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Institutional Change, the Judiciary, and Military Service in South Korea

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Abstract

In 2018 the South Korean Supreme Court declared the Military Service Act unconstitutional and mandated that the National Assembly implement an alternative service for those who object to military service for moral or religious reasons. This ruling is a reversal from previous cases dealing with the same issue. Using theories of institutional change, this paper investigates the evolution of the judicial branch as well as military service to identify the causal mechanisms for the reversal. This paper uses thematic analysis of secondary literature to generate themes and applies those themes to legal arguments employed by the judiciary. The results suggest that incremental changes to judicial formal and informal rules produced the 2018 decision.

Keywords

Conscription, Institutional change, Judicial review, Supreme court, Constitutional court, South Korea

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Introduction

In the fall of 2018, the fourteen judges of the South Korean Supreme Court deliberated the policy of imprisoning those who, for moral or ethical reasons, refuse to take up arms and serve in the military. The issue of conscientious objectors is a longstanding point of debate within South Korean society, a country that requires all young men to serve a term 21 months in military service. The policy of universal conscription is not unique in the world and dozens of nations have adopted similar policies. What *is* unique, however, is the prosecution of conscientious objectors. Most wealthy democracies like South Korea allow for either alternative service in non-military fields or exemptions for religious or ethical prohibitions to violence. Since universal conscription began in the 1950s, nearly 20,000 conscientious objectors, mostly Jehovah's Witnesses, have been prosecuted, convicted, and imprisoned by the South Korean courts, representing 90% of the worlds imprisoned objectors (Hwang, 2018; Mun, 2012).

South Korea underwent seismic political reform in the late 1980s. Under some form of authoritarian rule since its inception, the regime folded after significant resistance from civil society, intellectuals, students, and a recalcitrant middle class. Yet Democratization signaled the beginning, not the end of reform. Through the subsequent decades Korean institutions adapted to new political and social realities as the nation continued to negotiate conceptions of government, citizenship, civil liberties, and nationhood.

Central to democratization was the question of a large, militarized, garrison state that placed heavy emphasis on both repression of the civil society as well as safeguarding national security. Although there were numerous reforms to elections, press freedoms, and governmental institutions, leaders deemed military service critical to the very existence of the nation. The precise terms and duration of enlistment have oscillated over the years, but military life has remained a staple experience and a cultural touchstone since the 1950s. For many Korean men, it is a rite of passage, a transition period to adulthood, and the fulfillment of a patriotic duty to protect the nation. For others, it is an onerous burden, a violation of personal rights, and the remnant of military dictatorship. For some in the latter group, military service was so morally objectionable that they refused to enlist. Article 88 of the Military Service Act (MSA) stipulates that refusal to present oneself for military service without "justifiable cause" is grounds for punishment under the law (Cho, 2007; Kim, 2020). For decades, conscientious objectors

experienced legal and economic consequences for the refusal to serve in the armed forces and, despite numerous rulings, appeals, and cases brought before higher courts, remained firmly outside the law – that is, until the fall of 2018 when the Supreme Court demanded an end to the practice (Kim, 2020).

The 2018 reversal in opinion is notable for several reasons. The South Korean judiciary is not traditionally an activist court. Indeed, prior to 1988, it worked hand in glove with state prosecutors to enforce executive authority (Kim, 2015). It rarely pushed back against an executive that was able and willing to curtail civil liberties in the name of national defense and regime stability. Yet suddenly, this conservative institution, a bastion of state power, dismissed a longstanding policy on the centrality of military service.

Imagine a particularly tenacious student submits a paper to their teacher. The teacher returns the paper with a failing grade. Undaunted, the student tries again and again fails. The process goes on like this for some time, until the paper is returned with a passing grade. Now, was it the student or the teacher who changed? Perhaps the student presented a modified paper to the teacher deserving of a passing grade. Perhaps the teacher's heart softened, or the grading standards changed. Perhaps some combination of factors. Yet it is not sufficient to simply describe the changed grade. We must investigate why both teacher and student changed and how those changes yielded better marks.

Aim and Purpose

Trite metaphors aside, the 2018 case prompts questions about institutions and the nature of institutional change. The Supreme Court decision reflects upstream change in its structure and culture. Indeed, the previous three decades of South Korean history is rife with reform, both statutory and normative. What is the nature of the changes and how did they shift the legal reasoning of the court? Answering these questions requires an investigation into the nature of institutional change as well as an examination of the specific changes in South Korean institutions running up to the 2018 case. Thus armed with a theoretical framework and specific regulations and trends, we may derive insights into the causal mechanisms that prompted the shift. The *hows* of instructional changes lead directly to explanations of the *whys.*

This paper seeks to address the following research questions:

1. How have the institutions of the judiciary and military service evolved over time and what is the nature of these changes?
2. What are the significant shifts in legal reasoning between the 2018 case and previous contentious objector cases and do they reflect the evolution of the institutions?
3. How can the evolution of the conscientious objector question aid in the understanding of institutional change in South Korea writ large?

South Korea is fertile ground for the study of institutions. The 20th century saw massive and repeated revolutions in its sovereign status, its political and social systems, and economy. The 2018 Supreme Court Case acts as a useful case study through which we can examine the intersection between two of South Korea's critical institutions and understand how their internal evolution produced external consequences. The case also yields insights into the nature of democratization, conceptions of law, citizenship, and culture. The 2018 case is neither the beginning nor the end of the processes of change, but rather a milepost along the way – a cause for reflection on the forces that continue to shape Korean society.

The paper begins with a methodology section, explaining the collection and use of data. Next, a theoretical framework erects scaffolding to understand the process of institutional change followed by a contextualizing of institutional change of the South Korean Judiciary and conscription regime. It then proceeds to a literature review on the most relevant research surrounding South Korean conscription, judiciary, and democratization. It then discusses institutional change in the formal and informal rules of the judiciary and military service in history. After that, the paper explores the 2018 Supreme Court case and contrasts it to previous legal decisions. Finally, these contrasts are analyzed within the theoretical framework of institutional change of the judiciary and conscription.

This project makes the following arguments. First, the 2018 Supreme Court decision primarily reflects formal and informal institutional changes within the judiciary. These changes fortify one another and act as a system to enable the decision. Changes within military service are unlikely to be major contributors to the decision, though they may play a secondary role. Finally, these changes within both institutions have been incremental and path dependent in nature.

Methodology

Research Design

This paper explores the effects of evolutionary change in South Korean institutions on the 2018 Supreme Court case regarding conscientious objectors. To accomplish this goal, the research process began a thematic analysis of secondary qualitative and quantitative research produced in the last thirty years regarding the judiciary as well as military service. This analysis produced a set of codes that were arranged thematically into macro trends that spanned the decades running up to the 2018 case (Bryman, 2016; Dawson, 2002). These thematic codes were applied in a comparative case study that contrasted a 2004 Constitutional Court case regarding conscientious objectors to the 2018 Supreme Court case on the same topic. Finally, relevant changes between the two cases were identified and compared to the original trends identified within the secondary literature.

Underpinning this line of research are several ontological and epistemological assumptions about the nature of institutions. Epistemologically, the paper adopts a positivist view of the world – objective reality exists, and we can understand it through observation and deduction. It assumes that institutions are "real" in the sense that they exist not just in the imaginations of the public but as conduits of change and agency. Institutions are emergent entities from an amalgam of their component parts, specifically the formal and informal rules they enforce as well as the individuals that comprise it (North, 1991). In this sense the paper is neither purely objectivist nor constructivist in its ontology. Institutions are objective organizations subject to formal rules, but also exist in the imaginations of its constituent members and the public. These perceptions form both interactions with and informal rules of the institution itself.

Data Collection

The first step in data collection was the development of thematic codes derived from secondary literature on the Judiciary and Military Service. The process began with identifying relevant literature using online journal databases to search for scholarly articles. The articles were selected for relevance to the research question -- specifically regarding institutional change, history, development, and reform. Due to language limitations, all articles were either written in or translated to English. This paper focuses on the post-democracy period, so priority was placed on articles published in the post-democratization era to ensure a longitudinal perspective in the

literature. Furthermore, special attention was paid to articles that utilized institutional change as a theoretical framework. Given the ubiquity of literature on South Korean militarized culture from prolific authors such as Seungsook Moon, military service yielded far more sources than the judiciary. Once selected, the articles analyzed for relevant patterns of institutional change and organized into themes (Dawson, 2020).

The next phase began with selecting two cases for comparative analysis. The 2018 Supreme Court case was the clear starting point, as the research question focuses on this landmark ruling. Court documents were obtained from publicly available governmental sources, including a full (translated) copy of the court decision and associated information such as relevant statutes and testimony. Several secondary sources were also identified for relevant context and legal analysis (Bryman, 2016; Dawson, 2020). The comparative case study design necessitated a second case providing a relevant counterexample that was representative of previous high court decisions while being sufficiently temporally distant, given the theoretical framework of evolutionary change (Bryman, 2016). The 2004 Constitutional Court case fit these criteria.

The 2004 Constitutional Court case was chosen for several other reasons as well. First, the Constitutional Court is a relatively new institution, established in 1987 (Kim, 2015). The 2004 case was the first time the court, charged with interrogating the constitutionality of law, ruled on the Military Service Act and conscientious objectors. As such it is a useful starting point for understanding modern jurisprudence on the issue. Until 2018, subsequent rulings by the court (both Supreme and Constitutional) refer to and upheld the legal position taken by the majority opinion, and the 2004 case provides far more thorough documentation and clearer legal justification than subsequent court cases. The Constitutional Court and the Supreme Court have overlapping duties, as both are high courts that rule on the constitutionality of South Korean law, so the constitutionality of the Military Service Act remains the central question in both cases. However, being two different legal entities there is no overlap in membership of the benches, providing a wholly independent sampling of individual judges. Two Supreme Court decisions could yield decisions made by the same judges, and thus be overly static or reflect personal growth rather than institutional change. Given that this paper is investigating institutional change

and not just the evolution of individual judges, having two separate high courts ruling on the same case is critical.

Data Analysis

The two court cases offer two types of qualitative data. First and most obviously, the cases present the legal reasoning of the court on matters of law and constitutionality. Court documents systematically detail the competing arguments and cogently explain the reasoning behind decisions. The reader can clearly see the formal reasoning that most affect the judges' decisions and identify significant shifts in stated thought processes. These arguments reflect formal statutes as interpreted by the court. It also represents the intended message of the document – a direct and concise summation of the case for public consumption (Bryman, 2016).

Second, court decisions also contain evidence of value judgments. In addition to existing as public policy documents, the court cases also exist as artifacts of the internal processes of individual judges with normative, societal, and institutional influences. Legal decisions are underpinned by both external realities, but also internal normative positions taken by judges. By examining the legal reasoning, one can infer and extrapolate the underlying values present in the decision (Bryman, 2016). A careful reading of the case yields insights into these positions.

Ethical Considerations and Limitations

My status as an American prompts questions of positionality and bias within this research. Military service is a deeply consequential policy that has affected the lives of millions of Korean men over the decades as well as their loved ones. It is an intensely personal experience to entire generations who hold complex views of the subject about which I, as an outsider and non-veteran, can only learn about from conversations and secondhand sources. I have also been raised in a nation with strong values surrounding separation of powers, judicial review, and liberal traditions regarding civil liberties. These personal biases pose a threat to the objectivity of this research, and I cannot claim to speak for the individuals who undergo these experiences (Sultana, 2007). As such, I have avoided normative claims about the desirability of military service and status of the judiciary. Given my own language skills (or lack thereof) only English language documents have been used. Although legal documents tend to be clear and straightforward in their language, a translated document may lose some of the intended and

meaning. English language sources are more likely to be produced by non-Koreans to the South Korea and could carry a degree of bias or Orientalism when observing South Korean institutions. That being said, most of the sources cited are South Korean authors (writing in English) or Korean by extraction.

While this paper focuses on institutions writ large, the issue of military conscription has deeply personal implications for ordinary South Koreans. The debates surrounding the burdens of service, national security, and personal sacrifice for nation are, for me, purely theoretical. Thus, further investigations into the nature of institutional change would need to better address the "human story" of conscription. Yet a full and logical argument is possible without deeply investigating the personal aspects and lived experience of those who interact, both directly and indirectly, with military service.

In a similar vein, the paper does not examine individual judges. Time and word count constraints limit the granularity of the research, so a deep investigation into the background and influences of individual judges was omitted. This line of questioning bears strongly on the case. The age, educational background, and personal experiences of both the Constitutional Court and the Supreme Court judges are likely to influence their legal reasoning, but also be representative of the institution writ large. Further research could be very illuminating to the topic but is beyond the scope of this paper.

As a comparative case study, it is not possible to fully replicate this research to verify the results, but there are alternatives that could potentially support (or contradict) the conclusions found here (Bryman, 2016). One could use the thematic elements developed by the first phase of this paper in investigations of other examples of overturned court precedent. Other rulings could provide further evidence of the same institutional changes manifesting in other cases, supporting or contradicting the findings herein.

Theoretical Foundation

Broadly conceived, institutions are the "rules of the game" (North, 1991). From massive governmental organizations to local school boards, institutions permeate, restrict, and dictate interactions between individuals as well as other institutions. Rules may be formal or informal.

Formal rules are codified in political documents, manifestos, religious texts, tax codes, or constitutions that dictate through fiat the way institutional actors are permitted to behave. Yet institutions need not be limited to formal, organized groups, with codified rules but include informal codes of conduct as well. A company may distribute an employee handbook describing workflow and office regulations, but the more amorphous "office culture" is not expressed so explicitly and may differ from branch to branch, or even department to department. These cultures have their own *unwritten* values, customs, and beliefs that shape their action. Indeed, formal rules are often reinterpreted and expressed through informal means (Williamson, 2000). Ethical and moral values, tradition, patterns of behavior, and the ever elusive "culture" shape the interpretation and implementation of formal rules. Institutions are an overlapping set of organizations and standards with formal and informal rules.

Now armed with a definition we may turn to how said institutions evolve. Institutions are not static. Their evolution, both gradual and acute, has garnered significant interest from academics from diverse fields such as biology, sociology, political science, and economics. Two paradigms have emerged that offer differing descriptive analysis on the cadence of institutional change: punctuated equilibrium (also known as radical or episodic change) and evolutionary (or gradual) change.

The theory of Punctuated Equilibrium, championed by Connie Gersick in 1991 offered a framework for institutional change. Gersick aggregated research from different academic fields which observe systems evolve in fits and starts, with long periods of apparent calm before cataclysmic shifts. Institutions, Gersick argued, are anchored in place by a "durable deep structure" that resisted change and yielded long and relatively stable "equilibrium periods." Initial conditions and replicate conditions that perpetuate the status quo, incentivizing adherence to the current order as well as developing coalitions who benefit from it (Greif & Laitin, 2004). Favorable subsidies to a specific industry may spawn advocacy groups or lobbyists to ensure the subsidies remain. As Gersick analogizes institutions as a game, with deep structure correlating to the rules of the game and the equilibrium as a game in play (Gersick, 1991). The players of the game fortify rules both through adherence but also by exploiting them through various strategies. Players come and go, changing the flow of the game, but minor adjustments to the rules neither undermine the overall play nor fundamentally change the goals of the players (Greif & Laitin,

2004). The “game” ends with a “revolutionary period” in which the deep structure is altered in such a way that the entire endeavor changes. Successful strategies that thrived under the old rules are rendered obsolete as players adapt to the new reality. From the chaos emerges a new deep structure, often shaped by important individuals in the old system. The cycle begins again (Gersick, 1991).

The punctuated equilibrium paradigm relies on two assumptions about the nature of change. First is the rationality of the individuals in the system. Stable institutions standardize incentive structures and restrict action. This in turn standardizes the behaviors of the actors in the system who react rationally and predictably to the environment, limiting variance. The second assumption is that exogenous factors act as the primary catalyst for change. While minor evolutions happen within the institutional framework, outside forces impose revolutionary periods. Wars, revolutions, hostile takeovers, or pandemics break down existing structures rather than forces working within the constraints of the system (Gersick, 1991).

It is easy to appreciate the appeal of the punctuated equilibrium theory in historical and political analysis. History is rife with “turning points” that signal the end of a given regime, paradigm, or era. Wars, elections, revolutions, or other catastrophic shifts create the conditions for a new order. Similarly, the importance of individuals in the so-called “great man” view of history highlights certain figures possessing such gravitas, genius, or vision that they can drive massive reforms by their will alone. It also insulates individuals from criticism when they fail to anticipate Black Swan events.

Yet this paradigm is not alone in the literature. A different school of thought regards change as an incremental process that, through the accumulation of small changes, push institutions to adapt to new realities and survive up through adaptation and reform. These reforms, like a river eroding its bank, accumulate to generate massive shifts in society without any single precipitating event. The evolutionary (or gradualist) school accuses the punctuated equilibrium paradigm of overestimating the “stickiness” (inertia) of institutions and assert that institutions are never still and may undergo significant change over time. The accumulated effects of change are not felt until the opportunity arises for them to manifest themselves (like, for instance, a Supreme Court case).

Evolutionary change theorists operate under different assumptions than their punctuated equilibrium neighbors. Whereas proponents of punctuated change adopt rational actor theory, incremental change assumes *bounded* rationality of its members (Kingston & Caballero, 2009). Bounded rationality argues that individuals are rational -- but only to a point. They will act logically and within their self-interest given the information they have and how they interpret said information, filtered through the beliefs and intuitions of the individual in question. This assumption introduces many more variables into the decision-making process such as individual needs, values, experience, and compulsion. It thus broadens the likely range of choices individuals make in a given system. Variation threatens stability and predictability (Lewis & Steinmo, 2012). Given this unpredictability, gradualists look to endogenous forces when searching for primary drivers of change. With a more chaotic internal structure, institutions are far more liable to evolve new methods of problem solving or optimize personal outcomes. This is not to say that the gradualists reject exogenous forces because coups, wars, and elections do happen. Rather, they tend to see these events as products of accumulated endogenous forces in their own right (Lewis & Steinmo, 2012; North, 1991).

Institutions do not exist in isolation from one another, but compete, overlap, and ultimately influence one another in complex ways. These interactions may be formal, such as the interactions between branches of government, or informal as the interplay of personal morality and legal judgements. Institutions are often nested within one another, with overarching macro-level system and interdependent subsystems. Institutional evolution is therefore path dependent and requires time to cascade either horizontally to different levels of the system, or horizontally to other interconnected institutions. Thus, any change to a specific institution will, given time, influence the trajectory of others (Lewis and Setinmo, 2012). As several scholars have observed, “growing stronger arms and legs might improve speed, but unless the heart grows stronger simultaneously, a stronger body could easily undermine the long-term health and reproductive capacity” (Lewis & Steinmo, 2012). Given the interconnected nature of institutions, a change in one necessitates adaptation from others in the system. A large, exogenous force may elicit significant reform or even destruction of existing institutions, but the downstream effects of these adaptations linger as they move through the system. The use of atomic bombs in 1945 was certainly a significant event, but it took over a decade before the creation of the IAEA.

Some theorists have attempted to blend these two paradigms into a more cohesive package. Cortel and Peterson (1999) provide a framework that argues both approaches have fatal flaws that are effectively solved when combined with one another. Punctuated equilibrium suffers from blindness to the role of individuals, small groups, and activists in driving long term change. Gradualists downplay the importance of acute Black Swan events that may not have precipitating factors. To reconcile these estranged approaches, Cortel and Peterson take a more granular approach and posit that the nature of change is largely dependent on the institutions themselves. A rigid, authoritarian state is simultaneously more stable and less likely to reform than an electoral democracy, and will break before it bends, bringing about the end to a period of equilibrium (Cortell & Peterson, 1999). Gradualism is more conducive for informal institutions such as morality, values, social systems, and organizations run through debate and compromise (democratic institutions) (North, 1991; Roland 2004). The degree of change (how extreme the deviation from the original system) as well as the scope (how wide is the area of effect) are both of interest. A small increase in federal taxes affects the entire tax-paying population but only to a small degree, whereas a wildfire in a small town may be devastating to a very narrow band of individuals while leaving the nation unaffected. What constitutes a "major" shift in institutions is more a matter of interpretation than reality.

Punctuated equilibrium and gradualist theories are not mutually exclusive and exist on a spectrum rather than as a dichotomy. Change may come quickly and radically, or gradually and pass by unnoticed until the accumulated evolution yields results (Cortell & Peterson, 1999). The challenge for scholars and academics is not *whether* the gradualist or episodic schools better captures institutional change, but rather *when* and *where* to apply (or blend) the two frameworks to gain insight into a case study.

Literature on Korean democratization tends to focus on radical changes, and with good reason. Major events in Korean political history seemingly correspond well to the "revolutionary periods" in Gersick's framework. The Park Chun Hee's 1962 military coup, the Yushin Constitution, Park's assassination, the Gwangju uprising, Minjung movements, and democratization in 1988 remain critical nodes for scholars of Korean democratization and are regarded as major shifts in the political landscape in the ROK. Yet there remains a central weakness in this understanding. While these events are certainly critical in framing modern

Korean history, they provide only mileposts in a far more incremental process. It does not explain, for example, the durability of many institutions that span modern Korean history to the present, or the persistence of nondemocratic structures that continue to evolve well into the 21st century. The historical impulse to identify events as transformative misses the far less dramatic march of minor reforms and long-term transformation of institutional norms and behaviors. This paper adopts a gradualist framing of the issues, rather than a punctuated equilibrium. South Korean institutions change due to long-run factors that evolve the incentive structures of actors within the system, eventually causing breaks with precedent.

Literature Review

Conscription

Just as labor interacts with capital to produce goods and services, military labor interacts with equipment to generate targeted destructive power. Like new equipment in a factory, the evolution of the weapons of war changes the productive (destructive) power of labor. There is a significant body of literature surrounding the so-called "Revolution in Military Affairs" (RMA) which took place beginning in the late 1970s and culminated in the Gulf War in 1990. It should be noted that the RMA goes by other names, such as the Military Technology Revolution (Harkavy, 1994). The RMA was predicated on a series of technological breakthroughs that had significant ramifications for military equipment. Advances in material sciences, guided munitions, stealth technology, unmanned vehicles, GPS, and other sophisticated command and control systems signaled a sea change in military operations. The revolution was largely theoretical until a US-led coalition engaged the Iraqi military in the early 1990s. The Iraqi military, large and armed with Soviet-era equipment, was soundly defeated by coalition forces. The war signaled the obsolescence of older systems and a new era of high-tech weaponry, prompting a global scramble to update to military doctrine (Anthony, 1991; Harkavy, 1994). One downstream effect of the RMA was an increased need for highly-educated, professional troops who would remain in their positions for much longer than conscripts (Burke, 1992; Poutaara & Wagener, 2011).

Given these demands, several scholars have investigated the decline of conscription systems worldwide (Cowen, 2006; Burk, 1992). Three observations have been made to this point. First, the increased technical and educational demands of modern militaries increases human capital investment in troops through training. The high turnover of conscripts means a low return on investment for governments and thus incentivizes nations to switch to professional militaries with longer service periods. Second, as nations mature economically, conscription represents a significant opportunity cost for the labor market through wasted productivity. Third, moral-political institutions that rely on state-citizen loyalty have been weakened in favor of a more market-oriented arrangement (Burk, 1992, Choi & Kim, 2017). The empirical literature largely agrees with the assertion that wealthy liberal societies are in tension with policies of universal conscription. The question thus becomes: What about South Korea?

Korean independence saw formal rules instituted that enshrined military service in the 1948 constitution. Article 39 reads, “All citizens shall have the duty of national defense under the conditions as prescribed by an Act.” Article 39 and the subsequent Military Service Act laid the statutory foundation for military service, requiring all eligible South Korean men to serve a term of three years in the military before the age of 29 (Kim, 2020). Some exceptions were made, barring the “medically unfit, criminals, and delinquents” (Tikhonov, 2009, Mun, 2012). The act was not fully implemented until 1957 due to the chaos of the Korean War, and even then the military struggled to enforce conscription, with large numbers (17%) avoiding service. By 1970, the Park administration had created the Military Manpower Administration to coordinate the recruitment and training of conscripts, limited foreign travel, fired civil servants who failed to serve, and punished the families of draft dodgers. By 1974 evaders were down to .01% of eligible males (Tikhonov, 2009, Moon, 2005).

While South Korea has adopted neo-liberal marketization after the 1997 Asian Financial Crisis, it has not seen commensurate reform in the military. Theoretical models and global patterns suggest liberalization of trade policies, privatization, and weakening state-corporate bonds in favor of market-oriented solutions would lead to a weakening and eventual disillusion of inefficient government programs. These patterns have not been observed in South Korean military service, driving vectors of research into why neoliberal globalization has been slow to influence the South Korean system (Choi & Kim, 2015) . One structural explanation is that the

enormous bureaucratic structures in place to manage and plan military service, as well as private companies that benefit from the supply of materiel to the military, have a vested interest in continuing the policy. These groups apply pressure to maintain the current system (Choi & Kim, 2015). Other researchers have argued that, given a rational system, the constituency for ending conscription is quite small. First, conscription provides a non-excludable public good for society (national security) based on the labor of a relatively small portion of the population. At any given moment, the South Korean army has around 650,000 active-duty personnel, in a nation of over 50 million – a little over 1%. Half the nation is exempt through military service due to gender, and more through medical and psychological exemptions. The majority of the serving population has already finished their service and, either through nostalgia, self-interest, or cultural attachment, want to see the tradition continue. Thus, the constituency most invested in seeing the end of conscription – young healthy men under the age of 30 – are neither large nor politically active enough to see conscription overturned (Poutaara & Wagener, 2011).

Perhaps most poignantly for the purposes of this paper, scholars have also pointed out the importance of cultural attachments and support for the military. The impact and internalization of the military in South Korea has been broadly described as "Militarized Citizenship" (Moon, 2005; Tikhonov, 2009) South Korean conscription has been shown to significantly affect the broader culture. Service appears to have significant impacts on political views, with post-service males showing significantly more support for the military, the United States, and a higher awareness of threat from North Korea. This is not entirely surprising, as conscripts undergo significant political and moral education (Joo, 2015). Volunteer militaries have reasonable certainty in the ideological dedication of their troops. Conscript armies, on the other hand, must buttress any potential ideological doubts in the ranks and invest in ideological training to ensure loyalty (Poutaara & Wagener, 2011). This training appears to be effective (Joo, 2015). These ideological effects are persistent, as politicians capitalize on these biases through regular reference to their own military service, often through political ads that feature photographs of their time in the military (Moon, 2005; 2018). The military has also been identified as a significant factor in the development of militarized political and corporate culture (Cho & Yoon, 2001; Ramirez & Rubio, 2010).

In political discourse, service is framed as an exchange between citizen and state, where men provide service to the state though the military and are admitted into the body politic and labor market. Exclusion from the military service system yields social and economic exclusion as well. The consequences for failing to perform service – whether through refusal or medical exemption, or racial background – yields ostracization from both formal and informal modes of inclusion. Yi and Jung, (2017) interviewed a middle-aged citizen of mixed heritage about his experience of exclusion. "For [him]… that exclusion was symbolic of South Koreans' discrimination against bi-racial citizens… He could never get a full-time job, not only because of his looks but also because of his lack of military experience, and that he has rarely been financially stable as a result " (Yi & Jung, 2017). Conscription is a powerful cultural and political institution in South Korea, but what of those who are eligible for service, but refuse to do so?

Conscientious Objectors

There are several longitudinal examinations of the Conscientious Objector movement that trace its origins in the colonial period through post-democratization. The first organized conscientious objector movements formed in South Korea as Japan began impressing Koreans into the military beginning in the late 1930s and escalating into all-out conscription in 1943 (Mun, 2012; Tikhonov, 2009). Western missionaries arrived on South Korean soil in the 19th century and many denominations took root. The first objectors were tied to these religious groups, specifically Seventh Day Adventists and Jehovah's Witnesses who began to be imprisoned as early as the 1930s (Mun, 2012). The "Deung dae sa" incident saw 38 arrested for resisting conscription. Five of their number would die in prison, and the rest would remain jailed until liberation in 1945 (Cho, 2007). In these early years, pacifist groups adopted nationalistic and anti-imperial language as well as more traditional religious and moral protestations against violence.

Independence from Japan did not eliminate resistance to military service. Like the colonial period, most objectors post-1945 were from religious minority groups – Seventh Day Adventists and Jehovah's Witnesses. However, unlike the colonial period, objectors petitioned a judiciary and government armed with a constitution that ostensibly protected their civil liberties.

Article 19 of the Korean constitution reads: “All citizens shall enjoy the freedom of conscience." Article 20 states: "[a]ll citizens shall enjoy the freedom of religion." Wielding these articles, conscientious objectors had at least the premise for a court hearing (Kim, 2020; Tikhinov, 2009).

The democracy movements that stretched across the authoritarian period notably did not include resistance to conscription in their platforms. Despite resistance to the state and unjust rule the movements remained highly nationalistic and supportive of national defense and building a strong nation (Cho, 2007). Paradoxically, the student democratization movements in the 70s and 80s, despite an anti-military bent were semi-militarized themselves, being highly organized, hierarchical, and disciplined (Kwon, 2013). Feminist advocates demanded equal rights in the workplace and in society, but these demands did not extend to inclusion in the military service system itself, but rather focused on the extra points system (see below) and unfair hiring practices (Kwon, 2013). Among young men, military service enforced societal norms around masculinity and criticisms of service were widely regarded as “cowardice” and “unmanly.” (Kwon, 2013; Cho, 2007). The wider Christian community, deeply involved with the democracy movement, did not support Jehovah’s witnesses. The Christian Council of Korea, an alliance of Catholic and protestant leaders condemned the movement, calling them “heretics” despite Christianity’s doctrinal advocacy of non-violence (Cho, 2007).

Democratization in the late 1980s signaled a changing political environment that, in theory, would be more sympathetic to the movement. Loosening of restrictions on free speech and protest along with a renewed emphasis on civil liberties invigorated debates about militarism and belonging. Conscientious objectors had continued to protest conscription throughout this period. As under authoritarianism, Jehovah’s witnesses maintained their commitment to challenging military service. Some notable changes in the movement occurred, however. First, the movement expanded to include non-Christians. Jehovah’s Witnesses, and previously Seventh Day Adventists were considered outliers and rejected from mainstream protestant and Catholic churches in South Korea. Indeed, religious leaders maintained full-throated support for the state and national defense. Yet beginning in 2000, an increasing number of non-Witnesses joined the ranks of objectors such as Buddhist Oh Tae Yang (Cho, 2007; Kwon, 2013). Buddhists, Catholics, and pacificists became an increasingly common throughout the decade and by 2011, 52 were awaiting trial for imprisonment for refusing service (Mun, 2012). This diversification of

the movement shifted the parameters of debate from anti-military and anti-state, to pro-minority rights, garnering more attention if not support from the broader public (Kwon, 2013). Despite these changes, appeals to Constitutional Court and Supreme Court Cases throughout the early 21st century were all dismissed until 2018. The 2018 Supreme Court case has yielded little scholarship due to its recency. Several retrospectives on the case have been published reviewing the constitutional debate, but none examine the case in the context of broader inquisitional change. This research seeks to fill that gap.

The Judiciary

The modern South Korean judiciary has existed in one form or another for well over a century and its history, rules, and culture are foundational to understanding the 2018 Supreme Court ruling. The courts have been defined by three underlying characteristics, all of which have weakened in recent decades. First, the legal code is predicated on a tradition of Germanic civil law, binding judges to normative ideals of legal formalism. Second, the Germanic legacy instilled a system of insulated, hierarchical, and bureaucratic control over the recruitment and promotion of judges. Finally, the years of authoritarian rule imprinted on the courts a strong deference to other branches of government. The courts did not spring fully formed out of the ether, but were constructed and have evolved over modern Korean history. Understanding the origins of Korean institutions allows us to trace their development in the decades preceding 2018. Each of these three themes -- legal formalism, bureaucratic control, and deference to other branches of government-- weakened considerably since democratization, and each was necessary for the eventual 2018 decision.

The Germanic (or Continental) legal tradition came to South Korea by way of Japanese colonialism. During the Meiji Restoration Japan looked abroad for inspiration in adapting its governmental institutions. The court system it adopted stemmed from the Germanic (or Continental) legal tradition, which it subsequently imposed upon its colonial holdings (Chisholm, 2014). The Continental tradition relies heavily on a bureaucratic system of recruitment, training, and promotion of judges. Upon entering the judiciary, judges are promoted through an ostensibly meritocratic system, gaining experience and responsibility with age. The German system also relies on a civil law tradition, which draws legal reasoning from a strict word-for-word interpretation statutes and laws – an approach known as "legal formalism"

(Chisholm, 2014) Contrast this system with the Anglo-American tradition, which relies on judges appointed to lifetime positions by elected leaders rather than a system of recruitment and promotion. Common, rather than civil law, is the basis for the Anglo-American system, under which the application of laws derives from legal rulings by judges rather than the law code, furthering the power of judicial independence. The Anglo-American judge is therefore a more political rather than bureaucratic actor, with more job security and a wider permission structure for activism. Korea thus inherited (by way of Japan) a continental system of laws and with it all its attendant incentives – bureaucratically selected and promoted judges with a strong bias towards legal formalism. The courts established during the colonial period rule far outlived their Japanese importers.

The end of World War II and American occupation of South Korea saw a gradual phasing out of Japanese and pro-Japanese judges, as well as reforms to colonial-era laws. "Gradual" is the operative word here, as a wholesale erasure of the colonial political system was untenable. In 1945 a provisional Supreme Court was established as well as district courts, with a more formal system established with the passage of the 1948 constitution (Rhee, 2009). Yet the new regime retained a continental judiciary system which remained a critical part of the state structure.

Ostensibly a meritocratic institution open to all, the judiciary selected for, trained, and promoted a narrow selection of individuals, creating strong internal cohesion. The career pipeline to judicial appointment was highly regulated and predicated on seniority and a performance-based promotion system (Chisholm, 2014). To become a judge after 1962, candidates had to finish an undergraduate degree, pass a highly competitive judicial examination, then attend Seoul National University's (SNU) Graduate School of Law. In 1971 the Judicial Training and Research Institute (JTRI) was introduced as an acceptable alternative to SNU (Rhee, 2009). This rigorous credentialing system selected for well-educated students who could spend time and money studying at highly selective educational institutions – i.e. wealthy students with well-connected families. Furthermore, the entrance examination included interview questions for test-takers. This oral portion of the examination served as an informal filtering mechanism, ensuring that those without proper connections or beliefs would fail. This system demanded candidates begin their journey to judgehood relatively young, impressionable, and vulnerable to

indoctrination (Rhee, 2014). The limited choices for graduate school (SNU and JTRI) ensured a narrow band of teachers held sway over forming legal habits of mind, including a strict formalism, where it was feared "a concession to individual morality might undermine the [judiciary] and compromise the goal of maintaining the union" (Kim, 2015). Once a candidate was confirmed as a judge, they were subjected a series of bureaucratic and political pressures (Kim, 2015).

Judge promotions flowed through the Chief Justice of the Supreme Court, who was appointed by the President and confirmed by the National Assembly, both controlled by the ruling party throughout the authoritarian period (Mosler, 2021). Thus, the executive branch held significant influence on promotions and placement of judges in legal districts (Lee, 2011). "Unacceptable" rulings could be punished by being passed over for promotion or placement at an undesirable district in the countryside. In 1973 the executive mandated a wholesale reshuffling of the judiciary with the Court Organization Act, with all serving judges under review and subject to reappointment. In other instances, judges were summarily dismissed for going against the wishes of the executive branch (Kim, 2015).

Some scholars have argued that Confucian cultural underpinnings buttressed the institutional pressures of conformity and hierarchy within the system (Fukuyama, 1995). Given the path-dependent career pipeline, older judges tended to also be senior in the bureaucracy (Heo & Hahm, 2014). This reinforced an already strong Confucian impulse for younger judges to defer. Judges often ruled in teams of three, with two junior judges and one senior. Junior judges were reticent to dissent with or overturn rulings made by their elders (Chisholm, 2014).

The bureaucratic nature insulates judges from outside pressures. In the continental system judges are unelected, (unlike legislative leaders and presidents) and have little obligation or incentive to follow public opinion (Cortell & Peterson, 1999). Furthermore, the civil-law tradition absolves judges of the responsibility of striking down laws that violate the spirit of the constitution or democracy, and only demands they interpret whether the statuary laws have been followed (Chisholm, 2014; Kim, 2015). Contrast this system with Anglo-American approach where judicial appointment by elected leaders to lifelong terms insulates judges from top-down bureaucratic pressure. The Anglo-American system creates some degree of connection between popular will and judicial performance by delegating judicial appointments to a wider range of

elected officials. Furthermore, as a civil law system, Judges create law through their rulings, and are not constrained to the same degree.

South Korea faced significant national security threats. The state exploited these threats, though very real, to strengthen the garrison state and create a legal framework for suppression of civil liberties. Under civil law a tradition, judges were duty bound to follow the laws as written and enforce authoritarian orders (Chisholm, 2014). German legal Scholar Carl von Schmitt postulated the "Theory of State Exception", which investigated the degree to which liberty could be curtailed in times of crisis (Kim, 2015). This responsibility falls to the Judiciary. Yet judges failed to effectively push back against unjust and unconstitutional provisions.

The 1972 Yushin Constitution greatly expanded executive emergency powers. Article 53 read,

> "The president shall, when speedy measures are deemed necessary due to natural calamity or grave financial and economic crisis, and when the state's security or public safety and order is seriously threatened or is anticipated to be threatened, have the power to take emergency measures concerning the matters of state governance such as domestic affairs, foreign relations, national defense, economic or financial affairs, and judicial affairs… Emergency measures under Paragraphs 1 and 2 [of Article 53] shall not be subject to judicial deliberations thereon."

The Park administration took full advantage of the article, passing Emergency Decrees criminalizing criticism and calls for reform of the constitution, establishing separate military courts, and prohibiting antigovernment protests (Kim, 2015, Mosler, 2021). The courts could do nothing due to the cloud of national security threat that hovered over the nation.

The Yushin Constitution of 1972 curtailed the ability of the judiciary to review and resist executive power in order to avoid questions of constitutionality in its more repressive amendments, the regime abolished formal judicial review and established the Constitutional Committee. The Constitutional Committee was a supervisory organization mandated to review the constitutionality of actions taken by the executive (Mosler, 2021). As one may expect, the committee was not an unbiased check on state overreach, but rather a ballast of executive power, dominated by presidential appointments or appointment by proxies. The Constitutional

Committee did not rule once during the Yushin Regime nor during the 5th republic (1980-1987) (Kim, 2015).

These reforms placed judges in a serious bind. On the one hand, judges are mandated to enforce and interpret statutory regulations under civil law. On the other, what is a judge to do with a "unconstitutional constitution" (Kim, 2015)? Until 1980, the Constitution read "Judges shall rule independently according to their conscience in conform with *this* constitution" (emphasis added). The courts were constitutionally mandated to enforce the specific amendments in Yushin and no other The Yushin constitution effectively bound the hands of the judiciary, which adhered to a strict, formalist interpretation of law. It narrowed the purview of rulings to whether or not the defendant violated the letter of the statute, and not broader principles of fairness or civil liberties.

This is not to say that judges were wholly passive during the authoritarian era, but resistance came not through challenges to the legal system itself, rather a strategic resistance that evinced itself in court proceedings. Judges would allow defenses to speak at length and present expert witnesses, as in the 1976 Kim Dae Jung trial (Kim, 2015, Lee, 2011). Others sought to release political prisoners on technicalities, procedural errors. This passive resistance avoided direct confrontation with the regime and perhaps won some small victories for individuals but did little to change the system as a whole (Kim, 2015).

Until 1988, the South Korean court system operated as a tool of state control, both formal and informal rules constricting its decision-making power. The Continental legal system obligated judges to adhere to statutory law, rather than the universalist principles espoused in the constitution. Under the continental system Judges also experienced significant pressures from hierarchical bureaucratic structures as well as cultural traditions to uphold previous legal precedent, limiting the impact of judicial review. The legal framework, constructed under the shadow of internal and external national security threats restricted judges into supporting suppression of civil liberties.

Democratization and Institutional Change

Democratization in 1988 is often cited as the seismic event that ushered in a new era of punctuated equilibrium. Yet an examination of post-'88 institutional practices yields an

evolutionary, not revolutionary pattern of institutional change that continues well into the 21st century. 1988 created a window of opportunity for reform. Scholars have pointed out the insufficiency of South Korean democratization in the late 1980s, where it erected the basic structures of democracy but failed in its maximalist goals of strengthening institutional norms, values and traditions (Heo & Hahn, 2014) The authoritarian period had long suppressed the proper functioning of the judiciary, and as executive power fell away, "rules and procedures… [were] either apolitical institutions previously grounded by other principles" (Tihinkov, 2009). This opportunity is necessary but insufficient for lasting institutional change and requires political or societal actors to capitalize on it. In the years and decades after 1988 legal formalism, bureaucratic hierarchy, and deference to the executive, were all eroded.

Formal institutional changes preceded democratization in 1988. The Constitutional Council, the never-used guardian of state power, was dismantled in favor of a Constitutional Court modeled on Germany's court of the same name (Mosler, 2021). Unlike its predecessor, the Constitutional Court began responding to petitions regarding controversial statutes which might violate constitutional law. In 1987 the language of the constitution changed to "Judges shall rule independently according to their conscience in conformity with *the* Constitution and law" [emphasis added] (Kim, 2015). The change from "this" to "the" as well as the insertion of "according to their conscience" gave judges more leeway to interpret laws predicated on general constitutional principles and natural rights.

Over time the appointment system was also revamped. Instead of a narrow pipeline that produced like-minded and docile judges, a more diverse crop of entrants brought with them more diverse perspectives and training. A 2004 Judicial Reform Committee, comprised of representatives from 21 different governmental and civil society groups sought to expand the pool of judges, diversifying the branch to include new perspectives through a more flexible appointment system. Instead of being forced into one of two graduate law programs at SNU and JRTI, aspiring judges could accrue the necessary experience through practice as a lawyer or clerkships (Rhee 2009). These reforms not only introduced more diverse legal thought, but also judges at different points in their career – older, more experienced, and less likely to be bullied into silence by superiors. In 2008 more reforms sought to incentivize service in some of the less-

desirable countryside districts with increased pay and benefits, weakening the practice of punishing recalcitrant judges with transfer.

There has also been informal institutional change. An influx of judges who had studied law in the United States brought with them the ethics of an Anglo-American judicial system, with its emphasis on judicial activism, adherence to universal principles of natural law, and suspicion of overly legalistic interpretations of statutes (Rhee, 2009). Indeed, the aforementioned 1987 inclusion of "conscience" into the constitution provided a mechanism for informal normative beliefs to influence legal rulings. Between 2010 and 2013 emergency decrees 1, 4, and 9 were all overturned by judges, who rejected the decrees as outside the "standard of constitutional normativity" and "basic requirements of justice" (Kim, 2015) Over twenty years after constitutional reform, expansion of judicial review, and democratization, South Korean judges espoused "decisions [that] seem to be in line with the jurisprudential tendency worldwide to recognize implied substantive limitations on constitutional provisions" (Kim, 2015) Judges took a broader view of their own constitutional duty, extending their purview to balance statutory law with more universalist principles of natural law as well as incorporating popular sentiment into their rulings. In 2010 the Constitutional Court declared that "Judges ought to reject the Constitutional provision that collided with the superior norms in the constitution" (Kim,2015). These normative changes in legal interpretation are critical in the case of conscientious objectors.

One can trace the gradual strengthening of the South Korean judiciary by examining the performance of the Constitutional Court. In the years immediately after its conception, the Court was reticent to even hear, much less overturn laws that violated the constitution. Indeed, this was a continuation of de facto policy since well before democratization, where higher courts rarely overtured statutes (Mosler, 2021). In the early 1990s, the court dismissed over 70% of the petitions that came before it and of the cases that it heard, only 14% found violations of rights. As of 2021, the court receives cases through two avenues – petition (93% of cases) and through referral by lower courts (7%). The court deems about half of all referred cases unconstitutional – a significant step in asserting its judicial authority. Petitions have a much lower rate (11.3%) (Arrington & Goedde, 2021). However, the court has vastly increased the volume of cases it hears. This illustrates the "stickiness" of institutions – given the years of executive dominance and legal traditions of the state, the court was either unwilling or unable to enforce its mandate,

and only grew into the role with time. This assertiveness has meant that the "judiciary has [an] incrementally greater affect on policy" (Rhee, 2009).

It is necessary to emphasize that these reforms to the South Korean judiciary took place over the course of *decades*. While the dramatic events of the 1980s are certainly a useful landmark to understand Korean history, the subsequent years were far more substantive in reforming formal and informal institutional practices. Furthermore, these reforms were not in any single case sweeping and revolutionary, but rather incremental and accumulative. Expanding judicial licensing, improved benefits for rural judges, or gradual shifts in conceptions about legal precedent were not by themselves transformative but rather interacted with one another to incrementally enhance the power and independence of the Judicial branch while empowering individual judges to break precedent.

Judicial evolution is but one piece to the puzzle. The 2018 Supreme Court case demonstrates an institution in the midst of long-term reform but intersects with a very different but nonetheless important pillar of South Korean life: military service.

Military Service

Military service is a categorically different institution from the Judicial branch. Rather than an insulated governmental bureaucracy, conscription is a wide-ranging, ubiquitous set of statutes, informal attitudes, and bureaucratic structures that deeply influence the entirety of South Korean society. While the courts may be arbiters of law and civil liberties, military service bleeds into abstract conceptions of citizenship, belonging, and natural rights. There have been three major vectors of change within military service in recent decades. First, an evolving relationship with North Korea has affected the "demand-side" of national security, and by extension, military service. As perceptions of threats have waxed and waned, so too has the demand for conscripts. Second, Military service has acted as a gatekeeper to Korean society, regulating the entrance to economic and social life. Finally, the public's relationship with the institution has matured as perceptions of identity, belonging, and citizenship have developed. These developments have led to an evolution of the formal rules of service, expanding inclusion while maintaining the overall terms of conscription.

South Korea emerged from the Korean War as a highly militarized nation on the front lines of the struggle against communism. The proximity of a hostile North Korea (and, by extension, Soviet Union and China) necessitated high defense spending and an obsessive focus on national security. With South Korea's economic development it is easy to forget that in the early days North Korea was home to nearly all of the peninsula's industrial power and had a much higher GDP than the agrarian South. The stark realities and dangerous neighborhood enabled the authoritarian state to suppress civil liberties and society in the name of national defense. Responses to national security threats included a deep commitment to developing a domestic arms industry, maintaining close connections to the United States, and most importantly, developing a national military service (Kwon, 2018; Moon, 1991). National military service was therefore a response to perceived threats and was intended to develop high levels of preparedness against foreign incursion.

Conscription had non-military downstream effects the labor market through formal rules and institutions. Many chaebols, (large conglomerates) required the completion of military service as a precondition for employment, alienating those who could not or did not serve (i.e. women and those with physical exceptions). These companies, disproportionately composed of veterans, took on a distinct military flavor -- highly disciplined, patriarchal, and hierarchical organizations (Choo & Yoon, 2021; Moon, 2002; Ramirez, 2010). Some even incorporated physical training into their company curricula (Moon, 2002). This bias in the labor market was further exacerbated by the so-called "extra points" system. The Employment Support Act, later extended with the Honorable Treatment Act, allowed for preferable treatment to veteran candidates for public service exams as well as university entrance exams. While not mandated by either act, many chaebols followed suit. The Employment Support Act stipulated veterans would receive and extra 5% on written examinations, and the Honorable Treatment Act extended these perks to qualitative and oral evaluations. Given that civil service and entrance exams are highly competitive for limited positions, the 5% boost to veteran candidates was often the difference between pass and failure (Moon, 2002; 2005). Furthermore, the bonus mean they jumped other, nonveteran candidates who were equally (or more) qualified (mostly women). The extra points system swung the composition of the already highly gendered workforce even more in favor of males. But beyond this, the extra points system was an implicit signal of cultural value – the value of military service and celebration thereof (Moon, 2005).

Given the ubiquity of military service and its centrality to the labor market and political participation, it could not help but form notions about citizenship and identity. Military service came to be accepted as both a rite of passage but also a necessary duty to the nation – a duty necessary for acceptance into the national family. Those deemed as outsiders were thus barred from service. A 1972 law barred those "Clearly and externally identifiabl[y]" of mixed heritage from serving in the military (Iwabuchi et al., 2017). The stated goal was to protect mixed-race Koreans from discrimination, which would in turn undermine unit cohesion and military effectiveness. Yet the discriminatory practices betray a deeper pathology surrounding race and inclusion. Through the extra points system and the barring of minorities from service, military service acted as a gatekeeper of Korean identity (Li & Jung, 2017).

In the decades before democratization, military service became deeply embedded in South Korean culture through both formal and informal rules. External threat necessitated a militarized state. Young men were required to serve, and numerous carrots and sticks were employed to ensure they did so. Those who completed service received preferential treatment over those who did not. These formal rules yielded informal rules, values, and cultural beliefs related identity and belonging to the national community. Through the performance of duty, young men "earned" their place in the body politic. The obligatory service-for-rights arrangement erected barriers between who could and could not be considered part of the national family.

Democratization and Institutional Change

Democratization brought neither immediate change to the institution of conscription nor the cultural values thereof. Although authoritarian rule was nominally ended, the national security concerns that spawned the garrison state were not. North Korea still lay across the DMZ and there was little outcry from civil society to end the practice of mandatory conscription, suggesting a strong cultural acceptance of the institution. However, that is not to say that institutional evolution did not happen.

Polling data in South Korea is notoriously difficult to parse. Longitudinal polling over the decades even more so. There has been little consistent polling spanning the years of

democratization to the present, so popular attitudes towards conscription are vague. However, some macro-trends are apparent from the data. There has been a significant decline in perceptions of equity within the system since the early 1990s. More and more Koreans believe that the rich and well connected do not shoulder the same burden as the poor and that the system is an increasingly onerous obligation on young people. Other polls show increased skepticism that the military is an effective fighting force and that it poses an inadequate deterrent (Choi & Kim, 2017; Hwang, 2018b).

Paradoxically, despite decreased faith in military effectiveness, perceptions of the North Korean threat also began to recede in the 1990s. The rapid economic (and by extension, military) development of South Korean had eclipsed the North in the 1970s and only continued to widen the gap in subsequent years. The South had developed a significant military industrial complex to support a large and well-trained military (Kim, 2011). The North, on the other hand, struggled with the death of Kim Il Sung in 1994 and famine in the latter half of the decade. The collapse of the Soviet Union and the liberalization of the Chinese economy further undermined the North's ability to pose a significant threat to its southern neighbor . Both China and the USSR supported North Korea's floundering economy with foreign aid, and when this aid dried up, the North's economy crumbled (Oberdorfer, 2001). This trend of a weakening North has reversed in recent years, as North Korea continues developing a capable nuclear deterrent and delivery systems.

The extra points system came under scrutiny in the late 1990s, as the Blue House investigated making reforms and expanding the system to incentivize private companies to participate in the extra points system and include faster promotion tracks and pay increases. Civil society organizations, especially feminist groups, derided the practice as discriminatory and sexist, as it fostered unequal treatment of women and non-veterans. The case was presented before the Constitutional Court in 1999, who ruled the practice unconstitutional and a violation of principles of equality in the workplace (Moon, 2002). The ruling was widely criticized in conservative circles as well as among veterans' groups. This ruling was a sign of things to come, when twenty years later the Supreme Court would similarly reform military service through judicial fiat.

In 2006 Korean courts ruled that the exclusionary practices barring mixed-race Koreans from the military were unconstitutional, opening the institution to mixed race volunteers. In 2009 they were granted full equality in the conscription system and by 2012, the ROK military commissioned first mixed-race officers. In the same year, the oath taken by new recruits changed its language from "The Korean people" to "citizens," (Iwabuchi & Kim, 2016). The evolution of practices surrounding mixed-race Koreans, suggests an expanded conception of community and citizenship in South Korea. However, it still fortifies conscription as the mechanism of inclusion. Rather than expanding conceptions of belonging to include those who don't serve in the military, the institutional change focused on incorporating a formerly-ostracized population through the same institution, signaling the continued relevance of conscription as a cultural cornerstone.

Democratization did not bring about the disillusion of conscription or the larger garrison state. However, some shifts in formal and informal rules are apparent. Threat perceptions from abroad have been variable, with significant fears during the authoritarian period, decreased perceptions in the 1990s and early 2000s, and renewed threats over the last decade. While conscription remains a powerful governmental and cultural institution, its position in society has shifted. Military service's traditional role as a gatekeeper to civic life has eroded. Policy changes such as the end of the extra points system or the inclusion of mixed-race Koreans in military services have both increased inclusion in the system while removing barriers to those who do not serve. Finally, public opinion polls show a declining belief that the system is "unfair" and that it favors well-connected citizens but does not reflect a widespread desire to abolish conscription, but advocates a more equitable enforcement of rules. Perceptions among the population that the military is inadequate to meet foreign threats buttresses the institution of conscription rather than weakens it, and general perceptions that conscientious objectors are avoiding their duty remain strong (Cho, 2007). Thus, incremental reforms not come though popular consensus or grassroots movements, but rather through judicial fiat.

The Two Cases: 2004 and 2018

Thus far, we have discussed general theories of institutional change and examined how those theories apply generally to both the South Korean judiciary and military service. Formal

and informal developments within the institutions have manifested within specific actions taken by the courts. It is now time to turn our attention to the specifics of two cases to determine how these broad shifts specifically influenced legal policy.

In the fall of 2018, the South Korean Supreme Court passed a landmark ruling on the Military Service Act (MSA) which has a profound impact for conscientious objector cases across the country as well as broader implications for military service and national defense. The case centered around a Jehovah's Witness, Mr. Oh, who had refused to report for military service on religious and moral grounds. The MSA requires all those eligible for conscription to present themselves at the appropriate polling or recruiting station for enlistment. Article 88, Section 1, stipulates that failure to do so *without justifiable cause* is grounds for punishment of up to six months in prison. This phrase, "justifiable cause", remained the central question of the case. The vague and somewhat philosophical question of what constitutes "justifiable cause" has functioned as fertile battleground between conscientious objectors and state prosecutors over the decades, with the state routinely rejecting the arguments of the defendants who seek to avoid service (Kim, 2020). In the 2018 case, however, the Court broke with previous rulings and, in a 10-4 ruling, decided in favor of the defendant. This break with legal precedent prompts a closer examination of the shifting legal interpretation of both the Military Service Act and the South Korean constitution (2016Do10912, 2018). Before analyzing the Supreme Court's decision, we must examine a previous case: the 2004 Constitutional Court case.

2004 Constitutional Court Case

In 2004 the South Korean Constitutional Court reviewed the constitutionality of the Military Service Act after being petitioned by both the defendants in a Seoul Southern district case and the lower courts. A point of clarification here is necessary. South Korea has two high courts, the Supreme Court and the Constitutional court, the latter of which specifically addresses constitutional cases as well as impeachment trials. The Constitutional Court does not decide cases, but rather adjudicates petitions for redressing constitutional questions (Arrington & Goedde, 2021). This case is not alone in a litany of challenges to the MSA and other laws that require mandatory service, but it does provide a case study of the legal arguments employed in the prosecution of conscientious objectors. Subsequent decisions by both the Supreme Court and the Constitutional Court closely mirror the 2004 case.

Grounds for Petition

The petitioners based their argument on the apparent tension between Article 88 of the MSA and several articles of the South Korean Constitution. Article 19 guarantees the rights of freedom of conscience to all citizens. While Article 20 protects the freedom of religion, the judges point out that religious freedoms are also protected under Article 19, with religious belief being an extension of conscience. Furthermore, Article 10 protects "human worth and dignity", as well as the right to pursue happiness. The petitioners argued that, given these protections embedded in the constitution, a religious or moral aversion to violence represents a justifiable obstacle to military service. These freedoms, they continue, are "indispensable vitalizing elements of the basic order of free democracy." Finally, Article 11 of the constitution protects the citizenry from discrimination on the basis of "political, economic, social or cultural life on account of sex, religion or social status." The continued legal prosecution of objectors whose transgressions largely stem from religious doctrine is discriminatory and an unequal application of the law (1412002Hun-Ka1, 2004).

The state therefore has an obligation to provide reasonable accommodation for its citizens to perform their duties given the moral constraints of religion and conscience. Notably the petitioners did not argue for the wholesale jettisoning of the MSA but argued the need to provide alternative service for those whose conscience or religion forbids taking life. The state does not adequately accommodate the fundamental rights of the citizenry. They further point out that South Korea is alone among other advanced democracies in its failure to provide alternative service or accommodation for conscientious objectors. Many European nations, for example provide constitutional or legal stipulations that protect COs and offer alternatives for military service (1412002Hun-Ka1, 2004).

Testimony for Upholding the MSA

The defenders of the MSA chose a different framing, specifically Article 39, Section 2 of the constitution, which stipulates that the rights of the citizenry may be modified with regards to situations of "clear and present danger." They point out that while not a "hot war," the Korean War was never formally ended, and legally South Korea is still in a state of war with the North.

Furthermore, they point out that religious freedoms are subject to legal rules regardless of protections. The minister of National Defense also testified that Articles 19 and 20 of the constitution do protect the freedoms of conscience and religion, it stops well short of protecting conscientious objector status. The "right", therefore, not enumerated in the constitution, is extrapolated from other articles, and thus does not represent a substantive statuary challenge to the MSA. The minister further argued that, while the current number of conscientious objectors remains small, creating a legal framework to accommodate them would encourage others to follow suit, shirking their duties and deteriorating national security (1412002Hun-Ka1, 2004).

Majority Opinion

The majority opinion of the court framed its ruling using the principle of proportionality. All rights are guaranteed under the umbrella of public interest and the state may curtail civil liberties when rights unduly threaten social stability. Given that laws are imposed upon the entire population, any given statute has the possibility of infringing on the moral compass of some its citizens. This imposition alone is not sufficient to declare unconstitutionality. The principle of proportionality would suggest that the apparent contradiction between the MSA and the Constitution may be mediated through a careful measuring of the relative weight of the public interest regarding conscientious objectors. National security is the most fundamental guarantor of social stability and if a fundamental right threatens national security, it is fully consistent with the constitution to moderate it (1412002Hun-Ka1, 2004).

The court further clarified the difference between the "external world" with the "internal world" of conscience. While the constitution protects the right to adhere to whatever moral code one desires, citizens are still responsible for their actions in the "external world" and are obligated to follow the laws and customs of society. "Internal" conscience is fully protected; the public exercise thereof is not. Freedom of conscience and religion is not a blank check to ignore statutes one finds abhorrent, but rather protects the right of opinion to find it thus. Article 19 empowers the citizenry to petition the government to "take into account and protect individual conscience *if possible*" [emphasis added] (1412002Hun-Ka1, 2004).

The possibility of accommodation is thus a central question. Can the court allow for conscientious objectors while still protecting law, order, and the survival of the South Korean state? The state must account for questions of national security and, by extension, the combat

readiness and overall health of the ROK military while attempting to reasonably protect rights of its citizens.

The court also invokes the principle of equality. While the petitioners invoke Article 11 (the nondiscrimination principle) as a defense of CO, the judges employ it to warn against alternative service. Military service is a significant sacrifice in defense of the nation, and creating an alternative service risks a lighter burden than ordinary service. Requiring two different types of service unfairly favors a religious minority and places extra burdens the general population (1412002Hun-Ka1, 2004).

The majority decision presents two possible perspectives: optimistic and pessimistic. Optimistically, conscientious objectors represent a small percentage of conscripts in a modern military whose reliance on manpower is steadily decreasing due to technological progress. Alternative service that maintains the principle of equality would allow conscientious objectors to contribute to the national defense while accommodating their moral imperatives. The pessimistic paradigm echoes the perspective of the defense minister and highlights the difficulty of implementing an equally rigorous service and the dangers of compromising the integrity of the armed forces. Ultimately, the court argues, the determination of these competing paradigms must come from the legislature, not the supreme court (1412002Hun-Ka1, 2004).

Dissenting Opinion

The decision by the Constitutional Court was not unanimous. Two judges, justices Kim Kyong Il and Kim HyeoSook, wrote a dissenting opinion on the case. The judges begin by echoing the importance of national security and social stability present in the majority opinion but diverge when interpreting the meaning of "freedom of conscience" as posed in the constitution. Conscience, they argue, should not be relegated to the internal world but acted upon for it to be fully realized and those who refuse military duty are exercising the imperative of action of conscience (1412002Hun-Ka1, 2004).

The judges further argue that the ruling violates the principle of equal application of the law. The conscientious objector population has been a stable (albeit miniscule) group over the decades who have continually suffered punishment for their refusal to serve. Their continued existence as a minority population and continued persecution under the law presents a case of de

facto separate treatment based on religious and conscientious preconditions, forbidden by Article 11. Indeed, the values of peace and nonviolence are enshrined in the preamble of the South Korean constitution as it seeks “perpetual peace and prosperity.” Thus, pacifism and peace as moral imperatives are not divergent from to constitutional principles (1412002Hun-Ka1, 2004).

Finally, they came to different conclusions with regards to the state imperative to accommodate conscientious objectors. The dissenting opinion concludes that the relatively low number of objectors do not meaningfully compromise national security nor would the implementation of alternative service. Thus, the legislature has a constitutional obligation to offer accommodation by way of alternative service for religious minorities and conscientious objectors. The legislature, the dissenting decision argues, has failed in its duty and it thus falls to the judiciary to impel the National Assembly to act (1412002Hun-Ka1, 2004).

The 2004 court case may be understood as two competing sets of legal interpretation: that of legal formalistic framing and a universalist liberal reading of the case. The majority opinion leans towards the former, while the dissenting opinion favors the later. In the introduction of the majority opinion, the judges pay tribute to the universal principles of conscience as the “earnest voice of one's heart, the failure to realize which in action upon judging right and wrong of a matter would destroy one's existential value as a person.” However, as they enunciate their decision, the focus remains on a statutory interpretation of the laws as written in both the constitution and the MSA. They point out the legal contradictions between articles 19 and 39 (and, by extension, the MSA) and argue that the court must side with one or the other. Their decision presents the case as “only the choice between freedom of conscience and the public interest.” Given that the constitution “does not have any normative expression therein that recognizes the unlimited superiority of the freedom of conscience,” the court places higher importance on public interest and national defense. The majority opinion recognizes the tension between freedom of conscience and national security, but again reverts to its formalist interpretation of separation of powers, stating that it is the prerogative of the legislature, not the judiciary, to determine whether or not alternative service is a viable solution (1412002Hun-Ka1, 2004).

The dissenting opinion accepts the validity of the arguments, but only to a degree. The dissenting judges expand their argument to include universalist appeals high-flatulent liberal

ideals that, they argue, supersede statutory principles. The ability to express one's opinion is one of the "spiritual fundamental rights of democratic nations" and the "voice from the heart" is paramount in the full realization of humanity and citizenship. These judges aim beyond the literal textual interpretation of the law and appeal to more grand constitutional principles.

2018 Case: Supreme Court

The intervening fourteen years between the 2004 and 2018 cases allowed the vectors of evolution to spread and permeate institutions. Judicial appointment was overhauled and with it came new judges who joined the bureaucracy. Perceptions of judicial responsibility, community, national security, citizenship, and belonging continued to evolve. These changes enabled the courts to take a new perspective on the issue of conscientious objectors.

The 2004 case is a typical example of the legal arguments employed by the state to defend the constitutionality of the MSA. Article 88 requires a "justifiable cause" for neglecting to serve, and a violation of one's conscience or religious beliefs did not constitute such a justification. Citizens have no right to ignore statutory law in the name of conscience if the state has made reasonable attempts to accommodate citizens while maintaining national security and the general welfare. The creation of an alternative service might undermine the effectiveness and ethos of equality among the armed forces and compromise the security of the state. This final determination is not the responsibility of the court and should be investigated and possibly implemented by the legislature. As it stands, the court argued, there is no glaring contradiction between the MSA and the South Korean constitution (1412002Hun-Ka1, 2004). In 2018, the Supreme Court rejected this argument.

The majority opinion adopts the same position as previous courts on several issues. The court agrees that national security has precedent over civil liberties. It agrees that freedom of conscience is not an absolute right and may be limited when the public interest is concerned. It even agrees with the 2018 majority opinion that alternative service could be abused, although the court asserts that this is not an unsolvable problem (2016Do10912, 2018).

From here the court departs from the logic of the 2004 majority. Although the Supreme Court, like the Constitutional Court, recognized the tension between the MSA and Article 19, the

Supreme Court took a broader framework, including of Article 39 of the constitution, which remained the legal foundation and justification for the MSA. Article 39 sates "All citizens shall have the duty of national defense under the conditions as prescribed by an Act", later enshrined by the MSA. Given that Article 39 only stipulates the need for "national defense", and not the manner in which said service is provided, the constitutional underpinnings of the MSA may be interpreted as much broader than the narrowly-defined parameters of military service(2016Do10912, 2018). Alternative service could easily contribute to national defense through medical care, public service, or law enforcement, or any number of non-military positions. Thus, the MSA is "unnecessarily restrictive" in its interpretation of article 39(2016Do10912, 2018).

The language of the court's decision is further of note. Whereas the earlier majority decision is couched in legalistic and literal readings of the statuary parameters of the MSA, the 2018 shifts to more general and universal appeals to human rights and humanity, echoing the dissenting opinions of the 2004 case. The MSA, the court argues compromises the "value of existence as a human being" and thus "contravene[s] the spirit of free democracy" (2016Do10912, 2018).

Like 2004, the decision was not unanimous. The just as the majority opinion mirrored the 2004 dissenting, the 2018 mirrored the 2004 majority. Like all previous opinions (both majority and dissenting), the judges begin with the assertion that civil liberties are secondary to national defense and must be constrained by questions of security. The duty towards national defense is absolute, and without "the grounds for exemption… clearly stipulated in the Military Service Act," may not be abridged. The opinion continues to argue that due to the language of the MSA, only "value-neutral" circumstances may be considered when deeming a candidate fit for exemption (2016Do10912, 2018).

2018 Dissenting Opinion

The dissenting opinion is very concerned with practical questions of executing an alternative service. Alternative service would be vulnerable to exploitation by those who are unwilling to perform military service due to selfish (i.e. non-idealistic) reasons. Since it is nearly impossible to conclusively demonstrate or prove "genuine conscience," there is no viable standard to measure one's dedication to the tenants of conscience, religious or otherwise. Thus

any alternative service system would be severely hindered in determining a candidate's edibility. Furthermore, invoking article 11 and the principle of equal application of the law, the judges warn of the difficulty in creating a program that is a burden of equal difficulty compared to military service (2016Do10912, 2018). The judges protest the overturning previous judgements on the MSA, claiming that such an action compromises "legal stability."

Finally, like the 2004 majority decision, the dissenting judges argue that regardless of the merits of the case, it not the place of the judiciary to compel the National Assembly into action. The judges take the separation of powers seriously in their decision and warn against judicial overreach in their quest for justice (2016Do10912, 2018).

The 2018 Supreme Court case is a mirror image of the 2004 Constitutional Court case – with a narrow, formalist interpretation rejecting the right of conscientious objection and a broader, universalist, value-driven argument demanding a revision to the MSA, with the majority and dissenting opinions of the judges flipped. In the analysis of these higher court decisions and the search for causality, a further comparison of the positions is necessary. It is not enough to observe the shift in legal reasoning and the case begs the question as to *why* the change occurred.

Findings

Impact of Judicial Institutional Change

Evolutionary changes over the previous decades within the judiciary paved the way for the 2018 decision. As discussed, the judiciary shifted in three principal ways: a decreased adherence to formalism through evolving conceptions of judicial responsibility, a decreased adherence to hierarchy through updated appointment and promotion practices, and a decreased deference to the other branches of government. Significant trends in the institution of military service are changing threat perceptions of North Korea, an expansion of inclusion within the conscription system, and waning public perceptions of performance and fairness within the system. These six trends – three in the judiciary and three in military service – provide the backdrop for the case. Now the question arises: which are the most instrumental in the changing court decision? If we examine the legal arguments made by the courts – both majority and

dissenting opinions, and gauge which arguments shift and which remain the constant, a pattern emerges, pointing to the most salient variables.

In 2018, empowered judicial institutions were able to effectively project their constitutional power, long suppressed, over the legislature and executive. The 2004 ruling incorporated testimony from the executive branch – namely the defense minister and the Military Manpower Administration, to formulate its opinion about the nature of national security. Furthermore, 2004 deferred to the legislature to make decisions about alternative service, declaring that it was the responsibility of the National Assembly, not the courts, to evaluate the viability of alternative service. The courts deference displays its hesitancy to force other branches to act, whereas the Supreme Court rejected both arguments, making its own judgement about military readiness as well as seizing the initiative by forcing the National Assembly to develop a plan for alternative service. It further made its own evaluations of national security, something the court did not do in 2004, when it relied on the testimony of the defense minister and National Assembly (1412002Hun-Ka1, 2004). An empowered judiciary was then able to claim jurisdiction over areas previously relegated to the executive and legislative branches, ending their monopoly over national security, democratizing issues of national defense (Hwang, 2018). This assertive judiciary shows a clear transformation from the more deferential courts of earlier decades.

In addition to being more assertive in projecting its power outward, the courts were more assertive in overturning internal precedent. Expanded avenues for judicial appointment allowed for more diverse judges with varied experiences with alternative legal traditions – especially from the United States. These judges brought more expansive notions of judicial power and constitutional rights beyond the narrow formalist interpretations of former judges. A more diverse and empowered bench of judges could exercise more independence – both from the executive branch but also their more conservative predecessors. It is important to point out that the judges on the bench in 2018 were recruited *before* the reforms to the appointment process. Nonetheless, they would have been exposed to colleagues, subordinates, and an organization that was increasingly diverse in its legal backgrounds and opinions. New incentives to county seats ameliorated the threat of exile for unpopular judgement or overturning of precedent. This enabled a newfound assertiveness of judges present in the 2018 case. We may observe remnants

of the old deferential impulse in the dissenting opinion, where judges warned against compromising "legal stability" of the courts (2016Do10912, 2018). The judges act as if the overturning of previous judgement --a critical role of the judiciary -- is somehow inappropriate for the courts. This demand is an implicit indictment against overturning previous court rulings, without sufficiently demanding that the previous rulings be adequately audited. It is not a legal argument, but rather an appeal to authority without legal reason. The argument displays remnants of a system that highly values stability, precedent, and the status quo.

Small changes to the language of the constitution ("this constitution" to "the constitution") expanded the permission structure just enough to allow more leeway in legal decisions. Judges could assert authority beyond narrow interpretations of individual statutes and with less acquiescence to precedent. These developments strengthened an internal culture that was more sympathetic towards maximalist interpretations of constitutional rights and less concerned with legal formalism. Contrasting the 2004 and 2018 decisions illustrates the point. In 2018 there is a greater adherence to the universalist claims of the "value of existence as a human being" and "the spirit of free democracy" rather than statutory, formalist interpretations ((2016Do10912, 2018). Another example is the Supreme Court's broad interpretation of Article 39 which required the population to provide for national defense. A formalist interpretation (and one employed by previous courts) sees the MSA as narrowly reflective of Article 39, whereas a more expansive view (one adopted by the 2018 majority) considers it unnecessarily restricting.

Institutional change within the judiciary was both instrumental and necessarily for the 2018 decision. Remove of any of the three developments and it is unlikely that the court rules in favor of the objectors. Without reforms to the hiring and promoting of judges, the internal culture of the courts does not change, and judges remain dedicated to formalist interpretations of the law rater than boarder conceptions of natural rights and liberal constitutional principles. Enforced adherence to precedent -- trough exiling judges or through informal normative deference to older judges -- had to be similarly weakened for judges to overturn previous rulings. Finally, both these developments would be rendered impotent by an inability (or hesitance) to assert the full power of the judicial branch over the executive and legislative branches, demanding that they implement alternative service.

An Alternative Explanation?

What of military service? While the evolution of the judiciary was clearly instrumental in the 2018 decision, military service could also conceivably play just as large role in the decision. To entertain this argument, we must revisit the changes in military service since democratization in order to explore its viability. Recall that military service evolved along three axis: perceptions of external threat, public perception of service, and military service's role as a gatekeeper to the national community. These vectors are not as easily measured in terms of influence on the decision. However, we may speculate on their impact.

Decreased perceptions of national security risk from the North would suggest with a deceased need for active soldiers. However, recent developments in the North in nuclear and rocketry capabilities muddy the waters. All majority and dissenting opinions regard national security as the paramount concern of the state, although judges disagree to what extent alternative service would compromise readiness. In 2004, both the defense minister and the Military Manpower association testified that alternative service would unnecessarily limit combat effectiveness (1412002Hun-Ka1, 2004). These considerations have not disappeared and are present in the dissenting opinions in 2018. However, the majority opinion in 2018 asserts that a small decrease in manpower would not compromise security, given improvements to military technology and the relatively small number of objectors. It is unclear how much bearing these changes had in the court's evaluation of national security and the subsequent weight it had on the final decision (2016Do10912, 2018).

The court of public opinion has no formal jurisdictional power over the Supreme Court. Unlike the other branches of government, judges are insulated from everyday politics through bureaucratic appointment procedures rather than direct elections. Changes in public opinion over the fairness and utility of military service hold little sway over the opinions of judges from a formal standpoint. However, some small shifts in the public consciousness over conscription are not irrelevant to the case. Judges may not be beholden to public opinion, but through cultural osmosis may adopt the values of the nation as a whole. While the Korean public remains largely supportive of the military and national defense, accommodation of minority rights is also increasingly salient among the population. The majority opinion makes no reference to public opinion and the dissenting judges in the 2018 case assert that there has been a significant shift in public opinion is responsible for the change in court decision, as they argue, "no obvious

normative and practical changes are observed to deem that the established legal doctrine should be overruled" (2016Do10912, 2018). Indeed, the courts already showed themselves capable of defying public opinion, as they did in 1999 when they struck down the extra points system. Overall, the impact of public opinion is murky at best.

The evolution of military service away from its traditional role as a gatekeeper of citizenship is equally unclear. Formal changes to both the extra points system and the inclusion of mixed-race Koreans in military service do point to an evolution of South Korean society, signaling acceptance of minority groups and women in the workplace and society. Expanded conceptions of inclusion and a decreased emphasis on the rights-service relationship do not effectively erode military service. Indeed, the inclusion of mixed-race Koreans strengthens and legitimizes the system. By expanding inclusion, the state reaffirms the importance of service as a marker of belonging and entrance to Korean society. While one may applaud Korea's move toward a more open and pluralistic society, it is not a refutation of military service as an institution. In this sense, alternative service may be understood as an affirmation of minority rights, allowing another pathway for an ostracized group to join the body politic, albeit through alternative avenues. Finally, it is notable that the courts were responsible for both the end of the extra points system and the inclusion of mixed-race Koreans, and not the executive or legislative branches. Some of the same forces that prompted the 2018 decision were already influencing military service prior to 2018.

The Nature of Institutional Change

When we place the 2018 Supreme Court case into the context of wider institutional change, a pattern emerges. Or rather, an existing pattern continues. Democratization was not an overwhelming moment of massive change in South Korean institutions. True, popular presidential elections have yielded repeated peaceful transfers of power and declarations of victory from democracy advocates. The Constitutional Court replaced the Constitutional Committee and was vested with significant powers of judicial review. Yet it is far from the "equilibrium" predicted by Punctuated Equilibrium theorists.

Incremental changes within the judiciary enabled the 2018 decision. Institutional evolution is path dependent, just as evolution in nature require certain conditions to be viable. Reforms to the military service system could not take place without a corresponding

liberalization and empowerment of the judicial branch. That process took time, decades, even. The courts diversified its pool of judges through expanded appointment mechanisms, enabling a wider range of opinions and weakening adherence to precedent. It also slowly became more assertive in its constitutionally-given role as overseer of justice. The evidence for change in terms of military service affective the outcome of the case is weak. Punctuated equilibrium identifies as large, sudden, exogenous changes to systems as the critical ingredient to institutional change. The 2018 case provides a counterexample for how a slow, steady, evolution in minor formal and informal rules might shape incentives and attitudes into producing

Conclusion

The 2018 Supreme Court decision was predicated upon several significant but gradual changes in the judiciary. Revisions to the judicial appointment system diversified the pool of presiding judges, who in turn affected the normative values of the judiciary. Judges became more sympathetic to wider conceptualizations of constitutionality and judicial review and less likely to follow precedents set by older judges. Revisions to statutory regulations on judicial review and expanded conceptions of judicial responsibility empowered judges to be more assertive with their decisions and thus more likely to impel other branches of government to action. Military service evolved as well. Oscillating analysis of external threats had a corresponding effect on the demand for national defense. Public opinion has shifted over the decades to be more suspicious of the egalitarian nature of and effectiveness of the conscription system. Finally, military service's traditional role as a conduit to public life has also been weakened through the removal of the extra points system, and inclusion of minority groups.

While changes in the judiciary were necessary preconditions for the decision, the changes in military service are less clear-cut. While the evolution of military service certainly has normative impacts on informal rules, the causal mechanisms that bridge these changes to the Supreme Court are amorphous, making formal analysis difficult. Ultimately, the shifts have taken place over years and have been largely path dependent. Judicial evolution needed several interconnected reforms before the shift in court decision could manifest. Thus, the 2018 Supreme Court decision was neither aberrant nor unexpected given the preceding changes in South Korean institutions and society.

In 2019, the National Assembly passed a law introducing alternative service for those who, for religious, moral, or political reasons do not wish to serve in the military. Candidates for alternative service must apply to the Military Manpower Administration for approval and undergo a vetting process to determine whether their pacifism is, in fact, a "sincerely held belief" (Gibson, 2020). If accepted, objectors may pursue alternative forms of service in lieu of a military position. As of 2021, nearly a thousand objectors had begun work in homeless shelters, prisons, hospitals, or as firefighters (Oh, 2021).

Despite the apparent victory won by pacifist activists, we should not let ourselves overstate the importance of the 2018 case. In reality, the courts went from a 7-2 decision supporting the MSA to a 10-4 decision striking it down – a shift of only a few judges across two different courts. There has been no overwhelming wave of support for objectors, nor widespread calls for the abolition of military service. Objectors remain a tiny fraction of those eligible for military service. Despite reservations about the hazing of troops, inequality in service among rich and poor, and the burden placed on young men, military service remains a relatively stable part of South Korean life. The threat from North Korea and an increasingly assertive China continue to place high demands on the South Korean military as well as ingrained cultural conceptions of masculinity and militarism.

Armed with a better understanding of the evolution of institutions in South Korea, we can extrapolate the trends of the last 30 years. Democratization opened a window of opportunity for policymakers to make changes previously hindered by formal and informal institutional rules. Yet the changes did not happen all at once. It is possible the creation of alternative service will have downstream effects on attitudes toward military service. Will it empower pacifist movements to even more activism? Will it normalize nonmilitary service, leading to a demilitarization of South Korean culture? Will there be a backlash to alternative service from conservative forces within the state? Whatever the effects, they are likely to be gradual in nature.

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