

## Designing Interstate Institutions: The Example of the SSUTA

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### ABSTRACT

This Article presents a case study in designing cooperative interstate institutions. It takes as its subject the Streamlined Sales and Use Tax Agreement (“SSUTA”), a recently-developed compact among the States now awaiting congressional ratification. The SSUTA’s primary goal is to bring uniformity to the field of state and local sales taxation, a regime in which multi-jurisdictional sellers now confront literally thousands of different sets of rules. I predict here that the SSUTA as currently designed is unlikely to accomplish that goal, and attempt to suggest possible amendments that could improve its expected performance. From these efforts I extract larger lessons about the workings of many similar cooperative ventures.

My prognosis for the SSUTA turns largely on the political economy of state taxation. Extending Daniel Shaviro’s seminal work on state incentives for tax-law disuniformity, I examine how the institutional arrangements set out by the SSUTA respond to the pressures identified by Shaviro. I additionally weigh a number of factors omitted in his analysis. For example, I consider the possible public-regarding tendencies of bureaucratic ideology or sense of mission among either state-level tax administrators, state courts, or the governing body of the SSUTA. I also examine the possibility that ongoing intervention by Congress or a reviewing federal court might help either to check rent-seeking by, or instill a stronger sense of public regard in, the SSUTA Governing Board and state-level actors.

I find none of these alternatives especially promising. For example, federal judicial review is often offered as a panacea by present critics of the SSUTA. However, it was precisely the relative incompetence of federal judges in balancing the goods of uniformity against the possible autonomy and experimental benefits of diversity that lead the Supreme Court to, in essence, punt the problem back to Congress. And the failure of local businesses to internalize the costs of national disuniformity likely distorts the decisions not only of state politicians and bureaucrats but also of state courts and Congress.

Having made a more precise diagnosis of the problems that confront the SSUTA, I am able to suggest more precisely targeted solutions. Somewhat radically, I propose tying the deductibility of businesses’ federal deduction for state and local tax paid to federal administrative approval of the taxing state’s compliance with SSUTA, with approval subject in turn to federal judicial review. In this way, the businesses are made to internalize the costs they impose on others. And the most politically remote actors,

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federal judges, would have a reliable interpretive partner to supplement their own, ordinarily rather weak, fact finding and policy analysis.

Finally, I claim that this analysis is generalizable. It helps to evidence the weakness of nationwide policy making that is dependent purely either on unmitigated “market” federalism, or on relatively rigid and uninformed judicial mandates. And it opens the possibility that conditional taxes, like conditional spending, can be a significant tool in coordinating our national policy goals.

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### Introduction

One of the strengths of the U.S. Constitution is that it draws up a fairly open floor plan for arranging the internal architecture of government. Justice Kennedy, for example, has likened the invention of federalism to a sort of Manhattan Project of political philosophy.<sup>1</sup> With largely autonomous sub-national governments, we get tremendous opportunities for experiments in the goals and design of government.<sup>2</sup> But, of course, the

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<sup>1</sup> U.S. Term Limits, Inc. v. Thornton, 514 U.S. 779, 838 (1995) (Kennedy, J., concurring).

<sup>2</sup> New State Ice Co. v. Liebmann, 285 U.S. 262, 311 (1932) (Brandeis, J., dissenting); David L. Shapiro, FEDERALISM: A DIALOGUE 85--88 (1995); Ann Althouse, *Vanguard States, Laggard States: Federalism and Constitutional Rights*, 152 U. PA. L. REV. 1745, 1749--76 (2005); Michael C. Dorf, *Foreword: The Limits of Socratic Deliberation*, 112 HARV. L. REV. 4, 60--69 (1998); Barry Friedman, *Valuing Federalism*, 82 MINN. L. REV. 317, 381--82, 386--405 (1997); Vicki C. Jackson, *Federalism and the Limits of Power:*

jostling of so many different political bodies also leads to serious collective action problems, as the Articles of Confederation experience taught us.<sup>3</sup>

Fortunately, then, the Constitution also seems to offer many different avenues for coordinating national and local policies. The menu includes prescriptive federal legislation,<sup>4</sup> judicially-enforced constitutional rights,<sup>5</sup> compacts among states,<sup>6</sup> and offers of federal or other grants in exchange for state agreements,<sup>7</sup> among many others. Each of these, in turn, can involve many different permutations. An agreement might be held

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*Printz and Principle?*, 111 HARV. L. REV. 2180, 2217 (1998); Deborah Jones Merritt, *The Three Faces of Federalism: Finding a Formula for the Future*, 47 VAND. L. REV. 1563, 1575 (1994).

<sup>3</sup> E.g., THE FEDERALIST No. 4 (John Jay); THE FEDERALIST No. 15 (Alexander Hamilton); James Madison, *Vices of the Political System of the U. States* (April 1787), reprinted in 24 LETTERS OF THE DELEGATES TO CONGRESS: 1774-1789 at 265 (Paul H. Smith ed. 1996); JAMES MADISON, NOTES OF DEBATES IN THE FEDERAL CONVENTION OF 1787, at 29--30 (statement of Edmund Randolph) (Adrienne Koch ed. 1984); PATRICK T. CONLEY AND JOHN P. KAMINSKI, THE CONSTITUTION AND THE STATES 25--26, 58, 202 (1988); PETER S. ONUF, THE ORIGINS OF THE FEDERAL REPUBLIC, JURISDICTIONAL CONTROVERSIES IN THE UNITED STATES, 1775-1787 at 8--20, 122 (1983); Richard E. Levy, *Federalism and Collective Action*, 45 U. KAN. L. REV. 1241, 1256--66 (1997). For a thorough grounding in the theory of collective action problems, see MANCUR OLSON, THE LOGIC OF COLLECTIVE ACTION: PUBLIC GOODS AND THE THEORY OF GROUPS (1962); TODD SANDLER, COLLECTIVE ACTION: THEORY AND APPLICATIONS (1992).

<sup>4</sup> For a careful theoretical description and, in part, condemnation of this approach, see Richard B. Stewart, *Beyond Delegation Doctrine*, 36 AM. U. L. REV. 323, 328--35 (1987); Richard B. Stewart, *Reconstitutive Law*, 46 MD. L. REV. 86, 89--102 (1986).

<sup>5</sup> Of course, there are many senses in which we can describe constitutional rights as a way of shaping national policy. For instance, there is the communitarian sense in which the Constitution helps to define the limits of our political community and the meaning that attaches to membership in it. See, e.g., Frank Michelman, *Law's Republic*, 97 YALE L.J. 1493, 1503--15 (1988); Hiroshi Motomura, *Federalism, International Human Rights, and Immigration Exceptionalism*, 70 U. COLO. L. REV. 1361, 1392--94 (1999) (describing constitutional treatment of immigration as part of definition of national identity). Then, perhaps one metaphysical step down, there is the sense in which constitutional rights are expressions of national ideals of justice, which states are not free to contradict. See, e.g., JESSE CHOPER, JUDICIAL REVIEW AND THE NATIONAL POLITICAL PROCESS 185 (1980); Matthew D. Adler & Seth F. Kreimer, *The New Etiquette of Federalism*: New York, Printz, and Yeskey, 1998 SUP. CT. REV. 71, 127--30. And then there is the more pedestrian (but still important) sense in which constitutional rights serve an almost mechanical role in implementing good policy, as by preventing inefficient state interference with commerce, or remedying other kinds of collective action problems. See Brian Galle, *Getting Spending: How to Replace Clear Statement Rules with Clear Thinking About Conditional Grants of Federal Funds*, 37 CONN. L. REV. 155, 209--10 (2004); Cass Sunstein, *Interest Groups in American Public Law*, 38 STAN. L. REV. 29, 33, 49--59 (1985). There may also be others.

<sup>6</sup> WILLIAM KEVIN VOIT, COUNCIL OF STATE GOV'TS, INTERSTATE COMPACTS & AGENCIES 10--13, 158--59 (2003) (identifying over 200 compacts); see Ann Bowman, *Horizontal Federalism: Exploring Interstate Interactions*, 14 J. PUB. ADMIN. RESEARCH & THEORY 535, 535--46 (2004); Jill Elaine Hasday, *Interstate Compacts in a Democratic Society: The Problem of Permanency*, 49 FL. L. REV. 1, 2--7 (1997); see generally Felix Frankfurter & John Landis, *The Compact Clause of the Constitution---A Study in Interstate Adjustments*, 34 YALE L.J. 685 (1925).

<sup>7</sup> See Galle, *Getting Spending*, *supra* note 5, at 185--86.

together by the threat of private suits,<sup>8</sup> by the judgments of a new quasi-governmental entity established under the agreement,<sup>9</sup> by a third-party government arbiter,<sup>10</sup> by public and stakeholder pressure in response to data disclosed about the performance of the parties to the agreement,<sup>11</sup> or merely by mutual interest in its continued existence. The rules for each of these enforcement functions, too, vary widely.

Again, the pre-constitutional era showed us clearly that the institutional design of our interstate arrangements can be crucial to their success or failure. If we choose unwisely, we may end up with a problem worse than the one we started out to solve.

This Article does not attempt a grand, high-level theory of interstate institutions. Others have undertaken that mission, often impressively.<sup>12</sup> My focus, instead, is much closer to the ground. I want to get at how, in actual practice, we can apply the theory of institutional design to particular challenges in interstate coordination. In order to do that, I have adopted a case-study approach. I take a single policy challenge, and describe

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<sup>8</sup> Jody Freeman, *The Private Role in Public Governance*, 75 N.Y.U. L. REV. 543, 667--71 (2000); Brian D. Galle, *Can Federal Agencies Authorize Private Suits Under Section 1983? A Theoretical Approach*, 69 BROOK. L. REV. 163, 203--05 (2003) (describing role of private suits under 26 USC § 1983 in promoting collaborative regulatory systems). For those who might wonder how the States can, by their mutual consent, create a federal cause of action, it is worth noting that Congress, in approving a compact, can provide for tools for its enforcement that would not be available to the States alone. *Virginia v. West Virginia*, 246 U.S. 565, 602 (1918).

<sup>9</sup> E.g., New York-New Jersey Port Authority Compact, ch. 77, 42 Stat. 174 (U.S. 1921); see JOSEPH F. ZIMMERMAN, *INTERSTATE COOPERATION: COMPACTS AND ADMINISTRATIVE AGREEMENTS* (2002).

<sup>10</sup> See DAVID B. WALKER, *THE REBIRTH OF FEDERALISM: SLOUCHING TOWARD Washington* 182, 189--91 (1995) (discussing -- and decrying -- expansion of federal agencies in controlling relationships between states through federal spending programs).

<sup>11</sup> Michael C. Dorf & Charles F. Sabel, *A Constitution of Democratic Experimentalism*, 98 COLUM. L. REV. 267, 314, 321 (1998); Brandon L. Garrett & James S. Liebman, *Experimentalist Equal Protection*, 22 YALE L. & POL'Y REV. 261, 308--13 (2004); Bradley C. Karkkainen, *Information as Environmental Regulation: TRI and Performance Benchmarking, Precursor to a New Paradigm?*, 89 GEO. L.J. 257, 363--70 (2001).

<sup>12</sup> E.g., THE TOOLS OF GOVERNMENT: A GUIDE TO THE NEW GOVERNANCE (Lester M. Salamon ed., 2001); Richard Briffault, *Who Rules at Home?: One Person / One Vote and Local Government*, 60 U. CHI. L. REV. 339 (1993); Dorf & Sabel, *supra* note 11; Jody Freeman, *Collaborative Governance in the Administrative State*, 45 UCLA L. Rev. 1 (1997); Neil Gunningham & Darren Sinclair, *Regulatory Pluralism: Designing Policy Mixes for Environmental Protection*, 31 POL'Y STUD. J. 1 (2003); Orly Lobel, *The Renew Deal: The Fall of Regulation and the Rise of Governance in Contemporary Legal Thought*, 89 MINN. L. REV. 342 (2004).

existing state and federal efforts to address it. Then, I unpack those existing efforts and, using what we know about how institutions work, try to rebuild them to better realize the policy goal. In the process, I uncover several significant, generalizable lessons about the pragmatics of institutional design. The policy challenge I have selected is a timely one: the threat posed to state and local budgets by sales into their jurisdictions from far away, particularly in the fast-growing area of sales over the internet.<sup>13</sup>

The rise of electronic commerce is something like the global warming of state finance. That is, it is a problem of the States' own making that is not urgent now but may someday not far away leave them deep underwater. The States, of course, did not invent the internet. But it is largely their own fault that the exploding market for goods and services sold over the internet may put them in dire financial straits. Fortunately, they may have a serviceable patch already on its way, called the Streamlined Sales and Use Tax Agreement ("SSUTA").<sup>14</sup> Unfortunately, as I will try to show, in its present form it faces many serious challenges.

Why does e-commerce affect state budgets? States depend heavily on sales and use tax<sup>15</sup> revenues – some states draws upwards of 40% of their revenues from them.<sup>16</sup> Although e-commerce is still a relatively small portion of total nationwide retail sales, in

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<sup>13</sup> For some earlier scholarly discussions of the scope of this problem, see Kendall L. Houghton & Walter Hellerstein, *State Taxation of Electronic Commerce: Perspectives on Proposals for Change and Their Constitutionality*, 2000 BYU L. REV. 9, 10--12, 51; Walter Hellerstein, *Deconstructing the Debate Over State Taxation of Electronic Commerce*, 13 Harv. J. L. & Tech. 549 (2000); Walter Hellerstein, *State and Local Taxation of Electronic Commerce: Reflections on the Emerging Issues*, 52 U. MIAMI L. REV. 691 (1998).

<sup>14</sup> Available at <<http://www.streamlinedsalestax.org/agreement.htm>>.

<sup>15</sup> A "use" tax is simply a tax imposed on the in-state use of a good or service purchased out of state; it is designed to make state purchasers indifferent between purchasing in and out of state.

<sup>16</sup> See U.S. Census Bureau, *State Government Tax Collections 2005*, available at <<http://ftp2.census.gov/govs/statetax/05staxss.xls>>.

nominal terms the figures are already very substantial.<sup>17</sup> And the proportion is growing quickly.<sup>18</sup> As the United States transitions to a knowledge-based economy, more and more of what we produce that is of value to consumers will be readily ordered or acquired from our computer chair or our set-top cable box.<sup>19</sup> Current estimates of the cost of e-commerce to the States over the next few years range from a few billion to tens of billions of dollars.<sup>20</sup> If states continue to depend on sales taxes, they will have to find ways to tax these transactions.

Unfortunately, the States have made it hard on themselves in that regard. Over the past few decades, the U.S. Supreme Court has interpreted the Dormant Commerce Clause to dramatically limit the authority of states and other local taxing jurisdictions to oblige non-local sellers to collect sales and use taxes – in essence, only sellers with a “physical presence” in the jurisdiction need comply with the jurisdiction’s demands.<sup>21</sup> That rule, arguably, arose in response to the States’ irresponsibility in allowing such a bewildering array of state and local sales tax rules to develop. The Court, turn, seems to have felt compelled to act in order to protect the constitutional guarantee of an open market for domestic goods against the threat of rules so cumbersome in their multiplicity that interstate trade would diminish.

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<sup>17</sup> For example, although e-commerce made up only about 1.7 percent of all U.S. 2003 retail sales, that represented \$56 billion in sales. U.S. Dep’t of Commerce, E-Stats, E-Commerce 2003 Highlights (May 11, 2005), available at <[www.census.gov/estats](http://www.census.gov/estats)>.

<sup>18</sup> For instance, the percentage of e-commerce as a portion of all retail sales roughly tripled between 2000 and 2005, and grew at a fairly steady rate throughout that period. U.S. Census Bureau, Quarterly Retail E-Commerce Sales 2nd Quarter 2005, at 1 (Aug. 19, 2005).

<sup>19</sup> Houghton & Hellerstein, *supra* note 13, at 12--13; Walter Hellerstein, *Jurisdiction to Tax Income and Consumption in the New Economy: A Theoretical and Comparative Perspective*, 38 GA. L. REV. 1, 41-42 (2003).

<sup>20</sup> See Multistate Tax Commission, *Federalism at Risk*, 2003 STATE TAX TODAY 217-4, at [6]; George S. Isaacson, *A Promise Unfulfilled: How the Streamlined Sales Tax Project Failed to Meet Its Own Goals for Simplification of State Sales and Use Taxes*, 2003 STATE TAX TODAY 207-5, at [17] (summarizing competing estimates).

<sup>21</sup> *Quill Corp. v. North Dakota*, 504 U.S. 298, 311--15 (1992).

The Court's interpretation of the Dormant Commerce Clause, however, can be superseded by Congress. Thus, in the last several years the States have developed the SSUTA, a multi-lateral agreement among states designed to harmonize their sales tax in exchange for congressional authorization to impose collection obligations on out-of-state sellers.<sup>22</sup> It is a tremendous and impressive undertaking. But it has some potential flaws. Quite possibly, the same political and social forces that melted our fiscal ice caps will keep the states from genuinely reforming.

To be more specific, I argue that the design of the Agreement leaves itself open to political influence by the very stakeholders who have driven state tax disuniformity. Local businesses have powerful incentives, and ample opportunity within the relatively weak anti-discrimination protections of the Court's tax Commerce Clause jurisprudence, to shape local tax policy to favor themselves. The Agreement, as now drawn up, sets out a model code for each state to enact and interpret independently, with the threat of some sanction if they stray too far from the collective ideal. But the sanction mechanism depends on a three-quarters vote from the members of the Agreement, who are represented largely by political appointees from their home states, removable at the discretion of state political actors. Through log-rolling and other similar devices, member states are very likely to escape any punishment for deviation -- and, knowing this, will be free to give heed to the cohesive, aggressive demands of in-state businesses. And state-by-state judicial review will be unlikely to constrain state heterodoxy, as judges will either themselves be politically dependent or, if independent, unconcerned with the threat of sanctions.

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<sup>22</sup> For the history of the SSUTA's development, *see* WALTER HELLERSTEIN & JOHN A. SWAIN, STREAMLINED SALES AND USE TAX 2-1 to 2-15 (1st ed. 2005).



Thus, I argue, the SSUTA can only succeed if its Governing Board is reformed in a way that allows it to influence apolitical state courts, and if the stakeholders who influence political decisions internalize the costs of state disuniformity. These considerations, I show, are related. Therefore, I suggest a possible improvement on the current design, proposing that the federal deductibility of a state's corporate taxes be made contingent on a Treasury determination that the state is in compliance with the SSUTA. The deduction helps to make certain that in-state businesses, who I claim are the driving forces of disuniformity, have a reason to want the SSUTA genuinely to succeed. If the Board, freed of their influence, can then produce opinions that rest on principled application of the Agreement's nationalizing goals rather than parochial advantage, it has a hope of swaying state judicial opinion to its way of thinking. Federal judicial review, although problematic standing by itself, can supplement both ends if supported by expert federal agency judgment.

This analysis also gives us important clues about the larger puzzle of the design of interstate institutions. Attempting to reform a system upon which the fiscal future of the States depends is, of course, an important goal in itself. But I try to show here also that a close analysis of the SSUTA, and of potential amendments to it, also demonstrates the weaknesses of some traditional approaches to coordinating state and federal policy. In particular, this case study, I argue, is strong evidence of the need for a "refereed federalism," a vision of federalism in which the experimentation in and competition between thousands of local jurisdictions is managed and channeled by a system of officials whose incentives are themselves balanced and attuned to screen out imperfections in the political market. That conclusion has important implications

especially for judicial efforts to impose national standards in such diverse fields as state business tax incentives and criminal procedure.

Thus, Part I of this Essay offers a description of the evolution of federal limits on state power to tax sales originating in another jurisdiction, as well as the shape of the SSUTA that developed in response. Part II begins the diagnosis of the institutional design problem to be overcome, by providing an overview of the political economy of state sales and use taxation. Parts III and IV describe what I see as the central obstacles for the SSUTA's success -- in large measure, its failures to resolve the difficulties uncovered in Part II. Part V describes my solution, and how it addresses the structural failings uncovered earlier. In the Conclusion, I examine our lessons learned for similar projects in other fields.

## **I. An Overview**

In order to understand the SSUTA it is helpful first to explore some of the factors that make it necessary. The most immediate impetus for the Streamlined Sales Tax Project<sup>23</sup> was probably the Supreme Court's decision, in *Quill Corp. v. North Dakota*, that the Commerce Clause prohibits a state or local taxing jurisdiction from imposing an obligation to collect sales or use tax on a vendor whose only "physical presence" in the jurisdiction is the travel of its goods by common carrier to its customers.<sup>24</sup> Although the Court's ultimate rationale is open to some question, it seems clear that at least one major determinant on the face of the opinion was that forcing mail-order sellers to cope with the different taxing rules of literally thousands of different taxing jurisdictions was

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<sup>23</sup> That is, the Project that gave rise to development of the SSUTA. See John A. Swain & Walter Hellerstein, *The Political Economy of the Streamlined Sales and Use Tax Agreement*, 58 NAT'L TAX J. 605, 609--10 (2005).

<sup>24</sup> *Quill*, 504 U.S. at 311--15.

inconsistent with the Commerce Clause’s goal of creating a free, open market for domestic goods.<sup>25</sup> In this part I describe the development of the *Quill* rule, and the design of the Agreement that the States developed in response

### A. Black “Letter” Law

At the time of *Quill*, the United States included somewhere on the order of 6000 distinct sets of local tax rules.<sup>26</sup> Even where those rules were facially similar, each jurisdiction could litigate the application of its terms, such as whether a particular item or bundle of items was “tangible personal property” or used in “manufacturing.”<sup>27</sup> Each jurisdiction, in theory, could have its own forms, and the authority to audit sellers to ensure that they were properly collecting sales and use taxes. Understandably, nationwide sellers complained -- and still complain -- that the burden of complying with this welter of rules could be substantial.<sup>28</sup>

Ultimately, this proliferation of tax rules and burdens had additional, legal, consequences. Through the middle of the 20th Century, the Supreme Court imposed fairly drastic limits on state power to tax interstate commerce, using not only the Commerce Clause (or its negative implications) but also the Due Process Clause.<sup>29</sup> In a series of early cases, the Court held that due process limited a state’s jurisdiction to impose tax and the obligation to collect tax on its behalf only to entities having sufficient

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<sup>25</sup> See Charles E. McClure, Jr., *Sales and Use Taxes on Electronic Commerce: Legal, Economic, Administrative, and Political Issues*, 34 URB. LAW. 487, 497--98 (2002); Swain & Hellerstein, *supra* note 23, at 605.

<sup>26</sup> *Quill*, 504 U.S. at 313 n.6.

<sup>27</sup> Isaacson, *supra* note 20, at [13]. Isaacson represents the Direct Marketing Association, a trade group of remote-selling merchants. *Id.* at [1].

<sup>28</sup> Isaacson, *supra* note 20, at [3--4]; see Charles E. McClure, Jr., *Radical Reform of the States’ Sales and Use Tax: Achieving Simplicity, Economic Neutrality, and Fairness*, 13 HARV. J.L. & TECH. 567, 573--74 (2000).

<sup>29</sup> *E.g.*, *Nat’l Bellas Hess v. Dep’t of Revenue*, 386 U.S. 753, 756--57 (1967); *Spector Motor Serv., Inc. v. O’Connor*, 340 U.S. 602, 608--09 (1951); *Freeman v. Hewitt*, 329 U.S. 249, 252 (1946).

“nexus” with the taxing state.<sup>30</sup> Generally, in order to meet this standard, the state had to show that the entity had some “definite link” or “minimum connection” with the state, which it could satisfy by demonstrating a physical presence within its borders.<sup>31</sup> Similarly, on the Commerce Clause side, the Court often refused to allow “direct” taxes on interstate commerce, although it was never entirely clear what separated direct from indirect.<sup>32</sup>

By 1977, though, both ends of the doctrine had largely been transformed, setting the stage for a potential revolution in state taxing power. The reach of a state court’s jurisdiction had expanded, so that even in suits *in rem* it could reach any entity with minimum contacts, ties, or relations to it.<sup>33</sup> And in the commerce arena, the Court had rejected formalism in favor of a practical test that appeared to guard primarily against unfair or discriminatory tax regimes.<sup>34</sup> It appeared, then, that there would in the future be few barriers to states imposing fairly apportioned and non-discriminatory taxes or tax-collection obligations, even on those who sold largely from out of state. Although the Court’s restatement of the Commerce Clause test for permissible taxes included a requirement of “substantial nexus,”<sup>35</sup> it seemed plausible that that meant only the minimal nexus imposed by the Due Process Clause.

The *Quill* case, in 1992, dashed those expectations. *Quill*, as I’ve mentioned, held that “substantial nexus” demands some physical presence in a state before the state can

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<sup>30</sup> *Miller Bros. Co. v. Maryland*, 347 U.S. 340, 344--45 (1954).

<sup>31</sup> *Id.*; see *Bellas Hess*, 386 U.S. at 756.

<sup>32</sup> *Freeman*, 329 U.S. at 252. On the uncertain doctrinal meaning of “direct” and “indirect” taxes in this context, see generally Noel T. Dowling, *Interstate Commerce and State Power*, 27 VA. L. REV. 1 (1940).

<sup>33</sup> *Shaffer v. Heitner*, 433 U.S. 186, 212 (1977); see *International Shoe Co. v. Washington*, 326 U.S. 310, 316 (1945). The *Burger King* decision eight years later made this even clearer. *Burger King Corp. v. Rudzewicz*, 471 U.S. 462, 476 (1985).

<sup>34</sup> *Complete Auto Transit, Inc. v. Brady*, 430 U.S. 274, 279, 285 (1977).

<sup>35</sup> *Id.* at 279.

collect, or demand help in collecting, sales or use taxes from a seller.<sup>36</sup> *Quill* acknowledged that, under the Due Process Clause, the States were now free to impose such a tax.<sup>37</sup> But it held that “substantial nexus” also embodied dormant Commerce Clause “concerns about the national economy.”<sup>38</sup> In particular, it explained that the substantial nexus test “limit[s] the reach of state taxing authority so as to ensure that state taxation does not unduly burden interstate commerce.”<sup>39</sup> And, in the threat of imposing compliance obligations with “6,000-plus taxing jurisdictions,” it found a serious likelihood that vesting jurisdiction to tax in every one of those jurisdictions would burden the activities of interstate vendors.<sup>40</sup> Its solution was to preserve a pre-1977 “bright-line rule” setting out a sales and use tax “safe harbor for vendors ‘whose only connection with customers in the taxing State is by common carrier or the United States mail.’”<sup>41</sup> Diversity now had its price: in many cases, states would be forced to tax in-state businesses more heavily than out-of-state sellers.<sup>42</sup> In addition, the Court’s resolution left it rather uncertain what, precisely, “substantial nexus” would require in any other circumstance, including any other form of tax.<sup>43</sup>

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<sup>36</sup> *Quill Corp. v. North Dakota*, 504 U.S. 298, 311, 315 (1992). I describe the *Quill* holding carefully, because, as we will see momentarily, it is unclear to what extent it has any significance outside the context of sales and use taxes.

<sup>37</sup> *Id.* at 307.

<sup>38</sup> *Id.* at 312-13.

<sup>39</sup> *Id.* at 313.

<sup>40</sup> *Id.* at 313 & n.6. For a summary of empirical studies of the welfare effects of growing tax regime disparities, see Bartley Hildreth et al., *Cooperation or Competition: The Multistate Tax Commission and State Corporate Tax Uniformity*, 38 STATE TAX NOTES 827, [836--38] (2005). The authors conclude that the available evidence shows measurable but rather modest costs associated with the existing, pre-SSUTA, arrangements. *Id.* As Daniel Shaviro notes, however, these types of estimates for the most part fail to include additional social costs, such as tax planning, litigation, and lobbying. Daniel Shaviro, *An Economic and Political Look at Federalism in Taxation*, 90 MICH. L. REV. 895, 920 (1992).

<sup>41</sup> *Quill*, 504 U.S. at 313-14 (quoting *Nat’l Bellas Hess, Inc. v. Dep’t of Rev.*, 386 U.S. 753 (1967)).

<sup>42</sup> See McClure & Hellerstein, *supra* note 64, at [6]; Shaviro, *supra* note 86, at 286; MTC, *supra* note 20, at [6].

<sup>43</sup> Houghton & Hellerstein, *supra* note 13, at 28; John A. Swain, *State Income Tax Jurisdiction: A Jurisprudential and Policy Perspective*, 45 WILLIAM & MARY L. REV. 1 (2003).

The explicit shift, however, to a pure Commerce Clause rationale had its own important implications. As the Court repeatedly emphasized, Congress has the power to overrule its dormant Commerce Clause determinations. Indeed, the Court all but handed Congress an invitation, explaining that it was overruling any earlier implication that the Due Process Clause might stand in Congress' way, and concluding, "Congress is now free to decide whether, when, and to what extent the States may burden interstate mail-order concerns with a duty to collect use taxes."<sup>44</sup>

### **B. The States Respond: The SSUTA**

Thus, although *Quill* was technically a loss for the States, the opinion did offer local taxing authorities a potential path to jurisdiction over out-of-state sellers. Over the ensuing decade-plus, the States developed a two-pronged strategy to realize the opportunity the Court had offered them. First, the States crafted a compact, known as the Streamlined Sales and Use Tax Agreement, in which they sought to harmonize much of what had grown disparate.<sup>45</sup> And, critically, they sought congressional authorization, under the Commerce Clause, to require sellers to collect their sales and use taxes.<sup>46</sup>

The structure and history of the SSUTA are described thoroughly elsewhere,<sup>47</sup> so I will mention here only a few brief highlights. The Agreement is a voluntary compact among the member states.<sup>48</sup> Membership is contingent on approval from existing members.<sup>49</sup> Approval is formally granted through the principle governing entity of the

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<sup>44</sup> *Quill*, 504 U.S. at 317-18; see *id.* at 320 (Scalia, J., concurring); *id.* at 333 (White, J., concurring).

<sup>45</sup> See Swain & Hellerstein, *supra* note 23, at 609--10.

<sup>46</sup> HELLERSTEIN & SWAIN, *supra* note 22, at 10-1 to 10-2.

<sup>47</sup> Walter Hellerstein and John Swain, in fact, already have prepared a brief treatise describing the SSUTA. HELLERSTEIN & SWAIN, *supra* note 22.

<sup>48</sup> *Id.* at 3-2 to 3-3.

<sup>49</sup> SSUTA § 801.

Agreement, known as, logically enough, the Governing Board.<sup>50</sup> I discuss details of the Board's composition in considerable length over the next two Parts.

Substantively, the Agreement obliges would-be member states to enact a variety of amendments to their own statutes or constitutions.<sup>51</sup> Perhaps most significantly, the Agreement sets out a "library" of putatively uniform definitions for all of the myriad of items that could be subject to sales tax.<sup>52</sup> States must then establish a tax "matrix," in which they can check off which of these library items they will tax.<sup>53</sup> The states cannot impose a tax on any item that would also be covered by a library definition unless it uses the library definition of that item.<sup>54</sup> States can have only a select number of tax rates, including rates imposed by sub-state entities such as cities or counties.<sup>55</sup> Further, the states must adopt uniform administrative procedures, also set out in the Agreement.<sup>56</sup> The Board will contract with software developers to produce easy-to-use computer software to incorporate all of the choices and rates set out by each state and locality, thereby (it is hoped) allowing any out-of-state merchant to comply easily with the tax rules of every jurisdiction.<sup>57</sup>

The Agreement has no formal legal status. That is, there is no SSUTA equivalent of the Supremacy Clause. Just as with other model codes, once states have enacted their mirror provisions into law, those provisions simply become part of each jurisdiction's

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<sup>50</sup> *Id.*

<sup>51</sup> HELLERSTEIN & SWAIN, *supra* note 22, at 3-3.

<sup>52</sup> SSUTA §§ 302, 316; SSUTA App. C.

<sup>53</sup> HELLERSTEIN & SWAIN, *supra* note 22, at 7-12.

<sup>54</sup> *Id.* at 304.

<sup>55</sup> SSUTA § 308.

<sup>56</sup> *E.g.*, SSUTA §§ 317--20, 322, 324, 401--04. Each state also can only have one auditing authority. *Id.* § 301.

<sup>57</sup> HELLERSTEIN & SWAIN, *supra* note 22, at 7-25 to 7-30.

statutory or constitutional scheme.<sup>58</sup> In order to obtain membership, however, a new member state must show “substantial compliance” with the existing Agreement,<sup>59</sup> and the Governing Board has power to sanction, by three-quarters vote, any existing member who goes out of “substantial compliance.”<sup>60</sup> Again, I discuss this mechanism in more detail in a bit.

Finally for now, the plan of the Agreement is that it will later be complemented by federal legislation. Several such bills have been proposed over the past several terms of Congress, although none has yet passed.<sup>61</sup> In the main, the federal legislation would largely overrule *Quill*, granting SSUTA member states jurisdiction to impose tax collection obligations on sellers regardless of their “nexus” with the taxing state.<sup>62</sup> Various iterations of the legislation have also added some wrinkles to the structure of the agreement, such as a provision for federal judicial review of Board decisions.<sup>63</sup>

## II. The Political Economy of Tax Chaos

In order to appraise whether the SSUTA is likely to succeed or fail in its goal of nationwide uniformity, we first have to understand the forces that produced disuniformity. In one sense, the diversity of state and local sales tax rules is by design. The Constitution largely preserved state autonomy to tax, albeit often subject to Congressional oversight.<sup>64</sup> There are good, and familiar, policy reasons for that decision.

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<sup>58</sup> See HELLERSTEIN & SWAIN, *supra* note 22, at 3-2 to 3-3; Isaacson, *supra* note 20, at [10].

<sup>59</sup> SSUTA § 801.

<sup>60</sup> SSUTA §§ 805, 809.

<sup>61</sup> Streamlined Sales Tax Simplification Act, S.2153, 109th Cong., 2d Sess. (2005); Streamlined Sales and Use Tax Act, S.1736, 108th Cong., 1st Sess. (2003); Streamlined Sales and Use Tax Act, H.R. 3184, 108th Cong., 1st Sess. (2003); Internet Tax Moratorium and Equity Act, S.512, 107th Cong., 1st Sess. (2001).

<sup>62</sup> See McClure & Hellerstein, *supra* note 64, at [10] (summarizing proposed legislation).

<sup>63</sup> E.g., Streamlined Sales Tax Simplification Act, S.2153 § 5(b), 109th Cong., 2d Sess. (2005); Streamlined Sales and Use Tax Act, S.1736 §5(b), 108th Cong., 1st Sess. (2003).

<sup>64</sup> See Charles E. McClure & Walter Hellerstein, *Congressional Intervention in State Taxation: A Normative Analysis of Three Proposals*, 2004 STATE TAX TODAY 40-3, at [3].



Different states will have different distributions of needs and resources, so that the most efficient tax base may vary by region.<sup>65</sup> Tax and spending decisions often are reflections of an underlying notion of distributive justice.<sup>66</sup> In a federal system in which citizens are fairly mobile and local government reasonably democratic, we can likely best enable everyone to live under a close approximation of their own ideal of justice if we allow sub-national units to make policy, including tax policy, based on discrete notions of justice.<sup>67</sup> In that way, citizens can shop for the model that best fits their preferences.

Even if we think norms of justice are or ought to be relatively uniform nationwide, tax federalism has experimental benefits. It is worth describing these in some detail, because their significance is largely overlooked in *Quill*. In the so-called “Tiebout” model of inter-state competition, parallel state efforts to reach similar policy goals put competitive pressure on states to do the best job, so as to retain citizens and attract capital.<sup>68</sup> Entrepreneurial politicians can win rewards by eliminating inefficiencies

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<sup>65</sup> For example, if our goal is to maximize total utility across a community, we can produce more utility by taxing more heavily those whose utility curve is more inelastic relative to income and transferring those resources to those whose curves are more elastic. See Richard A. Musgrave & Peggy B. Musgrave, *Public Finance in Theory and Practice* 277--95 (5th ed. 1989). It is possible that utility curves are more consistent, or are more measurable, by region rather than nationally.

<sup>66</sup> See, e.g., Michael J. Graetz & Alvin C. Warren, Jr., *Income Tax Discrimination and the Political and Economic Integration of Europe*, 115 *Yale L.J.* 1186, 1231 (2006).

<sup>67</sup> See Calvin Massey, *Federalism and the Rehnquist Court*, 53 *HASTINGS L.J.* 431, 444--47 (2002); Michael W. McConnell, *Federalism: Evaluating the Founders' Design*, 54 *U. CHI. L. REV.* 1484, 1497-98 (1987).

<sup>68</sup> ADVISORY COMM'N ON INTERGOVERNMENTAL RELATIONS, INTERJURISDICTIONAL TAX AND POLICY COMPETITION: GOOD OR BAD FOR THE FEDERAL SYSTEM? 60--63 (1991); WILLIAM A. FISCHER, THE HOMEVOTER HYPOTHESIS: HOW HOME VALUES INFLUENCE LOCAL GOVERNMENT TAXATION, SCHOOL FINANCE, AND LAND USE POLICIES ix (2001); Abraham Bell & Gideon Parchomovsky, *Of Property & Federalism*, in *PERSPECTIVES ON PUBLIC CHOICE* 73, 83--85 (Dennis C. Mueller ed., 1997). The theory originates with CHARLES M. TIEBOUT, A PURE THEORY OF LOCAL EXPENDITURES, 64 *J. Pol. Econ.* 416 (1956), and there is a voluminous literature criticizing, defending, and applying it. Among other criticisms, later commentators complain that the model assumes, probably counter-factually, that there are enough different “bundles” of government services that an individual’s choice to live or invest in any one jurisdiction reveals his or her preference about only a single policy choice in the bundle. E.g., Susan Rose-Ackerman, *Tiebout Models and the Competitive Ideal: An Essay on the Political Economy of Local Government*, in 1 *PERSPECTIVES ON LOCAL PUBLIC FINANCE AND PUBLIC POLICY* 23, 28 (ed. 1983).

or borrowing best practices from elsewhere.<sup>69</sup> By attracting capital and retaining productive tax-payers, the politicians are able to deliver more services, thereby making voters happy and ensuring re-election or election to higher office.<sup>70</sup> Even in a system in which taxpayer mobility is fairly limited, there can still be competitive pressures. For example, high-earning taxpayers could merely *threaten* to exit in order to extract rents, leaving local politicians in the position of having either to pay, and reduce the quality of services delivered to everyone else, or refuse to pay, and face the chance of a strong negative signal (exit by the most successful) to their constituents.<sup>71</sup> In order to avoid that position, the politician must make certain that her jurisdiction is so obviously better than the alternatives that threats to leave are not credible. Again, then, in theory state diversity can lead to efficiency gains for the whole system.<sup>72</sup>

Of course, there is such a thing as too much of a good thing. We expect diversity and experimentation to converge on more uniform best practices, as states copy the

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Another critique objects that individuals, and some capital, are not mobile enough to produce competitive pressures, an argument I discuss briefly in the main text. Shaviro, *supra* note 40, at 907, 964. There also are a number of potential vices associated with competition, which it is not my intention to dwell on extensively here. But, among other claims, competition in a system in which some governments have unequal resources may distort the market for good government. See Richard Briffault, *Our Localism, Part II--Localism and Legal Theory*, 90 COLUM. L. REV. 346, 349--352, 415 (1990).

<sup>69</sup> William W. Bratton & Joseph A. McCahery, *The New Economics of Jurisdictional Competition: Devolutionary Federalism in a Second-Best World*, 86 GEO. L.J. 201, 208--09 (1997).

<sup>70</sup> PAUL E. PETERSON, *THE PRICE OF FEDERALISM* 17--18, 25 (1995).

<sup>71</sup> Timothy Beasley & Anne Case, *Incumbent Behavior: Vote-Seeking, Tax-Setting, and Yardstick Competition*, 85 Am. Econ. Rev. 30--31 (1995); Bratton & McCahery, *supra* note 69, at 264-65.

<sup>72</sup> There is a spirited debate among economists concerning whether federalism in fact results in more efficient delivery of government services, particularly those that redistribute resources. Economists who believe that local services are inefficient argue that the benefits of competition and experimentation are outweighed by deadweight losses that result from the costs taxpayers incur in researching competing jurisdictions and relocating. For summaries by some of the primary combatants, see Wallace E. Oates, *Fiscal Competition and European Union: Contrasting Perspectives*, 31 REGIONAL SCI. & URB. ECON. 133--45 (2001); John Douglas Wilson & David E. Wildasin, *Tax Competition: Bane or Boon?*, J. PUB. ECON. (2001), available at < <http://davidwildasin.us/pub/Wilson-Wildasin.pdf>>; George R. Zodrow, *Tax Competition and Tax Coordination in the European Union*, 10 INT'L TAX & PUB. FINANCE 651--71 (2003). I take no particular position in that debate here. However, I do argue later that the possibility that inter-jurisdictional competition could be beneficial, and the complexity that evidently surrounds any true measure of that benefit, are reasons that we need to design a policy-making structure that is capable of analyzing the question thoroughly and openly.

superior efforts of their competitors.<sup>73</sup> For example, states compete to develop the most attractive sets of tort and contract law, but over time there will be pressure on states to adapt the model that is most effective in drawing in capital and taxpayers.<sup>74</sup> And familiarity is a virtue: it may be more costly to analyze a new set of rules, or to learn to comply with them. As Daniel Shaviro has explained, each new set of tax rules and enforcement procedures creates additional costs for multi-jurisdictional sellers across the nation, some of them simply deadweight losses, so that diversity may lower nationwide wealth, and increase costs for consumers.<sup>75</sup>

So in fact it may be a bit of puzzle why state and local taxation is so disuniform. Shaviro, though, offers a compelling account of the political economy of disuniformity. The key to his analysis is the observation that voters and purely in-state businesses do not fully internalize the benefits of a uniform set of national rules, because the gains of that benefit are distributed nationally.<sup>76</sup> That is, the benefit of a marginal increase in uniformity to the in-state actor is not congruent with the benefit that increase produces for the nation as a whole.<sup>77</sup> Therefore, when weighing the gains of uniformity against disparate policies that benefit only them, local voters won't act in a way that maximizes overall social welfare.

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<sup>73</sup> See WALLACE E. OATES, *FISCAL FEDERALISM* 12 (William J. Baismol ed. 1972); Wallace E. Oates, *Decentralization of the Public Sector: An Overview*, in *DECENTRALIZATION, LOCAL GOVERNMENTS AND MARKETS* 43, 53 (Robert Bennett ed., 1990).

<sup>74</sup> See David A. Rice, *Product Quality Laws and the Economics of Federalism*, 65 B.U. L. REV. 1, 55--58 (1985). Admittedly, "best" practices may turn out to be, from some perspectives, the worst. "Races," as I suspect the reader knows, can be both to the top and to the bottom. See, e.g., *Coll. Sav. Bank v. Fla. Prepaid Postsecondary Educ. Expense Bd.*, 527 U.S. 666, 703 (1999) (Breyer, J., dissenting); Richard P. Revesz, *Rehabilitating Interstate Competition*, 67 N.Y.U. L. Rev. 1210, 1216--17 (1992).

<sup>75</sup> Shaviro, *supra* note 40, at 919--21, 925--26 (1992).

<sup>76</sup> Shaviro, *supra* note 40, at 957--58; see McClure & Hellerstein, *supra* note 64, at [11] (arguing that essential problem SSUTA is designed to confront is that states do not bear cost to vendors of complying with differing tax regimes).

<sup>77</sup> See A.C. PIGOU, *THE ECONOMICS OF WELFARE* 172--83 (1920).

Moreover, as Shaviro also explains, even if each individual voter fully realized the gains of national uniformity, his or her political representatives might not. Public choice theory predicts that government officials respond not only to the number of voters who prefer an outcome but also to the intensity of their expressed preference.<sup>78</sup> Where the gains or harms of a problem are spread widely and thinly, each affected individual is unlikely to recognize the problem, inclined to assume that someone else will be motivated to solve it, and, even if aware of and motivated by the issue, may find it difficult to find others who feel similarly with whom to form a coalition.<sup>79</sup> Since the costs of disuniform or unpredictable laws are spread widely and thinly, neither uniformity nor reasoned consistency are apt to generate intense voter interest.<sup>80</sup> Thus, the beneficiaries of uniformity often lose out to those who can realize greater gains from the disparate set of rules.

Although Shaviro does not fully flesh out how this analysis plays out in the specific context of sales and use taxes, it is not difficult to construct scenarios in which differing local rules could disproportionately benefit a local constituency.<sup>81</sup> One involves preserving “home-field advantage,” as it were. Let’s consider Jurisdiction A. Existing merchants in A would certainly benefit from the opportunity to sell in neighboring B and C without having to study and adapt to new rules. But the merchants in A want B and C to change to the A rules, not the other way around. They are already expert in the A rules, while new competitors will have to adapt; the A merchants may already have

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<sup>78</sup> George J. Stigler, *The Theory of Economic Regulation*, 2 BELL J. ECON. & MGMT. SCI. 3 (1971), reprinted in ADMINISTRATIVE LAW ANTHOLOGY 399, 402 (Thomas O. Sargentich ed., 1994).

<sup>79</sup> See Olson, *supra* note 3, at 11--16, 21--22, 31, 35, 46--48.

<sup>80</sup> Shaviro, *supra* note 40, at 931--32.

<sup>81</sup> Shaviro does mention in passing the possibility of “inducing state tax competition to provide investment incentives,” Shaviro, *supra* note 40, at 958, which could presumably include exemptions from sales tax.

designed their existing business processes to maximize profits under A's rules; and the A rules may represent the long-term efforts of A merchants to extract favorable rules from A politicians.<sup>82</sup> Further, the A rules might be explicitly protectionist, in that they may be designed to favor the A merchant manner of doing business over others. For many A businesses, losing all of these benefits is likely much more costly to A merchants than gaining access to other markets. At the same time, A politicians may be perfectly happy that disuniformities make it harder to move from jurisdiction to jurisdiction, because that helps to lock in A businesses, insulating the politicians from the danger that valuable business will flee elsewhere or demand more hold-ups.

Relatedly, state tax bases might change frequently in order to maximize opportunities for tax exporting. All else being equal, we would expect state actors to try to shift the burden of paying for their government services onto others.<sup>83</sup> It is not surprising that Delaware is funded heavily by corporate registration fees and tolls at the Delaware Memorial Bridge, or that Florida employs hotel and sales taxes instead of an income tax.<sup>84</sup> Assuming the tactics I mentioned in the last paragraph are not perfectly

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<sup>82</sup> Cf. Jonathan R. Macey, *Federal Deference to Local Regulators and the Economic Theory of Regulation: Toward a Public-Choice Explanation of Federalism*, 76 VA. L. REV. 265, 278--79 (1990) (explaining how interest groups develop stakes in legal status quo favoring the jurisdiction in which they are expert).

<sup>83</sup> See Ernest Brown, *The Open Economy: Justice Frankfurter and the Position of the Judiciary*, 67 YALE L.J. 219, 228--33 (1957); Jesse H. Choper & Tung Yin, *State Taxation and the Dormant Commerce Clause: The Object-Measure Approach*, 1998 SUP. CT. REV. 193, 227; Donald H. Regan, *The Supreme Court and State Protectionism: Making Sense of the Dormant Commerce Clause*, 84 MICH. L. REV. 1091, 1191 (1986); Shaviro, *supra* note 40, at 910.

<sup>84</sup> See Federation of Tax Administrators, 2005 State Tax Collection by Source, available at <<http://www.taxadmin.org/fta/rate/05taxdis.html>>; Jacques LeBoeuf, *The Economics of Federalism and the Proper Scope of the Federal Commerce Power*, 31 SAN DIEGO L. REV. 555, 572--73 (1994). For more detailed Delaware fiscal data, see State of Delaware, Government Information Center, Ch. 7, available at <<http://gic.delaware.gov/lwv/body/dgbody-09.shtml>>; Delaware Department of Transportation Public Relations, Delaware Transportation Facts 60--61 (2004), available at <[http://www.deldot.gov/static/pubs\\_forms/trans\\_facts/factbook\\_2004.pdf](http://www.deldot.gov/static/pubs_forms/trans_facts/factbook_2004.pdf)>. For Florida information, see State of Florida, Florida Tax Guide, available at <<http://www.stateofflorida.com/Portal/DesktopDefault.aspx?tabid=29>>.

successful in preventing business and labor from migrating and developing,<sup>85</sup> state legislatures might rationally shift bases in order to maximize the extent to which the state can impose a heavier burden on out-of-state actors.<sup>86</sup> Alternately, as Shaviro also suggests, even the illusion of successful exporting may win political rewards for state politicians.<sup>87</sup>

On the other hand, in the specific context of sales and use taxes we can in fact identify a discrete group that is heavily impacted by disuniformity: large out-of-state remote sellers, such as catalog companies and internet retailers, the Land's Ends and Amazons of the world. The problem these entities face is that, assuming they can find something other than votes that might be of value to legislators (cough, cough), they still face the immense challenges of monitoring and lobbying in thousands of jurisdictions simultaneously. The conventional solution for groups in that position in the United States has been to seek pre-emptive federal legislation, so that battles need be fought only in a single arena.<sup>88</sup> Here the powerful tradition of (and, arguably, constitutional entitlement to) state tax autonomy may have been an insuperable barrier to that strategy.

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<sup>85</sup> If businesses can easily relocate, tax exporting is unlikely to work because the out-of-state business will simply move to avoid efforts to impose tax on it.

<sup>86</sup> See Daniel N. Shaviro, *State and Local Taxation: The Current Judicial Outlook*, 22 CAP. U. L. REV. 279, 282, 288--89 (1993). The Supreme Court's Commerce Clause tax cases, in theory, are supposed to limit state opportunities to discriminate against outsiders. As a practical matter, though, there are many tax rules that are not facially discriminatory, and can pass Commerce Clause scrutiny, but can easily be manipulated to favor the home team. Shaviro, *supra*, at 288--89. The classic example in state taxation is "formulary apportionment," the method by which states determine what portion of a multi-state corporation's revenue should be taxed in each jurisdiction. States are permitted to allocate based purely on the proportion of a corporation's sales in the state, which obviously greatly favors in-state exporters over primarily out-of-state importers. MTC, *supra* note 20, at [11]. In the sales and use tax context, states can simply define their exemptions to leave strong home-town industries lightly taxed. See Hildreth et al., *supra* note 40, at [839]. Other popular strategies include excluding out-of-state manufacturing from a state exemption for purchases intended for use in manufacturing, a practice that has survived some judicial scrutiny.

<sup>87</sup> Shaviro, *supra* note 40, at 956--57.

<sup>88</sup> See Macey, *supra* note 82, at 271--73.

Uniformity in tax rules, therefore, may be something of a tragedy of the commons. In many situations, uniform rules and open borders are utility-maximizing. But each individual jurisdiction, for political and self-serving economic reasons, can exact greater benefits than other participants by deviating a bit from the uniform system. As each jurisdiction pursues that strategy, we end up with mostly deviation and not much uniformity.

### **III. “Neither Streamlined Nor an Agreement...Discuss”**

So the SSUTA, as we saw in Part I, sets up an elaborate structure aimed at bringing uniformity to sales and use taxes. In the last part, we saw the forces arrayed against the SSUTA’s proponents. The question now is whether the Agreement, as it presently is structured, can weather the assault. Thus, in this Part I consider how the institutions set up by the SSUTA are, based on what we know about the performance of public officials, likely to respond to the political-process pressures we saw in Part II. My prediction here is that they, like the state legislators who drafted our many diverse sales tax rules, will bend.

#### **A. Restarting the Clock?**

The central structural challenge for the SSUTA is that it must be enacted, enforced, and interpreted separately in each state. Again, the Agreement functions as a model code; each member state agrees to enact legislation conforming its own code to the definitions and procedures of the SSUTA.<sup>89</sup> The Agreement specifically provides that member states and their officers cannot be sued for failure to conform their law or behavior to the Agreement.<sup>90</sup> Despite an admirable effort on the part of the drafters, the

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<sup>89</sup> SSUTA §1102; *see* Hellerstein & Swain, *supra* note 22, at 3-2.

<sup>90</sup> *Id.* § 1103(B), (C).

SSUTA’s library definitions are not self-interpreting.<sup>91</sup> Even if the terms were so clear as to need no further gloss, there will be facts and circumstances that we can’t now anticipate that will arise, and demand interpretation.<sup>92</sup> Taxpayers will attempt to find nuances of the terms most favorable to their positions. Those controversies will be resolved like all other tax controversies; they will begin with administrative proceedings before state and local tax authorities, and be settled, ultimately, by state courts.<sup>93</sup>

As a result, the SSUTA potentially might merely reset the clock on state taxing disparities. That is, although it restores an initial state in which all jurisdictions have the same set of taxing rules, over time the rules could again diverge widely. The same forces that pulled our 7,500+ taxing jurisdictions<sup>94</sup> apart in the first place may well continue to tug on the agencies and courts to whom the model code is entrusted.

Thus, a critical question for supporters of the SSUTA’s general goals is whether the political-process flaws Professor Shaviro identified as affecting state legislative outcomes would also bend the path of state agency and court decisions. Skeptics have claimed, with little analysis, that the flaws will infect administration of the SSUTA, as well.<sup>95</sup> But different institutions behave differently. Before making any predictions, we have to look closer at the operations of state agencies and state courts.

## **B. How Will State Agencies Perform?**

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<sup>91</sup> See Hellerstein & Swain, *supra* note 22, at 4-5; Isaacson, *supra* note 20, at [10]. For example, the Agreement defines one of its most important terms, “tangible personal property,” simply as “personal property that can be seen, weighed, measured, felt, touched, or that is any other manner perceptible to the senses.” SSUTA Appendix 3, at 87 (Jan. 13, 2006).

<sup>92</sup> Hellerstein & Swain, *supra* note 22, at 4-5, 4-18 to 4-20.

<sup>93</sup> See generally CCH STATE TAX LAW EDITORS, U.S. MASTER STATE TAX PRACTICE AND PROCEDURE GUIDE (4th ed. 2005); 72 Am. Jur. 2d State & Local Taxation (1974).

<sup>94</sup> See Hellerstein & Swain, *supra* note 22, at 1-1 (noting that there now are “more than 7,500 local taxing jurisdictions”).

<sup>95</sup> See Isaacson, *supra* note 20, at [13].



Let us begin by considering the incentives and other factors that are likely to shape the behavior of state revenue officials. By now it is a familiar point that, although not directly elected, bureaucrats may still be sensitive to political considerations by way of legislative or chief executive influence, not to mention the possibility of direct lobbying.<sup>96</sup> Legislatures can control the budget for and procedural rules governing the bureaucrats, and can use these tools not only to shape deliberative processes but also to offer rewards and punishments.<sup>97</sup> For example, many theorists posit that officials are interested in expanding their own power and influence (whether out of self-

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<sup>96</sup> For a large handful of sources among the hundreds to choose from on these points, see Jerry L. Mashaw, *GREED, CHAOS, & GOVERNANCE: USING PUBLIC CHOICE TO IMPROVE PUBLIC LAW* (1997); Bruce Ackerman, *The New Separation of Powers*, 113 HARV. L. REV. 633, 690--92, 699--700 (2000); Kathleen Bawn, *Political Control Versus Expertise: Congressional Choices About Administrative Procedures*, 89 AM. POL. SCI. REV. 62 (1995); Jonathan Bendor & Terry M. Moe, *An Adaptive Model of Bureaucratic Politics*, 79 AM. POL. SCI. REV. 755 (1985); Jonathan Bendor et al., *Bureaucratic Expertise Versus Legislative Authority: A Model of Deception and Monitoring in Budgeting*, 79 AM. POL. SCI. REV. 1041 (1985); Randall L. Calvert et al., *A Theory of Political Control and Agency Discretion*, 33 AM. J. POL. SCI. 588 (1989); Daniel P. Carpenter, *Adaptive Signal Processing, Hierarchy, and Budgetary Control in Federal Regulation*, 90 AM. POL. SCI. REV. 283 (1996); J.R. DeShazo & Jody Freeman, *The Congressional Competition to Control Delegated Power*, 81 TEX. L. REV. 1443 (2003); David Epstein & Sharyn O'Halloran, *A Theory of Strategic Oversight: Congress, Lobbyists, and the Bureaucracy*, 11 J.L. ECON. & ORG. 227 (1995); Thomas H. Hammond & Jack H. Knott, *Who Controls the Bureaucracy? Presidential Power, Congressional Dominance, Legal Constraints, and Bureaucratic Autonomy in a Model of Multi-Institutional Policy-Making*, 12 J. L. ECON. & ORG. 119, 120--25 (1996); Murray J. Horn & Kenneth A. Shepsle, *Commentary on "Administrative Arrangements and the Political Control of Agencies": Administrative Process and Organizational Form as Legislative Responses to Agency Costs*, 75 VA. L. REV. 499 (1989); Jonathan R. Macey, *Organizational Design and Political Control of Administrative Agencies*, 8 J.L. ECON. & ORG. 93 (1992); Mathew D. McCubbins et al., *Administrative Procedures as Instruments of Political Control*, 3 J.L. Econ. & Org. 243 (1987); Mathew D. McCubbins et al., *Structure and Process, Politics and Policy: Administrative Arrangements and the Political Control of Agencies*, 75 VA. L. REV. 431 (1989) [hereinafter McCubbins et al., *Structure and Process*]; Terry M. Moe, *The New Economics of Organization*, 28 AM. J. POL. SCI. 739 (1984); Mark Seidenfeld, *The Psychology of Accountability and Political Review of Agency Rules*, 51 DUKE L.J. 1059 (2001); David B. Spence, *Managing Delegation Ex Ante: Using Law To Steer Administrative Agencies*, 28 J. LEGAL STUD. 413 (1999); Craig Volden, *Delegating Power to Bureaucracies: Evidence From the States*, 18 J.L. ECON. & ORG. 187 (2002); Barry R. Weingast, *The Congressional-Bureaucratic System: A Principal Agent Perspective (With Applications to the SEC)*, 44 PUB. CHOICE 147 (1984); Barry R. Weingast & Mark J. Moran, *Bureaucratic Discretion or Congressional Control? Regulatory Policymaking by the Federal Trade Commission*, 91 J. POL. ECON. 765 (1983). My account of this vast literature here is necessarily much simplified. Among the many influences that may shape bureaucratic outcomes, I here develop only those I see most likely to affect administration of the SSUTA. My hope is that I have identified the most significant factors in that question, but only observations of the SSUTA in action can tell us for certain.

<sup>97</sup> See Lindsay, *A Theory of Government Enterprise*, 84 J. Pol. Econ. 1061 (1976); McCubbins et al., *Structure and Process*, *supra* note 96, at 434, 440--44.

aggrandizement or a belief in their mission), and that legislatures use this desire to align bureaucratic with legislative incentives.<sup>98</sup> That would tend to lead us to conclude that Shaviro's predictions about state behavior will also extend to state administration of the SSUTA's terms.

On the other hand, the literature also suggests that there rarely is a complete match between legislative (or even legislative and chief executive) and bureaucratic goals.<sup>99</sup> Some agency personnel may be difficult to monitor, and political actors' available sanctions may be more costly to the political actor than to the bureaucrat.<sup>100</sup> Thus, for instance, some argue that agency personnel have a stronger institutional interest in preserving the long-term financial stability of the state government than their political superiors, because they need not balance the need to obtain funds against voter antipathy to taxes, and their time horizons in their jobs are much longer.<sup>101</sup>

Even so, any bureaucratic preference for healthy revenues over the long term is still likely, as with the factors Shaviro identified, to favor local taxpayers over out-of-state interests. True, free-trade theory predicts that shifting the locality's tax burden to foreign payers will reduce tax revenues for everyone, by degrading the efficiency of the market.<sup>102</sup> But that is a very long-term effect,<sup>103</sup> and likely to be considerably

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<sup>98</sup> E.g., GORDON TULLOCK, *THE POLITICS OF BUREAUCRACY* 134--36, 167--70 (1965); Peter H. Aranson et al., *A Theory of Legislative Delegation*, 68 CORNELL L. REV. 1, 38, 47--48 (1982).

<sup>99</sup> See, e.g., David Schoenbrod, *Separation of Powers and the Powers that Be: The Constitutional Purposes of the Delegation Doctrine*, 36 AM. U. L. REV. 355, 386--87 (1987); Peter L. Strauss, *The Place of Agencies in Government: Separation of Powers and the Fourth Branch*, 84 COLUM. L. REV. 573, 583--95 (1984).

<sup>100</sup> See I RICHARD C. PIERCE, *ADMINISTRATIVE LAW TREATISE*, § 7.9, at 356--57 (4th ed. 2002); Matthew Diller, *The Revolution in Welfare Administration: Rules, Discretion, and Entrepreneurial Government*, 75 N.Y.U. L. REV. 1121, 1208 (2000).

<sup>101</sup> See Mark Seidenfeld, *A Civic Republican Justification for the Bureaucratic State*, 105 HARV. L. REV. 1511, 1554--55 (1992).

<sup>102</sup> LORTIE, *ECONOMIC INTEGRATION AND THE LAW OF GATT* 2 (1975); J. VINER, *THE CUSTOMS UNION* ISSUE 41-56 (1950). I focus here on the effects on the tax base because our working hypothesis is that state officers may be motivated largely by a desire to expand available revenue. Tax exporting, and other locational inefficiencies, create other, larger losses of societal welfare generally. Shaviro, *supra* note 40, at

outweighed in the middle term by the possibility of raising rates on a constituency that has little political influence. However long the agency time horizon, its members are likely to discount (both rationally and, to some extent, irrationally) the cost of losses in the distant future.<sup>104</sup> And in some cases it is likely that immediate rents, plus interest, will exceed the cost to the state treasury of any inefficiencies.

Other state revenue agency influences also tend to favor in-state actors. For example, administrative scholars generally predict that agencies will often be heavily influenced by the entities they regulate.<sup>105</sup> Part of that influence arises from the fact that the regulated entities have knowledge and experience that the agency needs to do its job well; another part is familiarity; and a significant portion is the possibility of payoffs in some form to the regulators.<sup>106</sup> Local taxpayers can employ all these tools more effectively than their rivals. They will have more knowledge about local conditions, will do business more regularly with their in-state revenue agency than the foreign taxpayer, and will be more likely to be able to intervene with political supervisors, or offer enticing future employment, than the out-of-towners.

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898--901. Although such losses no doubt affect state revenue officers to some degree, the extent to which they internalize this harm may reflect only a small fraction of its harm to society.

<sup>103</sup> LORTIE, *supra* note 102, at 2.

<sup>104</sup> See Eyal Benvenisti, *Exit and Voice in the Age of Globalization*, 98 MICH. L. REV. 167, 199 (1999); Daniel A. Farber, *From Here to Eternity: Environmental Law and Future Generations*, 2003 U. ILL. L. REV. 289, 294--301; Dan Kahneman & Amos Tversky, *Prospect Theory: An Analysis of Decision Under Risk*, 47 ECONOMETRICA 263, 265--66 (1979); Clayton P. Gillette, *Plebiscites, Participation, and Collective Action in Local Government Law*, 86 MICH. L. REV. 930, 971--73 (1988); Clayton P. Gillette & James E. Krier, *Risk, Courts, and Agencies*, 138 U. PA. L. REV. 1027, 1039--41 (1990); *cf.* Aranson et al., *A Theory of Legislative Delegation*, 68 CORNELL L. REV. 1, 31 (1982) (predicting that elected officials will tend to respond more to issues with "immediate impact").

<sup>105</sup> *E.g.*, Thomas W. Merrill, *Capture Theory & the Courts: 1967-1983*, 72 CHI.-KENT L. REV. 1039, 1050--51 (1997); Richard A. Posner, *Theories of Economic Regulation*, 5 BELL J. ECON. & MGMT. SCI. 335, 335 (1974).

<sup>106</sup> See David B. Spence & Frank Cross, *A Public Choice Case for the Administrative State*, 89 GEO. L.J. 97, 114 (2000); Richard B. Stewart, *The Reformation of American Administrative Law*, 88 HARV. L. REV. 1669, 1686 (1975).

At the same time, there is also a thread in the theoretical literature on agency behavior suggesting that bureaucrats respond not purely to incentives but also to their own sense of institutional ideology or mission.<sup>107</sup> More recent developments in the psychology of public officials offers a causal explanation for the power of an individual's sense of mission, or "role-norm." Both the individual and society may expect certain kinds of behavior from persons who hold that individual's office, and the individual may experience shame, embarrassment, fear of lost identity and social status, or cognitive dissonance -- all powerful internal forces -- when she deviates from those expectations.<sup>108</sup> Thus, the bureaucrat's perception of social expectations, and internalization of them, can lead her to resist entreaties to heed other political forces.<sup>109</sup>

It isn't clear how the influence of institutional norms would likely cut for administration of codified SSUTA provisions. Even if there were a norm that state public servants should regulate in the "public interest," it seems very doubtful that there would be a clear norm that the public to be served is the nation rather than the state. There seems no apparent reason why the existence of the SSUTA, standing alone, would lead to a norm of national welfare-maximization. It is true that laws, as a source of expectations

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<sup>107</sup> E.g., STEPHEN KELMAN, MAKING PUBLIC POLICY 244--45 (James Q. Wilson ed., 1987); RICHARD H. LEACH & REDDING S. SUGG, JR., THE ADMINISTRATION OF INTERSTATE COMPACTS 213 (1959); Freeman, *supra* note 8, at 562, 570; Edward L. Rubin, *Getting Past Democracy*, 149 U. PA. L. REV. 711, 767 (2001); Amartya K. Sen, *Rational Fools: A Critique of the Behavioral Foundations of Economic Theory*, 6 PHIL. & PUB. AFF. 317 (1977); Mark Tushnet, *Non-Judicial Review*, 40 HARV. J. ON LEG. 453, 455 (2003).

<sup>108</sup> See JON ELSTER, THE CEMENT OF SOCIETY: A STUDY OF SOCIAL ORDER 131 (1989); BERNARD GUERIN, SOCIAL FACILITATION 164 (1993); GABRIELE TAYLOR, PRIDE, SHAME, AND GUILT: EMOTIONS OF SELF-ASSESSMENT 57--68 (1985); Robert Cooter, *Expressive Law and Economics*, 27 J. LEGAL STUD. 585, 585-86 (1998); Robert C. Ellickson, *Law and Economics Discovers Social Norms*, 27 J. LEGAL STUD. 537, 539-40 (1998); Dan M. Kahan, *Social Influence, Social Meaning, and Deterrence*, 83 VA. L. REV. 349, 354-58 (1997); Russell B. Korobkin & Thomas S. Ulen, *Law and Behavioral Science: Removing the Rationality Assumption from Law and Economics*, 88 CAL. L. REV. 1051, 1130 (2000); Richard H. McAdams, *The Origin, Development, and Regulation of Norms*, 96 MICH. L. REV. 338, 355-66 (1997); Mark C. Suchman & Lauren B. Edelman, *Legal Rational Myths: The New Institutionalism and the Law and Society Tradition*, 21 LAW & SOC. INQUIRY 903, 915 (1996).

<sup>109</sup> See Suchman & Edelman, *supra* note 108, at 919.

about how we will behave, how it is “right” or “wrong” to behave, and perhaps as an heuristic for how we believe other people are behaving, probably can significantly shape norms.<sup>110</sup> The SSUTA, though, on its face is only a collection of definitions and procedural rules. If it announces a new norm of national tax harmonization, it does so only very subtly. But perhaps Congressional approval, and state ratifications, might contain or be accompanied by powerful and public dedications of commitment to national unity, which might be of some help. And yet, as I have argued elsewhere, norms of commitment to higher principles may dissolve under the pressure of cynicism about the behavior of public officials.<sup>111</sup> Here, for instance, as citizens and officials in State A see that State B is “cheating,” the expectations for State A officials might quickly diminish. Developing a strong nationwide norm among state officials could, as a result, be very difficult, because any cracks in the wall might quickly spread.

In short, without a strong tool for ensuring nationwide compliance, it seems unlikely that we will see national uniformity develop spontaneously from the behavior of state-level administrators.

### **C. The Performance of State Courts**

The state judiciary may be unlikely to do much better. As other commentators have observed, state courts have their own structural features that can tend to make them inclined to favor local interests over national, or at least non-local, goods.<sup>112</sup> The vast

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<sup>110</sup> See Robert Cooter, *Do Good Laws Make Good Citizens? An Economic Analysis of Internalized Norms*, 86 VA. L. REV. 1577, 1581, 1596--1600 (2000); Jackson, *supra* note 2, at 2222; Richard H. McAdams, *The Origin, Development, and Regulation of Norms*, 96 MICH. L. REV. 338, 347 (1997).

<sup>111</sup> Brian Galle, *The Justice of Administration: Judicial Responses to Executive Claims of Independent Authority to Interpret the Constitution*, 33 FLA. ST. UNIV. L. REV. 157, 176--78 (2005).

<sup>112</sup> Neal Miller, *An Empirical Study of Forum Choices in Removal Cases Under Diversity and Federal Question Jurisdiction*, 41 AM. U. L. REV. 369, 372--75 (1992); Burt Neuborne, *The Myth of Parity*, 90 HARV. L. REV. 1105, 1124-27 (1977). For a similar view in the tax context, see, e.g., William J. Quirk &

majority of state courts are elected, and many state judges depend either on campaign contributions or intensely motivated grassroots support to win elections.<sup>113</sup> State judges may, like administrators, prefer empire-building; that is, they would rather make their own doctrine than have to follow a set of rules set out by someone else.<sup>114</sup> They then can more clearly take credit for the results, especially if the result favors their constituency. And there is basically no federal jurisdiction to entertain challenges to any aspect of a state tax system, assuming the state provides its own forum.<sup>115</sup>

There are, however, some defenders of state courts, including the U.S. Supreme Court. These defenders often insist that state courts are, or at least must be presumed to be, equally as committed as federal courts to the defense of federal rights.<sup>116</sup> Although they do not generally develop a strong explanation for that assertion, they often claim that state judges are at least as “conscientious” or “principled” as federal judges.<sup>117</sup> In other words, the claim of state and federal judicial equivalency is a claim about the common institutional ideology or role-norm of judges. I agree that the process of internalization of rule-of-law norms is largely what we think makes courts act like courts: judges have an ideological or deep psychological commitment to behaving in the way we expect judges

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C. Rhett Shaver, *Does Congress Put Federalism at Risk When It Limits the States' Power to Tax?*, 21 STATE TAX NOTES 649, 649 (2001).

<sup>113</sup> Steven P. Croley, *The Majoritarian Difficulty: Elective Judiciaries and the Rule of Law*, 62 U. CHI. L. REV. 689, 725 (1995).

<sup>114</sup> Cf. Graetz & Warren, *supra* note 66, at 1234 (noting that European supreme courts have refused to send legal questions to European Court of Justice despite treaty obligations to do so); Daryl Levinson, *Empire-Building Government in Constitutional Law*, 118 HARV. L. REV. 915, 960--64 (2005) (analyzing possible “empire-building” tendencies of federal judges).

<sup>115</sup> JEROME R. HELLERSTEIN & WALTER HELLERSTEIN, STATE AND LOCAL TAXATION 1062 (7th ed. 2001) (citing *Cal. v. Grace Brethren Church*, 457 U.S. 393, 411 (1982)).

<sup>116</sup> E.g., *California v. Grace Brethren Church*, 457 U.S. 393, 417 & n.32 (1982); Paul M. Bator, *The State Court and Federal Constitutional Litigation*, 22 WM. & MARY L. REV. 605 (1981); Paul M. Bator, *Finality in Criminal Law and Federal Habeas Corpus for State Prisoners*, 76 HARV. L. REV. 441, 509--11 (1963) [hereinafter Bator, *Finality*].

<sup>117</sup> E.g., Bator, *Finality*, *supra* note 116, at 510--11.

to behave.<sup>118</sup> The Supreme Court, I have argued, has labored to control inferior courts by setting out (largely informally) a code of behavior for judges, an “institutional ideology” of principled behavior it expects judges to follow.<sup>119</sup> We could see the Court’s frequent pronouncements that “[s]tate courts, like federal courts, have a constitutional obligation to safeguard personal liberties and to uphold federal law”<sup>120</sup> as part of its more general project to encourage a norm of obedience to precedent among its lower courts.

Even if this project is effective, it does not particularly help to maintain sales and use tax uniformity. Once *Quill* is displaced by the SSUTA, there will be few federal-law constraints on the content of state law. As a result, even a very strong norm that state judges must set federal law above local interests will do little to maintain consistency between jurisdictions, unless there is something in the SSUTA itself that requires that. To the extent that the judicial institutional norm is not simply “follow federal law,” but “set national interests above local interests,” it is unclear how much work such a norm can do in resisting local diversification. Remember, again, that diversity can also be a national good. It will be very unclear, viewed from the perspective of a single local tax controversy, whether the additional diversity that would result from a non-uniform decision is a useful experiment or a destructive deviation. Even a very principled nationalist court will often be at a loss as to how national interests should cut in any given sales tax dispute. And, again, state courts may be demoralized by failures of others who in theory are supposed to comply with the same set of national-interest norms.

#### **D. The Risk of Sanctions as Reform**

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<sup>118</sup> Galle, Justice of Administration, *supra* note , at 177--78, 202--08.

<sup>119</sup> *Id.* at 202--09.

<sup>120</sup> *Stone v. Powell*, 428 U.S. 465, 493 n.35 (1976).

The SSUTA does, however, offer a pair of mechanisms apparently aimed at containing these problems, although both have their own vulnerable points. First, under Article IX of the Agreement, states or other persons or entities can petition the Governing Board to issue a definition, or refine a definition, of any disputed term.<sup>121</sup> In addition, the Board has the power to find that a member state is not “substantially compliant” with the Agreement, and to impose an appropriate sanction.<sup>122</sup>

The difficulty for Article IX is that, again, states and their interpreters are not bound by the Board’s determinations. States are not obliged to codify new interpretations under Article IX.<sup>123</sup> Nor need state courts or administrators agree with the views of the Board. This is not to say that Article IX opinions will be useless, but much may depend on the form and quality of Governing Board decision making. Obviously a well-reasoned, persuasive, and objective opinion will be more likely to induce state courts to follow it, if for no other reason than that the rhetorical burden on a dissenting court to articulate an opposing view will be correspondingly high.<sup>124</sup>

On a more fundamental level, a highly “principled” Board will likely be far more effective than one that is ruled simply by competing political impulses.<sup>125</sup> Suppose again that state courts, perhaps even state taxing authorities, are similarly principled, at least to a fair extent. There is a good argument that the Board’s judgments will be more

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<sup>121</sup> SSUTA § 903.

<sup>122</sup> SSUTA §§ 805, 809, 1002. The SSUTA’s sanction provision recognizes what is probably a basic fact of economic life: if states act in their own self-interest, and have opportunities to capture rents by defecting from an agreement, they probably will do so unless there is a counter-balancing incentive. *See* Hildreth et al., *supra* note 40, at [841].

<sup>123</sup> *See* HELLERSTEIN & SWAIN, *supra* note 22, at 4-5.

<sup>124</sup> *See* Larry Alexander & Lawrence B. Solum, *Popular? Constitutionalism?*, 118 HARV. L. REV. 1594, 1627--28 (2005) (reviewing LARRY KRAMER, *THE PEOPLE THEMSELVES: POPULAR CONSTITUTIONALISM AND JUDICIAL REVIEW* (2004)); Robert Weisberg, *The Calabresian Judicial Artist: Statutes and the New Legal Process*, 35 STAN. L. REV. 213, 240--41, 250--51 (1983);

<sup>125</sup> By “principled” here I mean the capacity to make decisions based on reasoned elaboration from prevailing authority, constrained by lexical and logical bounds of prior elaborations.



persuasive to such a body if the judgments are recognizably based on the same sorts of considerations that the body itself entertains – are obviously “legal” and not political. The difference is the difference between citing, in a brief, the decision of a sister circuit as persuasive authority and citing the results of a public opinion poll on the same subject. The “principled” court believes, rightly or wrongly, that legal reasoning is what it engages in, and will have to engage much more directly arguments presented in the same mode. A principled approach also makes it easier for state courts to resist local political pressure to reach an outcome different than the Board’s, because it provides the court with the rhetorical claim that it is simply “following the law” rather than enacting the political preferences of an out-of-state majority.<sup>126</sup> We can see something of the same effect in the federal administrative law tendency for courts to find more “persuasive” administrative decisions that remain consistent over time.<sup>127</sup> That rule helps to protect private planning, of course,<sup>128</sup> but it also seems to reflect a judgment that a consistent position across administrations evinces a more principled stand, rather than a convenient political one. In any event, it remains the case that even a highly principled Board with highly principled state courts can at most expect to be highly persuasive, not controlling.

The Board’s persuasiveness will be further constrained by an ambiguity in its fundamental structure. If we look to how courts (federal courts, at least) have treated other institutions’ interpretations of the other institutions’ own judgments, we see two main threads. One thread follows the legislative history paradigm. Courts typically

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<sup>126</sup> See LARRY KRAMER, *THE PEOPLE THEMSELVES: POPULAR CONSTITUTIONALISM AND JUDICIAL REVIEW* 237 (2004).

<sup>127</sup> *United States v. Mead Corp.*, 533 U.S. 218, 228 (2001); *EEOC v. Arabian American Oil Co.*, 499 U.S. 244, 256-58 (1991).

<sup>128</sup> See *Zenith Radio Corp. v. United States*, 437 U.S. 443, 457-58 (1978); Geoffrey P. Miller, *Pragmatics and the Maxims of Interpretation*, 1990 WIS. L. REV. 1179, 1184.

accord little weight to the views of a subsequent Congress about the meaning of an earlier enactment.<sup>129</sup> Another thread is agency interpretations of the agency's own rule, where, in contrast, the agency will usually receive overwhelming deference.<sup>130</sup> The difference is, basically, a difference in judicial attitudes about the appropriate scope of the other institution's authority. If we want the institution to move slowly, and to have to deliberate carefully and reach specific agreement before its rules can take effect, we give little heed to opinions issuing from only a portion of the body, especially those attempting to modify the meaning of earlier, more formal enactments.<sup>131</sup> If we prefer flexibility and quick responses, with not as much regard for transparency, we allow easy, informal modifications.<sup>132</sup> It is not particularly evident from the design of the SSUTA which model the States had in mind. At a minimum, then, we should expect some courts to take a "legislative history" approach, and give relatively little weight to Article IX opinions.

Of course, the Board is not limited to speaking softly; it also can sanction states it finds not "substantially compliant" with the Agreement. Presumably, Article IX rulings could be used in concert with the substantial compliance power to assure that, even as the world changes, the essence of the underlying SSUTA remains fairly constant. Much therefore turns on the form and efficacy of the Board's sanctions. If the main effect of a sanction is political, and courts are apolitical, they may be largely indifferent to sanction. If our target is political courts or revenue authorities, we have to determine what the relevant constituency for those entities is, and what size and sort of sanction will be

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<sup>129</sup> *E.g.*, *Sullivan v. Finkelstein*, 496 U.S. 617, 628-29 & n.8 (1990).

<sup>130</sup> *E.g.*, *Gonzales v. Oregon*, 126 S. Ct. 904, 914 (2006).

<sup>131</sup> *See* Cass R. Sunstein, *Law and Administration After Chevron*, 90 COLUM. L. REV. 2071, 2082 (1990).

<sup>132</sup> *See* Jon Connolly, *Alaska Hunters and the D.C. Circuit: A Defense of Flexible Interpretive Rulemaking*, 101 COLUM. L. REV. 155, 175--77, 179-180 (2001)

sufficient to move them to invoke their influence with the relevant state decision makers. Most importantly, the Board must have the capacity to make these determinations, and the political will to follow them through.

In addition to persuading or incentivizing, the Board also may have the capacity to affect the norms of state-level actors. As we saw, the power to curb the occasional bad actor -- and the expectation that that power will be exercised -- may play an important role in sustaining developing norms of national interest among state officials and judges. Also, prominent sanctions, like criminal penalties, may serve their own norming function,<sup>133</sup> although perhaps there is also a risk that they might simply increase the salience (that is, the visibility) of non-compliance by the sanctioned parties or “crowd out” individuals’ desire to comply absent the threat of sanction.<sup>134</sup> In any event, there also may be a substantial risk that if the Board members are parochial or self-serving in their sanction decisions, they will offer a highly salient example of regionalism that could undermine efforts to develop a nationalist norm in the States.

Thus, whatever we think of the principle or political dependence of state interpreters, the long-term prospects for uniformity under the SSUTA look to depend largely on how the Governing Board functions. I turn there in the next part.

#### **IV. Can the Governing Board Govern?**

So the central challenge for the SSUTA, again, is that it creates not a single sales and use tax code but rather fifty parallel, albeit initially very similar, codes. But, we’ve

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<sup>133</sup> For developments of this argument, see, e.g., Robert Cooter, *Prices and Sanctions*, 84 COLUM. L. REV. 1523 (1984); Dan M. Kahan, *Social Influence, Social Meaning, and Deterrence*, 83 VA. L. REV. 349 (1997).

<sup>134</sup> For a discussion of the literature on the counter-productive use of sanctions in forming norms, see Jonathan M. Barnett, *The Rational Underenforcement of Vice Laws*, 54 RUTGERS L. REV. 423, 455--62 (2002).

concluded, that may not be a serious problem if there is effective centralized coordination and oversight. Unfortunately, as I outline here, the current design for the SSUTA’s central authority, the Governing Board, is not promising.

#### **A. The Board’s Operations: The Mechanics**

It may be helpful at this point to review the structure of the Governing Board. The Board is governed not only by the Agreement itself but also by a set of bylaws as well as an evolving list of “Rules and Procedures.”<sup>135</sup> The Board is comprised of up to four representative from each member state, but each state receives only one vote.<sup>136</sup> As for the Board members themselves, the member states, it appears, are free to decide for themselves how to select the representative, but the expectation (and current reality) is that most are state elected officials or commissioners of revenue.<sup>137</sup> Compliance Review committee representatives “must be executive or legislative branch employees of the member state.”<sup>138</sup> Board representatives are not compensated, but can receive reimbursement for expenses.<sup>139</sup>

At present the Board’s decision making mechanisms are still only bare bones. Requests for interpretation are forwarded to a “Compliance Review and Interpretations Committee” for recommendations to the Board.<sup>140</sup> The Committee must solicit comments from the states and the general public.<sup>141</sup> All final decisions are public, and

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<sup>135</sup> <[http://www.streamlinedsalestax.org/bylaws\\_rules.htm](http://www.streamlinedsalestax.org/bylaws_rules.htm)>

<sup>136</sup> SSUTA § 806.

<sup>137</sup> See HELLERSTEIN & SWAIN, *supra* note 22, at t 9-9 (“[B]oard representatives . . . must come from either the legislative or executive branches of the state’s government.”).

<<http://www.streamlinedsalestax.org/index.html>> (identifying titles of SSTP Executive Board members).

<sup>138</sup> Bylaws of the Streamlined Sales Tax Governing Board, Inc., Art. 7 § 2 (Oct. 1, 2005), available at <[http://www.streamlinedsalestax.org/bylaws\\_rules.htm](http://www.streamlinedsalestax.org/bylaws_rules.htm)>.

<sup>139</sup> *Id.* Art. 5 § 6.

<sup>140</sup> SSUTA § 902(B).

<sup>141</sup> *Id.* § 902(C).

posted on the Board’s website.<sup>142</sup> A three-quarters vote of the Board is required to adopt any interpretation.<sup>143</sup> For the most part, the Board’s meetings must be open.<sup>144</sup> The Board has the authority, as yet unexercised, to create an issue resolution procedure, including the use of non-binding arbitration.<sup>145</sup> The Board must still vote to approve any recommendation that is produced by its resolution procedures.<sup>146</sup>

The sanctions process is similarly sketchy. The only sanction specifically mentioned is expulsion from the Agreement, although the Board has authority to impose “other penalties as determined by the governing board.”<sup>147</sup> Again, it takes a three-quarters vote of all member states to impose any sanction.<sup>148</sup> Crucially, a state can be sanctioned only where it is not “compliant.”<sup>149</sup> States must certify annually that they are in compliance, and the Board is supposed to develop procedures for responding to a state admission that it is not in compliance.<sup>150</sup> A state is in “compliance” when it is “substantially compliant” with the Agreement.<sup>151</sup>

## **B. The Flaws**

This combination of a three-quarters vote requirement and a “substantial compliance” standard for imposing penalties rather obviously portends a fairly sluggish enforcement operation. By itself, though, that is not necessarily a fatal flaw. As we saw earlier, there is a fair argument that courts, perhaps even revenue agencies, in the

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<sup>142</sup> *Id.* § 902(G).

<sup>143</sup> SSUTA § 809; Bylaws Art. 4 § 6.

<sup>144</sup> Streamlined Sales Tax Governing Board, Inc. Rules and Procedures (Amended Jan. 13, 2006), § 807.1(B)(1), available at <[http://www.streamlinedsalestax.org/bylaws\\_rules.htm](http://www.streamlinedsalestax.org/bylaws_rules.htm)>.

<sup>145</sup> SSUTA § 1001.

<sup>146</sup> *Id.* § 1003.

<sup>147</sup> *Id.* § 809.

<sup>148</sup> *Id.*

<sup>149</sup> *Id.*

<sup>150</sup> *Id.* §§ 803; 809.

<sup>151</sup> *Id.* § 805.

individual states could on their own pursue a fair degree of uniformity, if there were strong, principled leadership from the Governing Board. It might not matter that the Board moves slowly and seldom, if it moves wisely. But I am skeptical that in its current design it is likely to do that, either. I see four broad sets of problems.

First, political process failures at the state level may readily be transmitted to the Board by way of individual states' influence over their Board representatives. Board members serve at the pleasure of the appointing state. Administrative law scholars argue convincingly that, in the absence of some external constraint on the appointer, at-will appointees will closely reflect the political preferences of their appointer.<sup>152</sup> Obviously, if the position has any value to the appointees, they have an incentive to remain. Even if that incentive fails to operate, in instances where the appointee deviates too far, she will be replaced with someone more tractable, unless the costs of replacing her exceed the costs of her intransigence. There is no obvious reason here why states would be reluctant to remove appointees who fail to represent fully the interests of the appointing state officials. Publicity over removal, for instance, seems likely only to increase the appointer's support among constituents who oppose the appointee's positions. One possible constraint on removal is that an appointee with long tenure may develop ties to

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<sup>152</sup> E.g., Stephen Calabresi & Christopher S. Yoo, *The Unitary Executive During the First Half-Century*, 47 CASE W. RES. L. REV. 1451, 1460--61 (1997); Neal Devins, *Political Will and the Unitary Executive: What Makes an Independent Agency Independent?*, 15 CARDOZO L. REV. 273, 278 (1993); Cynthia Farina, *Statutory Interpretation and the Balance of Power in the Administrative State*, 89 COLUM. L. REV. 452, 504 & n.226 (1989); Geoffrey P. Miller, *Introduction: The Debate Over Independent Agencies in Light of Empirical Evidence*, 1988 DUKE L.J. 215, 218-22 (1988) (summarizing results of studies); see also *Morrison v. Olson*, 487 U.S. 654, 687--92 (1988) (assuming that power to remove implies power to control executive officers); *Humphrey's Executor v. United States*, 295 U.S. 602, 629 (1935) (“[I]t is quite evident that one who holds his office only during the pleasure of another, cannot be depended upon to maintain an attitude of independence against the latter’s will.”). The Board is also dependent on states for funding and/or staffing, so that even rather independent-minded Board members may be somewhat constrained by their need for continuing logistical support in carrying out their perceived mission. Cf. WELDON V. BARTON, *INTERSTATE COMPACTS IN THE POLITICAL PROCESS* 169 (1965) (arguing that commissions without independent revenue-raising authority are obliged, as a result of their financial dependency on states, to be “responsive to the states rather than to any regional constituency”).

other Board members, or other institution-specific expertise, that would make replacing her somewhat costly.<sup>153</sup> But that would represent a long-term cost, and a fairly difficult one to measure. The appointee's specific adverse vote (or proposed vote), however, on an issue known to the appointer's constituency, would represent a clear and immediate political cost to the appointer.<sup>154</sup> Thus, the appointee's replacement cost is unlikely to prevent her removal over any publicized policy issue, and she will probably be aware of that calculus.<sup>155</sup>

The possibility of logrolling likely will make this state influence a significant factor in Board outcomes. Obviously, a single state cannot by itself vote down a sanction aimed at its deviant tax scheme -- indeed, states must abstain from sanction votes against themselves.<sup>156</sup> The state can, however, logroll; it can trade its vote on matters in exchange for votes against sanction. In a body of diverse interests, especially one with a high vote threshold, logrolling is inevitable.<sup>157</sup> That is not to say logrolling is bad; often, it is utility maximizing, in that it permits voters for whom a particular outcome is utility-positive to attract votes from those for whom it is either a matter of indifference or a smaller utility-negative.<sup>158</sup> The peril to the public may come if there are significant agency costs or other market breakdowns, as where representatives are indifferent to an

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<sup>153</sup> See Nina A. Mendelson, *Agency Burrowing: Entrenching Policies and Personnel Before a New President Arrives*, 78 N.Y.U. L. REV. 557, 641--46 (2003) (noting benefits both to public welfare and political superiors to long-tenured agency personnel, even across administrations).

<sup>154</sup> On the significance of long-term versus short-term costs, see *supra* note 104.

<sup>155</sup> The appointee's awareness, of course, is significant because a significant part of the removal power is its "chilling effect on insubordinate employees." Calabresi & Yoo, *supra* note 152, at 1461.

<sup>156</sup> SSUTA § 809.

<sup>157</sup> See Jerry L. Mashaw: *Why Administrators Should Make Political Decisions*, 1 J. L. Econ. & Org. 81 (1985), reprinted in ADMINISTRATIVE LAW ANTHOLOGY 20, 24 (Thomas O. Sargentich ed., 1994).

<sup>158</sup> J. BUCHANAN & G. TULLOCK, THE CALCULUS OF CONSENT: LOGICAL FOUNDATIONS OF CONSTITUTIONAL DEMOCRACY chs. 10--13 (1962); Lynn A. Baker, *Direct Democracy and Discrimination: A Public Choice Perspective*, 67 CHI.-KENT L. REV. 707, 727--28 (1991); cf. Hildreth et al., *supra* note 40, at [840] (noting that logrolling could permit state cooperation on tax policy in some cases in which many states are indifferent or would actually suffer some harms from the policy).

outcome because they fail fully to internalize the costs of the outcome to their constituents.<sup>159</sup> In that case, the indifferent voter trades off her vote for too little, so that the end result is a net-negative utility outcome for the public.<sup>160</sup>

As a result, the Board probably will perpetuate the problem that state tax decision-makers do not internalize the costs of disuniformity. Board members represent the political constituency of their appointers. As we have seen, these voters, in turn, do not fully internalize the benefits of a uniform set of national rules – again, because the gains of that benefit are distributed nationally.<sup>161</sup> Thus, it is probable the Board will often be willing to trade a more-uniform rule for one granting or permitting deviations that result in disproportionate benefits for one group of Board voters.<sup>162</sup>

Moreover, to the extent that there are parties who do suffer the full pains of disuniformity, the Board also seems not to alter Shaviro’s prediction that there will be no stable coalition in favor of reform. As we saw in the pre-SSUTA scenario, businesses who sell taxable products in multiple jurisdictions might plausibly form a potent lobbying bloc, although their influence there was limited by their need to monitor and lobby thousands of taxing jurisdictions. Under the SSUTA, their situation is somewhat improved; while they still must monitor developments in every taxing jurisdiction, they probably need only lobby the fifty states that appoint Board members. Further, the SSUTA gives the business community a quasi-formal role in decision making, through

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<sup>159</sup> See David P. Barron, *Majoritarian Incentives, Pork Barrel Programs, and Procedural Control*, 35 AM. J. POL. SCI. 57, 58, 60--63 (1991); William H. Riker & Steven J. Brams, *The Paradox of Vote Trading*, 67 AM. POL. SCI. REV. 1235, 1240 (1973).

<sup>160</sup> In addition, representatives may exchange votes for mutually inefficient legislation that offers some political or other reward to the representative, so that the logrolling degrades public welfare. Aranson et al., *supra* note 104, at 44--45.

<sup>161</sup> See *supra* text accompanying notes 76--77.

<sup>162</sup> Cf. Isaacson, *supra* note 20, at [2] (claiming that even during development of SSUTA states have continued to hold onto “many diverse and unique features of their individual state tax systems”).



the medium of a “Business Advisory Council,” whose precise operation is at present unclear.<sup>163</sup> On the other hand, the business community will repeatedly be fractured between businesses whose interests are solely in uniformity, and those who have the opportunity to benefit from a disuniformity, as from one favoring local businesses.<sup>164</sup> These disuniformity rents may often be highly salient for the business.<sup>165</sup> If so, the pro-uniformity coalition will likely be unstable. While these factors are somewhat unpredictable, on balance it seems that the influence of business as a force for uniformity will be at best uneven.

In addition, it is unclear that even businesses who would benefit from uniformity and principle will in fact prefer them to the opportunity to extract disuniformity rents for themselves in the future.<sup>166</sup> Consider, for example, the recent litigation over the tax breaks Ohio offered to Daimler-Chrysler in order to entice it to build an auto manufacturing plant in state.<sup>167</sup> The vast majority of states’ attorneys general filed an amicus brief in the Supreme Court supporting Ohio,<sup>168</sup> notwithstanding the fact that, as an economic matter, what was probably happening was that the states were being forced

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<sup>163</sup> SSUTA § 811.

<sup>164</sup> See Isaacson, *supra* note 20, at [15--16] (arguing that local “retail giants” are strongest force resisting effort by out-of-state sellers to reduce tax-compliance burdens); Swain & Hellerstein, *supra* note 23, at 612 (describing successful efforts of local business interests to alter some terms of SSUTA in their states); *id.* at 613 (noting that small and large sellers disagree about rules for exempting some businesses from collection obligations).

<sup>165</sup> *Cf.* Shaviro, *supra* note 40, at 956--57 (describing high visibility and importance to taxpayers of state tax rules disproportionately favoring them).

<sup>166</sup> See Hildreth et al., *supra* note 40, at [850]; Shaviro, *supra* note 40, at 958. In addition, some jurisdictions lack a significant export presence, diminishing somewhat the influence there of forces in favor of uniformity.

<sup>167</sup> *Cuno v. DaimlerChrysler Corp.*, 386 F.3d 738 (6th Cir. 2004), *rev'd on standing grounds*, 126 S. Ct. 1854 (2006).

<sup>168</sup> Brief of Florida, Alabama, Arizona, Arkansas, California, Colorado, Connecticut, Delaware, Georgia, Guam, Hawaii, Idaho, Illinois, Indiana, Iowa, Kentucky, Maine, Maryland, Massachusetts, Michigan, Missouri, Nebraska, Nevada, New York, North Dakota, Northern Mariana Islands, Oklahoma, Oregon, Pennsylvania, Puerto Rico, South Carolina, South Dakota, Tennessee, Texas, Utah, Vermont, Washington, and Wisconsin, as Amici Curiae in Support of Petitioners, *DaimlerChrysler Corp. v. Cuno*, 126 S. Ct. 1854 (Dec. 5, 2005).

into a race to slash taxes the lowest in order to attract businesses.<sup>169</sup> These targeted lower tax revenues, for the most part, hurt business, because they result in fewer services and/or a heavier tax burden on the rest of the tax base.<sup>170</sup> Yet the state AG's pressed on in favor of targeted tax breaks – arguably exactly because significant business constituencies threatened to go elsewhere if they did not do so.<sup>171</sup> Collective action problems aside, what may have lined up these businesses in favor of tax breaks was the hope that maintaining a system in which they could obtain their own big break would outweigh the costs of giving some breaks to others.<sup>172</sup>

These political effects might be of little moment if the Board were charged with interpreting a highly detailed and fairly rigid set of legal rules, which might leave little play for vote-trading or political influence. Instead – and this is the third problem – the most pertinent legal provision before the Board in every sanction case will be the remarkably open-textured term “substantially compliant.”<sup>173</sup> The uncertainty of the meaning of “substantial” is not simply lexical. There are at least three major theoretical

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<sup>169</sup> See Dan T. Coenen, *Business Subsidies and the Dormant Commerce Clause*, 107 YALE L.J. 965, 1025--26 (1998); Peter D. Enrich, *Saving the States From Themselves: Commerce Clause Constraints on State Tax Incentives for Business*, 110 HARV. L. REV. 377, 382--404 (1996); Walter Hellerstein & Dan T. Coenen, *Commerce Clause Restraints on State Business Development Incentives*, 81 CORNELL L. REV. 789, 793 (1996). For a skeptical response to these claims, see Clayton P. Gillette, *The Law and Economics of Federalism: Business Incentives, Interstate Competition, and the Commerce Clause*, 82 MINN. L. REV. 447, 478--92 (1998). Notably, though, Professor Gillette relies on Commerce Clause theory, and does not really dispute the claim that tax-incentive competition tends to reduce overall welfare of the competing states. *Id.* at 480--81.

<sup>170</sup> Enrich, *supra* note 169, at 378; James R. Rogers, *The Effectiveness and Constitutionality of State Tax Incentive Policies for Locating Businesses: A Simple Game Theoretic Analysis*, 53 TAX LAW. 431, 431 (2000).

<sup>171</sup> Cf. Kelly Edmiston, *Strategic Apportionment of the State Corporate Income Tax*, 55 NAT'L TAX J. 239--62 (2002) (concluding that states face a prisoner's dilemma in deciding whether to institute tax policy that favors local producers, and that the optimal strategy for them will therefore be to adopt such incentives even if revenue-negative).

<sup>172</sup> For example, if the cost of a break to Business A, spread among all state taxpayers, is \$1,000, it is entirely rational for Business B to want to maintain the tax-break system, at least for one more round, if B has a better than 1-in-100,000 chance of its own \$100 million incentive being next in the queue.

<sup>173</sup> SSUTA § 805. See Isaacson, *supra* note 20, at [9--10] (complaining that “substantially” language allows state regimes to “vary . . . in countless ways”).

open questions standing behind the concept of substantiality. The most important is the *Quill* dilemma I've already described – whether in fact it is better to have perfect uniformity, or whether some diversity actually serves national interests by enabling innovation and a spur to competition.<sup>174</sup> Quite probably, the Board should have the power, and the policy goal, of permitting some differences among states in order to foster valuable experimentation.

Two other substantiality concepts are thorny but not as important to the goals of the project. For one, it is unclear whether an individual state should bear the cost of deviations by others. That is, a single definition, in the context of an entire state code, is unlikely by itself to be viewed as rendering a state not substantially in compliance. But if every jurisdiction gets “one free deviation,” then we quickly have a patchwork again. Yet if we view each state's substantiality in the context of whether the system of rules already has exceptions, then states will have an incentive to be the first to deviate. It is similarly difficult to say how we should treat state choices in enforcement or auditing. If a state's code nominally complies, but it is clear that the state will not enforce some provisions it disfavors, is the state in compliance? If we say yes, we come very close to dictating how states choose to allocate scarce enforcement funds among competing policy priorities. But if we say no, substantial compliance may be meaningless.

The point here is not that these problems are insuperable, only that they are highly debatable. So there will actually be a fairly principled argument against uniformity in many cases. Thus, even if there were a strong demand among some portions of the public for principled interpretation by the Board, it would be fairly easy for the Board to

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<sup>174</sup> See *supra* text accompanying notes -- .

evade. The Board could almost always appease individual interest groups, while giving at least lip service to demands for principle by others.

That leads us to the fourth problem. The danger of using principle as a cover for rent-seeking is not serious if we think that the Board will genuinely internalize demands or expectations of principled behavior. As with state-level bureaucrats, or state courts, the Board could itself develop an institutional mission that might lead it to resist rent-seeking. Right now, however, that looks unlikely. The Board is composed of political appointees removable at will, so that there would be little reason for the public to expect them to resist popular pressure. In contrast to, for example, Commissioners of the European Union, who must pledge to represent the interests of the EU over those of their home nation,<sup>175</sup> the Board members have no obvious institutional mission. Even if they did, the Board members are not full-time employees. It is doubtful that being a weekend Board member will be as important to the members' sense of identity and self-worth as their full-time job, so that the corresponding importance of fulfilling any role-norms will be diminished.<sup>176</sup> The Board also may not have the budget for full-time staff, and its performance in their absence may be so low as to diminish any public expectations for better, which would further ratchet down pressures on the Board to *do* better.<sup>177</sup>

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<sup>175</sup> Derek W. Urwin, *From a Europe to a State of Europe?*, in THE EUROPEAN UNION HANDBOOK 3, 16--18 (Philippe Barbour ed., 1996).

<sup>176</sup> See Vicki Schultz, *Life's Work*, 100 COLUM. L. REV. 1881, 1890--93 (2000).

<sup>177</sup> In correspondence, Professor Swain points out that Board members are likely to be able to draw on staff resources at their home-state taxation and finance agencies. But that inter-dependence would likely only exacerbate the danger that the Board members would empathize more closely with their home state and its interests than the nationalist goals of the SSUTA. Cf. Diller, *supra* note 100, at 1209--10 & n.450 (noting study demonstrating that cooperation between agency and contractors undermined independent thinking of contractors); Larry Kramer, *Understanding Federalism*, 47 VAND. L. REV. 1485, 1553--54 (1994) (claiming that collaborating experts tend to follow views of fellow experts over those suggested by outsiders).

And so we were hoping that principled, or at least frequent, Board sanctions could influence state-level actors, upon whom the SSUTA ultimately depends. But the Board alone may not be capable of delivering such sanctions. Thus, at the risk of invoking, in the physicist Richard Feynmann's memorable phrase, a tower of "turtles all the way down," we also should examine whether there are yet other layers of review that could in turn discipline the Board. Two possibilities leap immediately to mind: Congress and federal courts. I consider these two in turn.

### **C. What About Congress?**

The Governing Board has flaws, but it does not exist in isolation. In thinking about the Board's performance, we also need to consider the possible influence of other interested parties. For example, Professor Swain, in his thoughtful article describing the SSUTA, argues that Congress will have a strong influence on Board behavior.<sup>178</sup> He claims that fear of further congressional meddling after federal ratification of the SSUTA would ensure that the Board protected the purposes of the legislation.<sup>179</sup> With respect, I am dubious.

To begin with what if probably a simplified picture, let us start with what is likely Congress' most powerful oversight tool in the administrative arena is the budgeting process.<sup>180</sup> Agencies and other cooperative ventures set up and funded by Congress

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<sup>178</sup> John A. Swain, *State Sales and Use Tax Jurisdiction: An Economic Nexus Standard for the Twenty-First Century*, 38 GA. L. REV. 343, 381--82 (2003).

<sup>179</sup> *Id.*; see also Hildreth et al., *supra* note 40, at [845] (noting arguments by others that federal authorization would put pressure on Congress to ensure future viability of compact).

<sup>180</sup> See LOUIS FISHER, *THE POLITICS OF SHARED POWER: CONGRESS AND THE EXECUTIVE* 100 (4th ed. 1998); HAROLD J. KRENT, *PRESIDENTIAL POWERS* 77-83 (2005); Peter Raven-Hansen & William C. Banks, *Pulling the Purse Strings of the Commander in Chief*, 80 VA. L. REV. 833, 834--36 (1994); Charles Tiefer, *Congressional Oversight of the Clinton Administration and Congressional Procedure*, 50 ADMIN. L. REV. 199, 212--14 (1998). For a sweeping survey of a wide variety of congressional control techniques, and an appraisal of their effectiveness, see Jack Beerman, *Congressional Administration*, 43 SAN DIEGO L. REV. 61, 71--143 (2006).

know that each year their performance will be weighed by a budgeting committee, and that poor performance may result in tighter budgets or increased substantive restrictions on their use of the funds.<sup>181</sup> Greater even than the power of the purse in this process, I would argue, is the power of certainty. The agency knows that it cannot avoid scrutiny, or at least must marshal substantial outside forces (as from lobbying from its private-sector regulatory partners) to mitigate the scrutiny it will endure.

Certainty is so important in the oversight context because legislative inertia is otherwise so pandemic.<sup>182</sup> The world is large and Congress is small. Again, this is one of the key insights that drives public-choice theory: the cost of enacting legislation is very high, because it is difficult to capture Congress' attention for long enough to carry out all the various steps that lead to legislation, and to overcome the doubts, opposing interests, and presumptions in favor of the status quo.<sup>183</sup> Further, given the difficulty of predicting future results and discerning their political effects, legislators may be reluctant to tie themselves to the continuing success of legislation that is already enacted.<sup>184</sup> At the same time, the rewards of high-profile claims of ongoing responsibility are less than the rewards of moving on to new legislation.<sup>185</sup> Voter attention tends to be highest at enactment and rather low afterwards. Thus, the average legislator often concludes that it is better by far to take credit only for the ribbon-cutting, and remain free to assign blame

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<sup>181</sup> See Tiefer, *supra* note 180, at 212--14.

<sup>182</sup> See Hammond & Knott, *supra* note 96, at 121 (claiming that Congress tends not to exercise its ongoing supervisory power). For more general accounts of legislative inertia, see GUIDO CALABRESI, A COMMON LAW FOR THE AGE OF STATUTES 91--119 (1982); William N. Eskridge, Jr., *Dynamic Statutory Interpretation*, 135 U. PA. L. REV. 1479, 1524--25 (1987).

<sup>183</sup> See Thomas W. Merrill & Henry E. Smith, *Optimal Standardization in the Law of Property: The Numerus Clausus Principle*, 110 YALE L.J. 1, 66 (2000); Martin Redish & Theodore T. Chung, *Democratic Theory and the Legislative Process*, 68 TUL. L. REV. 803, 850--51 (1994).

<sup>184</sup> See Aranson et al., *supra* note 104, at 32--33; Macey, *supra* note 82, at 284--85; Morris P. Fiorina, *Legislative Choice of Regulatory Forms: Legal Process or Administrative Process?*, 39 Pub. Choice 33, 55--60 (1982).

<sup>185</sup> See Aranson et al., *supra* note 104, at 53--54.

for later failures to bumbling by someone else.<sup>186</sup> On the other hand, elected officials do have important incentives to undertake low-profile involvement in the ongoing administration of government, as I will return to in a moment.

For now, though, the point here is that Congress may be unlikely to pay attention to the SSUTA after it is ratified, and the Board will almost certainly suspect as much. Congress provides no funds, and will have no regularly scheduled oversight of the Board's performance. The most pertinent example here is PL 86-272, a statute enacted in 1959 to protect out-of-state sellers from some forms of state taxation.<sup>187</sup> Congress also provided for a detailed analysis and report on the "problems" 86-272 was to address;<sup>188</sup> a thoughtful and interesting report followed; and Congress has done nothing since.<sup>189</sup>

Nor will there likely be any sustained constituency for congressional oversight. If we think that Congress, like state-level elected officials, responds to the intensity of constituent demands, it is hard to see how advocates of uniform state rules will prevail. Again, the prediction here is that the most intense and persistent participants in debates about state sales tax rules will be local businesses who might benefit from rules that disproportionately favor them. If anything, then, Congress' involvement would be likely to undermine uniformity, as representatives and senators exert their influence with the Board in a way that is far from a disapproving (but fairly inattentive) public eye but quite

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<sup>186</sup> See Aranson et al., *supra* note 104, at 57--58.

<sup>187</sup> 15 U.S.C. §§ 381--84 (2002). Swain and Hellerstein also point to the PL 86-272 experience, among others, as evidence of Congress's general disinterest in state tax matters. Swain & Hellerstein, *supra* note 23, at 614.

<sup>188</sup> See *U.S. Steel Corp. v. Multistate Tax Comm'n*, 434 U.S. 452, 455 (1978) (describing history of Pub. L. 86-272).

<sup>189</sup> See Hildreth et al., *supra* note 40, at [830]. Hildreth, Murray, and Sjoquist attribute Congress's inaction to a stalemate between competing interest groups, with none of them able to muster enough support to convince Congress to devote legislative effort to passing any more detailed solution. *Id.*

well-known and appreciated by the beneficiary.<sup>190</sup> That approach is particularly attractive to legislators because of their incomplete data about public opinion; it is easy for them to get information about how an active interest group feels about their work, but rather difficult to obtain information about how the general public will respond.<sup>191</sup> As a result, the legislator with an opportunity to appease an interest group with an action beneath the general public's notice is likely to seize it.<sup>192</sup>

Let us now add yet another layer of complication. Coalitions who approach Congress seeking legislation or other congressional activity can observe, as we just have, the possibility of future inattention, or, at a minimum, the need to remain cohesive as a lobbying force. They will discount to themselves the value of legislation that comes with these future risks or costs, and therefore be willing to pay a lower price to obtain it. Accordingly, Congress can extract higher rents by building in stronger assurances of future performance, such as opportunities for third parties themselves to alert Congress or police the terms of the deal they have struck,<sup>193</sup> or structural limitations on an agency's ability to go in a different direction.<sup>194</sup> At present, though, we don't see any of these features in the present design of the SSUTA or its enabling legislation. At most, Congress has signals sent to it by, say, dissenting opinions from Board sanction determinations, or statements from the Business Advisory Council. But Congress, without devoting close to its full attention, cannot be certain whether these signals are

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<sup>190</sup> Cf. Shaviro, *supra* note 40, at 953 (noting that public choice theory predicts that Congress may be reluctant to intervene to prevent single state from using its tax system to impose costs on others).

<sup>191</sup> Aranson et al., *supra* note 104, at 38--39.

<sup>192</sup> Cf. Macey, *supra* note 82, at 276, 285--86 (describing how regulators extract rents from interest groups in exchange for forbearing from preempting state regulation).

<sup>193</sup> See Arthur Lupia & Matthew McCubbins, *Learning from Oversight: Fire Alarms and Police Patrols Reconstructed*, 10 J. L. ECON. & ORG. 96, 97--98, 112 (1994).

<sup>194</sup> See Horn & Shepsle, *supra* note 96, at 499; Macey, *supra* note 96, at 700; McCubbins et al., *Instruments of Political Control*, *supra* note 96, at 246.



genuine or self-serving.<sup>195</sup> As a result, Congress' most effective tools for supervising those who receive its delegations --- regular budget review, strait-jacket agency procedures, and third-party oversight -- all seem to be lacking in its relationship with the Governing Board.

These generalizations may not be fair to all congresspersons. Some legislators will have a principled attachment to uniform tax rules, or will have ideological or institutional commitments to state political parties or state government that may cause them to prize the long-term revenue interests of states over their own short-term political rewards.<sup>196</sup> (One sponsor of the SSUTA legislation, for example, was formerly a state revenue official.)<sup>197</sup> This point, too, though, ends up cutting against uniformity. To the extent that federal legislators make efforts to please their state counterparts, or are very receptive to their entreaties, that will only dilute Congress' power as an independent check on the state tendency to disuniformity. So our pool of effective overseers must be drawn from those congressmen who are truly committed to state fiscal stability, and not simply to being on good terms with state officials. I submit this will be a very small pool, and that that fact will, again, be quickly evident to the Board.

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<sup>195</sup> See Lupia & McCubbins, *supra* note 193, at 104--05.

<sup>196</sup> For descriptions of how government officials' personal and professional values may shape their response to interest-group pressure, see *supra* text accompanying notes 107--109. For descriptions of how loyalty to a political party or other ideological group may trump lobbying, see Michael A. Fitts, *The Vices of Virtue: A Political Party Perspective on Civic Virtue Reforms of the Legislative Process*, 136 U. PA. L. REV. 1567, 1604 (1988); Gene M. Grossman & Elhanan Helpman, *Party Discipline and Pork-Barrel Politics* (Nat'l Bureau of Econ. Research, Working Paper NO. 11,396, 2005), available at <[www.nber.org/papers/w11396](http://www.nber.org/papers/w11396)>; Larry D. Kramer, *Putting the Politics Back into the Political Safeguards of Federalism*, 100 COLUM. L. REV. 215, 279--85 (2000).

<sup>197</sup> See Internet Tax Moratorium and Equity Act, S.512, 107th Cong., 1st Sess. (2001) (identifying Byron Dorgan as one of bill's sponsors); Biographical Directory of the United States Congress, Byron Leslie Dorgan, available at <<http://bioguide.congress.gov/scripts/biodisplay.pl?index=D000432>> (noting that Sen. Dorgan was the Tax Commissioner of the State of North Dakota from 1969 to 1980).

In short, much the same forces that produced disuniformity in the first place, and that will likely entrench it in the Governing Board, are also likely to disable significant congressional oversight of the Board. And that will be apparent to the Board itself.

#### **D. Judicial Review?**

Professor Swain also suggests that judicial review might improve uniformity under the Agreement.<sup>198</sup> Although he does not have much opportunity to elaborate on that thought in his brief essay, Congress might provide (as it has in several versions of the SSUTA bill) for review of Board determinations in federal court.<sup>199</sup> That, in turn, might either prompt the Board to give greater heed to national interests, or, failing that, provide for occasional overruling of egregious Board decisions. As the reader no doubt can guess, I am not optimistic on this front, either, although I do think that judicial review has a role to play in any successful redesign of the SSUTA.

The effect of the threat of judicial review on the deliberations of the entity under review is a subject of dispute across legal scholarship. At the risk of over-simplifying, the main dispute seems to be whether reviewed entities (to be less cumbersome, let's call them agencies, with the understanding that sometimes they are something else) care that they will be overturned by the court. Some scholars -- Mark Tushnet is a leader on this side -- claim that judicial review simply creates a sort of "overhang," where the agency will deliberately avoid considering the grounds that the court will consider.<sup>200</sup> That frees the agency more completely to fulfill constituent demands. When a court then reverses, the agency simply turns to the constituents, shrugs, and says, "we did all we could for

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<sup>198</sup> Swain, *supra* note , at 382; *see also* Isaacson, *supra* note 20, at [17].

<sup>199</sup> *E.g.*, Streamlined Sales Tax Simplification Act, S.2153 §5(b), 109th Congress, 2d Sess. (2005); Streamlined Sales and Use Tax Act, S.1736 §5(b), 108th Cong., 1st Sess. (2003).

<sup>200</sup> MARK TUSHNET, TAKING THE CONSTITUTION AWAY FROM THE COURTS 57--65 (2001).

you.” Indeed, in this scenario, the agency arguably benefits from reversal, because it can extract rents a second time around for its next attempt. Dan Shaviro is also in this camp, at least on the question of state tax uniformity; he is skeptical that the Supreme Court can intervene usefully, especially to the extent that its interventions might deter Congress from itself acting.<sup>201</sup>

Other writers, including this one, argue instead that constituents and ideologically committed agency personnel want results, not excuses, and that they have limited patience for demands for rents from their government.<sup>202</sup> It follows that agencies therefore will be forced to balance the most perfect constituent outcome against the possibility of reversal. The agency might then select a second-best solution that is mindful both of constituents and the court. And, crucially, judicial review need not be all or nothing; judges have available to them a variety of tools that allow them, in essence, to ask political actors to take a second and more careful look at the challenged outcomes, often with guidance from the court about which factors deserve more attention or respect.<sup>203</sup> In this way courts can improve the deliberative quality of political decisions.<sup>204</sup>

There is another way in which I would argue that judicial review can improve the deliberations of the Board. As I described earlier, a large part of what we think affects the “principled” character of bureaucratic outcomes is institutional mission and public expectations. Arguably, a bureaucracy subject to judicial review may come to see itself

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<sup>201</sup> Shaviro, *supra* note 40, at 975, 988--90.

<sup>202</sup> See Philip P. Frickey, *The Avoidance Canon, Legal Process Theory, and Narrowing Statutory Interpretations in the Early Warren Court*, 93 CAL. L. REV. 397, 461-62 (2005); Galle, Justice of Administration, *supra* note 111, at 194--95.

<sup>203</sup> For a comprehensive summary of these tools, see Dan T. Coenen, *A Constitution of Collaboration: Protecting Fundamental Values with Second-Look Rules of Interbranch Dialogue*, 42 WM. & MARY L. REV. 1575, 1587 (2001).

<sup>204</sup> See Galle, Getting Spending, *supra* note 5, at 205.

not simply as a purely political machine but instead part of the instrumentation of justice. Judicial review, in other words, may encourage bureaucrats to internalize the rules laid down by the court, or at least see themselves as part of the “rule of law,” which may limit the play of political pressures to favor localities.

My concern, therefore, is not with the institution of judicial review, but rather with its particular design here. Direct review of Board decisions in lower federal courts implicates all of the structural weaknesses of the federal judiciary. As the Supreme Court itself has already stated repeatedly, federal courts are not well-positioned to determine the appropriate balance between state political tax autonomy, with the benefits that diversity may offer, and the need for national uniformity.<sup>205</sup> That inability is precisely why the *Quill* Court “punted” the problem of jurisdiction to tax back to Congress.<sup>206</sup> Courts cannot easily measure, and can even less easily track over time, how diverse states have become, how burdensome those differences are, whether differences are producing fruitful experiments or races to the bottom, and so on.<sup>207</sup> Yet the determination whether a state is in “substantial compliance,” as we have seen, requires just these judgments. Furthermore, guesswork by different federal courts, in different districts or circuits, may result in the same patchwork the Agreement hopes to prevent.<sup>208</sup>

These problems are exacerbated by the fact that any act authorizing judicial review of board decisions would likely have to authorize review at the behest of affected

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<sup>205</sup> *Quill Corp. v. North Dakota*, 504 U.S. 298, 318 (1992); *Moorman Mfg. Co. v. Bair*, 437 U.S. 267, 278--80 (1978); see also Erwin Chemerinsky, *The Assumptions of Federalism*, 58 STAN. L. REV. 1763, 1789 (2006); Choper & Yin, *supra* note 83, at 211--12.

<sup>206</sup> See McClure & Hellerstein, *supra* note 64, at [6].

<sup>207</sup> See, e.g., *Schlesinger v. Reservists Comm. to Stop the War*, 418 U.S. 208, 211 & n.10 (1974); Charles F. Sabel & William H. Simon, *Destabilization Rights: How Public Law Litigation Succeeds*, 117 HARV. L. REV. 1015, 1058--59 (2004); Lon Fuller, *The Forms and Limits of Adjudication*, 92 HARV. L. REV. 353, 394--96 (1978).

<sup>208</sup> See Peter L. Strauss, *One Hundred Fifty Cases Per Year: Some Implications of the Supreme Court's Limited Resources for Judicial Review of Agency Action*, 87 COLUM. L. REV. 1093, 1105--10, 1114 (1987).

private individuals. Again, our hypothesis is that state officials themselves are unlikely vigorously to challenge discriminatory provisions by other states, largely in order to facilitate logrolling. That logic would seem to extend to state court challenges to Board decisions. Thus, in order to police disuniformity, we would have to permit the private interests disadvantaged by a particular provision, or by disuniformity generally, to bring their own challenges in court. The difficulty there, as I have described elsewhere, is that private enforcement efforts often further complicate courts' policy-making efforts.<sup>209</sup> For example, the threat of a private suit will tend to make it harder for any central authority -- here, the Board -- to strike a negotiated solution with the alleged offender.<sup>210</sup> They may deprive the court of the experience of the agency that ordinarily brings enforcement actions.<sup>211</sup> They may be less open to the competing public voices that would otherwise be reflected in a government decision to proceed.<sup>212</sup> And there may be lots of them.

Finally, there is an argument that, in providing a basis for judicial review, any authorizing act would violate the non-delegation doctrine.<sup>213</sup> The argument would posit that federal ratification of the SSUTA would in effect delegate authority to shape the future content of federal law to an entity remote from federal political controls.<sup>214</sup> The non-delegation doctrine, although now largely a dead letter, is thought to prohibit Congress from assigning its law-making power to any other entity. Although delegations

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<sup>209</sup> Galle, 1983, *supra* note 8, at 216--25.

<sup>210</sup> Mark Seidenfeld, *Empowering Stakeholders: Limits on Collaboration as the Basis for Flexible Regulation*, 41 WM. & MARY L. REV. 411, 420 (2000).

<sup>211</sup> Galle, 1983, *supra* note 8, at 217.

<sup>212</sup> See PETER H. SCHUCK, *SUING GOVERNMENT: CITIZEN REMEDIES FOR OFFICIAL WRONGS* 156--61 (1983); Fuller, *supra* note 207, at 394-404.

<sup>213</sup> For a good summary of the non-delegation doctrine, see Nicholas Quinn Rosenkranz, *Federal Rules of Statutory Interpretation*, 115 HARV. L. REV. 2085, 2131-32 (2002).

<sup>214</sup> Absent federal ratification, which renders the SSUTA federal law, see *Cuyler v. Adams*, 449 U.S. 433, 438--40 (1981), federal courts would be unable to second-guess state court interpretations of their SSUTA-inspired code provisions. *Erie R. Co. v. Tompkins*, 304 U.S. 64, 78--80 (1938).

to federal agencies and to states are now relatively unrestrained, delegations to private actors may be more problematic.<sup>215</sup> The Court, it appears, is anxious about its own ability either to fill in broad swaths of policy content left open by Congress, or uncertain of its ability to gauge the openness and democratic character of delegations to private actors.<sup>216</sup> The Board's processes plausibly would implicate both of those problems. Future interpretations of the SSUTA under the present plan are to be crafted, not by Congress, and not directly by states, but by a private entity, the Board, which is incorporated under the laws of Indiana.<sup>217</sup> It is unclear that the democratic-representativeness and transparency rationales that permit delegation to purely state

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<sup>215</sup> See *Whitman v. Am. Trucking Ass'n*, 531 U.S. 457, 472 (2001) (upholding broad delegation of authority to federal agency); *United States v. Sharpnack*, 355 U.S. 286, 294 (1958) (upholding federal law punishing as criminal any act committed in a federal enclave which would be criminal if committed in the state in which enclave is located); *Prudential Ins. Co. v. Benjamin*, 328 U.S. 408, 434--36 (1946) (recognizing Congress' power to authorize states to exercise its own power to regulate insurance); *Carter v. Carter Coal Co.*, 298 U.S. 238, 311--12 (1935) (suggesting that some delegations to private parties would be unconstitutional); *FM Props. Operating Co. v. City of Austin*, 22 S.W.2d 868, 873--77 (Tex. 2000) (rejecting, under Texas constitutional principles similar to federal non-delegation doctrine, delegation of policy-making authority to private entity).

<sup>216</sup> For example, in *Carter Coal*, the Court suggested that delegation to large coal producers of power to regulate the coal industry might be unconstitutional, highlighting the difference between "presumptively disinterested" official bodies and "private persons whose interests may be and often are adverse to the interests of others in the same business." 298 U.S. at 311--12. Later courts considering delegations to state authorities distinguished *Carter Coal* on the ground that state officials are politically accountable to their constituencies. *E.g.*, *Lac Courte Oreilles Band of Lake Superior Chippewa Indians v. United States*, 367 F.3d 650, 659--60 (7th Cir. 2004); see also *FM Props.*, 22 S.W.2d at 873--74; *Rosenkranz*, *supra* note 215, at 2133.

Vikram Amar, on the other, reads the state-delegation cases to suggest an alternative theory of non-delegation under which the key criterion is not the public accountability of the delegatee, but rather the ease with which Congress could reclaim or amend its delegation. Vikram Amar, *Indirect Effects of Direct Election: A Structural Examination of the Seventeenth Amendment*, 49 VAND. L. REV. 1347, 1360--84 (1996). Under this view, delegations to private actors should be unproblematic.

<sup>217</sup> *Bylaws*, *supra* note , at Art. II § 1. This possibility for future amendments is a key difference, I believe, between the SSUTA and many other compacts. When Congress ratifies a compact, it has before it all of the provisions that will become law, so that there is no reasonable argument that Congress did not itself contemplate the compact's effects on federal law. But later amendments to the compact, such as will be routine under the SSUTA, raise the possibility that the amendments will introduce policy choices Congress never weighed or perhaps even anticipated. See *Gibbons v. Ogden*, 22 U.S. (9 Wheat.) 1, 207--09 (1824). While that possibility is acceptable in the case of delegations to trustworthy partners, see *Yakus v. United States*, 321 U.S. 414, 424 (1944), that may not be true of delegations to others.

entities would reach the Board. The question, then, is whether the Board is more like a private entity or a state under these criteria. I think this would be a hard question.<sup>218</sup>

These concerns about judicial review all have a common thread, and I believe a common solution. Each reflects the courts' inability expertly to function as representatives of national interests. The courts' connection to popular preferences is attenuated, and is updated only intermittently by their encounters with individual litigants. Similarly, the demands of balancing different federalism interests stretches the courts' technical expertise and fact-finding ability beyond their current institutional limits. And there are many courts, with the prospect of a unifying Supreme Court opinion an unlikely and infrequent one. These are the exact considerations that usually lead federal courts to rely on, and defer to, the judgments of federal agencies.<sup>219</sup> In the next Part, I suggest how we can get one involved in the decision making process.

## **V. A Possible Solution**

In sum, there is a decent probability that the SSUTA as currently designed won't work. Yes, it will permit states to tax out-of-state sellers. And many of its labor-saving goals, such as computerized and uniform tax reporting and collection, are fine accomplishments and will function nicely. However, the grandest policy goals of the Agreement, its ambition to resolve deep tensions between experimentalism and nationwide uniformity, may not. I suspect there are many possible fixes for the problems I've described. Here I'd like to detail one of them.

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<sup>218</sup> Cf. FM Props., 22 S.W.2d at 874--75 (setting out eight factors court considers in determining whether delegation to a private entity contravenes purposes of non-delegation doctrine).

<sup>219</sup> E.g., *Barnhart v. Walton*, 535 U.S. 212, 222 (2002); 1 PIERCE, *supra* note 100, § 2.6, at 97--98

To review, our challenges are several. The foremost is that in-state businesses do not fully internalize the costs of national uniformity.<sup>220</sup> Many unfortunate consequences flow from that market failure, including the likelihood that the Governing Board set up by the Agreement won't have much interest in constraining non-compliance. Judicial review might, in theory, either improve Board performance, correct its errors, or both. Direct judicial review of Board decisions, however, looks unlikely to produce better results, and might even be constitutionally problematic.

The first goal for my proposal, therefore, is to make in-state businesses take more account of the SSUTA's uniformity goals. The most direct way to do that is to impose a financial penalty for businesses in states that are not compliant. States already must submit an annual assessment of their own compliance.<sup>221</sup> I suggest that the federal deductibility of corporate state and local-level taxes<sup>222</sup> should be contingent on a federal finding that the state collecting the taxes in fact is substantially compliant. The federal arbiter could impose intermediate sanctions, such as 95% deductibility for all state business taxpayers. The IRS could serve the arbiter function, or it might be located in an agency with built-in expertise in consumer goods, such as the Commerce Department. States and other affected parties could appeal an adverse determination to the Federal Circuit. Certification and sanctions would be binding on the IRS and taxpayers, and could not be relitigated in a refund suit or in Tax Court.<sup>223</sup>

This structure is very similar to many other conditional federal subsidies. Consider, for example, Medicaid, which provides compensation to states to defray the

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<sup>220</sup> See *supra* text accompanying notes 76--77, 105, 112, 151--172.

<sup>221</sup> SSUTA §§ 803, 809.

<sup>222</sup> See 26 U.S.C. 164.

<sup>223</sup> [explain tax appeal process]



costs of care for the indigent in exchange for meeting a long list of federal conditions, including approval of the state's plan for care by the U.S. Department of Health & Human Services.<sup>224</sup> The most significant difference is that the subsidy here is a tax deduction for state taxpayers, rather than a direct grant of cash to the state government. Why taxes? The key advantage here is that using the deduction helps to remove any discounting or fiscal illusion that might minimize the impact of subsidies on corporate incentives. That is, federal block-grant dollars can always be diluted, wasted in administrative costs, or given over to someone else, so that the rational business manager may discount their proportional value.<sup>225</sup> Further, the less-than-fully rational manager may fail to perceive the full value of a grant, as where the manager may not properly calculate the value to her business of federally-subsidized health insurance.<sup>226</sup> The deduction, in contrast, hits the corporation right at its bottom line -- no doubts, no discounts.<sup>227</sup> That makes any penalty more efficient, since the feds need not inflict additional (sometimes unnoticed) fiscal pain in order to achieve the desired level of incentive.<sup>228</sup> In addition, by a quirk of doctrine, placing conditions on tax benefits escapes a major set of limitations on conditional expenditures, including a cumbersome

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<sup>224</sup> 42 U.S.C. 1396, 1396a (2006); see *Wis. Dep't of Health & Family Servs. v. Blumer*, 534 U.S. 473, 479 (2002); *Schweiker v. Hogan*, 457 U.S. 569, 581--82 & n. 18 (1982).

<sup>225</sup> See Lynn A. Baker, *Conditional Federal Spending After Lopez*, 95 COLUM. L. REV. 1911, 1949--50 (1995); David Freeman Engstrom, *Drawing Lines Between Chevron and Pennhurst: A Functional Analysis of the Spending Power, Federalism, and the Administrative State*, 82 TEX. L. REV. 1197, 1249 (2004).

<sup>226</sup> See Brian Galle, *Fairness & Federalism in Taxation*, at 27--29 (unpublished manuscript, on file with author).

<sup>227</sup> Or, in any event, no discounts beyond whatever agency costs may result from the separation of management and capital, which would be present in any decision affecting the business.

<sup>228</sup> See David A. Dana, *Rethinking the Puzzle of Escalating Penalties for Repeat Offenders*, 110 YALE L.J. 733, 759--70 (2001).

requirement that all federal obligations be spelled out clearly on the face of the statute.<sup>229</sup>

There are presently no comparable limits on conditional tax benefits.

Replacing the Board with a federal agency in the compliance certification process also alleviates many of the concerns we had about the efficacy of judicial review. The agency will give our reviewing court a much more reliable interpretive partner -- a partner with a national constituency, predictable and ample staffing, developed expertise, little obvious self-interest in any particular outcome, and perhaps an institutional mission in its staff to regulate commerce in the national interest. Agency approval, under federal APA procedures, will also offer an opportunity for formal public participation in the outcome by all of the affected stakeholders in a relatively transparent forum.<sup>230</sup> That is not to say that the federal agency will be immune to lobbying by the same constituencies that affect the Board. Far from it; that is why we still would want judicial review. But, for the same reasons that we are rather less concerned about delegation to federal agencies than to private entities -- the greater assurances of transparency and democratic accountability that come with agencies, whose deliberations are themselves subject to democracy-reinforcing review -- courts could have much greater assurance that the policy conclusions arrived at by the agency are reliable and reflect national norms over local preferences. The court's ability to rely on its agency partner, in turn, largely mitigates any danger that the court would have to draw on its own, limited capacity to determine the right policy outcome.<sup>231</sup> Further, centralizing review in a single court (and one

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<sup>229</sup> See Galle, *Getting Spending*, *supra* note 6, at 160--66.

<sup>230</sup> See Richard B. Stewart, *U.S. Administrative Law: A Model for Global Administrative Law?*, 68 *LAW & CONTEMP. PROBS.* 63, 73--74 (2005).

<sup>231</sup> See Dorf & Sabel, *supra* note 11, at 363; Mashaw, *supra* note 96, at 164--80.

already with a fair amount of tax experience) allows that court to develop its own expertise, and eliminates the circuit-split problem.

I do not claim that my proposal would eliminate all disuniformity. That is not its goal. As I mentioned at the outset, I believe the best approach to state taxation is a mix of experimentation and certainty. Under my alternative, the Board is still free to issue new interpretations or amend old ones. The reviewing agency is free to permit some experimentation, under the large umbrella of “substantial” compliance. Thus, even if the reviewing agency found that a state’s unique approach was non-compliant, it might permit it for a period in order to develop data about whether the alternative approach was better policy, and the Board could utilize that data to revise existing standards. I expect that the Board and the agency would coordinate to share views about whether a given deviation should be viewed as an encouraged experiment or local rent-seeking.

It is hard to predict the political viability of my proposal, but I think it not significantly less plausible than the existing SSUTA structure. Like most pre-commitment strategies, it requires at least a momentary coalition of the public-minded.<sup>232</sup> Whether or not we think states will support my version depends, I suppose, on whether we think states genuinely want uniformity or are presently only pretending to want it in order to get jurisdiction to tax out-of-state sellers. Businesses should prefer my plan, despite what looks like a potential for draconian penalties -- assuming, again, that they genuinely are burdened by disuniformity, and aren’t simply latching onto that argument as a basis for resisting sales tax collection duties. So, if nothing else, debate about this proposal should give us more information about where the sides really stand.

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<sup>232</sup> SEE BRUCE ACKERMAN, *WE THE PEOPLE: FOUNDATIONS* 240, 262, 272--74 (1991); JON ELSTER, *ULYSSES AND THE SIRENS* (1979); *cf.* Swain & Hellerstein, *supra* note 23, at 613 (noting that success of SSUTA project is dependent on “individual sacrifice to the greater good”).

## VI. Conclusion

There are several generalizable points that emerge from this case study. The foremost, I think, is that federalism is not self-implementing. Our first efforts at implementing state sales tax autonomy were something of a disaster. Unmediated competition and experiment among jurisdictions, reigned in only by severe and economically distorting penalties imposed by the Supreme Court when the experiment threatened the existence of an open market, produced a fairly unhappy outcome. Everyone, from Court to states to businesses, recognizes that the present regime is fairly untenable.<sup>233</sup>

Unfortunately, we have been slow to broaden the scope of this recognition. Despite its evident failures, we are still using, in essence, the state sales tax model as the purported solution to a variety of other national policy problems. That is, we permit largely unmediated competition among state and local actors, with the only regular intervention a relatively rigid judge-made rule that freezes the competition in place or draws a bright line beyond which it cannot cross. Consider law enforcement. Localities may compete to see which can be toughest on crime, pressing the envelope of crime-fighting tactics until stung back, occasionally, by the extreme sanction of suppression of evidence or dismissal of the conviction or sentence.<sup>234</sup>

This project therefore supports the view, pressed elsewhere by this and other commentators, that experimentation and competition are best served by a refereed

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<sup>233</sup> See sources cited *supra* note 13.

<sup>234</sup> See James S. Liebman, *The Overproduction of Death*, 100 COLUM. L. REV. 2030, 2047--2135 (2000) (analyzing variety of political-process factors that undermine death penalty procedural safeguards).

federalism.<sup>235</sup> As I have shown, to make the most of our federal system, we need to develop the institutional expertise to evaluate parallel programs, and the institutional will to implement best practices that may run contrary to purely local interests. Achieving those goals will often mean that the market, or the market as intermittently regulated by a fairly limited federal court system, must be supplemented by other actors working in coordination with courts, with one another, and with private stakeholders.

Thus, designing a system that can accomplish both tasks at once may require some ingenuity. One particular design lesson the SSUTA experience shows us is the importance of identifying the incentives of key stakeholders. Once we saw that it was primarily local businesses who were driving state tax disuniformity, our design task became relatively simple: find a way to align the incentives of those businesses with our more general object of balancing local experiments with easy nationwide tax compliance.

These insights could lead to an immediate payoff in a related corner of the law of state and local taxation. As I discussed briefly earlier, the States face destructive competition for mobile capital,<sup>236</sup> and recently a set of plaintiffs trying to challenge Ohio's decision to give up more than \$100 million in tax incentives reached the Supreme Court only to be thrown out on standing grounds.<sup>237</sup> Commentators have urged the Court, again, to follow the sales-tax model in regulating what has become a dysfunctional market: they argue that the Court should hold that all such incentives are unconstitutional

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<sup>235</sup> Glenn S. Koppel, *Toward a New Federalism in State Civil Justice: Developing a Uniform Code of State Civil Procedure Through a Collaborative Rule-Making Process*, 58 VAND. L. REV. 1167, 1202--10 (2005); Marc L. Miller, *A Map of Sentencing and a Compass for Judges: Sentencing Information Systems, Transparency, and the Next Generation of Reform*, 105 COLUM. L. REV. 1351, 1393--95 (2005); Edward L. Rubin & Malcolm Feeley, *Federalism: Some Notes on a National Neurosis*, 41 UCLA L. Rev. 903, 924--25 (1994).

<sup>236</sup> See *supra* text accompanying notes 166--172.

<sup>237</sup> *DaimlerChrysler Corp. v. Cuno*, 126 S. Ct. 1854 (2006).

under the Commerce Clause.<sup>238</sup> Congress, in turn, was preparing to do the opposite, contemplating a bill, in the event the Supreme Court were to have decided in favor of the Cuno plaintiffs, that would have given broad authorization to the States to give whatever investment incentives they pleased to lure businesses.<sup>239</sup>

I believe my study here shows that both these models are seriously flawed, in that they are vulnerable either to excessive influence from self-serving interests, or too inexpert and inflexible to respond nimbly to those interests. As I suggested for the SSUTA, one way to counter-act both difficulties at once would be to contemplate instead an institution in which stakeholder input is channeled and shaped by more detached deliberation, and the deliberation is informed by expert regulators, so that we capture the healthy impulse of state competition while constraining the prisoner's-dilemma dynamic that sometimes results.

Finally, our effort to determine how best to target stakeholder incentives lead us to one other significant lesson. Our model for coordinated interstate agreements has usually relied on conditional federal spending. Whether it was health care for the indigent, education of children with disabilities, or speed limits, we have used the offer of federal dollars as a carrot to entice state compliance (where outright federal mandates

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<sup>238</sup> See Enrich, *supra* note 169, at 448--66; Philip P. Frickey, *The Congressional Process and the Constitutionality of Federal Legislation to End the War Among the States*, THE REGION, June 1996, at 58; Matthew Schaefer, *State Investment Attraction Subsidy Wars Resulting From A Prisoner's Dilemma: The Inadequacy of State Constitutional Solutions and the Appropriateness of A Federal Legislative Response*, 28 N.M. L. REV. 303, 322--27 (1998) (agreeing with Enrich, but doubting that litigation will succeed because of difficulty in finding plaintiffs with standing).

<sup>239</sup> See Economic Development Act of 2005, S. 1066 § 2, 109th Cong., 1st Sess. (2005) ("Congress hereby exercises its power under Article I, Section 8, Clause 3 of the United States Constitution to regulate commerce among the several States by authorizing any State to provide to any person for economic development purposes tax incentives that otherwise would be the cause or source of discrimination against interstate commerce under the Commerce Clause of the United States Constitution, except as otherwise provided by law."); Economic Development Act of 2005, H.R. 2471, 109th Cong., 1st Sess. (2005) (same).

were thought undesirable or beyond Congress' power).<sup>240</sup> But tax subsidies can be carrots, too.<sup>241</sup> The SSUTA example, I would argue, shows us an instance where conditioning tax benefits in the same way we have in the past conditioned direct spending can be a more efficient way of affecting the behavior of local or private actors. Federalism, for all its benefits, gives us plenty of headaches in coordinating our many competing sub-national interests. We should be open to any solution, even one as strange as conditional business deductions.

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<sup>240</sup> See 42 U.S.C. 1396, 1396a (2006) (Medicaid); 20 U.S.C. §§ 1411--19 (Individuals With Disabilities Education Act); *Arlington Cent. Sch. Dist. Bd. of Educ. v. Murphy*, 126 S. Ct. 2455, 2458--59 (2006) (IDEA); *Wis. Dep't of Health & Family Servs. v. Blumer*, 534 U.S. 473, 479 (2002) (Medicaid); *South Dakota v. Dole*, 483 U.S. 203, 206--07 (1987) (speed limits).

<sup>241</sup> Thus, this work extends the argument I began elsewhere, see Brian Galle, *A Republic of the Mind: Fiscal Federalism, and Section 164 of the Tax Code*, manuscript at 42--50 (forthcoming INDIANA L.J. 2006), that conditional tax benefits may be a useful, if presently overlooked, policy tool. There are other fairly preliminary efforts in this direction, as well. See Nancy Staudt, *Redundant Tax and Spending Programs*, 100 Northwestern Univ. L. Rev. 1197 (2006);