoked proposals to ease

the process for constitutional amendment even further. In 2016, a Gallup poll showed that 54 percent supported constitutional change. But the main focus has centered on the presidency, which is currently held for a single five year term. Various proposals over the years have sought to introduce a French system, in which power is divided between a President and prime minister, the American system, in which a powerful President has a four-year term with a single opportunity for re-election, or a British Westminster system with a single prime minister heading both the legislative and executive branches simultaneously. In the wake of President Park's impeachment and removal, interest in constraining executive power, and allegedly the corruption that follows in its wake, has risen.

In March 2018, President Moon Jae-in's ruling party responded to these developments by introducing a package of amendments to the existing Constitution, introduced in 1987. The proposals were developed by a Special Public Advisory Committee for the Constitution, created by the Presidential Advisory Committee on Policy Planning. It proposed an American-style four-year presidential term, with re-eligibility limited to a second term. It also sought to decentralize the structure of government by devolving more power to regional bodies and increasing individual rights. The Committee proposed moving toward a more direct public role in government, though without altering the constitutional amendment process. It allowed for popular legislative initiatives, the recall of national legislators, and the reduction of the voting age from 19 to 18. But reflecting the anti-majoritarian nature of the 1987 Constitution's amendment process, the Moon administration's package failed to win the two-thirds vote in the Korean legislature needed to send it to the people for popular approval.

Moon's efforts to lower the barriers to change more closely resemble the internal experience of U.S. states, such as California, in amending their constitutions, rather than that of the federal government. Like Korea, U.S. states themselves are often unitary in nature, with formal government power flowing from the state government and constitution. Popular initiatives, both legislative and constitutional, trace to the Progressive Era at the turn of the 20th Century, when critics believed that entrenched interests dominated state government and blocked reform. The parallels to Korea seem apparent: the impeachment of President Park expressed dissatisfaction with a government that had perhaps grown less accountable

and her charge of public corruption reflect the concern that large businesses dictate Korean public policy. If that is the diagnosis, then the Moon government, like California reformers of an earlier time, naturally sought to change the Constitution to make it easier for the people to avoid the existing government altogether and change the law directly.

The California experience should sound a cautionary note for Korean reformers. As political scientists have observed, much policymaking now occurs through popular initiative.³⁸⁾ Berkeley political science professor Jack Citrin observes that after the famous Proposition 13, which limited state property taxes, “California moved from representative to plebiscitary government.”³⁹⁾ This deprives the state of the opportunity for legislative bargaining, coalition-building, and coherence across subjects. A patchwork of single-issue initiatives has come to dominate California’s taxes and spending, with no overall prioritization or multi-year planning. “Incredibly complex policy matters are being decided by voters with limited knowledge and it is easy to point to unintended consequences that pose serious adjustment problems,” Citrin observes.⁴⁰⁾

It is also not clear that a more democratic process for either legislation or amendment cures the negative effects of special interest influence in the legislature. It may simply rearrange political structures without stopping the role of money, which California politician Jesse M. Unruh famously described as the “mother’s milk” of politics.⁴¹⁾ The initiative process has allowed single issue groups to raise funds for specific proposals, which has increased the power of lobbyists and campaign consultants. It has accelerated the rise of policy entrepreneurs, both private citizens and elected officials (Rob Reiner and Arnold Schwarzenegger, for example, in the case of California), who use the initiative to pursue pet projects. It has allowed interest groups to advance policies that could not pass the legislature, with proposals that may call for discrete spending, but which

38) See Jack Citrin, *Proposition 13 and the Transformation of California Government*, 1 Calif. J. Pol. & Pol’y 1, 6-8 (2009).

39) *Id.* at 7.

40) *Id.* at 8.

41) LOU CANNON, RONNIE AND JESSE: A POLITICAL ODYSSEY 99 (1969).

also buys off potential opponents with generous deals.⁴²⁾

Comparisons to American constitutions, both U.S. and Korean, can provide lessons for Korean reform by identifying the costs and benefits of greater majoritarianism and whether it fits best with national circumstances. For example, constitutional reformers will want to ask, before embarking on innovations such as the popular initiative and legislator recall, whether Korean politics seems too dominated by special interests that can frustrate popular wishes for legislation. The U.S. Constitution reinforces the status quo by deliberately making the passage of new laws difficult – though the creation of the administrative state has significantly bypassed the limitations imposed by bicameralism and presentment. Korean leaders and the political community may wish to have a system that is more responsive to contemporary wishes and wishes to avoid republican deliberation. More deliberation, however, will lead to greater coherence in policymaking and a desirable attention to priorities. A more majoritarian constitution can produce faster action, but at a loss of stability and support for the overall constitutional order – what Madison referred to when he hoped that a constitution difficult to change would increase veneration for the system.

42) I have drawn the critique in this paragraph from Citrin, *supra* note, at 7-8.

