CHAPTER 3

Constitutional Considerations (II): A Less Deferential Alternative

In the first part of this chapter, I construct what I believe to be the most plausible theory of the Takings Clause that is less deferential to a governmental entity's decision to regulate rather than meet public aims through tax-and-spend programs.[1] I address at length the possibility that the Court will demand that governmental entities substitute broader-based taxes for regulations whose costs are borne by a narrower subgroup of citizens than a typical tax, and I address briefly the possibility that the Court should ban regulatory programs whose benefits are inadequately publicly dispersed even if it did not review parallel spending programs to insure such dispersion of benefits.

In the second part of this chapter, I argue that this, the most plausible interventionist theory of the Takings Clause, is ultimately unsatisfactory. It is readily recognized that the Court cannot, on the spending side, scrutinize whether programs are adequately public, in large part because there is no good theory, let alone one commanding constitutional consensus, differentiating programs that serve the public from those that serve coalitions of private parties. Understanding the fundamental interchangeability of regulation and taxation should make most people quickly realize that scrutinizing the implicit spending in regulatory programs for its publicness is an equally hopeless task.[2] I think it is more difficult to see at first blush but equally true that attacks on unduly narrowly based regulatory taxes

1. Again, when I describe this theory as plausible, I mean first that the Supreme Court is most likely to adopt this theory if adopting a more interventionist theory and second that while I ultimately find it seriously wanting, I believe it has more normative force than do other interventionist theories.

2. The Court decided in *Yee v. City of Escondido* to reach only the "physical seizure" (*Loretto*) issues rather than the issues raised by Judge Kozinski in *Hall v. City of Santa Barbara* that were dominant in the petitioner's brief. This decision reflected a recognition that detailed judicial scrutiny of whether the beneficiary class of regulations was an adequately dispersed or public group was not plausible.

assume, quite wrongly, that there is or should be activist constitutional scrutiny of unduly narrow explicit taxes.

A First Statement of the Theory

I derive what I take to be the most plausible interventionist reading of the Takings Clause dominantly from my own interpretation of Justice Scalia's dissenting opinion in *Pennell* and his majority opinion in *Nollan,* but I do not claim that this reading is as faithful as one could be either to Justice Scalia's words or his intention. My point in this section is not to construct an interpretation faithful to an authoritative source. Thus, I will generally not cite particular passages in the cases that are most consistent with my reading unless they help explain an argument, nor will I attempt to deal with the passages that are least consistent with my reading. The basic argument is as follows:

1. As I noted in the introductory chapter, it is vital to be aware that regulation and taxation are substitutes one for the other, whether or not they are permissible substitutes for one another.[3] The state almost invariably may meet its goals either through the public-spending programs that tax revenues finance or through regulatory mandates requiring that actors take certain steps and forbear from others. Private parties will treat regulatory mandates and explicit taxes as equivalents; to the extent that private parties are nonaltruistic, they are interested in the amount of goods they can privately appropriate, and that amount is the maximum gross income they could generate in a zero-tax, no-regulation world, net of the costs of compliance with either a tax or regulation.

2. Governments are entitled to pursue two legitimate sorts of ends or goals. The Court will be extremely deferential to programs in either of these classes. First, the government is entitled to engage in regulation, and second, the government is entitled to engage in traditional tax-and-spend programs. Naturally, both these terms need workably clear definitions. Preliminarily, though, I would say that *regulation* consists first of efforts

3. I further noted in the introductory chapter that the state may choose to manage the same social problems that give rise to public-spending programs and/or regulation either by inaction (letting losses lie where they may unless private parties spontaneously choose to avert the losses) or by public provision of services for which those most benefited by the services must pay (user charges). The recognition that the state has these additional options, though, is germane to one critique of the interventionist position, not to its construction.

either to forbid activities, where doing so will result in limiting unwarranted social costs, or to force certain parties to compensate other parties that bear social costs. Second, *regulation* consists of efforts to insure that no party in a contractual relationship with another party exploits that party in any fashion either by unduly degrading the quality of the goods or services provided or by charging what might be thought to be an excessive price for the goods or services provided. Traditional tax-and-spend programs consist first of the provision of any good or service broadly consumed. The core cases might be spending programs in which the state entity provides what conventional public-finance economists would think of as goods that would be underconsumed in private markets. (For example, the state might provide pure public goods, like defense or protection of air quality, in which exclusion of beneficiaries from all the benefits of the spending is impossible, or goods whose consumption generates substantial positive externalities, like education or immunization, in which individuals capture some private exclusive benefits, but third parties cannot be excluded from capturing other gains.) The state may also publicly provide goods that largely lack these qualities. (For example, the state might provide health care of benefit only to sick people, which might be publicly provided dominantly for paternalistic reasons, or utility hookups, which almost exclusively help the particular dwellers who gain access to the relevant utility.) Second, traditional tax-and-spend programs may be redistributive. (State entities may choose to redistribute income in cash or, for paternalist or other reasons, in-kind. Typically, redistributive programs transfer income from richer to poorer individuals, but this is by no means necessarily the case. Redistributive transfers could go from one social group to another for a variety of reasons—for example, from the able-bodied to the disabled, from whites to African Americans, from nonveterans to veterans.)

3. What the state is not permitted to do is to use regulation to meet one of the ends that has traditionally been accomplished and should continue to be accomplished through a tax-and-spend program. Operationally, though, the Court will not analyze what should be done through spending programs—recall that the Court in this conception is quite deferential to spending decisions and will therefore allow pretty much anything to be done through such programs, without a normative theory of their appropriate domain—but rather decide that a particular program is not a legitimate regulatory program. Generally, a regulation will be deemed to be ille-

gitimate when it is thought unfair to expect the regulated party rather than society at large to bear costs. Owners are bearing an unduly narrowly focused implicit tax unless they are asked to abate or pay for a social cost that they, along with the regulation's beneficiaries, are atypically responsible for creating or ordered to stop exploiting a contractual partner. There is a secondary argument that a regulation might be illegitimate because the benefits (implicit spending) of the program are inadequately publicly dispersed even though a parallel explicit spending program might be sustained.

Illustrating the Application of the Theory: The *Pennell* Dissent, *Dolan,* and the ADA Case

(i) *Pennell, Nollan,* and *Dolan*

The San Jose municipal rent-control ordinance at issue in *Pennell* was an ordinary price-control measure with a single significant twist. One of the enumerated factors in determining the maximum rent that landlords could charge their tenants was the economic status of the tenant in possession. "Hardship" tenants might be entitled, by administrative order, to be charged lower rents than nonhardship tenants. Justice Scalia argued that this twist rendered the ordinance constitutionally suspect.[4]

Scalia himself doubtless believes that rent-control statutes are not just unwise policy but are premised on a misunderstanding of the workings of rental housing markets. Price controls, he believes, might be appropriate when sellers monopolize a market, but since the rental housing market is one with many sellers, he appears skeptical of the claims that rent control protects renters from exploitation.[5] However, he also believes that the legislature is entitled to regulate based on what he takes to be its incorrect belief that the market is monopolized and that the prices that landlords

4. *Pennell v. City of San Jose.*

5. Ibid., 20. ("The same cause-and-effect relationship [between the property use restricted by the regulation and the social evil that the regulation seeks to remedy] is popularly thought to justify emergency price regulation. When commodities have been priced at a level that produces exorbitant returns, the owners of these commodities can be viewed as responsible for the economic hardship that occurs. Whether or not that is an accurate perception of the way a free-market economy operates, it is at least true that the owners reap unique benefits from the situation.") For a strong argument that housing markets may not reach competitive equilibria despite the presence of large numbers of sellers, see Phillip Weitzman, "Economics and Rent Regulation: A Call for a New Perspective," *NYU Rev. of L. and Soc. Change* 13 (1984–85): 975.

charge tenants are therefore unjustly high. Given this supposition, a price regulation prevents the exploitation of the regulation's beneficiaries by the regulated party and is therefore valid.[6] Though the state entity would clearly have been permitted to substitute a tax-and-spend program for price regulation—collecting money from a broad base of taxpayers and transferring it (redistributively), whether in-kind (through housing vouchers) or cash, to those who could not afford market rates—it need not do so because the price-control program arguably serves a valid regulatory aim.

A program that controls rents only to the subset of hardship tenants, however, does not prohibit landlords from exploiting their tenants on some (misguided but constitutionally acceptable) theory that landlords are overcharging tenants. Instead, by not covering all tenants facing the same market conditions, the city implicitly concedes that it is not protecting buyers from exploitation but rather supplementing the income of a certain group of tenants.[7] If it is not protecting tenants from exploitation, though, it is using the regulation to accomplish an end that has been, and must, be accomplished through taxing and spending: the redistribution of income

6. *Pennell v. City of San Jose,* 20 (price regulation is valid when the seller causes the buyer's hardship).

7. This account of the city's intention is hardly unassailable. Imagine, for example, that San Jose is not the least bit interested in redistributing income to the poor but merely in efficiency: one can interpret this statute as directing monopolists to act as (imperfect) price discriminators, thus insuring that there are fewer efficiency losses associated with their monopoly power. If landlords charge uniform monopoly prices, some units will go unoccupied, though poorer (hardship) tenants would be able and willing to pay the cost—but not the price—of providing rental housing services. It is doubtful, though, that profit-maximizing landlords would have to be forced to lower prices rather than leave units vacant.

It is conceivable too, though in my mind nearly equally unpersuasive, to argue that the city believed that hardship tenants were more vulnerable to exploitation. My suspicion would be that even if poorer tenants are systematically less able to shop and/or bargain over rents, their poverty would make them less likely to pay more than the cost of provision of housing services than would richer tenants.

More plausibly, the city might well believe that it is difficult to resolve the question of whether landlords exploit their tenants when they charge them prevailing market rents in a tightening housing market. Given this ambiguity, the city chooses to split the difference, allowing landlords as a group to keep some but not all of what may be the monopoly profits that arise from scarcity. The city then chooses to protect only those most vulnerable to the seizure of scarcity rents. The question, to which I return in the text, is whether the city, in that case, should be forced to levy an excess-profits tax on all landlords and divide the proceeds among hardship tenants rather than to regulate those landlords renting to hardship tenants. At the same time, of course, it is necessary to ask whether a tax on all landlords is adequately broadly based, especially if there is uncertainty about whether it constitutes an excess-profits tax and the proceeds of the tax are earmarked for what appears in some senses to be a redistributive program.

(in-kind) to the poor.[8] The regulated party is no more responsible for the beneficiaries' poverty than are nonregulated parties.[9] The harm the program seeks to alleviate (poverty) is not the sort of harm (exploitation or the bearing of unwarranted social costs) regulation can justifiably alleviate.

That Scalia is willing to be deferential to legislative judgments not just that regulations preclude exploitation but that they avert unwarranted social costs can be seen both from his opinion in *Nollan* and from his refusal (thus far) to disclaim explicitly the *Penn Central* or *Miller v. Schoene* results. In *Nollan,* Scalia takes it for granted that the California Coastal Commission could have barred intensive shoreline development. Yet a prohibition on developing beachfront property would certainly not prevent a common law nuisance or any other traditional form of wrongdoing/harm-causing. Such a prohibition does, however, manage a social cost: the sum of the values of owning developable beachfront property and walking along the roads nearest a beach in a world in which the relevant activities (viewing the beach and ocean, developing the land) do not interact is clearly higher than their joint value in the world in which they do. Whether the social cost is most directly borne by the viewers (who cannot see the ocean when there is unfettered development) or the owner (who cannot build or must build differently or dedicate a viewing space to avoid interfering with the viewers' interest) is beside the point. It is constitutionally permissible for regulations to allocate such social costs.

Scalia, in this regard, accepts the argument that there is no bright-line distinction between regulation that averts harm and regulation that demands that parties confer benefits on others. The Court in *Miller v. Schoene*[10] certainly anticipates Coase's skepticism about the moral relevance of commonsensical causation judgments (while at the same time

Moreover, as I discuss later in the text, the idea that the state entity cannot define exploitation with an eye toward the specific character of the protected class is not especially persuasive: it is certainly possible to imagine a regulatory law protecting improvident buyers that required only those sellers who dealt with the impulsive or cognitively deficient to take costly steps to protect them from buying poorly. It may be similarly appropriate to define a fair pricing structure in part in terms of the capacity of the buyers with whom one deals.

8. Presumably, those following this theory would also seek to invalidate a number of parallel regulations that demand that providers subsidize the provision of certain services. Some such regulatory programs precisely parallel this one: for example, mandates during the energy crisis that utilities not raise fuel bills for senior citizens and impoverished customers.

9. An analogy may help: one may believe that a particular poor person should be able to buy more food than she currently can, but the grocer from whom she typically buys is not particularly responsible for her inability to buy all one thinks she should be able to buy.

10. 276 U.S. 272 (1928).

rejecting Scalia's Burkean/traditionalist reliance on the common law of nuisance that he employs in the limited *Lucas* class of cases) in declaring that ornamental red cedar tree owners may be forced, without compensation, to destroy their trees to prevent the spread of a rust disease that would otherwise infect nearby apple trees despite the fact that the cedar tree owners neither created a nuisance nor unambiguously harmed the apple tree owners. (Surely, it would be sensible to say that they were forced to destroy their own property to benefit the apple tree owners.)

In a Coasean world, causation judgments are arguably impossible—as Coase himself seems to have suggested—since each party is the but-for cause of the typical social harm. (Without the farmer's crops, there are no crop fires; without the train's emitted sparks, there are no crop fires.) Put like that, Coase's argument is true but morally obtuse: the fact that my having a nose—one of the two relevant but-for causes of my having a broken nose when you slug me—is not helpful in answering either ordinary questions of cause or, more significantly, moral responsibility. But Coase can be retranslated in a fashion that makes his views on causation more morally germane.[11] Typically, what must be accounted for in situations in which states choose to regulate, whether through nuisance law or statute, is a social cost—the cost that results from the fact that two activities must coexist, or, put more precisely, the difference in the sum of the values of the activities engaged in independently of one another and the sum of the values engaged in jointly. The social costs of spark-emitting trains running near flammable crop fields may be manifest in a wide variety of ways (crop fires; higher spark-suppressant costs; crops being grown further away from the tracks, thus lowering aggregate crop production). There may be a way of minimizing social cost (for example, spark suppressing may be cheaper or may be more expensive than moving crops back or tolerating the occasional fire), but there will be some social cost since crops could be grown on more land, without fires, or spark suppressants avoided if these activities did not abut or inhabit the same social world. But the social cost is not in any apparent sense either party's moral responsibility (unless one party's consumption desire morally trumps the other party's), nor is it possible to say which party physically caused the social cost (if it is manifest as fire, it might be caused by sparks; if it is manifest as spark suppressant, it might be caused by the farmer's placement of his crops).

The owner's claim in *Dolan* is that the floodplain greenway and bike

11. See Mark Kelman, "Necessary Myth," 579, 581–86.

path are general public projects that should be purchased, using general tax revenues, from the relevant landowners, except to the degree that the need for them is caused specifically by the owner's development. Developers may, though they need not, be asked to bear social costs (increasing the risk of flooding; increasing car use with its negative impacts on traffic flow, air quality, and so on), whether by being forced to restrict development or by an exaction that meets the same end, which amounts to charging an in-kind fee for being one of the parties jointly responsible for creating a social cost. Presumably, too, developers could be asked to fund programs that specifically benefit them (a user fee/benefit tax is once again permitted, though seemingly not mandated). But to the extent that the city of Tigard cannot establish that it is simply forcing developers to bear the social costs associated with development or pay for a project of atypical benefit to them, developers cannot be singled out to pay any more to fund the public improvement than any other "similarly situated citizen."[12]

(ii) The ADA Case

Federal regulatory officials could not, given this conception of the Takings Clause, unambiguously defend the requirement that people who (happen to be?) owners of public accommodations bear the costs of making their facilities accessible to customers with disabilities. The statute is clearly defensible given current practice norms, because even those regulations requiring the dedication of certain portions of the property to improve accessibility do not seize title or transfer a traditional property right to the third party beneficiaries of the regulation. However, if this more interventionist perspective were adopted, the Court would have to ask: (a) whether public accommodation owners can be singled out either as injuring the disabled or at least partly creating a social cost by their proposed conduct, and (b) whether the fact that the regulation applies to public accommodation owners generally rather than some subgroup of owners makes what might be treated as an implicit tax adequately broadly based. My sense is that the theory, rigorously applied, might well demand that the federal government compensate owners forced to comply with many, though not all, of the ADA's reasonable accommodation requirements. At the same

12. The phrase *similarly situated citizen* appears in quotation marks precisely because it is so problematic: I argue later in the chapter that there is no reasonable constitutional theory to label the dimensions along which citizens must be similarly situated when they are taxed explicitly, and therefore there should be no such theory when they are taxed implicitly.

time, I suspect that the recognition that such is the case would give considerable pause to many people who might otherwise be drawn to the theory stated in the abstract or even applied to cases like *Dolan.*

(a) Does the access requirement meet a permissible regulatory end?

It is most helpful, I think, in doing this analysis, to think of the ADA's accommodation requirements as establishing a scheme of exactions. The exaction analogy is reasonably straightforward: in exchange for the right to start (or continue to operate) a business classed as a public accommodation, owners must agree to provide greater access to those with disabilities than the owners would choose to do in the absence of the regulation, given the costs of so doing and the legal and practical barriers to recovering these costs by charging disabled customers the incremental cost of the accommodation. (Recall that this supposition applies only to cases in which the owner bears some genuine cost in accommodating. The ADA is clearly premised in some significant part on what strikes me as the justifiable supposition that owners often wrongly believe that making facilities accessible will be costly when doing so is not. Opponents of the ADA often argued that the statute would prove extremely financially burdensome, especially for small business employers.[13] Studies seem to reveal, though, that the costs of accommodating disabled employees have in fact generally been quite low.)[14]

What differentiates exaction law in this expansive theory and the actual law dealing with exactions that I detailed in chapter 2 is simply that current law applies only in situations in which the municipality exacts title from the owner. In this more expansive and interventionist view, though, aspects of existing law are used to identify cases in which a regulation does not really serve a traditional regulatory end.

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13. See, e.g., Thomas H. Barnard, "The Americans with Disabilities Act: Nightmare for Employers and Dream for Lawyers?" *St. John's Law Rev.* 64 (1990): 229, 251–52, and George C. Dolatly, "The Future of the Reasonable Accommodation Duty in Employment Practices," *Columbia J. of L. and Soc. Problems* 26 (1993): 523, 546 (both arguing that the ADA places an onerous financial burden, including litigation costs, on employers).

14. See, e.g., "Developments in the Law: Employment Discrimination," *Harvard L. Rev.* 109 (1996): 1568, 1619–20 (noting that studies indicate that the average cost of accommodation is less than one thousand dollars and as low as two hundred dollars per employee, that some employers have even reported savings as a result of accommodating their disabled employees, and that the costs of accommodation are lower than the costs of litigation).

It is also helpful to imagine two distinct sorts of regulatory requirements. In the first class of cases, the accommodation requirements apply only prospectively[15] but order owners not only to design buildings to be as accessible as possible to those with disabilities, if choosing between two equally profitable buildings, but also to accommodate even when doing so is (not unreasonably) costly.[16] Imagine, second, that the ADA applies both prospectively and retroactively, demanding retrofitting efforts (as long as they do not cost an unreasonable amount). Within this second class of cases, it can be imagined that only some of the firms that need to retrofit made non-cost-based decisions in the past that were detrimental to the interests of those with disabilities.[17]

It would be difficult, but perhaps not impossible, to find, as one must under *Nollan,* that this regulation serves the same permissible end that a ban on development (or a ban on allowing a business to continue to operate) would serve or to interpret *Dolan* and *Nollan* somewhat less precisely to argue that this exaction does no more than rectify the problem that the owner's development causes.[18] At first blush, the regulatory aim, to insure that people with disabilities have access to a range of goods and services, would not be met by a development ban. If the store does not exist at all, it offers people with, for example, certain mobility impairments no more goods and services than if it exists without ramps. In that sense, since the regulation does not substitute for a development ban, it is impermissible. Similarly, the argument would be that development of nonaccessible facil-

15. Accommodation requirements for mass-transit providers are more stringent prospectively than retrospectively. Thus, for example, a commuter railroad could not purchase any new equipment that was inaccessible to those who use wheelchairs but need not make wheelchair-accessible more than one car per existing train. See P.L. 101–306, §242(b)(1), §242(b)(2)(A), and §242(c). Similarly, providers of intercity railroad services had twenty years to make existing stations accessible, although new stations could not be built that were not accessible to those with disabilities. Compare §242(e)(1) with §242(e)(2)(A)(ii)(I).

16. It is probably easiest to think about this sort of accommodation if one considers something other than an environmental modification, even though takings law is generally associated with the exaction of real property rather than fees or services. Imagine that any law firm that opens after the effective date of the ADA, but none that opened before, must insure that hearing-impaired clients can communicate with the lawyers, at firm expense, by providing interpreters facile in signing.

17. For example, they may have chosen to install an inaccessible stairway over a ramp although it did not decrease costs or increase available floor space. Other firms, though, are like those covered by the prospective provisions. They are simply asked to bear the unavoidably higher costs of serving certain customers with disabilities.

18. In most cases, including this one, I don't think the formulations are distinct. See chapter 2, text following n. 61, for an explanation of why I generally prefer the first formulation.

ities itself does not cause or add to a problem—lack of access to goods and services—but simply leaves the situation as it was prior to development. In *Dolan*'s terms, this exaction puts the governmental entity in a better position than it was prior to development, which is impermissible. The exaction must do no more than make the regulator indifferent between development and nondevelopment, at least as long as the exaction could be made less onerous for developers. Yet another way of getting at this same point is that one would generally believe, at first blush, that the interaction of disabled customers and a nonaccessible store does not decrease the wealth of either party compared to the interaction of a disabled customer with no store at all. In this view, the accommodation requirement can seemingly be justly imposed on only one class of owners: those who must retrofit because their initial design decisions disadvantaged those with disabilities but did not save real social resources. Such parties could be said to have decreased the chances that disabled people would have access to facilities, since scale economies in service provision make it less likely that an accessible provider of the same service will come along after the inaccessible facility is built.

The best argument that the ADA is constitutionally permissible if uncompensated regulations are reviewed in this fashion would appear to be that a ban on building nonaccessible facilities would, in fact, meet a regulatory goal. If the regulatory goal is not simply to increase access to goods and services but to insure equality of access to goods and services or the absence of exclusion from activities available to the able, then the access requirement could be said, alternatively, to substitute for a development ban or remedy the problem of unequal access toward which the creation of new inaccessible facilities contributes. (Similarly, the creation of the public accommodation creates a social cost from an access equality perspective. The wealth—commodifying all subjective end states—of the class of disabled persons is diminished by the presence of inaccessible facilities below the level that existed when there were simply no facilities, just as either Coase's farmers are less wealthy once spark-emitting railroads are nearby or the railroads are less wealthy when they must interact with fire-vulnerable farmers.) The argument seems rather compelling that at least a purpose, if not the sole purpose, of regulations mandating access is to avoid the sociopsychological harms that result from being marked as a social outsider or lacking the sense of belonging that one can get only if integrated into whatever a community's ordinary social life may be. It is also important to recall that in my view, this general theory of the Takings

Clause is quite deferential to regulatory programs. Thus, the ban would likely be sustained even though development of nonaccessible facilities is clearly not a traditional tort toward the disabled and does not unambiguously harm them.

A court adopting this theory would still be faced with a *Dolan* problem, though. If there must be some rough proportionality between what the state gets through this regulation (both physical access to goods and services and social inclusion as equals for the population with disabilities) and what it would get through the development ban (merely social inclusion as equals), some might interpret *Dolan* as mandating that the state disgorge the net benefits either by disclaiming the regulation or by compensating owners for the losses borne to create the net benefits. I believe such a view is unpersuasive, even if one reads *Dolan* expansively. *Dolan* does not preclude uncompensated regulation in this case because the governmental entity took no more than was needed to undo the negative impact (inequality of participation) of development. The fact that the state happened to get additional benefits (physical access to goods) does not by itself render the regulation suspect. In *Dolan* itself, in this view, the problem is that the state simply did not need a public greenway to deal with flooding or this particular bike path to deal with traffic congestion. There is no reason to believe, though, that the Court would or should have invalidated the exaction of the bike easement if it precisely remedied the congestion problem caused by the store's expansion just because city officials were also glad that it permitted, for example, better views of the creek for recreational bicyclists than they had had in the past.

(b) If this is a tax rather than a legitimate regulation, is it adequately broad based?

When I return to criticize the viability of this general theory of constitutional review, I will highlight the point that the theory as developed up until now has not, and in my view could not, answer the question of whether any tax, explicit or implicit, is levied on a constitutionally permissible base. It is clear that a permissible general tax must treat equally some group of individuals who are similarly situated along some relevant dimension, but it is not clear how many people must be in the group or along what dimensions equality may be measured. For now, though, I will make three different points.

First, it is possible that judges utilizing this theory of review would simply decide that a regulation covering all American public accommodations is adequately broad, simply because such a large number of implicit taxpayers are affected by the regulation. The sorts of exactions that have typically been litigated have affected single parties—that is, literally no parties other than the plaintiff have been asked to pay (implicitly) the precise same tax that the owner has been asked to pay. It is conceivable that the theory restricts only regulatory taxes applied to individuals or small groups.

Second, it is possible that the ADA would be constitutionally impermissible given this theory of review if applied only prospectively. However, an implicit tax that put new and old businesses in the same position as each other (expecting each to spend whatever it takes, within reason, to solve the access problem) might be administratively senseless since it might demand that old businesses waste more resources on retrofitting, given the contributions such expenditures make to genuine access. It is not clear in the *Dolan* context, for example, whether it would have been permissible to demand that all downtown businesses contribute to a bike path, even if one believed that the businesses do not cause a congestion problem the path can alleviate, on the ground that a uniform tax on downtown businesses is adequately broad based. (It is not clear because none of the cases have, or in my mind could, specify when a base is adequately broad.) But it is clear that the Court believes the base is unduly narrow when it applies only to those businesses applying for building permits—that is, those that are either opening or expanding businesses. A prospective ADA, though, in essence, establishes a federal building permit system: it applies a regulatory requirement only to those who seek to build new facilities (new businesses or expanding old businesses), allowing permission (a form of federal license) to operate the business to turn on meeting access demands. (At the substantive level, I take it, proponents of this form of review believe they are protecting certain insular or identifiable minorities from expropriation by the broader group; as the expropriated parties themselves become adequately broad based, this problem becomes less of a concern. The fear, then, in *Dolan,* is that coalitions of relatively indifferent taxpayers and old businesses impose all the costs of meeting certain general social goals on isolated new businesses, plucking them off one at a time when they seek permits. But it is hard to see why a federal program that plucks off new businesses several thousand at a time while immunizing hundred of thousands more old businesses from requirements to contribute to meeting some social problem is really much better.)

Third, and perhaps most significant, it is possible that the ADA's reasonable accommodation requirement as it is usually interpreted—demanding higher expenditures to accommodate the disabled by those entities able to afford the expenditures on the supposition that an accommodation requirement is unreasonable only when it threatens the viability of the accommodating institution—is unconstitutional under this theory because an entity's profitability has nothing to do with whether it injures those with disabilities by opening or operating nonaccessible facilities. If, instead, the idea behind levying a higher implicit tax on hyperprofitable firms is to tax those whose tax-paying capacity is high, there appears to be little reason, within this conception of the Takings Clause, to single out those well-heeled taxpayers who happen to operate public accommodations. Just as the tenant's hardship does not change the degree to which a landlord exploits the tenant in Scalia's view of the San Jose rent-control ordinance at issue in *Pennell,* so owners' wealth or capacity to increase accessibility do not affect the degree to which those with disabilities are harmed by the failure to provide certain sorts of access.

Critiquing the Interventionist Theory: A First Statement of the Primary Critique

If it is correct to say that explicit taxing-and-spending programs could substitute for regulations, it may well be the case that the constitutional limits on regulation can be no more stringent than the constitutional limits on taxation or spending.

This point appears relatively uncontroversial when the focus is on the implicit spending side. Many believe it might be valuable to make implicit spending decisions more politically transparent by forbidding regulations that serve unduly private ends; the instinct behind that belief is that narrow constituencies should receive government largesse only when it is explicitly appropriated to them, when the funds expended for their benefit are clearly marked on budget. But the proponents of such increased transparency have justifiably been quite unsuccessful in gaining adherents to the view that it might be constitutionally mandated to review regulatory programs for publicness more stringently than explicit spending programs.

Take the mobile-home-pad rent-control statutes that were the subject of litigation in both *Yee* and *Hall.* Attacks on both the California state statute (which permitted local rent control, barred mobile-home-park owners from charging transfer fees on the sale of a mobile home, and precluded park owners from rejecting mobile-home buyers as tenants without good reasons) and the local ordinance, which limited rents that could be charged to mobile-home-pad occupants, take the following tack: First, they concede that conventional rent control is constitutional. When land available for housing or a particular kind of housing is scarce (i.e., its supply is essentially fixed), whether because growth in demand outstrips supply responsiveness or because municipal zoning precludes supply expansion (as it almost certainly does in the case of mobile-home parks), it is permissible to control prices to prevent the transfer of consumer surplus to effective monopolists. Rent-control statutes prevent this transfer by setting prices and forbidding would-be occupants to bid up the price of housing to market rates. Any current occupant benefits (at least in the short run) from such a program. This state and local mobile-home price-control scheme, though, does not protect occupants from paying market rents. The public regulatory interest in protecting occupants from exploitation by monopolists is legitimate, but it will not be met here. To occupy a mobile home, one must both rent a pad and purchase a mobile home that sits on the pad, since there are effectively no empty pads available for new mobile homes to occupy. Though rent for the pad is set by the rent-control statute, those willing to pay more to rent the pad will simply bid more to purchase the mobile homes. Thus, assume the market value of the mobile home is thirty thousand dollars and the market rent is five thousand dollars per year, but rent control restricts market rent to two thousand dollars per year. Buyers willing to pay five thousand dollars per year rent will simply pay far more than thirty thousand dollars for a home; they will pay that amount plus the value of the right to occupy the pad for three thousand dollars a year less than the rent they would be willing to pay (and the right to convey that same right to a third purchaser). In essence, the price of the pad is uncontrolled; it is simply the case that the tenants in possession at the time the rent-control ordinance passes rather than the park owners receive (the discounted present value of) the difference between the controlled and market prices.

Even assuming, solely for argument's sake, that occupying tenants are not protected from paying monopoly profits and that only tenants in possession at the time of the passage of the statute gain from it, should the statute be invalidated?[19] Mobile-home-park owners claim that this scheme

19. For a different view of the statutory purpose that focuses on the degree to which the state and local statutory schemes in combination protected tenants against the expropriation of their site-specific investments, given the especially high explicit and implicit moving costs for mobile-home-pad renters, see AFL-CIO's amicus curiae brief in support of the respondent, *Yee v. City of Escondido* (no. 90–1947).

serves only to transfer the right to receive monopoly profits from the landlord to the tenants in possession at the time of the enactment of the statute and that this transfer constitutes a redistribution to particular private parties rather than to some group that can be identified in terms of any publicly cognizable status. The statute does not protect occupants from high housing prices but simply redirects occupants' housing payments from the owner to a group of private parties and thus serves to fulfill no public goal. While *Poletown Neighborhood Council v. City of Detroit*[20] is typical of state court holdings that do not invalidate any scheme from which private parties (like General Motors) benefit, and *Hawaii Housing Authority v. Midkiff,* at the federal level, explicitly allows redistribution to land tenants in possession to reduce the concentration of landownership, such cases arguably require that the legislature might at least believe that others, besides the most direct beneficiaries, may benefit as well from the taking (e.g., through economic growth in *Poletown* or some combination of increased social integration and less monopolistic housing prices in *Midkiff*). Naked transfers of monopoly rents have no public purpose.

Certainly, though, a public spending program that transferred taxpayer funds to occupants in possession at the time the ordinance was passed would be permissible, whether the transfer occurred through a tax abatement for such current occupants (à la Proposition 13, whose constitutionality was upheld in *Nordlinger v. Hahn*)[21] or through direct funds transfers to such occupants. The claim that this transfer is permissible if enacted directly but not if enacted via regulation must be no more than a prudential claim about the political-process perils of invisible transfers, because visible transfers to what some might quite reasonably identify as particular constituencies are unquestionably constitutionally unproblematic.[22]

Courts must, given current understandings of what "public" goals are, approach both ordinary spending programs and the public-use requirement in takings law quite deferentially. The distinction between true public purposes and aggregated private purposes is too conceptually blurry to provide a basis for critiquing particular programs. Many in this

20. 304 N.W. 2d 455 (1981).

21. 505 U.S. 1 (1992).

22. I will address later in this chapter and in chapter 5 what I see as the limited persuasiveness of the argument that, in some general sense, implicit transfers are less transparent and hence less subject to democratic scrutiny than are explicit transfers.

political culture believe there can be no transcendent public purposes, that all public programs simply aggregate private purposes and interests. Those who adhere to this view believe, in fact, that this is a necessary truth (since they believe that only individuals rather than collectivities can have interests or purposes). Even the most traditional public programs (in terms of history and public-finance economists' pedigree) meet some individuals' aims better than others: roads help drivers more than nondrivers; defense expenditures protect those in areas more vulnerable to attack more than those in isolated rural locations; those receiving subsidized public education privately capture at least some substantial portion of the gains from education.

Naturally, then, the state and municipality should argue that even if the redistribution occurred entirely to those tenants who happened to be in possession at the time the ordinance was enacted, that outcome is legitimate. The legal point is doubtless grounded in the minimalism of the *Poletown/Midkiff* public-purpose requirement, but I believe there is a more powerful if less legally familiar argument to be made. The owners' constitutional claim to void a scheme giving tenants in possession control of the monopoly rents ought to be no better than the constitutional claim of the tenants in possession against the traditional property regime that permitted the owners to retain monopoly rents. Absent some sort of natural rights perspective, the ownership of the monopoly rents is simply up for grabs (particularly, but by no means exclusively, since the monopoly rents were in substantial part created by the state through its restrictive zoning decisions), and if the state even mildly prefers that tenants in possession (who may be marginally poorer or who may have claims as old-timers) get the monopoly rents, the decision is valid.

It is perhaps less obvious that the same problem plagues the implied-tax side. In the absence of a more thought-out view of the constitutionally permissible explicit tax bases,[23] it is difficult to know when a particular implicit tax is unduly narrow. There are remarkably few constitutional limits on the breadth of explicit taxes. Proponents of the view that regulations should never substitute for more legitimate explicit general taxes must recognize that regulations may function as legitimate taxes.

23. None of the obvious conventional bases (income, consumption, property ownership) are constitutionally mandated, and they should not be. I will subsequently discuss why sales taxes, if they exist, need not be uniformly levied on all commodities and the implications of that fact for thinking generally about constitutionalizing tax bases.

The Tax-Base Problem

Assume that the hardware store owner asked to donate land or money (and for my purposes it does not matter which) to build a bike path in a case like *Dolan* in exchange for a building permit is indeed bearing a tax to fund what is *arguendo* a nonregulatory program benefiting the general public. Imagine that the store owner pays one or more other local taxes: taxes levied on the assessed value of his property, a sales tax on items that he purchases, maybe even a local income tax. He claims that he pays more than other citizens who are equal along all relevant dimensions (presumably, given the hypothetical town's tax system, these dimensions are property ownership, consumption of taxable goods, and income) because he alone is asked to pay an additional tax when he seeks a building permit to expand his premises. Why would such a tax be considered illegitimate? How would it be determined that he had been singled out to bear a burden that should be borne by taxpayers generally rather than identified as someone who owed more taxes? How would the court declare that he was similarly situated along all relevant dimensions yet treated differently when he was clearly dissimilar along a dimension the local government declared relevant? If the locality argues that what differentiates the store owner from those who pay lower taxes is that the others were not applying for a building permit, what is the interventionist court to answer? There are two broad ways to answer that question. First, existing practice can be used to determine when an explicit tax could be challenged, successfully, on equal protection grounds. Second, a standard less deferential to explicit and implicit tax allocation decisions can be imagined.

(i) Equal Protection and Taxation: A Picture of Near-Total Deference

No scheme that classifies taxpayers differently based on some fact about their situation will be invalidated under current law on equal-protection grounds, except in four sorts of cases. Unless tax classifications are based on status, burden the exercise of a protected constitutional right (e.g., free speech, the right to travel across the states), discriminate against out-of-staters, or are administered by officials in plain violation of express state policy, review will be highly deferential: "If the selection or classification is neither capricious nor arbitrary, and rests upon some reasonable consideration of definition of policy, there is no denial of equal protection of the laws."[24] None of the implicit regulatory taxes examined here suffers from these defects. While it is plausible that some exactions incidentally burden newcomers, the fact that they apply on their face equally to out-of-state and in-state developers would probably preclude challenges focusing on either the right to travel or Commerce Clause–like concerns.

Courts have upheld all sorts of classifications that tax persons differently depending on factors distinct from their wealth, income, spending, or ownership of equally valuable resources. A state may, for example, tax personal property held by a corporation more than identical personal property held by the same sort of business conducted in noncorporate form[25] or exempt veterans groups but not other nonprofit lobbying organizations, from certain taxes.[26] Most interestingly, in thinking about the sorts of regulatory taxes of which Scalia is so suspicious in *Pennell,* an explicit New York tax levied against utilities but not other businesses, for the benefit of unemployment relief generally, was upheld in *New York Rapid Transit Corp. v. City of New York.*[27]

Tax classifications are overturned in very few circumstances. If a tax were to classify persons in terms of an ascriptive status, whether a status distinction subject to strict scrutiny (like race) or intermediate scrutiny (like gender), the tax regulation would then be reviewed like any other such status-conscious government enactment. Thus, just as a preference in benefits grants to widows over widowers has been overruled when based on irrational stereotypes,[28] so a property tax that exempted widows would pass muster only if it relied not on archaic and overly broad generalizations about women but data about the impact of spousal loss on members of each gender.[29] Second, if people's taxpaying obligations varied in ways that burdened the exercise of a constitutional right, the tax statute would be reviewed like any other piece of legislation so burdening the right.[30]

24. *Allied Stores of Ohio, Inc. v. Bowers,* 358 U.S. 522, 527 (1985).

25. *Lenhauer v. Lake Shore Auto Parts Co.,* 410 U.S. 356 (1973).

26. *Regan v. Taxation with Representation of Washington,* 461 U.S. 540 (1983).

27. 303 U.S. 573 (1938), rehearing denied 304 U.S. 588 (1938).

28. See, e.g., *Califano v. Goldfarb,* 430 U.S. 199 (1977) (striking down Social Security provision that provided benefits to all widows of deceased workers but provided benefits for widowers of deceased workers only if the widower had been receiving at least half his support from his deceased wife).

29. See *Kahn v. Shevin,* 416 U.S. 351, 355–56 (1974) (upholding such a statute). The cases may not be distinguishable in fact, and it is unclear whether *Kahn* survives *Goldfarb,* or, at a minimum, is restricted to its facts.

30. See, e.g., *Minneapolis Star & Tribune Co. v. Minn. Comm'r. of Revenue,* 460 U.S. 575 (1983) (a special-use tax applicable only to print media is a presumptive violation of Free Speech guarantees).

Third, and most commonly, equal-protection norms are invoked to find that states may not ordinarily tax out-of-staters more than state residents by virtue of that fact alone,[31] just as states cannot distribute benefits to longtime residents not available to those arriving more recently.[32] These decisions, even when grounded explicitly in the Equal Protection Clause, appear to have far less to do with equality concerns than with the desire both to protect citizens' right to travel among the states and to insure that a single national market is maintained. Fourth, and finally, local officials may not distinguish arbitrarily between two taxpayers, in the limited sense that the officials are acting arbitrarily if the distinctions, though defensible as a matter of abstract policy, are not distinctions that the state has directed be made: thus, county officials in West Virginia cannot reassess property only when it is sold when the state constitution directs that property be evaluated according to current market value,[33] even

31. See, e.g., *Hooper v. Bannadillio County Assessor,* 472 U.S. 612 (1985) (New Mexico could not allocate property-tax exemptions only to the subset of Vietnam War veterans who had lived in state prior to 1976, though the allocation of such benefits to veterans or even in-state veterans did not itself pose problems); *Metropolitan Life Ins. Co. v. Ward,* 470 U.S. 869, 880 (1985) (state cannot, consistent with the Equal Protection Clause, tax out-of-state insurance companies more than in-state companies); *William v. Vermont,* 472 U.S. 14, 23–24 (1985) (state cannot, consistent with the Equal Protection Clause, give residents who bought cars out of state credit against an auto-use tax for sales tax paid on cars purchased out of state without giving the same credit to nonresidents who purchased cars now being driven in Vermont).

32. See *Zobel v. Williams,* 457 U.S. 55 (1982) (Alaska cannot constitutionally distribute a higher portion of state oil-lease revenues to longtime residents).

33. *Allegheny Pittsburgh Coal Co. v. Webster County,* 488 U.S. 336, 345 (1989). It is worth noting that the Court may have incorrectly discredited or misunderstood the county assessor's claim that reevaluating property in the absence of sale was not feasible: the complaint that properties with equal market values were taxed differently may have ignored the fact that it was difficult to value land that looks comparable but might or might not contain commercially exploitable quantities of coal. As soon as such coal was discovered, the land was sold; in the absence of sale, the land was simply assumed to be noncomparable (whether or not it had coal, the land was less valuable because people did not yet know it had coal). See Robert Jerome Glennon, "Taxation and Equal Protection," *George Washington L. Rev.* 58 (1990): 261, 271–72.

It also may seem odd to allow a finding that the Equal Protection Clause is violated to turn on whether the government official is violating the state's own law. As Cohen has noted, guarantees of equality should apply equally to official state policies and eccentric administrative practices. See William Cohen, "State Law in Equality Clothing: A Comment on *Allegheny Pittsburgh Coal Company vs. County Commission,*" *UCLA L. Rev.* 38 (1990): 87, 92–93. The Court's ostensible explanation—that the Court simply follows state authorities in interpreting relevant local law and is thus deciding a case given a record in which the state has disclaimed reliance on any of the ends that might plausibly differentiate the taxpayers' status—may be inadequate; the result might instead have been driven by the peculiar absence of relevant state law remedies for the violation of the state's own taxing laws. See John Hart Ely, "Another Spin on *Allegheny Pittsburgh,*" *UCLA L. Rev.* 38 (1990): 107, 110.

though the state of California can constitutionally mandate that property be assessed only when it is acquired rather than at market value.[34]

It is plausible, though not clear, that an entity could not impose a tax or surcharge on a named or readily identified party.[35] Obviously, the distinction between exemptions and surcharges is not going to be clean. Where a municipality has granted property tax abatements to most but not all businesses in the jurisdiction, the failure to extend such abatements to all would not as a formal matter impose a surcharge or nongeneral tax on the nonexempted entities but would produce a result that was indistinguishable in substance. There appears to be no case law barring such a practice, however.

(ii) What More Interventionist Accounts of Permissible Tax Bases Might and Might Not Plausibly Look Like

If the Court concludes that a regulated party may in some cases be overpaying when asked to bear an implicit tax, the Court must decide that the party is unjustly taxed because it is equal to others less heavily taxed in relationship to some base. But what base is constitutionally mandated? It is clear that income is not the only permissible base: thus, the fact that the owner pays more taxes than other citizens with his precise income will not, by itself, mean that he has been unjustly taxed. As a matter of history, very few municipalities and relatively few states have employed income taxes; the federal government raises a great deal of revenue from sources other than the personal income tax, and did so to an even greater extent until well into the twentieth century. As a matter of policy, many

34. *Nordlinger v. Hahn,* 505 U.S. 1 (1992) (upholding California's Proposition 13 despite the fact that the complainant paid property taxes more than five times as high as those levied against neighbors with identically valuable homes, because the state could plausibly defend such a program as helpful to preserving neighborhood stability and protecting reasonable reliance interests). The *Allegheny Pittsburgh Coal* Court had anticipated *Nordlinger,* noting, "we need not and do not decide today whether the Webster County assessment method would stand on a different footing if it were the law of a state instead of the aberrational enforcement policy it appears to be" (488 U.S. 336, 344 n. 4).

35. A governmental entity can clearly exempt a particular taxpayer from regulations, even if that party is named. See *New Orleans v. Duke,* 427 U.S. 297, 306 (1976), explicitly overruling *Doud v. Morey,* 354 U.S. 457 (1957), which had held that regulations against the issuance of money orders that exempted American Express, by name, violated the Equal Protection Clause. A government can certainly exempt taxpayers who are clearly identifiable though formally unnamed.

economists believe that income is a poor base, either for extrinsic reasons[36] or for fairness reasons.[37]

It is more interesting still, keeping in mind the focus on exactions, to consider owners' types of claims in a jurisdiction that raised all money through a selective sales tax (e.g., one that exempted certain household items or set rates especially high for certain status-oriented luxuries). Presumably, some would argue that a selective sales tax is unfair because it taxes those with the same aggregate consumption differently. Why, the taxpayer might ask, should I pay more taxes because I use less household detergent but take clothes to the cleaners or buy more expensive clothes? Plainly, though, a selective sales tax is constitutional. The municipality's decision to tax certain items and not others is unassailable even though it will unquestionably result in differentiating the burdens some people bear on the basis of a factor other than income or aggregate consumption. (To anticipate an argument, to which I will return later, that the Court should

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36. The use of an income rather than consumption tax base arguably causes serious welfare losses. For standard arguments to that effect, see, e.g., Martin Feldstein, "The Welfare Cost of Capital Income Taxation" *J. Pol. Econ.* 86 (1978): S29; Lawrence H. Summers, "Capital Taxation and Accumulation in a Life Cycle Growth Model," *Am. Econ. Rev.* 71 (1981): 533; Michael J. Boskin, "Taxation, Saving, and the Rate of Interest" *J. Pol. Econ.* 86 (1978): S3.

37. Compared to a consumption tax, an income tax may overtax a subset of those people with identical productive capacity who defer consumption, and market-realized productive capacity may well be a reasonable base in some views. For critical discussions of the claim that the income tax is fairer than a consumption tax that exempts savings, see, e.g., Barbara Fried, "Fairness and the Consumption Tax," *Stanford L. Rev.* 44 (1992): 961; Mark Kelman, "Time Preference and Tax Equity," *Stanford L. Rev.* 34 (1983): 649. Conventional attacks on the equity of the income tax are presented in, e.g., William Andrews, "A Consumption-Type or Cash Flow Personal Income Tax," *Harvard L. Rev.* 87 (1974): 1113, 1167–69; U.S. Department of the Treasury, *Blueprints for Basic Tax Reform* (Washington, DC: U.S. Government Printing Office 1977), 38–42. Still others may believe that it is just to tax people on what they have taken out of the common pool (private preclusive consumption) rather than what they have created (earnings). See, e.g., Andrews, *id.,* 1165–67. Other people believe that a benefits tax is most appropriate and that income is a poor surrogate for the degree to which one benefits from government services.

Similarly, while local governments have most typically relied on taxing those who own equal amounts of real property equally, it is quite clear that a claim that one must be protected by the Court because one was taxed more than others owning equal amounts of real property hardly seems constitutionally compelling. More tellingly, the Court (in a decision that Justice Scalia joined) has tolerated local decisions to tax owners of real property differently from one another depending on when they purchased the property. See *Nordlinger v. Hahn.* It seems less than intuitively obvious that it is constitutionally permissible to say that taxpayers are treated adequately equally as long as all those who bought property after a certain date are taxed equally, even if those who bought before that date pay a lower percentage of market value in taxes, but not permissible to say that taxpayers are treated equally as long as all those seeking building permits are equally taxed.

attempt to prevent majorities from imposing taxes on identifiable parties, knowing that the majorities will not be subject to the levies, one should note that there would seem to be no possibility of challenging a selective sales tax even though the legislative majority could or did know what subgroup of the population was likely to bear the predominant burden of the tax. Imagine high sales taxes on recreational boats or private club memberships in a jurisdiction where virtually all consumers of such items are more or less known. Or imagine a politically conservative legislature that picks high rates for what it sees as "politically correct" items—solar batteries or organic produce—or a legislature that does not attach penalties to building permits but enacts high taxes on home-construction materials.)

It is absolutely critical to note that one of the many reasons a municipality might well choose a selective sales tax is that the tax could be imposed on those items for which demand was relatively price inelastic, thus insuring that the tax would have limited impact on economic behavior. The ideal tax, in terms of minimizing deadweight loss, would simply be a worldwide head tax (levied on simply existing) since no one could avoid the tax by either changing behavior (from the ideal no-tax-world behavior to some less desirable tax-evading alternative) or moving out of the taxing jurisdiction to avoid the tax. (Assuming, of course, that dying is a not a desirable tax-evading strategy for a significant number of people subject to the tax.) Some taxes may approximate head taxes better than others: if one is levying a sales tax, it is preferable to levy it on goods for which demand is inelastic so that taxpayers do not substitute less desirable goods for ones they would desire more in a no-tax world, as they would if higher-elasticity goods were taxed.[38] The constitutional complaint against such a tax is not clear: the fact that people are taxed equally when they are equal along the dimension of consuming goods for which demand is generally inelastic would seem to be enough to sustain the tax, even though such people might have different incomes, have different aggregate amounts of consumption, or own different amounts of property. It is also of no moment that the generalization that the tax will not alter behavior is imperfect; the

38. Municipalities might also use selective sales taxes on the supposition that, for administrative or political reasons, they want to use only sales taxes but want to blunt the regressivity of ordinary sales taxes by exempting items more typically purchased by poorer taxpayers. In particular cases, though, parties with atypical spending patterns will be rewarded or punished by the exemption and will not pay the same tax as similarly situated others pay when they follow the dimensions the legislature thought most relevant. A poor citizen who happened to purchase numerous nonexempt items pays a higher tax than someone similarly situated in terms of both income and aggregate consumption.

fact that, at a minimum, the legislature will sometimes be wrong and will have levied a tax that will alter some consumer conduct surely does not invalidate the tax, and a prudent Court would not invalidate a tax on its own supposition that the legislature picked the wrong items to tax and had thus failed to meet its goals.

Exactions may well, on their face, be taxes that are most perfectly designed to have little impact on behavior. Because they are essentially negotiated with the taxpayer, the municipality can choose to moderate the burden if it believes the taxpayer will either flee the jurisdiction rather than pay the tax or back off development plans in a fashion that the locality finds undesirable. The owner facing an exaction is in the odd position of claiming that the tax is less acceptable than a selective sales tax because it is administratively more precise. Those enacting selective sales taxes may only guess that they are taxing items for which demand is generally price insensitive, while those administering exactions may levy the tax knowing that if they set an overly high rate, the entity will simply withdraw its request for the permit.[39]

Imagine an income tax administrator who knew each class of workers' labor-supply curve and set a very high marginal tax whenever the administrator believed a class of workers earned economic rent. The most difficult point, to which I soon return, is whether it would be constitutionally permissible to base a tax on knowledge of the labor-supply curves of particular people. Thus, could Ken Griffey Jr.'s baseball earnings be taxed at a higher rate than what are assumed, counterfactually, to be equal baseball earnings by Deion Sanders because Sanders has the option of playing football full time so that a high tax on his earnings might have an atypical impact on the allocation of his labor time? Could this unequal taxation be maintained if rather than being directed to undertax Sanders, a named person, or to overtax a larger group of named players, the IRS were directed to give more general sorts of exemptions to people who have earned a certain amount of money outside their primary earning field? Even if this category was known to apply to very few people, all of whose identities could be ascertained by focusing on the question? Is it enough

39. As a matter of prudence, the local administrator ought not simply consider whether this particular entity can be taxed without changing its behavior, for example, because it has already sunk costs into the venture that will be unrecoverable if abandoned. A sustainable optimal-tax scheme should not only not change this entity's actions but also signal to new builders that they will pay at least marginally less than the amount that makes them indifferent between engaging in the sort of development the municipality desires and some alternative development path.

that the reason for singling out a taxpayer is a general, public-policy reason rather than capriciousness or arbitrariness?[40]

The point is not whether such a tax is administrable or even unambiguously desirable in efficiency terms given its administrative difficulties.[41] The point is that such a tax is plainly constitutional even though it affects unequally people with the same income.[42]

It appears fairly obvious to me that the interventionist strategy will flounder to the degree that it depends on establishing some list of constitutionally acceptable explicit tax bases.[43] The alternative, of course, is to say that a base is acceptable as long as one can articulate some general rule of taxation, applicable to a substantial number of parties. If this is the test,

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40. Imagine, for example, that the tax-administering authority is fairly certain that virtually all professional athletes earn a considerable amount of economic rent. That is to say, the tax-collecting authority believes that when a player earns seven million dollars a year before taxes, his next-best alternatives to playing the sport for one million dollars after taxes—leisure or a job outside the sport—would rarely, if ever, be superior to the one million dollars. It is possible to be rather sure of this supposition because prior to the advent of free agency and the player-salary explosion, there was no evidence that players abandoned the game.

41. It is far easier to determine that those who have already trained as baseball players could be taxed very heavily without altering allocation—whether or not they play baseball—than it is to figure out prospectively what salaries draw people into training for the profession. Moreover, it is possible to believe that it is desirable to allocate players among teams using salary signals, just as some rent-control opponents believe it might be desirable to allocate a fixed number of units among tenants using dollar bids. (I strongly suspect that most sports fans, like rent-control proponents, would argue that such an allocative system has proven quite detrimental.)

42. The tax is constitutional not only because courts are reluctant to second-guess legislative policy judgments even when the courts suspect the legislation could not be justified rationally. Such a tax may well be more economically efficient than a tax that treated taxpayers as relevantly identical if and only if their incomes were the same. Moreover, under certain plausible conceptions of fairness, the tax is fairer as well. Assume that two people have both been making fifty thousand dollars per year, and each gets a raise to seventy-five thousand dollars. Assume further that the raise only marginally compensates one person for the added disutility of taking on more burdensome or annoying work, while for the other, it represents pure economic rent. Those who believe that for fairness reasons both people should each be taxed in relationship to hedonic utility (for which income is just a second-rate approximation) will note that the first person is barely better off now than when she was making only fifty thousand dollars, while life has improved substantially for the second person. For far fuller discussions of issues of taxing surplus, see Fried, "Fairness," 982–85, 1008–1015.

43. Though it is purely speculation, I would guess that one of the reasons that the Court has backed off the more interventionist interpretations of cases like *Nollan* is that at least some members of the Court foresaw that the justices would ultimately be asked to rule on the permissibility of distinct tax bases and would inevitably have to do so without any grounding. As Justice Thomas noted in his *Nordlinger* concurrence, pressing the Court to overrule *Allegheny Pittsburgh Coal:* "The Equal Protection Clause does not prescribe a single method of taxation" (505 U.S. 1, 22).

though, a tax on all landlords to support low-income tenants will surely pass muster, as most likely would a tax on the reasonably large, unnamed group of landlords that has hardship tenants. How exactions (or an income tax keyed to knowledge of particular labor-supply curves) would fare under such a test is less clear. One could argue that both are unduly person specific in the sense that parties could not know their tax liability by looking at general regulations making reference to impersonally known observables.

There are both administrative and theoretical problems with this alternative formulation, however. Administratively, one must ask how a court should recognize when a statute is inadequately general? If all those who seek to expand near the creek in Tigard must add to the easement, is the tax general enough? In this regard, to what degree may the legislature rely on the fact that some taxpayers may pass along a tax to consumers to argue that what appears to be a narrow tax is in fact reasonably broadly based? If all those who seek to expand near the creek must pay the tax unless they get a variance (the regulatory equivalent of a property tax abatement or exemption), is that condition general enough, even though those who receive variances may arguably be members of the same class?

More interestingly, it is not clear whether a tax is adequately general if a broadly dispersed group of citizens is subject to some liability, but the precise level of liability varies on a case-by-case basis without regard to general rules. Thus, does the statement in the ADA that every public-accommodation owner owes disabled customers reasonable accommodation state an implicit tax liability that is general enough, or does the fact that the dollar amount of the liability will turn on particular facts about the owner's business and the nature of the required accommodation make such a regulatory tax suspect? Is it sufficient that some tax applies to all public-accommodation owners (or even to all those opening new public accommodations)? If so, there appears to be nothing problematic in either *Nollan* or *Dolan,* since what is, for argument's sake, a tax to be used for general public purposes rather than a substitute for regulation or a user fee applies to all coastal owners who seek to develop. Or is the tax insufficient because its size is facially indeterminate?

The fact that parties may often bear distinct financial obligations when asked to comply with nominally equal obligations poses a more sweeping embarrassment for Scalia's general theory. Everyone is governed by the same nominal common law of nuisance, which forbids, for example, undertaking activities that impose substantial (or, in other jurisdictions, substantial non-cost-justified) losses on neighboring property owners. But the precise content of this obligation—the distinct costs each person bears—is as dependent on the identity of particular neighbors as the San Jose landlords' obligation to lower costs in *Pennell* is dependent on the tenants' identity. Some people may be entitled to make a certain amount of noise; others must change their conduct or abate that same amount of noise, depending on the particular activities in which others have chosen to engage.

One might say, to track my earlier account of Scalia's scheme, that the concept of exploitation is (at least permissibly) victim-specific: what counts as an exploitative price depends on the identity of the buyer. Such could surely be the case in relationship to an expansive law of duress of fraud/information-sharing. Everyone may all be bound to protect those with whom they deal against certain sorts of improvident decisions, yet the costs of complying with this general mandate for sellers who deal with customers with greater levels of cognitive impairments, impulsiveness, or lack of information may be substantially higher than the costs borne by those who deal with more self-protective buyers. Nonetheless, the expansive, consumer-specific law of consumer protection should still be reviewed deferentially.

Thus, the line between the traditional regulatory functions and traditional redistributive functions is simply less sharp than one must imagine to make Scalia's scheme workable. Alternatively, it is possible to simply believe that the fact that traditional common law regulation poses few problems, though it imposes distinct taxlike burdens on parties, ought to make people less wary of the fact that either explicit taxes or new regulation may also impose uneven burdens.

The second major problem is theoretical: What might ultimately be gained, substantively, from invalidating an unduly narrow tax? I will return to that point only after considering a closely related issue: Should the court intervene to invalidate an unduly broad tax?

(iii) Should One Care about Unduly Broad Taxes?

From a libertarian viewpoint, it is just as troublesome to collect a general tax to pay for something for which a private individual or individuals should pay as it is to make private individuals shoulder the costs of public programs. Take the *Dolan* case. Assume, at least for argument's sake, that particular landowners living proximate to the creek gain a great deal more from flood protection than do citizens of Tigard living further away from the creek. Should the general taxpayers not have a just complaint that they have had property expropriated if the government substitutes a tax-and-spend program either for a benefits tax/user fee (charging floodplain occupants the bulk of the price of whatever flood-risk-reducing public improvements are built) or for inaction (letting private parties bear or avert the losses from flooding themselves)? Libertarian theory is rights-protective: the fact that a majority of the town rather than a minority is stripped of its rights by a general tax is of no moment. Individuals who are coerced into transferring funds for projects that are not truly public or to pay for problems they did not cause should get no comfort (from a libertarian perspective) from the fact that the tax was voluntarily accepted by similarly situated neighbors who in some ways resemble the people coerced, just as the Dolans are not thought to be adequately protected by simple democracy.

Many would argue that the failure of the sorts of interventionists I describe in this chapter to favor judicially mandated user charges or inaction simply demonstrates that they are not libertarians, a point that was already dramatically obvious given their deference to taxation more generally and to legislative determinations that regulations avert unwarranted social costs or unjust exploitation of contractual partners. If this interventionist program is not libertarian, however, what is it? One answer is that it focuses on political-process concerns. In this view, the interventionists are undisturbed when the public at large pays for private benefits because the taxpayers of Tigard can adequately protect themselves: they have imposed a tax on themselves and need no constitutional protection from democracy.[44]

44. This is another variant on Ely's argument recommending court deference to affirmative action, on the ground that the white majority group that disadvantages itself by enacting preferences for African Americans is not politically isolated or powerless. See John Hart Ely, *Democracy and Distrust* (Cambridge: Harvard University Press, 1980), 170–72. The responses to the argument in the text and the Ely arguments on affirmative action are, of course, structurally the same. Some who oppose affirmative action will assert (rather mysteriously in my view) that the "right" to (what they see as) meritocratic treatment is not up for democratic grabs. Opponents of affirmative action willing to engage the political-process point more directly will typically note that the groupings are arbitrary. The fact that someone who loses out as a result of what he sees as an unjust race-based preference program is a member of a majority group (whites) that generally has reasonable political access and bargaining power does not really mean that he is a member of more relevantly empowered political groups or that his voice was heard or his capacity to horse-trade uncompromised. Some of Tigard's townspeople who taxed themselves to protect creek-abutting flood victims may have gotten something back from the downtown businessmen; some may rightly feel like they gave yet got nothing.

The point seems quite troublesome. First, it seems to ignore the very real possibility that majorities can readily single out and harm minorities without using narrow taxes as long as it is understood that the choice between user fees (or inaction) and taxing and spending cannot be scrutinized. A governmental entity may charge justified user fees for only a small subset of the services for which benefits are concentrated. The user fee itself will be free from scrutiny (since it is facially legitimate), while the decision not to charge user fees for services for more politically potent constituencies (whether bare majorities or empowered minorities) is likewise left unexamined. Imagine, for example, a quite plausible scenario in which the local governmental entity charges user fees for the marina and the golf course but not for equally privately beneficial playgrounds and baseball fields (as well as the town dump, bike path maintenance, and schools), knowing full well the rough identities and traits of those who will both bear the selectively imposed user fees and pay taxes that subsidize the services utilized exclusively by the majority, which could have been subject to user fees.[45]

Second, this position seems unduly oblivious to the argument that majorities may readily be victimized by organized minorities.[46] The idea that the political process is unproblematic whenever legislatures vote is hardly unassailable.

It may be reasonable to be suspicious of all governmental programs in which parties decide issues knowing how that decision will affect known people. The Rawlsian veil of ignorance does indeed promote civic-mindedness and a search for just rather than self-serving legislation. Majorities

45. Or, to track the example I used in talking about selective sales taxes, imagine a politically conservative town that charges user fees for alternative energy projects but subsidizes conventional power or a state that supports state research on conventional but not organic agricultural innovation. It may be the case that a jurisdiction could, under the more expansive understandings of unconstitutional conditions analysis that Sullivan has expounded, run into some problems if its selective subsidy pattern compromised or pressured the exercise of constitutional rights (e.g., imagine subsidizing childbirth but not abortion, though the state could not directly manifest its disapproval of abortion; imagine viewpoint-dependent subsidies). See Sullivan, "Unconstitutional Conditions," 1489–1504. But even an expansive reading of this doctrine will cover few cases in which majorities or politically powerful minorities simply insure a more favorable post-state-action distribution for themselves.

46. See, e.g., Sam Peltzman, "Toward a More General Theory of Regulation," *J. of L. and Econ.* 19 (1976): 211; Gary Becker, "A Theory of Competition among Pressure Groups for Political Influence," *Q. J. of Econ.* 98 (1983): 371; George Stigler, "The Theory of Economic Regulation," *Bell J. of Econ. and Mgmt. Sci.* 2 (1971): 3. I believe this argument is often stated with undue certainty; such public-choice accounts of legislation are, in my view, frequently wrong, though they may be more or less correct in particular cases. See Mark Kelman, "On Democracy-Bashing," 199.

may well be especially tempted to gather benefits for themselves while imposing costs on the minority (just as well-organized minorities will be tempted to stick it to the widely dispersed and difficult-to-organize public). But the Court cannot really invalidate every statute in which a legislature knowingly gouged the economic interests of a political out-group. As the Court notes, quite reasonably, in *Nordlinger,* the manifest injustices of Proposition 13 may well go uncorrected by the political process: "Certainly," Justice Blackmun writes, "California's grand experiment appears to vest benefits in a broad, powerful, and entrenched segment of society . . . and ordinary democratic processes may be unlikely to prompt its reconsideration."[47]

(iv) So, What Is Important?

In invalidating an unduly narrow regulatory tax, interventionists could not, it seems, really be seeking improvements in the political process. Legislation is generally both more opaque (as to the actual distributive impact of either tax or spending programs) and more transparent (as to the intended beneficiaries and losers of each sort of program) than those who believe regulation must be specially scrutinized imply. Such invalidations also do not protect any individual's substantive entitlement to a certain level of posttax, posttransfer income. Taxpayers generally may be asked to finance programs of special benefit to individuals or narrow subgroups, which erodes libertarian entitlements just as much as when an individual is asked to fund programs of general benefit.

What should interventionists seek, then? I think, at most, they can hope only to prohibit imposing atypically high tax burdens on parties that are identified or identifiable as individuals. The goal is very limited. Even tax legislation that is personal on its face is all right provided it singles out people to pay atypically low rates rather than atypically high ones.

It is hard to imagine why a court would interfere with the authority of local governments to grant local property tax abatements to any particular named party, given the importance of such abatements in fostering local development.[48] Thus, a local property tax abatement system would become

47. *Nordlinger v. Hahn,* 18.

48. For examples of local property tax abatements designed to encourage particular entities to stay or to locate in a particular jurisdiction, see, e.g., Andrew L. Kolesar, "Can State and Local Tax Incentives and Other Contributions Stimulate Economic Development," *Tax Law* 44 (1990): 285, 287–88 (GM's Saturn plant lured to Spring Hill, Tennessee, in 1985 by an economic-incentive package that included seventy million dollars in local property tax

impermissible only as abatements were granted more and more routinely so that the very occasional nonexempt party were personally identifiable.

Federal income tax rules can even exempt or favor single parties, though the convention is not to name the party but to apply the favor to a class of parties that happens to have but one member. Most highly particularistic federal tax legislation is found in transition rules, exempting certain taxpayers from the impact of tax law changes. These rules do not appear in the code itself but are footnotes or endnotes to newly enacted sections.[49] Again, while such exemptions may in fact frequently result from corrupt influence peddling, the possibility that the exemption serves to meet allocative or fairness goals should preclude real judicial scrutiny.

In the final analysis, then, there is less protection against biased distribution of burdens (which can just as readily occur when small groups are victimized by overly high taxes or spending programs that exclude these groups) than against the breach of impersonality. The fear is the intrusive Orwellian tax collector, with undue knowledge about and concern over features of one's private situation that permit a too precise assessment of how the taxpayer might respond to government intrusion.[50]

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abatements); Alex Kotlowitz and Dale D. Buss, "Costly Bait: Localities' Giveaways to Lure Corporations Cause Growing Outcry," *Wall Street Journal,* Sep. 24, 1986, 27 (Ohio promises Honda Motor Co. fifteen years of property tax abatements on an auto and motorcycle complex built in 1977); Joseph William Singer, "The Reliance Interest in Property," *Stanford L. Rev.* 40 (1988): 611, 615 n. 15 (between 1980 and 1984, Chicago granted U.S. Steel local property tax abatements worth tens of millions of dollars to induce the company to keep its South Works steel plant open).

49. Thus, for example, certain readily identified entities were exempted from the application of the repeal of §336 of the code in the Tax Reform Act of 1986 (which had allowed tax-free distributions of appreciated property in complete corporate liquidations). See, e.g., §633(e) of PL 99-514 (100 STAT. 2280), which provided, in part, "The amendments made by this subtitle shall not apply to any liquidation of a corporation formed under the laws of Pennsylvania on August 3, 1970 if . . . an agreement for the sale of a material portion of the assets of such corporation was signed on May 9, 1986" and went on to specify three other identifiable entities exempted from the more stringent tax treatment.

Particularistic tax legislation is more frequently directed not at individuals or individual entities but industries: For example, §613 and §613A of the code contain percentage depletion allowance rules that favor the covered industries listed in §§613(b) and 613A(b); these listed industries may depreciate/amortize a sum larger than the cost of their initial investment; moreover, even among these favored extractive industries, some are favored by extremely rapid (22 percent) cost-recapture provisions, while others may deduct as little as 5 percent per annum.

50. The opposition to such tax "bills of attainder" may derive as well from the belief that taxpayers are entitled to retain some of the economic rents they earn—i.e., that taxpayers want to restrain the government's ability to seize surplus. Such opposition might also be motivated by the belief that it will help guard against both arbitrariness and discrimination, on the supposition that direct prohibitions of such arbitrariness or discrimination may be difficult for courts to enforce fully.

In an odd way, regulatory takings law should become a minor offshoot of privacy law, driven more by the (traditionally politically progressive) antistatist sentiments associated with zealous Fourth Amendment advocacy than the (typically right-wing) antistatist sentiments associated with the property-rights-protection movement.