

CHAPTER 6

Conclusion

There are, in my view, no constitutional principles that would regularly force governmental entities to use tax-and-spend programs rather than regulatory ones. (Courts should also never order these entities to let losses lie rather than remedy or prevent some harm or to employ user fees or benefits taxes, even though there are situations in which some observers might well be able to make a good case that these solutions to social problems are more appropriate.) Even if Justice Scalia is correct to believe that it is possible to distinguish situations that involve “pure” regulation (the reduction or allocation of social costs or the policing of unjust contracts) from those in which regulation substitutes for a traditional tax-and-spend program, analysis of the suspect regulations as disguised tax-and-spend programs shows that they almost invariably withstand constitutional scrutiny.

Regulations may indeed substitute for available tax-and-spend programs (and the reverse is true as well), but if the suspect regulations are analyzed as implicit taxes followed by implicit spending programs, there is generally no good basis for the Court to intervene to undo either the implicit tax or the implicit spending programs. Virtually no regulatory taxes violate the justifiably slim equal-protection principles against unduly narrowly based taxation, and no regulatory spending programs violate the even more trivial constitutional limits on narrowly focused benefits. It is remotely conceivable that a court might strike down a particular regulatory tax because it required particularistic knowledge of a taxpayer that could only be gained through undue intrusion in the implicit taxpayer’s affairs, but it is hard to imagine realistic cases in which existing regulations would fail on that ground.

The prudential limits on the use of regulation are far harder to summarize but ultimately considerably more significant than the constitutional ones. In assessing which form of government action to employ, it is necessary to try to answer a number of questions on the tax side: How will the implicit tax impact behavior, given the desire to minimize undue

allocative dislocation? How expensive will the tax be to administer compared to available alternatives? Will it result in a fair distribution of burdens, given certain conceptions of posttax distributive justice (vertical equity, properly understood)? How will the tax meet the substantive concerns often mischaracterized as horizontal equity concerns: maintenance of allocative incentives; avoidance of status-based discrimination; reduction in rent seeking; and minimization of privacy intrusions.

Opponents of regulatory taxation have not only underestimated the possible tax advantages of regulation but also wholly failed to focus on its spending-side advantages. It is dangerous to overstate the inevitable cost-effectiveness or innovativeness of private entities—this is, after all, a country that enjoys its most marked technical superiority in the three industries (agriculture, computers, and aerospace) most dominated by government research and development—but there are certainly situations in which dispersed private producers will both know more about how to deliver desired services than will the state and operate with superior incentives to reduce costs. Compensating these private producers for the cost of actual service provision may frequently blunt whatever desirable incentives they would otherwise face, and compensating for typical costs may lead producers to devote a good deal more resources to winning the political battle over how much they should receive than to minimizing service-provision costs. These problems will be less severe when the regulated entity can meet the state's goal only by forbearing from conduct entirely, but in many cases in which the government has simply enacted restrictive regulations, it is possible to meet regulatory goals either through remedial action that offsets the initial ill effects of conduct or through forbearance, so that maintenance of incentives for cost-effective remedial action is desirable.

It might well be that governmental entities have enacted regulations that unduly burden disenfranchised subgroups, but there is no guarantee that tax-and-spend programs will do a better job protecting either disorganized majorities or outvoted minorities. The total costs (and distribution of the costs) of regulation may indeed sometimes be opaque, but this, too, is a problem in explicit taxing and spending. I believe, however, that the political process may indeed be distorted when regulations are used instead of taxing and spending to the degree that it is socially plausible that regulation's beneficiaries make entitlement-based rather than redistributive claims and that their claims therefore trump those made by beneficiaries of the welfare state.