Strategy or Principle?

Strategy or Principle?

The Choice between Regulation and Taxation

Mark Kelman

Ann Arbor

THE UNIVERSITY OF MICHIGAN PRESS

Copyright © by the University of Michigan 1999 All rights reserved Published in the United States of America by The University of Michigan Press Manufactured in the United States of America © Printed on acid-free paper

2002 2001 2000 1999 4 3 2 1

No part of this publication may be reproduced, stored in a retrieval system, or transmitted in any form or by any means, electronic, mechanical, or otherwise, without the written permission of the publisher.

A CIP catalog record for this book is available from the British Library.

Library of Congress Cataloging-in-Publication Data

Kelman, Mark.

Strategy or principle? : the choice between regulation and taxation / Mark Kelman.

p. cm.

Includes bibliographical references and index.

ISBN 0-472-11047-0 (acid-free paper)

1. Taxation—Law and legislation—United States. 2. Fiscal policy—United States. I. Title.

KF6289 .K45 1999

343.7304—dc21

99-6269 CIP With the deepest love and gratitude to my parents,

Kurt and Sylvia Kelman,

and to the second set of parents

I was lucky enough to acquire as an adult,

my mother-in-law, Barbara Richman,

and the memory of my father-in-law, Bud Richman

Contents

Preface	ix
Chapter 1.	Introduction
Chapter 2.	Current Constitutional Practice
Chapter 3.	Constitutional Considerations (II): A Less Deferential Alternative
Chapter 4.	Prudential Concerns (I): Public Finance Considerations
Chapter 5.	Prudential Concerns (II): Political Process113
Chapter 6.	Conclusion
Index	

Preface

I delivered a somewhat different version of this manuscript as the forty-second annual Thomas M. Cooley Lecturer at the University of Michigan Law School in October 1997. I am especially grateful to Dean Jeffrey Lehman and the faculty at Michigan, particularly Tom Green, Sam Gross, Michael Heller, Don Herzog, Rick Hills, Saul Levmore, Kyle Logue, Catharine MacKinnon, Deborah Malamud, Bill Miller, and Julie Roin, for being generous hosts and intellectually stimulating critics of my work. I am grateful as well to workshop participants here at Stanford for their probing questions and most of all to colleagues who read and responded to earlier drafts of the manuscript: Joe Bankman, Tom Grey, Peggy Radin, and especially Barbara Fried.

I benefited greatly from the capable research assistance of Christine Wade and Lina Ericsson. Truc Do did the bulk of the research for this particular project and merits my greatest gratitude in that regard. The research was supported financially by both the Roberts Program in Law and Corporate Governance and by the Stanford Legal Research Fund, made possible by a bequest from Ira S. Lillick and by gifts from other friends of the Stanford Law School.

As always, my wonderful wife, Ann, and kids, Nick and Jake, matter most by a mile.