BOOK REVIEW

RIGHTS, COSTS, AND THE INCOMMENSURABILITY PROBLEM

The Cost Of Rights: Why Liberty Depends On Taxes. By Stephen Holmes & Cass R. Sunstein. W.W. Norton & Co. 1999.

Reviewed by Jonathan M. Barnett[*]

RECENT years have seen a steady dilution of the American social welfare state, of which the elimination of a federally guaranteed minimum income entitlement and the replacement of welfare by "workfare" are some of the more prominent examples. Corresponding to this policy shift, the popular media, academic journals, the federal courts, and legislative and policymaking bodies have become the site of an ongoing debate over the New Deal idea that our worse-off citizens have a fundamental claim to minimal levels of income, education, and health care. Some conservatives do not simply argue that welfare entitlement programs are bad public policy because they are unjustifiably exorbitant expenditures under current budget constraints, are always administered inefficiently, or perversely exacerbate the problem they seek to remedy. These hardened opponents of the social welfare state suggest that 1) the federal government has no special obligation to aid its poorer constituents; and 2) the strong enforcement of "artificial" welfare rights threatens the "natural" set of private-property rights. This principle-based (rather than policy-based) position relies on the libertarian-styled claim that the social contract undergirding American liberal democracy includes "negative" rights that protect private property by limiting government intervention, but excludes "positive" rights that promote distributive equality by demanding government intervention. In response to this principle-based attack on the regulatory state, many liberals offer a principle-based defense that, curiously, largely accepts the

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conservatives' negative/positive dichotomy. According to this liberal response, the New Deal means that the government has recognized certain positive rights by virtue of which the state bears a fundamental responsibility to aid its more vulnerable citizens, even if meeting this responsibility generates significant budgetary demands and a correspondingly inflated tax burden.

In *The Cost of Rights*,[1] Stephen Holmes and Cass Sunstein argue that both the conservative and the liberal positions in the current rights debate share a common failing. By uncritically assuming the truth of the negative/positive distinction, both positions ignore the basic empirical fact that *all* meaningful rights are "positive" rights that impose a significant tax burden in order to sustain extensive government enforcement activities. Conservatives misunderstand the cost of rights when they misleadingly depict welfare rights as expensive giveaways that expand the scope of required government action and property rights as no-cost entitlements that simply set a bar to the range of permissible government action. Liberals ignore the cost of rights when they argue that rights generally, and welfare rights in particular, largely operate as "trumps" that rest on principle-based grounds, thus relegating policy-based cost considerations to a secondary factor in determining the justifiable scope of rights.

The Cost of Rights' straightforward thesis shows that both positions are untenable. If all effectively enforced rights necessarily require affirmative government action, then it is incorrect to claim either that 1) only welfare rights are costly government-created and government-sustained entitlements; or 2) budgetary and other social costs are largely irrelevant in determining the justifiable scope of fundamental rights. The inescapable "cost of rights" explains why determining the scope of any right always demands a tradeoff-based analysis that weighs the expected social costs of enforcing a particular right against those of other rights, legal entitlements, and public policy objectives. In fact, close scrutiny of case law shows that courts often, or even usually, cannot resist this demand; as a result, social costs are *already* an often determining (although consistently disguised) feature of judicial discussions of

[1] Stephen Holmes & Cass R. Sunstein, The Cost of Rights: Why Liberty Depends on Taxes (1999).

rights questions. But there is no reason to beat around the bush: Courts, legislators, administrators, and academic commentators should negotiate rights questions by evaluating explicitly the social costs that necessarily attend the introduction of new rights or the redefinition of existing rights.

In my discussion of the authors' arguments, I will proceed as follows. In Part I, I will review the central steps in the authors' arguments. I should state at the outset that I cannot possibly describe all of the authors' arguments in adequate detail; thus, I concentrate on those I find to be most central to their general project. In Part II, I will indicate some of the most sweeping (but perhaps, to some readers, not necessarily worrisome) implications of these arguments. I will show that the "cost of rights" thesis 1) threatens to conflate any significant distinction between rights and all other legal entitlements; and 2) narrows considerably the justifiable grounds for judicial review of alleged rights violations. In Part III, I will take a more critical stance, arguing that "rights talk" represents a local instance of the more general phenomenon of incommensurability norms and, as such, often may *thrive* on the dissonance between a cost-insensitive rights rhetoric and a cost-sensitive process of rights adjudication.

I. WHY RIGHTS ALWAYS HAVE COSTS (AND WHY THAT MATTERS)

The Cost of Rights primarily represents a polemic against what the authors identify as the widely prevalent tendency to ignore the social costs that result from the introduction or redefinition of any legally protected right. Elaborating upon arguments that Holmes and Sunstein have presented separately in several other books,[2] the

[2] For Stephen Holmes' other relevant books, see The Anatomy of Antiliberalism (1993) [hereinafter Holmes, Antiliberalism]; Passions and Constraints: On the Theory of Liberal Democracy (1995) [hereinafter Holmes, Passions and Constraints]. For Cass Sunstein's other relevant books, see After the Rights Revolution: Reconceiving the Regulatory State (1990) [hereinafter Sunstein, After the Rights Revolution]; Legal Reasoning and Political Conflict (1996) [hereinafter Sunstein, Legal Reasoning]; One Case at a Time: Judicial Minimalism on the Supreme Court (1999) [hereinafter Sunstein, One Case at a Time]; The Partial Constitution (1993) [hereinafter Sunstein, Partial Constitution]. Many of the arguments that Holmes and Sunstein present in The Cost of Rights echo, elaborate upon, or condense arguments the authors have developed separately in some of their earlier publications. To give interested readers further points of reference, I have sought in the footnote comments to indicate (but

authors show that this persistent blindness to the cost of rights characterizes a misguided intellectual paradigm that colors and distorts much current popular, academic, legislative, and judicial discussion about rights,[3] including a significant body of Supreme Court precedent.[4] In their norm-entrepreneurial mission to shift the prevailing paradigm, Holmes and Sunstein's primary target is the widely accepted distinction between the "negative" property rights of the laissez-faire state and the "positive" welfare rights of the regulatory state.[5] To contest this distinction, they show repeatedly that the government necessarily must allocate significant resources to the enforcement and maintenance of all rights, including private-property rights that may intuitively (but misleadingly) appear to impose no cost upon the public fisc.[6] By definition, the existence of any right (or, at least, any non-empty right) implies a significant government investment in enforcing that right and a resulting tax burden upon individual citizens.

The claim that all rights necessitate affirmative government action (thus, "liberty depends on taxes") has three implications. First, this claim suggests that conservatives have no reason to argue that welfare rights represent a misguided expansion of the rights category because they impose an unusual affirmative obligation upon government actors and a heavy strain on the individual taxpayer. This feature is not unusual at all: Any non-empty right necessarily imposes affirmative obligations upon government actors and a corresponding tax burden upon private individuals. In terms of the government's expected enforcement costs and the individual's expected tax burden, there is no structural difference between welfare rights and property rights and thus, no good reason to deny the rights label to welfare entitlements. Second, this claim suggests that liberals have no reason to argue that cost considerations should generally defer to principle-based concerns in rights analysis. If property rights require extensive government investments akin to those that sustain welfare rights, then there is no strategic reason to overlook the basic fact that effectively enforced welfare

certainly, on a less than comprehensive basis) those earlier publications in which the authors articulated comparable or related lines of reasoning.

[3] See Holmes & Sunstein, supra note 1, at 35–48.

[4] See id. at 35–37, 89–94.

[5] See id. at 35–37.

[6] See id. at 43–49.

rights divert significant public and private resources. Third, if government intervention necessarily accompanies the preservation of any legally recognized right, then rights analysis necessarily should devote significant attention to considering—rather than denying the existence or dismissing the relevance of—the expected social costs that will result from introducing, strengthening, or weakening any legally recognized right.

A. The Positive/Negative Rights Distinction

As understood by Holmes and Sunstein, the positive/negative rights distinction refers to the distinction between rights that set a limit to invasive government action and rights that require a certain minimal level of government intervention.[7] Whereas negative rights are rights *against* government intervention, positive rights are rights *to* government intervention. In American law, the best illustration of this distinction is the "state action" requirement[8] the Supreme Court has instituted for claims under the Equal Protection Clause and the Due Process Clause of the Fourteenth Amendment.[9] With respect to the Equal Protection Clause, the Court has ruled that the right protected is a "negative" right in the sense that it simply requires the government to refrain from acting discriminatorily or from directly aiding or encouraging discriminatory action by private individuals.[10] Similarly, the Court has ruled

[7] See id. This distinction naturally recalls the well-known distinction that Isaiah Berlin drew between negative liberties that refer to noninterference by government and positive liberties that refer to individual self-realization or a democratically organized collectivity. See Isaiah Berlin, Four Essays on Liberty 118–72 (1970). This is not, however, the intellectual target that Holmes and Sunstein have in mind. See Holmes & Sunstein, supra note 1, at 239 n.3; see also Holmes, Passions and Constraints, supra note 2, at 28 (attacking Berlin's distinction as unclear and misleading because it assumes that so-called positive and so-called negative rights are logically and historically unrelated).

[8] For the original articulation of the state action requirement under the Fourteenth Amendment, see The Civil Rights Cases, 109 U.S. 3, 11 (1883).

[9] U.S. Const. amend. XIV, § 1 ("No State shall deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.").

[10] See, e.g., Moose Lodge Number 107 v. Irvis, 407 U.S. 163, 177 (1972) (ruling that the state action requirement for an Equal Protection claim is not satisfied when a private club acts discriminatorily, despite the fact that the club relies on a state-provided liquor license). Although the Court has consistently resisted arguments that have sought to weaken the severity of the state action bar by including more tangential

that the right protected under the Due Process Clause does not mean that the government bears any positive obligation to ensure that private citizens enjoy minimal levels of safety and security.[11]

There is much at stake in the state action requirement and, more generally, in the Supreme Court's reliance on the background distinction between negative and positive rights. This distinction obviously skews the debate over the relative importance of two broad categories of rights: 1) the classical, private-property rights of the laissez-faire state, and 2) the social-welfare rights of the regulatory state. As its key consequence, the negative/positive distinction operates as a burden-shifting device that relaxes the justificatory burden for property-rights proponents while aggravating the justificatory burden for welfare-rights proponents. Under this distinction, property rights figure as "natural" liberties of security of person and property that constrain the government's acceptable range of action.[12] By contrast, welfare rights are "artificial" subsidies that threaten the baseline set of natural rights by expanding the government's mandate to appropriate private resources for redistributive purposes.[13] What's more, property rights apparently cost nothing while welfare rights are visibly expensive to sustain.[14] Whereas property rights limit government expenditures (and thus, property holders' tax burden) by constraining the permissible range of government action, welfare rights increase government expenditures (and thus, property holders' tax burden)

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claims of state-sponsored discriminatory action under the Equal Protection umbrella, there have been (as Holmes and Sunstein point out) some notable exceptions. See, e.g., Burton v. Wilmington Parking Auth., 365 U.S. 715, 726 (1961) (ruling that the state action requirement is satisfied where a private restaurant that rents space in a municipal parking garage acts discriminatorily); Shelley v. Kraemer, 334 U.S. 1, 20 (1948) (holding that a seller cannot compel a court to enforce a racially restrictive covenant between a buyer and a seller on the ground that such action would constitute state action under the Equal Protection Clause).

[11] See DeShaney v. Winnebago County Dep't of Soc. Servs., 489 U.S. 189, 202 (1989) (ruling that the state action requirement is not satisfied where government social workers egregiously ignored indications of child abuse and the child subsequently became severely handicapped as a result of a prolonged pattern of parental abuse).

[12] See Holmes & Sunstein, supra note 1, at 35–43.

[13] See id. For other discussions of the normative authority that the Court has sometimes—especially during its Loclmer era—accorded to a "natural" baseline of state inaction, see Sunstein, After the Rights Revolution, supra note 2, at 17–20; Sunstein, Partial Constitution, supra note 2, at 3–4, 69–71.

[14] See Holmes & Sunstein, supra note 1, at 25 (referring to the widespread but mistaken assumption that our most fundamental rights are costless to maintain).

by expanding the required range of government action.[15] If this is true, then welfare-rights proponents must present an exceedingly strong case to justify giveaway entitlements that strain the public fisc and endanger fundamental private-property entitlements.

The negative/positive distinction shapes conservative and liberal participants' negotiating strategies in discussions over the justifiable scope and definition of the set of legally protected rights. Based on the assumption that welfare rights are the only kinds of rights that require significant government enforcement expenditures, conservatives can argue that the rights label properly applies only to legal entitlements that set a ceiling, rather than a floor, for government intervention.[16] In a libertarian sense, rights properly conceived tell the government what it *may not* do, rather than what it *must* do. Thus, welfare rights represent an unwanted idiosyncrasy that threatens to upset the theoretical coherence of the classical set of property rights.[17] Curiously, liberals take a somewhat analogous position: Welfare rights *are* unusual departures, but are also welcome innovations that complete the set of fundamental rights entitled to legal protection.[18] Similarly assuming that only welfare rights require affirmative (and expensive) government action, liberals must argue that public-finance considerations should play a minor role in rights analysis on the ground that certain rights are aspirational, value-based entitlements that trump a wide range of pragmatic, policy-based considerations.[19] Under this approach, the very essence of welfare rights is a charitable principle that demands that better-off citizens sacrifice private resources to ensure a minimal level of housing, health care, and schooling for worse-off citizens.[20] If welfare rights carry an intrinsic principle of social solidarity that frustrates the type of policy analysis generally applied to

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[15] See id. at 40–42.

[16] See id.

[17] See id.

[18] See id.

[19] See id. at 28, 41–42, 119. Ronald Dworkin is the leading exponent of this "rights as trumps" argument. See Ronald Dworkin, Taking Rights Seriously, at xi, 297–98, 363–68 (1977). For a lengthy discussion of, and attack on, Dworkin's articulation of fundamental rights in absolutist, idealistic terms largely divorced from pragmatic considerations, see Daryl J. Levinson, Rights Essentialism and Remedial Equilibration, 99 Colum. L. Rev. 857, 926–40 (1999).

[20] See Holmes & Sunstein, supra note 1, at 41–42.

most government actions,[21] then cost considerations are usually not pertinent to the definition and enforcement of these rights.[22]

B. All Rights Are Positive Rights

Holmes and Sunstein show that both the conservative and liberal sides of the rights debate have it wrong: The simple fact is that both negative and positive types of rights—that is, property rights and welfare rights—always generate significant social costs and always rely on affirmative government intervention.[23] If this is true, then conservatives cannot argue that property rights are costless to maintain, and liberals do not need to ignore the basic fact that welfare rights are costly to enforce. What do Holmes and Sunstein mean specifically by "costs"? For the most part, they refer to the government's enforcement costs in taking affirmative steps to 1) detect and punish public and private actors who infringe upon legally recognized rights; and 2) establish and maintain a legal apparatus whereby private individuals can present and seek compensation for alleged rights violations.[24] The authors, however, do spend a significant amount of time describing some other types of social losses that result from the introduction or redefinition of legal rights. Although Holmes and Sunstein do not employ these terms, they effectively argue that property rights and welfare rights always generate 1) *compliance costs* in the form of third-parties' duties not to violate a particular right; and 2) *redistributive costs* in the form of the differential economic effects of enforcing certain rights rather than others.

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[21] On the distinction between policy analysis (which involves weighing competing interests against one another) and principle-based analysis (which generally precludes interest-balancing tests), see Dworkin, supra note 19, at 82–84, 297–99.

[22] See id. at 199–200, 363–64 (arguing that principle-based rights analysis should generally ignore the costs of enforcing or extending fundamental rights, except under certain exceptional circumstances).

[23] See Holmes & Sunstein, supra note 1, at 35–83. For the authors' separate and fairly comparable articulations of this claim, see Holmes, Passions and Constraints, supra note 2, at 6–8, 19–23, 37–38, 243–46, 254–62; Sunstein, After the Rights Revolution, supra note 2, at 17, 216–17; Sunstein, Partial Constitution, supra note 2, at 3–4, 69–71.

[24] See Holmes & Sunstein, supra note 1, at 15–16, 20–24 (defining "costs" as budgetary costs incurred as the result of rights enforcement).

1. Enforcement Costs

Economically speaking, there is no structural difference between so-called negative rights to security of person and property and so-called positive rights to various welfare entitlements.[25] The effective enforcement of the positive rights to minimal levels of housing, education, and medical care obviously requires that the government expend considerable resources on hospitals, schools, and building construction (and consequently, raise significant taxes for those purposes). But it should be just as obvious that the effective enforcement of the negative rights to security of person and property requires that the government expend considerable resources on police, prosecutors, judges, and prisons (and again, collect significant tax revenues).[26] Without the government's investments in an enforcement apparatus that detects and punishes property crimes, it is fair to believe that most individuals would routinely forfeit their private-property rights to well-armed thieves and trespassers. Countries that either lack a central government (for example, Somalia) or whose central government lacks sufficient enforcement resources (for example, Russia) compellingly demonstrate this point.[27] To drive home the necessary relationship between property rights and affirmative government action, Holmes and Sunstein present numerous figures roughly indicating government expenditures on various measures essential to the preservation of property rights: extinguishing a large fire on Long Island and thereby preventing destruction of private property ($1.1–$2.9 million),[28] public protection of private property through disaster relief and disaster insurance ($11.6 billion in 1996),[29] general property and records management ($203 million in 1997),[30] and

[25] See id. at 15 (stating that both welfare rights and property rights make claims on the "public treasury"); id. at 119–20 (arguing that the distinction between priceless property rights and costly welfare rights does not survive scrutiny).

[26] See id. at 15, 119–20.

[27] See id. at 47 (arguing that it is implausible to be "for rights" and "against government"). For a similar point, see Holmes, Passions and Constraints, supra note 2, at 19.

[28] See Holmes & Sunstein, supra note 1, at 13.

[29] See id. at 14.

[30] See id. at 65.

police protection and criminal corrections ($73 billion in 1992).[31] These figures make clear the authors' point. As it turns out, the purportedly frugal "night watchman" state that scrupulously keeps its hands *out* of the market nonetheless requires significant government expenditures, much like the purportedly extravagant, social-welfare state that cannot keep its hands *off* of the market.

2. Compliance Costs

Holmes and Sunstein adopt the Hohfeldian claim that the introduction of a particular right always generates a correlative duty on the part of potentially infringing individuals or entities to respect that right.[32] They then use this claim to rebut the argument, advanced by many "communitarian" commentators, that the judicial and legislative expansion of individual rights during the 1960s and 1970s has resulted in a corresponding reduction in individuals' responsibilities to one another and to the general community.[33] Holmes and Sunstein argue that the communitarians' narrative of decline is misleading because it ignores the fact that some civic responsibilities have lapsed while new civic responsibilities have emerged—thus, there has been no *net* reduction in the general pool of civic duties. Although the Supreme Court may have constrained certain classical property rights by expanding the scope of government regulation, they have increased free speech and antidiscrimination rights, thus generating a host of new obligations for private and governmental actors who must avoid violating those

[31] See id. at 64. It should be noted that Holmes and Sunstein do not break down this figure into crime-specific enforcement expenditures; thus, the exact enforcement expenditures relating to property crimes is not indicated.

[32] See id. at 140–41. Wesley Hohfeld famously sought to classify legal entitlements in terms of a complex scheme of corresponding and offsetting permissions, claims, powers, and immunities. See Wesley Hohfeld, Fundamental Legal Conceptions, 23 Yale L.J. 16 (1913).

[33] See Holmes & Sunstein, supra note 1, at 136–39 (describing the communitarian claim that expansion of rights has led to a decrease in individuals' sense of duty). For Sunstein's earlier response to the communitarian critique, see Cass R. Sunstein, Rights and Their Critics, 70 Notre Dame L. Rev. 727 (1995) [hereinafter Sunstein, Rights and Their Critics]. For Holmes' earlier attacks on the communitarian dichotomy between the individualist ethos of liberal democracy and the collectivist inclinations of civic republicanism, see Holmes, Passions and Constraints, supra note 2, at 5–12; Holmes, Antiliberalism, supra note 2.

rights.[34] Thus, whereas political activists under the formerly weaker speech-rights regime had a stricter responsibility not to disturb the peace of a city park to conduct a demonstration, employers under today's stronger antidiscrimination-rights regime have a stricter responsibility not to treat employees differently on the basis of any suspect classification.

3. Redistributive Costs

Holmes and Sunstein argue that the enforcement of a particular right often has a negative or positive differential effect on certain economic classes relative to others.[35] Thus, active enforcement of property rights tends to favor wealthy individuals holding significant amounts of property, while active enforcement of welfare rights tends to favor poor individuals unable to afford minimal levels of housing or health care.[36] Speaking the language of social contract theory, Holmes and Sunstein use this insight to argue that the modern combination of welfare rights and property rights represents a fair bargain that compensates the poor for their inability to extract full value from the purportedly uniform set of property rights.[37] Simply put, actively enforced welfare rights introduce a progressive distributive effect that mitigates the regressive distributive effect of actively enforced property entitlements.[38] A fair and prudential social contract introduces positive welfare rights as a compensating measure in a world where the poor cannot exploit to the same extent as the wealthy the right to hold private property, the right of free expression, or the right to effective legal counsel.[39] When conceived of as a central provision in the social contract between the poor and the wealthy, welfare rights are not

[34] See Holmes & Sunstein, supra note 1, at 140–51.

[35] See id. at 229 (stating that "redistribution is omnipresent" and that redistribution occurs not just through welfare subsidies but through the diversion of public resources to the protection of private property).

[36] See id. at 229–30.

[37] See id. at 204–11. For a similar social-contractarian argument for the necessity of welfare rights, see Holmes, Passions and Constraints, supra note 2, at 249–53 (stating that the social contract compensates the poor for relinquishing their "right to grab" by the state's commitment to protect its citizens against unilateral violence and life-threatening dangers).

[38] See Holmes & Sunstein, supra note 1, at 204–19.

[39] See id. at 208–09.

an optional but a *necessary* addition that preserves the basic fairness and legitimacy of the total "package" of fundamental rights.

C. Toward a Cost-Based Rights Analysis

The Cost of Rights is not an entirely destructive enterprise. To the contrary, Holmes and Sunstein demonstrate the systematic neglect of cost considerations in conventional rights analysis and propose an alternative framework in which cost estimation would play a central role in determining the justifiable scope of fundamental rights. If all rights require significant government intervention to operate effectively (and, additionally, trigger important third-party and redistributive effects), then courts should always consider the expected social costs of introducing or redefining the particular right at stake.[40] Effectively, Holmes and Sunstein may be suggesting that courts reverse priorities. That is, courts should adjudicate rights disputes primarily in terms of expected social costs while importing principle-based considerations as a limiting factor.[41] Toward this end, Holmes and Sunstein propose that courts and other political participants ask themselves 1) how much of a particular right do we want to have?; 2) what is the most cost-effective means of maximally protecting that right?; 3) what are the expected redistributive consequences of enforcing that right at a certain level?; and 4) how will enforcing that right at a certain level affect the government's ability to enforce all other rights?[42]

This candidly (and ambitiously) cost-sensitive approach stands in contrast to three common features of current judicial practice. First, it departs from the standing presumption that anything but direct state involvement in allegedly rights-violative practices generally does not raise any cognizable constitutional question.[43] Second, it departs from the absolutist use of rights in some judicial

[40] For an outline of this adjudicatory model, see id. at 220–32. See also id. at 98 (stating that courts would reason more intelligently about rights if they took into account the expected costs of rights enforcement).

[41] See id. at 101–02 (calling for cost-conscious rights analysis but adding that this argument does not mean that all rights questions should be thrown into an economist's "cost-benefit calculating machine").

[42] See id. at 228–29.

[43] See id. at 35–36, 89–94; see also supra notes 7–11 and accompanying text.

analysis as priceless trumps that sweep aside anything but the most compelling policy-based arguments.[44] Third, it departs from the disguised manner in which courts stealthily import cost considerations as a limiting factor to detour around the more impracticable results generated by a principle-based approach.[45] As Holmes and Sunstein show, cost considerations play an inevitable and routine role in judicial determinations of the scope of all legally recognized rights—classical property rights just as much as the more novel set of welfare rights.[46] For example, it is virtually impossible for courts to determine the practical demands of the Due Process Clause under the Fifth and Fourteenth Amendments without some consideration of the administrative costs that may result from imposing requirements that enhance prosecutors', police officers', or administrative judges' procedural responsibilities.[47] If cost considerations are an inevitable part of settling rights disputes, however, then courts (as well as legislators and commentators) have little to gain by postponing the inevitable. Should we not prefer a transparent and systematic discussion of social costs to the

[44] See Holmes & Sunstein, supra note 1, at 97–101.

[45] See id. at 97–98 (stating that "[r]ights are familiarly described as inviolable, preemptory, and conclusive," but that this cannot be seriously taken as anything more than "rhetorical flourishes" since all rights enforcement obviously is constrained by budgetary considerations).

[46] See id. at 100 (showing that even proponents of the "rights as trumps" argument acknowledge that extenuating circumstances as well as conflicting rights claims can justify limiting the scope of a particular right); id. at 27–28 (showing that courts routinely choose whether to take cases on appeal based on pragmatic, cost-conscious considerations of judicial caseloads). Several scholars have made a somewhat similar point, arguing that the Dworkinian view of rights as absolutist trumps does not describe much judicial practice, which limits the scope of rights based largely on nonprincipled considerations. See Richard H. Pildes, Why Rights Are Not Trumps: Social Meanings, Expressive Harms, and Constitutionalism, 27 J. Legal Stud. 725, 729–30 (1998) (arguing that courts are willing to limit the scope of constitutional rights provided the government presents compelling reasons to do so); Frederick Schauer, Commensurability and Its Constitutional Consequences, 45 Hastings L.J. 785, 797–98 (1994) (stating that a sufficiently strong collection of pragmatic reasons, such as a "compelling interest" or "clear and present danger," can override even deontological conceptions of constitutional rights).

[47] See Holmes & Sunstein, supra note 1, at 26–28. Holmes and Sunstein cite explicit language in which the Supreme Court acknowledged the relevance of cost considerations in defining due process requirements in administrative hearings relating to the granting or denial of welfare benefits. See id. at 26–27 (citing Mathews v. Eldridge, 424 U.S. 319, 348 (1976)).

disguised manner in which courts currently wield cost concerns as an adjudicatory device of last resort?[48] For Holmes and Sunstein, that is a rhetorical question with an easy answer. Awareness of the expected enforcement, compliance, and redistributive costs of defining a particular right in a particular manner should become a primary component of popular, academic, legislative, and judicial rights discussions.[49]

II. SOME OBSERVATIONS ON THE "COST OF RIGHTS" THESIS

In this Part, I present a critical analysis of some of Holmes and Sunstein's arguments. Specifically, I point out two potentially drastic implications of a cost-based approach that, at least in the mind of some readers, may make it an unsatisfactory framework for settling rights disputes. First, a theory of rights that relies largely on policy-based cost considerations is likely to obscure certain features many readers may intuitively attribute to rights as opposed to other kinds of legal entitlements. In much of popular, academic, legislative, and judicial rights discourse, rights are said to differ from other legal interests insofar as they carry an intrinsic social value that generally trumps at least a significant range of policy-based cost considerations. This is why free speech debates are of an intrinsically different nature than debates over agricultural subsidies or the size of the defense budget. Thus, some readers might object that the authors' cost-based theory is unsuccessful because it erodes any recognizable distinction between rights, which are usually not subject to short-term policy considerations, and all other legal entitlements, which always are. Second, even if a cost-based theory somehow maintains an adequate rights/interests distinction, there is still no apparent reason why courts are competent (and, even more doubtfully, the *most* competent) arbiters of rights disputes within an analytical framework that understands rights in terms of policy-based, rather than principle-based, considerations. For this reason, a cost-based theory of rights is likely to narrow the

[48] For my negative response to this question, see infra Part III.

[49] See Holmes & Sunstein, supra note 1, at 98 (stating that "[c]ourts that decide on the enforceability of rights claims in specific cases will also reason more intelligently and transparently if they candidly acknowledge the way costs affect the scope, intensity, and consistency of rights enforcement").

justifiable grounds for judicial review of rights claims and shift to other political institutions some of the responsibility for defining the scope of rights-designated entitlements.

A. Rights and the Materialist Dilemma

Holmes and Sunstein adopt a peculiarly functionalist definition of rights. Their rights category includes only the rights that "count." Thus, they include legally cognizable claims for which holders can expect reasonable levels of government enforcement and exclude "toothless" moral claims to which the government has not accorded either legal recognition or significant enforcement resources.[50] This functionalist definition explains why Holmes and Sunstein extend the rights category to include statutorily founded entitlements that many readers may not readily identify as rights. Most notably, Holmes and Sunstein include under the rights rubric welfare entitlements such as Medicare and Social Security to which courts have not yet assigned (and show no indications of assigning) the rights label. Holmes and Sunstein argue that these statutory entitlements have obtained such an inviolate political status that they effectively operate as if they were constitutionalized rights.[51] That is a fair (albeit controversial) argument, but the boundaries of Holmes and Sunstein's functionally defined rights category become fuzzy when they include a variety of far more pedestrian legal entitlements that most readers would not intuitively place in the same category as due process or free speech rights. In their effort to show that all rights generate social costs, Holmes and Sunstein in-

[50] See id. at 16–20; see also id. at 19 (limiting the rights category to those entitlements that "are ordinarily enforced in functioning and adequately funded courts of law").

[51] See id. at 121 (suggesting that the distinction between welfare rights grounded in constitutional provisions (for example, Germany) and welfare rights grounded in statutory provisions (for example, the United States) may be more a matter of form than of substance). Sunstein and Holmes have made similar arguments elsewhere. See Holmes, Passions and Constraints, supra note 2, at 6–8 (arguing for a "positive constitutionalism" where constitutional rules trigger affirmative government obligations to provide certain social-welfare services); Sunstein, After the Rights Revolution, supra note 2, at 24–29 (arguing that the proliferation of statutorily founded rights in the 1960s and 1970s effectively established a new set of rights—such as the right to clean air and water, the right to a social safety net, and the right to product safety measures—that depart from the set of classical rights recognized at the time of the framing of the Constitution).

clude under the rights category such disparate legal entitlements as the right to ride a motorcycle without a helmet,[52] the right to change one's name,[53] the right to recover money damages for defamation,[54] and the right to obtain a sheriff's levy upon a debtor's personal property.[55]

This unusually expansive usage of the rights label may be symptomatic of a theoretical peculiarity in the "cost of rights" thesis. As Holmes and Sunstein recognize, a cost-based approach to rights analysis is vulnerable to the objection that it threatens to obscure any coherent distinction between fundamental rights and all other legal entitlements.[56] Although a cost-based approach emphasizes certain features that a values-based rights analysis tends to overlook, it may fail to account satisfactorily for some of the peculiar features of rights-designated entitlements. Thus, Holmes and Sunstein may somewhat casually extend the rights label to a wide range of everyday legal entitlements (as well as some well-entrenched quasi-rights to certain welfare entitlements) because their rights theory does not easily accommodate any workable distinction between rights and other legally cognizable interests. Not so coincidentally, this objection generally can be raised against any *materialist* theory of rights—that is, any theory that explains rights in terms of external, political-economic motives rather than intrinsic, value-based principles. Although Holmes and Sunstein do not adopt the materialist label, it clearly is befitting. In the tradition of Legal Realism, they spend a good deal of time showing that many rights often do not reflect principle-based considerations but rather represent the historical outcome of an interest-driven bargaining process among competing political participants.[57] As Holmes and Sunstein themselves suggest, this line of thinking is not far from the classical Marxist approach, which views

[52] See Holmes & Sunstein, supra note 1, at 23.

[53] See id. at 38.

[54] See id.

[55] See id. at 48.

[56] See id. at 106 (stating that "[i]f all rival claims must be weighed against one another, then claims of right are not essentially different from claims of interest").

[57] See id. at 177 (stating that "[g]ranted by governments and accepted by citizens in a trading of concessions, rights may even, at a stretch, be deemed bargains"); id. at 195 (arguing that common-law property rights "did not descend from high principle but were rather rough-hewn in a process of social give-and-take").

rights in a liberal democracy as universalist fictions that the holders of capital skillfully establish and then routinely manipulate to advance their parochial interests.[58] (Incidentally, public-choice theorists would have very few qualms about adopting a comparable stance on the process of rights determination, replacing the "holders of capital" with the "holders of lobbying resources.")

The problem for Holmes and Sunstein is that they are not Marxists. Clearly they do not want to provide an account that ends up suggesting that rights are nothing more than empty phrases cynically deployed by influential political actors. Holmes and Sunstein want to preserve some of the normative specificity of fundamental rights while arguing that courts and legal theorists can most satisfactorily settle rights disputes through an empirically sensitive analysis that closely resembles the cost-based analysis that legislators and administrators normally apply to all other legal entitlements.[59] To show how this feat may be possible, Holmes and Sunstein take the mixed position that the distinction between rights and other legal entitlements is not only one of *kind* (as the "trumps" thesis proposes) but also one of *degree.* Rights differ from other legal entitlements because courts and legislators must meet either a different type or a higher magnitude of justification for government actions that interfere with any rights-designated entitlement.[60] Thus, the rights designation excludes either categorically inappropriate or inadequately compelling reasons from entering into legislative and administrative decisionmaking with respect to fundamental legal entitlements.[61] This does not mean that (again, as the "trumps" thesis proposes) courts should refrain from subjecting rights questions to much of the cost-sensitive scrutiny

[58] See id. at 207 (stating that Marxist writers draw attention to the fact that putatively impartial rights tend to operate in a decidedly partial manner because wealthier individuals can exploit their rights to a greater extent than poorer individuals).

[59] See id. at 104 (stating that "[a]ttention to the cost of rights does not render meaningless the fundamental liberal distinction between interests and rights").

[60] See id. at 104–05 (arguing that "[r]ights talk . . . raises the threshold of justification for interfering with interests deemed especially important" by identifying certain arguments as either insufficiently weighty or normatively inadmissible with respect to such interests).

[61] See id. at 106 (stating that "[r]ights rule off-limits certain justifications for action or inaction" by requiring the state to defend rights-violative practices by presenting reasons that are both sufficiently compelling and normatively appropriate).

that policymakers apply to all other legal entitlements. But aspirational principles should operate as a limiting factor on a cost-conscious analysis and courts should permit rights-violative governmental conduct in any particular instance only when the "would-be rights violator comes up with legitimate and sufficiently weighty grounds for neglecting [rights]."[62]

B. Can Judicial Review Survive a Cost-Conscious Rights Analysis?

Partially rephrasing rights in terms of a "degree" rather than a "kind" distinction is an important departure from traditional rights analysis, whether represented by principle-based, conservative theories of "natural" property rights or principle-based, liberal theories of "rights as trumps." It is unclear whether this conceptualization of the rights/interests distinction corresponds to the manner in which academic and political participants commonly apply the rights label. There may be no real problem on this score, however, insofar as Holmes and Sunstein at least partially seek to upset intuitive understandings of rights concepts. Nevertheless, a degree-based conceptualization of the rights/interests distinction triggers a more immediate problem since it may narrow considerably the range of cases in which courts are reasonably competent to review legislative and executive actions that allegedly violate fundamental rights. This is because courts are viewed as competent arbiters of rights disputes precisely because rights are viewed as principle-based entitlements that lie above the interest-driven fray

[62] Id. at 107. In several publications, Sunstein has sought to chart a middle path of constitutional adjudication that avoids the simple dichotomy between 1) a top-down analysis that subjects constitutional questions to the cost-blind demands of high principle; and 2) a bottom-up analysis that subjects constitutional questions to the principle-blind demands of cost-benefit analysis. See Sunstein, After the Rights Revolution, supra note 2, at 164–68, 229–31 (stating that courts should develop strategies to promote public-regarding deliberation by government actors); Sunstein, One Case at a Time, supra note 2, at 239–41 (arguing that judges should avoid applying abstract philosophical principles, should focus on issuing case-specific rulings with limited general applicability, and should treat constitutional rights as aspirational propositions that are given content by concrete cases); Sunstein, Partial Constitution, supra note 2, at 145–46, 353–54 (rejecting the view of rights as trumps and the view of the Court as a "forum of principle" and suggesting that courts should focus on ensuring that legislative, administrative and executive bodies engage in deliberative, democratic procedures that generate internally consistent and public-regarding reasons for government actions).

of the political bargaining process. From this perspective, courts are a logical choice to ensure that interest-driven political agreements do not ignore the fundamental background set of legal entitlements to which all such agreements are subject. Whereas legislators are almost inescapably vulnerable to capture by parochial interest groups and may have weak incentives to preserve fundamental rights, judges (especially appointed federal judges with lifetime tenure) should be fairly immune to powerful interest groups and are good candidates to preserve fundamental rights against politically expedient dealmaking. But if rights analysis is just another branch of the interest-driven process of allocating public resources, then it is unclear 1) why courts have any *special* competence in adjudicating rights disputes; and 2) whether courts have *any* competence to adjudicate any rights dispute.

In several passages, Holmes and Sunstein lend support to the idea that courts are not especially good candidates to execute a cost-based analysis of rights enforcement questions. Endorsing the widely held view that courts are notoriously error-prone at evaluating and second-guessing administrative and legislative decisions about case-specific allocations of budgetary resources, Holmes and Sunstein recommend that courts restrict themselves to sanctioning egregious governmental misallocations of rights-enforcement resources.[63] Even in such instances of gross misallocation as the notorious *DeShaney* case (in which state social workers neglected to act on a pattern of violent parental abuse that led to severe injuries to the abused child),[64] Holmes and Sunstein express some doubt as to the courts' ability to fashion and implement workable remedies.[65] But if courts should 1) generally stay away from reviews of government allocative decisions with respect to rights enforcement; and 2) focus on social-cost considerations in fashioning the scope of rights-designated entitlements, then the courts' competence appears confined to an exceedingly narrow range of cases. To

[63] See Holmes & Sunstein, supra note 1, at 94–95.

[64] See DeShaney v. Winnebago County Dep't of Soc. Servs., 489 U.S. 189, 202 (1989); supra note 11 and accompanying text.

[65] See Holmes & Sunstein, supra note 1, at 96. Sunstein elsewhere has expressed similar doubts. See Sunstein, Partial Constitution, supra note 2, at 148–49 (stating that limited judicial remedial and fact-finding capacities partially explain the Court's aversion to enforcing positive claims to government intervention).

put this another way, Holmes and Sunstein assigu courts a task (policy-based analysis) they are not very well trained to carry out, and discourage courts from engaging frequently in a task (principle-based analysis) they are much more competent at carrying out. So what exactly is left for an honest court to do?

This may be an overly extreme conclusion, and Holmes and Sunstein do not make clear whether they intend for their readers to draw this implication. I should add that Holmes and Sunstein leave some room for government intervention by adding that the Court could have found a rights violation in the *DeShaney* case if government social workers had neglected the abused child on discriminatory grounds of race or religion.[66] But this caveat does not do much to safeguard courts' current claim to competency in reviewing a broad rauge of alleged rights violatious. For Holmes and Sunstein's hypothetical antidiscrimination ruling in the *DeShaney* case would represent precisely the type of principle-based approach to rights claims that courts have traditionally engaged in—and, according to Holmes and Sunstein, have *over*-engaged in. Thus, it seems that a cost-based theory may leave courts engaging primarily in a principle-based analysis but limiting themselves to a narrow range of rights violations in which they may justifiably take that approach. If this implication is correct, then a cost-based approach might create a more prominent role for political actors that have greater policy-based evaluative capabilities—legislators, administrators, and academic commentators—in molding prevailing definitions of existing rights.[67] Perhaps courts could then rely upon

[66] See Holmes & Sunstein, supra note 1, at 105.

[67] There are some indications that Holmes and Sunstein may be receptive to a reallocation of institutional responsibilities with respect to protecting and defining rights-designated entitlements. Holmes and Sunstein suggest a possible symbiosis between judicial and policy analysis by calling for empirical research that might give more accurate estimates of the costs of particular rights. See id. at 24. Furthermore, Sunstein has made numerous and explicit indications in earlier writings that the task of constitutional interpretation should be shared among several judicial and nonjudicial actors. See Sunstein, After the Rights Revolution, supra note 2, at 229–31 (stating that the task of constitutional interpretation and of introducing constitutional safeguards within the regulatory state will rely largely on remedies and initiatives that come from nonjudicial institutions, as encouraged by courts' deliberation-promoting strategies); Sunstein, Partial Constitution, supra note 2, at 145–46 (stating that the courts should not be viewed as the primary "forum of principle" because the legislative and executive branches have potentially strong competencies to interpret and

these third-party policy evaluations to constrain some of the less cost-conscious results generated by a principle-based analysis of any particular rights question. Whatever Holmes and Sunstein's desired implication, a significantly narrowed scope for judicial review seems to be a fair consequence of a cost-based theory of rights and a potentially worrisome implication that its proponents must be ready to elaborate upon, defend, or somehow correct.

III. A CRITIQUE OF THE "COST OF RIGHTS" THESIS

In Part II, I pointed out two of the more important implications of a cost-based approach to rights and rights enforcement. For some readers, these implications may be welcome consequences that enhance the attractiveness of a cost-based approach; for others, they may be decidedly unwelcome departures from traditional rights analysis. Perhaps it is of no great concern that rights might partially merge into the general pool of legal entitlements or that courts might lose their role as the preeminent arbiters of rights disputes. In this Part, I argue that there may be cause for concern so far as a cost-based approach to rights enforcement sometimes unjustifiably endangers the normative authority of rights-designated entitlements. This is not, however, an entirely destructive argument. It should be obvious that my argument builds upon and enhances—rather than discards—Holmes and Sunstein's insightful model of the chronically self-contradictory manner in which rights claims function in legislative and judicial decisionmaking.

My argument engages the prescriptive element of the "cost of rights" thesis. As stated earlier, the authors *descriptively* argue that effectively enforced rights always necessitate significant government enforcement expenditures (not to mention third-party compliance and distributive costs). As a result, participants in the rights-determination process cannot help but fall into a cost-based analysis when they talk about initially recognizing or defining the

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apply constitutional requirements); see also Sunstein, One Case at a Time, supra note 2, at 241–43 (arguing that judges should act modestly and only invalidate legislative judgments in the occasional case where such judgments are not the result of a deliberative process or are such as to impose second-class citizenship on disadvantaged social groups); Sunstein, Rights and Their Critics, supra note 33, at 749 (stating that the attack on excessive judicial review should be kept separate from attacks on rights).

scope of any particular right. Put another way, it is impossible to talk about introducing or defining any right without also talking about—at least implicitly—the social resources that the government must expend to defend that right or to defend a particular definition of that right. Holmes and Sunstein thoroughly demonstrate this point and I have little fundamental quarrel with their arguments on this level. The authors, however, draw a prescriptive lesson that does not easily follow from their descriptive claim. Based on the observation that rights talk always *does* and ultimately *must* involve cost-conscious, balancing-test analytical strategies, the authors argue that courts, litigants, legislators, political commentators, and academic observers *should* usually strive to consider explicitly and thoroughly the social costs of introducing or redefining particular rights. This thesis I contest. Even if cost considerations always play some significant or even determinative role in settling rights disputes, this fact does not wholly support the recommendation that courts, litigants, and legislators and other political participants should usually consider those cost considerations *explicitly* and *primarily* in determining the scope of legally protected rights.

A. Rights as an Incommensurability Norm

My objection relies on the claim that rights, to the extent that they stigmatize the application of cost-based approaches to certain "priceless" legal entitlements, constitute a local instance of the general phenomenon of incommensurability norms.[68] In fact, Sun-

[68] Several scholars have explored briefly the idea that rights indicate an incommensurability relation between a certain fundamental value and other political interests. See Richard H. Pildes & Elizabeth S. Anderson, Slinging Arrows at Democracy: Social Choice Theory, Value Pluralism, and Democratic Politics, 90 Colum. L. Rev. 2121, 2148–50 (1990) (indicating that the "rights as trumps" thesis suggests an incommensurability between rights and general considerations of social policy); Pildes, supra note 46, at 727 (stating that individual rights are commonly, but mistakenly, viewed as representing inviolate entitlements that cannot be weighed against majoritarian preferences concerning the common good); Schauer, supra note 46, at 792 (indicating that judicial traditions which view individual rights as absolutist claims against the interests of the majority appear to rely on an incommensurability of values).

stein has written at some length on incommensurability[69] and has suggested (along with several other scholars) that the "rights as trumps" thesis is a type of incommensurability claim.[70] Among the multiple definitions of this term that populate the scholarly literature, I rely on the notion of a *constitutive* incommensurability: namely, a basic normative commitment that discourages partners in a certain relationship from assessing the value of certain goods or behavioral options on a common metric with all other goods or options.[71] Consider a mother's relationship to her daughter: Almost all mothers would adamantly refuse to place a price on their daughters and would decline to answer questions such as, "Would you be willing to give up your daughter for $100,000,000?" Thus, we might say that a mother signals the type of relationship she has with her daughter by treating that relationship as an incommensurable good and withdrawing it from the common pool of bargained-for goods. There is good reason to believe that rights may play a similarly constitutive function in setting up the basic relationship between individual citizens and a democratic government or among individual citizens in a democratic society. The rights label may protect certain fundamental components of the legal order by removing those components from the common pool of entitlements that are always subject to renegotiation and modification in

[69] See Cass R. Sunstein, Conflicting Values in Law, 62 Fordham L. Rev. 1661, 1665–72 (1994) [hereinafter Sunstein, Conflicting Values]; Cass R. Sunstein, Incommensurability and Valuation in Law, 92 Mich. L. Rev. 779 (1994) [hereinafter Sunstein, Incommensurability].

[70] See Sunsteiu, Conflicting Values, supra note 69, at 1666–67. For other scholars' expressions of comparable views, see supra note 68.

[71] "Constitutive incommensurability" is Joseph Raz's term. See Joseph Raz, The Morality of Freedom 356 (1986) (stating that constitutive incommensurabilities arise when individuals are "engaged in a pursuit or a relationship that includes the belief that certain options are not comparable in value"). For a discussion of the notion of constitutive incommensurability, see Richard Warner, Does Incommensurability Matter? Incommensurability and Public Policy, 146 U. Pa. L. Rev. 1287, 1291–92 (1998). For a discussion of the related notion of a hierarchical incommensurability (that is, the notion that certain "higher" values are incommensurable with certain "lower" values), see Pildes & Anderson, supra note 68, at 2149–50. Constitutive and hierarchical forms of incommensurability differ from the more common phenomenon of "plain" incommensurability, where an individual cannot find any common metric by which to compare systematically the costs and benefits of (and thus, rank as better, worse, or equal) two alternative courses of conduct—say, choosing vanilla or strawberry ice cream, or selecting a career in law or medicine. See Warner, supra, at 1302–04.

the political bargaining process. Thus, we might say that the Fourth Amendment prevents legislators from even seriously considering crime-fighting measures that might significantly expand police officers' powers to search the bodies and homes of private individuals without probable cause or a judicially authorized search warrant. It may be that a cost-benefit analysis could show that eliminating the warrant or reasonable suspicion requirement in most instances would enhance social welfare by incapacitating violent criminals at the price of a small inconvenience to law-abiding citizens. But serious political participants are unlikely to voice such considerations. This is because the Fourth Amendment institutes an incommensurability norm that stigmatizes political rhetoric measuring or proposing to measure the value of the warrant requirement against anything but the most compelling types of social priorities.

As some of Sunstein's earlier writings suggest, he would have virtually no quarrel with depicting rights—or, more precisely, rights rhetoric—as a type of incommensurability norm.[72] But Sunstein (and probably Holmes) would add an important caveat: The use of incommensurability rhetoric with respect to legal rights is often misleading because it conceals the inescapable fact that rights are not hallowed principles fixed in stone but, just like any other legal entitlement, are constantly subject to interest-driven renegotiation and redefinition.[73] Thus, Fourth Amendment rulings that take into account the public's security needs and the police's administrative costs easily rebut the apparently naïve claim that the Fourth Amendment renders personal integrity an incommensurable entitlement that is always left off the political bargaining table. This basic contradiction between rights rhetoric and rights practice

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[72] See supra note 69 and accompanying text.

[73] Confirming this educated conjecture, Sunstein has argued explicitly that the assumption of commensurability with respect to apparently incommensurable goods sometimes can advance enlightened policymaking. See Sunstein, Incommensurability, supra note 69, at 814–15. Furthermore, Sunstein has elsewhere suggested that courts should shy away from deciding cases founded on broadly applicable, theoretical principles and, instead, incline toward "incompletely theorized" and analogically reasoned rulings that make case-specific decisions and avoid taking a position on fundamental controversies. Sunstein, Legal Reasoning, supra note 2, at vii–viii, 3–7, 35–61; see also Sunstein, One Case at a Time, supra note 2, at 240–63 (arguing that courts deciding constitutional questions usually should issue "narrow" and "shallow" rulings that do not rely on abstract philosophical arguments and do not settle fundamental controversies).

suggests that the claim that rights are incommensurable is almost always a deceptive myth.[74] What's more, it is a potentially harmful myth, because an absolutist rhetoric that misleadingly accords rights an inviolate status may frustrate rational, cost-conscious decisionmaking and lead to socially costly decisions about the justifiable scope of certain rights.[75] Thus, although it may be true that the incommensurability thesis characterizes much rights talk, Holmes and Sunstein respond that this is an unfortunate state of affairs that legal theorists, legislators, and judges should try to correct.

B. Rights Talk and Acoustic Separation

It is this recommendation that I wish to contest. I recognize as an important insight Holmes and Sunstein's observation that there is a curious and potentially worrisome contradiction in rights adjudication between 1) the absolutist, cost-insensitive rhetoric with which courts describe many fundamental rights; and 2) the pragmatic, cost-dependeut mechanics through which courts often settle rights disputes. Why should courts talk about the Fourth Amendment, for example, as if it were inviolable when it usually does not function in this manner? In response to this legitimate query (which, as it turns out, is *not* a rhetorical question), I argue that courts often may want to *preserve* this apparent contradiction between judicial rhetoric and practice because it may play a socially valuable function in sustaining the normative authority of rights-designated entitlements. That is, the incommensurability thesis may be a *good* myth if there are reasons why we would prefer that judges often say one thing about rights but act quite differently in practice.

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[74] This line of thinking, which I conjecture Holmes and Sunstein would pursue, actually applies an argument developed by Eric Posner in a more general discussion of the "incommensurability thesis." Posner argues that no goods or commitments are ever truly incommensurable because individuals consistently engage in behavior that belies the incommensurable status that they attach to certain goods or commitments. See Eric A. Posner, The Strategic Basis of Principled Behavior: A Critique of the Incommensurability Thesis, 146 U. Pa. L. Rev. 1185 (1998). Thus, my critique of Holmes and Sunstein's "cost of rights" thesis may alternatively be read as a critique of Posner's critique of the incommensurability thesis.

[75] I am virtually paraphrasing a position Sunstein has expressed in an earlier publication. See Sunstein, Incommensurability, supra note 69, at 813–15.

A distinction that Bentham originally introduced, and Meir Dan-Cohen re-presented (with some modification), shows how this somewhat curious result may be possible. Expanding on Bentham's original intuition, Dan-Cohen distinguishes between conduct rules, which are addressed to the general public, and decision rules, which are addressed to officials who apply and enforce the conduct rules.[76] Dan-Cohen employs this distinction to show that the criminal law sometimes achieves competing objectives by disseminating harsh conduct rules to the public (for example, ignorance of the law is *never* a defense) and more lenient decision rules to officials (for example, ignorance of the law is *sometimes* a defense).[77] The essential prerequisite for this selective transmission of legal rules is the existence of a sufficient degree of "acoustic separation." That is, certain normative messages must be more likely to "register" with the public than with officials, and vice versa.[78] If this prerequisite is adequately satisfied, a court may successfully engage in selective transmission. For example, a court could loudly repeat in every case the maxim, "ignorance of the law is no defense," while regularly finding subtle detours that avoid the harsh results that application of the maxim often would entail in practice.[79]

A comparable process may explain—and partially justify—the persistent contradiction between judicial rhetoric and judicial practice with respect to the definition and enforcement of fundamental rights. On the one hand, judges employ grand rhetoric ascribing an

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[76] See Meir Dan-Cohen, Decision Rules and Conduct Rules: On Acoustic Separation in Criminal Law, 97 Harv. L. Rev. 625, 625–26 (1984) (showing that the criminal law sometimes disseminates a harsher version of the law to non-officials and a more lenient version to officials and that this "acoustic separation" enables the law to accomplish competing objectives). For the original source in Bentham, see Jeremy Bentham, A Comment on the Commentaries and a Fragment on Government 393 (J.H. Burns & H.L.A. Hart eds., Athlone Press 1977) (1776).

[77] See Dan-Cohen, supra note 76, at 645–46.

[78] See id. at 634–35. I am aware of only a single dedicated effort to apply the "acoustic separation" concept to constitutional law questions. See Carol S. Steiker, Counter-Revolution in Constitutional Criminal Procedure? Two Audiences, Two Answers, 94 Mich. L. Rev. 2466, 2466–71 (1996) (arguing that the debate over the degree to which the Court has reversed the Warren Court's innovations in criminal procedure may reflect a dissonance between the Court's "conduct rule" decisions, which incline toward the Warren Court's defendant-friendly approach, and the Court's "decision rule" holdings, which tend toward a "public order" approach by significantly expanding the number of "inclusionary" rules).

[79] See Dan-Cohen, supra note 76, at 645–48.

inviolate status to constitutionalized rights—a rhetoric that appears to allow little room for considering the budgetary and other social costs of particular definitions of fundamental rights. On the other hand, judges commonly, but often surreptitiously, take into account budgetary-cost considerations in defining the scope of a right in a particular situation. Holmes and Sunstein amply demonstrate this chronic inconsistency between rhetoric and practice. But this discrepancy sometimes may be socially desirable if it enables courts to 1) sustain the normative incontestability that peculiarly characterizes rights-designated entitlements; but 2) avoid the impractical (and often unenforceable) results an absolutist, cost-blind approach to rights analysis would entail in practice. If courts primarily and explicitly approached rights questions through a policy-inclined analysis, then fundamental rights could steadily lose many of the principle-based features that distingnish rights from all other legal entitlements. Because political participants aud private citizens no longer could distinguish readily between rights-designated and non-rights-designated entitlements, fundamental rights would become just as contestable and negotiable as any other political bargain between competing interest groups.

This scenario should especially interest Holmes and Sunstein because it may have important consequences for the *costs* of enforcing fundamental rights. If rights-designated entitlements lost much of their normative specificity as incommensurable entitlements, then potential individual and institutional rights-violators might have weaker grounds to respect fundamental rights, and the actors charged with enforcing those rights—judges, legislators, administrators, private litigants, and government prosecutors—could face ballooning costs in preserving the existing scope of fundamental rights.[80] Thus, a cost-based approach to rights adjudication may have an important cost of its own: It could generate social costs (increased costs of rights enforcement and, possibly, reduced levels of rights protection) that exceed the social gains (improved allocation

[80] For a related claim, see Schauer, supra note 46, at 792–93 (stating that it is plausible (but possibly incorrect) to argue that treating rights as commensurable entitlements may result in a lesser degree of protection of those rights because policymakers may be more inclined to sacrifice those rights for the sake of competing non-rights-based interests).

of enforcement resources) that result from courts shifting to a more empirically aware mode of rights analysis.

Holmes and Sunstein actually consider this possibility indirectly. Acknowledging the educative force of hyperbolic rights talk,[81] Holmes and Sunstein hastily dismiss the challenge this possibility poses to their cost-based approach by suggesting that the social gains arising from this educative function probably pale in comparison to the social costs arising from faulty allocative decisions based on misleading rights rhetoric.[82] I have two responses to this plausible rejoinder to my argument. The first is, "we just don't know." That is, it is impossible to measure the competing social costs and gains on each side of the ledger and thus, the debate cannot proceed further on this empirical level. The second is "it doesn't matter that we just don't know." That is, there is no need to balance out the competing costs because courts may be able to engage in a cost-conscious mode of rights analysis while still preserving a healthy dose of rights rhetoric—thus avoiding the unknown but probably significant social cost of a normatively diluted rights category. Simply put, courts often do not face a zero-sum choice between emotionalized, cost-blind rights *rhetoric* and hyperrational, cost-conscious rights *analysis*. To accomplish this magician's trick, judges sometimes may—or sometimes *could* and *should*—act *as if* rights were incommensurable commitments while recognizing effectively that rights are subject (at least to a signifi-

[81] See Holmes & Sunstein, supra note 1, at 102 ("Although it is theoretically misleading to portray rights as absolutes, such a description can be defended as psychologically and rhetorically useful."); see also id. at 127 (acknowledging the symbolic value of designating even an entrenched legal entitlement as a constitutional right). In fact, Sunstein has written elsewhere on the symbolic and educative significance of Supreme Court pronouncements and, in particular, of the "trumps" view of constitutional rights. See Sunstein, Incommensurability, supra note 69, at 833–34. In The Cost of Rights, it appears that Sunstein may have partially abandoned this earlier, more sympathetic position with respect to the symbolic value of "rights as trumps" rhetoric.

[82] See Holmes & Sunstein, supra note 1, at 103 ("[A]n overstatement [of the absolute character of some rights] can create problems too, and an insistence that rights are absolute may lead to the over-protection of some rights to the detriment of others that have an even greater claim. And since political attention, too, is a scarce resource, the more time officials lavish on one claim, the less time they have for another.").

cant degree) to the budgetary-cost considerations that necessarily apply to the enforcement of any legal entitlement.[83]

An essential precondition for this thesis is the existence of a good degree of acoustic separation between the various audiences to which courts commonly address their rulings concerning rights questions: government prosecutors, potential litigants, potential targets of litigation, legislators, and the general public. That may be an entirely reasonable proposition if popular audiences do not delve deeply into the intricacies of judicial rulings, whereas prosecutors, potential litigants, and targets of litigation may scour rulings for signs of judicial receptiveness to cost-based arguments that may erode the absolutist nature of the particular right at issue. If there is some degree of acoustic separation on a particular rights question, then a clever judicial strategy may consist of loud pronouncements on the inviolability of constitutionalized rights coupled with more subtle indications of the court's possible willingness to bend principles so as to satisfy pressing considerations relating to enforcement costs, compliance costs, or redistributive costs.[84] If judges treated the Fourth Amendment primarily and explicitly under the cost-conscious approach that legislators apply to any politically vulnerable entitlement, the constitutional guarantee against search and seizure might quickly lose its normative hold over executive officers and the public in general. But judges can

[83] Exploring a related line of reasoning, Frederick Schauer raises the possibility that our constitutional system may treat certain interests as if they were incommensurable in order to protect against the likely shortsightedness of policymakers—including judges—in weighing certain rights-based interests against competing social priorities. See Schauer, supra note 46, at 793–94. By contrast, I argue that judges perpetrate (rather than being fooled or manipulated by) this institutional ruse. That is, judges generally do not take incommensurability claims seriously and play along with the "as if" quality of rights-designated interests in order to protect those rights against the interest-driven bargaining process within which all other political actors (including voters) operate. It is precisely judges' Janus-like role that explains how the judicial system can at once preserve the putative inviolability of rights claims while still adapting rights claims to suit changing empirical conditions.

[84] Providing some empirical support for this claim, Carol Steiker has argued that the public may overestimate the effectively enforced constitutional limitations on police investigative procedures, whereas the police have a much more accurate idea of the likely (and generally tolerant) judicial response to constitutionally questionable police procedures. See Steiker, supra note 78, at 2470–71, 2532–40. In contrast to my argument, Steiker believes that this is an undesirable state of affairs that could undermine the legitimacy of constitutional decisionmaking. See id. at 2471.

still neutralize some of the more impractical consequences of an unreservedly absolutist approach by implicitly importing cost considerations as a limiting factor, thus alleviating the costly burden the Fourth Amendment may impose upon effective police enforcement. These discreet indications may invite challenges to relax or strengthen existing constitutional requirements, which in turn allow courts to adapt putatively absolute rights to the fluid cost structures of evolving political realities and enforcement technologies.

Viewing rights as a type of incommensurability norm and rights adjudication as an instance of acoustic separation leads to a potentially fruitful insight. Holmes and Sunstein make the sound observation that much rights talk (like all incommensurability rhetoric) is inherently misleading because it masks the fact that even judicial decisions applying apparently inviolate principles necessarily must place a price on those principles by taking into account budgetary and other social-cost considerations. Duplicity may be a price worth paying, however, if rights would lack any normative force in a world where political participants and private citizens did not usually and explicitly treat them as if they were inviolate principles that really are immune to cost considerations. Courts' best strategy may be to play along sometimes even if they know it is all just a game. This is because rights derive both their normative authority and practical viability from an unavoidable tension between the necessarily cost-sensitive character of rights enforcement and the necessarily cost-*in*sensitive character of rights rhetoric. Just as rights are unavoidably costly, rights adjudication is unavoidably double-faced. Holmes and Sunstein decry the obvious discrepancy between the principle-based features of rights talk and the cost-based tradeoffs that often ultimately determine a court's final decision about the scope of any particular right. But the authors may be making a demand for rational consistency and adjudicative transparency that sometimes would undermine and run counter to the socially valuable function of rights claims.

CONCLUSION

Holmes and Sunstein make an important contribution to the rights debate by rebutting an assumption that conservatives loudly promote and liberals tacitly accept. As Holmes and Sunstein show,

the negative/positive distinction plays an intellectually harmful role in rights talk by shifting the terms of the debate so that the burden of persuasion falls on welfare-rights proponents rather than property-rights proponents. Understanding rights in terms of their unavoidable budgetary and other social costs shows that each side of the debate bears an equal burden in justifying the expected social costs that always result from the effective enforcement of any legally protected right. Conservatives should recognize that even property rights are costly, government-created entitlements; and liberals should recognize that welfare rights must (and can) be justified on cost-based (and not just principle-based) grounds. Although this is a valuable descriptive claim, it does not easily follow that, as a prescriptive matter, courts and other political participants always should treat rights questions explicitly and even primarily in terms of a social-cost analysis. This is because courts' unabashed use of a cost-based rights analysis may improve the quality and transparency of judicial rights determinations at the cost of undermining the distinctive normative authority that rights-designated entitlements exert over legislators, executive officers, and the general public. Although this irreducible tension in rights adjudication certainly merits more discussion (and, perhaps, some empirical research), courts may be wise to retain a good deal of cost-insensitive rights talk while discreetly engaging in an empirically aware analysis that avoids the socially undesirable results to which absolutist rhetoric can lead.