

**THE EMPEROR'S NEW CLOTHES:
CLOAKING AND DISROBING THE SUPREME COURT
IN CARRESE'S *THE CLOAKING OF POWER***

J. Scott Johnson[†]

The Cloaking of Power: Montesquieu, Blackstone, and the Rise of Judicial Activism. By Paul O. Carrese. University of Chicago Press, 2003. 312 pages. \$39.00.

Paul Carrese argues in *The Cloaking of Power*¹ that the roots of today's activist judiciary can be found in Montesquieu's *The Spirit of Laws*.² He does so by tracing Montesquieu's influence on Blackstone, Hamilton, Tocqueville, and Holmes. While Justice Holmes is the chief villain of the book, the current Supreme Court is also criticized, especially concerning the *Roe v. Wade*³ decision and its subsequent modification in *Casey*.⁴ The problem for Carrese seems to be the loss of any conception of natural law or right reason as developed through the practice of common law judging. This loss allows our current courts and their apologists to engage in pure partisan politics. The big bugaboo in his eyes is, of course, *Bush v. Gore*.⁵ The question really is whether this is the exception that proves the rule or the best example of partisan rule itself. Carrese prefers the former, as do I, but he seeks to ground his argument in historical texts that simply can't support what he is trying to do. While there are many interesting insights offered in this book, Carrese's argument is ultimately unpersuasive as it twists its texts in order to make points that cannot be reached with a

[†] Associate Professor of Political Science, Saint John's University and the College of Saint Benedict.

1. PAUL O. CARRESE, *THE CLOAKING OF POWER: MONTESQUIEU, BLACKSTONE, AND THE RISE OF JUDICIAL ACTIVISM* (University of Chicago Press 2003).

2. BARON DE MONTESQUIEU, CHARLES DE SECONDAT, *THE SPIRIT OF LAWS* (Thomas Nugent trans., J.V. Pritchard rev., University of Chicago Press 1952) (1748).

3. 410 U.S. 113 (1973).

4. *Planned Parenthood of Southeastern Pa. v. Casey*, 505 U.S. 833 (1992).

5. 531 U.S. 98 (2000).

straightforward reading.

Carrese's book is organized into three parts. The first and longest section discusses Montesquieu's *The Spirit of Laws*. The second part investigates Blackstone who cribbed much of Montesquieu in his own evaluation of the English constitution. The third and final part quickly reviews the influence of Montesquieu on Hamilton, Tocqueville and Holmes, while carrying out the more important part of making Carrese's own argument concerning the role of the judiciary in American politics. In this review I will concentrate primarily on the first and third parts of Carrese's project.

The first problem with this book, and it is a common one in political theory, is the lack of an adequate literature review. Political theorists seem to believe that the field is not cumulative; nothing can be learned from what went before; each interpretation can and should reinterpret the text as if nothing before really mattered and whatever is presented is a new finding. This is troubling since it is often the case that previous scholars have found insights that must be considered even if they are eventually countered by a better interpretation of the available evidence.

In a brief two pages, Carrese dismisses most previous work, often mentioning authors only in the footnotes. He ends his quick tour by stating, "[s]till, most readers of *The Spirit of Laws* have not found this distinctive conception of subtle judges and a judicialized liberalism."⁶ If this is true, and I think it is, though not for the reasons given by Carrese, then it is incumbent upon the interpreter to defend the method of discovery as well as its fruits. Why haven't most other readers found this novel insight of Carrese's? I suggest that they haven't found it because it isn't there.

Certainly Montesquieu makes brave claims for the consistency and unity of design in *The Spirit of Laws*. But it is also well known that Montesquieu worked on the manuscript over twenty years as he was steadily going blind. Carrese quotes "the encyclopedist d'Alembert: that one 'must distinguish apparent disorder from real disorder' and that 'voluntary obscurity is not obscurity.'"⁷ This invites "an intricate, hardly obvious reading of his works" according to Carrese, as well as a "reading between his lines."⁸ Maybe, maybe

6. Carrese, *supra* note 1, at 16.

7. *Id.* at 5.

8. *Id.* at 5, 16.

not.

One possibility is that Montesquieu exaggerated his ability to keep the book together. This possibility cannot be dismissed altogether. A second possibility is that Montesquieu has invited us to play a game of blind man's bluff, hunting for clues when much of the game is really in plain sight. This book was placed on the Index of Forbidden Books in 1751, a mere three years after publication, so the dangers of censorship and persecution cannot be ignored. The final possibility, and a favorite of postmodern critics, is to read the text as they choose to, finding what they will regardless of what Montesquieu might or might not have intended. This last possibility really shouldn't be called interpretation and it seems to be what Carrese occasionally engages in.

While Carrese's approach is ideologically conservative, his method has much in common with the distorted readings of some postmoderns. His method, like that of Leo Strauss, notices the number of citations to particular authors,⁹ the number of chapters in a book,¹⁰ the changes in a turn of phrase,¹¹ and from these "clues" extracts dramatic conclusions. One quick example is on page 100 where Carrese mentions an erroneous citation, "'Aristotle, *Republic*, Bk 5, ch. 3.'" In fact, this discussion occurs in the corresponding book and chapter of the *Politics*¹² and this is the only time that Montesquieu misnames Aristotle's main work of political science. This may signal his attempt to replace Aristotle as the teacher of true prudence . . ." While he softens his inference with a "may," the evidence is still too slim to support that conclusion. This may simply be the error of a man too blind to proofread his own text. An earlier breathless conclusion drawn from similarly meager support is patently absurd. Carrese writes, "[n]ever in the work does Montesquieu declare legislative or executive power so singularly essential to a liberal constitution, nor so important for individual security or liberty."¹³ Imagine *any* constitution without either a legislative or executive power, and the naive absurdity should be obvious. In both cases, Carrese overstates

9. *Id.* at 55.

10. *Id.* at 85.

11. *Id.* at 87.

12. ARISTOTLE, *THE POLITICS* (T.A. Sinclair trans., Trevor J. Saunders rev., Penguin Books 1992) (335).

13. Carrese, *supra* note 1, at 6 (emphasis added).

the inferences that can be drawn from the evidence. I do not think it is his method that is to blame.

While the method Carrese uses can be quite powerful in the right hands, revealing things that a casual or quick reader might miss, it is incumbent upon the practitioner of this method to be doubly sure that he or she makes no obvious mistakes or the method reflects back on its user and forces us to wonder whether the mistake was intentional thus revealing a more secret purpose instead of a simple accident. For example, Carrese quotes Locke and writes, “[t]his by itself raises the prospect of revolution, in which ‘[t]he People shall be Judge’ after all, but this puts everyone back in the state of nature.”¹⁴ Here he simply misreads Locke. No plausible interpretation of Locke can suppose that it is ever possible to return to the state of nature. When the State fails, the power reverts to the people as a community, not to them as individuals.¹⁵ It is difficult to reconcile this and other small errors made by Carrese with the weight Carrese puts on the mistakes of Montesquieu.

Turning to the main theme of the book, Carrese writes that “Montesquieuan constitutionalism reflects some debt to the founder of political science and constitutionalism, Aristotle, who simultaneously teaches the importance of natural right and the soundness of dividing regimes into distinct functions—the deliberative body, the offices and the law courts.” Though earlier, like most everyone else including the Founders, Carrese gives credit for the separation of powers to Montesquieu.¹⁶ I have often wondered why more has not been made of this odd attribution. It could be that many do not recognize the difference between separating the powers of government and checking and balancing those powers.

Carrese, in laying out Montesquieu’s distinctive approach to the separation of powers, clearly shows how Montesquieu begins with Locke’s tripartite division of legislative, federative, and executive powers before splitting the executive power into punishing crimes and judging disputes. Carrese notes how the federative power then falls out of consideration in order to

14. Carrese, *supra* note 1, at 24.

15. JOHN LOCKE, *THE SECOND TREATISE OF GOVERNMENT* 123-24 (C.B. Macpherson ed., Hackett Publishing 1980) (1690).

16. Carrese, *supra* note 1, at 260.

redefine executive power and emphasize the importance of a judicial power independent of both the punishing and the legislative powers. He shows how “Montesquieu then refines his formulation a final time, defining the powers as ‘that of making laws, that of executing public resolutions, and that of judging the crimes or the disputes of individuals.’”¹⁷ This is a great strength of Carrese’s exposition.

What Carrese does not adequately emphasize is that the first formulation is Locke’s, the second more appropriate for criticizing the English constitution, while the third has the greatest applicability toward reforming French absolutism, which for Montesquieu was a deformed or despotic version of the ancient French constitution. I think Carrese, given his method, could clearly have emphasized the reasons for this tortured approach. Despots do not take criticisms easily, so the true weight of the attack must be lightened. Only a careful reading will notice the shifts and understand their significance. A quick reader might simply miss Montesquieu’s shifts or blame them on Montesquieu’s own supposed carelessness.

The main point of these tripartite divisions is, as Carrese correctly points out, the emphasis on the power of judging as separate from that of legislative or executive power. One of Montesquieu’s greatest complaints was of Louis XIV’s emasculation of the *parlements*, and he did have to make those criticisms subtly. While Carrese is correct to note Montesquieu’s insistence on the rights of “*enregistrement* and *remonstrance*,”¹⁸ he does not adequately discuss their diminishing historical importance. Montesquieu, by referring often to Louis IX’s reign, was seeking to reverse history. The *parlements* could slow the executive power in France where there was no independent legislature, but that power was quickly disappearing. There was a new need for an independent judiciary in France, and England provided some possibilities. But Montesquieu was also criticizing England’s prerogative courts, which were abolished in 1641, and the role of the House of Lords. In order for the courts to have any power to check the legislative or executive powers, the courts must first be separated from each of the other two.

Carrese quotes Montesquieu as follows:

17. *Id.* at 46.

18. *Id.* at 32.

The power of judging ought not to be given to a permanent senate, but ought to be exercised by persons drawn from the body of the people (as at Athens), at certain times of the year, in the manner prescribed by law, to form a tribunal which only lasts as long as necessity requires.

In this fashion, the power of judging, so terrible among men, being attached neither to a certain estate, nor to a certain profession, becomes, so to speak, invisible and null. People do not continually have judges present to their view; and they fear the magistracy, not the magistrates.¹⁹

From this, however, Carrese concludes that “Montesquieu appears to use juries not only to cloak the judging power but also to cloak professional judges.”²⁰ The second part of his conclusion does not follow from the text.

While the text clearly mentions juries, it explicitly rules out “a certain profession,” thus professional judges are not cloaked, they are excluded. This is also a critique of the *parlements*, which belonged to a certain estate or class. Perhaps Carrese is trying to make sense of how the institution of courts might survive without a set of functionaries to organize and supervise the juries. What does a judge do, if the jury is doing the judging? This is an important question to which no answer is forthcoming. In this part of the book Carrese seems more concerned with explaining Montesquieu’s quarrel with Machiavelli concerning the use of courts by the people to promote their factional disputes with the nobility.

In order to limit the factional temptation “Montesquieu indicates the first limits that should be placed on popular judging. If ‘the tribunals ought not to be fixed,’ the judgments certainly should be, so that ‘they are never anything but a precise text of the law.’”²¹ Even while quoting Montesquieu’s main points, Carrese seeks to evade them such that, by the end of this part of his book Carrese claims, “[t]his obscure discussion at the close of *The Spirit of Laws* suggests that a general principle of moderation or balance, one avoiding small minded extremes, should be used to formulate

19. *Id.* at 48.

20. *Id.* at 49.

21. *Id.* at 49-50.

not strict judicial policies but judicial maxims or rules of thumb.²² It is hard to reconcile Montesquieu's call for a "precise text of the law" with what Carrese endorses as "judicial maxims" or "rules of thumb." Montesquieu's limits are far more precise than those of Carrese. Indeed, it would seem more likely that activist judges would prefer Carrese's formulation to that of Montesquieu.

In the last few pages of this section Carrese makes much of Montesquieu's failure to cite Coke. Instead, "the only reference to a common-law text or author" is to Littleton, Coke's predecessor.²³ Here Carrese tries to equate what Coke and Littleton do with "the kind of judicial depository advocated throughout" *The Spirit of Laws*. Common-law textbooks are clearly not the kind of depository Montesquieu preferred. The *parlements* did not convert the common law decisions into code law, though they did provide an independent record of monarchical decrees. That alone provided a check on monarchical power. These texts of Coke and Littleton reduce the multiform complexity of the common law into the kind of maxims that Carrese prefers but not the specificity that Montesquieu advocates. This confusion of the black letter restatements with the detail of the common law is a mistake non-lawyers are particularly prone to make.

The conclusions to be drawn from part one are elaborated more clearly in part three. Here again, as in part one, Carrese makes unusual interpretive choices. When discussing Publius, the "author" of the Federalist papers, Carrese only reluctantly distinguishes Hamilton's contributions from those of Madison and Jay. Indeed, by interpreting them all as if they have but one author he significantly distorts the differences among them. When discussing Tocqueville, Carrese's emphasis on a legal aristocracy leaves entirely out of the discussion "How An Aristocracy May be Created by Industry."²⁴ I also believe he overemphasizes the influence of Holmes on legal realism, at the expense of Justice Brandeis, Justice Cardozo, or Karl Llewellyn. It would be better to describe Holmes as a legal positivist, even though the terms have much in common.

Carrese is aware that "[t]he brief analyses of Hamilton,

22. *Id.* at 99.

23. *Id.* at 103.

24. ALEXIS DE TOCQUEVILLE, *DEMOCRACY IN AMERICA* 555-58 (J.P. Mayer ed., George Lawrence trans., Harper Row 1969).

Tocqueville, Holmes, and the late-twentieth-century Supreme Court . . . are, if taken individually, inadequate treatments of complicated and controversial topics.”²⁵ He hopes that taken together they will allow him to raise questions about the legitimacy of judicial review and the pressures of democratization that led to “immoderate repudiations of natural right, a stable constitutionalism, and the separation of powers.”²⁶ Holmes is the villain because “[h]is project to redefine law epitomizes . . . philosophical and constitutional immoderation by claiming to *uncloak* the real nature of politics and judging.”²⁷ Here is the crux of the issue: Is Carrese more concerned with the power of judging or the fact that we now all know it is there? Given the multiple references to cloaking, I believe he is more concerned with the revelation of that power and the poor interpretation that many have given to that revealed power. If the power of the Court to decide the law is a power that is in some ways legislative, and it always has been, then what limits can be put on that power? For Carrese the only response to this uncloaking must be a return to a natural law jurisprudence imposed on a democracy by an aristocratic judiciary trained through an experienced application of right reason that we call common law. I do not think Carrese can adequately support that return.

Part of the problem is that Carrese does not adequately understand the binding character of positive law that legislatures make, regardless of natural law. Carrese seems to see this when he writes that “for Holmes, law is the posited will of the dominant forces of the community at a given moment.”²⁸ This law is made by legislatures and may trump the common law made by courts, especially in a democratic system. When Carrese quotes Holmes’s dissent in *Jensen*,²⁹ “I recognize without hesitation that judges do and must legislate, but they can do so only interstitially; they are confined from molar to molecular motions,”³⁰ he doesn’t consider the full case, but rather Holmes’s correspondence with Laski. At issue in the *Jensen* case was exactly the type of separation of powers,

25. Carrese, *supra* note 1, at 181.

26. *Id.* at 183.

27. *Id.* at 231.

28. *Id.* at 240.

29. *Southern Pac. Co. v. Jensen*, 244 U.S. 205 (1917) (Holmes, J., dissenting).

30. Carrese, *supra* note 1, at 239.

here a states' rights federalism to fill in by legislation what Congress has not decided, that Carrese seems to support. The Court in a 5-4 decision, over Holmes's dissent, invented a remedy to reverse a state court decision requiring a railroad to pay a workmen's compensation claim. Holmes clearly stated later in his dissent:

The common law is not a brooding omnipresence in the sky but the articulate voice of some sovereign or quasi sovereign that can be identified; . . . It always is the law of some State, and if the district courts adopt the common law of torts, . . . they thereby assume that a law not of maritime origin and deriving its authority in that territory only from some particular state of this union also governs maritime torts in that territory,—and if the common law, the statute law has at least equal force, as the discussion in *The Osceola* assumes.³¹

It strikes me as odd that Carrese does not realize that Holmes could serve as his ally.

Instead he criticizes Holmes by introducing a “rule of thumb.” He argues that “today’s judiciary should not attempt ‘statesmanlike’ adjudications, since in the wake of the Holmesean revolution these most likely would be made without regard to the Constitution’s fundamental principles.”³² In support of this maxim he cites Lincoln’s “principled but prudent opposition to the constitutional authority of the Supreme Court’s *Dred Scott* decision”³³ and later his own opposition to the “statesmanlike” adjudication in the abortion decisions, *Roe* and *Casey*.³⁴ Clearly *Dred Scott*³⁵ was a dread spot on our constitutional history (and only the second time judicial review was used to strike down an act of Congress). While I tend to support the outcome of *Roe*, I agree that this, too, was an act of judicial statesmanship and not proper judicial decision-making. On the other hand, Carrese would do well to remember that Holmes dissented in *Lochner*,³⁶ a key precedent for *Roe* and *Casey*, and was a fundamental critic of “substantive” due process. As Justice Holmes wrote in that dissent,

I think that the word “liberty,” in the 14th Amendment, is

31. *Jensen*, 244 U.S. 205, 222 (1917) (Holmes, J., dissenting).

32. Carrese, *supra* note 1, at 228.

33. *Id.*

34. *Id.* at 245.

35. *Dred Scott v. Sandford*, 60 U.S. 393 (1856).

36. *Lochner v. New York*, 198 U.S. 45 (1905).

perverted when it is held to prevent the natural outcome of a dominant opinion, unless it can be said that a rational and fair man necessarily would admit that the statute proposed would infringe fundamental principles as they have been understood by the traditions of our people and our law.³⁷

The Great Dissenter was dissenting against one of the very things that concern Carrese: unbridled judicial power.

Carrese does not find an ally in Scalia's dissent from *Casey* either, and for some of the same reasons that he rejects Holmes. Carrese condemns Scalia because he "adheres to such traditional legal authorities simply from a democratic skepticism about any others."³⁸ For Carrese, "[t]he severing of reason from tradition, of the rational use of precedent from the customary character of the law, explains why the *Casey* plurality has failed"³⁹ He goes on to argue, "[a] historicist notion of judicial statesmanship prescribes an isolated, autonomous individual, while the positivist alternative lacks the deeper reasoning to counter th[is] pragmatic individualism."⁴⁰ Carrese's attack on Holmes, Scalia and especially Rawls is part and parcel of what is really an attack on liberalism itself. Liberalism, as we have come to know it, suffers from "a modern skepticism leading us to eschew any meaning or order in nature independent of the human will, any reality to the traditional distinctions regarding what is higher or virtuous in human life."⁴¹ Carrese prefers a "blend of natural rights and a traditional legal prudence . . . for counteracting the slide toward modern nihilism and individualism."⁴² For this he needs "a genuine moral realism rooted in the reality of nature."⁴³

Carrese never specifies exactly what the reality of nature might be or what a genuine moral realism might require. Certainly his approach to natural law is not the modern reliance on reason, but it appears to be the more robust kind of Aristotle. It would be appropriate to remind ourselves that Aristotle thought men were superior to women "by nature" and that there were "slaves by

37. *Id.* at 65 (Holmes, J., dissenting).

38. Carrese, *supra* note 1, at 248.

39. *Id.* at 249.

40. *Id.* at 248.

41. *Id.* at 253.

42. *Id.*

43. *Id.* at 259.

nature.” I hope this is not the reality of nature that Carrese prefers. Arguments from nature can ossify habit and prejudice rather than determining what is really essential to the human condition. That is why opponents of the older versions of natural law remain skeptical and sadly why those who accept things as “natural” cease to argue about the truth of their assumptions.

Carrese seems to be assuming that a quasi-aristocracy is the natural place for a judicial power⁴⁴ and he does so by deferring to authority rather than truly making an independent assessment of what nature might require.

A comparison between Holmes and either Hamilton or Tocqueville indicates that it is the classic common-law element in the framers’ jurisprudence, and not solely the Montesquieuan conception of judging, that provides this *ennobling, quasi-aristocratic* character to the original American conception of judicial power. Holmes repudiates exactly this *moral* element of American law.⁴⁵

It is hard for those with republican sentiments to accept nobility as a moral element in America.

Carrese begins and ends with an attack on activist judges as serving the ends of liberalism while destroying the separation of powers and majoritarian democracy.⁴⁶ His case is made more clearly when “statesmanlike” judges attempt to enforce what they believe a majority would like instead of exercising judicial power interstitially, as Holmes recommended. Carrese’s discussion of the Federalist fails to discuss the key contribution of Madison in Federalist 10,⁴⁷ where he discusses the dangers of majority factions. If there is any last redoubt for the rights of individuals, it must be in the words of the Constitution and then in statutes interpreted by judges sometimes against the precedents of common law.

Gay marriage, while not discussed by Carrese, is an obvious example. Common law and long-standing tradition seem to preclude the state’s recognition of same sex unions. Yet the plain wording of the Constitution’s equal protection clause,⁴⁸ and other

44. *Id.* at 209.

45. *Id.* at 209-10 (emphasis added).

46. *Id.* at 1, 261.

47. THE FEDERALIST NO. 10 (James Madison) (Michael Kammen ed., Penguin Books 1986).

48. “No State shall . . . deny to any person within its jurisdiction the equal protection of the laws.” U.S. CONST. amend. XIV, § 1.

phrases in the Massachusetts and California constitutions,⁴⁹ are being interpreted to trump those traditional understandings. Is it activist judges or just plain meanings seen differently? Some will say these unions are against nature, but the proper response must be that the unwritten natural law was not enacted by the people and it is far harder to understand an unwritten law than a written one. Clearly there are unintended consequences of every enactment, but this does not reduce the force of those enactments. Common law judicial decision-making is essentially a process of determining what all the consequences of a particular enactment might be on a case-by-case basis, then allowing the legislative power in a separate body to respond or clarify if they so choose. It is not an attempt to replace the legislative judgment.

The movement to enact a constitutional amendment discriminating against homosexual unions is a more powerful response to current social changes than the southern states' laws against interracial marriages that were ultimately struck down in 1967.⁵⁰ Both actions were activist attempts by supposed majorities to work their will against identifiable minorities. One was stopped and the first has yet to play itself out. If the attempt to add positive discrimination against a particular group into the Constitution succeeds, it will be a spot on our constitutional history every bit as bleak as *Dred Scott*.

The Cloaking of Power is a useful book. I cannot recommend the book as an excellent study of any of the authors it purports to interpret. However, it defends and decloaks an important ideological current in American legal thought by outlining some of its origins in suspicious readings of Montesquieu, one-third of the authorship of the Federalist, and pieces of Tocqueville. It outlines an aristocratic approach to the judicial power completely in line with the inegalitarian anti-homosexual movement now active. For that reason, those who prefer a more liberal, limited, and positivist approach to judicial power will find much to argue with here.

49. See, e.g., *Goodridge v. Dep't of Pub. Health*, 798 N.E.2d 941 (Mass. 2003). "Barred access to the protections, benefits, and obligations of civil marriage, a person who enters into an intimate, exclusive union with another of the same sex is arbitrarily deprived of membership in one of our community's most rewarding and cherished institutions. That exclusion is incompatible with the constitutional principles of respect for individual autonomy and equality under law. *Id.* at 949 (emphasis added).

50. See, e.g., *Loving v. Virginia*, 388 U.S. 1 (1967).