NELLCO
NELLCO Legal Scholarship Repository

University of Connecticut School of Law Articles and Working Papers

University of Connecticut School of Law

5-7-2007

Wrestling With MUDs to Pin Down the Truth About Special Districts

Sara C. Galvan
University of Connecticut, sara.bronin@law.uconn.edu

Follow this and additional works at: http://lsr.nellco.org/uconn_wps

Recommended Citation
Galvan, Sara C., "Wrestling With MUDs to Pin Down the Truth About Special Districts" (2007). *University of Connecticut School of Law Articles and Working Papers.* Paper 70.
http://lsr.nellco.org/uconn_wps/70

This Article is brought to you for free and open access by the University of Connecticut School of Law at NELLCO Legal Scholarship Repository. It has been accepted for inclusion in University of Connecticut School of Law Articles and Working Papers by an authorized administrator of NELLCO Legal Scholarship Repository. For more information, please contact tracy.thompson@nellco.org.

WRESTLING WITH MUDS TO PIN DOWN THE TRUTH ABOUT SPECIAL DISTRICTS

*Sara C. Galvan**

Federal, state, and local governments encourage and empower special districts—board-run, special purpose local government units that are administratively and fiscally independent from general purpose local governments. Special districts receive incentives, grants, and freedom from limitations (such as limitations on tax and debt) imposed on general purpose local governments. Special districts are treated favorably because they are small in size, which theoretically means they foster democratic participation; are limited in purpose, meaning that states can tailor special districts' powers to serve specific problems; and are viewed as efficient solutions to specific problems. Though special districts have tripled in number over the last fifty years, the rationale justifying their favorable treatment has not been thoroughly scrutinized. One obstacle to such scrutiny is the difficulty in determining a metric of assessment: Too many different kinds of special districts exist, and the scope of districts changes constantly. An imperfect, but no less revealing, method is a close investigation of one type of special district.

This Article provides one of the few in-depth reviews of special districts in the academic literature, focusing on the Texas municipal utility district (MUD), originally designed to supply water to unincorporated areas. MUDs—the most common type of special district in the state with the third largest number of special districts—embody both the strengths and weaknesses of special districts. Texas's failure to address MUDs' negative effects reflects our nationwide failure to analyze and correct problematic special districts. This Article discusses MUDs' formation, powers, and scope, and analyzes how MUDs operate without real democratic checks, have too much power, and ineffectively work toward their goals. Throughout, it attempts to engage the central question in modern local government law: the optimality of certain units of government.

* Gallivan Research Professor of Law, University of Connecticut School of Law. I would like to thank Robert C. Ellickson, Jeremy Paul, Sachin Pandya, and especially Eduardo Peñalver, for their thoughtful suggestions, and my father, Eleuterio Galvan, Jr., P.E., for introducing me to the world of MUDs.

TABLE OF CONTENTS

INTRODUCTION 102
I. THE MYTH OF SPECIAL DISTRICT DEMOCRATIC PARTICIPATION 107
A. *Developers' Formation of MUDs* 109
B. *Developers' Governance of MUDs (At Least Initially)* 112
C. *Lack of Long-Term Democratic Participation in MUDs* 113
II. THE MYTH OF SPECIAL DISTRICT LIMITED POWERS 117
A. *MUDs' Powers Resemble Those of General Purpose Local Governments* 119
B. *Clarifying the Special District—General Purpose Local Government Distinction* 122
1. Difficulties at the Supreme Court 123
2. Sketching Out a Distinguishing Mechanism 126
III. THE MYTH OF SPECIAL DISTRICT EFFICIENCY 127
A. *MUDs, Fragmentation, and Externalities* 128
B. *Addressing the Efficiency Gap* 132
1. Consolidation 133
2. Annexation 134
3. Regional Planning 136
4. Intergovernmental Cooperation 138
CONCLUSION 139

INTRODUCTION

If you have ever called the fire department, been to an airport, or strolled around a business improvement district, you have likely enjoyed the services of a special district.[1] Special districts handle a wide range of discrete governmental functions—from local matters like emergency services or library maintenance to regional matters like irrigation, flood control, and transportation. Despite having myriad missions, all special districts share the same basic structure: They are board-run, special purpose local government units that are administratively and fiscally independent from general purpose governments.[2] Special districts also share in

1. The terms special district, special service district, limited purpose district, and special purpose district will be used interchangeably in this Article; all exclude school districts.

2. For classic definitions of special districts, see 1 U.S. Advisory Comm'n on Intergovernmental Relations, Regional Decision Making: New Strategies for Substate Districts—Substate Regionalism and the Federal System 20 (1973) ("Independent special districts are limited purpose governmental units which exist as separate corporate entities and which have substantial fiscal and administrative independence from . . . local governments. . . . They possess the corporate power necessary to perform their activities; are governed by a board of directors, trustees, commissioners, etc. . . . and are authorized to raise revenue from one or more sources."); *see also* John C. Bollens, Special District Governments in the United States 1 (1957) ("They are organized entities, possessing a structural form, an official name, perpetual succession, and the rights to sue and be sued, to

significant support from policies that encourage their proliferation and empower them with broad capabilities.

This Article focuses on the favorable treatment of the special district. Three concepts may explain such treatment: democracy, limited power, and efficiency. First, in theory, special districts are among the most democratic forms of governance—closer to the people by virtue of their small size. Second, special districts are limited in purpose, which means that states can tailor districts' powers to solve a specific problem. Finally, special districts can supposedly target a defined geographic area more efficiently than general purpose governments. For these reasons, as a federal commission observed thirty years ago, "[a]ll three levels of government have encouraged the growth of special districts":[3] The federal government provides incentives in its transportation, housing, natural resource, and public facility construction grant programs and policies; the states release special districts from tax and debt restrictions[4] and weaken the powers of other local governments, allowing special districts to operate without having to comply with local rules; and general purpose local governments advocate for special districts as an easy solution for the toughest problems. As a result of these favorable policies, special districts have been the fastest-growing type of local government in the United States (as compared to general purpose local governments, counties, and school districts) since they first came to prominence around World War II.[5] By 1952, 12,340 special districts existed in the United States; fifty years later, they numbered 35,052—a nearly threefold increase.[6] Today, special districts earn

make contracts, and to obtain and dispose of property."); Max A. Pock, Independent Special Districts: A Solution to the Metropolitan Area Problems 11-12 (1985) (characterizing special districts as follows: "(1) they exist as separate corporate entities, though they may have been created under any of several types of formation procedures; (2) they are entrusted with the performance of one or more governmental functions or proprietary services vested with a public interest, although these may range from the operation of a mass transit system to the control and eradication of noxious weeds; (3) they are entrusted with corporate powers commensurate with the performance of their activities; (4) they are governed by a board of directors, although these may have been installed pursuant to any of several different selection procedures; (5) their jurisdiction, with few exceptions, is delimited by territorial boundaries; (6) they are possessed of one or more revenue sources and financial powers found in conventional units of local government").

3. U.S. Advisory Comm'n on Intergovernmental Relations, *supra* note 2, at 341.

4. Debt restrictions are placed on municipalities to prevent them either from assuming too much debt and hindering the provision of current services or from going bankrupt.

5. Jon C. Teaford, City and Suburb: The Political Fragmentation of Metropolitan America, 1850-1970, at 173 (1979) (describing how the number of special districts soared during the wartime era, as the suburban boom compelled more and more metropolitan areas to resort to special districts to meet specific needs).

6. U.S. Census Bureau, Government Organization 6 (2002), *available at* http://www.census.gov/govs/www/cog2002.html (excluding school district governments). By contrast, the number of general purpose local governments has held steady during that period. *Id.* at 4 (showing that 34,009 general purpose subcounty local governments existed in 1952, while 35,933 existed in 2002). School districts, meanwhile, have dramatically decreased in number, primarily as a result of consolidation: Only one-fifth of the number of

approximately $123 billion in revenues annually (and have approximately $217 billion in debt).[7]

Though special districts continually grow in number and scope, the theories that support them have not been thoroughly scrutinized. Perhaps the obstacle to such scrutiny is the difficulty in developing a metric of assessment: Too many types of special districts exist, and the scope of districts changes constantly. An imperfect, but nonetheless revealing, method is a close investigation of one type of special district. This Article therefore narrows the focus and reviews one special district in depth: the Texas municipal utility district (MUD), originally designed to supply water to unincorporated areas.

MUDs are deserving of in-depth scrutiny for several reasons. They are included in the group of water districts that together comprise the most popular type of special district[8] in a state with one of the largest total quantities of special districts.[9] They are proliferating, growing in number every year in and around Texas cities. MUDs' powers are clearly laid out in the Texas constitution and statutes, and, because they have been active for over three decades, their effects are observable. But most importantly, MUDs embody both the strengths and weaknesses of special districts, and the lessons learned from MUDs apply broadly.

Like other special districts, MUDs have become a favored form of government. The Texas constitution was amended to provide for the establishment of water districts in the early part of the twentieth century, and modern MUDs were authorized in 1971 by the passage of Chapter 54 of the Texas Water Code. Today, about 950 MUDs exist in Texas,[10] with

school districts exists today as existed in 1952. *Id.* at 6 (showing that 67,355 school districts existed in 1952, while 13,506 existed in 2002).

7. U.S. Census Bureau, Finances of Special District Governments: 2002, at 3 (2005), *available at* http://www.census.gov/prod/2005pubs/gc024x2.pdf.

8. U.S. Census Bureau, *supra* note 6, at 13-14. The Texas Water Code establishes six different types of water districts, all subject to the provisions of Chapter 49 and one other Water Code chapter: fresh water supply districts (also governed by Tex. Water Code Ann. § 53 (Vernon 2002)), groundwater conservation districts (Tex. Water Code Ann. § 36 (Vernon 2000)), MUDs (Tex. Water Code Ann. § 54 (Vernon 2002)), underground water conservation districts (*id.* § 52), water control and improvement districts (Tex. Water Code Ann. § 51 (Vernon 2000-2002)), and water improvement districts (Tex. Water Code Ann. § 55 (Vernon 2002)). Of the estimated 1300 water districts in Texas, municipal utility districts (MUDs) far outnumber the other five primary types. Tex. Natural Res. Conservation Comm'n, A Handbook for Board Members of Water Districts in Texas 1, 58 (4th ed. 1996), *available at* http://www.tceq.state.tx.us/comm_exec/forms_pubs/pubs/rg/rg-238_188886.pdf.

9. Only California and Illinois have more special districts. U.S. Census Bureau, *supra* note 6, at viii (indicating that Illinois has 3145 special districts, California has 2830, and Texas has 2245).

10. Texas Commission on Environmental Quality, Water Utility Database District Count Report, http://www3.tceq.state.tx.us/iwud/reports/index.cfm (last visited Mar. 20, 2007). This data was taken from a report listed on November 6, 2006, but note that this figure changes constantly; MUDs are created, rendered inactive, and annexed every month.

the average MUD comprising about 525 acres.[11] In the Houston area alone, four or five hundred[12] MUDs comprise over 210,000 acres of land, or about 329 square miles.[13] This Article discusses MUDs' formation, powers, and scope, siting the discussion within the larger debate about special districts. This Article argues that Texas's failure to address MUDs' negative effects mirrors our failure, nationwide, to analyze and correct problematic special districts—those that operate without real democratic checks, have too much power, or ineffectively work toward their goals. Throughout, this Article considers MUDs through the lens of several normative frameworks: civic republican ideals of citizen participation in governance; vertical equity, or the impact of MUDs on different groups of people; horizontal equity, including the problem of "givings" to well-connected developers; and efficiency questions.

Part I of this Article challenges the notion that special districts facilitate democratic participation better than larger units of government. In one sense, special districts might be said to satisfy a democratic impulse: With their myriad forms and purposes, special districts provide options on which mobile individuals can "vote with their feet." Under Charles Tiebout's famous hypothesis, the existence of multiple jurisdictions of different sizes, and with different packages of services, allows citizens to exercise their powers to choose where they live or work.[14] Tiebout's public choice hypothesis, however, falls short in explaining the lure of special districts because, as a practical matter, many citizens are unaware of special district boundaries and services.[15] Without prior knowledge, individuals cannot truly be said to have exercised a choice.

---

11. Mun. Info. Servs., An Introduction to Houston Area & Other Texas MUDs 1 (Mar. 2003) (unpublished manuscript), *available at* http://www.mudhatter.com/MUD_Folder/Intro_2004.pdf (explaining that MUDs average 500 to 550 acres).

12. Mun. Info. Servs., Guide to Houston Area Municipal Utility Districts 220-23 (4th ed. 2003) (listing 594 water districts total); Ronald L. Welch, Revival of Houston Area Municipal Utility Districts 2 (Nov. 2001) (unpublished manuscript), *available at* http://www.mudhatter.com/MUD_Folder/Recovery_MUDS_1page.pdf (stating that in 2000, there were 422 "active 'typical' MUDs (normal size and configuration) within the boundaries or [extraterritorial jurisdictions] of Houston and other surrounding cities").

13. Welch, *supra* note 12, at 2. One of Texas's foremost MUD lawyers reported that Houston-area MUDs represent more than 470,000 single family residences, 107,000 apartments, $9 billion in commercial buildings, and 52,000 acres of commercial property. *See AWBD Figures Prominently in Testimony Before House Committee Hearing on Natural Resources Hearing in Houston; Focus Was on MUDs, Their Benefits and Concerns*, AWBD J., Fall 2006, at 19 [hereinafter *AWBD Figures Prominently in Testimony*] (quoting Joe B. Allen).

14. Charles M. Tiebout, *A Pure Theory of Local Expenditures*, 64 J. Pol. Econ. 416 (1956) (discussing the efficiency rationale behind allowing diverse jurisdictions to present competing packages of public goods to consumers, and allowing those consumers to choose among such choices); *see also* Richard Briffault, *Our Localism: Part II—Localism and Legal Theory*, 90 Colum. L. Rev. 346, 399-403 (1990) (describing the Tiebout hypothesis).

15. *See* Nancy Burns, The Formation of American Local Governments: Private Values in Public Institutions 12-13 (1994) (describing the author's efforts to find special district boundaries, including conversations with state, county, and local government officers who

Special districts' small size may be a more significant factor in accommodating greater citizen participation: They are sized such that people might know someone on the district board, take advantage of opportunities for community building, or otherwise become interested in district politics. But, as the study of MUDs proves, size does not end the story. MUDs fall short of the democratic ideal in both their formation and their maintenance. Typically, developers—not the general public—determine when MUDs are formed, how big they are, and who governs initially. Once MUDs are created, few people bother to vote in MUD board elections or take an interest in district affairs. In the absence of public participation, MUDs' ability to influence the state law that governs them goes unchecked. These realities raise many doubts about the democratic nature of special districts.

Part II questions where we draw the line between general purpose local governments and special districts and negates the myth that special districts' powers always differ from those held by general purpose local governments. Scholars and policy makers have justified the treatment of special districts on the grounds that special districts are more like corporations than governments and thus should be given wide latitude to accomplish their goals. According to this view, there is intrinsic value to limited government. Over time, however, special districts' powers have broadened significantly; little effort has been made to distinguish between broadly empowered special districts and the general purpose governments they have come to resemble.[16] In one prominent example, discussed in Part II, the United States Supreme Court extends the one person, one vote exception for special districts to even those districts with powers as broad as many general purpose local governments.

MUDs, the object of this study, occupy a gray area between general purpose governments and truly specialized special districts. MUDs have the power to tax and issue bonds, exercise eminent domain, obtain easements, incur debt, provide fire department and solid waste services, build parks and playgrounds, hire peace officers, and run elections. One might argue that MUDs have effectively become general purpose local governments. Their ever-expanding scope begs the question: When does a special district become so far-reaching that it should be considered a general purpose local government and limited in similar ways? Relatedly, how can states increase controls over special districts without compromising the independence and flexibility they need to achieve their

could not pinpoint such boundaries). In Texas, the legislature has recognized that many people move into MUDs unaware that they are doing so; state law requires that anyone who sells or conveys property within a MUD must give notice to purchasers that the land is located in a MUD. Tex. Water Code Ann. § 49.452 (Vernon 2000).

16. And it has become more difficult to do so: Almost all states, for example, give special districts the ability to impose property taxes. *See* George W. Liebmann, *The New American Local Government*, 34 Urb. Law. 93, 113 (2002) (identifying Alabama, Alaska, Arkansas, Pennsylvania, and Virginia as the exceptions).

goals?[17] Using MUDs as a backdrop, this part will argue that existing frameworks—including the Supreme Court's inadequate attempts to distinguish between general purpose local governments and special districts—should be modified to better distinguish between the two types of governance.

Part III challenges the notion that special districts are the most efficient unit to tackle the problems that they are meant to address. The perceived advantage of special districts is their ability to impose costs on those who receive their benefits—that is, the group of people living or owning property within the district. But special districts have many negative consequences beyond their bounds—externalities that are not factored in to the calculus used to justify their creation. Moreover, having too many small special districts leads to fragmentation, creating an anticommons, which makes a coordinated approach to solving a large problem impossible. A study of MUDs illustrates these concerns. This Article argues that MUDs have many negative externalities and that MUDs are not the optimal unit of governance to address the water supply issue that they were created to address.

I. THE MYTH OF SPECIAL DISTRICT DEMOCRATIC PARTICIPATION

It has long been assumed that smaller units of government facilitate democratic participation because leaders are closer to their constituents and more people can have a voice in the decision-making process.[18] One of the more prominent advancers of the "small-is-better" theory is Harvard professor Gerald Frug, who has consistently advocated for more substantively empowering local governments and for "the reduction of the scale of decisionmaking, since limited size appears to be a prerequisite to individual participation in political life or at the workplace."[19] Professor

17. *See* James Leigland, *External Controls on Public Authorities and Other Special Purpose Governments*, *in* Public Authorities and Public Policy 31, 45 (Jerry Mitchell ed., 1992) (posing this exact question).

18. *See, e.g.*, I Alexis de Tocqueville, Democracy in America 53-54 (Stephen D. Grant trans., Hackett Publishing Company, Inc. 2000) (1835) (discussing the democratic virtues of the New England town and observing that "[i]t is in the township, at the center of the ordinary relations of life, that are concentrated the desire for esteem, the need born of real interests, the taste for power and éclat; these passions, which so often disturb society, change character when they can be thus exercised close to hearth and home and in a way in the bosom of the family"); Kenneth T. Jackson, Crabgrass Frontier: The Suburbanization of the United States 155 (1985) (stating that "democracy seems to call for government to remain small and close to the people"); Briffault, *supra* note 14, at 396 (characterizing the link between small governance and greater participation); Richard Briffault, *Who Rules at Home?: One Person/One Vote and Local Governments*, 60 U. Chi. L. Rev. 339, 341 (1993) (summarizing that "[l]ocal governments are often thought of as little democracies, providing fora for participation, deliberation and collective action concerning a wide range of policy matters").

19. *See, e.g.*, Gerald E. Frug, *The City as a Legal Concept*, 93 Harv. L. Rev. 1057, 1069 (1980). Frug adds that to truly encourage participation, local governments must be both small-scale and powerful: "Power and participation are inextricably linked: a sense of powerlessness tends to produce apathy rather than participation, while the existence of

Richard Thompson Ford also supports small over large governments, believing that smaller governments advance "democratic government, effective place based political initiatives, and civic interaction and identification with the public sphere" and that larger governments are "more distant, more bureaucratic, and less responsive."[20] Under this logic, relatively small-sized special districts might be especially encouraging of participation. Yet the realities of special districts belie this conclusion, in part because they attract the attention of interest groups who want to leverage districts' powers, and in part because the average citizen tends to be disinterested in district activities.[21]

In the case of MUDs, real estate developers have become their most vocal advocates and have received most of their benefits. While the regulatory capture story is not new, the surprising extent to which developers control MUDs calls into question the many benefits given to special districts. Many developers integrate MUD financing into their earliest feasibility studies of a development project.[22] Developers support MUDs because MUDs provide a vehicle for them to recoup initial infrastructure expenditures: Typically, MUDs issue bonds in the amount of the expenditure and immediately repay the developer; then, MUDs tax incoming landowners to repay the bond.[23] Without the bonding and taxing powers, MUDs would not be able to provide a wide range of amenities, and developers would not be able to benefit from the construction of infrastructure at low or no cost to them. MUDs thus make exurban developments less risky—and more attractive—by distributing public funds to subsidize private developers' efforts. As the Texas Commission on

power encourages those able to participate in its exercise to do so." *Id.* at 1070. As Part II of this Article argues, MUDs combine both. More recently, Frug identified the special district as a possible exception to his classic formulation, observing that special districts' "relative imperviousness to political control increases the power of entities unaccountable to metropolitan residents" and that "the multiplicity of entities and their technical nature generate an unusual amount of voter confusion and apathy." Gerald E. Frug, *Beyond Regional Government*, 115 Harv. L. Rev. 1763, 1783-84 (2002) [hereinafter Frug, *Beyond Regional Government*].

20. Richard Thompson Ford, *Beyond Borders: A Partial Response to Richard Briffault*, 48 Stan. L. Rev. 1173, 1184 (1996); *see also* Clayton P. Gillette, *Regionalization and Interlocal Bargains*, 76 N.Y.U. L. Rev. 190, 200 (2001) ("Small jurisdictions promote political participation, as recognized even by those who advocate more local attention to metropolitan perspectives. Expansion of boundaries necessarily reduces the competition among localities that is credited with controlling bureaucratic budgets and facilitating monitoring of local officials. Finally, larger boundaries may integrate residents who likely have competing preferences about the provision of local public goods, so that some preferences, even those that do not cause spillovers, get frustrated.").

21. *See* Burns, *supra* note 15, at 26-27 (describing how developers control special districts across America). In Arizona, fire service and equipment firms play a major role in creating fire districts. *Id.* at 28.

22. *See* Mun. Info. Servs., *supra* note 11, at 4.

23. As the Rockwall-Rowlett Morning News put it, "Developers cheer the districts because they can mean big bucks, are created easily and face scant local governmental regulation." Paula Lavigne, *Builders Call for "Summit" on Utility Districts*, Rockwall-Rowlett Morning News (Tex.), Dec. 17, 2003, at 9M.

Environmental Quality (TCEQ) observed, "The developer is the major force behind the creation and development of a district. . . . He may obtain a financial commitment from a loan institution, hire engineers to draw plans, employ attorneys to create the district, nominate the initial board of directors, and oversee construction within the district."[24] As a result, MUDs are, from formation through initial governance, in large part controlled by Texas's real estate developers, not the general public.

In the long term, too, MUDs suffer from a public participation deficit: Though the developer's initial board of directors may be replaced over time by more recent arrivals, few people care about MUD affairs. The board tends to run its MUD without significant public checks. A close look at MUDs exposes just how this situation comes about and how it persists.

A. *Developers' Formation of MUDs*

Forming general purpose local governments is typically very difficult: To do so, many individuals must come together to overcome a collective action problem. Forming special districts, however, can be quite easy and may involve just one entity or a small group of like-minded individuals.[25] MUDs, similarly, are almost always conceived, bounded, and created by developers and their associates, who make the most of the lenient legal provisions that allow for MUDs' formation. Authorized by the state constitution,[26] water districts in Texas fall into two categories: general law districts formed pursuant to Chapter 49 of the Texas Water Code,[27] and special law districts named and bounded by stand-alone legislative acts. General law districts follow certain statutory rules of formation, while special law districts do not.

Under state law, creating a general law MUD involves four basic steps: (1) a landowner petition, (2) a review by a state agency, (3) a city or county review, and (4) an election. First, a landowner or group of landowners

24. Tex. Natural Res. Conservation Comm'n, *supra* note 8, at 35. Few in Texas dispute this characterization, and most of the state's major newspapers have defined MUDs as tools of developers. *See, e.g.*, Sandra Baker & Andrea Jares, *Baker & Jares: 3 Projects Get in Motion*, Fort Worth Star-Telegram, June 12, 2006, at D5 ("Municipal utility districts are government bodies established by a land developer . . . ."); Janet Elliott, *Voting Rights Statute Tested: Austin Water District Sues over Portion Dealing with Minority Participation*, Houston Chron. (3 Star ed.), Sept. 8, 2006, at B1 (describing a MUD set up "so the developer could recover the costs of installing water and wastewater infrastructure"); Ian McCann, *Senate Candidates Debating Who's Out of Touch*, Dallas Morning News (Collin County ed.), Feb. 17, 2006, at 12B ("The utility district was set up to allow subdivision developers to tax the homeowners to help pay for water and sewer services and roads.").

25. Burns, *supra* note 15, at 31 ("By and large, [special districts generally] have been efforts by developers to use public financing for development.").

26. Tex. Const. art. XVI, § 59(a)-(b) (declaring that the conservation and development of natural resources, including water, is a "public[] right and dut[y]" and authorizing the legislature to create districts to fulfill that purpose).

26. Tex. Water Code Ann. tit. 4 (Vernon 2000) (entitled "General Law Districts").

27. *Id.*

submits a petition to the state environmental agency, the TCEQ, calling for the creation of a MUD. The petition must be signed by a majority of individuals who own the affected land, as listed on the tax rolls; however, if there are more than fifty persons holding title in the proposed district, at least fifty landowners must sign the petition.[28] These petitions are almost uniformly drafted by the developer of a new subdivision, typically a single-family residential subdivision on the outskirts of a major city. Second, the TCEQ reviews the petition. The agency must consider the availability of comparable services from other systems; the reasonableness of projected construction costs, tax rates, and sewer rates; and whether the district will have an unreasonable effect on land elevation, subsidence, groundwater, recharge capability, natural run-off rates and drainage, water quality, and total tax assessments.[29] Third, the petition for the MUD must be reviewed by the relevant city or county government. If a proposed MUD is within the extraterritorial jurisdiction of a city,[30] the city must consent to the MUD before a petition is filed with the TCEQ.[31] A city's consent typically comes as a matter of course[32]—even, sometimes, in the face of widespread public disapproval.[33] If a proposed MUD is outside the extraterritorial jurisdiction of a city, the commissioners' court of the county in which the district is located may submit written comments to the TCEQ.[34] In contrast to city approval, which is mandatory when MUDs are within the city's extraterritorial jurisdiction, the county court's comments are merely advisory. Once the TCEQ approves the petition, it appoints an initial board of five members, almost always comprised of those individuals listed by the developer in the original petition. Finally, an election is held to determine whether the district may be formed and to select the first permanent board.[35] If a majority of electors in the proposed district approve, the MUD is created.

28. Tex. Water Code Ann. § 54.014 (Vernon 2002).

29. *Id.* § 54.021.

30. In 1983, ninety-five percent of MUDs reportedly were in cities' extraterritorial jurisdiction. Tex. Advisory Comm'n on Intergovernmental Relations, A Handbook for Board Members of Utility Districts in Texas 2 (1983). The author could find no such figures for 2006.

31. Tex. Water Code Ann. § 54.016.

32. One reason for this ready consent is that city officials might view MUD land as a future annexable tax base. *See, e.g.*, Chunhua Zen Zheng, *Pearland Mayor Addresses Growth, Challenges*, Houston Chron. (Brazoria County ed.), Jan. 22, 2004, at 1 (interviewing the mayor of Pearland, who said, "We did consent to their [MUDs'] formation, with the understanding that when they are built out, we would proceed to have a planned annexation of their territory into the city").

33. *See, e.g.*, Dan Feldstein, *Proposal Raising Home Values—and Tempers*, Houston Chron., July 18, 2006, at A1 (describing how the City of Houston approved a MUD which had been requested by a prolific developer despite public opposition).

34. Tex. Water Code Ann. § 54.016. Texas has 254 counties, each governed by an elected commissioners' court, which includes a county judge and the county commissioners.

35. Tex. Water Code Ann. § 49.102(a), (e) (Vernon 2002 & Supp. 2006).

While the process of creating a general law MUD seems arduous, in practice a legally sufficient petition is rarely denied.[36] High approval rates result in part from a close working relationship between the developers and various levels of government during the petition process. Even cities with power to reject a proposed MUD are reluctant to do so because a MUD creates development without an immediate cost to the city; the city can later annex the land to augment its tax base. Another reason for high MUD application approval rates is that the voter pool for the confirmation election usually consists of a small group of property owners who are handpicked by the developer. In practice, the developer often builds a few structures or installs mobile homes during the early phases of development; the developer then leases the underlying land at a nominal rate to a group of individuals he hopes will become the initial board of directors.[37] These individuals then sign the petition to the TCEQ, become "voters" in the MUD, and elect themselves permanent directors.[38] While there are limits on who may serve on the board, these limits are not difficult to overcome.[39] As a result, the developer will almost always have substantial influence over the initial infrastructure development and MUD activities.

If the TCEQ is reluctant to approve a general law petition, or if a general purpose government withholds necessary consent, a developer may ask her legislator to help her create a special law MUD, exercising what has been called an "end run around a reluctant government."[40] Special law MUDs are much easier to form than general law districts because they simply require the passage of one bill and do not require approval by the TCEQ. It is difficult to know how many special law districts exist in Texas, since most bills creating them are not published outside the compilation of session laws.[41] The consolidation of all such laws in a new code, the

36. Telephone Interview with Michael Byrne, Bond Reviewer, Dists. Review Dep't, Water Supply Div., Tex. Comm'n on Envtl. Quality, in Austin, Tex. (Nov. 6, 2006) (guessing that "ninety-nine percent" of district creation petitions make it through the Texas Commission of Environmental Quality (TCEQ) review process and suggesting that failed petitioners turn to the special law process to create a MUD).

37. *See* Burns, *supra* note 15, at 26 (citing Virginia Marion Perrenod, Special Districts, Special Purposes 47 (1984)).

38. Mun. Info. Servs., Texas MUDs: A Synopsis 3 (Mar. 1990) (unpublished manuscript), *available at* http://www.mudhatter.com/MUD_Folder/TexasMUDsSynop.pdf (describing this process).

39. *See infra* text accompanying notes 46-47.

40. Mike Lee & Josh Shaffer, *Developing Power: Regional Growth, Once Dominated by a Few Tycoons, is Now Driven by Agencies, City Managers, Landowners and Average Residents. Though Money Still Talks, Power Is Harder to Hold*, Fort Worth Star-Telegram, Sept. 1, 2002, at 1 ("The fastest route [for development] is through Austin, where the Legislature has routinely granted municipal utility districts.").

41. *See* Texas Legislative Council, Special District Local Laws Code Project, http://www.tlc.state.tx.us/legal/sdcode/sd_code.html (last visited Mar. 20, 2007); *see also* State of Tex. S. Comm. on Intergovernmental Relations, Interim Report, 78th Leg., at 58 (2002) (noting that there is no single source listing all special law districts in Texas and that budget shortfalls apparently hinder the creation of one).

Special District Local Laws Code, has been slow.[42] In any case, special law district legislation often has three components: (1) a statement of what type of district has been formed, including references to the relevant portions of the governing law (for MUDs, Chapters 49 and 54 of the Texas Water Code); (2) a legal description of district land; and (3) a statement of the specific powers of the district. Many special law district laws mandate that district residents confirm the creation of a MUD through an election.[43] Special law MUDs are first governed by the board named by the legislature in the original enabling law.[44]

B. *Developers' Governance of MUDs (At Least Initially)*

Developers tend to exert tremendous influence over MUDs' boards of directors, at least initially. As discussed, the initial board of a general law MUD must be confirmed by the TCEQ. In practice, the TCEQ confirms as directors those persons listed by the developer in the original petition.[45] Typically, of course, the developer advances only the names of persons he believes will be sympathetic to his aims and willing to help him recover his costs through bonding.[46] The Water Code imposes some limitations on MUD directors' identities, prohibiting a person from serving on certain MUD boards if he is related to the developer, another board member, or someone providing professional services to the district; provides professional services or serves as an employee to the developer or district; is the developer himself; or is a party to a district contract.[47] Overcoming these obstacles by finding willing allies is not difficult.

Developers using the special law route find controlling the board appointment process even easier because the initial board makeup may be codified in the statute creating the MUD, obviating the need for TCEQ review. Moreover, special law MUDs whose governing law does not require public elections are exempt from the provisions excluding certain

42. H.B. 3508, 78th Leg., Reg. Sess. (Tex. 2003) (mandating the creation of the Special District Local Laws Code).

43. *See, e.g.*, Tex. Spec. Dists. Code Ann. § 8112.003 (Vernon 2006) (creating the East Montgomery County Municipal Utility District No. 8 and providing that a confirming election be held before 2010 for the district to continue as a MUD).

44. A third, less common, method of creating a MUD is conversion from another type of water district. The conversion process only requires the approval of the TCEQ and is relatively easy to accomplish. Unlike the other methods of creating MUDs, the conversion method limits developers' control in at least one way: The district's boundaries are already set by the boundaries of the previous water district. They cannot be changed except through the annexation processes described in Parts II and III of this Article. *See* Tex. Water Code Ann. §§ 54.030, .033 (Vernon 2002).

45. *See* Telephone Interview with Michael Byrne, *supra* note 36.

46. *See* Mun. Info. Servs., *supra* note 38, at 3.

47. Tex. Water Code Ann. § 49.052(a) (Vernon 2000). However, this limitation applies only to MUDs located entirely within one county, and, if located in the corporate area of a city or cities, includes within its boundaries less than seventy-five percent of the area of the city. Tex. Water Code Ann. § 49.052(a) (Vernon 2000 & Supp. 2006).

kinds of persons from serving on boards.[48] Whether they have created a special or general law district, many developers also install a management company that works alongside the MUD to exert another method of control.[49]

Texas courts have never satisfactorily addressed developers' close relationship with the water districts they create, though the Supreme Court of Texas did consider the issue in *Quincy Lee Co. v. Lodal & Bain Engineers, Inc.*[50] In *Quincy*, an engineer sued the developer of a water district to enforce a mechanics' lien on the developer's property after the engineer was not paid by the district.[51] The engineer argued that the district, in contracting with him to engage in services affecting a public improvement project, served as the agent of the developer.[52] Choosing not to further analyze the district's agency powers, the court stated, "There is nothing in Chapter 54 of the Water Code and we have been cited no other provision that authorizes the [district] to act as an agent for the developer."[53] In so ruling, the court focused exclusively on express authority as the means to establish agency, ignoring the well-known legal doctrine that apparent or inherent authority can also establish agency. If it had given the issue more thought and delved more deeply into the realities of MUDs' creation and operation, the court might well have ruled otherwise. *Quincy* illuminates just one legal area where developers' control over MUDs has determinative weight.

C. *Lack of Long-Term Democratic Participation in MUDs*

More troubling for a special district than the control of a powerful interest group early in its development is the sustained absence of democratic participation in special district activities over time. The notion that special districts "have a high degree of public accountability"[54] is simply misguided: Few people bother to vote in special district elections or become active in its affairs. One political scientist estimates that after formation, a turnout of two to five percent is "unusually high" for special district elections.[55] Many people are not aware of what special districts do, or where their boundaries—usually drawn without reference to municipal or county lines—end.[56] As William Fischel has noted, the functioning of

48. Tex. Water Code Ann. § 49.103(f)(1) (Vernon 2000 & Supp. 2006).

49. *See* Renee C. Lee, *The Fight for The Woodlands*, Houston Chron., Oct. 8, 2006, at A1 (describing the management role of an entity created by the developer of The Woodlands, which "will lessen" as the suburb is completely built out).

50. 602 S.W.2d 262 (Tex. 1980).

51. *Id.* at 262-63.

52. *Id.* at 263.

53. *Id.* at 264.

54. Bollens, *supra* note 2, at 1.

55. Burns, *supra* note 15, at 12.

56. *See* Roderick M. Hills, Jr., *The Political Economy of Cooperative Federalism: Why State Autonomy Makes Sense and "Dual Sovereignty" Doesn't*, 96 Mich. L. Rev. 813, 826 (1998) (arguing that when multiple levels of government share powers, "it may be difficult

special districts "is, with some justice, ignored by most voters unless something goes badly awry in them."[57] Even voters who pay attention cannot necessarily vote in special district elections; in many cases, the franchise in special districts is limited to landowners, excluding other residents or affected parties.[58]

Although MUDs do not so limit the franchise, MUDs generally suffer from weak electoral participation,[59] except when major decisions (like annexation to a nearby city) are on the line.[60] Unfortunately, there is no good way to measure precisely how many individuals vote in MUD board or bonding elections, since records over the last thirty-five years have been poorly kept.[61] This problem renders a determination of when the developer's initial board is replaced by a "resident board"—one composed of relative newcomers free from the developer's influence—nearly impossible.[62] Without these figures, it might seem rash to assert that few people participate in MUD affairs. But there is other qualitative evidence that supports this claim. For example, we know that in some MUDs, board elections[63] have not been held for over a decade because the seats are uncontested.[64] When a change in board membership does occur, one

for voters to determine which set of officials is responsible for which duties: intergovernmental schemes can be notoriously complex in their allocation of responsibilities").

57. William A. Fischel, The Homevoter Hypothesis: How Home Values Influence Local Government Taxation, School Finance, and Land-Use Policies 22 (2001); *see also* U.S. Advisory Comm'n on Intergovernmental Relations, The Problem of Special Districts in American Government 51 (1964) ("[T]he public generally pays little attention to the activities of special districts once they have been created. Perhaps the most important reasons [sic] for this situation is that special districts, once created, usually are free to go their own way.").

58. *See supra* Part II.B.

59. To remedy this lack of participation, the TCEQ has published a citizens' guide to water districts, urging citizens to "Help Your District Succeed: Participate!" Tex. Comm'n on Envtl. Quality, Texas Water Districts: A General Guide 5 (2004), *available at* http://www.tceq.state.tx.us/comm_exec/forms_pubs/pubs/gi/gi-043_379907.pdf.

60. *See, e.g.*, Beth Kuhles, *Residents Want Woodlands to Become a City*, Houston Chron. (The Woodlands ed.), Sept. 28, 2006, at 1 (chronicling how 450 people attended a meeting to determine an alternative to annexation for multiple Houston-area MUDs); Lee, *supra* note 49 (describing how 300 people attended a MUD meeting after a nearby city (Conroe) announced plans to annex land governed by the MUD).

61. The Texas Election Board does not separate MUD turnout from turnout in other elections.

62. By the time a resident board replaces the initial board, the developer has recouped his initial investment and can move on to another project.

63. The process for board elections is straightforward. General law MUDs and most special law MUDs are governed by boards of directors elected every four years, pursuant to the Texas Election Code by qualified voters in the district. Tex. Water Code Ann. § 49.101 (Vernon 2000) (setting out general electoral qualifications); Tex. Water Code Ann. § 49.103(a) (Vernon 2000 & Supp. 2006) (setting out the term length). Qualified voters include, generally, resident citizens over the age of eighteen who are registered to vote. Tex. Elec. Code Ann. § 11.002 (Vernon 2003).

64. *See, e.g.*, Emily Akin, *Directors' Races on Saturday Ballot*, Houston Chron. (Fort Bend ed.), May 11, 2006, at 1 (noting that a water district had not held elections in more than ten years because no one ran against incumbent board members).

common method of transfer involves a director who, having decided not to seek reelection, resigns his seat so that his chosen successor may be appointed by the remaining board and subsequently run as an incumbent.[65] To make matters worse, absentee landowners who reside elsewhere or who lease their properties to third parties, may hold director positions.[66] Absentee voters may have fewer reasons to be familiar with the issues, to be in touch with neighbors, or to have a sense of accountability to their peers. Anecdotally, we also know that only a handful of voters vote in special bond elections.[67] As a 2004 expert panel on MUDs agreed, "Developers who plan to issue bonds must first win voter approval to back the bonds with a pledge of unlimited taxes, even if the voters can be counted on one hand."[68] But the long-term democracy deficit does not simply consist of poor electoral participation.[69]

Weak public oversight has facilitated numerous cases of fraud or unlawful behavior on the part of MUD boards and individual directors.[70] In 2002, the Texas legislature investigated claims that Dallas-area developers had received hundreds of millions of dollars in taxing authority from a handful of voters who received free rent, jobs, or other benefits in exchange.[71] The same legislative committee also examined one developer's practice of annexing land belonging to other developers and then splitting it off as a separate MUD, thereby obviating the need for city or county consent.[72] As another example, directors of three now-defunct Kingwood MUDs, located north of Houston, spent $1 million of MUD

65. Bollens, *supra* note 2, at 37.

66. Tex. Water Code Ann. § 54.102 (Vernon 2002) (mandating that board directors be either qualified voters or landowners).

67. *See, e.g.*, Kim Canon, *Horsepen Bayou MUD Voters Approve $14 Million Bond Issue*, Houston Chron. (FM 1960/Spring/Klein ed.), Sept. 26, 2002, at 7 (reporting how just thirty-two voters, with no opposition, approved $14 million in long-term bonds).

68. Richard Williamson, *Special MUDs Have Served Texas Well for a Century, Experts Say*, Bond Buyer, Feb. 4, 2004, at 32.

69. Note that all MUDs are subject to the Voting Rights Act, which requires that most political subdivisions comply with certain voting rules. 42 U.S.C. § 1973(a) (2000). At least one MUD has attempted to free itself from these requirements, on the grounds that they were unconstitutional and imposed a financial burden and undue time delays. *See generally* Complaint, Nw. Austin Mun. Utility Dist. No. One v. Gonzales, No. 1:06-cv-01384 (D.D.C. Aug. 4, 2006) (arguing that the access barriers the Voting Rights Act set out to address had been resolved in Texas and that the Voting Rights Act's imposition of costly compliance measures prevented small districts like MUDs from instituting beneficial changes in election procedures); Elizabeth Albanese, *Texas MUD Sues U.S. for Bailout from Elections Law*, Bond Buyer, Aug. 30, 2006, at 40 (quoting an elections expert predicting that "Texas will be ground zero for the decade's most high profile Supreme Court case"); Elliott, *supra* note 24 (describing the board members as all white, and the district as including 1300 homes, two apartment complexes, a church, and some office buildings).

70. As the Fort Worth Star Telegram reported, "MUDs have a history of governance problems." Mike Lee, *Utility Vote Is Set for Today*, Fort Worth Star-Telegram, May 30, 2006, at B1.

71. Reese Dunklin, *Taxing Districts to Get Airing*, Dallas Morning News, Feb. 25, 2002, at 15A.

72. *Id.*

taxpayers' money on frivolous lawsuits and other items, displaying what *The Houston Chronicle* called "little or no concern for upholding the law and safeguarding the public purse."[73] The City of Houston sued the directors in their individual capacity, claiming that the money the MUDs had spent to sue the city was obtained through illegal gifts which violated the state constitution.[74] In other MUDs, boards have set extremely high rates, refusing to explain such rates to residents.[75] If public oversight was more substantive, more instances of managerial misbehavior might be thwarted.

While involvement of MUD residents within their own MUDs is lacking, statewide participation is nonexistent. No statewide lobby on behalf of MUD residents exists. Residents of various MUDs across the state would have to overcome significant coordination barriers, as well as voter complacency, to organize a MUD-reform lobby. Conversely, MUD boards and developers are natural allies and have powerful advocates and lobbyists working to persuade Texas legislators of a coordinated MUD agenda.[76] In 2006, MUDs issued 167 lobbying contracts—one quarter of the total number of contracts issued by all public entities in Texas—worth up to $4 million and paid for by MUD taxpayers.[77] The problem with public officials lobbying MUDs has become so bad that the lieutenant governor and speaker of the state House of Representatives have called for an analysis of the lobbying practices of local governments and potential limitations on their powers for the 2007 session.[78] One group in particular, the Association of Water Board Directors (AWBD), serves as a powerful clearinghouse for Texas MUDs' lobbying efforts and biannually sets out an agenda for the legislative session. According to its 2007 platform, the AWBD opposes limitations on a water district's right to incur debt and levy

73. *See* Editorial, *MUD in Your Eye*, Houston Chron., Dec. 13, 1998, at 2C.

74. *See* Matt Schwartz, *Todd Upset at City Attorney over Kingwood MUD Suits*, Houston Chron., Dec. 9, 1998, at A33.

75. *See, e.g.*, John Pape, *Residents of Riverwood Subdivision Still Seek Relief from High Water Bills*, Houston Chron. (Fort Bend ed.), July 13, 2006, at 10 (discussing how MUD residents felt the Fort Bend County MUD 19 board ignored their concerns in setting rates nearly four times higher than the cost of acquiring water from the nearby municipality of Richmond); John Pape, *Riverwood Subdivision Residents Seek Relief from High Water Bills*, Houston Chron. (Fort Bend ed.), June 1, 2006, at 4 (describing how neighbors tried to contact MUD management and the MUD lawyer about the high bills but received no response).

76. Certain MUDs also hire their own lobbyists. *See, e.g.*, Ctr. for Pub. Integrity, *Ex-Legislators Registered to Lobby 2005—Texas*, Oct. 12, 2006, http://www.publicintegrity.org/hiredguns/reg.aspx?state=TX (noting one MUD's hiring of former legislator John Cliff Johnson).

77. Christy Hoppe, *Cities, Counties Put Lobbyists to Work on Taxpayers' Dime*, Dallas Morning News, June 10, 2006, at 1A (estimating a total lobbying budget for Texas's public entities of between ten and twenty-three million dollars).

78. *Id.*; *see also AWBD Figures Prominently in Testimony*, *supra* note 13, at 19 (describing the testimony of MUD supporters before an investigatory committee and noting that "[t]hanks to promotion of the meeting . . . the hearing room was filled with supporters of the benefits of utility districts").

taxes, opposes new regulatory schemes regarding recycling or reuse of water, opposes the creation of uniform or consolidated election dates, and supports broader authority for MUDs in the road-building, parks and recreation, and contract negotiation contexts.[79] Its legislative committee includes four MUD board members, six lawyers from powerful Texas law firms, and one engineer.[80] No discernable lobby serves as a "MUD watchdog," and no natural lobby that might be organized enough to become one exists. The influence of MUDs on the Texas legislature may help to explain why some of the simplest means of addressing the democracy deficit in MUDs have not been undertaken. Some of these simple solutions include requiring that MUD board elections be held on statewide uniform election days, giving individual notice to voters about special elections, requiring that board members make their primary residence in the district, or mandating that a minimum percentage of registered voters vote to issue bonds (thereby preventing bonds from being issued by a disproportionately small number of voters). For all of the reasons discussed in this subpart, such solutions are unlikely to be instituted without significant changes in the political structure and reforms that make the pro-MUD lobby less powerful.

This part has clarified why developers want to create MUDs and how they exert control over MUDs' formation and governance. Some might argue that developers' control is simply an outgrowth of the laws as written (and not that the laws are products of developers' influence), or that, even if MUD laws were changed, developers could capture the process in some other way. Free market advocates might add that developers should be left to do what they want and that existing MUD laws already constitute overregulation. But all of these critiques evade the central issue raised by Part I. Developers' control is troubling primarily because the existence of MUDs disguises the facts: One interest group controls their governance; their formation, at least at first, serves primarily private ends; and long-term democratic participation in MUDs is poor. The lack of public involvement may be understandable for special districts that follow the traditional model of handling a specific problem that experts are best left to address. But for special districts with broad powers, such as MUDs, the lack of involvement opens the door for widespread private abuse and capture of public entities.

II. THE MYTH OF SPECIAL DISTRICT LIMITED POWERS

As Part I detailed, special districts like MUDs may be highly susceptible to interest group capture, a reality that contradicts the assumption that special districts, by virtue of their small size, foster a sense of civic engagement. Another assertion sometimes made about special districts is

79. Legislative Principles of the Association of Water Board Directors, http://www.awbd-tx.org/legis_princ.html (last visited Apr. 22, 2007).

80. Legislative Planning Committee of the Association of Water Board Directors, http://www.awbd-tx.org/leg_com.html (last visited Mar. 21, 2007).

that they embody limited government, in that their powers are always tailored to meet specific goals—an assertion used to explain the favorable treatment they receive at federal, state, and local levels. Even one of the most prominent local government law scholars assumes that "[s]pecial districts are limited purpose governments . . . without general governmental authority over the territory or its residents[] . . . [that] supply engineering solutions to technical problems."[81] Depending on the relevant law, such favorable treatment typically includes providing for the easy formation of special districts; giving them significant powers to accomplish their goals; declining to extend the one person, one vote requirement to their elections; and freeing them from the state limitations on taxing, bonding, and indebtedness, which might have prevented them from engaging in large-scale utility projects.[82] To take one prominent example, many special districts are free from state constitutional limitations on taxes (as well as debt), on the theory that their narrow purpose renders their revenue-raising authority more like assessments than taxes.[83] But while some special districts are extremely limited in purpose and scope, many others are not. Those districts with the most expansive powers tend to look and act like general purpose local governments, without the attendant limitations.

This part considers whether the state's special treatment of MUDs—which includes easy formation, freedom from taxation and debt limitations, and other incentives—can indeed be defended on the ground that their powers are narrowly tailored to their purposes. When water districts were first authorized by the Texas constitution in 1917, legislation empowering such districts aimed to address a pressing need to supply water to outlying areas. Over time, however, the powers of water districts have been extended far beyond water supply, and MUDs now often function far too much like general purpose local governments to be given special treatment. State MUD laws give developers a potent tool—the establishment of a permanent local government—that far exceeds typical development

81. Richard Briffault, *The Local Government Boundary Problem in Metropolitan Areas*, 48 Stan. L. Rev. 1115, 1145 (1996). Briffault later says that special districts "allow people within metropolitan regions to obtain desired physical infrastructure and related services at reasonable costs without submitting to more comprehensive forms of governance." *Id.* at 1146 (internal quotation marks omitted).

82. *Cf.* U.S. Advisory Comm'n on Intergovernmental Relations, *supra* note 57, at 31 ("There are three basic aspects of State law which might be expected to have a bearing on the incidence of special districts. These are State restrictions on: (1) the taxing powers of local government; (2) the indebtedness of local governments; and (3) the functions and powers of local government.").

83. Richard Briffault, *Foreword: The Disfavored Constitution: State Fiscal Limits and State Constitutional Law*, 34 Rutgers L.J. 907, 938 (2003). State courts across the nation have both permitted special districts to charge landowners "fees" free of constitutional limitations and expanded the scope of these taxes. *Id.* at 934-35. Such rulings "appear to be nothing more than municipal attempts to orchestrate an end-run around state taxation limits" which attempt to get around stringent limits on governments' ability to resort to general taxation, advocated by taxpayers. Laurie Reynolds & Carlos A. Ball, *Exactions and the Privatization of the Public Sphere*, 21 J.L. & Pol. 451, 456 (2005).

incentives like tax breaks and zoning variances. After a critique of MUDs' powers, the discussion broadens to examine the main line of Supreme Court case law that has considered the powers of the special district, albeit indirectly: the so-called "one person, one vote" cases. This part shows how the Court's rationale in defining special districts is inadequate in light of ever-expanding special district powers and sketches new criteria for distinguishing between general purpose local governments and special districts.

A. *MUDs' Powers Resemble Those of General Purpose Local Governments*

Each legislative session, the powers of MUDs—originally intended to serve as stewards and suppliers of water—are augmented.[84] The management of water resources, in itself, leads to the assumption of greater power than one might anticipate: MUDs can take virtually any measures to supply water, collect and dispose of waste, control local storm water, irrigate land, alter land elevation, and navigate coastal and inland waters.[85] In 2001, MUDs were empowered to create and maintain recreational facilities, including parks, landscaping, trails, beautification projects, street lighting, and equipment.[86] One MUD has even used its powers to beautify a historic cemetery.[87] In addition, the Texas constitution specifically allows MUDs to engage in fire-fighting activities,[88] as many MUDs have, and to issue bonds for that purpose.[89] Like any traditional local government, a MUD can make contracts.[90] And like the typical employer, MUDs can provide for retirement, disability, and death compensation funds and enroll in workers' compensation insurance.[91]

---

84. Because acts creating special law MUDs often mandate conformation with one or more chapters of the Water Code, this section will make no distinction between general and special law MUDs.

85. Tex. Water Code Ann. § 54.201(b) (Vernon 2002 & Supp. 2006); Tex. Water Code Ann. § 54.203 (Vernon 2002).

86. Tex. Water Code Ann. §§ 49.462-.463 (Vernon Supp. 2006).

87. *See* Anitra D. Brown, *Cemetery on Cypresswood Drive Gets New Life*, Houston Chron. (Spring/Klein/Tomball ed.), June 15, 2006, at 1.

88. *See, e.g.*, Zen T.C. Zheng, *Sienna Fire Station Step Closer to Reality*, Houston Chron. (Fort Bend ed.), Sept. 21, 2006, at 4 (noting how the Sienna Plantation MUD 1 is building a fire station to be used in part by residents of a nearby municipality, Missouri City).

89. Tex. Const. art. XVI, § 59(f). Under state law, district electors can approve a plan to operate or jointly fund the operation of a fire department. Tex. Water Code Ann. § 49.351 (Vernon 2000 & Supp. 2006).

90. Tex. Water Code Ann. § 49.067 (Vernon 2000 & Supp. 2006).

91. Tex. Water Code Ann. §§ 49.069, .070 (Vernon 2000).

Almost all MUD powers extend beyond district boundaries.[92] MUDs can acquire interests in "land, materials, waste grounds, easements, rights-of-way, equipment, contract or permit rights or interest,"[93] either inside or outside district lines.[94] They can provide services to areas "contiguous to or in the vicinity of the district."[95] In 1995, MUDs acquired the power of eminent domain over any land, easement, or other property inside or outside the district boundaries that is necessary for any of its projects or purposes.[96] In addition, MUDs can petition the TCEQ to obtain the powers granted to road utility districts.[97] Even without formally being granted such authority, MUDs may be able to issue bonds to repair and maintain roads; the legislature has found that the condition of streets affects MUDs' ability to accomplish their statutory purposes.[98] Finally, MUDs can contract for peace officers, including police officers, with the power to make arrests to enforce the laws of the district and the state.[99]

As suggested above, MUDs, like many special districts, can take on significant debt without complying with the debt limitations imposed on the state, counties, or municipalities.[100] MUDs are authorized by the state constitution to issue tax-exempt bonds to fund nearly any MUD project or purpose.[101] The bonds are typically secured by a trust or mortgage lien on part or all of the physical properties of the district,[102] a pledge of *ad valorem* taxes, and/or the MUD's general revenues.[103] There are some limitations on MUDs' bonding authority. For instance, certain MUDs may

92. *See, e.g.*, Tex. Water Code Ann. § 49.211(b) (Vernon 2000 & Supp. 2006) ("A district is authorized to purchase, construct, acquire, own, operate, maintain, repair, improve, or extend inside and outside its boundaries any and all land, works, improvements, facilities, plants, equipment, and appliances necessary to accomplish the purposes of its creation or the purposes authorized by this code or any other law.").

93. *Id.* § 49.218(a).

94. *Id.* § 49.218(c).

95. Tex. Water Code Ann. § 49.215(a), (b), (e), (f) (Vernon 2000) (authorizing such services, so long as they are not duplicated, and allowing MUDs to assess operating and maintenance fees and issue and sell related bonds and notes).

96. *Id.* § 49.222(a). A MUD cannot use eminent domain outside district boundaries, however, to acquire a site for a water treatment plant, water storage facility, wastewater treatment or disposal plant, park, swimming pool, or other recreational facility. Tex. Water Code Ann. § 54.209 (Vernon Supp. 2006).

97. Tex. Water Code Ann. § 54.234 (Vernon 2002 & Supp. 2006). Often, special law MUDs are granted road-building powers without having to petition the TCEQ.

98. Tex. Water Code Ann. § 54.522 (Vernon 2002).

99. Tex. Water Code Ann. § 49.216 (Vernon 2000).

100. *See, e.g.*, Tex. Const. art. III, § 50 ("The Legislature shall have no power to give or to lend, or to authorize the giving or lending, of the credit of the State in aid of, or to any person, association or corporation, whether municipal or other, or to pledge the credit of the State in any manner whatsoever, for the payment of the liabilities, present or prospective, of any individual, association of individuals, municipal or other corporation whatsoever.").

101. *See id.* art. XVI, § 59(c); Tex. Water Code Ann. § 54.501 (Vernon 2002 & Supp. 2006).

102. Tex. Water Code Ann. § 54.504 (Vernon 2002).

103. *See* Tex. Natural Res. Conservation Comm'n, *supra* note 8, at 8 (summarizing these characteristics).

not issue bonds to pay for golf courses or pools.[104] More significantly, the amount of most bonds must be approved in a general election, and the issuance of the bonds themselves must be approved by the TCEQ.[105] The TCEQ now receives roughly 160 to 175 bond applications per year for an average amount of four to five million dollars, and typically approves such applications.[106] By 1990, $3 billion of bonds had been issued by Texas MUDs;[107] by 2003, that figure had doubled.[108]

A necessary complement to the bonding authority is the taxing authority, which can be used to repay debts taken on to build new infrastructure. Like many general purpose local governments, MUDs have the legal authority to levy a range of taxes.[109] MUD boards can set *ad valorem* property taxes each year to pay for bonds and other contractual obligations.[110] MUDs can charge impact fees to recover capital costs for the construction, installation, or inspection of a tap or connection to district water, sewer, or drainage facilities.[111] MUDs can also assess standby fees on undeveloped properties, either for expenditures already made (like debt servicing) or for operating and maintaining facilities that have not yet been financed.[112] Finally, MUDs can levy and collect taxes for operating and maintaining their works and facilities[113] and have the power to cut off services to delinquent taxpayers.[114]

MUD boards also have the power to easily annex land, whether or not contiguous to the district, by petition of the landowners.[115] If the board finds that the annexation is feasible, practical, and beneficial to the area and

104. Tex. Water Code Ann. § 49.4645(a) (Vernon Supp. 2006) (prohibiting districts' use of bonds for golf courses or pools).

105. Tex. Water Code Ann. §§ 49.106, .181 (Vernon 2000 & Supp. 2006). No election is needed if the board borrows money to be paid solely from revenues. *Id.* § 49.153(a).

106. Telephone Interview with Michael Byrne, *supra* note 36.

107. Mun. Info. Servs., *supra* note 38, at 3.

108. *See* Mun. Info. Servs., *supra* note 11, at 2; *cf.* Williamson, *supra* note 68, at 32 (noting that all of Texas' water districts together accounted for $18 billion in outstanding bonds that year).

109. *See* Tex. Const. art. XVI, § 59(c) (authorizing districts like MUDs to levy taxes to pay for bonds).

110. Tex. Water Code Ann. § 54.601 (Vernon 2002).

111. Tex. Water Code Ann. § 49.212(d) (Vernon 2000 & Supp. 2006).

112. *Id.* § 49.231(b) ("The intent of the standby fee is to distribute a fair portion of the cost burden for operating and maintaining the facilities and for financing capital costs of the facilities to owners of property who have not constructed improvements but have potable water, sewer, or drainage capacity available."). Such a fee has to be submitted to the TCEQ, *id.* § 49.231(c)-(g), which will approve an application only if the fee is necessary to maintain the integrity and stability of the district and fairly allocates the district's costs among all landowners. Tex. Natural Res. Conservation Comm'n, *supra* note 8, at 9.

113. Tex. Water Code Ann. § 49.107(a) (Vernon 2000 & Supp. 2006). A public election must be held to approve such a tax. *Id.* § 49.107(b).

114. *Id.* § 49.212(c).

115. Tex. Water Code Ann. § 49.301(a) (Vernon 2000). The petition must be signed by a majority of landowners in a proposed annexation area; fifty landowners must sign if the number of landowners is more than fifty. Tex. Water Code Ann. § 49.302(b) (Vernon 2000 & Supp. 2006).

district, the land may be added.[116] In this process, no state, city, or county has oversight. The State Senate Committee on Intergovernmental Relations has suggested changing the laws to add a requirement that a municipality give written consent to MUDs' annexation of land in the municipality's extraterritorial jurisdiction, but no such law has been passed.[117] Once annexed, the new part of the district bears its pro rata share of bonds, notes, taxes, and other obligations.[118]

Given all of these abilities, it should come as no surprise that MUDs offer significant advantages to developers. The exercise of annexation, bonding, taxing, and eminent domain powers could collectively be considered regulatory and financial givings to the private developers who take advantage of the MUD form.[119] In the MUD context, givings are troubling because developers pay nothing to receive them and no public oversight tempers their distribution. Equally troubling is the fact that the most well-connected developers are most likely to receive MUD benefits, raising horizontal equity concerns. These powers also reveal how blurry the line between special district and general purpose local governments can become. In view of their broad powers, it is more difficult than it might seem to justify the separate and more lenient legal regime governing MUDs on the ground that their powers are narrowly drawn. It is time to reevaluate the MUD, just as it is time to reevaluate how special districts are defined.

B. *Clarifying the Special District—General Purpose Local Government Distinction*

The legal distinction between special districts and general purpose local governments is not without significance: Special districts receive many benefits from their status.[120] Sometimes, granting these powers has backfired, as occurred in the 1980s, when a number of MUDs, hurt by an economic slowdown, defaulted on their debt service obligations.[121]

116. Tex. Water Code Ann. § 49.302(e) (Vernon 2000 & Supp. 2006). Courts will review board decisions regarding annexation by the lenient standard of whether the annexation is rationally related to a legitimate state interest. *See* Mahone v. Addicks Util. Dist., 836 F.2d 921 (5th Cir. 1988) (remanding to the trial court the issue of whether a MUD board's decision to annex 147 acres of land, which completely encircled twenty acres of unannexed, undeveloped property near the MUD's geographic center and owned by the plaintiff, was rationally related to a legitimate state interest).

117. State of Tex. S. Comm. on Intergovernmental Relations, *supra* note 41, at 59.

118. Tex. Water Code Ann. § 49.302(h) (Vernon 2000 & Supp. 2006).

119. For the first full treatment of givings, see Abraham Bell & Gideon Parchomovsky, *Givings*, 111 Yale L.J. 547, 549 (2001) (defining givings as "governmental distributions of property," the inverse of takings).

120. *See supra* text accompanying note 82.

121. *See* Welch, *supra* note 12, at 5 (noting that between 1987 and 1994, eighteen MUDs defaulted on $64 million in loans); Ronald L. Welch, *Trouble on Tap for Municipal Utility Districts*, Houston Chron., May 17, 1987, *available at* http://www.mudhatter.com/MUD_Folder/TroubleOnTap.pdf (describing the pending default of Northwest Harris County MUD No. 19, which had to raise taxes nearly fivefold after an economic slowdown dampened demand for lots, and which nonetheless could not pay for

Legislative reforms limiting the bonding power discussed in Part II.A were passed, but for the most part, the powers of MUDs have only grown. Yet Texas, like many other jurisdictions governing special districts, lacks clear standards to discern where a special district ends and a general purpose local government begins. Making this distinction is not easy, and even the Supreme Court's few attempts to do so have fallen short. The Court's confusion pervades government at every level, and a new mechanism must be conceived. The following subpart attempts to sketch a distinguishing method in light of some of the issues raised by MUDs.

1. Difficulties at the Supreme Court

The Supreme Court has had difficulties distinguishing between special districts and general purpose local governments, as is well illustrated by its one person, one vote cases. These cases originate with the Court's landmark 1964 decision in *Reynolds v. Sims*.[122] The *Reynolds* Court examined an Alabama election scheme which apportioned voting districts for the state legislature according to population figures from a federal census that was over sixty years old.[123] The plaintiffs argued that their equal protection rights were violated because the outdated apportionment metric rendered their locales disproportionately underrepresented.[124] The Court concluded that the Alabama scheme was unconstitutional, holding that the Equal Protection Clause "requires that the seats in both houses of a bicameral state legislature must be apportioned on a population basis."[125] Though "mathematical exactness or precision" was not necessary, the Court did require a good faith effort to establish "substantial equality of population among the various districts, so that the vote of any citizen is approximately equal in weight to that of any other citizen in the State."[126] In the years that followed, the Court extended *Reynolds* to local governments[127] and community college districts that exercised general governmental powers,[128] but it initially declined to rule on whether "a special-purpose unit of government assigned the performance of functions affecting definable groups of constituents more than other constituents" should be treated differently.[129]

The 1973 case *Salyer Land Co. v. Tulare Lake Basin Water Storage District*[130] marked the first time the Court considered how *Reynolds*'s one

debt service on issued bonds); Mun. Info. Servs., *supra* note 11, at 2 (asserting that only four percent of Houston-area districts actually defaulted since 1988).

122. 377 U.S. 533 (1964).
123. *Id.* at 538-40 (describing the state's apportionment scheme).
124. *Id.* at 537.
125. *Id.* at 577, 568.
126. *Id.* at 579.
127. *See* Avery v. Midland County, 390 U.S. 474 (1968).
128. *See* Hadley v. Junior College Dist., 397 U.S. 50 (1970).
129. *Avery*, 390 U.S at 483-84.
130. 410 U.S. 719 (1973).

person, one vote formulation should be applied to special districts. The special district at issue supplied and distributed water to a small group of farmers.[131] District residents who did not own land brought the suit to invalidate a California statute that allowed only landowners to vote in district board elections in proportion to their acreage.[132] The Court found that this water district was one of the exceptions to *Reynolds*'s election requirements.[133] The Court reasoned that the water district "has relatively limited authority. . . . It provides no other general public services such as schools, housing, transportation, utilities, roads, or anything else of the type ordinarily financed by a municipal body[] . . . [including] hospitals . . . a fire department, police, buses, or trains."[134] In other words, the district did not offer government services so broad that it should be subjected to stricter voting rules.[135] The Court's characterization of general purpose local governments belied reality at the time. Schools, for example, for decades have been almost universally operated by separate school districts. Only large cities provide housing, transportation services, buses, or trains.[136] And more and more, general purpose local governments were handing off responsibilities like hospitals, utilities, and roads to special districts. In other words, the Court's perception that general purpose local governments necessarily oversaw these activites was incorrect. Therefore, its conclusion that the water district was free from *Reynolds* requirements because it had only limited authority—a conclusion based on the Court's observation that the district did not conduct such activities—seems fundamentally flawed.

The Court's logic became even more confused in *Ball v. James*,[137] which examined an Arizona water district similar to a Texas MUD. In that case, residents who did not own land in the district brought suit alleging an equal protection violation as a result of a rule that allowed only private landowners to vote for directors.[138] The special district considered in *Ball* was very different from the district in *Salyer*. At the time, the district in *Ball* was one of the five largest special districts in the country in terms of

131. *See id.* at 722-23.

132. Because the largest landowner owned enough property to give it a majority of the voting rights, an election had not been held since 1947. *Id.* at 735 (Douglas, J., dissenting). Most of the non-landowning residents in the district worked for one of four corporations that owned eighty-five percent of district land, and thus argued that they had a significant personal interest in the management of the district. *See id.* at 723, 726 (majority opinion).

133. *Id.* at 730.

134. *Id.* at 728-29.

135. The Court also stated that landowners should have the vote exclusively because they alone bore the costs of maintaining the district; assessments against landowners constituted the sole source of district revenue. *See id.* at 731. The Court noted that non-landowning residents had another way to make their voices heard: They could bargain with a landowner to vote as the landowner's proxy, a move authorized by California law at the time. *See id.* at 733.

136. *See* Lisa M. Card, *One Person, No Vote? A Participatory Analysis of Voting Rights in Special Purpose Districts*, 27 T. Jefferson L. Rev. 57, 65 (2004).

137. 451 U.S. 355 (1981).

138. *Id.* at 360 (noting that such vote was proportionally based on landowners' acreage). Corporate and governmental landowners were not entitled to vote. *Id.* at 371 n.21.

revenues and expenditures.[139] It covered 260,000 acres, made up of both rural land and substantial portions of nine cities, including Phoenix, Mesa, Tempe, and Scottsdale.[140] It had the power to condemn land, sell bonds, and levy taxes.[141] Most of the district's revenues were provided not by landowners, but by the sale of electricity to half of the state's population.[142] Despite the district's significant powers, however, the Court once again declined to apply *Reynolds*. The Court reasoned that the district could not impose *ad valorem* property taxes or sales taxes, enact laws governing citizen conduct, maintain streets, operate schools, or provide for sanitation, health, or welfare services.[143] In addition, the Court said that the district's provision of electricity—even though it affected half of the citizens in the state and constituted ninety-eight percent of the district's revenues—was merely incidental to the district's primary purpose of water supply and did not constitute "a traditional element of government sovereignty."[144] In concluding, the Court observed that the district might never have been created if landowners had not been assured a significant voice in its ongoing affairs.[145] As one commentator observed, the Court looked not to the actual scope and diversity of the district's activities, but instead focused on its original stated purpose.[146]

A blistering, four-Justice dissent criticized the majority opinion in *Ball* for ignoring critical differences between the districts in *Salyer* and *Ball* and for ignoring the significant role that the electricity supplying function played in district operations.[147] Moreover, the dissent argued that the provision of water and electricity was not an incidental aspect of municipal government, but critical to maintaining health and welfare.[148] While some scholars agree with the dissent's view that the majority turned the vote into a utility-serving rather than a democracy-serving function,[149] others have said that *Ball* is consistent with democratic ideals.[150] For our purposes, however, the important issue is the inconsistency and inadequacy of the Court's analysis in determining that the districts in *Salyer* and *Ball* merited freedom from the *Reynolds* rule. The special district in *Ball* seemed a

139. Briffault, *supra* note 18, at 367 (citing Comment, *Voter Restrictions in Special Districts: A Case Study of the Salt River Project*, 1969 Ariz. St. L.J. 636, 658).

140. William H. Riker, *Democracy and Representation: A Reconciliation of* Ball v. James *and* Reynold v. Sims, 1 Sup. Ct. Econ. Rev. 39, 40 (1982).

141. *Ball*, 451 U.S. at 360.

142. *Id.* at 365.

143. *Id.* at 366.

144. *Id.* at 368.

145. *Id.* at 371.

146. *The Supreme Court, 1980 Term—Voting in Special Purpose Districts:* Ball v. James, 95 Harv. L. Rev. 91, 181, 187 (1981).

147. *Ball*, 451 U.S. at 378-83 (White, J., dissenting).

148. *Id.* at 386.

149. *See, e.g.*, Grant M. Hayden, *The False Promise of One Person, One Vote*, 102 Mich. L. Rev. 213, 216 (2003).

150. *See, e.g.*, Riker, *supra* note 140, at 59 (calling *Ball* "fully justified in terms of the conventional theory of democracy").

particularly good candidate for *Reynolds* scrutiny because its powers so resembled those of general purpose local governments. Yet the Court declined to apply *Reynolds*, simultaneously failing to precisely define the difference between a general purpose local government and a special district.

Salyer and *Ball* dealt with special districts that limited the vote to landowners.[151] The Court's confused classification in those cases conferred upon special districts the power to dispense with one of our most important voting requirements—the one person, one vote principle. The Court's history of granting such powers to special districts that operate too much like general purpose local governments appears misguided. A look into this line of cases reveals why a clear distinction between special districts and general purpose governments is so difficult, yet so important.[152]

2. Sketching Out a Distinguishing Mechanism

As at least one commentator has noted, the Court's inconsistencies demonstrate how difficult it is to categorize these entities in a meaningful way.[153] But we must venture to do so, because classification rules have an impact even beyond the application of the Supreme Court's voting cases: to district funding, tax and debt limitations, eligibility for incentive programs, boundary-setting, and easy formation. The programmatic and policy aims of these impacted areas may be thwarted if general purpose local governments are allowed to masquerade as special districts.

Sketching a way to distinguish between special districts and general purpose local governments proves difficult. One commentator has said that the difference between these two types of government is that municipalities have the power to define citizenship through zoning and residential inspection,[154] but this characterization seems rather thin. Zoning powers alone fail to definitely indicate the existence of a general purpose government. Like the Supreme Court in *Ball*, state and local governments that create special districts determine how a local government unit is treated, primarily by reviewing the district's original stated purpose. They do not necessarily reevaluate the special district after their powers have evolved. Such is the case with Texas, which classifies MUDs as special districts—because of their original water supply mission—despite their evolving, far-reaching powers.

A sorting mechanism must focus on the actual powers granted to the special district. What functions are central to a general purpose local

151. Texas MUDs do not so limit the franchise, though under these Supreme Court precedents, no doubt they could.

152. *Cf.* Briffault, *supra* note 18, at 360 ("Although . . . many [special districts] do not utilize landowner voting, the proprietary cases influence contemporary understandings of local government.").

153. Card, *supra* note 136, at 57.

154. Burns, *supra* note 15, at 8.

government? What functions, or set of functions, can constitute a special district? Certain powers are so critical to general purpose local governments that to have them means to function like a general purpose local government, including the powers to tax, build roads, sustain emergency services, run elections, supply water, and exclusively control the geographic area.[155] These six functions might be the best place to start; no one could argue that any of them are solely the province of private entities or beyond the power of general purpose local governments. Special districts with these powers, including many MUDs, should be considered to be more like general purpose governments. In other words, they should not receive the favorable treatment currently granted to special districts by legislatures and courts. Other special districts—those with narrower functions, more true to the traditional notion of a special district—might not have all of these functions, and therefore may be more deserving of lenient treatment. Distinguishing rules may vary by state and other conditions, but are necessary as the number of special districts fast approaches the number of general purpose local governments in America.[156]

III. THE MYTH OF SPECIAL DISTRICT EFFICIENCY

Favorable policies for special districts are driven in part by the notion that special districts are efficient: They solve problems within their respective bounds at a cost to only those persons who work or live within them, and they are the right size to take advantage of economies of scale.[157] Clayton Gillette advances this notion in his work on local government efficiency, arguing that local governments can best address social problems through cooperation and small-scale policy making.[158] His work relies on the Tieboutian public choice theory, which posits that individual sorting can occur most efficiently when there are multiple jurisdictions with competing packages of services.[159] Others have characterized the efficiency argument

155. School construction and maintenance, once primarily the province of local government, is not included in this list because now separate school districts primarily deal with education.

156. U.S. Census Bureau, *supra* note 6, at v (showing that 38,967 general purpose governments and 35,052 special districts exist in the United States).

157. *Cf.* U.S. Advisory Comm'n on Intergovernmental Relations, 89th Cong., Metropolitan America: Challenge to Federalism 30-32, 85-86 (Comm. Print 1966) (*prepared by* Bernard J. Frieden) (laying out criteria for evaluating the performance of governmental functions in metropolitan areas to include this definition as well as five other factors: (1) a geographic area of jurisdiction adequate for effective performance; (2) the legal and administrative ability to perform services assigned to it; (3) responsibility for a sufficient number of functions so that governing processes involve a resolution of conflicting interests and a balancing of needs and resources; (4) the performance of public functions should remain subject to public control; and (5) functions should be assigned to a level of government that provides opportunities for active citizen participation and still permits adequate performance).

158. *See* Gillette, *supra* note 20, at 192-94.

159. *Id.* at 270; *see also supra* text accompanying note 14.

favoring localism as permitting public policy decision making to match distinctive conditions and preferences.[160]

But many special districts have external effects, both positive and negative, which reach beyond district lines or target problems that would be better addressed by larger (or smaller) units of government. Moreover, despite their claims to efficiency, special districts spend more than central cities to perform the same functions.[161] This part analyzes the myth of special district efficiency through the MUD lens. It shows how the proliferation of MUDs leads to governmental fragmentation, which prevents a coherent approach to water supply—the very issue that MUDs were created to address. Perhaps more significantly, increased fragmentation has had a profound effect on land use planning (or the lack thereof) and sprawl. MUDs thus impose negative externalities on both the municipal and regional levels, creating a kind of anticommons with an inefficient number of competing regimes.[162] Recognizing the potentially hazardous consequences of MUDs, this part attempts to address the efficiency problem by evaluating several possible solutions for improving coordination among existing MUDs.

A. *MUDs, Fragmentation, and Externalities*

The roots of governmental fragmentation go back a century, and fragmentation grew in part as a result of attempts to meet the challenges of water supply and management. As municipal historian Jon Teaford describes, the establishment of water systems was one of several initiatives (along with parks, streets, hospitals, and beautification) undertaken by early nineteenth-century cities.[163] By the late nineteenth century, cities began to pass these duties along to new suburban governmental units.[164] Between 1910 and 1930, suburbs began to develop their own special purpose districts; water districts were the most common.[165] William Fischel has commented that he would add the "homevoter" dimension to Teaford's explanation about the rise of the suburb (and consequently the special district).[166] In other words, suburbanites likely advocated for special districts because they believed that special districts ensured higher property values.[167] State legislatures, encouraged by this expanding suburban

160. Briffault, *supra* note 81, at 1124.

161. Frug, *Beyond Regional Government*, *supra* note 19, at 1784.

162. Michael A. Heller has advanced and explained the anticommons concept. *See* Michael A. Heller, *The Tragedy of the Anticommons: Property in the Transition from Marx to Markets*, 111 Harv. L. Rev. 621 (1998) (focusing on the example of empty Russian stores).

163. Jon C. Teaford, The Municipal Revolution in America: Origins of Modern Urban Government 1650-1825, at 102 (1975).

164. Teaford, *supra* note 5, at 26.

165. *Id.* at 78-80.

166. Fischel, *supra* note 57, at 212.

167. *Id.* at 4 (commenting that "homeowners, who are the most numerous and politically influential group within most localities, are guided by their concern for the value of their

support, passed enabling legislation to legalize and empower these districts. As Teaford puts it, "By the early twentieth century suburbanites had begun carving up the metropolis, and the states had handed them the knife."[168]

Forty years later, we have not adequately addressed the problem of fragmentation, which has its most significant effect in areas such as water supply and land use planning—regional, large-scale issues that are not efficiently addressed by unrelated, small-scale governmental units like MUDs.[169] In one famous hierarchical list, the Federal Advisory Commission on Intergovernmental Relations in 1963 ranked common governmental functions from "most local" to "least local": fire protection, public education, trash disposal, libraries, police, health, urban renewal, housing, parks, welfare, medical care, transportation, land planning, water supply and sewage disposal, and air pollution control.[170] Only air pollution was characterized as "least local," and thus more deserving of a regional response, than water supply or planning.[171] Nonetheless, in many states, including Texas, these issues have become impossible to address on an area-wide basis, in large part because of the fragmentation created by a multitude of special districts. The legislation authorizing water districts in Texas roughly follows Teaford's chronology. The Texas constitution was amended in 1917 to allow for water districts in unincorporated areas, and for the most part, these districts were used to enhance rural water supply in the western part of the state. But with the growth of Texas's cities and their attendant suburbanization, specific laws on MUDs were set forth in 1971, anticipating their use in urban areas.

A full assessment of Texas's water supply system is beyond the scope of this Article, but one indicator of governmental fragmentation is the patchwork of special districts attempting to address the water supply issue.[172] Today, the following types of districts join nearly one thousand

homes . . . . [T]hey will tend to choose those policies that preserve or increase the value of their homes").

168. Teaford, *supra* note 5, at 31; *see also* U.S. Advisory Comm'n on Intergovernmental Relations, *supra* note 157, at 39 (describing the fragmentation of the metropolitan water supply as a problem which originated in suburban areas); Pock, *supra* note 2, at 1 (criticizing "the proliferation of ineffectual units of local government that, either co-existing side by side or overlapping each other with limited territorial jurisdiction, are pitifully inadequate to the task of rendering urban services or performing regulatory functions that peremptorily demand area-wide jurisdiction and control").

169. As Sheryll Cashin has persuasively argued, fragmentation also exacerbates racial and class inequalities, a topic not covered by this paper. Sheryll D. Cashin, *Localism, Self-Interest, and the Tyranny of the Favored Quarter: Addressing the Barriers to New Regionalism*, 88 Geo. L.J. 1985, 2022 (2000) ("While political fragmentation inculcates a parochialism that may discourage or distract citizens from forging potentially beneficial regional alliances, it also institutionalizes the advantaged position of the favored quarter.").

170. *See* John C. Bollens & Henry J. Schmandt, The Metropolis: Its People, Politics, and Economic Life 266 (1982) (citing U.S. Advisory Comm'n on Intergovernmental Relations, Performance of Urban Functions: Local and Areawide (1963)).

171. *Id.*

172. Another indicator is that three agencies oversee state water policy: the Texas Water Development Board, which creates a water plan and provides loans and grants for water or

MUDs in supplying water: 48 drainage districts, 66 fresh water supply districts, 91 groundwater conservation districts, 25 irrigation districts, 46 levee improvement districts, 42 municipal management districts, 26 navigation districts, 31 river authorities, 55 special utility districts, 221 water control and improvement districts (which resemble MUDs), and 18 water improvement districts.[173] Of these groups, MUDs are of particular concern because, unlike many of the other districts, MUDs are primarily found on the edge of urban areas and are thus more likely to overlap with school, college, fire, emergency, counties, and other jurisdictions. MUDs are also extremely easy to create, as Part I.A detailed, yet they are difficult to dissolve, even if rendered obsolete by a geographically overlapping local government performing the same functions.[174] Often, several MUDs are established around the same time, by the same developer, for the same development project; developers who initiate the MUD process have recognized that they have a greater chance at maintaining control over time by fragmenting potential opposition into many small MUDs.[175] In one development alone, fifty-five MUDs grapple for water and other services.[176] Once a new MUD is formed, it is not required to consider any of the water planning issues that one might argue are critical to its mission, much less land use issues attendant to its development. Neither are MUDs required to form or join metropolitan coordinating bodies addressing such issues. As a result, other local governments that must deal with MUDs' existence often fail to integrate MUDs fully into existing water supply systems.[177] At the same time, by having so many different districts, the economies of scale in building large water systems are lost.[178]

---

wastewater treatment plans and for water supply facilities; the Texas Commission on Environmental Quality, which handles permits of water use and water pollution control and deals with MUD applications; and the Texas Parks and Wildlife Department, which enforces the environmental provisions of the water law.

173. Tex. Comm'n on Envtl. Quality, *supra* note 10 (using figures as of March 5, 2007, counting both active and inactive districts, with active districts outnumbering inactive districts three to one).

174. *See, e.g.*, Akin, *supra* note 64 (describing the city of Sugar Land's attempts to dissolve a nonfunctioning water control district whose purpose was mooted after the city began providing water and other services to the district's customers).

175. *See* Pate McMichael, *Developer's Grand Finale Takes Shape, Gives Brownsville, Texas, Facelift*, Brownsville Herald, Aug. 13, 2004, at B3 (describing how developers within one Brownsville subdivision used multiple MUDs to fund utility lines); Mun. Info. Servs., *supra* note 38, at 4 (describing how developers negatively viewed the takeover of the 15,000-acre Clear Lake City Water Authority by new residents).

176. Beth Kuhles, *Houston: No Plans for Annexation*, Houston Chron. (South Montgomery County ed.), Feb. 28, 2002, at 1 (describing The Woodlands' relationship with the City of Houston).

177. *See, e.g.*, Zeke MacCormack, *Kendall Defers to State on Utility District*, San Antonio Express-News, May 10, 2006, at 3B (discussing how Kendall County commissioners expressed concern over the ability of a pending MUD (the Lerin Hills MUD) to adequately treat and manage limited water resources).

178. *But see* Richard B. Peiser & Ron Welch, Texas Real Estate Research Ctr., Economies of Scale in Water and Sewer Construction Costs for New Subdivisions 2-3, 16

MUDs thwart land use planning as much as they thwart a coherent approach to water supply. Indeed, MUDs tend to encourage and facilitate sprawl,[179] which some blame on "efforts by individual localities to capture economic benefits of growth while imposing costs on others in the same region."[180] Sprawl is low-density development, which enlarges the spatial boundaries of a city and which has been attacked on a number of fronts. Environmentalists allege that sprawl reduces animal habitat, threatens ecosystems, increases impervious surface cover, depletes farmland, and erodes soil. Social theorists argue that sprawl encourages racial and class segregation and reduces bonding. Economists have observed that sprawl hurts central cities by pushing jobs and tax revenues outside their bounds. Architects denounce sprawl as aesthetically unpleasing, while planners say that sprawl ruins chances for sensible growth. Other commentators, of course, defend sprawl as a natural outgrowth of market needs or population expansion. Yet most concede that sprawl is not without its costs.

While a full critique of sprawl is beyond the scope of this Article, MUDs' easy creation and tremendous powers make it easy for developers to build large, single-family subdivisions quickly and without central planning.[181] MUDs incentivize development in unincorporated suburban areas, instead of in urban areas: Typically, developers who build in urban areas pay for their infrastructure by rendering exactions to local governments. By contrast, developers who build in suburban areas can use MUDs' bonding and taxing powers to pay fully for their infrastructure: Developers can determine the size and location of the subsidy; MUDs further exacerbate central cities' problems by luring wealthy homeowners outside the city's taxing authority.[182] While MUD supporters claim that "MUDs have been a driving force in the availability of affordable housing, helping to build Texas neighborhoods and . . . urban communities," in reality MUDs tend to lure high-wealth individuals away from cities, depleting the urban tax base.[183] Neither vertical equity nor a careful

(1985), *available at* http://www.mudhatter.com/MUD_Folder/EconomiesofLot.pdf (showing that municipal and MUD costs per water connection were comparable).

179. Bernard Siegan, the most vocal proponent of Houston's lax land use regulations, has observed that MUDs "tend to encourage single family, as opposed to multifamily, development." Bernard Siegan, *Commentary on Redistribution of Income Through Regulation in Housing*, 32 Emory L.J. 721, 727 (1983).

180. Gillette, *supra* note 20, at 233.

181. *See, e.g.*, Jeff Mosier, *Officials Fight Permit to Stall Development*, Rockwall-Rowlett Morning News, July 18, 2003, at 1M (describing how a developer outside of Dallas could build over seven times as many houses in his planned subdivision because of the financial assistance provided by MUDs).

182. *See* Briffault, *supra* note 81, at 1136; Laurie Reynolds, *Intergovernmental Cooperation, Metropolitan Equity, and the New Regionalism*, 78 Wash. L. Rev. 93, 94 (2003) (describing how inequalities between localities are "the intended result of state laws pertaining to local government formation, which allow affluent, homogenous enclaves to form their own government and thus prevent the redistribution of resources that occurs when wealthy and poor pay property taxes to the same general purpose municipality").

183. *Legislative Planning Committee Report: The 79th Texas Legislature and Beyond*, AWBD J., Fall 2006, at 33.

approach to land use has been a MUD priority. The myopia of developers, and their self-interested decisions to use MUDs, contributes to sprawl's spread and otherwise hurts central cities.

In the past few years, several cities have begun to notice MUDs' negative effects on land development. The Fort Worth City Council has publicly expressed doubts about "leapfrog" MUDs, which thwart the city's aims of dense, mixed-use development.[184] In Dallas, the local home builders' association convened a summit three years ago to discuss concerns about MUDs with local developers and officials.[185] For about a decade, Austin fought MUD developers whose development would have strained an important creek and put an endangered species of salamander at risk.[186] Rural areas find the MUD growth particularly difficult to address, as MUDs encourage and facilitate outward development in rural areas without coordinated controls.[187] A bill proposed in the last legislative session by state representatives from a growing rural area would have required MUDs to give notice of development plans to any nearby municipality, but stalled in committee.[188]

Today, living in multiple overlapping jurisdictions—school districts, special districts, emergency service zones, fire service districts, counties, or cities—is very common. But fragmentation prevents governments from operating at the same scale as the problems they need to address. In Texas, state laws and policy support the proliferation of hundreds of MUDs and other water districts, whose sheer numbers make addressing issues like land use planning, and water planning for that matter, impossible—calling into question whether MUDs and similar special service districts can indeed be defended on grounds of governmental efficiency.

B. *Addressing the Efficiency Gap*

What can be done to mitigate the negative effects of MUDs' fragmented proliferation? Almost no one would now call for the creation of a large metropolitan government that includes both municipalities and special districts (including MUDs), a solution that has been advocated for many

184. Lee, *supra* note 70 (describing these concerns in light of several MUDs being planned in the city's extraterritorial jurisdiction).

185. Lavigne, *supra* note 23.

186. *See* Gregory F. Brown, *Legislative Branch—Of Water and Weevils: The Texas Supreme Court Further Restricts the State Legislature's Power to Delegate to Private Entities.* FM Properties v. City of Austin, *22 S.W.3d 868 (Tex. 2000)*, 32 Rutgers L.J. 1482, 1498 (2001).

187. *See, e.g.*, Jim Foy, *A Tale of Two Counties*, Dallas Morning News (Collin County ed.), Oct. 24, 2003, at 8B (describing how a small rural town northeast of Dallas struggled to cope with large-scale MUD development); Mike Warren, *City OKs Incentive for Home Developer*, Houston Chron. (N. Montgomery County ed.), Sept. 20, 2001, at 1 (describing the City of Conroe's use of incentives to attract developers to build within city limits instead of in rural areas).

188. Editorial, *Ready?: Cities Need Help, Teamwork to Handle Staggering Growth*, Dallas Morning News (Collin County ed.), May 4, 2003, at 17B.

times in other contexts.[189] But consolidation, annexation, regional planning, and intergovernmental cooperation may help to address the problem. Of these, intergovernmental cooperation has been most utilized by MUDs and—despite potential inefficiencies—is likely to be adopted in more MUD jurisdictions than any of the other solutions.

1. Consolidation

Consolidation of similar types of local governments performing the same or similar functions has long been advocated by critics of fragmentation.[190] Consolidation aims to minimize the amount of bureaucracy, and thus maximize the efficiency, of governments dealing with particular problems. School districts have significantly consolidated over the last half century, and studies have shown significant cost savings resulting from the economies of scale.[191]

Unlike school districts, special districts have increased threefold over that same period.[192] Some states, including Texas, have provided mechanisms by which special districts can be consolidated.[193] Two MUDs can consolidate if each district holds an election in which electors vote in favor of consolidation.[194] While consolidation is a relatively simple procedure, few MUDs have taken steps to consolidate.[195] As Part II explained, developers have disincentives to streamline their MUDs: Creating many different districts, at least initially, helps them maintain control over the initial stages of development. It would be surprising if political will urged consolidation later.[196] One recent exception is The Woodlands, a community north of Houston governed by MUDs, a road utility district, a commercial association, a tax district, a county, a service corporation offering maintenance and landscaping services, and more.[197] That community, whose population has increased seventy-nine percent over the last decade, has begun to demand a more centralized government.[198]

---

189. *See, e.g.*, Anthony Downs, Brookings Inst., New Visions for Metropolitan America 170 (1994) (recognizing that creating large metropolitan governments "has almost no political support").

190. *See, e.g.*, U.S. Advisory Comm'n on Intergovernmental Relations, *supra* note 57, at 80.

191. *See* Marvin E. Dodson III & Thomas A. Garrett, *Inefficient Education Spending in Public School Districts: A Case for Consolidation?*, 22 Contemp. Econ. Pol'y 270 (2004) (studying Arkansas' public school system); William Duncombe & John Yinger, *Does School District Consolidation Cut Costs?* (Ctr. for Policy Research, Working Paper No. 33, 2001), *available at* http://www-cpr.maxwell.syr.edu/cprwps/pdf/wp33.pdf.

192. *See supra* text accompanying note 6.

193. *Cf.* Edgewood Indep. Sch. Dist. v. Kirby, 804 S.W.2d 491, 497 (Tex. 1991) (stating that the state "[c]onstitution does not present a barrier to the general concept of tax base consolidation," at least with regard to school districts).

194. Tex. Water Code Ann. §§ 54.728-.729 (Vernon 2002).

195. The author could find no evidence of any past consolidations.

196. *See supra* text accompanying note 169.

197. Lee, *supra* note 49.

198. *Id.*

2. Annexation

Annexation has also been suggested as a solution to the fragmentation crisis. The rationale for annexation is similar to consolidation: Once a special district has achieved its purpose, it is more efficient to add the district's land to a municipality ruled by a general purpose government. If a special district is annexed, landowners may have access to a broader range of services than those available to them in the special district alone. Several scholars have pointed out that when cities are elastic—that is, when they can extend their boundaries—their growth is economically healthier and less plagued by segregation.[199] It has been said that without having the ability to expand their boundaries easily, Texas cities would not be the flourishing, growing cities that they are today.[200] Annexation powers are particularly important since Texas cities receive little state aid.[201]

In Texas, municipalities' powers of annexation have been a controversial issue. For many years, cities abused their annexation powers, adding outlying subdivisions at will, and often by surprise. In 1963, the state legislature passed the Municipal Annexation Act to limit cities' annexation powers and to mandate a public hearing before proceedings begin.[202] Now, annexation processes differ depending on how a city is designated: general law or home rule. Most large cities are home rule cities, which means that they can annex land in their extraterritorial jurisdiction without consent, depending on the terms of their charter.[203] General law cities, on the other hand, must get landowners' consent to annex, except in limited circumstances.[204] Cities must have a three-year annexation plan, which can be amended.[205] Except in certain circumstances, no land can be added unless it has been indicated on the plan at least three years in advance.[206] During this three-year time period, cities and MUDs often try to phase in annexation by gradually shifting the burden of providing services to the city.[207] Any sparsely populated area can, by landowner petition, ask to be

199. Downs, *supra* note 189, at 169 (stating that "cities which can annex growing areas will do better than those that must watch growth move beyond their boundaries" (citing David Rusk, Cities Without Suburbs (1993))).

200. *See* Scott N. Houston, Municipal Annexation in Texas: "Is it Really That Complicated?" 10 (2004), *available at* http://www.tml.org/legal_pdf/ANNEXATION111704.pdf (claiming that "[i]f San Antonio, for example, had the same boundaries it had in 1945, it would contain more poverty and unemployment tha[n] Newark, New Jersey").

201. *See id.* at 11.

202. For a history of annexation in Texas, see *id.*

203. Tex. Loc. Gov't Code Ann. § 43.021 (Vernon 1999).

204. Tex. Loc. Gov't Code Ann. § 43.033 (Vernon 1999 & Supp. 2006).

205. *Id.* § 43.052(c).

206. *Id.* § 43.033.

207. *See, e.g.*, Press Release, City of Austin, City, Lost Creek MUD Will Continue to Negotiate Final Service Plan, U.S. State News (Aug. 15, 2006), *available at* http://www.ci.austin.tx.us/news/2006/lostcreek_input.htm (describing how the 789-acre Lost Creek MUD negotiated levels of service, operation, and infrastructure maintenance with the City of Austin during the interim three-year pre-annexation period).

annexed to a municipality.[208] Through annexation of infrastructure-building districts like MUDs, cities can avoid the cost, management, and liabilities of constructing new infrastructure.[209] Moreover, cities can avoid the risks associated with real estate development in their urban fringes.[210]

Despite its advantages and attractions, however, there are a number of barriers to using widespread annexation as a solution to fragmentation. One challenge to the annexation solution is that a city may annex land only within its extraterritorial jurisdiction.[211] Most MUDs, however, are outside cities' extraterritorial jurisdiction, placing them beyond the city's power to annex.[212] Other limitations on annexation abound in Texas law. A municipality in a county of between 800,000 and 1,300,000 people, for example, cannot annex part of a MUD unless ninety percent or more of all facilities have been installed and completed and the municipality assumes the pro rata share of the bond indebtedness, making the prospect of annexation somewhat less attractive.[213] An annexing city cannot tax MUD property owners to subsidize the cost of absorbing them, and in 1989, the Texas legislature prohibited cities and municipally owned water and sewer utilities from requiring that MUDs assess a surcharge against users of the water and sewer service as a precondition to annexing the MUD.[214] Under existing law, cities may skip over low-performing MUDs and annex MUDs with high tax bases—an approach that may make certain annexations more attractive, but hardly offers a solution to the problem of fragmentation and inefficiency.

Moreover, MUD residents tend to view annexation with suspicion, perceiving annexation to result in increased taxes and greater burdens placed on them by central city problems.[215] This fear may be well founded,

---

208. Tex. Loc. Gov't Code Ann. § 43.028 (Vernon 1999).

209. *See* Cherie Bell, *Offer by Developer Praised*, Mesquite Morning News, Feb. 20, 2003, at 1T (citing the City of Mesquite's approval of a MUD established by a developer willing to "spend millions for water and sewer lines that could one day provide a significant revenue stream for the city" through annexation); Darrell Preston, *Austin's Powers: Laid-Back Texas Town Seeks Ways to Cope with Dizzy Growth*, Bond Buyer, Feb. 17, 1998, at 1 (citing Austin's incorporation of ten bond-financed MUDs to expand its tax base and keep up with growth).

210. Note that a city has control over its extraterritorial jurisdiction through platting and subdivision regulations, if extended by ordinance, though zoning regulations and plumbing/electric codes cannot be extended. *See* Tex. Water Code Ann. § 54.2052 (Vernon Supp. 2006) (a MUD is not required to adopt a plumbing code); Robert R. Ashcroft & Barbara Kyle Balfour, *Home Rule Cities and Municipal Annexation in Texas: Recent Trends and Future Prospects*, 15 St. Mary's L.J. 519, 528 (1984).

211. The extraterritorial jurisdiction of municipalities includes 0.5 miles if the municipality has fewer than 5000 inhabitants, 1 mile if 5000 to 24,999 inhabitants, 2 miles if 25,000 to 49,999 inhabitants, 3.5 miles if between 50,000 and 99,999 inhabitants, and 5 miles if 100,000 or more inhabitants. Tex. Loc. Gov't Code Ann. § 42.021 (Vernon 1999).

212. Mun. Info. Servs., *supra* note 11, at 10 (describing the location of most Houston-area MUDs as being outside Houston's extraterritorial jurisdiction).

213. Tex. Water Code Ann. § 54.813 (Vernon Supp. 2006).

214. Tex. Water Code Ann. § 13.0421 (Vernon 2000).

215. *See, e.g.*, Closed Caption Log of Austin City Council Meeting, http://www.ci.austin.tx.us/council/2006/council_08142006.htm (last visited Nov. 1, 2006)

given how annexation has affected services in former MUDs.[216] Some MUDs have even created pacts with the city in whose extraterritorial jurisdiction they lie to stall or prevent annexation.[217] To make matters worse, MUD residents might not even know that they live in land capable of being annexed.[218] In sum, while annexation may be an attractive solution to the problem of governmental fragmentation in theory, it is not always easy, and it is not a panacea.

3. Regional Planning

Regionalism has enjoyed an upsurge over the last fifteen years, and scholars, policy makers, and planners have come to view it as a solution for local governmental fragmentation.[219] Even local government boosters like Gerald Frug recognize that a regional approach is sometimes necessary.[220] Put simply,

> [r]egionalism promises to reduce the inefficiencies related to fragmented government, reduce distributional inequality between cities and their suburbs, allow local public goods to be provided in a comprehensive manner consistent with scale economies rather than on the basis of fortuitous boundaries that bear only coincidental relationship to ideal service areas, and limit ethnic segregation.[221]

There may be costs, however, to a regionalist regime: Those who favor decentralized government argue that regionalism eliminates competition among localities, reduces preference satisfaction by homogenizing services, frustrates exit, and hinders political participation.[222] Despite its costs, regionalism continues to be one of the most frequently suggested solutions to the governmental fragmentation problem.

(chronicling the dialogue between officials of the City of Austin and from the Lost Creek MUD about the city's annexation plans, with MUD officials urging that the City provide a more detailed catalogue of costs and benefits).

216. *See* Renee C. Lee, *Annexed Kingwood Split on Effects*, Houston Chron., Oct. 8, 2006, at A21 (describing how firefighting services in a former MUD district diminished after annexation to the City of Houston, from eighty firefighters to thirty, and from twelve pieces of equipment to nine).

217. *See* Lee, *supra* note 49 (describing the 1999 pact between the City of Houston and several MUDs located within The Woodlands, a Houston suburb, which prohibited annexation until 2011).

218. *See* Julie Mason, *Two House Bills Focus on Annexation: Measures Seek to Ensure that Buyers Know Status of Their Property*, Houston Chron., Jan. 15, 1999, at 31A (describing the rationale for two proposed bills placing the onus on MUDs to inform buyers whose property is within a city's extraterritorial jurisdiction that their property is annexable).

219. Reynolds, *supra* note 182, at 109-11 (observing that "[t]he 1990s saw a resurgence of regionalist proposals").

220. Frug, *Beyond Regional Government*, *supra* note 19, at 1790-92 (sketching out the powers and rationale for a regional legislature). *But see* Ford, *supra* note 20, at 1174 (opposing the creation of more regional governments).

221. Clayton P. Gillette, *The Conditions of Interlocal Cooperation*, 21 J.L. & Pol. 365, 365 (2005).

222. *Id.*

A regional water or land use planning scheme, however, is not likely to be successful in addressing the problems posed by MUDs, given the realities of the Texas political and legal culture. To be more deliberate about the way new MUDs form, for example, the legislature could strengthen oversight by the body that approves district creation, the TCEQ, and require the TCEQ to evaluate the creation of a MUD against a statewide development plan. But strengthening TCEQ oversight over the creation and placement of districts is likely to be met by opposition from the powerful MUD and developer lobbies.

More significantly, regional water or land use planning is simply not part of the Texas ethos: The few regional solutions offered by state law are underutilized or poorly conceived. For example, the state was divided into sixteen water planning regions in 1997, and the Texas Water Development Board has been charged with preparing a state water plan.[223] Yet such efforts have fallen short in both implementation and design, no doubt affected by the creation of multiple types of regional water authorities. A MUD or a city can petition the state for the creation of a regional plan implementation agency "to encourage and promote regional planning by cities and to facilitate the implementation of areawide, systematic solutions to water, waste disposal, drainage, and other problems."[224] Another kind of regional district can be created under Chapter 59 of the Water Code to acquire and sell water, acquire equipment, operate facilities for sewer and wastewater treatment, and more.[225]

Very few of these regional agencies have been successful, due to a strong status quo bias and reluctance to yield power to such authorities. Those that have been created tend to work poorly. The North Harris County Regional Water Authority (NHCRWA), for example, coordinates about 140 Houston-area water districts, mostly MUDs, and aims to reduce their dependence on groundwater.[226] The NHCRWA earns much of its income from member MUDs and engages in construction projects to harness surface water from Houston-area lakes for sale to MUDs.[227] Supporters of the NHCRWA discourage the authority from entering into any contracts

223. *See* Tex. Water Dev. Bd., State Water Plan (2007), *available at* http://rio.twdb.state.tx.us/publications/reports/State_Water_Plan/2007/2007StateWaterPlan/2007StateWaterPlan.htm. Sixteen regional water plans dating back to 2001 are available at http://www.twdb.state.tx.us/rwpg/main-docs/regional-plans-index.htm.

224. Tex. Water Code Ann. § 54.037(a) (Vernon 2002).

225. Tex. Water Code Ann. § 59.004 (Vernon 2004).

226. *See* N. Harris County Reg'l Water Auth., MUDs by NHCRWA District (2005), http://www.nhcrwa.com/pdf/2005/MUDS_BY_RWA_DISTRICT.pdf.

227. N. Harris County Reg'l Water Auth., Operating Budget Planning Report, Fiscal Year 2006, *available at* http://www.nhcrwa.com/budget/2005/2006%20Budget%20Master%20-%20Adopted%2011_7_05.pdf (reporting that of NHCRWA's $14 million income in 2005, about $11 million was from pumpage fees paid by MUD member districts; expenses totaled just $5 million and included $190,000 for water purchases, $1.4 million for management services, and $132,000 for lobbying services).

with the City of Houston.[228] The city has long opposed the activities of the NHCRWA, in part because the city has invested $2 billion in a regional water system and had included north Harris County in its water planning.[229] While the NHCRWA helps to coordinate MUDs, then, it actually hinders coordination regarding regional water supply.

4. Intergovernmental Cooperation

As an alternative to regionalism, intergovernmental cooperation might be said to induce localities to account for and internalize the effects they impose beyond their bounds[230] or to solve service delivery problems without forfeiting political independence.[231] Cooperation among MUDs, and between MUDs and general purpose local governments, has already been occurring.[232] To improve service quality, MUDs may contract with neighboring MUDs and officials in the relevant county or city body.[233] Sometimes MUDs buy water from nearby cities.[234] A few MUDs overlap with other kinds of water districts, which act as "master districts" that provide water, sewer, and drainage services to a small group of MUDs.[235] The costs for these master districts are apportioned to the MUDs or are paid for by revenue bonds backed by specific performance contracts with the MUDs.[236]

Other MUDs use interlocal agreements with counties or city governments to exchange non-water-related services.[237] A MUD outside of the municipality of Missouri City, for example, has coordinated with the City Council of Missouri City to build a fire station, with the city providing operational support and site approval and the MUD paying for the site acquisition, design, and construction.[238] The City of Houston has offered other strategic partnerships with MUDs, sometimes called limited purpose

228. *See* Kim Canon et al., *Water Among Issues for Area Voters*, Houston Chron., Feb. 2, 2002, at 37A (describing a political action committee initiated by a state senator and a NHCRWA member which sought to ensure the authority's independence from Houston).

229. *See* Julie Mason, *Lindsay Uncorks Plan for Water District*, Houston Chron., Apr. 7, 1999, at A17.

230. Gillette, *supra* note 20, at 269 (arguing that "metropolitan problems are amenable to cooperative solutions without further governmental centralization").

231. Briffault, *supra* note 14, at 378.

232. Texas enables MUDs to enter into contracts and other arrangements with other governments. *See supra* text accompanying note 90.

233. Mun. Info. Servs., *supra* note 38, at 4.

234. The City of Houston sells $70 million in water to area MUDs, seventy-five percent more than it did five years ago. Dan Feldstein, *Plan Criticized by Tax Activists May Bring Relief*, Houston Chron., May 4, 2006, at B1.

235. Mun. Info. Servs., *supra* note 11, at 1.

236. *Id.*

237. *See, e.g.*, Anderson Mill Mun. Utility Dist., What Is a Municipal Utility District?, http://www.ammud.org/Whatis.htm (last visited Mar. 20, 2007) (describing how the Anderson Mill MUD had several interlocal contracts with the county government which let the county handle road construction and emergency medical services and the MUD handle landscaping and maintenance duties for its central parkway).

238. Zheng, *supra* note 88.

annexation agreements, in which the city provides certain services (like health inspections, code enforcement, police, and fire protection). In turn, the city adds one cent to the sales tax already levied, and the MUD and the city split the new revenue.[239] This type of coordination is the exception, rather than the rule.[240]

While intergovernmental cooperation may be a step in the right direction, it has the potential to work in reverse, with too many individual agreements worsening the fragmentation problem. Both Gerald Frug and Laurie Reynolds have discussed the counterintuitive claim that intergovernmental cooperation may have an anti-regional impact.[241] Reynolds states, "[B]y allowing independent local governments to participate in metropolitan governance only when it benefits their own short-term interests, intergovernmental cooperation may exacerbate the metropolitan regional inequality that [a regionalist approach] seeks to eliminate."[242] Frug agrees that interlocal contracts' piecemeal method complicates the coordination of local government activities and weakens public participation.[243] Finally, the beneficiaries of interlocal cooperation may not be entirely clear: Teaford's historical analysis notes that intergovernmental cooperation in the water supply context has primarily benefited outlying areas, not central cities.[244] The potential negative effects of cooperation must be considered in light of the alternatives available to addressing the gap between the perception and reality of special districts' efficiency.

CONCLUSION

Modern local government law strives to answer whether a certain unit of government is optimal. By asking this question of Texas's municipal utility districts, this Article attempts to advance our understanding of the optimality of the special district. Government policies facilitate the creation and empowerment of such districts, and certain abstract arguments lend support to such policies. These underlying justifications, however, must be

239. Ron Nissimov, *Houston Growing with Use of MUDs*, Houston Chron., June 14, 2004, at A11 (describing this process and noting that some MUDs use the revenues from sales tax to lower property taxes, while others use it to build infrastructure); *see also* Kim Jackson, *City Officials Pitch Service Plan for FM 1960 Area*, Houston Chron. (Jersey Village/Northwest Harris County/Cy-Fair/Copperfield/Fairfield ed.), July 14, 2005, at 1 (describing the fifty-fifty sales tax split between the city of Houston and certain northwest Harris County MUDs).

240. Of the several hundred MUDs eligible for the city of Houston strategic partnership agreements involving split sales taxes, only a few dozen have entered into such agreements. Nissimov, *supra* note 239.

241. Frug, *Beyond Regional Government*, *supra* note 19, at 1781-88; Reynolds, *supra* note 182, at 98.

242. Reynolds, *supra* note 182, at 123.

243. Frug, *Beyond Regional Government*, *supra* note 19, at 1785.

244. Teaford, *supra* note 5, at 80 (adding that cooperation had negative effects on central cities, because "cooperation undermined the competitive advantage that the central city traditionally had enjoyed with regard to public services . . . . Metropolitan cooperation . . . [] did much more for the suburb").

reevaluated. This Article argues that special districts like MUDs are not necessarily as democratic, narrowly tailored, or as efficient as either theorists or existing public policy might suggest.

This Article does not advocate dispensing with special districts altogether. Despite numerous flaws, the special district is worth keeping. They serve public aims: They provide services to geographic areas that other governments might not serve, manage critical public goods (such as water), and bring attention to specific, discrete problems. With their individualized service offerings, they provide alternatives to consumers looking for new places to live or work. But they are not perfect. Given special districts' continuing proliferation across the country over the last sixty years, more scholars should take up study of special districts. We must now ask whether we can create measures to better assess their impact, to fix them so that they do not create negative spillover effects, and to tailor their powers to serve both democratic and functional purposes.[245]

Our collective complacency about special districts is starting to change, especially in the American West, where special districts have spread most quickly.[246] And it should change more still. This Article has wrestled with the MUD example to pin down the truth about special districts. More investigation can shed light on the increasingly important, and always complex, special district.

245. *See* Downs, *supra* note 189, at 182 ("[T]he major shortcoming of local governments in metropolitan areas is that their failure to take account of the welfare of each area as a whole is undermining the long-run viability of American society. Unless Americans confront this reality by creating institutions that operate at the same scale as their major problems, their problems will only get worse.").

246. Liebmann, *supra* note 16, at 110-11 (noting that by 1992, five western states—California, Nevada, New Mexico, Oregon, and Washington—had appointed state commissions to reduce the number of special districts being created).