

THE COST OF RIGHTS

Why Liberty Depends on Taxes

STEPHEN HOLMES
AND CASS R. SUNSTEIN



DEFINING RIGHTS

The term "rights" has many referents and shades of meaning. There are, broadly speaking, two distinct ways to approach the subject: moral and descriptive. The first associates rights with moral principles or ideals. It identifies rights not by consulting statutes and case law, but by asking what human beings are morally entitled to. While no single agreed-upon theory of such moral rights exists, some of the most interesting philosophical work on rights involves an ethical inquiry, evaluative in nature, of this general kind. Moral philosophy conceives of nonlegal rights as moral claims of the strongest sort, enjoyed perhaps by virtue of one's status or capacity as a moral agent, not as a result of one's membership in, or legal relationship to, a particular political society. The moral account of rights tries to identify those human interests that may not, before the tribunal of conscience, ever be neglected or intruded upon without special justification.

A second approach to rights—with roots in the writings of the British philosopher Jeremy Bentham, American Supreme Court Justice Oliver Wendell Holmes, Jr., and legal philosophers Hans Kelsen and H. L. A. Hart—is more descriptive and less evaluative. It is more interested in explaining how legal systems actually function and less oriented toward justification. It is not a moral account.⁴ It takes no stand on which human interests are, from a philosophical perspective, the most important and worthy. It neither affirms nor denies ethical skepticism and moral relativism. Instead it is an empirical inquiry into the kinds of interests that a particular politically organized society actually protects. Within this framework, an interest qualifies as a right when an effective legal system treats it as such by using collective resources to defend it. As a capacity created and maintained by the state to restrain or redress harm, a right in the legal sense is, by definition, a "child of the law."