UNDERSTANDING POLITICS · CHAPTER 12

Governing and Constraining Power

Executives, legislatures and courts

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OPENING PUZZLE

A court and a housing crisis

The claim

Evicted families ask the state for emergency shelter.

The question

Should a court decide what housing policy must include?

Ask: who should decide: legislature, executive or court?

EXECUTIVE POWER

Formal and practical power

Formal

Constitutional powers: appointment, veto, decree.

Practical

The power to persuade others whose cooperation is needed (Neustadt, 1960).

Ask: can a weak-on-paper executive dominate in practice?

LEGISLATURES

Arena or transformative?

Arena

A stage for debate between government and opposition.

Transformative

Shapes and rewrites legislation independently (Polsby, 1975).

The Parliamentary Powers Index compares legislatures’ formal powers (Fish and Kroenig, 2009).

FUSION OR SEPARATION?

Two founding statements

Bagehot

“The close union, the nearly complete fusion, of the executive and legislative powers.”

Madison

“Ambition must be made to counteract ambition” (*Federalist* 51).

Party organisation alters both systems in practice.

> *“Neither FORCE nor WILL, but merely judgment.”*

Hamilton, *Federalist* 78

Courts depend on others to enforce their decisions.

WALDRON · THE CASE AGAINST

Who should settle disagreement about rights?

The conditions

Working democratic institutions and a general commitment to rights.

The argument

Reasonable people disagree about rights; legislatures settle disagreement among equals.

Strong review substitutes judges' judgment for citizens' (Waldron, 2006).

WHY POLITICIANS EMPOWER COURTS

Two explanations

Insurance

Parties unsure of future power create review as protection (Ginsburg, 2003).

Hegemonic preservation

Threatened elites move contested questions to courts (Hirschl, 2004).

Judicial power has political origins.

FEDERALISM

Dividing territorial authority

Coming-together

Separate units pool sovereignty.

Holding-together

Created to keep a diverse state united (Stepan, 1999).

Measuring it

The Regional Authority Index (Hooghe et al., 2016).

ACCOUNTABILITY

Who checks whom?

Vertical

Citizens through elections.

Horizontal

State institutions checking each other (O’Donnell, 1998).

Oversight

Police patrols or fire alarms (McCubbins and Schwartz, 1984).

Frontline discretion makes policy (Lipsky, 1980).

EMERGENCY POWERS

Limits that survive the emergency

Time limits

Expiry dates, but renewal can become routine.

Escalator

Each renewal needs a larger majority (Ackerman, 2004).

Review

Courts and legislatures scrutinise measures.

CASE · GROOTBOOM (2000)

A middle path for courts

The ruling

The housing programme was unreasonable: no provision for people in desperate need.

The restraint

The court did not prescribe the remedy.

The aftermath

Implementation was slow (Rosenberg, 1991).

SEMINAR TASK · 25 MINUTES

Who should decide housing policy?

1. Group A argues as the Constitutional Court.
2. Group B argues as the government.
3. Group C argues for the applicants.

THIS WEEK'S ESSAY

Should unelected judges strike down legislation?

Plan

Hamilton's case; Waldron's conditions.

Test

Ginsburg, Hirschl and weak-form review.

Judge

Depends on the condition of democratic institutions?

1,500 words maximum · Student Pack: essay questions