ARTICLES

Special-Purpose Governments

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When one thinks of government, what comes to mind are familiar general-purpose entities like states, counties, cities, and townships. But more than half of the ninety thousand governments in the United States are strikingly different: they are "special-purpose" governments that do one thing, such as supply water, fight fire, or pick up the trash. These entities have expanded far more rapidly than any other form of government. Yet they remain understudied, and they present at least two puzzles. First, special-purpose governments are difficult to distinguish from entities that are typically regarded as business organizations—such as consumer cooperatives—and thus underscore the nebulous border between "public" and "private" enterprise. Where does that border lie? Second, special-purpose governments typically provide only one service, in sharp contrast to general-purpose governments. There is little in between the two poles—such as two-, three-, or four-purpose governments. Why?

This Article answers those questions—and, in so doing, offers a new framework for thinking about special-purpose governments. The fundamental difference between public and private enterprise exists not in the services provided or even the governance structure, but in how they are created: governments can compel membership and financial contributions in a given territory from the moment they are formed—in contrast to private cooperatives, which contract for membership and accept funds in exchange for the provision of services. Moreover, an overlooked reason why special-purpose governments may provide only one service flows from the efficiency benefits of having "owners" with relatively homogenous interests. Just as private agricultural cooperatives tend to involve a single crop—ensuring that controlling members will have convergent interests—special-purpose governments work best when they provide a single service for which all the members share common incentives. As a result, special-purpose governments have much in common with some private firms. But this is not to praise or justify these entities: the patchwork of laws governing special-purpose governments has not kept pace with the evolution

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of organizational law in private contexts. Private law may thus suggest reforms to let special-purpose governments achieve their unfulfilled potential.

INTRODUCTION

The term "government" often calls to mind an organization that provides a broad array of services to the residents of a territory. But that description fits only a minority—about forty thousand—of the ninety thousand "governmental units" counted in the United States by the most recent Census of Governments.[1] Those "general-purpose" governments are counties, municipalities, and townships.[2] The other roughly fifty thousand governments, labeled "special-purpose governments" by the Census, typically undertake only a single activity, such as water supply or fire protection.[3]

Special-purpose governments—sometimes called special districts, special-purpose districts, special-assessment districts, and local districts—are both important and understudied. In recent decades, they have overwhelmingly been the source of growth in the number of governments in the United States. Since 1942, the number of general-purpose governments has held steady at around forty thousand.[4] Over the same period, by contrast, the number of special-purpose governments (not including school districts) has more than tripled, from just over eight thousand to more than thirty-nine thousand.[5] The associated growth in revenues of special-purpose governments is also striking. As shown in Table 1 below, over the latter half of the twentieth century, local government revenue grew at more than one and a half times the rate of federal revenue and is now more than half the size of federal revenue. By far the most rapidly growing component of local government revenue has been that of special-purpose governments.

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1 *See* U.S. CENSUS BUREAU, 2022 CENSUS OF GOVERNMENTS—ORGANIZATION tbls.1 & 4 (2022) [hereinafter U.S. CENSUS BUREAU, 2022 CENSUS OF GOVERNMENTS—ORGANIZATION]. The data from the 2022 Census of Governments is the most recent.

2 *See id.* at tbl.4 Notes.

3 *See id.* at tbl.2; U.S. CENSUS BUREAU, INDIVIDUAL STATE DESCRIPTIONS: 2022 CENSUS OF GOVERNMENTS 5 (2024) [hereinafter U.S. CENSUS BUREAU, INDIVIDUAL STATE DESCRIPTIONS].

4 *See* U.S. CENSUS BUREAU, 2022 CENSUS OF GOVERNMENTS—ORGANIZATION, *supra* note 1, tbl.3.

5 *See id.* at tbl.4. While the number of school districts has fallen dramatically—from over 100,000 in 1942 to under 13,000 today—this seems largely a consequence of consolidation, and not (as confirmed by Table 1 below) an indication that the level of services provided by SPGs might be falling. *See, e.g.*, WILLIAM A. FISCHEL, MAKING THE GRADE: THE ECONOMIC EVOLUTION OF AMERICAN SCHOOL DISTRICTS 67–118 (2009) (discussing various theories for the consolidation of school districts); William Duncombe & John Yinger, *Does School District Consolidation Cut Costs?*, 2 EDUC. FIN. & POL'Y 341, 342–45 (2007) (discussing the possible links between consolidation of school districts and economies of scale).

TABLE 1: GOVERNMENTAL REVENUE 1957–2017[6]

Type of Government	Revenue in 1957 ($B)	Inflation-Adjusted 2017 ($B)[7]	Revenue in 2017 ($B)	Growth 1957–2017
Federal	$80	$704	$3316	371%
State	$25	$220	$2537	1053%
Local[8]	$29	$255	$1946	663%
Counties	$5.9	$52	$454	773%
Municipalities	$12	$106	$663	525%
Townships	$1.2	$11	$59	436%
Special Districts	$1.5	$13	$249	1815%
School Districts	$8.9	$78	$576	638%

The services provided by special-purpose governments (SPGs) completely overlap those provided by general-purpose governments (GPGs). Thus, SPGs frequently provide such typically municipal services as drinking water, sewage, fire protection, trash collection, roads, parks, jails, libraries, and hospitals.[9] Conversely, it is difficult to find any service provided by an SPG that is not also provided somewhere by a GPG.

At the same time, SPGs often bear a strong resemblance to privately owned organizations, and particularly to organizations like consumer cooperatives. Indeed, an SPG providing irrigation or electricity to a rural community is difficult to distinguish—in terms of services, costs, and control—from a business cooperative

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6 The 2017 data is assembled from *2017 State & Local Government Finance Historical Datasets and Tables*, U.S. CENSUS BUREAU (Oct. 30, 2024), https://www.census.gov/data/datasets/2017/econ/local/public-use-datasets.html. The 1957 data is assembled from *Historical Data*, U.S. CENSUS BUREAU (Jan. 11, 2023), https://www.census.gov/programs-surveys/gov-finances/data/historical-data.html. To access the 1957 data, download the .zip file named Govt_Finances, then open the enclosed file named Govt_Finances.mdb, then open the table named 1_Revenues. Federal data comes from the OFF. OF MGMT. & BUDGET, HISTORICAL TABLES, BUDGET OF THE U.S. GOVERNMENT, FISCAL YEAR 2021, at tbl.1.1 (2020).

7 These inflation-adjusted values were derived from the U.S. Bureau of Labor Statistics CPI Inflation Calculator. *See CPI Inflation Calculator*, U.S. BUREAU OF LAB. STAT., https://www.bls.gov/data/inflation_calculator.htm.

8 These values are less than the sum of the breakdowns provided in the rows below. This is due to sampling errors in the calculation methodology. For more details, see *About the 2017 Census of Governments—Finance*, U.S. CENSUS BUREAU (Oct. 29, 2019), https://perma.cc/DRA8-DDK4.

9 *See* U.S. CENSUS BUREAU, INDIVIDUAL STATE DESCRIPTIONS, *supra* note 3, at 5.

providing precisely the same service.[10] Both types of enterprises, for example, are controlled by a board of directors that is elected by the consumers.[11] But cooperatives are considered distinctly private organizations, fully owned by their members.[12] They thus occupy important real estate on the border between public and private enterprise: they are increasingly important, yet fit poorly into the ordinary legal and conceptual categories that we conventionally use to think about organizations.

The broad similarity between SPGs and private organizations has received some high-profile recognition in the past.[13] A leading local government casebook describes special-purpose governments as "quasi-proprietary firm[s]."[14] And the Supreme Court, in the course of deciding whether special-purpose governments should be subject to the constitutional requirement of "one-person, one-vote" (the answer was no), described them as "essentially business enterprises, created by and chiefly benefiting a specific group of landowners."[15] And yet, despite these passing references, the implications of this connection have never been fully explored. There is a rich literature in economics and political science on the structure and theory of local government.[16] And there

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10 *See, e.g.*, *id.* at 22 (describing electrical districts in Arizona, which provide electricity to pump irrigation water, charge rates for their services, and are controlled by a board of directors elected by landowners); *id.* at 325 (describing irrigation districts in Wyoming, which distribute hydropower and water, collect charges, issue bonds, and are controlled by a board of commissioners elected by landowners); KIMBERLY A. ZEULI & ROBERT CROPP, COOPERATIVES: PRINCIPLES AND PRACTICES IN THE 21ST CENTURY 1–3 (4th ed. 2004) (describing cooperatives as providing agricultural and electric services, managing capital, minimizing input costs, and as controlled by member-elected boards of directors).

11 U.S. CENSUS BUREAU, INDIVIDUAL STATE DESCRIPTIONS, *supra* note 3, at 22, 325; ZEULI & CROPP, *supra* note 10, at 1.

12 *See* ZEULI & CROPP, *supra* note 10, at 45 (stating the International Cooperative Alliance's principle that "[c]ooperatives are autonomous, self-help organizations controlled by their members" and not by any external organizations, including governments).

13 An important analysis in the legal literature of the thin boundary between public and private organizations is Robert C. Ellickson, *Cities and Homeowners Associations*, 130 U. PA. L. REV. 1519, 1521–26 (1982) (arguing that the only important difference between cities and homeowners associations is the status of membership as involuntary and voluntary, respectively). The organizations on which Professor Robert Ellickson focused his analysis are multipurpose, as opposed to the single-purpose organizations that are the focus here. The lens through which we examine the relationship between private and public enterprise is similar, however, and our analysis builds on his.

14 RICHARD BRIFFAULT, LAURIE REYNOLDS, NESTOR M. DAVIDSON, ERIN ADELE SCHARFF & RICK SU, CASES AND MATERIALS ON STATE AND LOCAL GOVERNMENT LAW 228–42 (9th ed. 2022).

15 Ball v. James, 451 U.S. 355, 368 (1981).

16 The seminal contribution to this literature in both economics and political science is Charles M. Tiebout, *A Pure Theory of Local Expenditures*, 64 J. POL. ECON. 416 (1956).

is a rich literature on the law of local government, focusing particularly on the relationship between state and local governments as a form of federalism, and on the relationship between SPGs and GPGs.[17] But there is little scholarship that examines SPGs from the distinct perspective of private organizational law, and especially the law governing business corporations, cooperative corporations, and nonprofit corporations.

Viewing SPGs through this lens, and using the tools developed to study the law and economics of private enterprise, offers at least three important advantages. The first advantage is analytical. We offer reasons for some important and widespread legal trends in local government law that have so far defied easy explanation.[18] We first identify precisely what it is that separates SPGs from private organizations: it is not the services they provide, but the way in which they are formed.[19] At the moment of formation, governments can compel membership—a feature that can solve certain kinds of coordination problems with special force. We also explore the stark division between single-purpose and general-purpose governments.[20] There are many of each, but few between them—that is, almost no governments that provide two, three, or four services. (The gap between special- and general-purpose governments is so slight that we refer to single-purpose governments and special-purpose governments interchangeably. Happily, the acronym SPG remains the same.) Drawing on the literature in organizational economics and public choice, we argue that the costs of decision-making within entities places a constraint on government structure.[21] Those decision-making costs are best mitigated by employing one or the other of two polar organizational strategies: providing a single service to a homogeneous population (through a single-purpose government), or alternatively providing a broad array of services to a more heterogeneous population (through a general-purpose government).[22]

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17 *See generally, e.g.*, Richard Briffault, *Our Localism: Part I—The Structure of Local Government Law*, 90 COLUM. L. REV. 1 (1990).

18 *See infra* Part II.B–C (describing the legal basis for creating special-purpose governments).

19 *See infra* Part I.B–D.

20 *See infra* Part III.

21 *See infra* Part III.A.

22 *See infra* Part III.A.

A second advantage is historical clarity. The nineteenth century produced, from the undifferentiated primordial soup of individually chartered corporations, a standard set of statutorily enabled, specialized corporate forms, including the joint-stock business corporation, the cooperative corporation, the nonprofit corporation, and the municipal corporation.[23] Today, most states have a separate general enabling statute for each of these four types of corporation.[24] But while a large fraction of the early, individually chartered corporations had the basic character of modern SPGs, a general statutory form for SPGs did not emerge.[25] Instead, SPGs are governed by a disparate and confusing patchwork of state statutes, each of which typically applies only to SPGs formed for some particular purpose (like street lighting or fire protection).[26] This difference in contemporary law may stem from the distinct historical origins of the SPG: as we show, modern SPGs do not descend from the early SPG-like corporations in the original United States, but from later efforts to solve property and resource problems in the western United States.[27] Uncovering this and other historical relationships—or the lack thereof—between organizations sheds new light on the origins and evolution of SPGs and their place in the larger organizational taxonomy of modern law.

A third advantage of our approach is that it enables us to explore legal reforms. The laws that govern SPGs have not kept pace with the growth and economic importance of that organizational form. This body of law remains highly fragmented, with most states offering different statutes for different services.[28] This unfocused patchwork raises the question whether SPGs should follow the path toward simplification and rationalization taken by other types of corporate entities—a trend that may already have started, however hesitantly.[29] And it raises the question of why the process of forming a new government differs from the process of incorporating a business.[30]

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[23] *See infra* Part II.A.

[24] This importantly includes municipal corporations. *See* BRIFFAULT ET AL., *supra* note 14, at 286 ("Most states provide for the incorporation of new municipalities by general laws.").

[25] *See infra* Part II.C.

[26] *See infra* Part II.C.

[27] *See infra* Part II.B.

[28] *See infra* Part IV.A.

[29] *See infra* Part IV.B.2.

[30] *See infra* Part IV.B.1.

These theoretical insights matter for local government law. One of the great debates in the field over the last twenty years has been the ongoing contest between regionalism and localism.[31] On one side are the intellectual descendants of Professor Charles Tiebout, who have argued broadly that fragmentation and decentralization can yield more efficient delivery of local governmental services.[32] Fragmented services may more precisely track local need or demand than service areas that happen to track the path-dependent boundaries of a city or other general-purpose entity. On the other side are those who emphasize the drawbacks of decentralization. For them, special-purpose districts are unaccountable, inefficient, and opportunistic. Some critics claim that SPGs impose costs on the larger communities in which they operate by letting discrete local populations carve away service provisions on an à la carte basis, thereby sacrificing economies of scale and frustrating efforts to undertake redistribution at the local level.[33] Others claim that SPGs are difficult for citizens to follow and thereby hold accountable, often existing as a kind of invisible form of government that imposes costs but provides scant benefit—a critique memorably advanced by an episode of comedian John Oliver's *Last Week Tonight*.[34] Others worry still that special districts can be used as democratically unaccountable vehicles for corporate domination.[35]

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[31] *See, e.g.*, Richard Briffault, *The Local Government Boundary Problem in Metropolitan Areas*, 48 STAN. L. REV. 1115, 1164–71 (1996) (arguing that regional governmental structures are an attractive solution to the problems facing local governments); Richard Briffault, *The Rise of Sublocal Structures in Urban Governance*, 82 MINN. L. REV. 503, 526–32 (1997) (arguing that sublocal structures of government are unlikely to advance the egalitarian and participatory goals at which they are aimed); Gerald E. Frug, *Beyond Regional Government*, 115 HARV. L. REV. 1763, 1788–92 (2002) (arguing that a regional institution controlled by the region's cities would solve many of the coordination problems regions face without sacrificing local control); Laurie Reynolds, *Intergovernmental Cooperation, Metropolitan Equity, and the New Regionalism*, 78 WASH. L. REV. 93, 153–56 (2003) (arguing that voluntary intergovernmental regional efforts may actually hinder the egalitarian policy goals of regional solutions).

[32] *See, e.g.*, Clayton P. Gillette, *Regionalization and Interlocal Bargains*, 76 N.Y.U. L. REV. 190, 263–69 (2001) (arguing that removing the barriers to interlocal cooperation would more effectively serve regional interests than increased government centralization).

[33] *See* Reynolds, *supra* note 31, at 94 ("This increasing stratification between city and suburb may be the intended result of state laws pertaining to local government formation, which allow affluent, homogeneous enclaves to form their own government and thus prevent the redistribution of resources.").

[34] *See* German Lopez, *John Oliver Exposes a Part of Government You Didn't Even Know Existed*, VOX (Mar. 7, 2016), https://perma.cc/987R-NJPC.

[35] *See generally* Brian Highsmith, *Governing the Company Town*, 77 STAN. L. REV. (forthcoming 2025).

We do not attempt to resolve this broad debate or speak to the general desirability (or not) of SPGs—an effort that would require the quixotic resolution of broad and largely subjective trade-offs. It would be unrealistic to offer a theory of special-purpose government that can tell us, mechanically, whether this varied form of organizational life is bad in general or in a particular case. But we do seek to add fresh perspective to long-standing debates about government in general, and SPGs in particular, by providing new theories for important and understudied organizational structures, a sense of overlooked costs and benefits of those structures, and the potential for a rich avenue for reform grounded in private law.

I. SINGLE-PURPOSE GOVERNMENTS IN CONTEXT

Despite their ubiquity and rapid growth, SPGs occupy little space in the public or scholarly consciousness. Consequently, before proceeding to a systematic analysis, we provide context by offering brief descriptions of several functioning SPGs.

A. Illustrative Examples

The three examples below give a sense of the variation in the size, structure, and services of SPGs—though only in the loosest sense can they be taken as "typical" of the fifty-two thousand that can be found in the United States.[36]

1. Calleguas Municipal Water District.

The Calleguas Municipal Water District is a water wholesaler organized under California's Municipal Water District Law of 1911.[37] Calleguas was founded in 1953 in response to recurrent droughts in the Ventura County area.[38] The district currently supplies water to around three-quarters of the residents of Ventura County, situated an hour north of Los Angeles.[39] Calleguas's gross revenue for fiscal year 2023–24 was $140,602,770; its total operating expenses were $130,395,202.[40] Calleguas has an elected

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[36] This figure is the sum of all special districts and school districts as defined by the Census Bureau. *See* U.S. CENSUS BUREAU, 2022 CENSUS OF GOVERNMENTS—ORGANIZATION, *supra* note 1, at tbl.4.

[37] *See* CAL. WATER CODE § 71000 (West 2023).

[38] *District History*, CALLEGUAS MUN. WATER DIST., https://perma.cc/ULC7-HTW9.

[39] *Id.*

[40] CALLEGUAS MUN. WATER DIST., FY 24/25 ADOPTED BUDGET (2024).

board of directors comprised of five members, each representing one of the district's five geographical divisions.[41] The five divisions are of roughly equal population and are readjusted after each national census.[42] Elections to the Board of Directors are held by the county and coincide with general elections.[43] Members are elected to four-year terms, with either two or three members up for election every two years.[44] Members of Calleguas's Board of Directors set general policy, make financial decisions, and hire a district counsel, auditor, and general manager to run the day-to-day operations of the district.[45] These three officials report directly to the Board of Directors, which typically holds between six and eight meetings per month.[46]

Calleguas, like most special districts in California, is subject to oversight by the county Local Agency Formation Commission (or LAFCo).[47] These commissions are independent county agencies charged with encouraging "orderly formation and expansion" of government entities within their jurisdictions.[48] The commissions have the power to review and approve the formation, consolidation, dissolution, and division of districts; they also have certain oversight responsibilities over service provision conflicts between governments.[49] But it appears that the Ventura LAFCo has played a minimal role in overseeing the operations of the Calleguas District, which has rarely changed its boundaries.[50]

2. Enfield Fire District No. 1.

This district serves about twenty-two thousand people spread over twelve square miles near Middletown, Connecticut.[51] It employs sixteen full-time firefighters, who are supplemented by

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41 The details that follow are based on a telephone interview by Emily Barreca, Rsch. Assistant, Yale L. Sch., with Susan Mulligan, Gen. Manager of the Calleguas Mun. Water Dist. (Feb. 14, 2017).

42 *See id.*

43 *See id.*

44 *See id.*

45 *See id.*

46 *See* Telephone Interview with Susan Mulligan, *supra* note 41.

47 *Frequently Asked Questions*, VENTURA LAFCO, https://perma.cc/AH8D-VS7Z.

48 *See id.*

49 *Id.*

50 Telephone Interview with Susan Mulligan, *supra* note 41.

51 *See About*, ENFIELD FIRE DEP'T, DIST. 1, https://perma.cc/KAZ4-RKCD.

about fifteen volunteers.[52] The district is governed by nine commissioners who serve staggered three-year terms.[53] The annual elections are held in person at the fire station.[54] Only "a couple hundred" people turn out for an election, and typically they are "the friends and family of the candidates."[55] Although turnout is low, the elections are challenged; it is not unusual to have six or seven candidates for the three open seats in any given year.[56] The commissioners do not exercise significant control over the day-to-day operations of the district; seats are apparently desirable in part as resume-builders for prospective city council candidates.[57]

Enfield receives no revenue from service charges. It instead issues general obligation bonds that are backed by property taxes.[58] The bonds are approved by both the Commission and the members of the district.[59] The district has also succeeded in obtaining federal grants to buy and upgrade equipment.[60] Although Connecticut fire districts are subject to standard open-records laws and must provide annual reports to the town clerks of the towns they serve, they are not subject to specific oversight by a state agency.[61]

3. Samaritan Healthcare.

Washington State has fifty-four active public hospital districts, most of which serve rural communities.[62] Samaritan Healthcare is a midsize district with a fifty-bed hospital. It is one of five hospital districts that serve the ninety-five thousand people in Grant County.[63] The district's facilities include a hospital,

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52 *Id.*

53 Telephone Interview by Brad Polivka with Edward Richards, Chief, Enfield Fire Dep't, Dist. 1 (Mar. 30, 2017).

54 *See id.*

55 *See id.*

56 *See id.*

57 *See id.*

58 *See* Telephone Interview with Edward Richards, *supra* note 53.

59 *See id.*

60 *See id.*

61 *See id.*

62 Telephone Interview by Ariel Dobkin, Rsch. Assistant, Yale L. Sch., with Ben Lindekugel, Exec. Dir., Wash. State Hosp. Ass'n (Feb. 21, 2017).

63 Telephone Interview by Ariel Dobkin, Rsch. Assistant, Yale L. Sch., with Theresa Sullivan, Chief Exec. Officer, Samaritan Healthcare (Mar. 13, 2017). In 2016, Samaritan had 2,906 hospital admissions; 19,847 Emergency department visits; and 19,723 primary care visits to the clinic. Email from Theresa Sullivan, Chief Exec. Officer, Samaritan Healthcare, to Ariel Dobkin, Rsch. Assistant, Yale L. Sch. (Mar. 13, 2017).

two clinics,[64] and several specialized rural health centers.[65] Samaritan's Board of Directors consists of two at-large commissioners and three who represent specific district subdivisions; all are elected to six-year terms.[66]

The district's net operating revenue in 2016 was $74,700,000.[67] Although only about $2 million of that revenue comes from taxes,[68] state law treats the entire entity as taxpayer funded and thus subject to state regulations that would not apply to private hospitals (such as a state audit).[69]

B. What Defines Public Organizations?

The absence of a clear line between governmental and nongovernmental organizations is reflected in the absence, in both law and the social sciences, of an agreeable definition of a government.[70] This definitional problem came to prominence in the legal literature around 1980 as part of a debate—raised by the Critical Legal Studies movement—over the distinction between public

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64 Samaritan Healthcare is a network with two clinics and a hospital located in Moses Lake, Washington, offering primary care and a limited range of nonemergency specialist services. *See Home*, SAMARITAN HEALTHCARE, https://perma.cc/4AMS-MXC4.

65 Telephone Interview with Theresa Sullivan, *supra* note 63.

66 Telephone Interview with Ben Lindekugel, *supra* note 62.

67 Email from Theresa Sullivan, *supra* note 63.

68 *Id.*

69 *See id.*

70 The Census of Governments reports that it counts entities as governments if they possess three characteristics: existence as an organized entity, governmental character, and substantial autonomy. *See* U.S. CENSUS BUREAU, TECHNICAL DOCUMENTATION: 2022 PUBLIC USE FILES FOR STATE AND LOCAL GOVERNMENT ORGANIZATION 7 (2022) (available at https://perma.cc/2M38-FQJH).The first of these criteria is met by all legal entities, private or public, while the third criterion, met when "an entity has considerable fiscal and administrative independence," *id.* at 8, makes no distinction between subgovernments on one hand and proprietary subsidiaries on the other. That leaves us with the circular "governmental character" criterion, which (the Census continues) is met "where officers of the entity are popularly elected or are appointed by public officials" and when the organization has a "high degree of responsibility to the public, demonstrated by requirements for public reporting or for accessibility of records to public inspection." *Id.* But this definition also fails to establish a clear line between public and private enterprise. The "popularly elected" criterion, for instance, might seem to exclude an irrigation district—of which there are many—whose voting members are limited to owners of agricultural land and are allocated votes according to the number of acres they have in production. *See, e.g.*, U.S. CENSUS BUREAU, INDIVIDUAL STATE DESCRIPTIONS, *supra* note 3, at 28 (describing electrical districts in Arizona, which facilitate irrigation pumping and are controlled by a landowner-elected board of directors); *id.* at 325 (describing irrigation districts in Wyoming, which are controlled by a board of commissioners elected in the same manner). And the criterion might be thought to include a publicly traded business corporation with thousands of voting shareholders.

and private institutions in U.S. law. Professor Robert Ellickson's classic contribution to that debate demonstrated (by focusing on the border case of homeowners associations) that there is no consistent distinction in services provided between organizations typically classified as public or governmental and organizations typically classified as private.[71]

In our view, it is principally in terms of the procedures for the initial formation of organizations and their relationship with their members that any regularity appears in the distinction between public and private organizations.[72] And even that distinction is, in practice, often more formal than consequential.

To illustrate these points, we begin by offering the following definition of a government: A government is (1) a legal entity that is (2) associated with a defined geographic territory and (3) has the authority to provide one or more services whose costs (4) the entity can allocate among, and charge to, the territory's residents or property owners regardless of whether they have, as individuals, requested or consented to receive and pay for the services involved.[73]

A special-purpose government, then, is a government that is organized to provide only a single service, whereas a general-purpose government has, and exercises, authority to provide multiple services that it chooses from an open-ended set. The "authority" to act like a government, whether special- or general-purpose, is generally granted by a higher level of government, with the exception of sovereign governments (like, in the United States, the national and state governments), which draw their authority from constitutional sources.

Our definition does not specify how those who control the government are selected. Our definition therefore includes both democratic governments—that is, governments in which the management is chosen by voting among the organization's members—and nondemocratic governments, whose leaders are chosen in some other fashion. The managers of nondemocratic SPGs are usually appointed by a higher unit of government, such as a municipality or the state. Organizations in the latter category are sometimes referred to as "authorities," such as Boston's Massachusetts Bay

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71 *See generally* Ellickson, *supra* note 13.

72 *See id.* at 1521–26.

73 As to what constitutes a legal entity for our purposes, see Henry Hansmann & Reinier Kraakman, *The Essential Role of Organizational Law*, 110 YALE L.J. 387, 393 (2000) (arguing that the separation between a firm's pool of assets and the personal assets of the firm's owners and managers is "the core defining characteristic of a legal entity").

Transportation Authority and the Port Authority of New York and New Jersey.[74] In our view, authorities are best thought of as either subsidiaries of higher-level governments or joint ventures between two or more other governments. Importantly, authorities often (though not universally) lack the autonomy of democratic SPGs. While the Census figures lump together both democratic and nondemocratic SPGs, our own informal sampling of these organizations—combined with the fact that most state enabling laws of which we are aware contemplate elected boards—suggests to us that democratic entities constitute the majority of the fifty-two thousand SPGs reported by the Census.[75] For that reason, and for simplicity and clarity of both analysis and proposed reforms, we will confine our discussion to democratic SPGs.[76]

C. Governments as Territorial Cooperatives

What do the services provided by SPGs have in common? SPGs typically provide the same services that general-purpose local governments provide—that is, they provide the services of governments more generally. And what kinds of services are those? A common answer is that governments provide public goods—goods that are (at least for residents of the government's associated territory) nonrivalrous and nonexcludable.[77]

But a substantial fraction of governmental services are not public goods in the economic sense, since they commonly fail to meet at least one, and frequently both, of the criteria that define

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74 *See Leadership at the MBTA*, MASS. BAY TRANSP. AUTH., https://perma.cc/PR43-588E (describing a Board of Directors appointed by various Massachusetts government officials, plus the state's Secretary of Transportation serving ex officio); *Governance, Ethics and Integrity*, PORT AUTH. OF N.Y. & N.J., https://perma.cc/8F6K-GG44 (describing a Board of Commissioners with six members appointed by the governor of New York and six by the governor of New Jersey).

75 This is based on our own review of a sample of such organizations. Moreover, the state enabling statutes that provide for the creation of SPGs usually contemplate elected boards.

76 We also note that the terminology used in this area varies in occasionally subtle and often overlapping or inconsistent ways. The special-purpose governments we study are sometimes referred to as districts, authorities, boards, or commissions. Terms like tax district, zoning district, business improvement district, and regional district also carry specific and sometimes delicate connotations that vary by state. *See generally* U.S. CENSUS BUREAU, INDIVIDUAL STATE DESCRIPTIONS, *supra* note 3 (reviewing special-purpose governments in each U.S. state, with numerous examples of districts that take each of the names listed here). We use the term single-purpose government inclusively and loosely, focusing on the broadest features of local governments that provide only a single service.

77 *See, e.g.*, James M. Buchanan & Richard E. Wagner, *An Efficiency Basis for Federal Fiscal Equalization*, *in* THE ANALYSIS OF PUBLIC OUTPUT 139, 145 (Julius Margolis ed., 1970).

a public good. First, the cost of providing governmental services is rarely independent of the number of people served—that is, these services are not strictly nonrivalrous. The more residents in a jurisdiction, the more the government must spend on roads, schools, sewers, fire trucks, police officers, and courts. Second, residents of a government's territory can usually be excluded from consuming the government's services if they fail to pay for those services. For many governmental services, such as the construction and maintenance of local roads, exclusion is impractical. But governments have little difficulty in excluding nonpaying residents from the use of schools, transportation, utilities, museums, courts, and more.

Instead, the attribute that seems to distinguish services provided by governments from services provided by private entities is *monopoly*—or, more precisely, substantial market power vis-à-vis the residents of the government's associated territory. This market power has at least two sources. First, some services exhibit economies of scale that render a single provider of services the least-cost mode of production, a situation usually described as a natural monopoly.[78] Sewage systems are a simple example: building two or more parallel systems of competing sewage pipes in a town would involve the costly duplication of fixed and sunk costs. Second, higher-level governments often create monopolies—both in commodities (such as salt or tobacco) and services (such as access to a toll road)—that might otherwise be competitively supplied, and then assign them to lower-level governments to reduce the impact of market failure. Examples include regulation designed to limit externalities, such as zoning and other land-use controls, stoplights, and speed limits. Among other things, these services address coordination problems that demand a single solution.

The logic of using a democratic government to provide territorially monopolistic services is straightforward. In a democracy, the residents served by the government also control it, and can use that control to prevent the government from exploiting its monopoly position—by, for example, charging prices for its services that are far above the cost of production. This is also the economic role typically played by private cooperatives, including the

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[78] For a definition, see William J. Baumol, *On the Proper Cost Tests for Natural Monopoly in a Multiproduct Industry*, 67 AM. ECON. REV. 809, 810 (1977) (describing a natural monopoly as an "industry in which multifirm production is more costly than production by a monopoly").

numerous and often very large cooperatives found in utilities (electricity, gas, water, and telephone service), agricultural marketing, wholesaling, and franchising (at least in the many cases in which franchisees collectively own the franchisor to which they are effectively locked in).[79] In these and other situations, cooperatives arise where a monopoly is unavoidable or desirable, but where exploitation of the customers can be avoided by making customers the collective owners.[80] Viewed in this light, democratic governments are effectively territorial cooperatives, and perform the same consumer protection function as cooperatives in general.

There are, to be sure, other limits on the monopoly power of a local government. As Tiebout famously observed, if the cost of moving from one government's territory to another is negligible, and if governments seek to attract new residents, we might expect something like a competitive market for governmental services.[81] The world, however, appears far from meeting the strong assumptions of Tiebout's model. The costs of moving can be large; they entail not just finding new employment, housing, and schools, but new social relationships as well. And local governments often seem more interested in keeping new residents out than in attracting them.[82] The result is that exit—the opportunity to move out of a territory—provides only a modest limit to the market power of suppliers of locally monopolistic services. Thus, residents of a territory depend not just on exit, as per Tiebout, but also heavily on voice—essentially, control through the electoral process and other feedback mechanisms—to protect them from exploitation.[83] In this respect, one of the basic functions of government is also a basic function of the private cooperative: to control and manage monopoly power. Indeed, such control and management may be more important in the context of government if the costs of exit tend to be larger in the average government than in the average private firm.

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79 *See* ZEULI & CROPP, *supra* note 10, at 28–32 (discussing the range of services provided by cooperatives in the United States and presenting data on their strength in various markets).

80 *See id*. at 77.

81 *See* Tiebout, *supra* note 16, at 419–20.

82 *See* Robert C. Ellickson, *Suburban Growth Controls: An Economic and Legal Analysis*, 86 YALE L.J. 385, 399–403 (1977) (describing the exclusionary effects of municipal growth controls).

83 For the classic statement on the contrast between these types of responses, see generally ALBERT O. HIRSCHMAN, EXIT, VOICE, AND LOYALTY (1970) (examining the interplay between exit and voice in the economy and other social systems).

D. Government Formation Versus Business Incorporation

To explore the difference between governmental and nongovernmental organizations, it may be helpful to consider a service that both provide. We use local electricity distribution as an example.[84] This service has the rough character of a natural monopoly because of substantial fixed costs and the attendant inefficiency of constructing two parallel distribution systems. As a result, local electricity distribution is organized in a manner designed to mitigate the consequences of monopoly. Moving from the most private to the most public, the providers of electricity include the following kinds of organizations: (1) investor-owned and subject to governmental rate regulation; (2) customer-owned through a consumer cooperative (and generally free of rate regulation); (3) owned and operated by a special-district government; or (4) owned and operated by a municipality or other general-purpose government.[85] Although organizations in category (2) are considered "private," and the organizations in category (3) are considered "public," the practical differences between them are modest.

The principal difference lies in formation. An SPG is typically formed at the initiative of residents, who develop an initial proposal for both the service provided and the territory served.[86] The residents draft a petition and, if they obtain the statutory minimum number of signatures from among the residents of the

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84 The organization of multiunit housing is likewise provided by both but appears strongly affected by special rules of taxation. *See* Henry Hansmann, *Condominium and Cooperative Housing: Transactional Efficiency, Tax Subsidies, and Tenure Choice*, 20 J. LEGAL STUD. 25, 39–56 (1991) (describing the differences in tax subsidies available for owner-occupied and rental housing). For a discussion of the different forms of ownership of electric utility companies across the United States, see HENRY HANSMANN, THE OWNERSHIP OF ENTERPRISE 168–81 (1996) [hereinafter HANSMANN, THE OWNERSHIP OF ENTERPRISE].

85 *See What Is Public Power?*, AM. PUB. POWER ASS'N 8, https://perma.cc/X4ES-UN7D (distinguishing between publicly owned, cooperatively owned, and investor-owned electric utilities).

86 *See, e.g.*, *Establishing & Governing Special Districts*, NAT'L SPECIAL DISTS. COAL. (2024), https://perma.cc/T99Q-77MA ("In most states, districts are created by public referendum, which includes petitions, hearings, and a vote of the residents."); CAL. SENATE LOC. GOV'T COMM., WHAT'S SO SPECIAL ABOUT SPECIAL DISTRICTS? 12 (4th ed. 2010) (announcing that voters' application to form a special district must "detail the proposed district's boundaries and services," among other requirements); IOWA LEGIS. SERVS. AGENCY, LEGAL SERVS. DIV., SPECIAL DISTRICTS 1–2 (2009) (available at https://perma.cc/WL98-S92D) (noting that petitions are the "most common way under Iowa law to initiate the formation of a special district" and that petitions must often include information on boundaries and services to be provided).

territory (usually well under 50%), they conduct a vote on the proposal among all residents of the proposed territory.[87] If that vote meets the required minimum (usually 50% or more) and any other conditions—like the approval of a designated state official—the district comes into existence and commences operation.[88]

When the district comes into existence, all residents of the designated territory become members of the special district whether they voted in favor of it or not. They become liable for assessments levied by the district to cover the costs of supplying the service.[89] In the case of electricity distribution, these costs may include initial assessments to cover the capital expenses of constructing the distribution system, and then user fees charged according to the amount of electricity consumed.[90] Residents who decline to use the service can avoid the user fees but remain liable for assessments to cover their share of capital costs.[91]

Formation of a cooperative is also likely to begin with a proposed service and a proposed territory, followed by the solicitation of residents.[92] But approval in this case means a pledge to become a member of the cooperative if formed—a pledge usually conditioned upon receipt of similar pledges by a given fraction of the residents of the territory.[93] The cooperative will be owned and operated by the residents who have pledged to become members. But residents of the territory who do not wish to join need not

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87 *See* IOWA LEGIS. SERVS. AGENCY, *supra* note 86, at 1–2, 5–6 (explaining the number of signatures required and the election process); MUN. RSCH. & SERVS. CTR. OF WASH., SPECIAL PURPOSE DISTRICTS IN WASHINGTON STATE 19 (2003) (available at https://perma.cc/7JHB-L25A) ("The formation of a district generally requires an election to determine whether the majority of residents or landowners wish to form a district and pay taxes to receive the service.").

88 *See* IOWA LEGIS. SERVS. AGENCY, *supra* note 86; CAL. SENATE LOC. GOV'T COMM., *supra* note 86, at 12 (describing the SPG approval process as including Local Agency Formation Commission approval and majority approval of voters within the district, or two-thirds approval if new taxes are imposed).

89 *See* KATHRYN A. FOSTER, THE POLITICAL ECONOMY OF SPECIAL-PURPOSE GOVERNMENT 7 (1997) (discussing special districts' elected boards as a means of ensuring "no taxation without representation," a principle only relevant in the face of coercive power over all those represented).

90 *See id.* at 14 ("Taxing districts draw primarily on property tax levies but may also receive funds from bond issues, grants, user fees, rents, special assessments, and other taxes."); CAL. SENATE LOC. GOV'T COMM., *supra* note 86, at 12 (describing the taxes utility-providing special districts impose to pay off capital projects).

91 *See* FOSTER, *supra* note 89, at 14.

92 *See* ZEULI & CROPP, *supra* note 10, at 70–72.

93 *See id.* at 72 (discussing "membership agreements" that are not binding until the cooperative incorporates and the return of fees collected from signers of those agreements if the number of signers "falls short of a pre-determined goal").

become members and are not subject to any assessments if they do not use the services.[94]

Formation of these two forms of organization differs, then, in whether residents of the territory are *compelled* to join the organization—and to pay a share of its costs—once formed. In the case of a service such as electricity, where charges are based principally on metered use and where a resident can avoid the cost by declining the service, there is little practical difference between the arrangements. A resident of the territory can simply avoid using and paying for the service. But if residents choose to consume the service, they must obtain it from (and pay the fees to) the SPG or the cooperative, regardless of which of these two forms the organization takes.

This difference in formation may also explain the loose trends in the services that public and private entities provide. The difference in formation—the fact that governments can *compel* membership and cost-sharing—is particularly important for shared physical improvements such as street lighting and sidewalks. These are cases where it is impractical to exclude certain citizens. If a qualified majority of the owners of houses facing a given street wish to form a special district to install sidewalks along the street, they can compel all residents on the street to both accept the sidewalks and pay the assessed share of the cost. That is, an SPG can force residents to consume and finance the service it provides, and not just (as in the electricity distribution example) accept the availability of the service. While a private cooperative could in theory provide sidewalks to a given group of residents, it could not (absent some prior contractual agreement) force unwilling residents to pay for the sidewalks, nor force unwilling residents to install or even accept sidewalks on their own property. We are thus aware of no private cooperatives for sidewalks.

In short, SPGs, like governments in general, serve importantly to solve problems of the commons.[95] Once residents create an SPG to provide a service, the SPG can require everyone in the territory to pay their pro rata share of costs. Holdouts and free riders are eliminated. This difference in formation mechanisms between SPGs and cooperatives is fundamental. Once formed, an SPG may well be structured and operate similar to a

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[94] *See id.* at 1 (emphasizing that "the essential element of cooperatives" is that "membership is voluntary" and "[c]oercion is the antithesis of cooperation").

[95] For the classic statement of this issue, see generally ELINOR OSTROM, GOVERNING THE COMMONS: THE EVOLUTION OF INSTITUTIONS FOR COLLECTIVE ACTION (1990).

typical cooperative. To complete the partial definition of a government offered above, we must therefore add a fifth element: when a government is formed for a given territory, all residents of that territory must become members.

E. SPGs and Common-Pool Resources

As suggested above, common-pool resources (CPRs) and SPGs are closely linked, both conceptually and historically. As described in more detail below, one of the earliest enabling statutes for forming an SPG in the United States was adopted in California in 1887; it was designed to deal with the rights of farmers to share common sources of fresh water for their crops in a situation where total demand for water substantially exceeded total supply.[96] That is, the statute was adopted explicitly to deal with the classic CPR problem—the so-called problem (or tragedy) of the commons. The governmental character of the organizations formed under the act—which is to say, the legal power to force users of the water to restrict their consumption to levels chosen by the organization—was vitally important. The incentive to be a free rider, and race to pump as much water out of the common supply as possible, would intensify if only a portion of the individuals with water rights were included in the scope of the SPG's authority.

Conversely, placing a productive resource under the control of an SPG will make the SPG a monopoly: able to charge above-market prices for its services. Consequently, control of the organization by the individuals governed by it—or by some other trustworthy persons, such as managers accountable to a higher-level government—is an important feature of an SPG's organization.

The foremost scholar to have addressed, in general terms, the conditions favorable for the formation of organizations to deal with CPRs is the late economist Elinor Ostrom, whose work on the subject—and especially her first book, *Governing the Commons: The Evolution of Institutions for Collective Action*[97]—won her the Nobel Memorial Prize in Economic Sciences in 2009.[98] In her work, Ostrom took pains to show that the predictions of formal

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[96] *See* ELLEN HANAK, JAY LUND, ARIEL DINAR, BRIAN GRAY, RICHARD HOWITT, JEFFREY MOUNT, PETER MOYLE & BARTON THOMPSON, MANAGING CALIFORNIA'S WATER: FROM CONFLICT TO RECONCILIATION 30 (2011).

[97] ELINOR OSTROM, GOVERNING THE COMMONS: THE EVOLUTION OF INSTITUTIONS FOR COLLECTIVE ACTION (1990).

[98] *See Elinor Ostrom—Facts*, THE NOBEL PRIZE, https://perma.cc/73TJ-S4KB.

models of CPRs, created largely by economists and often assuming rational, utility-maximizing behavior by the users of the common resource, and consequent overconsumption, frequently do not offer accurate predictions of the behavior of the individuals involved.[99] Indeed, where CPR problems are severe, institutions to constrain demand are frequently constructed by the affected individuals.[100] Ostrom described these institutions in detail, often drawing on the work of other scholars, and showed particular interest in describing the societal and natural conditions favorable to forming such institutions.[101]

Ostrom did not include among the conditions she examined, however, the presence of enabling acts such as those common in the United States, which are our focus here. In *Governing the Commons*, for example, she offered an extended discussion of the formation following the Second World War of an SPG to ration the water drawn from two groundwater basins underlying the Los Angeles metropolitan area.[102] She also discussed the passage of a new law, the Water Replenishment District Act,[103] which was critical to the formation of this organization. Given that there are over fifty thousand SPGs currently operating in the United States—almost all of which were formed under enabling acts—the presence or absence of these acts, and the politics of their adoption and application, seems central to any evaluation of the control of CPRs.

II. HISTORICAL EVOLUTION

The theories we have sketched above are also reflected in the history of SPGs. This Part turns to that history: Where, when, and why did SPGs emerge? We make three basic points. First, the modern SPG shares a nineteenth-century heritage akin to other modern corporate forms, reflecting the broad overlap between public and private organizations that we described above. Second, the immediate impetus for the modern SPG was an assortment of property and governance problems in the western United

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99 *See* OSTROM, *supra* note 97, at 183–84 (arguing that the formal models in question utilize extreme assumptions and have a very limited range of effectiveness).

100 *See id.*

101 *See id.* at 58–102 (describing several of these institutions and their similarities); *id.* at 182–216 (developing a framework for analyzing these institutions).

102 *See id.* at 127–33.

103 *See* CAL. WATER CODE § 60000 et seq.

States—problems that other private or public organizational vehicles were not well adapted to solve, and that suggest a connection between SPGs and common-pool resources. Third, since the late nineteenth century, SPGs have evolved in ways that broadly resemble the evolution of other types of incorporated entities. Most notably, the statutes that govern SPGs exhibit increasing breadth, flexibility, and uniformity.

A. Types of Corporations in Early U.S. History

At the time of U.S. independence, Anglo-American law did not differentiate clearly among the structures and purposes of individual corporations. The term corporation referred broadly to joint-stock business corporations, guilds, eleemosynary (charitable) corporations, mutual corporations, cooperative corporations, and municipal corporations.[104] One reason for this linguistic conflation was that the government—generally the state legislature through private acts—granted corporate charters on an individual basis.[105] This left both the government and the incorporating parties with substantial freedom to tailor the organization's charter.

Over the course of the nineteenth century, the number of corporations in the United States swelled and corporations began to be categorized into distinct types, with each type governed by a separate state-level statute.[106] This development occurred first for business corporations early in the nineteenth century. Then, later in the nineteenth century, additional corporation statutes were adopted to enable the formation of (and to regulate) mutual corporations, cooperative corporations, nonprofit corporations, and municipal corporations.[107]

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[104] *See* Henry Hansmann & Mariana Pargendler, *The Evolution of Shareholder Voting Rights: Separation of Ownership and Consumption*, 123 YALE L.J. 948, 955–56, 958, 994–95 (2014).

[105] *See id.* at 950–51.

[106] *See id.* at 993–96.

[107] The first major general incorporation act was the New York Act of 1811, which provided for incorporation as of right for certain manufacturing industries. An Act Relative to Incorporations for Manufacturing Purposes, ch. 67, 1811 N.Y. Laws 151; *see also* Henry N. Butler, *Nineteenth-Century Jurisdictional Competition in the Granting of Corporate Privileges*, 14 J. LEGAL STUD. 129, 143–46 (1985) (discussing the development of general incorporation laws for businesses in the mid-nineteenth century). The first general incorporation act for cooperatives was enacted by Michigan in 1865; by 1911, twelve states had similar laws. ZEULI & CROPP, *supra* note 10, at 15. The first mutual general incorporation law was enacted by Maryland in 1843. SEYMOUR DEXTER, A TREATISE ON CO-OPERATIVE

General enabling statutes for incorporating special-purpose governments, however, were not adopted in the nineteenth century. This is surprising. At least until the mid-nineteenth century, incorporation for what we now think of as business (investor-owned and profit-seeking) purposes was not the norm, even when a corporation was formed as a joint-stock company.[108] Of the corporate charters granted in the United States between 1781 and 1800, more than 75% were for public infrastructure projects like canals, bridges, turnpikes, and docks.[109] Many corporate charters contained an explicit charge to serve the public, and it was commonly accepted that the state often conferred special charters not for the private benefit of businessmen but to "further the general welfare."[110] Indeed, the same pattern characterizes the incorporation boom in the first half of the nineteenth century, when over one-third of the legislatively chartered joint-stock companies in many states were formed to undertake activities, like roadbuilding, that would today be undertaken by government.[111]

These kinds of corporations—turnpikes, bridges, canals, and the like—were akin to special-purpose governments formed on a voluntary rather than a compulsory basis.[112] Their members (shareholders) usually consisted of their consumers. To take a typical example, the state legislature would, at the request of a group of citizens, pass a special statute creating and chartering a joint-stock company whose purpose was to build and operate a turnpike connecting two towns. Shares of stock in the corporation would be sold to persons who stood to benefit from the turnpike, such as farmers along its route and merchants in the towns it

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SAVINGS AND LOAN ASSOCIATIONS 65 (New York, D. Appleton & Co., 1889). The first nonprofit general incorporation acts were enacted far earlier, in the late 1700s. James J. Fishman, *The Development of Nonprofit Corporation Law and an Agenda for Reform*, 34 EMORY L.J. 617, 631–32 (1985).

108 *See* David Millon, *Theories of the Corporation*, 1990 DUKE L.J. 201, 207.

109 *See* P.M. Vasudev, *Corporate Law and Its Efficiency: A Review of History*, 50 AM. J. LEGAL HIST. 237, 243 (2010).

110 *See* Millon, *supra* note 108, at 207.

111 *See* JAMES WILLARD HURST, THE LEGITIMACY OF THE BUSINESS CORPORATION IN THE LAW OF THE UNITED STATES 1780–1970, at 17–18 (1970); William C. Kessler, *Incorporation in New England: A Statistical Study, 1800–1875*, 8 J. ECON. HIST. 43, 47 (1948) (finding that 36% of specially chartered companies in New England between 1800 and 1843 were "public utilities").

112 *See* Hansmann & Pargendler, *supra* note 106, at 959 ("State governments of the early nineteenth century were, however, prepared to give corporate charters to groups of citizens who wished to finance and manage publicly beneficial improvement projects on their own.").

connected.[113] But the shares were not purchased as a means of earning a profit. Rather, shareholders understood from the beginning that—though the company had the right to charge tolls for the use of its turnpike—those tolls would never be set high enough to make a profit, much less the monopoly profit that the turnpike could potentially obtain.[114] Instead, shares were purchased to make a voluntary contribution to help cover the fixed costs of a service that, in the hands of profit-seeking investors, would face the local community as a troublesome monopoly.[115] The charters of these companies thus commonly provided for capped or regressive shareholder voting—that is, provisions that radically limited the number of votes one could obtain by buying additional shares.[116] This was intended to prevent any individual or group of individuals from obtaining control of the company. The result was that most votes remained in the hands of residents who held few shares and stood to benefit more from low tolls than from high dividends.[117]

In short, through the middle of the nineteenth century, most corporate charters granted by state legislatures were for the formation of joint-stock companies that were not intended to operate as profit-seeking business firms. Instead, nineteenth-century corporations were intended to be consumer controlled (as in a modern cooperative corporation) with initial capital in large part donated (as in a modern nonprofit corporation), all for the sake of building public infrastructure of an inherently monopolistic character (like those provided by a modern municipal corporation).

Given this extensive experience with corporations that were in effect SPGs, why were the states slow to enact general enabling statutes for the formation of SPGs, which would solve collective action problems without reliance on financing through what were effectively private donations? One plausible answer is rooted in a change in the scope of U.S. local government over the course of the nineteenth century. From the founding of the Republic to the

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113 *Id.* at 960–61.

114 *Id.* at 960–63.

115 *Id.*

116 *See id.* at 959–60.

117 *See* Hansmann & Pargendler, *supra* note 106, at 963.

middle of the nineteenth century, local government was slow to develop.[118]

The second half of the nineteenth century brought with it a municipal explosion: the rapid expansion of general-purpose local governments.[119] The result was that the types of public infrastructure provided in the first half of the nineteenth century by legislatively chartered joint-stock companies were, in the latter half of the century, generally undertaken by the rapidly developing network of GPGs at the state, county, municipal, and township levels.[120]

By 1875, almost every U.S. state had an enabling law for business corporations.[121] Most of the statutes, however, did not provide for formation of the types of organizations that we would now characterize as SPGs.[122] Throughout the nineteenth century, special charters continued to serve as the principal means for creating single-purpose governments.[123]

B. The Birth of SPG-Incorporation Statutes

The first statutes enabling the formation of SPGs were not enacted in the eastern states, despite those states' extensive experience with voluntary SPGs nominally formed as joint-stock corporations. Rather, the first general incorporation statutes for any type of special district appeared in the latter part of the nineteenth century in the western United States.[124] These early statutes focused on the formation of SPGs to serve the water needs

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118 The reasons have not been well explored but seem to include difficulty in reconciling conflicting local interests. *See, e.g.*, ERNEST S. GRIFFITH, HISTORY OF AMERICAN CITY GOVERNMENT: THE COLONIAL PERIOD 259–61 (1938) (explaining that as communities grew, they faced tension between retaining local, individualized control and accepting the efficiencies accorded by incorporated city governments); Seth Low, *An American View of Municipal Government in the United States*, *in* 1 JAMES BRYCE, THE AMERICAN COMMONWEALTH 585, 589–90 (Liberty Fund 1995) (describing the pressure to transition to incorporated municipalities in terms of the financial flexibility the corporate form provided).

119 *See* JON C. TEAFORD, THE MUNICIPAL REVOLUTION IN AMERICA: ORIGINS OF MODERN URBAN GOVERNMENT 1650–1825, at 113–15 (1975) (describing significant growth in the provision of municipal services over the latter part of the nineteenth century as a result of prior ideological changes).

120 *See id.* at 114. The distinction between municipalities and townships is vague and varies from state to state. We generally use the term municipality to include townships.

121 *See* Susan Pace Hamill, *From Special Privilege to General Utility: A Continuation of Willard Hurst's Study of Corporations*, 49 AM. U. L. REV. 81, 104–05 (1999).

122 *See id.* at 106–07.

123 *See id.* at 139–45 (tracing the shift from special charters to general incorporation laws in the early twentieth century).

124 *See* Albert T. Henley, *Land Value Taxation by California Irrigation Districts*, 27 AM. J. ECON. & SOCIO. 377, 377–78, 380 (1968) (discussing the development of special districts in California and their spread across the West).

of the rapidly expanding frontier population, including irrigation, drainage, and flood control.[125] In contrast to the East, where plentiful rainfall made irrigation largely unnecessary and where the common law of riparian water rights adopted from England was well-suited to the terrain, the West often required water management that covered extensive territory and large-scale investments, and involved substantial—and contentious—rearrangement of property rights.[126] Many of these cases involved physical improvements where—like our sidewalk examples above—it would be difficult to exclude proximate landowners from the regime.

The California legislature responded to these needs in 1868[127] with a statute that "allowed landowners to join together and levy property assessments to fund construction of land reclamation and flood control projects."[128] This 1868 statute—which we believe to be the first major general-incorporation statute for special districts in the United States—brought the formation of hundreds of reclamation districts in California.[129] That success led in turn to the enactment in 1887 of California's prominent and influential Wright Act,[130] which permitted the formation of irrigation districts with, among other powers, the authority to exercise the

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[125] *See id.*

[126] *See* HANAK ET AL., *supra* note 93, at 26–31; Richard H. Peterson, *The Failure to Reclaim: California State Swamp Land Policy and the Sacramento Valley, 1850–1866*, 56 S. CAL. Q. 45, 45 (1974). As the U.S. Supreme Court noted in an early decision upholding special-district control over water use, "climatic conditions in some sections [of western states] so differ from those in others that the doctrine of the common law may be of advantage in one instance, and entirely unsuited to conditions in another." Justice George Sutherland went on to hypothesize that "this diversity of conditions [ ] gave rise to more or less confusion" in common-law decisions on resource rights. Cal. Or. Power Co. v. Beaver Portland Cement Co., 295 U.S. 142, 153 (1935).

[127] *See* Act of Mar. 28, 1868, ch. 414, 1867–68 Cal. Stat. 507 §§ 28–50.

[128] HANAK ET AL., *supra* note 96, at 25; *see also* Hagar v. Reclamation Dist. No. 108, 111 U.S. 701 (1884) (discussing the 1868 statute). An earlier California law did some related work. *See* Henley, *supra* note 124, at 377 (citing Act of Apr. 2, 1866, ch. 570, 1865–66 Cal. Stat. 799) (discussing an earlier California statute addressing water reclamation). But this 1866 statute did not provide for the incorporation of SPGs, although it did provide mechanisms for the appointment and financing of engineers to support reclamation efforts. *See* Act of Apr. 2, 1866, 1865–66 Cal. Stat. at 799–801.

[129] HANAK ET AL., *supra* note 96, at 25. Some earlier state-law efforts bear a resemblance to the California law, though they differ by degree and do not appear to have had the same influence. For example, it appears that an earlier law allowed for the decentralized formation of districts in Utah Territory in 1865, though relatively little is known about this effort. *See* DONALD WORSTER, RIVERS OF EMPIRE 78–79 (1985). In addition, an 1854 Vermont statute and 1849 New Hampshire statute allowed residents to petition for the formation of fire precincts, though the petition left considerable discretion in the hands of local elected officials. *See infra* notes 140 and 147.

[130] Act of Mar. 7, 1887, ch. 34, 1887 Cal. Stat. 29.

right of eminent domain[131] and the ability to finance projects by selling bonds.[132]

C. From Local to National and Specific to General

The Wright Act was conspicuously successful in spurring the construction of new irrigation networks,[133] and other states and territories soon began to follow California's lead.[134] In Washington territory (soon to be Washington state), for example, 1888 legislation authorized the construction of dikes to benefit farmers in Skagit County.[135] In 1889, the first legislature of the new state of Washington passed legislation that took the idea of special-purpose governments beyond water control, allowing the formation of road and school districts as well.[136]

Yet more types of SPGs soon followed. California continued to be a trendsetter: in 1899, it passed a statute governing the creation and management of sewer districts.[137] Illinois—which today has the largest absolute number of special districts in the country[138]—was also an early adopter of such statutes, passing a law allowing for the formation of water districts in 1899 and sanitary districts in 1907.[139] Early sanitary districts—responding to the sanitation pressures of urbanization in the early twentieth century—cropped up elsewhere; Tennessee passed one of the first such statutes in 1901.[140] Ten years prior, New Hampshire passed

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131 MICHAEL DI LEO & ELEANOR SMITH, TWO CALIFORNIAS: THE MYTHS AND REALITIES OF A STATE DIVIDED AGAINST ITSELF 117 (1983).

132 *See* CAL. SENATE LOC. GOV'T. COMM., *supra* note 82, at 4 (describing the history of the state's special districts).

133 Wells A. Hutchins, *Irrigation Districts, Their Organization, Operation and Financing*, U.S. DEPT. OF AGRIC., TECH. BULL. NO. 254, June 1931, at 1, 12:

> The original purpose of the irrigation district was the construction of irrigation works. Although the Wright Act gave the alternative power of purchasing irrigation systems, nevertheless it was the need for new development that resulted during the first few years in the formation of districts predominantly for the construction of new works.

134 *See* Henley, *supra* note 124, at 380 ("The legislation did not lack the tribute of emulation. Sixteen other western states have enacted irrigation district laws closely modeled upon the Wright Act.").

135 MUN. RSCH. & SERVS. CTR. WASH., SPECIAL PURPOSE DISTRICTS IN WASHINGTON STATE 5 (2003).

136 *Id.*

137 *See* U.S. CENSUS BUREAU, INDIVIDUAL STATE DESCRIPTIONS, *supra* note 3, at 41.

138 *See* U.S. CENSUS BUREAU, 2022 CENSUS OF GOVERNMENTS—ORGANIZATION, *supra* note 1, at tbl.4.

139 *See* U.S. CENSUS BUREAU, INDIVIDUAL STATE DESCRIPTIONS, *supra* note 3, at 93, 96.

140 TENN. CODE ANN. § 7-81-101 et seq. (2024).

a statute allowing for the creation of "village districts."[141] (To the best of our knowledge this was the first example of a single statute that enabled the incorporation of SPGs providing any of several different types of service.) By the early 1930s, we estimate that more than half the states had statutes providing for the creation of at least one type of special district.[142]

The states created still more incorporation statutes in the early twentieth century, when the rise of the suburbs—fueled by advances in communication and transportation—shifted some service provision away from urban population centers.[143] The exurbanites and new suburbanites continued to demand urban-level services outside the city, which led to new laws and new districts.[144] While these new suburban communities could have incorporated new general-purpose governments, or have been annexed by existing ones, many opted instead for services from special-purpose governments.[145]

As the number and type of these special districts proliferated rapidly, many of these new midcentury statutes—like the early New Hampshire statute mentioned above—stopped limiting their reach to one type of service. In 1935, for instance, Alabama passed a statute that allowed for the formation, with a uniform set of standard procedures, of districts that offered "water, sewerage, telephone, gas or electric heat, light, or power services, commodities or facilities."[146] In 1937, Tennessee passed a statute that covered "utility districts," a category that could include water service, sewer, garbage collection and disposal, street lighting, parks and recreational facilities, gas supply, fire and police protection, transit, transmission of industrial chemicals or natural gas by pipeline, and community antenna television facilities, or

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141 N.H. REV. STAT. ANN. § 52:1 (2024). In the 1891 revision of the New Hampshire laws, this statute took what is essentially its current form. PUBLIC STATUTES OF THE STATE OF NEW HAMPSHIRE 174–77 (1891); *see also id.* at v–vi (describing the process of revising the state's laws). The creation of village districts by voter petition for the purpose of fire-fighting in New Hampshire dates back to 1849. Act of July 6, 1849, ch. 852, 1849 N.H. Laws 850–51. Street lighting was added to their powers in 1874. Act of June 26, 1874, ch. 11, 1874 N.H. Laws 276. By 1887, they had the power to "sprinkle" streets and to obtain a water supply for firefighting. Act of Aug. 24, 1887, ch. 42, 1887 N.H. Laws 435. In 1889 they were still referred to as village fire districts. Act of July 30, 1889, ch. 11, 1889 N.H. Laws 45.

142 This is based on the authors' count.

143 *See* FOSTER, *supra* note 89, at 16–17.

144 *See id.*

145 *See id.* at 17.

146 ALA. CODE § 39-7-1 (1935).

combinations of those services.[147] And in 1970, Vermont expanded its definition of "fire districts" (governed by an earlier limited statute) to allow taxation and spending for "sewers and sewage treatment works; sidewalks; public parks; water works, water companies, and all equipment and real estate used in connection therewith, including reservoirs and dams; and for lighting purposes"—spending which would be authorized "as the fire district may vote."[148] Other states followed suit.[149]

The history of special-purpose governments has, in fact, been a story of relaxing constraints—from statutes that provide for only a single narrow type of service to more general statutes that enable the formation of SPGs providing any of a broad range of services.[150] After reviewing the incorporation laws of all fifty states, we estimate that almost half of the states have special district incorporation statutes that cut across service types. These states notably do not include many of the earliest enthusiastic adopters—like California and Illinois—which have no such general statutes. This suggests that reliance on the original patchwork approach, with a special statute for each type of SPG, may largely be a product of path dependence, in which early innovation reduces the incentive to adopt a newer and more efficient approach.

Indeed, even the most general of the state enabling statutes for SPGs embody restrictions on the purposes for which SPGs can be formed, impose different organizational and operational requirements on SPGs according to the purposes they serve, or give to a state official or agency discretion to deny incorporation

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147 *See* TENN. CODE ANN. § 7-82-302 (listing the utilities that utility districts have the power to operate).

148 VT. STAT. ANN. tit. 20, § 2601 (2024). In 1854, the legislature passed a law allowing for residents to create fire districts with powers to tax and spend for the purpose of fire protection. Act of Nov. 11, 1854, no. 7, 1854 Vt. Acts & Resolves 9. In 1909, the legislature allowed these districts to also provide sewers and lighting services and added the provision on voter-approved spending. Act of Jan. 22, 1909, no. 88, 1909 Vt. Acts & Resolves 78. Sidewalks were added in 1912. Act of Oct. 25, 1912, no. 130, 1912 Vt. Acts & Resolves 167. In 1941, sewage treatment works and public parks joined the list. Act of Mar. 13, 1941, no. 55, 1941 Vt. Acts & Resolves 68. The current language, which added water services, was enacted in 1970. Act of Mar. 31, 1970, no. 223, 1970 Vt. Acts & Resolves 154 (codified as amended at VT. STAT. ANN. tit. 20, § 2601).

149 *See, e.g.*, NEB. REV. STAT. § 31-727 (1949) (stating that a "majority of the owners . . . may form a sanitary and improvement district for the purposes of" more than a dozen listed purposes); UTAH CODE ANN. § 17B-1-202 (West 1957) (outlining more than twenty different service types that can be formed).

150 *See, e.g.*, Henley, *supra* note 124, at 377 ("A chronological survey of general district acts shows a definite movement from narrow to wide declarations of purpose.").

to individual special districts.[151] In these important respects they differ from modern statutes governing the formation of business corporations, as well as modern statutes governing cooperative corporations[152] and nonprofit corporations.[153]

D. Why Only in the United States?

SPGs appear almost unique to the United States. Among civil law countries, only Switzerland employs a similar form, and only to a limited extent.[154] While the United Kingdom has many special-purpose governments, they are not as democratic, since residents are not involved in their operations.[155] This might at first seem odd. Americans, descended largely from immigrants seeking to escape what they perceived as overly dominating governments in their country of origin, are characteristically averse to delegating strong powers to governments at any level. And this fact might also be interpreted as an indictment of the efficiency of SPGs: If they are so effective, why are they largely a U.S. phenomenon?

Why, then, is the U.S. public so ready to create autonomous governments to manage supply of public services? We will not attempt to explore this question in depth here. But the answer, we think, likely lies in the historical and geographic evolution of

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[151] For example, Colorado, which has one of the most general special-district-formation statutes—with one law for the formation of districts—still requires the green light from a state approving committee (typically the "board of county commissioners"). COLO. REV. STAT. ANN. § 32-1-203(1) (2024). *See generally id.* § 32-1-203.

[152] *See, e.g.*, CAL. CORP. CODE § 12201 (West 2024):

> Subject to any other provision of law of this state applying to the particular class of corporation or line of activity, a [cooperative] corporation may be formed . . . for any lawful purpose provided that it shall be organized and shall conduct its business primarily for the mutual benefit of its members as patrons of the corporation.

See also, e.g., N.D. CENT. CODE ANN. § 10-15-02 (West 2023) ("Cooperatives may be organized under this chapter for any lawful purpose except banking and insurance."); N.Y. COOP. CORP. LAW § 14 (McKinney 2016) (endowing cooperatives with various general powers).

[153] *See, e.g.*, N.J. STAT. ANN. § 15A:2-1 (West 2024) ("A [nonprofit] corporation may be organized under this act for any lawful purpose other than for pecuniary profit."); 15 PA. CONS. STAT. § 5301 (2017) (allowing the formation of nonprofits for "any lawful purpose or purposes" except insurance and reinsurance).

[154] Even these Swiss "special-purpose municipalities" are less pervasive and more restricted in scope. They are found primarily in German-speaking cantons, and mostly handle matters relating to churches, schools, and welfare. *See* Eur. Monitoring Comm., *Local and Regional Democracy in Switzerland*, 33d Sess., Doc. No.CG33(2017)14, at 9 (2017).

[155] *See* ANNA RIGGALL & CAROLINE SHARP, THE STRUCTURE OF PRIMARY EDUCATION: ENGLAND AND OTHER COUNTRIES 2–3 (2008) (explaining how local authorities control the provision of primary education, but omitting any mention of local residents' involvement).

SPGs. For most U.S. states, the second half of the nineteenth century was the period in which forms for local government were determined.[156] Not surprisingly, those forms were highly responsive to local needs. As we have seen, SPGs were first formed in the western United States. There were, because of the geography of the land and the pattern of rainfall, major challenges presented by CPRs, and little established government of a general character at the time (i.e., few GPGs) prepared to deal with those problems. It may have been natural for those most affected by a CPR problem to take that issue in their own hands and employ one natural approach to it—namely, to collectivize ownership (and hence control) of the resource among themselves. Special legislation, such as California's Wright Act, was procured to confirm the legality of this (essentially private) approach.[157] The same approach was copied by adjoining states and territories, and then moved east.[158]

Most other nations do not have our heritage of decentralized, democratic control. And it therefore seems reasonable to think they have less of a problem with local institutions managed by a higher level of government. Although these nations have many local services that are efficiently organized and managed at the local level, the officials who control these local service providers are often, at least in part, chosen by a higher level of government, and hence are what we have termed nondemocratic SPGs.[159] Put differently, in societies with a central government that is democratically chosen and that has ministries responsible for the provision of local services, such services are effectively organized through the higher-level GPGs.

III. WHY SINGLE-PURPOSE AND GENERAL-PURPOSE?

The corporation statutes under which municipalities operate place few limits on the type of services they may provide.[160] The

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[156] *See* TEAFORD, *supra* note 119, at 114 (discussing the expansion in municipal services during this period); FOSTER, *supra* note 89, at 16–17 (discussing changes in urban and suburban forms wrought by late-nineteenth-century technological developments).

[157] *See infra* Part II.B.

[158] *See infra* Part II.C.

[159] For example, many European countries are typically referred to as having a unitary, rather than a federal, structure and vary in the degree to which local jurisdictions may provide separate services. *See* Alfred Stepan, *Federalism and Democracy: Beyond the U.S. Model*, 10 J. DEMOCRACY 19 (1999).

[160] *See, e.g.*, IDAHO CODE § 50-301 (2024) ("Cities governed by this act shall . . . exercise all powers and perform all functions of local self-government in city affairs as are not

typical municipality takes full advantage, providing a range of services that often include police and fire protection, the construction and maintenance of roads and bridges, mass transit, zoning, education, trash collection, and utilities like water.

SPGs, on the other hand, usually provide only a single service, such as agricultural irrigation or fire protection. It is rare to find an SPG that provides two services, much less three or four. Of the SPGs counted by the Census, roughly 83% provide only a single service.[161] Even those districts that nominally provide more than one service (e.g., a district that provides erosion management and water conservation) might be better described as providing a single unified service (e.g., water management). Indeed, most districts that the Census categorizes as multiservice seem to provide a bundle of connected water-related services.[162] Large districts that provide more than one distinct service do indeed exist—one such district, providing both irrigation water and electricity, was at the center of controversy before the Supreme Court in *Ball v. James*[163]—but they are rare, and seem to have started out as single-purpose entities that fell victim to mission creep.[164]

Almost as a rule, then, local governments in the United States provide either a single service or a broad and largely

specifically prohibited by or in conflict with the general laws or the constitution of the state of Idaho."); OR. REV. STAT. ANN. § 221.410(1) (West 2024) ("Except as limited by express provision or necessary implication of general law, a city may take all action necessary or convenient for the government of its local affairs."); S.C. CODE ANN. § 5-7-30 (2024) ("Each municipality of the State, in addition to the powers conferred to its specific form of government, may enact regulations, resolutions, and ordinances, not inconsistent with the Constitution and general law of this State.").

161 *See* U.S. CENSUS BUREAU, SPECIAL DISTRICT GOVERNMENTS BY FUNCTION: 2022 (2022) [hereinafter U.S. CENSUS BUREAU, SPECIAL DISTRICT GOVERNMENTS]. The 2022 Census does not explicitly break districts down by single function or multifunction; this figure is derived by subtracting "[o]ther multifunction districts," "[s]ewerage and water supply," "[n]atural resources and water supply," and "[f]ire protection and water supply" from the total figure. This is how the U.S. Census Bureau tabulates single function and multifunction. *See* U.S. CENSUS BUREAU, 2022 CENSUS OF GOVERNMENTS—ORGANIZATION, *supra* note 1, at tbl.8; *see also* BRIFFAULT ET AL., *supra* note 14, at 691 ("In most instances, these government units exist for one reason only—to provide a single regional service.").

162 *See* U.S. CENSUS BUREAU, SPECIAL DISTRICT GOVERNMENTS, *supra* note 161 (including the categories "[s]ewerage and water supply" and "[n]atural resources and water supply").

163 451 U.S. 355, 371 (1981).

164 *See* BRIFFAULT ET AL., *supra* note 14, at 692 ("Each [multipurpose regional government] was initially created to address a specific problem that was indisputably regional in scope . . . . Starting out as something akin to a single-purpose regional special district, these entities gradually acquired new regulatory responsibilities.").

unbounded range of services. This divide exists even though the services provided by SPGs in one locality are often the same as those provided by municipalities in another locality, and vice versa. And the divide appears despite the absence of any *legal* reason why several services cannot be provided by the same district. The statutes that enable special districts often explicitly allow multiple services. Tennessee's Utility Districts statute, for example, provides that the districts may "conduct, operate and maintain a system *or systems* for the furnishing" of various services.[165] But the Census lists only 29 such districts out of Tennessee's 451 total special-purpose governments: 14 provide the related services of sewerage and water supply, and 15 belong to the ambiguous category of "[o]ther multiple function districts."[166] The Tennessee officials we spoke with, moreover, identified no multifunction districts in practice.

Why does this near-complete divide exist, with roughly forty thousand general-purpose governments and fifty thousand single-purpose governments, but virtually nothing in between? We know of no previous effort to study this question.[167]

We offer three related functional theories—laid out in the next three Sections—that can help explain the divide between single and general. The purpose is not to offer a complete, airtight theory of all SPGs. Instead, our primary goal is to generate new and overlooked explanatory hypotheses that fit commonly observed and understudied features of organizational life.

A. The Costs of Collective Decision-Making

One explanation for the distinct divide between single- and general-purpose governments involves the costs of collective decision-making. Both private firms and governments can benefit when their owners or members have relatively homogenous interests. Private firms are often owned and controlled by many individuals. The publicly traded business corporation is the most

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165 TENN. CODE ANN. § 7-82-302 (emphasis added).

166 *See* U.S. CENSUS BUREAU, 2022 CENSUS OF GOVERNMENTS—ORGANIZATION, *supra* note 1, at tbl.8.

167 Professor Richard Briffault and others suggested specialization as an important factor: "Having a specialized, single-purpose focus, moreover, enables the directors of the district to maintain a high level of expertise, knowledge, and enthusiasm about their mandate." BRIFFAULT ET AL., *supra* note 14, at 691. But while this consideration may play a role, it seems implausible as the sole explanation because, among other things, one sees no such discontinuous divide between single-product and multiproduct enterprise among standard investor-owned business firms.

familiar example, but large producer and consumer cooperatives—collectively owned, respectively, by the firm's suppliers or consumers—are also common in the United States and other advanced economies. It is extremely rare, however, to find successful firms that are jointly owned by a large number of persons with interests in the firm that are even mildly heterogeneous.[168]

Voting rights in widely held business corporations, for example, are generally tied to possession of shares of a single class of common stock that, for most purposes, leaves the shareholders all equally interested only in a single, simple, and clear measure of the firm's performance—namely, the firm's earnings per share. The result is that shareholders are usually affected identically (in proportion to their ownership) by decisions the firm makes. The same is true of cooperatives. The huge farmer cooperatives that market a large fraction of the country's staple crops—such as corn, wheat, cranberries, or Concord grapes—generally focus their activities on a single crop. If they market other crops as well, profits for the different crops are generally accounted for separately to avoid the potential for cross-subsidies, and hence for conflict among the members concerning the allocation of profits.[169] Because making decisions among a heterogeneous group of owners is costly, firms often sacrifice substantial economies in other aspects of their organization for the sake of having homogeneous ownership.[170]

Heterogeneous ownership can create conflict, inefficient decisions, and exploitation of one group by another; homogenous ownership can help avoid this. To see this, consider the example of an SPG established to provide irrigation to farmers in a semi-rural community consisting of a small town surrounded by farms. If the assessments levied by the district are made proportional to the number of acres a farmer has in production, and votes in the SPG are allocated in the same way, the farmers' interests in the management of the SPG are likely to be relatively homogeneous: all will want water distributed at the lowest cost per gallon possible. And since all farmers will be charged roughly according to the amount of water they use (as proxied by acres in production), and all will want roughly the same amount of water per acre, the farmer-members of the SPG will all be in rough agreement on the aggregate amount of water that needs to be

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168 *See* HANSMANN, THE OWNERSHIP OF ENTERPRISE, *supra* note 84, at 39–43.

169 *Id.* at 121, 135–38.

170 Employee-owned firms offer some particularly strong examples. *Id.* at 92–103.

supplied. Simple majority per-acre voting should yield the per-acre amount of water preferred by the median voter, which is also likely to be close to the average demand.

Of course, no set of interests is ever perfectly homogenous. Human beings are different, and one can always debate the appropriate breadth or narrowness of what constitutes "interests" that are homogenous or heterogenous. For example, even the farmers with a shared interest in low-cost water may have different interests with respect to the timing and reliability of that water supply. We do not mean to be too formal or inflexible in our analysis here. The general point is that there can be obvious and well-accepted variation in the degree to which a group's interests converge or diverge. And, where an SPG provides only one service, it is likely that voting rights and assessments can be allocated among members of the SPG in a fashion that broadly harmonizes interests, with no more than one important dimension of performance on which members might differ.[171] In such circumstances, voting is also more likely to lead to a stable outcome.

But now suppose that the SPG also distributes electricity to the same territory. And suppose that the per-capita and per-acre demand for electricity is much higher among the urban population—which needs electricity for light and power for homes, shops, offices, and industry—than among farmers. A stable and efficient level of both services will be more difficult to achieve. For example, suppose that a combined water and electricity district were created with votes allocated on a per-acre basis, like the hypothetical district described above. If so, the aggregate number of votes held by the farmer-members of the district would far exceed those held by the urban residents. It would thus be in the interest of the farmers to impose high assessments for electricity—perhaps in the form of exorbitant rates per kilowatt-hour consumed—and use the resulting net returns from electricity distribution to cross-subsidize the use of water for irrigation by levying assessments for water far below the cost of the water to the district. The expected result would then be less consumption of electricity, more consumption of water for irrigation, and a large transfer of wealth from urban to rural members of the district. (And there is nothing fanciful about this example: a version of it

[171] Moreover, as our example suggests, preferences along that one dimension are likely to be "single-peaked" and hence likely to yield one, and only one, stable voting equilibrium.

was the focus of the Supreme Court's decision in *Ball v. James*, which we discuss below.)

Alternatively, if voting rights in the two-service district were allocated according to the number of kilowatt-hours each member consumed, we should expect the opposite result: urban members would control the district and would have both the incentive and the opportunity to charge exorbitant rates for water usage, distorting consumption of both water and electricity and transferring substantial wealth from rural to urban members of the district.

There is no simple solution to the problem of allocating voting rights in the two-service district.[172] The problem remains even if the district establishes a separate user fee for each of its two services—for example, an electricity charge for kilowatt-hours consumed and a water charge for the number of acres in production. One of the two groups, urban or rural, will have a majority of the votes, and may be able to set service charges that exploit the minority group.[173] The fundamental problem lies in decision-making by voting where there is more than one important dimension to the available alternatives.[174]

In addition, regardless of whether the ultimate outcome is efficient or stable, the process of arriving at that outcome can be

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[172] Indeed, when the choice involves more than one dimension, voting may not only lead to inefficient choices concerning the values for the various dimensions, but also to choices that are unstable in the sense that there will always be another set of choices, involving a different combination of values for those variables, that will defeat the initial choices by majority vote. This gives rise to the potential for cycling among different choices, with resulting uncertainty and transaction costs. Such cycling, to be sure, might not be a serious concern for services that, like many governmental services, involve substantial fixed costs. But the closely related problem of agenda control—in which the persons choosing the order in which alternatives are voted on can manipulate the voting process to yield nearly any end result they want—may be more serious. The seminal contribution to the formal understanding of these dynamics is Richard D. McKelvey, *Intransitivities in Multidimensional Voting Models and Some Implications for Agenda Control*, 12 J. ECON. THEORY 472 (1976). *See generally* Gary W. Cox & Kenneth A. Shepsle, *Majority Cycling and Agenda Manipulation: Richard McKelvey's Contributions and Legacy*, *in* POSITIVE CHANGES IN POLITICAL SCIENCE: THE LEGACY OF RICHARD D. MCKELVEY'S MOST INFLUENTIAL WRITINGS (John Aldrich, James E. Alt & Arthur Lupia eds., 2007).

[173] Other legal doctrines may separately constrain exploitation. For example, user fees may be subject to constitutional limits on taxation if they exceed the reasonable cost of providing a service. *See* Clayton P. Gillette & Thomas D. Hopkins, *Federal User Fees: A Legal and Economic Analysis*, 67 B.U. L. REV. 795, 798 n.16 (1987).

[174] The median voter theorem—the theoretical prediction that a majority-voting system will select the policy preferred by the median voter—works only with strong assumptions. *See generally* Duncan Black, *On the Rationale of Group Decision-Making*, 56 J. POL. ECON. 23 (1948). Perhaps the strongest of these assumptions is that the policy options—and thus the voters' preferences—can be spread out along a one-dimensional policy space (e.g., a line from more spending to less spending, or liberal to conservative).

costly with heterogenous membership. Voters facing a decision with many dimensions need to inform themselves about those many dimensions and have more options for strategic bargaining and coalition building. Such costs are largely obviated when voting is confined to a single dimension.

The advantages of homogenous membership likely explain the large number of SPGs that provide only a single service. But what explains the large number of general-purpose governments that provide many services? A plausible theory is that general-purpose governments offer a solution to the problem of collective decision-making that is the opposite of the one offered by SPGs: where residents want many services, those services can be bundled together in a fashion that minimizes conflict and provides one general dimension along which residents vote—basic administrative competence.

When many services are provided by a single GPG, the supply of individual services is not voted upon one by one, but rather is typically determined by general administrators who are chosen in broadly spaced general elections. In this situation, residents who have an unusually strong preference concerning one individual service are unlikely to be able to form a coalition that will control the government. At the same time, virtually all residents share a common interest in having their municipal services—whatever they may be—provided with competence, at low cost, and without corruption. Rather than fight over the division of the pie, residents might well choose to enlarge the overall pie simply by having the municipality and its various services managed by officials who are (hopefully) competent and disinterested.

Indeed, this logic seems reflected in the gradual spread over the last century of the city-manager system, under which members of the city council are chosen in nonpartisan, at-large elections, and in turn hire a nonpartisan technocrat as city manager, much as the board of a business corporation hires an executive officer.[175] The same logic may help explain the decline of political parties in U.S. municipal government.[176] The plurality voting system that is almost universally employed in U.S. elections encourages the formation of two parties that bundle issues along a single common dimension (such as "progressive to conservative").

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[175] *See* Richard J. Stillman, II, *The City Manager: Professional Helping Hand, or Political Hired Hand?*, 37 PUB. ADMIN. REV. 659, 659–60 (1977).

[176] *See generally* David Schleicher, *Why Is There No Partisan Competition in City Council Elections?: The Role of Election Law*, 13 J.L. & POL. 419 (2007).

Severely reducing the dimensions of politics may be easier to accomplish at the national level, where politics takes on a relatively abstract character, than at the municipal level, where governmental services are more likely to directly impact the lives of voters in concrete ways.

One implication of this view is that adding further services to the purview of a given government may diminish the success of factions whose members favor one municipal service over others. This tendency seems likely to be strongest where no one service takes up a great deal more of the municipal budget than other services, and hence becomes the dominant focus when residents are choosing how to vote in municipal elections. This may be an important reason why primary and secondary education, which are typically the most expensive services provided by local governments, are usually organized separately as SPGs rather than included among the services provided by a general-purpose municipality.[177]

Following the same reasoning, the addition of another service to those already being undertaken by a given GPG should—if that service is not in itself disproportionately important to the municipality's electorate—reduce the average cost of collective decision-making across the GPG's services. The more services a government provides, the less likely it is that a group with particularly strong preferences on one service will be able to hijack the government and subsidize its preferences.

This continuing downward trend would provide a reason why, for a given territory at the municipal level, there is only one general-purpose government, even though there may be many SPGs. Suppose, for example, that a given territory were to be served by two general-purpose governments, the first of which provided twelve services and the second of which provided an additional eighteen services, all different from the twelve provided by the first GPG. By the reasoning just offered, it would then follow that, by merging the two governments into one that provides all thirty services, the average costs of collective decision-making for those services as a group would be reduced. And if, as argued here, the costs of collective decision-making are quite high in

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[177] In the 2017 Census financial data, primary and secondary education is the single largest spending category for county governments and township governments, the third largest category for municipal governments (after police protection and overall utility expenditures), and the largest spending category for all local governments, even excluding independent school-district governments from the total. *See 2017 State & Local Government Finance Historical Datasets and Tables*, *supra* note 6.

democratic governments, this would explain in turn why economies of scope in the number of services provided would continue to grow as additional services were provided by a single GPG.

More precisely, our reasoning suggests that, holding everything else constant, the per-service costs of collective decision-making increase rapidly as the number of services provided goes from one to two, and perhaps beyond that to three, four, or even more. Those costs then reach a peak, after which the per-service costs of collective decision-making decrease as further services are added to those that the government already provides, and continue to decrease, though perhaps only marginally, as the number of services increases. In short, the costs resulting from the governmental provision of an additional service would be minimized either by organizing it as a stand-alone SPG or by adding it to the multiple services already provided by the local GPG. Which of those two extremes is chosen for any given service will then depend upon the characteristics of the service involved, as discussed in the next Section.

Such considerations may also give additional perspective to one of the most frequently castigated features of SPGs: their low electoral turnout (and potentially corresponding low accountability).[178] In some cases, low turnout may have roots in apathy or ignorance, but our analysis suggests that less worrisome considerations may have explanatory power too: because SPGs typically have only one policy dimension, voting may produce stable and predictable results regardless of how many residents vote—and most voters can rationally abstain. While this is not going to be true in every case—and we are reluctant to dispute that in some cases SPGs may have low turnout and accountability because they are of low salience—we think homogenous interests provide, at a minimum, a competing explanation for the observed trends.

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178 *See* NANCY BURNS, THE FORMATION OF AMERICAN LOCAL GOVERNMENTS: PRIVATE VALUES IN PUBLIC INSTITUTIONS 12–13 (1994) (explaining that, after formation of a special district, "2–5% is an unusually high turnout" for an election, and even the "officials do not know when or if the elections are supposed to occur"). *But cf.* Elisabeth M. Currie, Beth Walter Honadle & Lawrence P. DeBoer, *Exploring the Growth of Special District Governments: Results of a Minnesota Survey*, 21 HAMLINE J. PUB. L. & POL'Y 67, 82 (1999) (noting that, in a presidential election year, 47% of Minnesota SPGs who responded to a survey reported having turnout rates of between 50% and 75%).

B. Specialization and Coordination

Our discussion of decision-making costs provides an explanation for the stark divide between SPGs and GPGs. But it does not explain why some services are provided by SPGs and others by GPGs—or why all governmental services are not provided simply by one or the other type. Why are both approaches often employed in the same locality?

One consideration may be the inherent complexity of the service itself. Choices regarding the provision of irrigation water to a reasonably uniform agricultural area may be relatively easy to think about as a single dimension, while provision of police services to a midsized city may not be.[179] For complex services like policing, an SPG may offer few advantages relative to a GPG.[180]

But one can also think about the trade-off between single- and general-purpose provision as a trade-off between *specialization* and *coordination*. While specialization has benefits—the general benefits of expertise and comparative advantage—those benefits are constrained by the costs of coordinating among different activities.[181] An urban police force, for example, may perform more effectively when its services are closely coordinated with fire protection, family services, courts, public transportation, schools, traffic control, road maintenance, public parks, and homeless shelters. In such circumstances, horizontal integration of policing with these other services will offer coordination benefits that would be unavailable if the police were organized as an autonomous SPG.

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[179] *See* Noah M. Kazis, *Special Districts, Sovereignty, and the Structure of Local Police Services*, 48 URB. LAW. 417, 456–57 (2016) (arguing that SPGs rarely provide police services because SPGs are mere "appendages of the state," as opposed to municipalities, which "share in sovereignty" of the state and therefore may legitimately employ the state's "monopoly on legitimate violence").

[180] This trade-off has been the focus of economic analysis for some time, particularly in the context of the business enterprise. *See generally, e.g.*, R.H. Coase, *The Nature of the Firm*, 4 ECONOMICA 386 (1937); Gary S. Becker & Kevin M. Murphy, *The Division of Labor, Coordination Costs, and Knowledge*, 107 Q.J. ECON. 1137 (1992); Jacques Cremer, *A Partial Theory of the Optimal Organization of a Bureaucracy*, 11 BELL J. ECON. 683 (1980); Oliver Hart & John Moore, *On the Design of Hierarchies: Coordination Versus Specialization*, 113 J. POL. ECON. 675 (2005). But there is little application of these insights to governments. *See* David A. Weisbach & Jacob Nussim, *The Integration of Tax and Spending Programs*, 113 YALE L.J. 955, 986–87 (2004) ("There is, to our knowledge, almost no formal literature on this topic.").

[181] As Professors David Weisbach and Jacob Nussim have put it, "Too much specialization means that coordination of the specialized activities becomes difficult." Weisbach & Nussim, *supra* note 180, at 986. At some point, coordination costs will outweigh specialization benefits.

The trade-off between specialization and coordination can also help explain when and why we see the rare two- and three-purpose governments. These districts typically combine services with the same or similar final outputs: irrigation and wastewater management, for example, or water storage and water supply. These are services for which the specialized expertise of a single administrative coordinator—dealing, in most cases, with the provision of water and a network for delivering, removing, and storing it—may exceed the costs. But a district that pays the fixed cost of building an irrigation network and develops expertise in water management will have few coordination benefits to offer a district that runs a cemetery or removes trash. We do not see such districts.

Of course, there is no reason in principle why there could not be more two- and three-service SPGs that take advantage of the benefits of coordination. But the fact that there are not many of these organizations suggests, in our minds, that one of two things is likely. First, it is possible that the opportunities for such beneficial coordination are simply not that common—that is, that there are not many combinations of services out there that can be usefully bundled. Second, it is possible that there are potentially beneficial combinations of services, but that the additional costs of collective decision-making—that is, making the interests of the owners more heterogeneous—is a substantial enough obstacle that we do not see them in practice.

C. Voting Rights and Legal Feedback

In previous sections, we have focused on strong practical considerations that seem to lie behind the stark division of local governments into either SPGs or GPGs. But those practical considerations are also reflected in and reinforced by legal doctrine. The practical divide between SPGs and GPGs has facilitated the evolution of legal doctrine that treats those two forms of government differently. The difference in legal regimes, in turn, has tended to further deepen the divide between the two types of government, providing further incentives that help guide the choice of form for any given service. The most important area where this occurs concerns voting rights, to which we now turn.

The Supreme Court has distinguished between governments that must adhere to the constitutional rule of "one-person, one-vote" and those that do not under the "special-purpose district"

exception.[182] This doctrine first emerged in *Salyer Land Co. v. Tulare Lake Basin Water Storage District*,[183] in which the Supreme Court upheld the constitutionality of a portion of the California Water Code that permitted only landowners—as opposed to all residents—to vote in elections for the board of directors of local water districts, and that allocated votes to landowners on the basis of the assessed valuation of their land.[184] We provide a new policy rationale for the stability of that doctrine, and new criticisms of its puzzling extension in *Ball v. James*.

1. Understanding the exception to one-person, one-vote.

A decade before *Salyer Land*, in *Reynolds v. Sims*,[185] the Court had held that the districts used for electing state legislatures had to be roughly equal in population: "[A]n individual's right to vote for state legislators is unconstitutionally impaired," the Court said, "when its weight is in a substantial fashion diluted when compared with votes of citizens living in other parts of the State."[186] Alabama, the state whose voters had challenged the state apportionment system, had districts with populations as much as forty-one times that of other districts.[187]

In subsequent cases, the Court extended the *Reynolds* rule to counties and other forms of local government.[188] But *Salyer Land* was the first time the Court considered a question that it had expressly reserved in those earlier cases: whether a special-purpose government that performed "functions affecting definable groups of constituents more than other constituents" could "be apportioned in ways which give greater influence to the citizens most

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[182] *See* Grant M. Hayden, *The False Promise of One Person, One Vote*, 102 MICH. L. REV. 213, 252–54 (2003).

[183] 410 U.S. 719 (1973).

[184] *Id.* at 734–35.

[185] 377 U.S. 533 (1964).

[186] *Id.* at 568.

[187] *See id.* at 545–46.

[188] *See* Hadley v. Junior Coll. Dist. of Metro. Kansas City, 397 U.S. 50, 54 (1970) ("While the particular offices involved in these cases have varied, in each case a constant factor is the decision of the government to have citizens participate individually by ballot in the selection of certain people who carry out government functions."); Avery v. Midland Cnty., 390 U.S. 474, 481 (1968) ("We [ ] see little difference, in terms of the application of the Equal Protection Clause and of the principles of *Reynolds v. Sims*, between the exercise of state power through legislatures and its exercise by elected officials in the cities, towns, and counties.").

affected by the organization's functions"[189]—that is, whether such a district could evade the rule of one-person, one-vote.

The *Salyer Land* Court held[190] that the voting provisions of the California Water Code[191] did not violate the Equal Protection Clause.[192] Justice William Rehnquist's majority opinion offered two reasons for this conclusion. The first was that the district "disproportionately affect[ed] landowners" because "[a]ll of the costs of district projects are assessed against land by assessors in proportion to the benefits received."[193] The second was that the district, while "vested with some typical governmental powers," had "relatively limited authority"—"[i]ts primary purpose, indeed the reason for its existence, is to provide for the acquisition, storage, and distribution of water for farming in the Tulare Lake Basin."[194]

As many scholars have observed, these two criteria—disproportionate effect and limited authority—leave much to be desired. As Professor Richard Briffault has pointed out, the disproportionate effect standard can be circular.[195] For example, a district that limits participation to landowners may still have a disproportionate effect on residents as *consumers*. The Court simply avoided engaging with this possibility by limiting the effects under consideration to the financial assessments levied to finance district activities. But this smuggles in the very conclusion that the disproportionate effect analysis is supposed to help determine—namely, whether such districts are best thought of as proprietary or more fully democratic.[196] Intriguingly, Justice Rehnquist's own opinion seemed to hint at this problem by noting that the effects of the district could extend far beyond its property-owning members: "Food shoppers in far away metropolitan areas are to some extent likewise 'affected' by the activities of the district."[197] It was perhaps the apparent hopelessness of the effect analysis—more than its power—that seemed to dictate the result. And, though the Court's opinion does not acknowledge the point directly, its decision was presumably guided in part by the realization that, if

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189 *Avery*, 390 U.S. at 483–84.

190 *Salyer Land*, 410 U.S. at 734–35.

191 CAL. WATER CODE §§ 41000–41001.

192 U.S. CONST. amend. XIV, § 1.

193 *Salyer Land*, 410 U.S. at 729.

194 *Id.* at 728.

195 *See* Richard Briffault, *Who Rules at Home?: One Person/One Vote and Local Governments*, 60 U. CHI. L. REV. 339, 370–71 (1993) [hereinafter Briffault, *Who Rules at Home?*].

196 *Id.* at 371.

197 *Salyer Land*, 410 U.S. at 731.

the one-person, one-vote rule were imposed on the district in question, it would have to abandon the water services it was formed to provide—services that, for all the Court said, were reasonably fair and efficient.

The Court's "limited purpose" rationale therefore seems to perform the primary analytical work. In applying such a standard, however, any court would seem to face a difficult line-drawing problem: There is, as Briffault has pointed out, "no natural or functional distinction" between general welfare services—the provision of which would require one-person, one-vote—and, say, water services.[198] The line between limited and not limited is, as Briffault observed, difficult to draw.[199]

And yet we have lived with the *Salyer Land* standard for more than forty years. How? A key reason, we believe, is the sharp factual divide between single-purpose governments and general-purpose governments—a divide that has allowed the law to function with an amorphous standard like "limited purpose."[200] Even if no principled distinction can be drawn between services that are limited and those that are not limited, courts are in practice rarely faced with the need to apply that distinction in a conceptually coherent fashion. The fact that the majority of SPGs have one function effectively provides those governments with a safe harbor against application of *Reynolds*'s rule of one-person, one-vote.[201] Other than school districts (which we discuss later), we know of no single-purpose districts that have been held subject to the rule of *Reynolds*. Whether or not *Salyer Land* intended this result, modern law has tracked the strong distinction in practice between single-purpose and general-purpose governments—and, in turn, has provided an incentive for districts to steer clear of the

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198 Briffault, *Who Rules at Home?*, *supra* note 195, at 373, 375.

199 *See id.* at 373.

200 *See Salyer Land*, 410 U.S. at 728.

201 The *Salyer Land* test—in its modern incarnation, sometimes framed as a question of whether the entity exercises "general governmental powers"—has been developed in the lower courts. *See, e.g.*, Day v. Robinwood W. Cmty. Improvement Dist., 693 F. Supp. 2d 996, 1004 (E.D. Mo. 2010) ("[T]he relevant question is whether the elected official will exercise 'general governmental powers' over a specific area, and that is certainly the case here." (citation omitted) (quoting *Avery*, 390 U.S. at 485); Cunningham v. Mun. of Metro. Seattle, 751 F. Supp. 885, 889 (W.D. Wash. 1990) (striking down limited vote where the local government had general powers, and noting that "[t]he broad purpose of [the district in question], according to the statute, is to 'provide for the people . . . the means of obtaining essential services not adequately provided by existing agencies of local government.'" (alteration in original)); Chesser v. Buchanan, 568 P.2d 39, 41 (Colo. 1977) (upholding limited vote in a tunnel district, noting that "[t]he district performs no general governmental services").

doctrinally uncertain territory between the two poles, thus reinforcing the distinction between them.

This is not to say that there are no hard cases. But the hardest cases are not ones in which a court must decide whether providing water is fundamentally different from providing fire protection. Rather, the hardest cases involve the rare instances in which a district provides more than one distinct service, but does not, in contrast to a typical municipality, provide an open-ended set of sometimes unrelated services. This is precisely what made the Court's second major brush with special-district voting—the case of *Ball v. James*—a narrowly decided and unsatisfying decision.

2. A problematic extension of the exception.

The special district at issue in *Ball*, like that in *Salyer Land*, was originally organized to provide irrigation to farms within its boundaries.[202] Assessments to pay for the district's operations and votes for the district's management were—as in *Salyer Land*—confined to persons owning at least one acre of land in the district.[203] But unlike in *Salyer Land*, voting and assessments were apportioned among landowners according to the number of acres owned.[204]

The district at issue in *Ball* eventually expanded its services to include electricity distribution. The primary motivation for this expansion was not that combining irrigation and electricity distribution offered economies of scope that could reduce the cost of both services if they were managed jointly. (That is, the two services could not, in the circumstances involved, be reasonably considered so interdependent as to constitute two different aspects of a larger single activity.) Rather, the motivation for combining the two services was to use profits from the electricity business to help cover the cost of the district's irrigation activities.[205]

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[202] *Ball*, 451 U.S. at 357–59.

[203] *See id.* at 359–60. After the litigation in *Ball* began, the Arizona legislature altered the relevant statute to entitle landowners owning less than one acre to fractional votes. *See* James v. Ball, 613 F.2d 180, 182 n.2 (9th Cir. 1979). There is no indication in the Supreme Court's opinion, however, that the Court considered this change important for its decision. *See Ball*, 451 U.S. at 359 n.2. Nor is there reason why it should be important. The basic conflict in the case is not between small and large farmers, but between farmers in general and urban residents.

[204] *See Ball*, 451 U.S. at 359 & n.2.

[205] *See id.* at 369.

In fact, the district in *Ball* was just like the hypothetical electricity and irrigation district we discussed above, in which the farmers who consume water use their voting control to set prices for electricity that result in the electricity consumers subsidizing irrigation. Indeed, the district in *Ball* is a particularly egregious instance of the problems illustrated by that hypothetical: although the Court characterized the electricity operation as "incidental" to the irrigation operations, 98% of the district's aggregate revenue came from charges for electricity.[206] In fact, the district encompassed, and provided electricity to, nearly half the population of the state of Arizona, including much of the city of Phoenix—all without allocating any votes in the district's operations on the basis of electricity usage.[207] Nevertheless, the Court, in a five to four decision that provoked a strong dissenting opinion, held that the district's voting scheme was consistent with *Salyer Land*'s exception to the one-person, one-vote principle and hence constitutional.[208]

Paradoxically, the Court's opinion in *Ball* makes the cross-subsidy an argument *in favor of* allocating votes according only to owned acreage.[209] In so doing, the Court turns the rationale for governmental ownership precisely on its head. The reason for governmental provision of electricity should be to avoid the monopolistic exploitation of consumers, not to enable it. As we noted above, the provision of electricity in the United States is typically undertaken through one of four organizational forms: a privately owned company subject to governmental rate regulation, a consumer cooperative, an SPG whose voting members are consumers

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206 *Id.* at 368–69, 370 n.19.

207 *See id.* at 359, 365.

208 *See id.* at 371. *Ball v. James* received a generally unfavorable scholarly reception. *See, e.g.*, Lisa M. Card, *One Person, No Vote? A Participatory Analysis of Voting Rights in Special Purpose Districts*, 27 THOMAS JEFFERSON L. REV. 57, 60, 63 (2004) (arguing that SPGs are "essential forums for participation" and objecting to the outcome in *Ball*); Melvyn R. Durchslag, Salyer*,* Ball*, and* Holt*: Reappraising the Right to Vote in Terms of Political "Interest" and Vote Dilution*, 33 CASE W. RSRV. L. REV. 1, 40–41 (1982) (arguing that the Court in *Ball* was wrong to focus on the distinction between governmental and nongovernmental organizations, and should have inquired into the difference in interests between voting and nonvoting members of the district); Frank I. Michelman, *Conceptions of Democracy in American Constitutional Argument: Voting Rights*, 41 FLA. L. REV. 443, 467–69 (1989) (disagreeing with the Court's conclusion that the district in *Ball* was nongovernmental); *The Supreme Court, 1980 Term—Voting in Special Purpose Districts:* Ball v. James, 95 HARV. L. REV. 181, 190 (1981) (objecting to *Ball* on the argument that voting is valuable because it "gives individuals the opportunity to participate in and influence the process by which [ ] outcomes are determined").

209 *Ball*, 451 U.S. at 370–71.

of electricity produced, or a general-purpose government. All of these forms are designed to avoid monopolistic exploitation of electricity consumers. The two-purpose district in *Ball*, by contrast, was not owned or controlled by its consumers, and charges for its electricity services were evidently exempted from public rate regulation.[210] Indeed, the organizational form of the district appears chosen expressly for exploiting electricity consumers, effectively taxing them to subsidize consumers of irrigation water.

And, in certain key respects, the district in *Ball* raised the same problem as the voting districts in *Reynolds* and its immediate progeny in the early one-person, one-vote line of cases—namely, the increasing empowerment in state government of rural voters relative to urban voters through the effect of urbanization on preexisting allocations of voting rights. The district in *Ball* was originally formed in the late nineteenth century when the territory it encompassed was largely rural. With only the subsequent growth of Phoenix did the district become overwhelmingly urban.[211]

The Supreme Court's majority opinion in *Ball* essentially treats the issue involved as a choice between, on one hand, the district's current voting rule, with votes allocated according to land ownership, and, on the other hand, a rule of one-person, one-vote for all residents of the district. But the latter rule would simply create the reverse problem, giving voting control over the district to urban residents and hence empowering them to set rate structures for electricity and irrigation water that would exploit the district's rural residents. In fact, as discussed above, there exists no administrable voting rule that would yield fair and efficient decisions in a two-purpose district like that in *Ball*. Rather, redesign of the organization would be required. The most obvious approach would be to separate electricity distribution and the supply of irrigation water into two separate and independent districts, with voting rights in each allocated according to consumption of their respective services. Such a reorganization, with its consequent removal of the cross-subsidy, might force a reduction or elimination of the supply of irrigation water. But if so, that would in fact be an advantage of the reorganization. It is neither fair nor efficient to tax urban residents for the sake of maintaining water services whose value is below their cost.

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[210] *See id.* at 379 (White, J., dissenting).

[211] *See Ball*, 613 F.2d at 183.

D. Some Common Objections

We have argued in the previous sections that practical exigencies—supported by legal developments that reflect those needs—have led to certain prominent features of how local governments organize themselves, most notably the divide between single-purpose governments and general-purpose governments. This division, we have suggested, asks for a body of organizational law for single-purpose governments that is distinct from the law governing general-purpose governments. There are, however, several types of local government that may appear to be a poor fit for our claims. We address them here.

1. Multiple-function districts.

The Census of Governments data indicates that 17% of nonschool special districts have "multiple functions."[212] The fraction is itself small, but it also appears to substantially overstate the number of special districts that provide more than a single service. Census personnel tell us that most "multipurpose" districts are sewer and water districts,[213] which could be most appropriately characterized as a single service. Demand for the two components of that service is likely to be highly correlated for individual members of a district, as are the costs of providing those services. They can be provided by a single district without creating additional conflicts of interest among the members of that district (unlike, conspicuously, the combination of electricity supply and irrigation water).

This is not to say that there are no special districts that provide multiple distinct services and appear to be viable notwithstanding our theorizing to the contrary. The most important, arguably, are residential-community development districts that account for the bulk of multifunction districts classified by the Census as serving "[o]ther" functions.[214] These organizations are common-ownership communities similar to condominiums and homeowner associations. Typically, all homeowners whose properties lie within designated boundaries are members of an association, which is a legal entity that is governed by a board of

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[212] *See* U.S. CENSUS BUREAU, 2022 CENSUS OF GOVERNMENTS—ORGANIZATION, *supra* note 1.

[213] Telephone Interview by Ariel Dobkin, Rsch. Assistant, Yale L. Sch., with Matthew P. Clarke, Statistician, U.S. Census Bureau (Oct. 8, 2016).

[214] *Id.*

directors elected by the homeowners. The association maintains, regulates, and may own property that is used in common by the members, and may also regulate the members' use of their private property. Costs incurred by the association are commonly covered by assessments on the homeowners that are proportional to the value of the homeowner's property, and voting rights are proportional to assessments. The association typically has the statutory authority—which it uses—to simultaneously pursue a variety of clearly distinct functions. For example, the 1980 Florida statute provides that a community development district can provide all—but *only*—the following services and facilities:[215]

- Water management and control
- Water supply, sewerage, and wastewater management
- Bridges and culverts
- District roads and street lights
- Parks and recreational facilities
- Fire prevention and control
- School buildings and related structures
- Security
- Waste collection & disposal
- Mosquito control

Such a development district might seem directly in conflict with our assertion that, owing principally to governance costs, one generally does not—and should not expect to—see limited-purpose governments providing more than a single service. But development districts differ markedly from most other forms of local government in their process of formation. The typical development district is created by a single property developer who initially owns all the property within the district.[216] The developer builds the district's housing and other amenities—roads, parks, and even schools—while maintaining sole control over the property. The development is generally planned from the beginning to appeal to a highly homogeneous class of homeowners. And everybody who becomes a homeowner in the district does so by affirmative choice, knowing what the entire community will be like. Indeed, the powers given to the homeowners association are commonly intended to provide reassurance to the purchasers of

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[215] Act of July 10, 1980, ch. 80-407, 1980 Fla. Laws 1628 (codified as amended at FLA. STAT. § 190.012).

[216] *See* René Rutan, *What Are Community Development Districts and How Do They Work?*, ATT'YS' REAL EST. COUNCILS OF FLA., https://perma.cc/7Y74-NZLK.

homes that they will be in a position—via their voting control over the association—to assure that the community will remain highly homogeneous.[217]

In effect, development districts deal with the costs of collective decision-making, not just by homogenizing the characteristics of the facilities and services that they offer, but also by constructing an electorate with homogeneous preferences. This approach is feasible, however, only for governments that are formed before there are any residents of the associated territory—which is to say that are formed in the manner that a business corporation or a cooperative is formed.

2. Business improvement districts.

Another potential exception to the sharp distinction between SPGs and GPGs is presented by business improvement districts, which have become popular in large cities in recent decades. Business improvement districts commonly supplement municipal services, often with the goal of keeping designated sections of the city's commercial sector safe and attractive (by, for example, deploying guards, picking up litter, removing graffiti, and regulating signage).[218]

Like SPGs, business improvement districts are limited-purpose organizations that do not have general legislative or governmental powers. But like general-purpose governments, business improvement districts often provide several different services simultaneously, many of which are traditional municipal services that are also sometimes provided by individual SPGs, like installing street lighting and collecting trash.

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[217] *See, e.g.*, *Community Development Districts—What You Should Know!*, CFM CMTY. DEV. DIST., https://perma.cc/8QQV-VCUX ("The CDD complements the responsibilities of community homeowner's associations . . . . Residents and property owners in a CDD set the standards of quality, which are then managed by the CDD. . . . This consistent and quality-controlled method of management helps protect the long term property values in a community."); *Welcome*, AMELIA CONCOURSE CMTY. DEV. DIST., https://perma.cc/8MFK-C3UJ ("[The CDD] allows a developer to establish higher construction standards, meanwhile providing a long-term solution to the operation and maintenance of the community's facilities.").

[218] *See* David Fleming, *The Key Tool for Urban Revitalization: Downtown BHM's Business Improvement District*, REV BIRMINGHAM (Mar. 15, 2024), https://perma.cc/93ZD-W4XH (listing services provided by business improvement districts, including "security, litter pick-up, graffiti removal," and "marketing programs"); R ST. SACRAMENTO P'SHIP, R STREET PROPERTY AND BUSINESS IMPROVEMENT DISTRICT: 2015 ANNUAL REPORT 1 (2015) ("The Board worked tirelessly to ensure the streets are clean, free of graffiti, litter and stickers and that visitors, residents and owners feel safe.").

For several reasons, however, business improvement districts are not as distinctive from single-purpose governments as they might initially appear. First, the number of services provided by the representative business improvement district is a difficult conceptual matter. Those services are often complementary, and the benefits of the services that the business improvement districts provide often seem to be similarly distributed. According to one study, the service that most business improvement districts provided was marketing, and half of business improvement district managers saw marketing (and designing new programming to market) as their primary role.[219] Lobbying and policy advocacy are also relatively common business improvement district purposes.[220] Viewed in this light, many of the other services commonly provided by business improvement districts—street cleaning, security, graffiti removal—have a similar character. Broadly viewed, these services are generally designed to improve public relations for a relatively compact cluster of businesses. And these services are likely to be valued in a relatively predictable and homogenous fashion by the commercial property owners who are the typical members of a business improvement district. Thus, the benefits we ascribe to voting in one dimension may largely be enjoyed by business improvement districts.

Second, and relatedly, business improvement districts are almost always located in large cities and reflect circumstances that are peculiar to large cities. As of 1999, the median size of the jurisdictions in which business improvement districts were located was 104,000, and a quarter of business improvement districts were in cities with more than 700,000 people.[221] (For perspective, as of 2002, the average local jurisdiction in the United States had only 6,200 people, and the median jurisdiction was probably smaller.)[222] A likely explanation is that, in large cities, there are enough commercial firms to lead to some geographic sorting among them, with the result that preferences for certain special services are more unified in any given section of a big city than in a similar-sized section of a medium or small city.

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[219] *See* Jerry Mitchell, *Business Improvement Districts and the "New" Revitalization of Downtown*, 15 ECON. DEV. Q. 115, 119 (2001).

[220] *Id.* at 120.

[221] *Id.* at 119.

[222] Wendell Cox, *America Is More Small Town than We Think*, NEW GEOGRAPHY (Sept. 10, 2008), https://perma.cc/RTX7-UKVE (relying on the 2002 Census of Governments data).

Third, business improvement districts are often governed by a board whose members are commonly appointed by the municipality in which they are located, rather than elected by members of the district.[223] As noted above, democratic SPGs are our principal focus, not subordinate parts of a larger government. Even in those districts governed by boards that are elected by owners of property in the district (which is the usual voting constituency in business improvement districts), the municipality containing the district often seems to retain strong rights to intervene in its affairs, making those business improvement districts, to a degree, subordinate units of a general-purpose government, rather than distinct and relatively autonomous special-purpose governments that run the risk of being captured by unrepresentative groups of constituents.[224]

3. County governments.

All but two of the fifty states are divided into counties, each of which has its own government.[225] A county generally contains multiple municipalities and is typically an intermediate level of government between municipalities and the state government. Although the structure, functions, and financing of counties—like all forms of local government—differ from state to state, they generally follow a common pattern. Unlike GPGs, counties generally do not provide a broad and open-ended array of services. Rather, they generally provide only a few services, commonly including courts, recording of births and marriages, road maintenance, airports, sheriff's departments, and health-care assistance for the poor.[226] Yet they are generally democratic.[227] Thus counties may appear to constitute an intermediate class of democratic local governments that provide a small number of largely unrelated

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223 *E.g.*, KAN. STAT. ANN. § 12-1788 (2024); MONT. CODE ANN. § 7-12-1121 (2023); N.M. STAT. ANN. § 3-63-11 (2024); TEX. LOC. GOV'T CODE ANN. § 372.008 (West 2023); WIS. STAT. § 66.1109 (2024).

224 *See* Göktuğ Morçöl & James F. Wolf, *Understanding Business Improvement Districts: A New Governance Framework*, 70 PUB. ADMIN. REV. 906, 907 (2010) (discussing criticisms of business improvement districts for lack of accountability to residents of their districts and surrounding communities—and also to their local governments).

225 Every state but Alaska and Louisiana has divided its territory into counties; the functional equivalent in Alaska is the borough, and Louisiana has the parish. These divisions have their own governments in every state but Rhode Island and Connecticut, whose counties are only used as geographical units. *See* NAT'L ASS'N OF CNTYS., COUNTY GOVERNMENT STRUCTURE: A STATE BY STATE REPORT 9, 27, 42 (2009).

226 *See id.* at 26–73 (discussing the services provided by counties in each state).

227 *See id.* at 22–23.

services—a class that, we have argued, generally does not exist and should not be expected to exist.

Counties are, however, much more consonant with our general description and analysis of local governments, at least once we take into account counties' special role, organization, and financing. By and large, counties are not autonomous governments, but rather appendages of the state that carry out, locally and under state government direction, programs adopted and administered by the state.[228] Consistent with this role, counties generally derive nearly half of their income from state and federal grants.[229] Moreover, the corporate governance of counties is often structured along the lines of the city-manager model—which is to say, along the lines of private business and nonbusiness corporations.[230] One approach is to place the authority to manage the county's affairs in the hands of a three- to five-person board of commissioners which is elected at large and which, in turn, hires a professional manager to be the county's chief executive officer.[231]

In short, the costs of collective decision-making in counties are constrained from above by state control, and from below by a muted form of electoral representation that puts county commissioners in a role that arguably makes them as much trustees as politicians.

4. School districts.

School districts meet our definition of SPGs. They operate, however, with powers and limitations that set them apart from SPGs that offer services other than schooling. This raises several questions.

First, we must ask why education—and particularly the primary and secondary education that is commonly provided by local governments—is provided by governments at all. We are wary of

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228 *Cf. id.* at 78 ("[S]tate supremacy over local governments has been effectively cemented by 'Dillon's Rule,' so named after the judge who stated in 1868 that municipalities were 'the mere tenants at will of the Legislature,' and whenever local versus statewide concern was in doubt, the state was to prevail." (quoting City of Clinton v. Cedar Rapids & Mo. River R.R., 24 Iowa 455 (1986)).

229 *See* SCOTT GRAVES, CAL. BUDGET & POL'Y CTR., COUNTY BUDGETS: WHERE DOES THE MONEY COME FROM? HOW IS IT SPENT? 1 (2018).

230 *See* Todd McGee, *What Is a County Manager?*, N.C. ASS'N OF CNTY. COMM'RS (Mar. 2014), https://web.archive.org/web/20180217190626/https://www.ncacc.org/417/What-is-a-County-Manager (explaining the manager model used in county governance).

231 NAT'L ASS'N OF CNTYS., *supra* note 227, at 7; Jonathan L. Marshfield, *Improving Amendment*, 69 ARK. L. REV. 477, 503–04 (2016).

the notion that externalities provide a complete answer: while education is often regarded as a public good, a substantial component of primary education can also be conceptualized as a private good. In our view, more complete explanations must involve market power, finance, and redistribution.

As for market power, most communities are too small to support two or more competing sets of schools. The most dramatic evidence of this is that the number of school districts nationwide declined from nearly 109,000 in 1942 to under 13,000 in 2022.[232] The fact that total expenditures by school districts increased at least sevenfold in real terms during the greater part of this era shows decisively that this reduction in the number of school districts was driven by consolidation and economies of scale rather than by withdrawal from governmental provision of education.[233]

There is also the problem of paying for primary and secondary education. If education were financed privately, families would often need to borrow to pay tuition. And, because the human capital accumulated by elementary school students cannot practically be used as collateral for commercial debt, many families would be unable to borrow anywhere near enough to pay for the appropriate amount of education. Even if families could obtain the needed credit, they would frequently find themselves facing a productivity-stifling debt overhang far larger than that which has already developed through borrowing for higher education.

These two problems—monopoly and financing—are mitigated by governmental provision of primary and secondary schooling. Only the market-power problem is solved, however, through the organization of schools as conventional democratic SPGs. A particular advantage of SPGs is that, by levying assessments that are proportional to members' use of a single service, they can match demand and supply for the service more closely than can a GPG. But using such benefit-based assessments in a school district leaves the core problem of finance unresolved. Thus, state law generally mandates that primary and secondary education, however organized, be financed entirely by general

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[232] U.S. CENSUS BUREAU, 2022 CENSUS OF GOVERNMENTS—ORGANIZATION, *supra* note 1, tbl.4.

[233] *See supra* tbl.1 (indicating growth in nominal education spending by 638% between 1957 and 2017).

taxation (usually ad valorem property taxes) without supplementation from user fees or other demand-based charges.[234] The result is that school districts accomplish substantial redistribution among district residents, from rich to poor and from families with no children to families with many children. To be sure that the net losers from this redistribution do not prevent it from happening, states generally require local communities to provide free education for all children in the community.[235]

But mandating that education be provided locally and financed with general taxes does not assure that an efficient level of education is provided even within any given school district, and it leaves untouched all disparities across districts in the quality of education they offer. It is not surprising, then, that administration and financing of primary and secondary education has been moving from local districts to the states, and even in part to the national government.[236] Indeed, in many states, a substantial and growing fraction of the cost of primary and secondary education, especially in relatively poor districts, is now covered directly by the state itself.[237] Such subsidies may materially reduce the variation in quality among schools within a given state to a degree that might be unachievable with fully independent and self-financed school districts. While we do not explore the reasons why primary and secondary education have come to be provided in this fashion, the bottom line is that school districts today are regulated and financed in a fashion that makes them substantially different from other types of SPGs.

We note, however, one respect in which providing education through SPGs rather than GPGs is consonant with our emphasis on the costs of collective decision-making in organizing governments. As Table 1 confirms, the revenues of school districts alone are roughly equal to the total revenues of municipalities. This means that, if primary and secondary education were provided

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234 *See* Nadav Shoked, *An American Oddity: The Law, History, and Toll of the School District*, 111 NW. U. L. REV. 945, 1010–13 (2017).

235 *See* David Schleicher, *Stuck! The Law and Economics of Residential Stagnation*, 127 YALE L.J. 78, 105 (2017) ("[P]ublic education has a huge redistributive element—although not always downward—for which states and localities provide about ninety percent of the funding.").

236 *See generally* STEPHEN Q. CORNMAN, OSEI. L. AMPADU, STEPHEN WHEELER & LEI ZHOU, NAT'L CTR. FOR EDUC. STAT., REVENUES AND EXPENDITURES FOR PUBLIC ELEMENTARY AND SECONDARY SCHOOL DISTRICTS: SCHOOL YEAR 2014–15 (FISCAL YEAR 2015) (2018).

237 *See id.* at 5 (showing that eight of the country's twenty-five largest school districts receive more funding from the state than from local sources).

not by SPGs but by municipalities, they would on average account for half the municipal budget. We argued above that municipalities cope with the costs of collective decision-making by offering a bundle of different services over which preferences are more uniform than they would be over any service. If that is correct, then adding education to the municipality's bundle of services would unbalance it, creating the risk that disputes about education policy would infect decision-making about all other municipal services as well.

5. Are governments really selected for efficiency?

We have been implicitly assuming that the forms taken by local governments in the United States are responsive to costs and benefits. In particular, we have assumed that local governments take forms that are responsive to the competing costs of monopoly and collective decision-making. One purpose of this Article is to suggest that this framework may help us organize our understanding of existing institutions—especially in ways that have been underappreciated in existing literature. But this exercise would not be promising or convincing if it were obvious that factors other than organizational efficiency dominate the evolution of governmental structures.

To be sure, many SPGs are almost certainly created for reasons that have nothing to do with efficiency of the organizational form. For example, it might be that many SPGs are formed for tax reasons. Starting in the early twentieth century, local governments received two important federal tax subsidies: the deduction for state and local taxes and the exclusion of interest income from state and local bonds.[238] If a group of individuals is choosing between setting up an organization to provide some service—a service that could be provided either by public or private enterprise—such incentives may tip the balance in favor of public provision. Other tax incentives and limits almost certainly matter in individual states.[239] And there are many other reasons why

[238] Revenue Act of 1913, Pub. L. No. 63-16, § 2, 38 Stat. 114, 167–68. The economics literature suggests that such federal policies can indeed have an effect on the shape of state and local finances. *See generally* Martin S. Feldstein & Gilbert E. Metcalf, *The Effect of Federal Tax Deductibility on State and Local Taxes and Spending*, 95 J. POL. ECON. 710 (1987).

[239] *See generally, e.g.*, Pengju Zhang, *The Unintended Impact of Tax and Expenditure Limitations on the Use of Special Districts: The Politics of Circumvention*, 19 ECON. GOV. 21 (2018) (exploring how tax and expenditure limitations have driven the creation of special districts).

SPGs may form—some of them more nefarious. Some may be driven by the desire to avoid redistribution in a wider community; others may be driven by exploitation.

But such other factors—many of which are familiar, if somewhat ad hoc, explanations—do not obviously work as a general explanation for the rise and expansion of SPGs. Although the historical evolution of the statutory framework for SPGs has clearly been slow, it has followed roughly the same path, at widely varying speeds, in most states. And it has done so despite the lack of any central organizing force. Competition may play a role in encouraging and dispersing efficient governmental forms, dulled a bit by the local market power that, we argue, is the stimulus for governmental organization in the first place. But we also suspect that conscious imitation and logic have played a large role too. (And it is imitation and logic that we are invoking here to influence the future evolution of SPGs.)

IV. CAN GOVERNMENTS LEARN FROM BUSINESSES?

In previous parts, we have taken up a project of description and have theorized about explanation: identifying common and salient features of the organizational landscape, describing their history, and offering functional explanations that fit the observed trends. A primary theme has been to use business organizations as a source of explanatory insight—that is, drawing on theory concerning business organizations to explain features of government. In this Part, we turn from explanation to prescription, and ask whether and what governments can learn from the structure and history of businesses.

A. Toward a Consolidated Statute

The first enabling acts for single-purpose governments—which obviated the need for getting a special legislative charter—were adopted piecemeal within individual states, with a separate statute for each type of SPG. As described above, the first of these statutes was adopted in California and was limited to irrigation districts. As California found more uses for SPGs, it proceeded to adopt a new specialized statute for each individual use. These statutes imposed different requirements on different types of SPGs. The cumulative result of this approach is that we now have an extensive patchwork of statutes that are inconsistent and confusing. For example, in California, water replenishment districts

are governed by a board comprised by five elected directors;[240] levee districts have three elected directors;[241] and water conservation districts can have three, five, or seven directors, based on how the district is split into electoral divisions.[242] One count of the enabling laws in California found 206 statutes enabling 55 varieties of special districts that provide 30 different types of service.[243]

California is an extreme example, but not atypical. The law governing SPGs in most states has evolved similarly, with the result that most SPGs are governed by a specific state statute that is limited to a specific type of service and varies in some way or other from the enabling statutes governing other types of SPGs. This is unlike the legal framework governing business corporations, which (generally) does not vary from industry to industry within a state and which is broadly consistent across states.

One key reason for this difference is that the laws governing SPGs are not subject to the same degree of competitive pressure as laws governing business corporations. Under the prevailing U.S. choice of law doctrine—the internal affairs doctrine—a business firm is free to incorporate in any state that it chooses and thus have its structure and conduct governed by the corporation law of that state, without regard to whether many, or even any, of the firm's shareholders, activities, assets, or personnel are in the state.[244] The resulting competition and selection effects have led most large and many small business corporations to be governed by the same body of corporation law—that of Delaware—and has resulted as well in relatively homogeneous corporation law across the other states of the Union.[245]

Not so with the laws that govern SPGs. In contrast to business corporations, SPGs appear universally to be—and presumably must be for basic federalism reasons—incorporated in the

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240 CAL. WATER CODE § 60131.

241 *Id.* § 70070.

242 *Id.* § 74200.

243 *See* FOSTER, *supra* note 89, at 11.

244 HOLGER SPAMANN, SCOTT HIRST & GABRIEL RAUTERBERG, CORPORATIONS IN 100 PAGES 4 (3d ed. 2022).

245 The dynamic involved is arguably a bit more complicated. Freedom of choice among jurisdictions for incorporation may have resulted in greater differentiation between the laws of Delaware and those of other states than would otherwise have appeared. *See generally* Ronald Gilson, Henry Hansmann & Mariana Pargendler, Corporate Chartering and Federalism: A New View (June 2015) (unpublished manuscript).

state in which they are located.[246] Thus, while it is relatively easy for a business to incorporate elsewhere in response to a less-than-desirable legal environment, it is enormously harder for dissatisfied residents of a sewer district to alter the law that governs their organization. This lack of competitive pressure helps explain why the expansion of SPG legislation has produced an idiosyncratic patchwork that is resistant to rationalization.

To be sure, there has long been serious debate about the efficiency and fairness of the state business corporation statutes that have emerged from the regulatory competition induced by the liberal choice of law doctrine applied to them. But whether that competition is a race for the top or for the bottom (or not a race at all),[247] it has not induced states to adopt different business corporation statutes for firms operating in different industries, with the important exception of the banking and insurance industries.[248] Rather, every state has a business corporation statute that, though providing for variation from default terms, does not alter its terms or their permissible variations depending on the kinds of products or services produced by a firm. The same is generally true for the rash of new forms that have emerged as alternatives for forming proprietary businesses, including the limited liability company and the statutory business trust.

Are there any reasons for taking a different approach to incorporation statutes for SPGs—as most states have in fact done—by having separate statutes for SPGs providing different services? In the abstract, we might expect to see a trade-off between the particularized benefits of individualized statutes and the general administrative costs of having many statutes—with the latter including the resulting awkwardness and complexity for citizens, judges, and the managers of the districts themselves. Substantial evidence that this trade-off runs in favor of generality can be found, not just in logic, but in the choice of many states, among those that have recently reformed their SPG incorporation

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[246] This requirement is not explicit in the state statutes governing SPGs, but it would appear to flow from basic federalism and state sovereignty principles, as well as from Dillon's Rule, under which substate governments lack any legal stature independent from their states. *See* NAT'L ASS'N OF CNTYS., *supra* note 225, at 78.

[247] *See generally, e.g.*, Daniel J.H. Greenwood, *Democracy and Delaware: The Mysterious Race to the Bottom / Top*, 23 YALE L. & POL'Y REV. 381 (2005).

[248] One reason why corporations operating in these two industries have come to be governed by special corporation statutes may be because important aspects of those statutes—such as their regulation of financial reserves—serve an important consumer-protection function as well as shareholder- and creditor-protection functions.

laws, to adopt a single statute governing all SPGs regardless of purpose. Colorado's statute, for example, specifies a single procedural mechanism for creating a district and puts almost no restrictions on the services provided by those districts.[249] South Carolina has adopted a single statute providing that "electric lighting districts, water supply districts, fire protection districts, and sewer districts may be established pursuant to this section."[250] In 1989, the Florida Legislature passed the Uniform Special District Accountability Act,[251] which provides the general requirements for all types of special districts.[252] Utah's current statute—the result of a series of enactments over two decades, and one of the most comprehensive and recently updated of the group—offers a unified procedure for forming SPGs providing any of more than twenty different types of services, including airports, cemeteries, fire protection, paramedics, law enforcement, libraries, parks, sewers, and streets.[253] And many states that haven't yet unified and standardized their SPG statutes report that it would be useful.[254] As a recent Missouri report put it, the state's districts "have the dubious distinction" of performing "20 different functions . . . under 28 different statutory authorizations."[255]

The trend toward a single, general enabling statute that provides a uniform but flexible framework for the formation of all types of SPGs suggests strongly that this is the most effective approach to their formation and governance, as it seems to be for other types of legal entities from partnerships to nonprofits and joint-stock companies. This is not to say that the optimal content

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249 2007 Colo. Sess. Laws 1186 (codified at COLO. REV. STAT. ANN. § 32-19-109 (West 2024)).

250 S.C. CODE ANN. § 6-11-10 (2012); *see* Cindi Ross Scoppe, *The SC Legislature's Special Little Governments*, THE STATE (Dec. 20, 2012), https://www.thestate.com/opinion/opn-columns-blogs/cindi-ross-scoppe/article14417213.html (stating that South Carolina first passed legislation allowing for special-purpose districts in 1973).

251 1989 Fla. Sess. Law Serv. 603 (West) (codified at FLA. STAT. § 189 (2016)).

252 *Id.*; *see also* FLA. DEP'T OF COMM., FLORIDA SPECIAL DISTRICT HANDBOOK 20 (2022).

253 UTAH CODE ANN. § 17B-1-202. This section was originally enacted in 2007, *see* 2007 Utah Laws 473, but has been amended several times since then, *see, e.g.*, 2016 Utah Laws 2185, § 10; 2014 Utah Laws 1929, § 6; 2012 Utah Laws 330, § 1; 2010 Utah Laws 159, § 1. *See generally* Email from LeGrand Bitter, Exec. Dir. Utah Assoc. of Special Dists., to Conor Clarke, Author (Oct. 4, 2013) (on file with author) ("Over the past 20 years, the state of Utah has recodified sections of the code dealing with districts. Part of this process has been the simplifications and standardization of state statutes dealing with districts.").

254 Email from Karen Horn, Vt. League of Towns and Cities, to Conor Clarke, Author (Oct. 7, 2013) (on file with author) ("We have far too many statutes on the books.").

255 MO. MUN. LEAGUE, MANUAL FOR NEWLY ELECTED OFFICIALS 4 (2015); *accord* IDAHO LEGIS. SERVS. OFF., LEGIS. AUDITS DIV., SPECIAL DISTRICTS IN IDAHO 10 (2014) (identifying thirty-five different statutes used to create special districts in Idaho).

for a general SPG enabling act is obvious down to all its details. The law of SPGs has clearly been a field in which the various states have acted effectively as the clichéd laboratories of democracy, leading to the gradual evolution of a large class of governmental entities largely without precedent, not just in common-law countries, but throughout the world. That experimentation should be encouraged to continue. As Judge Richard Posner put it in a Seventh Circuit opinion: if courts invalidate creative new ways of structuring public governance, then "we will never learn from experiments in the governance of public institutions."[256] And there is clearly still much to be learned.

At this point in the development of SPGs, however, it seems likely that experimentation with the legal framework will be most effective if it takes place across states rather than within states. If, for example, a given state adopts one form of governance for fire districts and another form of governance for mosquito abatement districts, it will be difficult to establish criteria for comparing the success of the two types, and it will be difficult to know the extent to which any observable difference in performance is rooted in difference of organizational forms. If, on the other hand, two neighboring states each adopt a single form of governance for all their SPGs, but the forms adopted differ in some meaningful way, the consequences of that difference can be examined by comparing SPGs providing the same service—say fire control—in the two different states. Indeed, such a comparison can be made simultaneously with respect to all of the services that are provided by SPGs in both of the states.

B. Toward Free Incorporation?

Under current statutory law, forming a new special-purpose government typically requires several steps.[257] The first is a petition from some minimum number of the residents or property owners in the proposed territory of the SPG.[258] The second is a public hearing open to anyone who has an interest in the proposed district.[259] And the third is approval by a higher level of government—an approval power that the governing statute ordinarily

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[256] Pittman v. Chi. Bd. of Educ., 64 F.3d 1098, 1103 (7th Cir. 1995).

[257] *See supra* Part I.D.

[258] *See Establishing & Governing Special Districts*, *supra* note 86; CAL. SENATE LOC. GOV'T. COMM., *supra* note 82 at 12.

[259] *Establishing & Governing Special Districts*, *supra* note 86; CAL. SENATE LOC. GOV'T. COMM., *supra* note 82 at 12.

gives to a county or state official, court, or agency.[260] This third and final step is generally not pro forma; the higher levels of government can and do exercise real discretion.[261] The first two of these three requirements seem unobjectionable. The justification for the third requirement, however, is less obvious—and is the primary subject of our reflections in the sections that follow.

One of the consistent features of U.S. business law is that anyone can form a business entity simply by filing the appropriate paperwork.[262] No discretionary approval by a state official is needed. One reason for this liberal approach is that no person can be made a member of a business entity, and hence subject to its internal rules and powers, without consent. There is, furthermore, widespread consensus that allowing business incorporation as a matter of right is overwhelmingly beneficial. Allowing unrestricted incorporation did away with artificial government-granted monopolies, expanded equality of opportunity, and helped foster a competitive economy and vibrant civil society.[263] The same is true of cooperative and nonprofit corporations.[264] Given this fundamental difference, can the evolution of free incorporation in the business world—and in the world of cooperative, nonprofit, and mutual organizations—offer any guidance for the way we create governments? We consider this question in three parts.

1. How easy should it be to create a government?

The very idea of forming governments with the same freedom available in forming business corporations might strike some as

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260 *See* IOWA LEGIS. SERVS. AGENCY, *supra* note 86, at 1–2; CAL. SENATE LOC. GOV'T. COMM., *supra* note 82, at 12.

261 *See, e.g.*, *Frequently Asked Questions*, *supra* note 47 (discussing the Ventura LAFCo's meaningful review of petitions to form new special districts).

262 *See* Millon, *supra* note 108, at 208 (discussing the enactment of "general incorporation laws" that "ordain[ed] simple procedures that could be followed by anyone seeking to incorporate").

263 *See id.* at 207–08. For a general discussion of these benefits, see DOUGLASS C. NORTH, JOHN JOSEPH WALLIS & BARRY R. WEINGAST, VIOLENCE AND SOCIAL ORDERS: A CONCEPTUAL FRAMEWORK FOR INTERPRETING RECORDED HUMAN HISTORY 21–25 (2009).

264 The potential gains from unrestricted incorporation are more relevant to nonprofit corporations than cooperatives. Cooperatives are normally restricted to a narrow set of industries (primarily agricultural) and are concerned with shoring up their members' natural monopoly. Nonprofits, on the other hand, are characterized by a variety of creative approaches to problems of contract failure, not all of which are captured by more restrictive nonprofit incorporation statutes. *See* Henry B. Hansmann, *Reforming Nonprofit Corporation Law*, 129 U. PA. L. REV. 497, 508–19 (1981) [hereinafter Hansmann, *Reforming Nonprofit Corporation Law*].

hopelessly idealistic, silly, or downright harmful. And, undeniably, the trade-offs are hard to evaluate: the benefits of lowering barriers seem inextricably paired with the costs. More numerous and fragmented government can produce a tighter fit between local preferences and local services (perhaps adjoining neighborhoods have irreconcilably different preferences for fire services), but it can also lead to the inefficient replication of fixed costs (perhaps one firehouse would really be enough). Likewise, more governments can mean more competition between governments: the familiar Tiebout Hypothesis suggests that increasing the varieties and combinations of services and service providers that potential residents can choose from can generate competition that will generate more efficient provision of public services.[265] But having more governments can also mean sacrificing economies of scale and scope, and can make it more difficult to eliminate inequalities through local redistribution.[266] (If the wealthiest neighborhood can carve out its own service districts, it will be less willing to subsidize service for the rest.) And, as discussed above, a proliferation of special districts may increase transaction costs and impose additional decision-making costs on voters and residents.[267]

Given these many trade-offs, it can seem difficult to say something satisfying or decisive about the appropriate ease for forming a government. Nonetheless, thinking about local governments through the lens of business law offers three insights about formation that are absent from the current debate over the costs and benefits of localism in U.S. government.

First, many of the concerns about the proliferation of local governments are about the externalities of forming a new government for those within and without the relevant territory. But business corporations can likewise create externalities and are subject to no such restraints on formation. Similarly, nonprofit organizations in most states no longer have to receive approval before coming into being.[268]

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[265] *See generally* Tiebout, *supra* note 16 (describing this result).

[266] *See* FOSTER, *supra* note 89, at 30.

[267] *See* MO. MUN. LEAGUE, *supra* note 255, at 4 ("[I]n Missouri, the proliferation of various types of special districts, particularly special road districts, has created a confusing patchwork of local government.").

[268] *See* Hansmann, *Reforming Nonprofit Corporation Law*, *supra* note 264, at 526 n.70 (discussing the process of liberalizing nonprofit incorporation statutes and abandoning the judicial approval requirement); NORMAN I. SILBER, A CORPORATE FORM OF FREEDOM: THE EMERGENCE OF THE NONPROFIT SECTOR 137–38 (2001) (discussing how, by

Because governments are mandatory organizations, they may impose different externalities on the public than private organizations. The proliferation of governments can, for example, make it harder for citizens and other organizations within a given jurisdiction (or those thinking about moving there) to stay informed about the applicable rules, costs, and services. But it is not obvious that the concerns particular to SPGs are more numerous or a magnitude greater than concerns that can be particular to certain private organizations. For example, nonprofit corporations may in some ways be more likely to impose inefficient burdens on society for a longer period of time than SPGs, since SPGs (unlike nonmembership nonprofits) have voting members with other things to do with their money and the power to dissolve the organization at will. The trade-offs are unclear.

Second, forming governments, unlike forming investor-owned firms, presents a collective-action problem. The benefits of a new government are widely shared—everyone in the neighborhood gets the new streetlamps or the improved fire protection—but the costs of creation fall most heavily on the small number of residents who start the petition and fill out the forms. This creates an incentive to free ride: someone else should go through the costly process of petitioning for the new firehouse or water system. In general, one might expect that the higher the costs of creation, the greater the likelihood that such free riding will occur. Lower barriers to forming governments can help compensate for these obstacles.

Third, the history of both business and government formation should remind us of one of the key reasons for why decentralization is desirable: to avoid the patronage and rent-seeking of central allocation. One of the vital drivers of the shift from privilege to right in corporate formation was the widespread feeling that the legislatures allocating corporate charters for what were often local monopolies did so for reasons of nepotism and patronage—and not for reasons of fairness or efficiency.[269] Those concerns about the privilege system still apply to discretionary chartering for special districts.

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the 1970s, "[s]ubstantive pre-incorporation review [for nonprofits] had practically disappeared"). They do, however, need to receive prior approval to get tax exemption. *See id*. at 153 (explaining how the Internal Revenue Service filled the gap that preincorporation review had left).

[269] *See* Vasudev, *supra* note 109, at 252.

2. A trend toward freer incorporation?

Although most states continue to require that proposals to form new SPGs receive the approval of some higher government authority, this is not universally true. Indeed, several states have recently enacted laws that allow for groups of citizens to form special districts with little or no prior approval. The apparent success of these statutes (or at least the absence of conspicuous problems) provides a notable counterpoint to the idea that the formation of governments—in contrast to the formation of corporations conventionally considered private—requires special oversight. These newer statutes also contain important procedural differences that can provide important lessons in reducing the barriers to SPG creation.

These newer and more permissive SPG statutes can generally be divided into two categories, neither of which gives direct discretionary veto power to a higher government authority. First, there are statutes in which the requirements of an initial petition process are relatively mild—perhaps only a small percentage of residents or voters need to sign on to a petition—but then there is a difficult second step: a general vote. Sanitation districts in Maine have a representative two-step method: A petition signed by at least 10% of the resident voters leads directly to mandatory notice and a majoritarian referendum at the next election.[270] After that, denial of the district by the state's Board of Environmental Protection requires publicly issued findings of fact and conclusions justifying that decision.[271] Second, there are statutes in which the original petition requirement imposes a high bar to formation—say, a large majority of voters or property owners must sign on to the original proposal—but once that happens, the remaining barriers to formation are low or nonexistent. In some of these statutes, the higher government authority is given a formal role (akin to making sure the papers are in order and properly signed) but does not decide the question of whether the district should or should not exist. In Minnesota, for example, rural water districts are created when a petition is signed by 50% of the landowners; when such a petition is received, the local court

[270] ME. REV. STAT. ANN. tit. 38, § 1101(1-A) (2024) ("Upon receipt of a written petition signed by at least 10% of the number of voters . . . the municipal officers shall submit the question to the voters of the proposed district at the next general, primary or special election within the proposed district.").

[271] *Id.* § 1101(4).

simply makes sure that the signatures are accurate.[272] Montana law contains a similar one-step mechanism: when a majority of residents and owners of one-third of the land in a given territory, or the owners of a majority of the land in a territory, want to form a water district,[273] the district judge is only authorized to verify that the signatures on the petition are accurate.[274]

There are several important differences between these two types of processes. States that combine the petition process and the election process into one step—a verified petition with signatures serving the function of an election—might be seen as saving a step: the clerk does not need to engage in a costly notice process or organize a subsequent election. On the other hand, the one-step process has important drawbacks. The two-step process—in which a petition with a relatively modest number of signatures leads to notice and then a general election—arguably strikes a better balance, for several reasons. First, the two-step process preserves the secret ballot. A signed and verified petition, by definition, does not have this. In theory, secret ballots offer a sense of stated preferences without subjecting them to personal or political pressure—and there is strong evidence that the mechanism has been successful in reducing corruption and other abuses.[275] Second, a two-step process does more to verify that a district project has the actual support of people living there. Besides offering another check against corruption, it helps ensure that enough people are interested in a project to make arranging a public referendum worthwhile. (A single resident cannot subject the public to repeated elections over some quixotic plan.) Furthermore, it helps capture something about the intensity of local preferences—since presumably the people willing to pay the costs of the petition process must be especially interested in and invested in the outcome. Finally, the two-step mechanism makes it possible for a deliberative process to play out. This is particularly true if, as is

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[272] MINN. STAT. §§ 110A.09, 110A.12 (2024) ("The petition must be signed by 50 percent of the landowners . . . within the area outside the limits of any city constituting the proposed district . . . . Upon receipt of the petition, the court shall determine whether it complies with the requirements of sections 110A.01 to 110A.36.").

[273] MONT. CODE ANN. § 85-8-101 (2023).

[274] *Id.* § 85-8-121 ("If it appears that the petition has been signed as required in this part, the court or judge shall so find . . . and shall appoint three suitable and competent persons as commissioners and fix their temporary bonds.").

[275] *See generally* Jean-Marie Baland & James A. Robinson, *Land and Power: Theory and Evidence from Chile*, 98 AM. ECON. REV. 1737 (2008) (offering empirical evidence for the benefits of the secret ballot).

the case in many states, a general election must be preceded by a public hearing.[276]

Such a process—petition, hearing, and election—provides reasonable assurance that an SPG is created only if it has broad and informed support from its prospective members, while at the same time providing the opportunity for a small minority of residents or landowners to pitch their idea for a new SPG to prospective members at a public hearing. Of course, it cannot be the case that such a process will perfectly solve all problems related to citizens' ability to obtain information about SPGs and hold their governments accountable. But it makes it more likely that the expected benefits will outweigh the costs.

3. Ex post checks on government formation.

In addition to the procedures described above, several state statutes attempt to address the potential risks of forming too many governments by including some form of ex post adjudication process in their procedures. A relatively new Kentucky statute, for example, allows any city that contains a new district—or any citizen living within that new district—thirty days to appeal the formation from the district court to the appeals court.[277] A North Dakota statute, likewise, allows "any person who is aggrieved" to appeal an SPG-formation decision made by the Department of Water Resources.[278] And in Maryland, interestingly, the landowners who do not sign a petition for district formation are issued summonses by a court, which seems to suggest that a kind of mandatory ex post litigation process is built into the formation procedure.[279]

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[276] *See, e.g.*, COLO. REV. STAT. § 32-1-305 (2024); IOWA CODE § 357.4 (2025).

[277] Act of Mar. 19, 1984, § 4, 1984 Ky. Acts 134, 136 (codified at KY. REV. STAT. ANN. § 65.186):

> Any city containing all or any portion of the service area or any state agency with jurisdiction over the taxing district or any citizen living in the proposed area of the taxing district may, within thirty (30) days of the decision of the fiscal court, appeal the decision of the fiscal court on the formation of a district to the Circuit Court.

[278] N.D. CENT. CODE ANN. § 61-05-20 (West 2023) ("An appeal may be taken to the district court from any order or decision of the department of water resources by any person who is aggrieved by the order or decision.").

[279] MD. CODE ANN., LOCAL GOV'T. § 27-204 (West 2024) (noting that "[e]ach landowner who has not signed the petition is a respondent," and that the "designated officer shall issue a summons to be served on each respondent").

Somewhat more broadly, many other states include opportunities for objection from landowners who fall within a proposed district.[280] And, notably, such statutes allow the type of objection made by an affected resident to extend beyond the simple question of whether the district is formed. For example, one representative North Carolina statute provides that any person who thinks he "will not be benefited by the improvement and should not be included in the district may appeal from the decision of the court."[281] A typical Nebraska statute likewise allows that, "[i]f any owner of real estate located in the proposed district satisfies the court that his or her real estate . . . will not be benefited thereby, then the court may exclude such real estate as will not be benefited and declare the remainder a district as prayed for."[282]

The sheer variety of objections that might be posed to a new district is perhaps why a court—as opposed to a higher legislative or administrative authority—is often the body that exercises oversight over the petition, formation, and ex post adjudication process.[283] And even those states in which the formation process is not overseen by a court include some adjudicatory oversight procedures, like hearings before a commission or other body after a petition for formation is submitted.[284]

The bottom line is that there is a wide variety of methods for correcting a problem that is (or would be) created by a new SPG. Ex post checks—hearings and adjudication *after* a district has been formed—have begun to appear more recently. This ex post litigation can be brought either by persons who were included in the district and wish to get out, or by persons who were left out and feel they should have been included. To us, this suggests that formation by right is compatible with safeguards against the most serious SPG concerns. Again, we think experience is probative:

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[280] *See* MO. REV. STAT. §§ 242.020, 242.030, 242.040 (2024) (describing a process involving petition by "owners of a majority of the acreage" to the county court, then notice, and then opportunity for objection—which operates as a kind of ex post litigation); *see also* N.C. GEN. STAT. § 156-56 (2024) (providing for petition and notice). Usually this means that due diligence has been used to determine the names of all landowners within the area of the proposed district; summons can then be issued for such landowners.

[281] N.C. GEN. STAT. § 156-66.

[282] NEB. REV. STAT. ANN. § 31-730 (West 2024).

[283] For a representative statute that gives jurisdiction to a court, see OKLA. STAT. ANN. tit. 82, § 542 (West 2024).

[284] In Texas, for example, a relatively small number of residents can submit a petition to form an emergency services district to the county board of commissioners, which then holds a public hearing before making the ultimate decision about formation. *See, e.g.*, TEX. HEALTH & SAFETY CODE ANN. §§ 775.011–775.016 (West 2023).

the states that have experimented with creation as of right (coupled with ex post adjudication) do not appear to have encountered serious difficulties as a result—suggesting that the resultant litigation would not be overwhelming.

4. Are ex ante checks useful?

This leaves us to consider the other side of the question: In states that use strong ex ante approval—say, required approval from a court or the county board of commissioners—are such mechanisms useful? The short answer is that we found little evidence that ex ante approval mechanisms were ever used. It is plausible that the types of petitions submitted are responsive to the approval mechanism—in which case, even if the ex ante controls are rarely used, they cast the shadow in which proposals are formulated. But we find this kind of relationship doubtful—in most states, the ex ante oversight mechanism *never* results in a rejected application. Our interviews failed to reveal more than a tiny handful of cases in only a small number of states in which the relevant authority failed to approve a petition to form an SPG.

We asked dozens of practitioners who work with SPGs about the circumstances under which a petition to form a new government is rejected. If, for example, the statute requires that the county board of commissioners sign off on all new water districts, do the commissioners ever say no? Only one person with whom we spoke was able to identify an instance of an application being rejected (apparently because the district's taxing power would not be subject to democratic oversight).[285] Several were surprised to learn that their state statutes had oversight mechanisms to begin with. While it is possible to imagine that dropping these approval mechanisms would open the floodgates to problematic new SPGs, few practitioners we spoke to thought this was a plausible concern.[286]

Voters do seem to occasionally reject proposals for new SPGs in majoritarian referenda[287]—but this is different from a court or

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[285] Email from LeGrand Bitter, *supra* note 253 ("The only situation that I am aware of where a proposal to create a district was rejected[ ] occurred because of citizen fears of taxation without representation.").

[286] Email from Karen Horn, *supra* note 254 ("I don't think there would be a proliferation of new districts. I sort of think that time is past.").

[287] Email from Thomas J. Mahon, Merrimack Town Council, to Conor Clarke, Author (Oct. 2, 2013) (on file with author):

commission rejecting a district that has been approved by the majority. And there is evidence, at least from the early days of SPGs, of proposed districts in which the boundaries were drawn to include a strongly opposed minority[288]—something which, we believe, could be handled as well or better by means of ex post adjudication.

More broadly, we found few reported cases of SPGs being unfairly imposed on unwilling residents. The most frequently reported problems tend to fall into two categories. First, there are problems of notice, such as cases in which people do not know they are living under a special district and are poorly informed of their rights or obligations. Second, there are reported cases of multiple overlapping or otherwise confusing special districts—suggesting that some could be merged productively, or otherwise have their boundaries rationalized. While these problems are notable and nontrivial, they strike us as problems that can be solved with adjustments to the statutory framework—such as better notice and easier merger mechanisms—and not problems that reflect anything inherently exploitative about the relationship between special districts and their residents.

5. Incorporation as of right?

There is, as the previous sections suggest, great variation in the procedures for forming an SPG. But there is, as far as we can tell, little rhyme or reason to this variation. To us, this variation suggests a statutory landscape that is fertile for reform.

Even in states that do have a petition and hearing process, there is ample room for rationalizing those processes. Because different enabling statutes have been passed decades apart, there are often mysterious, inexplicable variations in how the petition processes operate. In Iowa alone, for example, some petition processes require signatures by the owners of at least 30% of all real

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> In the last ten years, I believe slightly more have been rejected that [sic] have been authorized. . . . A small group in an area wish to be free of the host government and do not carry the rest of the residents of the proposed district, often because the cost will likely be higher to them.

See also Email from James Angle, Fla. Ass'n of Special Dists., to Conor Clarke, Author (Sept. 30, 2013) (on file with author) ("Usually, the idea of creating a district will clear its political hurdles before an advocate petitions for creation. When a petition is reject[ed], it is usually because it became politically controversial after being requested.").

288 *See* Hutchins, *supra* note 133, at 9 ("Some of the earliest districts met disaster or at least years of obstruction because of the inclusion of too much land belonging to persons opposed to district organization. This cause of failure, while still to be reckoned with, is not so pronounced as it was some years ago.").

property within the proposed district; others require 25% of the resident property owners owning at least 25% of the assessed land value; others require either twenty-five property owners or 25% of the property owners of the proposed district; still others require any twenty-five eligible electors residing within the limits of the proposed district.[289] In Oregon, a petition to recall officers of a special district must secure the support of at least 15% of voters,[290] but a petition requesting annexation to a district only requires 10% of voters to sign.[291] In other states, the bar is much higher: in Ohio, property owners of at least 60% of the "front footage" can petition the appropriate legislative authority, or owners of at least 75% of the land area within the proposed district can petition the appropriate legislative authority.[292]

CONCLUSION

Special-purpose governments lie on the boundary between public and private enterprise. They are analogous to consumer cooperatives in that they are typically formed to provide consumer control over a service that constitutes a local monopoly. Electoral control of the organization by its customers removes the organization's incentive to exploit its monopoly position. But as with fully private cooperatives—and indeed all forms of organizations—collective control by a numerous electorate evidently becomes quite costly as the electorate becomes more heterogeneous in its preferences concerning the conduct of the organization. In local government, there seem to be two polar solutions to this problem that are relatively effective. One is to create a government that is devoted explicitly to providing a single service, and that ties the allocation of costs and of voting control relatively tightly to the benefits each person obtains from the service. The other solution is to bundle together many services for provision by a single government, with the effect of inducing in the electorate a shared concern for competent general managers that overshadows concerns for particular levels of the individual services in the bundle.

The result is that there is a great divide in practice between single-purpose governments and general-purpose governments.

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289 *See* IOWA LEGIS. SERVS. AGENCY, *supra* note 86, at 1–2.

290 OR. REV. STAT. § 198.430 (2024).

291 *Id.* § 198.866.

292 Gregory A. Davis, *Special Improvement District: A Tool for Targeting Investment*, OHIOLINE (June 15, 2010), https://perma.cc/43RR-9C8J.

This divide permits the law to regulate single-purpose governments—for example, concerning voting rules and the right to formation—in a manner that is reasonably uniform across that class of governments, and that leaves the regulation of general-purpose governments largely unaffected. The divide also makes it clear just how close many special-purpose governments are to private enterprise in structure and function.

But the law has been slow to adapt to these realities, leaving most states with a hodgepodge of particularized statutes that impose arbitrarily different requirements on special-purpose governments according to the services they provide—a landscape that is ripe for improvement and reform. While our principal objective is not to advocate for reforms, we have outlined a broad perspective on the role and structure of special-purpose governments, and indeed of governments in general, that can guide development of an appropriate legal framework for the continuing evolution of this rapidly spreading and peculiarly U.S. form of organization.