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The Cost of Rights: Why Liberty Depends on Taxes. By Stephen Holmes and Cass R. Sunstein. New York: Norton, 1999 [paperback 2000]. Pp. 255. \$14.95. ISBN 0-393-32033-2.

Princeton political scientist Stephen Holmes and University of Chicago law professor Cass Sunstein reject classical liberal formulations of “rights,” “liberty,” and “justice.” A preliminary blurb by Bruce Ackerman hails their book as “[a] compelling analysis of the intellectual failures of libertarianism.” On the first page the authors identify two representatives of the opposition, the libertarians Charles Murray and David Boaz, and let forth a torrent of gainsaying. They affirm the left-liberal formulations now dominant in American academia. *The Costs of Rights* will be valued by establishment leftists as an unabashed declaration of enlightened sensibilities and by classical liberals as a candid opposing statement. The authors make no effort, however, to represent classical liberal formulations, much less engage in comparative evaluation. They simply assert their preferred formulations and condemn “libertarian fairy tales” (p. 216).

In classical liberal grammar, rights, whether functioning or merely proposed, whether upheld by legal apparatus or by voluntary mechanisms such as shunning, are divided into the negative and the positive. Negative rights of property, consent and contract – a composite known as *liberty* – stand opposed to interference by government or other potentially coercive parties. Positive rights correspond to prescribed, recognized claims on government resources, such as government efforts at protecting property and welfare-state benefits (e.g., due access to government roads, schools, and subsidies). David Hume and Adam Smith thought this way, though they did not use the terms “negative” and “positive.” The essential claim of classical liberalism (or libertarianism) is that negative-rights violation by government (including taxation) is far too extensive.

That claim is not engaged by Holmes and Sunstein. Instead, they try to dispose of the classical liberal grammar. They make arguments that depend on familiar but faulty suppositions, such as that gray areas in property and contract destroy the distinction between voluntary and coercive actions (pp. 67-69) and that classical liberals necessarily oppose entirely positive rights, or are anarchists (e.g., p. 72), even though the libertarians they actually name (Murray, Boaz, Robert Nozick, and Richard Epstein) do not embrace or advocate the anarchist position. But their chief argument is that because negative rights are attached to positive claims to government protection efforts, there is no real distinction between negative and positive rights. The authors seem to recognize no conceptual distinction between property rights, rights to government schooling, or minimum wage laws. As the title of the first chapter asserts, “All Rights Are Positive.”

The authors suppose that the observation of property rights necessarily or mainly depends on government protection efforts: “Without such governmental powers, rights would have no ‘bite’” (p. 56). But even without backing by police power, an articulation of rights can create or reinforce cultural focal points upon which unofficial mechanisms sustain those rights. Merchant law, international law, credit reporting, gossip often police promises by purely voluntary means (see D.B. Klein, ed., *Reputation: Studies in the Voluntary Elicitation of Good Conduct* (University of Michigan Press, 1997)). Sometimes customary rights stand in direct opposition to governmentally defined rights (e.g., ranching practices described in Robert C. Ellickson, *Order Without Law: How Neighbors Settle Disputes* (Harvard University Press, 1991)). Also, property rights are protected more by private enterprise than by government (see Bruce L. Benson, *To Serve and Protect: Privatization and Community in Criminal Justice* (NYU Press, 1998)).

Holmes and Sunstein seem to imply that there has to be a court behind every court. They identify the essence of a right to be attached claims to effective government enforcement, such that “vulnerable individuals must have relatively easy access to a second, higher-level set of government actors” (p. 54). They do not seem to recognize that such reasoning generates a regress, and prompts the question, how is the regress resolved?

But even if one were to grant that property and contracts are secure only or chiefly by virtue of government efforts, the distinction between negative rights and positive rights would still stand. Positive and negative rights may have one thing in common without having all things in common.

The great majority of Americans recognize and affirm the substance and logic of negative rights. If a delusional savior other than the government attempted to impose a minimum wage rule, a restriction on toilet flush capacity, or occupational licensure, most American citizens would regard such actions as attempts to violate their rights and encroach on their liberty. Classical liberals regard such actions as encroachments on liberty also when taken by government.

Holmes and Sunstein would counter by saying that we ought not liken government to a strongman, even a politically correct one. Unlike rule by a strongman, government is an encompassing social organization whose rules we all enter into “voluntarily” (p. 210). Voluntary parties to an organization or contract must abide by the rules. Holmes and Sunstein affirm the “deep truth” in the medieval legal notion that “only the sovereign [has] an absolute interest in land: ordinary landowners ‘hold of the sovereign’” (p. 63). In their left-liberal worldview, all things are owned, fundamentally and ultimately, by the government, and any decentralized exercise of property rights or contract is undertaken by its authorized delegation. “Private property [is] a creation of state action,” “laws [enable property holders] to acquire and hold what is ‘theirs’” (pp. 66, 230). One wonders if that most important form of property held by each of us – our own person – is also to be considered “ours” only in a diminutive sense that calls for quotation marks. Indeed, in replaying Marxist canards about “the propertyless” (pp. 189, 199, 208), Holmes and Sunstein show their small regard for the idea that, as owner of his or her own person, every soul is a property owner.

Holmes and Sunstein do not even begin to test their own grammar. They steer clear of matters in which it is plainly embarrassed – namely, interventionist policies that restrict voluntary actions. In their manner of speaking, practically no federal law is – or could be –

coercive of innocents or treading on liberty (it would be only if it went against higher level government rules). Drug prohibition does not tread on individual rights but merely reshuffles and redefines rights; incarceration of drug users does not encroach on liberty but enforces rules that the offender voluntarily agreed to by living in America. As though the country were one great university campus.

More than anything else, the book is a pledge of allegiance to modern American government, repeatedly called “the American social contract.” Holmes and Sunstein propagate the mythology of collective consent and a reverence for a supposed “shared national venture” (p. 198). Chapters 8 through 11 defend the welfare state against “victimology” charges and “responsibility” concerns. Chapters 13 and 14 try to sell it to taxpayers as a bargain to keep the poor respectful in peacetime and willing in wartime. The book seems to be born of an anxiety that the mythology since FDR of America as a great social organization led by elite university professors and the like is losing some of its sway. Holmes and Sunstein find libertarian notions to be “astonishingly widespread in American culture” (p. 216).

When cultural elites promote the notions that liberty is meaningless and rights are whatever the law says, is it any wonder that they should feel anxious about a lack of shared sentiment with much of the population?

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