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Areshidze, Giorgi, Paul O. Carrese, and Suzanna Sherry, eds. 2016. *Constitutionalism, Executive Power, and the Spirit of Moderation*. Albany, New York: SUNY Press.

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The new book by Giorgi Areshidze, Paul Carrese and Suzanna Sherry combines philosophical and political approaches of analysis to explore a diverse collection of constitutional, legal, and philosophical topics. Moreover, it provides some much needed analysis on the proper role of the courts in constitutional democracy. What makes this book atypical is the editors' dedication to their former professor, Murray Dry, who influenced them by conveying the need for both civil peace and the quest for truth in our constitutional political system.

Similar to other writers in judicial politics, Suzanna Sherry argues that judicial activism serves an important purpose in a constitutional democracy. Interestingly, the author unequivocally declares that judicial restraint not judicial activism "seems to be the more modern invention." I diverge from the statement that judicial restraint is more of a "modern" device. Judicial restraint has a long history in American legal theory and case law. As early as 1810, the U.S. Supreme Court in *Fletcher v. Peck* declared that judges should invalidate laws only if they "feel a clear and strong conviction" of unconstitutionality. Harvard law professor James Bradley Thayer (1831-1902) endorsed the concept that a legislator might vote against a law because he believed it unconstitutional but nonetheless, if he later became a judge, properly vote to uphold it on the grounds of restraint. U.S. Supreme Court justices associated with judicial restraint include Oliver Wendell Holmes, Jr., Louis Brandeis, and Felix Frankfurter. It was not until the second half of the Twentieth Century, during the era of Chief Justice Earl Warren did the Supreme Court begin making more liberal activist decisions, and restraint became more widely recognized as a conservative term. Moreover, Suzanna Sherry argues that only a Court predisposed toward

activism will assiduously avoid "false negative" cases, and therefore our society demands more activism. The author concludes that an examination of history demonstrates that limited judicial activism is worse than too much. Suzanna Sherry provides only six "universally condemned" case descriptions as evidence that the Supreme Court failed to prevent popular majorities from making grave constitutional mistakes. The author eschews the strict constructionist argument and the value of judicial restraint, which relies on each state legislature to formulate social policy by electoral majorities rather than by a few members of a judicial elite. A commonly known example of excessive judicial activism is the *Citizens United v. Federal Election Commission* (2010) ruling which triggered a polarizing societal division in American politics. The *Citizens United* decision was unanticipated given the sensitivity regarding corporate and union money being used to influence a federal election. Congress first banned corporations from funding federal campaigns in 1907 with the Tillman Act. In 1947, the Taft-Hartley Act extended the ban to labor unions.

In Chapter 2, Karl Coplan argues that "moral intuition" is as relevant as "rule-based" legal reasoning in the decision-making process of Supreme Court justices involved in constitutional judicial review. The chapter neglects to emphasize the relevance of *stare decisis* to justices' on the Supreme Court. The respect of precedent convinced a majority to uphold *Roe v. Wade*'s abortion rights in the *Planned Parenthood of Southeastern Pennsylvania v. Casey* (1992). As an adherent of judicial restraint, Chief Justice Rehnquist was a critic of the *Miranda v. Arizona* (1966) landmark ruling. Nevertheless, Rehnquist joined the majority in *Dickerson v. United States* (2000) to uphold the *Miranda* warnings.

In Chapter 3, Ayse Zarakol asks an important question for comparative political scientists to examine and test. The siphoning of legislative power by the judiciary is called

"judicialization." The author points out that while judicialization is a consequence of the spread of democracy, more judicial power does not automatically translate into a more vibrant democracy. Ran Hirschl maintains that the judicialization trend around the globe is not all about constitutionalization of civil rights but more an attempt for "hegemonic preservation." In other words, elites who previously controlled the state through legislative means have to resort to using the courts in order to maintain their power and impose their worldview. Nonetheless, the author admits that even the most politicized courts operate within the constraints of "legal-rational authority" that has a binding effect of rules and laws that are often the foundation of judicialization.

In Chapter 4, Barbara Kritchevsky's thesis is that the courts should act to protect constitutional rights if Congress does not ensure that all state citizens' receive the same redress for violations of constitutional rights. The author laments that the Roberts Court has not gone far enough in extending *Bivens* to considerations of state remedies. Barbara Kritchevsky declares that the Supreme Court reached the wrong decision in *Minneci v. Pollard* (2012) when it held that state remedies to control constitutional remedies were adequate under state tort law. Most importantly, the Supreme Court ignored the fact that the Constitution and state tort law protect different interests.

Chapter 5 is a better reference source for a historian than a political scientist. Sean Mattie discussed Lincoln's policy of wartime reconstruction to demonstrate Lincoln's insight about the "necessary and the good" in American politics. I found the chapter not cogently argued and poorly written.

In Chapter 6, Kevin Marshall calls for a return to the "Founder's Constitution" which would allow for a more restrained war-time president. The author's perspective is that there is a

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tendency toward expansive executive authority without requisite tools with which to check the expansion. Kevin Marshall admits that a return to the founder's perspective may not always produce straightforward or complete answers. One challenge of reverting to the founder's constitutional interpretation is that technological and scientific advancements in military weaponry have rendered Congressional deliberation of a declaration of war a moot point.

Chapter 7 provides a robust historical analysis of health care reform ideal for students of public policy. Unequivocally, James Monroe proclaims that the concept of free health care is a significant threat to American liberty. Republicans advocate the neo-liberal solution of meeting social needs through private markets. However, the author acknowledges that health care is difficult to privatize due to entrenched alliances.

In Chapter 8, James Stoner Jr. contrasts Plato's *Republic* and the Founding period as a contribution to political theory. Platonic philosophy and American constitutionalism share a virtue of magnanimity or "greatness of soul." In chapter 9, Peter Minowitz analyzes Adam Smith's invisible hand to not only reveal the rhetorical strategies that allowed Smith to influence institutions and public policies but to demonstrate his commitment to promoting intellectual curiosity and inquiry. The author faults William Grampp, one of our nation's most venerable historians of economic thought, for neglecting to appreciate how Smith's insightful discussion of an invisible hand can lead a reader to discover wisdom from God, nature, prophets, philosophers, or other sources.

Chapter 10 is an important discourse on American political theory. Both federalists and anti-federalists agreed that knowledge of ancient and modern political history was critical to good deliberation. Both Publius and his opponents emphasized the knowledge that comes from

experience. David Upham's main contribution to the book is to emphasize that good judgement comes from experience. The importance of experience is reflected in the founders' design for both the Constitution and the American political system. The author's most controversial statement is that the government must use its coercion to facilitate free discussion not stifle it. One way to accomplish a more open discourse is teaching the topics of U.S. history and government in America's middle and high schools.

Paul Carrese's chapter on moderation is a requisite philosophical examination of the factors contributing to an acrimonious political system. The author explains how academia's failure to study and teach the principle of moderation has led to a polarized political system. There is a growing awareness that universities and disciplines are not intellectually balanced and have neglected to search for or discern the truth, but instead are reinforcing certain "paths of inquiry" in the humanities and social sciences. Paul Carrese points out that the two failures of moderation, in political and intellectual discourse are related. Both Montesquieu and Tocqueville are analyzed to ascertain the intellectual virtue of moderation. Paul Carrese convincingly argues that Tocqueville sought to transform liberal individualism and egalitarianism by the merging of politics and civil society guided by religious principles and practice.   In addition, Tocqueville's new political science desires statesmen educated in religious and constitutional principle who can teach in the moderate goals of ordered liberty and the belief in the dignity of the person's ephemeral and eternal destiny. The author's so-called spirit of moderation discourages single-minded theories of justice or narrow doctrines that encourage democratic dogmatism in politics.

In the final chapter, Giorgi Areshidze seeks to reveal and evaluate some of the theoretical and constitutional shortcomings of both multiculturalism and militant secularism. The challenge of Muslim immigration illustrates the philosophical uncertainty in the constitutional identity of liberalism, not only in Europe but also in Canada over the span of liberal pluralism and over the issue of whether liberal values should be defined on a Christian or a secular foundation. Muslim groups are demanding religious equality and political recognition in European states. Although the main goal of Rawlsian liberalism is greater inclusiveness as the condition for the legitimacy and stability of the liberal democracy, the French ban on the Muslim headscarves demonstrates that the appeal of the Hobbesian approach is very compelling and runs the risk of constraining liberal constitutionalism in a direction that is detrimental to both religion and to liberalism. Giorgi Areshidze spends most of the chapter discussing the practical deficiencies of EU multiculturalism and the inability of Rawlsian political theory to communicate effectively with non-liberal religious believers. The author calls for a reconsideration in the practicality of any policy approach that assumes that integration in a liberal order can occur without a prior transformation of religious beliefs in a society. Giorgi Areshidze is also critical of the European Court of Human Rights (ECHR) ruling that banned from the public sphere "troublesome Islamic symbols." The ECHR decision is considered a strategic mistake that will make it difficult for the European Union's constitutional culture to accommodate religion.

In the final analysis, *Constitutionalism*, *Executive Power, and The Spirit of Moderation* is an important addition to the literature that blends philosophical and political approaches of analysis to study a collection of constitutional, legal, and philosophical topics. The book is also

a valuable resource for political theorists and scholars of judicial politics. It should be included on any reading list for graduate political science and/or law school classes.