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## The Water District and the State

**ABSTRACT.** In much of the American West, water districts dominate water governance. These districts serve vitally important functions in regions challenged by aridity, growing populations, and climate change. These districts also often operate within boundaries developed a century ago, or more, and under governing rules that are undemocratic by design. In many water districts, people who do not own land cannot serve on the governing board. Nor can they vote in water district elections. Not surprisingly, given their composition and power, water districts often thwart efforts to modernize and bring equity to water management.

This Article describes these problems. Drawing on original data and mapping, it shows how pervasive these undemocratic governance structures can be and how water districts with these structures are expanding their reach into new policy realms. It also explains continued problems with the geography of water districts. And it shows how some water districts have acted to thwart important state policy interests and why such conflicts are likely to increase.

This Article also explains how state governments can respond. It advocates a shift from impact litigation—which earlier generations of lawyers tried to use, largely unsuccessfully—to legislative activity. It explains specific steps state legislatures can take to reform water district governance structures, reset boundaries, and address districts that persistently undermine state policy goals. More generally, it explains how different governance frameworks can replace states' current hands-off approach to water district oversight.

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## INTRODUCTION

In January 2020, local-government agencies across much of California submitted long-term plans for managing groundwater.<sup>1</sup> Groundwater is precious in California, particularly in rural areas; it supplies forty percent of the state’s agricultural and urban water,<sup>2</sup> and many people have no other water source.<sup>3</sup> In California, as in many other places, groundwater supplies also are imperiled.<sup>4</sup> In 2014, California responded to its groundwater crises by enacting a landmark statute, the Sustainable Groundwater Management Act (SGMA).<sup>5</sup> The Act required local-government entities to respond to the state’s groundwater-management challenges by drafting and implementing “groundwater sustainability plans.”<sup>6</sup>

Yet many of the plans contemplated years of continued groundwater depletion.<sup>7</sup> One study predicted that over the life of the plans, thousands of wells

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1. *Groundwater Management and Safe Drinking Water in the San Joaquin Valley: Analysis of Critically Over-Drafted Basins’ Groundwater Sustainability Plans*, WATER FOUND. 3 (June 2020), <https://waterfdn.org/wp-content/uploads/2020/06/Groundwater-Management-and-Safe-Drinking-Water-in-the-San-Joaquin-Valley-Brief-6-2020.pdf> [<https://perma.cc/3NKA-P5BU>].
  2. See Caitrin Chappelle, Ellen Hanak & Thomas Harter, *Just the Facts: Groundwater in California*, PUB. POL’Y INST. OF CAL. (May 2017), <https://www.soquelcreekwater.org/DocumentCenter/View/507/Just-the-Facts---Groundwater-in-California-PDF> [<https://perma.cc/4NMZ-6XM7>].
  3. *Groundwater*, CAL. DEP’T WATER RES., <https://water.ca.gov/water-basics/groundwater> [<https://perma.cc/9MQC-WXMJ>] (“[M]any communities are 100 percent reliant on groundwater for their water needs.”).
  4. See M. Rodell, J.S. Famiglietti, D.N. Wiese, J.T. Reager, H.K. Beaudoin, F.W. Landerer & M.-H. Lo, *Emerging Trends in Global Freshwater Availability*, 557 NATURE 651, 655 (2018) (describing accelerating drawdown in California’s Central Valley); Steven M. Gorelick & Chunmiao Zheng, *Global Change and the Groundwater Management Challenge*, 51 WATER RES. RSCH. 3031, 3031 (2015) (discussing global water trends).
  5. See generally Tina Cannon Leahy, *Desperate Times Call for Sensible Measures: The Making of the California Sustainable Groundwater Management Act*, 9 GOLDEN GATE U. ENV’T L.J. 5 (2015) (describing the Sustainable Groundwater Management Act’s (SGMA’s) passage).
  6. See CAL. WATER CODE §§ 10727-10728.6 (West 2024) (setting requirements for groundwater sustainability plans).
  7. See Darcy Bostic, Linda Mendez-Barrientos, Rich Pauloo, Kristin Dobbin & Victoria MacClements, *Thousands of Domestic and Public Water Supply Wells Face Failure Despite Groundwater Sustainability Reform in California’s Central Valley*, 13 SCI. REPS. art. no. 14797, at 2-3 (2023); Debra Perrone, Melissa M. Rohde, Courtney Hammond Wagner, Rebecca Anderson, Samantha Arthur, Ngodoo Atume, Meagan Brown, Lauren Esaki-Kua, Martha Gonzalez Fernandez, Kelly A. Garvey, Katherine Heidel, William D. Jones, Sara Khosrowshahi Asl, Carrie Munill, Rebecca Nelson, J. Pablo Ortiz-Partida & E.J. Remson, *Stakeholder Integration Predicts Better*

would go dry, and between 46,000 and 127,000 people would lose some or all of their water supply.<sup>8</sup> Many of these people live in what California law refers to as “disadvantaged unincorporated communities”—poor communities, generally with predominantly nonwhite populations, that occupy county land and receive few municipal services.<sup>9</sup> The declining water levels thus would have their most pronounced effects on some of the state’s most vulnerable people.<sup>10</sup> The state government, which reviews groundwater sustainability plans, rejected a few of those plans, and more protective plans may be forthcoming.<sup>11</sup> But those second-round plans still will be drafted and implemented by the same governing bodies that had adopted first-round plans under which thousands of people would lose access to groundwater.<sup>12</sup>

How could this happen? There are many potential reasons, one of which is the basic challenge groundwater managers face.<sup>13</sup> In many parts of California, groundwater managers face genuinely wrenching decisions about how to balance the goal of protecting domestic water-supply wells against the competing goal of sustaining an agricultural economy.<sup>14</sup> Meanwhile, the strains of climate

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*Outcomes from Groundwater Sustainability Policy*, 14 NATURE COMM’NS art. no. 3793, at 8 (2023) (“60% of agricultural wells, 63% of domestic wells and 91% of groundwater-dependent ecosystems in California’s regulated basins are not protected from losing access to groundwater based on each Sustainability Plan’s stated minimum thresholds.”).

8. *Groundwater Management and Safe Drinking Water in the San Joaquin Valley*, *supra* note 1, at 3; see Darcy Bostic, *At Risk: Public Supply Well Vulnerability Under California’s Sustainable Groundwater Management Act*, PAC. INST. 1-2 (June 2021), [https://pacinst.org/wp-content/uploads/2021/06/PI\\_EvaluatingWellVulnerability\\_June\\_2021.pdf](https://pacinst.org/wp-content/uploads/2021/06/PI_EvaluatingWellVulnerability_June_2021.pdf) [<https://perma.cc/EEP5-68YL>] (finding that the plans would allow major impacts to public water-supply wells).
9. See Bostic et al., *supra* note 7, at 6-8; CAL. GOV’T CODE § 56033.5 (West 2024) (defining “[d]isadvantaged unincorporated community”).
10. See Bostic et al., *supra* note 7, at 6.
11. See Alistair Bland, *State Rejects Local Plans for Protecting San Joaquin Valley Groundwater*, CALMATTERS (Mar. 2, 2023), <https://calmatters.org/environment/2023/03/california-groundwater-valley-wells> [<https://perma.cc/85BQ-6DHN>].
12. See, e.g., Jesse Vad & Lois Henry, *State Rejects Six Valley Groundwater Plans, but Westlands Is Approved*, GV WIRE (Mar. 3, 2023), <https://gvwire.com/2023/03/03/state-rejects-six-valley-groundwater-plans-but-westlands-is-approved> [<https://perma.cc/ES62-9BW4>] (“The Tulare Lake plan also, apparently, allows an upper zone in the aquifer to be ‘depleted’ with no mention of how groundwater agencies would repair or replace the attendant dry wells, according to the DWR evaluation.”).
13. See Felicity Barringer, *A Simmering Revolt Against Groundwater Cutbacks in California*, & W. (Mar. 2, 2023), <https://andthewest.stanford.edu/2022/a-simmering-revolt-against-groundwater-cutbacks-in-california> [<https://perma.cc/A7JD-VVQC>] (describing resistance to groundwater-use regulation).
14. See *infra* notes 232-233 and accompanying text (describing the predicted economic impacts of limiting groundwater pumping to sustainable levels).

change are making water management more difficult.<sup>15</sup> Land-use law also is a contributing factor, for many of these isolated and neglected communities did not become that way by accident.<sup>16</sup> But a likely additional factor is the way California governs water.

In California, as elsewhere in the West, water management is dominated by local special districts.<sup>17</sup> Many of these districts operate independently of city and county governments and with only modest levels of state oversight.<sup>18</sup> They decide when to form, what areas to include, and when to disband.<sup>19</sup> They often take on functions – like groundwater regulation – that extend beyond delivering surface water to farmers.<sup>20</sup> And they are often controlled by large landowners, not just as a practical reality but as a matter of law.<sup>21</sup> Unless they own land – and many, including large numbers of renters, do not – the residents whose wells will go dry are legally prohibited from serving on the boards of many of the water districts that regulate groundwater use.<sup>22</sup> Likewise, even if those residents are citizens and registered voters eligible to vote in other local elections, many of them cannot participate in water district elections.<sup>23</sup> Even if they could participate, many of them live across borders from the government entities that are influencing their water levels, for maps of California water district boundaries

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15. See Chris Austin, *Urban Groundwater Institute: SGMA Implementation in the San Joaquin Valley: Farmers' Perspective*, MAVEN'S NOTEBOOK (May 12, 2022), <https://mavensnotebook.com/2022/05/12/urban-water-institute-sgma-implementation-in-the-san-joaquin-valley-farmers-perspective> [<https://perma.cc/8L7E-WRMV>] (describing the need for enormous reductions in water use and farmed area).
  16. See generally Michelle Wilde Anderson, *Mapped Out of Local Democracy*, 62 STAN. L. REV. 931 (2010) (describing the deliberate exclusion of unincorporated communities from municipal boundaries); Linda E. Méndez-Barrientos, Amanda L. Fencl, Cassandra L. Workman & Sameer H. Shah, *Race, Citizenship, and Belonging in the Pursuit of Water and Climate Justice in California*, 6 ENV'T & PLAN. E 1614, 1617 (2023) (describing the deliberate exclusion of poor and minority communities from water service areas).
  17. See John D. Leshy, *Irrigation Districts in a Changing West—An Overview*, 1982 ARIZ. ST. L.J. 345, 347 (“Such districts distribute . . . about one-half of all water used in the West . . .”).
  18. See *infra* notes 94-113 and accompanying text.
  19. See *infra* notes 94-101 and accompanying text.
  20. See *infra* notes 217-240 and accompanying text.
  21. See, e.g., *Salyer Land Co. v. Tulare Lake Basin Water Storage Dist.*, 410 U.S. 719, 725 (1973) (“[O]nly landowners are permitted to vote in water storage district general elections, and votes in those elections are apportioned according to the assessed valuation of the land.”).
  22. See CAL. WATER CODE § 21100(a) (West 2024) (“Each director . . . shall be a voter and a landowner in the district . . .”). But see *Choudhry v. Free*, 552 P.2d 438, 441-44 (Cal. 1976) (holding this limitation unconstitutional, but only for one irrigation district).
  23. See, e.g., CAL. WATER CODE § 34027 (West 2024) (“‘Voter’ means a person who is a holder of title.”); *id.* § 35003 (“Each voter shall have one vote for each dollar’s worth of land to which he or she holds title.”).

make even the most gerrymandered congressional districts look orderly and rational.<sup>24</sup> It should not be surprising if some of these districts are unresponsive to residents' concerns and to state policy goals. They are built to be that way.

This California example, though distinct in some ways, illustrates patterns of water governance that recur across the American West and that sometimes extend into the eastern United States. Throughout much of the West, water districts hold extensive water rights and play significant roles in water governance.<sup>25</sup> For many key aspects of governance, local control predominates; the laws of western states leave water district formation, expansion, retraction, and dissolution to local landowners' discretion.<sup>26</sup> Though no other state matches California's level of geographic absurdity, others also have water district boundaries that have little to do with either watershed<sup>27</sup> boundaries or the jurisdictions of other government entities.<sup>28</sup> Legal frameworks for district governance likewise favor large landowners, often to an even greater extent than in California.<sup>29</sup> And state regulation of water use, though present, often involves a decidedly gentle touch.<sup>30</sup>

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24. See *infra* Figure 2, notes 263-267 and accompanying text.
  25. See Barton H. Thompson, Jr., *Institutional Perspectives on Water Policy and Markets*, 81 CALIF. L. REV. 671, 686-89 (1993) (describing the importance of western water districts).
  26. See *infra* notes 94-101 and accompanying text.
  27. A watershed is a geographic area containing all the lands that drain into a common point.
  28. See, e.g., *Irrigation Organizations in Idaho*, IDAHO DEP'T WATER RES., <https://idwr.idaho.gov/water-rights/irrigation-organizations/map> [<https://perma.cc/P592-GQTM>]. The interactive map shows irrigation district and water company boundaries. Some make obvious geographic sense, while others, like the A&B Irrigation District, are filled with gaps. Irrigation district boundaries also generally do not align with groundwater management district boundaries. See *Groundwater Districts Map*, IDAHO DEP'T WATER RES., <https://idwr.idaho.gov/water-rights/groundwater-districts/map> [<https://perma.cc/Z7U7-SKBG>].
  29. See, e.g., ARIZ. REV. STAT. ANN. § 48-2917(A)(1) (2024) (prohibiting voting unless one is a "holder of title . . . to land in the district"); OR. REV. STAT. § 545.002(3) (2023) (defining "elector" as the "owner or a vendee under a contract of purchase of land situated within the district and subject to the charges or assessments of the district").
  30. See Reed D. Benson, *Alive but Irrelevant: The Prior Appropriation Doctrine in Today's Western Water Law*, 83 U. COLO. L. REV. 675, 688-89 (2012) (describing western states' reluctance to implement core but controversial elements of water law); Nell Green Nysten, Dave Owen, Jennifer Harder, Michael Kiparsky & Michael Hanemann, *Managing Water Scarcity: A Framework for Fair and Effective Water Right Curtailment in California*, BERKELEY L. CTR. FOR L., ENERGY, & THE ENV'T 9-11 (Apr. 2023), <https://www.law.berkeley.edu/wp-content/uploads/2023/04/Managing-Water-Scarcity-Report-April2023.pdf> [<https://perma.cc/77WZ-VPCE>] (describing anemic water-rights enforcement in California).

Though water districts, and special districts more generally,<sup>31</sup> receive less attention than their importance merits,<sup>32</sup> concerns about water district governance have simmered for years.<sup>33</sup> Reformers have achieved occasional successes.<sup>34</sup> But high-profile cases challenging the constitutionality of landowner voting have mostly failed,<sup>35</sup> and in their wake, most states have not seen a real push for change. In recent decades, the state-law reforms that have been implemented generally nibble around the edges of existing systems<sup>36</sup> or even reinforce them,<sup>37</sup> and they are rare; much of the statutory text setting water district governance systems is decades old. States could take more active roles in district governance, though the politics are difficult.<sup>38</sup> All districts owe their existence to state

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31. Other common forms of special districts include park districts, sanitary districts, and cemetery districts, among others. See *What Is a Special District? And Why Are They Important?*, INST. FOR LOC. GOV'T, <https://www.ca-ilg.org/post/what-special-district> [<https://perma.cc/FW9V-MRK4>].
  32. See Heather K. Gerken, *Foreword: Federalism All the Way Down*, 124 HARV. L. REV. 4, 27 (2010) (“[C]ities are the all but exclusive focus of localism . . .”); Leshy, *supra* note 17, at 346 (“[S]pecial districts have proliferated in recent decades with scarcely a serious debate.”). A notable exception is MEGAN MULLIN, *GOVERNING THE TAP: SPECIAL DISTRICT GOVERNANCE AND THE NEW LOCAL POLITICS OF WATER* (2009).
  33. See, e.g., MARC REISNER, *CADILLAC DESERT: THE AMERICAN WEST AND ITS DISAPPEARING WATER* 415 (1986) (describing major urban water districts as “well-oiled, well-funded political machine(s) trying to purloin water from every corner of the state”); Timothy De Young, *Special Water Districts: Their Role in Western Water Use 2-6* (1986) (unpublished manuscript) (on file with the Getches-Wilkinson Center for Natural Resources, Energy, and the Environment at the University of Colorado Law School) (describing critiques and potential reforms); Len Hall & Kevin Johnson, *Push Mounts for Reform of Water Districts: Management: Critics Cite Desire to Consolidate Some of the 19 Independent Agencies. Others, While Agreeing Greater Accountability Is Needed, Say Bigger Is Not Necessarily Better*, L.A. TIMES (May 2, 1993, 12:00 AM PT), <https://www.latimes.com/archives/la-xpm-1993-05-02-me-30355-story.html> [<https://perma.cc/SW2N-6M5N>].
  34. See, e.g., CAL. GOV'T CODE § 53087.8 (West 2024) (requiring independent special districts to have websites); CAL. ELEC. CODE §§ 14051-52 (West 2024) (requiring local districts that have had low voter turnout to consolidate their election dates with statewide elections). The impact of the latter reform upon water districts may be muted because many water districts usually have uncontested seats and therefore do not hold elections at all, which would make it impossible to measure turnout. See *infra* notes 206-207 and accompanying text.
  35. See *infra* notes 143-162 and accompanying text (discussing *Salyer Land Co. v. Tulare Lake Basin Water Storage Dist.*, 410 U.S. 719 (1973), and *Ball v. James*, 451 U.S. 355 (1981)).
  36. See *infra* note 262 and accompanying text (describing meaningful but modest reforms).
  37. See *infra* notes 168-169 and accompanying text (describing state legislation that expands landowner-weighted voting).
  38. See *infra* notes 110-117 and accompanying text (describing water districts’ political clout).



legislation, and that legislation could change.<sup>39</sup> But, for the most part, it does not.<sup>40</sup> Meanwhile, academic theorizing of local governance generally looks past water districts, and special districts more generally, lumping them in as after-thoughts to cities, if they are even mentioned at all.<sup>41</sup>

This Article maps a different path for water district governance. It argues that state governments should play more active roles and that reformers should emphasize legislation.<sup>42</sup> It advocates several specific reforms. One set of reforms focuses on elections. It includes extending voting rights, promoting increased election-related transparency, and limiting the tasks undertaken and privileges received by districts that lack democratic governance structures.<sup>43</sup> If districts wish to use corporate governance structures and insulate themselves from public oversight, they should be able to do so, but then they should be regulated like private corporations; they should not receive powers and perks typically reserved for government entities. A second set of reforms focuses on boundary rationalization. Western states rarely tinker with the boundaries of districts, even where those boundaries have long ceased to make sense, and states need mechanisms for boundary adjustment.<sup>44</sup> Third, states should develop procedures and standards for taking water district operations under state control – or even, at the extreme, dissolving water districts.<sup>45</sup>

Underlying these changes is a different vision of the relationships between local governments and states. In many western states, water districts have been

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39. Special districts thus are different from states, which have sovereignty, and municipalities, some of which have home-rule powers. See Gerken, *supra* note 32, at 26–27.
  40. See, e.g., Christopher Flavelle & Mira Rojanasakul, *As Groundwater Dwindles, Powerful Players Block Change*, N.Y. TIMES (Nov. 24, 2023), <https://www.nytimes.com/interactive/2023/11/24/climate/groundwater-levels.html> [<https://perma.cc/8GXV-HJ9S>] (describing an unsuccessful bill to reform water district governance in Kansas).
  41. See, e.g., Kristen Clarke, *Voting Rights & City-County Consolidations*, 43 HOUS. L. REV. 621, 631 (2006) (claiming, in a discussion of local-government forms and federalism, that “micro-level structures such as school boards, water districts, utility districts, and transit commissions provide even greater opportunities for citizens to meaningfully impact political life in their communities”). See generally Gerken, *supra* note 32 (extending federalism theory to specialized local-government units but not mentioning water districts).
  42. Other commentators have made compelling arguments that some water district governance arrangements violate federal and state equal-protection clauses and should be subject to challenge. See Louise Nelson Dyble, Comment, *Aquifers and Democracy: Enforcing Voter Equal Protection to Save California’s Imperiled Groundwater and Redeem Local Government*, 105 CALIF. L. REV. 1471, 1486–1508 (2017). I agree with Louise Nelson Dyble’s arguments but think legislatures, with their ability to craft more nuanced reforms, are more promising – and that litigation and legislation could be complementary approaches.
  43. See *infra* notes 354–373 and accompanying text.
  44. See *infra* notes 377–382 and accompanying text.
  45. See *infra* notes 391–398 and accompanying text.



established, powerful, and self-governing for so long that it is hard not to think of their governance as beyond the power of the state to change. That expectation of a hands-off state accords with ways Americans tend to think of local governance more generally. Despite legal rhetoric about cities and counties being powerless against states,<sup>46</sup> we do not typically expect state legislation to adjust city or county boundaries or to mandate different governance forms.<sup>47</sup> The expectation also accords with common themes of academic writing about local governance, for that writing often celebrates local governance and treats state authority as a problematic threat.<sup>48</sup> Indeed, that threat seems to be growing, with states adopting increasingly draconian limits not just on specific city initiatives but also on cities' basic ability to govern. But while this view has its merits as applied to cities,<sup>49</sup> water districts are a different story – and an important reminder of the need for more nuance and differentiation in discussions of local governance. States have the power to change water districts' governing rules, just as they had the power to – and did – set those governing rules in the first place.<sup>50</sup> And, as this Article will demonstrate, there are good reasons for states to act, even if state actions will not come easily and will inevitably have their own flaws. I do not

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46. See Gerald E. Frug, *The City as a Legal Concept*, 93 HARV. L. REV. 1057, 1060 (1980).

47. See U.S. ADVISORY COMM'N ON INTERGOVERNMENTAL RELS., LOCAL BOUNDARY COMMISSIONS: STATUS AND ROLES IN FORMING, ADJUSTING AND DISSOLVING LOCAL GOVERNMENT BOUNDARIES, at iii-iv, 10-11 (1992) (noting that boundary commissions exist in a minority of states and generally play minor and reactive roles).

48. See, e.g., Nestor M. Davidson, *The Dilemma of Localism in an Era of Polarization*, 128 YALE L.J. 954, 957-58 (2019) (describing state attacks on local initiatives); Richard C. Schragger, *Federalism, Metropolitanism, and the Problem of States*, 105 VA. L. REV. 1537, 1541-42 (2019); Erin Adele Scharff, *Hyper Preemption: A Reordering of the State-Local Relationship?*, 106 GEO. L.J. 1469, 1471-74 (2018); Michelle Wilde Anderson, *Democratic Dissolution: Radical Experimentation in State Takeovers of Local Governments*, 39 FORDHAM URB. L.J. 577, 581-82 (2012) (describing and criticizing state preemption of local democracy).

49. Writers focused on affordable-housing production sometimes take a more skeptical view of city power and a more sanguine view of state intervention. See, e.g., Eric Biber, Giulia Gualco-Nelson, Nicholas Marantz & Moira O'Neill, *Small Suburbs, Large Lots: How the Scale of Land-Use Regulation Affects Housing Affordability, Equity, and the Climate*, 2022 UTAH L. REV. 1, 5 (arguing for greater state involvement in housing production); Christopher S. Elmendorf, *Beyond the Double Veto: Housing Plans as Preemptive Intergovernmental Contracts*, 71 HASTINGS L.J. 79, 83-84 (2019). Similarly, county government tends to get less attention and less positive treatment than city government. See, e.g., Michelle Wilde Anderson, *Sprawl's Shepherd: The Rural County*, 100 CALIF. L. REV. 365, 368 (2012) ("Counties were, in short, sprawl's shepherd."). For broader accounts exploring situations in which state intervention in local government can be productive, see generally Joshua S. Sellers & Erin A. Scharff, *Preempting Politics: State Power and Local Democracy*, 72 STAN. L. REV. 1361 (2020); and Dave Owen, *Cooperative Subfederalism*, 9 U.C. IRVINE L. REV. 177 (2018).

50. See *infra* notes 81-88 and accompanying text (explaining how water district creation was empowered by state legislation).

argue that states should simply displace water district governance, except in extreme cases; collaborative relationships should and would evolve. But those collaborations should be backed by stronger and more engaged state authority.

This Article's analysis proceeds as follows. Part I provides background on water districts, explaining why they came into existence, how they are legally formed, what they do, and why they are worthy of more attention than local-government and even water-law scholars have traditionally given them. Part II explores reasons for concerns about water district operations and governance, focusing on undemocratic entities pursuing classically governmental tasks, boundary problems, and open opposition to important state policy goals. Although Part II draws heavily on examples from California, including original empirical data on, and mapping of, groundwater governance systems, these examples hold broader implications. With water, as with other policy arenas, California often is a harbinger of policy challenges elsewhere. Part III discusses potential reforms. It begins by explaining, at a conceptual level, how relationships between water districts and states could function and why those relationships do not fit with conventional understandings of state-local interactions. It then proposes specific measures to improve water district governance.

## I. THE EMERGENCE OF WATER DISTRICTS

Of all the types of government entities in the United States, special districts—that is, single-purpose local-government entities—are the most abundant, the least studied, and the least understood.<sup>51</sup> Both public debate and academic writing tend to equate local governance with cities, with little attention to the thousands of nonmunicipal local entities.<sup>52</sup> Within the realm of special districts, water districts can seem particularly obscure, at least outside the niche field of water law.<sup>53</sup> But scant public awareness does not mean a lack of importance.

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51. See MULLIN, *supra* note 32, at 6 (“[M]any aspects of special districts remain unknown.”); Nadav Shoked, *Quasi-Cities*, 93 B.U. L. REV. 1971, 1977 (2013) (“[T]he number of special districts almost equals that of counties, cities, and towns combined.”).

52. See, e.g., Schragger, *supra* note 48, at 1541-42 (speaking interchangeably of “cities” and “local governments”); Rick Su, *Democracy in Rural America*, 98 N.C. L. REV. 837, 840 (2020) (“Cities, particularly the nation’s largest, dominate the conversation.”). While Rick Su seeks to expand the conversation to counties and towns, his focus is not on water districts or other special districts.

53. See generally Gerken, *supra* note 32 (leaving water districts out of an otherwise extensive discussion of special districts).

Supplying water is a vital governmental (and sometimes private) function,<sup>54</sup> and as climate change stresses water-supply systems, the importance of water management is growing.<sup>55</sup> Supplying water is also just one of the many things water districts do.<sup>56</sup> This Part therefore introduces water districts, explaining their origins, their functions, and the controversies they sometimes create.

Before that discussion, a few words about scope are in order. This Article focuses on water districts and the West, but neither term is crisply self-defining. The West, for the purposes of this Article (and for water-law purposes more generally), refers to the states that straddle or are located west of the hundredth meridian, which roughly divides areas where agriculture depends on irrigation from areas where it does not.<sup>57</sup> That means states from the High Plains, Rocky Mountains, and West Coast (except Alaska and Hawaii) are covered; those of the wetter Midwest and East are not.<sup>58</sup> Nevertheless, readers should be aware that many of the governance issues discussed in this Article, though more prevalent in the West, are not unique to that region. Landowner voting happens elsewhere, for example.<sup>59</sup> And water, of course, is vitally important everywhere.

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54. In rural areas, mutual water companies often supply water, and private companies also serve as water utilities. See NORRIS HUNDLEY, JR., *THE GREAT THIRST: CALIFORNIANS AND WATER, A HISTORY* 104-07 (rev. ed. 2001) (describing the emergence of mutual water companies). Additionally, many homes and businesses have private individual supplies, primarily from wells. See Water Res. Mission Area, *Domestic (Private) Supply Wells*, USGS (Mar. 1, 2019), <https://www.usgs.gov/mission-areas/water-resources/science/domestic-private-supply-wells> [<https://perma.cc/LAG9-BDW7>].
55. See Blanca E. Jiménez Cisneros et al., *Freshwater Resources, in Climate Change 2014: Impacts, Adaptation, and Vulnerability, Part A: Global and Sectoral Aspects*, INTERGOVERNMENTAL PANEL ON CLIMATE CHANGE 229, 240 (Christopher B. Field et al. eds., 2014), [https://www.ipcc.ch/site/assets/uploads/2018/02/WGIIAR5-PartA\\_FINAL.pdf](https://www.ipcc.ch/site/assets/uploads/2018/02/WGIIAR5-PartA_FINAL.pdf) [<https://perma.cc/Q9JR-8CUZ>] (describing a variety of climate-related stresses on water resources).
56. See *infra* notes 219-240 and accompanying text (describing California districts' involvement in regulating groundwater use); *Ball v. James*, 451 U.S. 355, 377-80 (1981) (White, J., dissenting) (describing the functions of Arizona's Salt River Project Agricultural Improvement and Power District).
57. See BARTON H. THOMPSON, JR., JOHN D. LESHY, ROBERT H. ABRAMS & SANDRA B. ZELLMER, *LEGAL CONTROL OF WATER RESOURCES: CASES AND MATERIALS* 7 (6th ed. 2018).
58. The covered states are Arizona, California, Colorado, Idaho, Kansas, Montana, Nebraska, Nevada, New Mexico, North Dakota, Oklahoma, Oregon, South Dakota, Texas, Utah, Washington, and Wyoming.
59. See, e.g., FLA. STAT. § 189.041(3)(a)(1)(a) (2024) (prescribing partially landowner-weighted voting for rural special districts); MO. REV. STAT. § 256.641(2) (2024) (defining a qualified voter as "an owner of one or more acre of real property"); ARK. CODE ANN. § 14-125-106(13) (2024) (defining a qualified elector for water improvement districts as an "owner of land within the district who is registered to vote under the election laws of the State of Arkansas").

The phrase “water district” also carries many potential meanings. For the purposes of this Article, I use the phrase as an umbrella term encompassing standalone government entities that hold rights (whether property, contractual, or both) to obtain and distribute water. In this Article, the phrase “water district” does not encompass water departments that manage water supply and distribution within general-purpose governments; rather, it is limited to special districts. Nor does it encompass entities, like levee districts, that manage the movement of water but usually are not water providers.

This Article also focuses primarily on water districts in more rural or mixed rural-urban regions. Water management in the West’s large urban centers also has its issues,<sup>60</sup> but it (like water management in the eastern United States) tends to be dominated by large, visible, and popularly elected water districts or departments, some of which are embedded within city or county governments and thus are not special districts at all.<sup>61</sup> Again, however, readers should be aware that even if urban districts are not the primary focus of this Article, some of the concerns the Article raises can apply in urban contexts.<sup>62</sup>

More generally, readers should be aware that the water districts upon which this Article focuses are just part of a much broader set of institutions, both public and private, that manage water.<sup>63</sup> Table 1 summarizes the common categories of institutions.

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60. See, e.g., Angel Jennings, *In a First, California Abolishes Compton’s Water District Board After Years of Dirty-Water Allegations*, L.A. TIMES (Oct. 31, 2018, 8:00 PM PT), <https://www.latimes.com/local/lanow/la-me-sativa-takeover-20181031-story.html> [<https://perma.cc/54FE-8H5F>].
61. See, e.g., *Annual Report 2017-18*, L.A. DEP’T OF WATER & POWER 2 (2018), <https://ladwp-jtti.s3.us-west-2.amazonaws.com/wp-content/uploads/sites/3/2019/07/18144551/Annual-Report-2017-18.pdf> [<https://perma.cc/XRT6-BVU4>] (describing the agency’s governance structure); *Board of Water Commissioners*, DENV. WATER, <https://www.denverwater.org/about-us/board-and-organization/board-of-water-commissioners> [<https://perma.cc/GYW5-89YT>] (describing mayoral appointment of commissioners); *Philadelphia Water Department*, CITY OF PHILA., <https://www.phila.gov/departments/philadelphia-water-department> [<https://perma.cc/R5TU-TTKE>].
62. See, e.g., Elise Troxell, *Urban Drinking Water Governing Bodies: Representation and Accountability of Systems to Los Angeles County’s Residents*, UCLA LUSKIN CTR. FOR INNOVATION 6 (2021), <https://innovation.luskin.ucla.edu/wp-content/uploads/2021/06/Urban-Drinking-Water-Governing-Bodies.pdf> [<https://perma.cc/9VG9-CCL3>] (“My findings indicate that there is a striking lack of both representation and accountability in L.A. county’s water system governing bodies.”); Mark Olalde, *Why the Second-Driest State Rejects Water Conservation*, PROPUBLICA (Dec. 16, 2021, 6:00 AM EST), <https://www.propublica.org/article/why-the-second-driest-state-rejects-water-conservation> [<https://perma.cc/F9R7-KKGG>] (describing how the water districts serving urban Utah are thwarting badly needed reforms).
63. For more detail on water institution types, see generally Thompson, *supra* note 25.

**TABLE 1. COMMON TYPES OF WATER-MANAGEMENT INSTITUTIONS**

Governance Level	Entity Type
Federal	Water suppliers
	Regulators
State	Water suppliers
	Regulators
Local	Cities and counties and their departments
	Special districts
Private	Mutual water companies
	Investor-owned utilities
	Water users (individual or business)

Finally, readers should be aware that with thousands of water districts operating in a wide variety of settings across seventeen western states, and with each state offering multiple legal templates for water district formation and operation,<sup>64</sup> every generalization will have its exceptions. My goal is to capture general patterns rather than to explain the unique circumstances of each district.

*A. Origins and Functions*

In the nineteenth century, as settlers began populating the West, water was an obvious challenge.<sup>65</sup> Much of the land was arid, and there could be no large-scale settlement without irrigation, which would require major water

64. See *infra* Appendix Table 1 (listing district types and their voting and board-participation rules). Throughout this Article, I use “water district” as an umbrella term. Many of the entities I describe have different names. They may be called “irrigation districts,” “reclamation districts,” or “water agencies,” for example. See *id.*

65. See J.W. POWELL, REPORT ON THE LANDS OF THE ARID REGION OF THE UNITED STATES, at vii (Gov’t Printing Off., 2d ed. 1879) (“The redemption of the Arid Region involves engineering problems requiring for their solution the greatest skill.”).

diversions.<sup>66</sup> To make matters more difficult, many promising areas for settlement and farming were prone to flooding on the infrequent occasions when they were not dry.<sup>67</sup> Consequently, both finding water and keeping it at bay were major problems.<sup>68</sup> Notwithstanding popular myths of independence and self-reliance, Westerners quickly realized that they could not solve these problems alone.<sup>69</sup> Water management required extensive engineering, which often demanded more capital than individual landowners could raise.<sup>70</sup> The result was a turn to collective institutions, and, often, to the creation of governmental water-management agencies.<sup>71</sup>

In some states, the creation of these government institutions was also an attempt to solve a major legal challenge. When settlers first populated the West, they brought with them eastern states' English-derived systems of common law, which included riparian rights for water users.<sup>72</sup> In a riparian-rights system, only owners of parcels abutting or containing a waterway can hold water rights.<sup>73</sup> Some of the first western water users were miners, and they wanted to use pressurized water to blast apart mountainsides that were far from the streams from which the waters came and that were on public lands the miners did not own.<sup>74</sup>

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66. *Id.* at 2 (contrasting “the Arid Region, where irrigation is necessary to agriculture, and the Humid Region, where the lands receive enough moisture from the clouds for the maturing of crops”).

67. HUNDLEY, *supra* note 54, at 79-80 (describing conditions in California’s Central Valley); WALLACE STEGNER, BEYOND THE HUNDREDTH MERIDIAN: JOHN WESLEY POWELL AND THE SECOND OPENING OF THE WEST 225 (1954) (describing the threat of “flash floods that could wash out a dam and bury fields in unprofitable gravel”).

68. See STEGNER, *supra* note 67, at 225; William P. Aiken, *The Irrigation Question in California*, 5 YALE L.J. 122, 123 (1896) (“The dominant fact in the comprehension or settlement of the irrigation question is the incapacity of the individual to deal successfully with the problem and the consequent failure of laws acting on the individual alone to solve it.”).

69. See *Salyer v. Tulare Lake Basin Water Storage Dist.*, 410 U.S. 719, 721-22 (1973) (describing the infrastructure and economic challenges that led to the emergence of water districts).

70. POWELL, *supra* note 65, at viii (“[T]he redemption of all these lands will require extensive and comprehensive plans, for the execution of which aggregated capital or cooperative labor will be necessary. Here, individual farmers, being poor men, cannot undertake the task.”).

71. See generally DONALD WORSTER, RIVERS OF EMPIRE: WATER, ARIDITY, AND THE GROWTH OF THE AMERICAN WEST (1985) (describing this turn toward collective institutions and its political consequences).

72. See Eric T. Freyfogle, *Lux v. Haggin and the Common Law Burdens of Modern Water Law*, 57 U. COLO. L. REV. 485, 490-91, 497 (1986).

73. THOMPSON ET AL., *supra* note 57, at 28-29.

74. See Freyfogle, *supra* note 72, at 490-91.

For those miners, riparian rights were an obstacle and a threat.<sup>75</sup> Meanwhile, outside the public domain, wealthy landowners were acquiring much of the riparian land in the West, creating fears of water monopolies.<sup>76</sup> Some western states responded to these fears by outlawing riparian rights or by claiming that they had never existed in the first place.<sup>77</sup> But others—most importantly, California, through its supreme court—rejected those arguments,<sup>78</sup> which meant that riparian rights, though deeply unpopular, lived on.<sup>79</sup> Creating governmental water districts, which then could condemn riparian land and the associated water rights through eminent domain, was an appealing way to navigate these legal barriers to water access and control.<sup>80</sup>

In 1887, the California legislature enacted the Wright Act,<sup>81</sup> a statute authorizing the creation of irrigation districts, which were local-government entities charged with obtaining and distributing water. The basic concept was not new; Utah's Mormon settlers had enacted the West's first irrigation district law in 1865.<sup>82</sup> But California generally gets credit for popularizing the concept.<sup>83</sup> And despite years of growing pains,<sup>84</sup> the idea spread. Within a few decades, all the

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75. See *id.*; see also CHARLES F. WILKINSON, *CROSSING THE NEXT MERIDIAN: LAND, WATER, AND THE FUTURE OF THE WEST* 232 (1992) (“The miners, just as they did with the mining laws, developed their own water laws before any state or federal court or legislature spoke. . . . This rule of priority based on time amounted to a direct rejection of riparian water law, which applied in England and the eastern United States.”).
76. See DAVID SCHORR, *THE COLORADO DOCTRINE: WATER RIGHTS, CORPORATIONS, AND DISTRIBUTIVE JUSTICE ON THE AMERICAN FRONTIER* 25-31 (2012) (describing fears of monopoly and the populist origins of western water law).
77. See, e.g., *Coffin v. Left Hand Ditch Co.*, 6 Colo. 443, 447 (1882) (“We conclude, then, that the common law doctrine giving the riparian owner a right to the flow of water . . . is inapplicable to Colorado.”); *Reno Smelting, Milling & Reduction Works v. Stevenson*, 21 P. 317, 322 (Nev. 1889) (“Our conclusion is that the common-law doctrine of riparian rights is unsuited to the condition of our state . . .”).
78. *Lux v. Haggin*, 10 P. 674, 782-83 (Cal. 1886).
79. See Freyfogle, *supra* note 72, at 491.
80. See Mark T. Kanazawa, *Efficiency in Western Water Law: The Development of the California Doctrine, 1850-1911*, 27 J. LEGAL STUD. 159, 181 (1998) (“Proponents hoped that creating public irrigation districts empowered to condemn riparian rights would accomplish significant reallocations of water rights toward irrigation.”).
81. Act of Mar. 7, 1887, ch. 34, 1887 Cal. Stat. 29.
82. See DONALD J. PISANI, *FROM THE FAMILY FARM TO AGRIBUSINESS: THE IRRIGATION CRUSADE IN CALIFORNIA AND THE WEST, 1850-1931*, at 129 (1984). The idea of creating collective institutions to manage irrigation came along well before 1865. See Leshy, *supra* note 17, at 345.
83. See THOMPSON ET AL., *supra* note 57, at 773-74.
84. See REISNER, *supra* note 33, at 109 (describing the struggles of early irrigation districts and characterizing the Wright Act as “in most ways a failure”).



western states had irrigation district laws,<sup>85</sup> and many had adopted similar laws for a variety of other types of local water-management agencies, often including reclamation districts and flood control districts.<sup>86</sup> With authorizations in place, landowners began forming districts.<sup>87</sup> There are now thousands of water districts in the West.<sup>88</sup>

In the twentieth century, additional incentives for district creation emerged. One key incentive, which led some private water companies to convert themselves into water districts, was the ability to issue bonds.<sup>89</sup> Additionally, the U.S. Bureau of Reclamation, a federal agency, began building dams and reservoirs and offering the stored water for sale, usually at heavily subsidized prices.<sup>90</sup> However, the Bureau of Reclamation generally would not sell water directly to individual farmers; it operated as a wholesaler, with water districts serving as retail distributors.<sup>91</sup> In California, a state agency – the Department of Water Resources – played a similar role, constructing a massive water project and offering the stored water for sale to local-government entities.<sup>92</sup> Some districts formed for the specific purpose of obtaining those water contracts.<sup>93</sup>

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85. See PISANI, *supra* note 82, at 281.

86. The list of types is long. The California Water Code, for example, refers to irrigation districts, county water districts, California water districts, California water storage districts, reclamation districts, county waterworks districts, water replenishment districts, levee districts, municipal water districts, and water conservation districts. CAL. WATER CODE §§ 20500-76501 (West 2024).

87. While the Wright Act launched irrigation district formation in California, early districts often struggled, and it was not until World War I that the movement to form irrigation districts took off. See PISANI, *supra* note 82, at 356; HUNDLEY, *supra* note 54, at 240-41.

88. Some water districts were created through district-specific legislation. See, e.g., CAL. WATER CODE APP. §§ 99-1 to 99-29 (West 2024) (creating and defining the powers of the Kern County Water Agency).

89. Leshy, *supra* note 17, at 354 (quoting U.S. DEP'T OF AGRIC., CIRCULAR NO. 934, IRRIGATION-ENTERPRISE ORGANIZATIONS 13 (1953)).

90. See *Peterson v. U.S. Dep't of Interior*, 899 F.2d 799, 805-06 (9th Cir. 1990) (“In this litigation, the Department of the Interior has calculated the average present value of the irrigation subsidy for recipients of water from the Central Valley Project to be \$1,850 per acre.”).

91. See Leshy, *supra* note 17, at 359-69; Shoked, *supra* note 51, at 1986 (noting that the Bureau helped spur a national trend of special district proliferation).

92. See HUNDLEY, *supra* note 54, at 276-302.

93. See, e.g., *History*, PLEASANT VALLEY WATER DIST., <https://pleasantvalleywaterdistrict.com/about/history> [<https://perma.cc/Y64M-GGEV>] (“The Pleasant Valley Water District was formed . . . for the purpose of contracting with the U.S. Bureau of Reclamation . . .”); KERN DELTA WATER DIST., <https://www.kerndelta.org> [<https://perma.cc/BN2D-HER2>] (“Kern Delta Water District was formed . . . for the purposes of protecting the Kern River Water Rights serving certain lands within the District, and to provide a means for contracting water through the State Water Project . . .”).

The laws creating these districts vary both within and between states, yet several features tend to recur. First, although state law authorized the creation of districts, formation and boundary setting occur through local and landowner-driven initiatives. Water districts generally form through a multistep process, usually beginning with a landowners' petition to either a local court or the board of supervisors of the county or counties in which the district would be located.<sup>94</sup> In some states, like Idaho or Montana, the court or board can approve the petition and authorize the district;<sup>95</sup> in others, like Nevada, the role of the board is limited to verifying the petition and then setting up an election to determine whether the district will come into existence.<sup>96</sup> Where elections occur, if a majority of the landowners' votes favor forming the district, it forms.<sup>97</sup> Consequently, landowners on the losing side of the vote can be compelled to pay for water service from the district, and nonlandowners living within the service territory have no say in the district's creation.<sup>98</sup> Sometimes, residential landowners are excluded from the vote;<sup>99</sup> in New Mexico, for example, the franchise is limited to "resident freeholder[s]," defined as "owner[s] of agricultural land within the limits of the district."<sup>100</sup> Boundary changes typically follow similar procedures, with landowners holding the exclusive right to petition for annexation and to approve or contest expansions and retractions.<sup>101</sup>

Second, landowners often have dominance — de jure as well as de facto — over district governance. Irrigation district governance did not start this way; consistent with the ideals of the Progressive Era, the Wright Act stated that district

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94. See, e.g., ARIZ. REV. STAT. ANN. §§ 48-2903 to -2905 (2024) (establishing procedures for the creation of irrigation districts); OR. REV. STAT. § 545.025 (2023) ("The petition must be signed by a majority of the owners of land or 50 owners of land within the exterior boundaries of the proposed district."); IDAHO CODE § 43-102 (2024); MONT. CODE ANN. § 85-7-101 (2023).
95. See, e.g., MONT. CODE ANN. §§ 85-7-104 to -105 (2023) (calling for court action on petitions); IDAHO CODE § 43-108 (2024) (calling for an election after board review of the petition).
96. NEV. REV. STAT. § 539.043-.045 (2023).
97. See, e.g., *id.* § 539.055.
98. See HUNDLEY, *supra* note 54, at 101 ("[E]ven the most reluctant property owner had to go along").
99. See, e.g., *In re Cent. Irrigation Dist.*, 49 P. 354, 359-60 (Cal. 1897) (holding that owners of "town lots" — that is, property that was within the district boundaries but that would not be used for irrigated agriculture — could not vote on district formation, even though their lands would be included).
100. N.M. STAT. ANN. § 73-6-21 (2024); *id.* § 73-6-18 (giving voting rights to "resident freeholders").
101. E.g., COLO. REV. STAT. § 37-41-133 (2024) (giving any "holder of title, or color of title" the right to petition for expansion); *id.* § 37-41-137 (allowing "a majority of the qualified electors of the district" to protest an expansion).

boards would be elected by the registered voters in their service area.<sup>102</sup> For major landowners, popular elections were a concern; the large landowners would pay much of the cost to finance the district's operations, and they feared a system in which their voting power was not commensurate with their economic contribution.<sup>103</sup> At their behest, state governments soon created another governance model, which predominates to the present day.<sup>104</sup> In this alternative model, only landowners within the district's service area can vote,<sup>105</sup> and votes are allocated on the basis of landownership, just as a corporation allocates voting shares on the basis of stock ownership.<sup>106</sup> Typically, also, only landowners can be elected to the board,<sup>107</sup> and in some states, only agricultural landowners may become

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102. See PISANI, *supra* note 82, at 253 (“Wright assumed . . . that irrigation districts were ‘political divisions’ in which property qualifications for voting were prohibited by both the state constitution and the civil code.”); HUNDLEY, *supra* note 54, at 100 (“The [Wright Act] represented an effort to foster community values, promote small family farms, and curb the monopolistic excesses produced by the rampant individualism of California’s pioneer capitalists.”).
103. See PISANI, *supra* note 82, at 259-60 (“Is it right for the many men of small holdings who generally hang around those little villages and the men with no holdings at all except a cigarette holder, to waltz up to the polls on election day, and cast their vote, and thereby become the dictator to the man with his thousands of acres of land?” (quoting *Who Shall*, WKLY. COLUSA SUN, Oct. 29, 1887, at 1, 1)); DOUGLAS R. LITTLEFIELD, *RULING THE WATERS: CALIFORNIA’S KERN RIVER, THE ENVIRONMENT, AND THE MAKING OF WESTERN WATER LAW* 147-49 (2020) (describing opposition to one-person, one-vote districts in California’s Kern County).
104. Mason Gaffney & Merrill Goodall, *New Life for the Octopus: How Voting Rules Sustain the Power of California’s Big Landowners*, 75 AM. J. ECON. & SOCIO. 649, 668-69 (2016).
105. See, e.g., CAL. WATER CODE § 41000 (West 2024) (“Only the holders of title to land are entitled to vote at a general election.”); CAL. WATER CODE APP. § 33-6(a) (West 2024) (establishing landowner-weighted voting for the Palo Verde Irrigation District).
106. See, e.g., CAL. WATER CODE § 41001 (West 2024) (“Each voter may vote in each precinct in which any of the land owned by him is situated and may cast one vote for each one hundred dollars (\$100), or fraction thereof, worth of his land, exclusive of improvements, minerals, and mineral rights therein, in the precinct.”).
107. See, e.g., COLO. REV. STAT. § 37-42-108(1) (2024) (“The board of directors consists of three landowners of the district . . .”). Some laws require that the directors also be residents of the district. *E.g., id.* Others allow nonresident landowners to serve as directors. *E.g.,* CAL. WATER CODE § 34700 (West 2024) (imposing no residency requirement for California water district directors, and also allowing representatives of corporate landowners to serve as directors).

board members.<sup>108</sup> Consequently, a relatively small number of landowners can effectively control a district, even if that district is nominally a public agency.<sup>109</sup>

Third, the districts are legally powerful. Once formed, they enjoy a range of governmental powers, including the ability to use eminent domain to acquire land and associated water rights.<sup>110</sup> Their funding comes largely from sales of water, giving them regular and secure revenue streams, and some also can levy taxes or exactions.<sup>111</sup> Some have expanded into other fields, like supplying electricity.<sup>112</sup> They can also alter their boundaries, merge with other districts, or dissolve.<sup>113</sup> And they face minimal requirements for state oversight. Most states' water district statutes say little to nothing about state roles in reviewing district boundaries, operations, or governance. The presumption, instead, is that district governance remains local.

This legal power led to, and intertwined with, political power. By design, water districts are specialized entities with focused interests, small controlling groups, and relatively stable revenue streams. Basic public-choice theory predicts that such entities will be effective in political processes,<sup>114</sup> and any experienced participant in western water politics can verify that theory and reality correspond. Both individually and through lobbying associations, water districts are

108. *E.g.*, *Hancock v. Bisnar*, 132 P.3d 283, 284, 287-89 (Ariz. 2006) (holding that nonagricultural elected board members could not serve, even in a district with mostly nonagricultural land, and discussing the court's prior analysis of analogous cases from California).

109. See HUNDLEY, *supra* note 54, at 241; Tejon Ranch Co., Annual Report (Form 10-K) 20 (Mar. 8, 2016), <https://www.sec.gov/Archives/edgar/data/96869/000009686916000013/trc-2015123110k.htm> [<https://perma.cc/J5CZ-Q7E8>] (referring to “[t]he Tejon-Castac Water District, or TCWD, a local water district serving only our land and land we have sold in TRCC [Tejon Ranch Commerce Center]”). Norris Hundley, Jr.'s assessment of the consequences of landowner dominance is stark: “Thus did the family farm and local democracy fade from the California countryside.” HUNDLEY, *supra* note 54, at 241.

110. See, *e.g.*, *Hidalgo Cnty. Water Improvement Dist. No. 3 v. Hidalgo Cnty. Irrigation Dist. No. 1*, 669 S.W.3d 178, 181-82 (Tex. 2023) (describing a water district's eminent-domain proceeding against an irrigation district); *Riverside Irrigation Dist. v. Lamont*, 572 P.2d 151, 152 (Colo. 1977) (“Irrigation districts have the statutory right, under certain circumstances, to exercise the power of eminent domain.” (citing COLO. REV. STAT. § 38-2-101 (2024))).

111. See *Water Special Districts: A Look at Governance and Public Participation*, LEGIS. ANALYST'S OFF. 4-5 (Mar. 2002), [https://www.lao.ca.gov/2002/water\\_districts/Special\\_Water\\_Districts.pdf](https://www.lao.ca.gov/2002/water_districts/Special_Water_Districts.pdf) [<https://perma.cc/9CSN-DAFP>] (identifying revenue streams).

112. See Leshy, *supra* note 17, at 361-62.

113. See, *e.g.*, WASH. REV. CODE §§ 57.04.100, 57.24.040, 87.03.535 (2024) (establishing local control over district dissolutions, annexations, and consolidations); MONT. CODE ANN. § 85-7-1001 (2023) (establishing local control over district dissolutions); COLO. REV. STAT. § 37-3.5-101 (2024) (same).

114. See William N. Eskridge, Jr., *Politics Without Romance: Implications of Public Choice Theory for Statutory Interpretation*, 74 VA. L. REV. 275, 285-87 (1988) (explaining public-choice theory's account of the political advantages of small, focused groups).

constant presences in state legislative debates, and they cultivate close relationships with federal and state politicians.<sup>115</sup> They tend to be magnets for state and federal funding.<sup>116</sup> And they are recurring participants in water-related administrative proceedings and litigation.<sup>117</sup>

These systems of power overlaid patterns of property ownership with complex and problematic histories. In the late nineteenth and early twentieth centuries, people who owned land and water rights and created water districts were overwhelmingly white and male, or were corporations with white, male leadership; at the time, few others had wealth and power.<sup>118</sup> Likewise, the federal reclamation program, which subsidized agricultural development and helped irrigation districts develop senior and powerful water rights, provided its benefits

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115. See, e.g., Michael Wines & Jennifer Medina, *Farmers Try Political Force to Twist Open California's Taps*, N.Y. TIMES (Dec. 30, 2015), <https://www.nytimes.com/2015/12/31/us/farmers-try-political-force-to-twist-open-californias-taps.html> [<https://perma.cc/HAQ9-USWT>]; Kitty Felde & Viveca Novak, *The Politics of Drought: California Water Interests Prime the Pump in Washington*, OPENSECRETS (Apr. 10, 2014, 8:00 AM), <https://www.opensecrets.org/news/2014/04/the-politics-of-drought-california-water-interests-prime-the-pump-in-washington> [<https://perma.cc/3WCW-CH4S>] (describing political spending by the Westlands Water District).
116. See, e.g., Press Release, Bureau of Reclamation, President Biden's Bipartisan Infrastructure Law to Provide \$25.5 Million for Water Efficiency Projects in Eight Western States (June 21, 2022), <https://www.usbr.gov/newsroom/news-release/4247> [<https://perma.cc/8BQA-7VDH>] (describing grants "to safeguard local water supplies in the face of severe western drought," many of them to water districts); Press Release, Bureau of Reclamation, Reclamation Selects 22 Projects to Receive \$17.3 Million to Improve Water Efficiency in West (May 16, 2022), <https://www.usbr.gov/newsroom/news-release/4213> [<https://perma.cc/TG3K-TJRB>].
117. See, e.g., De Young, *supra* note 33, at 8 ("Litigation may be preferred as a political strategy by private interests who are able to use water districts as mechanisms for distributing costs throughout the jurisdiction."); Lois Henry, *Change Is Coming to the Westlands Water District Board. What Will It Mean for the Future of the District and Its Controversial General Manager?*, SJV WATER (Oct. 27, 2022), <https://sjvwater.org/change-is-coming-to-the-westlands-water-district-board-what-will-it-mean-for-the-future-of-the-sprawling-district-and-its-controversial-general-manager> [<https://perma.cc/627X-6TRG>] (describing Westlands Water District, which is one of the nation's largest agricultural water districts, as "well known for its many lawsuits").
118. See PISANI, *supra* note 82, at 442. As Donald J. Pisani notes, an exception, prior to World War II, was the substantial landholdings of Japanese American farmers. *Id.* Much of those landholdings were lost when those farmers were forcibly removed from their land and placed in internment camps during World War II. See Caroline Hatano, *The Loss of My Family's Farm Is a Loss for California's Japanese Agricultural Legacy*, KQED (Sept. 30, 2022), <https://www.kqed.org/news/11927282/the-loss-of-my-family-s-farm-is-a-loss-for-californias-japanese-agricultural-legacy> [<https://perma.cc/SF74-5V7Y>] (describing the drastic effects of internment).

almost exclusively to white farmers.<sup>119</sup> Though Native American tribes held arable land and, in theory, water rights,<sup>120</sup> the Bureau of Reclamation spent its money elsewhere.<sup>121</sup> Even as the West has diversified, those old distributions of power and wealth remain sticky.<sup>122</sup> Good data are hard to come by, but western water rights and governance structures appear to remain highly skewed toward white men.<sup>123</sup> Landowner-governed water institutions therefore are both grounded in, and reinforce, old and racialized distributions of wealth and power.

Though grounded in old traditions, these districts now operate in a changing world. Many formed and obtained their water rights in an era when pumping rivers dry was seen as responsible water management and most modern environmental laws did not yet exist.<sup>124</sup> Values have changed. Similarly, social-justice concerns have assumed increasing prominence in water management; as a consequence, the need to provide water to disadvantaged rural communities and tribes has sometimes led to changes in water management – or, at least, to calls for major reform.<sup>125</sup> In many parts of the West, declining groundwater levels are

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119. See William J. Brennan, Jr., Second Draft of Dissenting Opinion, *Wyoming v. United States*, No. 88-309 (recirculated June 23, 1989), reprinted in Andrew C. Mergen & Sylvia F. Liu, *A Misplaced Sensitivity: The Draft Opinions in Wyoming v. United States*, 68 U. COLO. L. REV. 683, 752-53 (1997) (summarizing huge disparities in expenditures on an irrigation project for a Native American reservation as compared to a neighboring non-Native American project); Kaylee Ann Newell, *Federal Water Projects, Native Americans and Environmental Justice: The Bureau of Reclamation's History of Discrimination*, 20 ENVIRONS 40, 40-44 (1997) (summarizing this history of disparities).
120. See *Winters v. United States*, 207 U.S. 564, 576-77 (1908) (holding that with the creation of a reservation, the United States reserves water rights sufficient to support the purposes of the reservation); Robert T. Anderson, *Indian Water Rights, Practical Reasoning, and Negotiated Settlements*, 98 CALIF. L. REV. 1133, 1139-44 (2010) (describing *Winters* and subsequent reserved-right cases).
121. See Newell, *supra* note 119, at 45-47.
122. See Megan Horst & Amy Marion, *Racial, Ethnic, and Gender Inequities in Farmland Ownership and Farming in the U.S.*, 36 AGRIC. & HUM. VALUES 1, 1 (2019).
123. See Ian James, 'A Foundation of Racism': California's Antiquated Water Rights System Faces New Scrutiny, L.A. Times (Mar. 6, 2023, 5:00 AM PT), <https://www.latimes.com/environment/story/2023-03-06/is-californias-antiquated-water-rights-system-racist> [<https://perma.cc/9D3T-QC6H>] (describing data analyses that used the race and ethnicity typically associated with last names to conclude that water rights were primarily held by, and water institutions primarily controlled by, white people).
124. See *United States v. Gerlach Live Stock Co.*, 339 U.S. 725, 728 (1950) (faulting California's Sacramento and San Joaquin Rivers for letting their waters "thriflessly dissipate . . . in the Pacific tides").
125. See, e.g., Camille Pannu, Comment, *Drinking Water and Exclusion: A Case Study from California's Central Valley*, 100 CALIF. L. REV. 223, 227-37 (2012) (describing drinking-water-access problems in California); Ian James, *The Klamath Dams Are Being Removed. Inside the Efforts to*



an increasing threat to all water users.<sup>126</sup> And climate change already is impacting water availability – a trend that is likely to worsen, with increasing droughts and floods exacerbating the traditional conflicts of western water management.<sup>127</sup> These changes raise important questions about whether water management still is – if it ever was – an appropriate area for elite control.

### B. Challenges to Water Districts

The emergence of thousands of water districts took place with the enthusiastic support of many Westerners, both within and outside political establishments.<sup>128</sup> But it brought controversy, too. Other forms of water governance were competing for the stage.<sup>129</sup> Water districts also were enmeshed in long-running controversies over efforts to limit the size of farms served by federal irrigation projects.<sup>130</sup> More generally, water districts emerged during eras when Americans were widely debating the roles of government, private business, and institutions that operated as hybrids of the two.<sup>131</sup> The districts were not immune from these controversies; indeed, the range of water district forms partly reflects the efforts

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*Restore a Scarred Watershed*, L.A. TIMES (Mar. 24, 2024, 3:00 AM PT), <https://www.latimes.com/environment/story/2024-03-24/klamath-river-restoration> [<https://perma.cc/CCX9-JPZS>] (describing the Klamath River restoration, which was driven partly by tribal activism).

126. See Mira Rojanasakul, Christopher Flavelle, Blacki Migliozi & Eli Murray, *America Is Using Up Its Groundwater Like There's No Tomorrow*, N.Y. TIMES (Aug. 28, 2023), <https://www.nytimes.com/interactive/2023/08/28/climate/groundwater-drying-climate-change.html> [<https://perma.cc/4PBU-SJG2>] (mapping groundwater depletion across the nation).
127. See generally Hervé Douville et al., *Water Cycle Changes, in Climate Change 2021: The Physical Science Basis*, INTERGOVERNMENTAL PANEL ON CLIMATE CHANGE 1055 (Valerie Masson-Delmotte et al. eds., 2021) (describing the impacts of climate change), [https://www.ipcc.ch/report/ar6/wg1/downloads/report/IPCC\\_AR6\\_WGI\\_FullReport\\_small.pdf](https://www.ipcc.ch/report/ar6/wg1/downloads/report/IPCC_AR6_WGI_FullReport_small.pdf) [<https://perma.cc/3L2H-VUYJ>].
128. As Pisani has observed, local districts were much more popular than the likely alternative of state-run water districts. PISANI, *supra* note 82, at 152.
129. Two of the main alternatives were municipal water departments, like the Los Angeles Department of Water and Power or Denver Water, and private companies. The private options included nonprofit cooperatives and for-profit utilities. See Thompson, *supra* note 25, at 687-89 (describing different types of water providers).
130. See HUNDLEY, *supra* note 54, at 262-72.
131. See, e.g., Shoked, *supra* note 51, at 1978-86 (describing legal debates over the creation and classification of special districts); William Boyd, *Public Utility and the Low-Carbon Future*, 61 UCLA L. REV. 1614, 1636-51 (2014) (describing the evolution of public utilities).



of competing political forces to assert control over water governance – and over public-service governance more generally.<sup>132</sup>

Those controversies played out in state and federal legislative proceedings. They also generated litigation, some of it focused on the governance structures of districts. Litigants argued that districts were unconstitutional because they were functionally private entities assuming public functions;<sup>133</sup> challenged districts' ability to compel inclusion of and payment from unwilling landowners;<sup>134</sup> and challenged districts' voting schemes.<sup>135</sup> Most of the challengers lost,<sup>136</sup> and the few wins did not last. In the most notable victory for challengers, the Idaho Supreme Court declared landowner-only voting unconstitutional.<sup>137</sup> But Idaho then simply amended its constitution to create an irrigation district exception to voting protections.<sup>138</sup>

These litigation defeats did not mean an end to contestation over water district forms. During the middle part of the twentieth century, some state legislatures formed general voting water districts, often in areas seeing increased suburban development. Between the 1940s and the early 1970s, for example, the California legislature created dozens of county water districts, with boards elected through popular voting.<sup>139</sup> In some parts of the state – typically closer to the coasts – these entities are now the main water institutions.<sup>140</sup> But by 1970,

132. See, e.g., Sarah S. Elkind, *Industry and Water Distribution in California: The East Bay Municipal Utility District, 1920-1930*, 18 ENV'T HIST. REV. 63, 65-67 (1994) (describing the political forces influencing the formation of a major Bay Area water district).

133. See, e.g., *Turlock Irrigation Dist. v. Williams*, 18 P. 379, 379 (Cal. 1888).

134. E.g., *Fallbrook Irrigation Dist. v. Bradley*, 164 U.S. 112, 178 (1896) (rejecting a series of arguments from an unwilling landowner); *Indian Cove Irrigation Dist. v. Prideaux*, 136 P. 618, 621 (Idaho 1913) (following *Fallbrook*).

135. See, e.g., *Tarpey v. McClure*, 213 P. 983, 989-90 (Cal. 1923) (rejecting a challenge to landowner-weighted voting); *In re Bonds of Madera Irrigation Dist.*, 28 P. 272, 278 (Cal. 1891) (rejecting a challenge to popular voting).

136. See, e.g., *People ex rel. Shaklee v. Milan*, 5 P.2d 249, 251-52, 254 (Colo. 1931) (holding that even small landowners could be excluded from voting); *In re Walker River Irrigation Dist.*, 195 P. 327, 331-32 (Nev. 1921) (rejecting a challenge to landowner voting); *Bd. of Dirs. v. Peterson*, 128 P. 837, 839-40 (Or. 1912) (same).

137. *Pioneer Irrigation Dist. v. Walker*, 119 P. 304, 308-09 (Idaho 1911).

138. See IDAHO CONST. art. I, § 20 (explicitly authorizing landowner voting for irrigation districts).

139. See CAL. WATER CODE APP. §§ 48-1 to 113-100 (West 2024) (creating dozens of county water agencies).

140. See, e.g., *About Us*, SONOMA WATER, <https://www.sonomawater.org/about-us> [<https://perma.cc/VZN9-2TML>] (describing the Sonoma County Water Agency's lead role in supplying water to Sonoma and northern Marin counties); *About Valley Water*, VALLEY WATER, <https://www.valleywater.org> [<https://perma.cc/4G6K-RP92>] (describing the operations of the Santa Clara Valley Water District).

the California legislature's efforts to create new popularly elected water agencies had largely ended. More recently, the Texas legislature has created groundwater conservation districts, which now manage many of the state's most important aquifers.<sup>141</sup> These, too, often have popular voting for their boards.<sup>142</sup> But in many other regulatory arenas, landowner-dominated agencies continue to predominate.

The 1970s and 1980s brought a second wave of courtroom challenges. This time, litigants turned to the federal courts, where they hoped to build on the one-person, one-vote principles established in *Baker v. Carr* and other landmark Supreme Court cases.<sup>143</sup> The first water district case to reach the U.S. Supreme Court was *Salyer Land Co. v. Tulare Lake Water Basin Storage District*.<sup>144</sup> The primary combatants in *Salyer* were the largest agricultural landowner in the state of California—J.G. Boswell Co.—and the Salyer family, another major landowner and the Boswell family's occasionally violent rival for local power.<sup>145</sup> The case might therefore seem like a rich men's feud dressed up in the guise of constitutional principles. But the plaintiffs also included nonlandowning residents of the district's service area, many of whom had suffered flooding partly brought on by

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141. See *Groundwater Conservation Districts*, TEX. WATER DEV. BD., [https://www.twdb.texas.gov/groundwater/conservation\\_districts/index.asp](https://www.twdb.texas.gov/groundwater/conservation_districts/index.asp) [<https://perma.cc/HJ2J-4HFH>] (describing districts and providing links to more detailed discussion of their history and authorization legislation).

142. See TEX. WATER CODE ANN. §§ 36.001-.457 (West 2023) (creating the law of groundwater conservation districts and not calling for landowner-only voting); see also *League of United Latin Am. Citizens v. Edwards Aquifer Auth.*, 313 F. Supp. 3d 735, 749 (W.D. Tex. 2018) (“[A]ll residents within the jurisdictional boundaries of the EAA are allowed to vote.”).

143. *Baker v. Carr*, 369 U.S. 186, 192-95 (1962) (describing the allegation that arbitrary legislative apportionment violates the Equal Protection Clause); see *Reynolds v. Sims*, 377 U.S. 533, 563-68 (1964) (holding that the Equal Protection Clause requires equal state-legislative representation of voters regardless of where they reside); *Avery v. Midland Cnty.*, 390 U.S. 474, 480-81 (1968) (preventing local-government units with general powers from being apportioned among single-member districts of substantially unequal populations); *Cipriano v. City of Houma*, 395 U.S. 701, 706 (1969) (succeeding in challenging voting limits for revenue bonds); *Kramer v. Union Free Sch. Dist. No. 15*, 395 U.S. 621, 630-62 (1969) (rejecting limits on school-district voting); *Hadley v. Junior Coll. Dist.*, 397 U.S. 50, 54-55, 58 (1970) (applying one-person, one-vote principles to state and local elections for persons performing public functions); *City of Phoenix v. Kolodziejski*, 399 U.S. 204, 214-15 (1970) (succeeding in challenging limits on voting for municipal general-obligation bonds).

144. 410 U.S. 719 (1973).

145. See MARK ARAX & RICK WARTZMAN, *THE KING OF CALIFORNIA: J.G. BOSWELL AND THE MAKING OF A SECRET AMERICAN EMPIRE* 325-27 (2003) (discussing the Salyer-Boswell rivalry); *id.* at 153-54 (discussing Clarence Salyer's involvement in the murder of a union activist).

the district's water-management choices.<sup>146</sup> It was unconstitutional, they argued, for a district over which they had no voting power to exert such control over their lives.<sup>147</sup>

The Supreme Court disagreed. It held that a water storage district was so different from the general-governance entities considered in previous one-person, one-vote cases that restricted and weighted voting was allowable.<sup>148</sup> The appellee district, the Court explained,

although vested with some typical governmental powers, has relatively limited authority. Its 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 . . . . Not only does the district not exercise what might be thought of as “normal governmental” authority, but its actions disproportionately affect landowners. All of the costs of district projects are assessed against land by assessors in proportion to the benefits received. Likewise, charges for services rendered are collectible from persons receiving their benefit in proportion to the services.<sup>149</sup>

The Court also noted that the district only delivered water and provided flood control, that fewer than one hundred people lived in its service area, and that the service area contained no “towns, shops, hospitals, or facilities designed to improve the quality of life.”<sup>150</sup>

Justice Douglas dissented, arguing that the district's flood-control responsibilities made it much more akin to a general-service government than the majority had let on.<sup>151</sup> He also noted that J.G. Boswell Co. held a controlling share of the district, and that, because the outcomes of elections were preordained, “there ha[d] been no election since 1947.”<sup>152</sup> “The corporate voter,” he bluntly concluded, “is in the saddle.”<sup>153</sup> But a majority of his colleagues were unpersuaded that anything was constitutionally amiss.

*Salyer* struck some advocates as distinguishable, largely because of the Court's description of a lightly populated district with relatively limited

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146. *Salyer*, 410 U.S. at 726; see also *id.* at 735 (Douglas, J., dissenting) (highlighting that the flooding threatened some residents more than it threatened J.G. Boswell Co., which had a controlling share of the district votes).

147. See *id.* at 726 (majority opinion).

148. *Id.* at 728-29.

149. *Id.*

150. *Id.* at 723, 728-29.

151. *Id.* at 738 (Douglas, J., dissenting).

152. *Id.* at 735.

153. *Id.*

functions. Litigants had other reasons to be hopeful; in voting-rights cases involving non-water-related special districts, plaintiffs had scored some notable wins.<sup>154</sup> But the Court soon expanded upon its *Salyer* precedent. In *Ball v. James*,<sup>155</sup> challengers brought a similar case against Arizona's Salt River Project Agricultural Improvement and Power District, which had become a major urban water and energy supplier and was using its urban energy sales to subsidize its agricultural water deliveries.<sup>156</sup> The result was the same.<sup>157</sup> In a 5-4 decision, the Court held that water districts were sufficiently different from normal governing institutions and that one-person, one-vote principles need not apply.<sup>158</sup> The Court explained:

[T]hough the state legislature has allowed water districts to become nominal public entities in order to obtain inexpensive bond financing, the districts remain essentially business enterprises, created by and chiefly benefiting a specific group of landowners . . . . As in *Salyer*, the nominal public character of such an entity cannot transform it into the type of governmental body for which the Fourteenth Amendment demands a one-person, one-vote system of election.<sup>159</sup>

Again, the case provoked a strong dissent. Justice White criticized “the strained logic that the provision of water and electricity to several hundred thousand citizens is a ‘peculiarly narrow function,’”<sup>160</sup> and he pointed out that the district’s ability to levy taxes, its exemption from state taxation, and its exercise of eminent domain all marked it as a governmental entity – as did the explicit text of Arizona statutes.<sup>161</sup> Again, however, the majority was more persuaded by the analogy to a corporation and by the governance functions the district did not provide than by White’s arguments. To this day, the Salt River Project Agricultural Improvement and Power District uses landowner voting.<sup>162</sup>

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154. See, e.g., *Hadley v. Junior Coll. Dist.*, 397 U.S. 50, 59 (1970); *Kramer v. Union Free Sch. Dist.* No. 15, 395 U.S. 621, 622 (1969).

155. 451 U.S. 355 (1981).

156. *Id.* at 365.

157. Justice White switched his position, joining the majority in *Salyer* but writing the dissent in *Ball*. See *id.* at 374-89 (White, J., dissenting).

158. *Id.* at 368 (majority opinion).

159. *Id.*

160. *Id.* at 374 (White, J., dissenting).

161. *Id.* at 377-79.

162. See *SRP Governance*, SALT RIVER PROJECT, <https://www.srpnet.com/about/governance-leadership/governance-elections> [<https://perma.cc/J9NZ-NYUH>].

In state proceedings, challenges to landowner-voting requirements generally fared no better. Courts in Arizona<sup>163</sup> and Montana<sup>164</sup> and an attorney-general opinion in Kansas<sup>165</sup> all rejected voting-rights challenges, generally following *Salyer* and *Ball*. There were limited exceptions. In California, the courts rejected two districts' voting and board-service restrictions, but they did so based on the facts of each case rather than by categorically rejecting such limits.<sup>166</sup> The Washington Supreme Court held that an irrigation district could not compel payments from small landowners while denying them the right to vote, which led to modest changes in Washington's irrigation district law.<sup>167</sup> But with limited exceptions and adjustments, states left traditional voting systems intact. Indeed, even as challenges to weighted voting were playing out, Texas amended its statutory code to allow existing districts to convert to landowner voting.<sup>168</sup> Even more recently, California has repeatedly enacted legislation taking popular voting away from some irrigation districts.<sup>169</sup>

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163. *Hancock v. Bisnar*, 132 P.3d 283, 289 (Ariz. 2006) (holding that agricultural-landowner-only voting limits were constitutional, even though most of the district's service area had shifted to other land uses); see *Porterfield v. Van Boening*, 744 P.2d 468, 469 (Ariz. Ct. App. 1987) (upholding the ability of foreign corporations to designate nonstate residents as representative voters).

164. *Johnson v. Killingsworth*, 894 P.2d 272, 275 (Mont. 1995).

165. Kan. Att'y Gen. Op. No. 2002-24 (May 9, 2002), 2002 WL 1012928, at \*5.

166. See *Choudhry v. Free*, 552 P.2d 438, 444 (Cal. 1976) (Richardson, J., concurring) (rejecting a state statute limiting board service to landowners, but only as applied to the Imperial Irrigation District, which the court described as "singular among irrigation districts"); *Bjornestad v. Hulse*, 281 Cal. Rptr. 548, 557-58 (Ct. App. 1991) (rejecting limits for a single small district); *Johnson v. Lewiston Orchards Irrigation Dist.*, 584 P.2d 646, 649-50 (Idaho 1978) (rejecting the use of landowner-weighted voting in a district that had become primarily an urban supplier).

167. *Foster v. Sunnyside Valley Irrigation Dist.*, 687 P.2d 841, 846, 849-50 (Wash. 1984) (allowing weighted voting but rejecting the complete exclusion of small landowners from voting).

168. See *Ward Cnty. Irrigation Dist. No. 1 v. Red Bluff Water Power Control Dist.*, 170 S.W.3d 696, 703 (Tex. App. 2005) (describing this history).

169. See CAL. WATER CODE §§ 20527.5-.13 (West 2024) (establishing landowner-only voting for eleven irrigation districts). The bills creating this change were enacted between 1968 and 2000. See 1968 Cal. Stat. 1321, 1321 (establishing landowner-only voting for Jackson Valley Irrigation District); 1969 Cal. Stat. 397, 397 (establishing landowner-only voting for Camp Far West Irrigation District); 1969 Cal. Stat. 1107, 1107 (establishing landowner-only voting for Montague Water Conservation District); 1971 Cal. Stat. 1179, 1179 (establishing landowner-only voting for Provident Irrigation District); 1975 Cal. Stat. 681, 681 (establishing landowner-only voting for Cordua Irrigation District); 1986 Cal. Stat. 1729, 1729 (establishing landowner-only voting for Big Springs Irrigation District and Princeton-Codora-Glenn Irrigation District); 1992 Cal. Stat. 5385, 5385 (establishing landowner-only voting for Glenn Colusa Irrigation District); 1996 Cal. Stat. 1748, 1748 (establishing landowner-only voting for

These cases need not have been the end of legal debates over water district governance. *Salyer* and *Ball* only settled, under rational-basis review, questions about whether weighted voting runs afoul of the U.S. Constitution,<sup>170</sup> and nothing in either decision mandates that states continue using those systems. Nor did any of the state decisions hold that landowner-favoring provisions were compelled. Indeed, in a concurring opinion in *Ball*, Justice Powell emphasized that the Court's position was grounded in deference to state legislative choices.<sup>171</sup> If it chose to do so, a state could amend the statutes that authorize weighted voting, either to moderate the schemes or to eliminate them entirely.<sup>172</sup> More generally, states could have adopted broader suites of water district governance reforms.

Instead, however, with the ability to press federal constitutional claims mostly lost, reform advocates largely retreated from the fray. In the years since *Ball*, efforts at water district governance reform have been rare.<sup>173</sup> A key question going forward is whether the rarity of debate and near absence of legislative intervention continue to make sense. And the time may be increasingly opportune for change. The traditional power of water districts rested on a combination of agricultural political power and the relative obscurity of water issues. But as the West continues to urbanize, that power may wane.<sup>174</sup> And climate change is forcing the realization, both in the United States and elsewhere, that our water challenges are too grave to be ignored.<sup>175</sup>

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Richvale Irrigation District); 2000 Cal. Stat. 8365, 8371 (establishing landowner-only voting for James Irrigation District); 2000 Cal. Stat. 8365, 8373 (establishing landowner-only voting for Corcoran Irrigation District).

170. *But see* Dyble, *supra* note 42, at 1486-1508 (arguing that when California water districts assume roles as groundwater regulators, as they are now doing under California's SGMA, property-based and weighted voting becomes unconstitutional).

171. *See* *Ball v. James*, 451 U.S. 355, 372-74 (1981) (Powell, J., concurring) (emphasizing this legislative power and explaining that it supported his decision to find weighted voting constitutional).

172. *See id.*

173. I base this claim on Westlaw-based reviews of state water codes. Except for modest reforms that addressed things like voting dates, I was unable to find evidence of significant legislative reform of water districts. And even those modest reforms were not pervasive.

For a rare example of a recent—though unsuccessful—reform attempt, see Flavelle & Rojanasakul, *supra* note 40 (describing failed legislation in Kansas).

174. *See* Todd Fitchette, *Is California Agriculture at a Political Tipping Point?*, W. FARM PRESS (Jan. 4, 2019), <https://www.farmprogress.com/farm-business/is-california-agriculture-at-a-political-tipping-point-> [https://perma.cc/5R9V-URNE].

175. *See generally* Douville et al., *supra* note 127 (describing how climate change will affect water systems).

## II. PROBLEMS WITH WATER DISTRICTS

From the perspective of many Westerners, water districts are a success story. For decades, they have delivered water to some of the most lucrative agricultural operations in the world and to growing urban areas. Americans routinely read about water crises – dire predictions of the West’s impending demise have been a cottage industry for years<sup>176</sup> – but most urban taps continue to run and most farms continue to operate, often quite profitably.<sup>177</sup> Some districts have also operated at the cutting edge of water-policy innovation, developing sophisticated systems of water marketing, banking, conservation, and recycling, for example.<sup>178</sup> Examples of good water management are not unique to water districts – municipal departments innovate too<sup>179</sup> – but there are many ways in which many water districts are succeeding.

One might infer from those successes that water district governance either is not a problem or is not a sufficiently serious problem to be worthy of attention. Indeed, the scarcity of reform initiatives suggests that such a view is widely held. But this Part contests that view. It discusses three primary and overlapping problems with contemporary water district governance: democracy deficits, archaic boundaries, and the thwarting of important state policy goals. It also shows that these are not just theoretical concerns.

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176. See, e.g., Sasha Abramsky, *The American West Is Running Out of Water*, NATION (Apr. 21, 2023), <https://www.thenation.com/article/environment/american-west-water> [https://perma.cc/8JLZ-UAWW]. See generally REISNER, *supra* note 33 (arguing that western water use is fragile and unsustainable).
177. See Rachel Becker, *Californians Used More Water as State Braces for Another Dry Year*, CALMATTERS (Mar. 15, 2022), <https://calmatters.org/environment/2022/03/california-water-use-up> [https://perma.cc/6RXC-PWSK]; Josué Medellín-Azuara, Alvar Escrivá-Bou, José M. Rodríguez-Flores, Spencer A. Cole, John Abatzoglou, Joshua H. Viers, Nicholas Santos & Daniel A. Summer, *Economic Impacts of the 2020-22 Drought on California Agriculture*, CAL. DEP’T OF FOOD & AGRIC. 14-15 (Nov. 22, 2022), [https://wsm.ucmerced.edu/wp-content/uploads/2023/01/Economic\\_Impact\\_CA\\_Drought\\_V02-1.pdf](https://wsm.ucmerced.edu/wp-content/uploads/2023/01/Economic_Impact_CA_Drought_V02-1.pdf) [https://perma.cc/8KLV-E54P] (showing that most lands remained in cultivation and that economic losses were generally below ten percent of normal output, even in years of extreme drought).
178. See, e.g., Michael Kiparsky, Kathleen Miller, Phoebe Goulden, Anita Milman & Dave Owen, *Groundwater Recharge for a Regional Water Bank: Kern Water Bank, Kern County, California*, 5 CASE STUD. ENV’T art. no. 1223400, at 2-9 (2021) (describing several water districts’ operation of an innovative – and controversial – groundwater bank); Turlock Irrigation Dist., *Turlock Irrigation District to Pilot First-in-the-Nation Water-Energy Nexus Project*, ACWA (Feb. 9, 2022), <https://www.acwa.com/innovation/turlock-irrigation-district-to-pilot-first-in-the-nation-water-energy-nexus-project> [https://perma.cc/DN28-BSWQ].
179. See, e.g., *Mayor Garcetti Announces Lowest Water Use in the Month of August on Record*, L.A. DEP’T WATER & POWER (Sept. 13, 2022), <https://www.ladwpnews.com/mayor-garcetti-announces-lowest-water-use-in-the-month-of-august-on-record> [https://perma.cc/A2TL-CWNR].



### A. *Democracy Deficits*

Americans often celebrate local government. From Alexis de Tocqueville's accounts of New England town halls<sup>180</sup> to modern legal writers' odes to local innovation,<sup>181</sup> treating local governments as, in Justice Powell's words, entities where "democratic self-government is best exemplified" is a longstanding American tradition.<sup>182</sup> But, as this Section explains, that tradition is premised on theoretical accounts that many water districts do not fit. Nor does the practical reality offer a better argument for water district governance. And the most common defense of water district governance — that it is more analogous to corporate governance, so democratic principles need not or cannot apply<sup>183</sup> — is difficult to reconcile with the roles water districts play.

#### 1. *Undemocratic Legal Frameworks*

The classic argument for localism is that local governments are more responsive to their constituents. This is so, advocates claim, partly because local governments' proximity to the people gives them a better understanding of local conditions than faraway state or federal leaders.<sup>184</sup> Local governments also are arguably more accessible to voters, and because they often serve narrower slices of the public, their decisions can be more fine-tuned to local preferences.<sup>185</sup> Local-democracy proponents also often identify "foot voting" as an advantage of local governance.<sup>186</sup> If people do not like the way a local government governs, they can move, and leaving a local jurisdiction is usually much easier than leaving

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180. See ALEXIS DE TOCQUEVILLE, *DEMOCRACY IN AMERICA* 37 (Henry Reeve trans., Wordsworth Editions Ltd. 1998) (1835).

181. E.g., Katrina M. Wyman & Danielle Spiegel-Feld, *The Urban Environmental Renaissance*, 108 CALIF. L. REV. 305, 337-47 (2020) (describing urban environmental initiatives); Paul A. Diller, *Why Do Cities Innovate in Public Health? Implications of Scale and Structure*, 91 WASH. U. L. REV. 1219, 1224-43 (2014) (describing innovations).

182. *Garcia v. San Antonio Metro. Transit Auth.*, 469 U.S. 528, 577 (1985) (Powell, J., dissenting) (internal quotation marks omitted). In that passage, Justice Powell lumped state and local government together. See *id.*

183. See *supra* notes 158-159 and accompanying text.

184. See Owen, *supra* note 49, at 192.

185. See Michael W. McConnell, *Federalism: Evaluating the Founders' Design*, 54 U. CHI. L. REV. 1484, 1493 (1987) (reviewing RAOUL BERGER, *FEDERALISM: THE FOUNDERS' DESIGN* (1987)) ("The first, and most axiomatic, advantage of decentralized government is that local laws can be adapted to local conditions and local tastes, while a national government must take a uniform — and hence less desirable — approach.").

186. See, e.g., Ilya Somin, *How Foot Voting Enhances Political Freedom*, 56 SAN DIEGO L. REV. 1089, 1090 (2019).

a nation or even a state.<sup>187</sup> Finally, for special districts, proponents can add an argument grounded in specialization. Because special districts' responsibilities are limited, and voters know it, those voters can seek the leaders who will handle particular issues in ways those voters prefer rather than select a generalist leader who just offers a workable collection of views across the wide range of subjects touched by the government.<sup>188</sup> These reasons have led some commentators to identify special districts as particularly promising sites for democratic engagement. Heather K. Gerken, for example, has referred to them as "sites of minority rule that best fit the voice paradigm."<sup>189</sup>

There are reasons, however, to be skeptical of that account, both for water districts and, to a lesser extent, for local governance more generally. Drawing on political traditions dating back to James Madison, critics have argued that local government is particularly prone to factionalism and to capture by elite groups.<sup>190</sup> Critics also contest the premise that local government is more accountable,<sup>191</sup> especially as the demise of local media limits people's ability to find out what local governments are doing.<sup>192</sup> Empirical studies suggest that these problems are particularly acute for local-government entities with specialized missions.<sup>193</sup> A few highly interested and relatively powerful people may get what they want, but their wants are often to the detriment of the greater good.<sup>194</sup>

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187. See Carol M. Rose, *Takings, Federalism, Norms*, 105 YALE L.J. 1121, 1134 (1996) (reviewing WILLIAM A. FISCHER, *REGULATORY TAKINGS: LAW, ECONOMICS, AND POLITICS* (1995)).
188. See MULLIN, *supra* note 32, at 34-35 (summarizing this argument); *Water Special Districts: A Look at Governance and Public Participation*, *supra* note 111, at 7 ("For those candidates (such as a supervisor or city council member) campaigning on a broad slate of responsibilities, including water, voters may not be as familiar with their water policy positions.").
189. Gerken, *supra* note 32, at 8; see *id.* at 30 ("If you care about participation, look down."). Heather K. Gerken's account focuses on special districts generally; she does not single out water districts.
190. Nestor M. Davidson, *Cooperative Localism: Federal-Local Collaboration in an Era of State Sovereignty*, 93 VA. L. REV. 959, 962 (2007). See generally BRYAN F. SCHAFFNER, JESSE H. RHODES & RAYMOND J. LA RAJA, *HOMETOWN INEQUALITY: RACE, CLASS, AND REPRESENTATION IN AMERICAN LOCAL POLITICS* (2020) (arguing that people of color and poor people are systematically underrepresented in local governance).
191. See David Schleicher, *Why Is There No Partisan Competition in City Council Elections?: The Role of Election Law*, 23 J.L. & POL. 419, 426 (2007) ("[L]ocal elections are very inefficient means of translating voter preferences into government policy."); SCHAFFNER ET AL., *supra* note 190, at 32 (describing the state of local democracy as "dismal").
192. See Christina Koningisor, *Transparency Deserts*, 114 NW. U. L. REV. 1461, 1522-25 (2020) (describing the decline of local media and the consequences for local government).
193. See J. ERIC OLIVER, *LOCAL ELECTIONS AND THE POLITICS OF SMALL-SCALE DEMOCRACY* 83-85 (2012) (explaining that special purpose districts may be more prone to elite capture).
194. *Id.*

Those reasons suggest that even water districts with one-person, one-vote governance structures will be prone to elite capture.<sup>195</sup>

The laws governing many water districts magnify these potential elite advantages, generally in rather unobvious ways. Democracy rests on accountability, and accountability generally requires the ability to vote.<sup>196</sup> But in every western state, landowner voting is a common feature of water district governance.<sup>197</sup> If only landowners can vote, and if only large landowners have meaningful shares of the votes, then for many—perhaps most—people within the water district’s service area, that opportunity for accountability does not exist.<sup>198</sup> Nor can they indirectly influence elections through mechanisms like campaign donations, for the nonlandowners who are frozen out of voting are unlikely to be able to make donations large enough or coordinate effectively enough to grab candidates’ attention. Those nonlandowners, or even small landowners, may care about how much groundwater a district pumps, what conservation programs it adopts, or how it prioritizes water deliveries. But in many districts, they cannot back those preferences with the power of voting.

Another key mechanism of democratic accountability is running for office—or encouraging someone with aligned interests to do so. Yet in many water districts, a person who only rents land cannot run.<sup>199</sup> This is true even for some districts, like California’s irrigation districts, that have popular voting for board members.<sup>200</sup> Consequently, nonlandowners who seek change through the ballot box can only obtain that change by finding sympathetic agricultural landowners to represent their interests.

In practice, the democracy deficits can be even more extreme than this account might suggest. Media coverage of most water district elections is nearly

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195. See generally SCHAFFNER ET AL., *supra* note 190 (arguing that wealthy people are overrepresented even in local governments with popular elections).

196. See, e.g., Jacob E. Gersen & Matthew C. Stephenson, *Over-Accountability*, 6 J. LEGAL ANALYSIS 185, 189 (2014) (linking voting and accountability). But see Nicholas O. Stephanopoulos, *Accountability Claims in Constitutional Law*, 112 NW. U. L. REV. 989, 994-95 (2018) (describing voters’ ignorance of elected officials’ performance).

197. See *infra* Appendix Table 1.

198. See *infra* Figure 1 and accompanying text (showing the prevalence of landowner-weighted voting in California groundwater governance).

199. See, e.g., CAL. WATER CODE § 34700 (West 2024) (limiting board service on California water districts to landowners); OR. REV. STAT. § 545.043 (2023) (requiring a board member to be “a bona fide owner, or a shareholder of a bona fide corporate owner, of land situated in the division”); WASH. REV. CODE § 87.03.051 (2024) (“No director shall be qualified to take or retain office unless the director holds title or evidence of title to land within the district.”).

200. See CAL. WATER CODE § 21100(a) (West 2024) (“Each director . . . shall be a voter and a landowner in the district . . .”).

nonexistent.<sup>201</sup> Off-cycle elections, which remain common practice for many water districts, selectively limit voter turnout.<sup>202</sup> And the elections themselves can be quite rare.<sup>203</sup> If a seat is not contested, no election needs to be held, and the incumbent can simply continue to serve.<sup>204</sup> Similarly, if a seat is vacated before the term ends, the existing board usually can appoint a replacement member, who then may run unopposed in the next election.<sup>205</sup> The limited studies on water district voting have found that such uncontested elections are routine.<sup>206</sup> Indeed, from water districts' perspective, the absence of contested elections often is cause for celebration, for avoiding elections is, among other things, a good way to save money.<sup>207</sup>

The classic defense of these voting limits and structures is that water districts are more like companies than governments. But the analogy has never fit some water districts all that well, and in some places, it is growing weaker. Water districts get benefits that most private companies do not get, including eminent-domain authority, preferential access to bonds, and preferential tax status.<sup>208</sup>

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201. I base this assertion on the extreme difficulty I had, while researching this Article, in finding local media coverage of water district voting or governance.
202. See, e.g., CAL. WATER CODE § 41300 (West 2024) (calling for California water storage district elections “on the first Tuesday after the first Monday in March in each odd-numbered year”); WASH. REV. CODE § 87.03.080 (2024) (“An election of directors in an irrigation district shall be held on the second Tuesday of December of each year . . .”); NEV. REV. STAT. § 539.115 (2023) (calling for April election dates); see also Sarah F. Anzia, *Election Timing and the Electoral Influence of Interest Groups*, 73 J. POL. 412, 412 (2011) (“When cities and school districts hold elections at times other than state and national elections, voter turnout is far lower than when those elections are held at the same time as presidential or gubernatorial elections.”).
203. See Charlotte Weiner, *Untapped Opportunity: Local Water Boards and the Fight for Water Justice*, CMTY. WATER CTR. 5 (Mar. 2018), <https://static1.squarespace.com/static/5e83c5f78f0db40cb837cfb5/t/5f3cb0928612216ba0e56f80/1597812906592/Untapped+Opportunity.pdf> [<https://perma.cc/2VQP-W8PH>] (finding that water boards in California’s San Joaquin Valley rarely had contested elections).
204. E.g., S.D. CODIFIED LAWS § 46A-4-30 (2024) (allowing an incumbent to continue serving if an election is uncontested); WASH. REV. CODE § 87.03.075 (2024) (same).
205. E.g., CAL. ELEC. CODE § 10515 (West 2024) (allowing the “supervisory authority” – which, for water districts, would be the board of directors – to appoint new directors to vacant and uncontested seats); WASH. REV. CODE § 87.03.081 (2024) (allowing appointments by the county board of supervisors).
206. See Weiner, *supra* note 203, at 5.
207. See, e.g., *AVEK Avoids Election; Three Incumbents Retain their Seats*, ANTELOPE VALLEY-E. KERN WATER AGENCY (2020), <https://www.avek.org/avek-avoids-election-three-incumbents-retain-their-seats> [<https://perma.cc/Q3H7-DKTE>] (noting that the absence of an election “saves AVEK more than \$120,000”).
208. See *Ball v. James*, 451 U.S. 355, 378 (1981) (White, J., dissenting) (discussing eminent domain, bonds, and taxation). There are partial exceptions to these generalizations. Utilities often have

Unlike private water-distribution utilities, they are generally not subject to price regulation.<sup>209</sup> They can receive government water contracts that are not available to private entities.<sup>210</sup> Likewise, they can and do receive grant money – often large amounts of it – through programs uniquely targeted at public entities.<sup>211</sup> They enjoy governmental tort immunities<sup>212</sup> and exemptions from employment laws.<sup>213</sup> Unlike publicly traded companies, for which ownership information is publicly available, water districts can maintain secrecy about who their major landowners are.<sup>214</sup> And some states exempt special districts from some of the public-law obligations applicable to other local-government entities.<sup>215</sup> There are other ways in which some water districts are functionally similar to private entities; they generally are funded primarily by water sales or assessments on benefited land rather than tax dollars, which means the same entities that hold the most votes are also paying the most money.<sup>216</sup> But in many respects –

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eminent-domain authority, *see* Alexandra B. Klass, *Takings and Transmission*, 91 N.C. L. REV. 1079, 1101-03 (2013), but they are subject to rate regulation. Nonprofit corporations also have preferential tax status. But I am not aware of other privately controlled entities that hold as many different traditionally (if not exclusively) governmental powers as water districts.

209. *See* Leshy, *supra* note 17, at 356 (noting this difference).
210. *See* 43 U.S.C. § 511 (2018) (authorizing the Bureau of Reclamation to enter contracts with “irrigation districts”); *SWP Water Contractors*, CAL. DEP’T WATER RES., <https://water.ca.gov/programs/state-water-project/management/swp-water-contractors> [<https://perma.cc/6ZES-85JY>] (“DWR administers long-term water supply contracts to 29 local water agencies.”).
211. *See, e.g., WaterSMART Water and Energy Efficiency Grants*, U.S. BUREAU RECLAMATION (Sept. 9, 2024), <https://www.usbr.gov/watersmart/weeg> [<https://perma.cc/B9LQ-QD4Y>] (describing grant programs and recent awards); Press Release, Westlands Water Dist., Westlands Water District Awarded \$7.6 Million Grant by the California Department of Water Resources (May 3, 2022), <https://wwd.ca.gov/wwd-media/press-release-5-3-2022> [<https://perma.cc/TKD3-MYPK>].
212. *See* *Krenning v. Heart Mountain Irrigation Dist.*, 200 P.3d 774, 785 (Wyo. 2009) (upholding the dismissal of tort claims against a district employee who had beaten an irrigator with a shovel); Arvo Van Alstyne, *Governmental Tort Liability: Judicial Lawmaking in a Statutory Milieu*, 15 STAN. L. REV. 163, 192-93 (1963) (discussing water district immunity and compiling cases).
213. *See* *Johnson v. Arvin-Edison Water Storage Dist.*, 95 Cal. Rptr. 3d 53, 55-56 (Ct. App. 2009) (holding a water district to be exempt from state laws regulating wages, hours, and meal breaks).
214. *See* *Using EDGAR to Research Investments*, U.S. SEC. & EXCH. COMM’N (Sept. 5, 2018), <https://www.sec.gov/filings/edgar-guide> [<https://perma.cc/LQ9F-8PQV>].
215. Shoked, *supra* note 51, at 1990 (“[S]uch districts are generally excluded from the civil service, procurement, and pension fund regulations that govern public agencies.”).
216. *See* *Salyer Land Co. v. Tulare Lake Basin Water Storage Dist.*, 410 U.S. 719, 729 (1973) (describing the district’s funding arrangements, which were important to the Court’s conclusion that landowner-weighted voting was constitutional).

particularly those that benefit their large landowners—water districts are governmental.

## 2. *Function Creep and California Groundwater Governance*

In addition to enjoying privileges that are typically governmental, water districts serve distinctly governmental functions. Often these functions go well beyond providing water deliveries to landowning customers, and these functions can expand over time. This is a longstanding concern. In *Salyer*, Justice Douglas noted in his dissenting opinion that the district, in addition to supplying water, had important flood-control responsibilities.<sup>217</sup> Likewise, in *Ball*, Justice White pointed out in dissent that the Salt River District supplied power to millions.<sup>218</sup> Function creep continues to be an issue, with a particularly compelling example coming from California’s recent implementation of SGMA.

California enacted SGMA in 2014, during one of the worst droughts in state history.<sup>219</sup> The goal of the law was to reverse California’s decades-long practice of pumping more water out of its aquifers than natural recharge put in.<sup>220</sup> Over time, that pumping had reduced California’s groundwater storage by amounts best measured in cubic kilometers,<sup>221</sup> lowering water tables by tens and, in some places, hundreds of feet and causing destructive subsidence of the ground surface.<sup>222</sup> During the drought, thousands of wells ran dry, often in poor rural communities where people had neither alternative water supplies nor the financial resources to dig and operate deeper wells.<sup>223</sup>

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217. *Id.* at 735 (Douglas, J., dissenting).

218. *Ball v. James*, 451 U.S. 355, 389 (1981) (White, J., dissenting).

219. See Leahy, *supra* note 5, at 34-39.

220. See Owen, *supra* note 49, at 183-84.

221. See Pang-Wei Liu, James S. Famiglietti, Adam J. Purdy, Kyra H. Adams, Avery L. McEvoy, John T. Reager, Raja Bindlish, David N. Wiese, Cédric H. David & Matthew Rodell, *Groundwater Depletion in California’s Central Valley Accelerates During Megadrought*, 13 NATURE COMM’NS art. no. 7825, at 4 (2022) (“The groundwater loss rate for the second phase of drought . . . was  $42.7 \pm 5.8$  mm/yr ( $6.56 \pm 0.89$  km<sup>3</sup>).”); Barringer, *supra* note 13 (“NOAA estimates say that 140 cubic kilometers of groundwater have been pumped out of the Central Valley in the past century.”).

222. See Matthew Lees, Rosemary Knight & Ryan Smith, *Development and Application of a 1D Compaction Model to Understand 65 Years of Subsidence in the San Joaquin Valley*, 58 WATER RES. RSCH. art. no. e2021WR031390, at 17-18 (2022) (describing the extent of subsidence).

223. See Scott Jasechko & Debra Perrone, *California’s Central Valley Groundwater Wells Run Dry During Recent Drought*, 8 EARTH’S FUTURE art. no. e2019EF001339, at 9 (2020).



California responded to this crisis with its first statewide law requiring sustainable groundwater management.<sup>224</sup> The law mandated a creative governance structure, which set the stage for newfound water district powers and roles.<sup>225</sup> Rather than giving state agencies sole responsibility for groundwater regulation, the statute called for local agencies—called groundwater sustainability agencies (GSAs)—to form and then to develop and implement groundwater sustainability plans.<sup>226</sup> Those plans would be subject to state-level review and would need to meet general standards set by state agencies, but frontline responsibility for managing one of the state’s most important resources would be at the local level.<sup>227</sup> The statute also left agency formation largely to local discretion. While it specified that counties would serve as the default GSAs in areas where no other district formed, the state otherwise would not decide where agencies would form, who would control agency governance, or what agency boundaries would be.<sup>228</sup>

Into the void stepped water districts.<sup>229</sup> Many formed GSAs within their existing service territories, sometimes in combination with other districts or government entities and sometimes independently.<sup>230</sup> In California’s San Joaquin Valley—the state’s largest agricultural area and the area facing the worst

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224. See *Sustainable Groundwater Management Act (SGMA)*, CAL. DEP’T WATER RES., <https://water.ca.gov/programs/groundwater-management/sgma-groundwater-management> [<https://perma.cc/U5ZX-CDCK>] (describing the passage of the three bills that make up SGMA).

225. See Owen, *supra* note 49, at 184.

226. CAL. WATER CODE § 10723 (West 2024) (allowing the creation of “groundwater sustainability agencies” (GSAs)); *id.* §§ 10727–10728.4 (discussing groundwater sustainability plans).

227. Owen, *supra* note 49, at 184.

228. See CAL. WATER CODE §§ 10723–10724 (West 2024). Section 10723 does identify a list of specific entities that will serve as groundwater sustainability agencies, but that list only covers a small portion of the state’s groundwater basins. See *id.* § 10723(c)(1).

229. See Linda Estelí Méndez-Barrientos, Alyssa DeVincentis, Jessica Rudnick, Ruth Dahlquist-Willard, Bridget Lowry & Kennedy Gould, *Farmer Participation and Institutional Capture in Common-Pool Resource Governance Reforms. The Case of Groundwater Management in California*, 33 SOC’Y & NAT. RES. 1486, 1497 (2020) (describing the power of water districts and the relative exclusion of nondistrict landowners).

230. See generally Esther Conrad, Janet Martinez, Tara Moran, Marcelle DuPraw, David Ceppos & William Blomquist, *To Consolidate or Coordinate? Status of the Formation of Groundwater Sustainability Agencies in California*, STAN. WATER IN THE W. AND MARTIN GOULD CTR. FOR CONFLICT RESOL. AND CTR. FOR COLLABORATIVE POL’Y 1 (Dec. 2016), [https://water-inthewest.stanford.edu/sites/default/files/GSA-Formation-Report\\_1.pdf](https://water-inthewest.stanford.edu/sites/default/files/GSA-Formation-Report_1.pdf) [<https://perma.cc/D9W3-682R>] (showing the types of entities that had taken steps to form GSAs). In a few areas, special legislation authorized the inclusion of private companies in GSA governing boards. See, e.g., CAL. WATER CODE APP. § 143–501 (West 2024) (stating that the board of directors for the North Fork Kings Groundwater Sustainability Agency will include representatives from several private companies).



groundwater problems – most of the land area now falls within the territories of GSAs formed partly or even entirely by water districts. Consequently, water districts are now the primary groundwater-use regulators in large areas where groundwater is a crucially important – for some people, indispensable – public resource, and where decades of wrenching decisions will need to be made about groundwater allocation and use.<sup>231</sup>

The stakes are enormous. Studies predict that bringing San Joaquin Valley’s groundwater pumping down to sustainable levels could require bringing between 500,000 and 900,000 acres out of cultivation, with tens of thousands of associated job losses.<sup>232</sup> A failure to achieve sustainability, however, will mean legal noncompliance, continued land subsidence, huge pumping costs, and thousands of wells running dry.<sup>233</sup> Yet many of the people who live in the San Joaquin Valley cannot vote for or serve on the governing boards that will make these decisions.

Figure 1 maps this story. To create the figure, I determined what kinds of entities hold board seats in GSAs and assigned scores to the different entities. I then created average scores for each GSA. Entities with landowner-only voting and landowner-only boards received scores of one, as did private entities. Entities with popular voting but landowner-only boards received scores of five. Entities with popular voting and any-voting-resident boards received scores of ten.<sup>234</sup> Thus, for a board with three members from landowner-only-voting

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231. See Maurice Hall, *Farms, the Environment, and the Future of Water*, CALMATTERS (Sept. 12, 2019), <https://calmatters.org/commentary/2019/09/sustainable-groundwater> [<https://perma.cc/HWN4-GB72>] (“In some areas, [SGMA implementation] will mean cutting long-term water use by 30% to 50%.”).
232. See Ellen Hanak, Andrew Ayres, Caitlin Peterson, Alvar Escrivá-Bou, Spencer Cole & Zaira Joaquín Morales, *Managing Water and Farmland Transitions in the San Joaquin Valley*, PUB. POL’Y INST. OF CAL. 9 (Sept. 2023), <https://www.ppic.org/?show-pdf=true&docraptor=true&url=https%3A%2F%2Fwww.ppic.org%2Fpublication%2Fmanaging-water-and-farm-land-transitions-in-the-san-joaquin-valley%2F> [<https://perma.cc/UR27-EZDB>] (estimating the fallowed acres and economic impacts under a range of scenarios).
233. See Bostic et al., *supra* note 7, at 2 (estimating the threats to wells); *Land Subsidence in California*, USGS, <https://www.usgs.gov/centers/land-subsidence-in-california> [<https://perma.cc/N3J9-HZTC>]; Helcio Blum & Jing Ke, *Estimates of Groundwater Pumping Electricity Use and Costs in California*, LAWRENCE BERKELEY NAT’L LAB’Y 1 (June 2023), <https://www.energy.ca.gov/sites/default/files/2023-06/CEC-500-2023-041.pdf> [<https://perma.cc/339A-QU47>] (“The energy footprint of groundwater . . . increases with falling water tables.”).
234. There is a wide variety of GSA board arrangements, and some entities do not fit cleanly into this categorization. Fresno State University, for example, shares a seat on a GSA board. *North Kings Groundwater Sustainability Agency Joint Powers Agreement* § 3.01 (Oct. 2016), [https://northkingsgsa.org/wp-content/uploads/2021/04/North\\_Kings\\_GSA\\_JPA\\_.pdf](https://northkingsgsa.org/wp-content/uploads/2021/04/North_Kings_GSA_JPA_.pdf) [<https://perma.cc/99CP-528W>]. Others attempt to give a balanced range of private groups

districts, two members from irrigation districts with at-large voting but landowner-only boards, and two members from county governments with at-large voting, the equation would be  $((3 \times 1) + (2 \times 5) + (2 \times 10)) / 7$ , and the GSA would receive a score of 4.71. GSAs with the lowest scores, and thus the least democratic voting arrangements, appear in black, and areas with highest scores, and thus the most democratic voting arrangements, appear in the palest shade of gray, with intermediate shades in between (the white areas do not have SGMA-regulated groundwater basins).

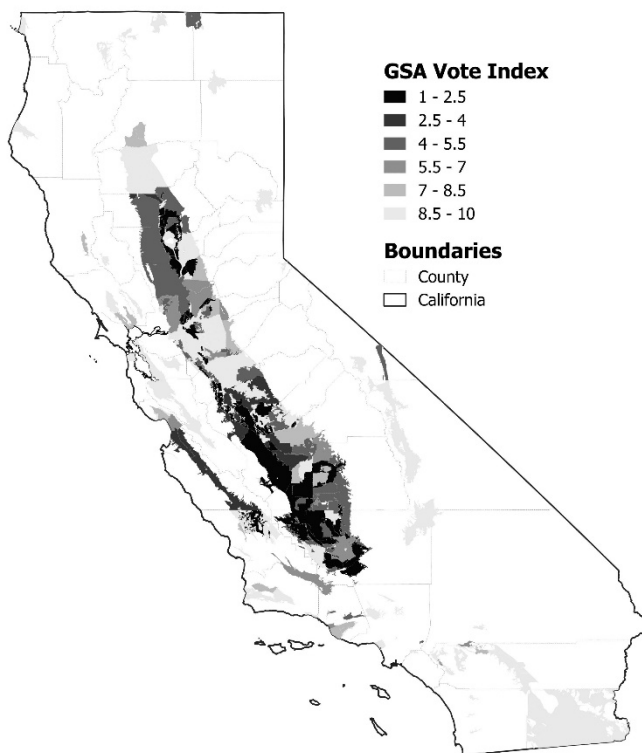
The primary point of the map is straightforward: in most of California's groundwater basins, landowner-dominated entities have major roles in groundwater governance.<sup>235</sup> In many areas, they are the primary or even the only local entities controlling implementation of a crucially important regulatory program.

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board representation. *E.g.*, *Joint Exercise of Powers Agreement Establishing the Salinas Valley Basin Groundwater Sustainability Agency* § 6.5 (Dec. 2016), <https://sgma.water.ca.gov/portal/service/gsadocument/download/2184> [<https://perma.cc/V3SK-EWpz>] (requiring the appointments of nominees selected by agricultural interests, a private water utility, disadvantaged communities, and environmental groups). Consequently, and as would be true for any simplified index, this map elides some nuance.

235. As secondary points, the map illustrates the geographic fragmentation of groundwater governance and the variety of governing arrangements.

**FIGURE 1. GSA VOTING ARRANGEMENTS**<sup>236</sup>



The practical consequences of that control may be problematic. In many of the black areas on the map, groundwater levels are predicted to decline, even with implementation of groundwater sustainability plans, and many private and public water-system wells are projected to run dry.<sup>237</sup> The state also has rejected most of the groundwater sustainability plans from the San Joaquin Valley, where

<sup>236</sup>. Ben Witeck (U.C. Berkeley, B.S. 2025) and I gathered the data for this map from water district websites and from the joint powers agreements creating GSAs, most of which are available on the website of the California Department of Water Resources. Ben used QGIS to map the data. Molly Bruce, a research fellow at U.C. Berkeley’s Center for Law, Energy, and the Environment, helped with mapping and provided guidance and suggestions.

<sup>237</sup>. See Bostic et al., *supra* note 7, at 2, 4 (mapping projected groundwater-level declines and de-watered wells).

undemocratic governance structures are most prevalent.<sup>238</sup> Causal relationships are difficult to prove empirically, largely because the short time period since SGMA implementation began and the relatively small number of data points limit the possibilities for statistical analyses. Perhaps democratically elected governments would have managed water-allocation tradeoffs in the same ways. But it is plausible, at least, to expect that if the residents whose wells will run dry had voting power commensurate with their numbers, they might have persuaded water managers to allocate the burdens of groundwater scarcity in different ways. Water managers might not plan for so many wells to run dry if those wells' users could vote the managers out of office.

SGMA is unique to California, but the tendency for organizations to expand their reach and power is not, at least where that expansion benefits the people who control the organization.<sup>239</sup> Indeed, in other states, entities with landowner-weighted voting already take on a variety of other governance functions. In Oklahoma, for example, conservancy districts, which have landowner voting and boards, are general-purpose managers of waterways, with the power "of diverting or in whole or in part eliminating watercourses."<sup>240</sup> South Dakota's watershed districts, which also have landowner voting and boards, have similarly broad powers,<sup>241</sup> as do conservation districts in Montana.<sup>242</sup> Indeed, some of these powers grew dramatically in 2023, when the Supreme Court decided *Sackett v. Environmental Protection Agency*,<sup>243</sup> a case that cut Clean Water Act protections for many streams and wetlands,<sup>244</sup> giving these landowner-controlled local entities considerably freer hands. Districts also have broad power to build infrastructure, even, sometimes, in places outside district boundaries and where landowners do not want it.<sup>245</sup> Likewise, the basic reasons why water districts

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238. See Bland, *supra* note 11.

239. See Daryl J. Levinson, *Empire-Building Government in Constitutional Law*, 118 HARV. L. REV. 915, 923-24, 932-34 (2005) (summarizing the conventional wisdom that government agencies will seek to expand their domains, but also observing that this conventional wisdom only makes sense where the expansion serves the interests of the people who control the agency).

240. See, e.g., OKLA. STAT. tit. 82, § 541.B.1.f (2024).

241. S.D. CODIFIED LAWS § 46A-14-4 (2024) (explaining the broad powers of watershed districts).

242. See MONT. CODE ANN. § 85-9-101 (2023) (giving broad missions to conservation districts).

243. 598 U.S. 651 (2023).

244. See Dave Owen, *Sackett v. Environmental Protection Agency and the Rules of Statutory Misinterpretation*, 48 HARV. ENV'T L. REV. 333, 346-47 (2024).

245. See, e.g., *E. Valley Water Dist. v. Or. Water Res. Comm'n*, 539 P.3d 789, 798 (Or. Ct. App. 2023) (describing an Oregon water district's plan, which the court rejected on other grounds, to flood land owned by farmers who were not part of the district and did not want to give up their land).

assumed such importance in California groundwater governance – namely, they had the advantage of already existing and saw opportunities to advance their interests – will arise in other circumstances. The problem of undemocratic entities serving important public functions is quite real, and as new water-management challenges emerge, or states try to respond more effectively to old ones, the problem could continue to grow.

### B. Boundaries

For well over a century, since John Wesley Powell published his famous – and famously disregarded – report on water in the West,<sup>246</sup> commentators and water managers have been arguing that jurisdictional boundaries should correspond to watersheds.<sup>247</sup> Consolidating governance by watershed makes sense for several reasons.<sup>248</sup> Absent consolidated governance, water managers will have incentives to extract water from other jurisdictions and to send their pollution across downstream or downgradient borders.<sup>249</sup> Even if water managers show admirable restraint, fragmentation creates coordination challenges.<sup>250</sup> It also can lead to – or exacerbate – democracy deficits. If governing entities are tiny, they are unlikely to attract attention from an increasingly consolidated media.<sup>251</sup> If they offer services that hold low salience to the typical voter, individual citizens' attention may not pick up the slack.<sup>252</sup> That means small governing units may operate with little transparency, little oversight, and little effectiveness.

Additional problems can arise when local governing units choose their own boundaries. If a governing unit is functioning as an economically rational actor,

246. POWELL, *supra* note 65.

247. See, e.g., Donald Worster, *Watershed Democracy: Recovering the Lost Vision of John Wesley Powell*, 23 J. LAND RES. & ENV'T L. 57, 64-65 (2003) (arguing for a revitalization of John Wesley Powell's vision).

248. Because watersheds occur at a range of scales – the Colorado River watershed, for example, includes the sub-watersheds of its tributary rivers, which include the sub-sub-watersheds of their tributary streams, and so on – consolidated governance is usually a matter of degree. The typical goal, and my suggestion here, is to reduce the number of boundaries that cut across watersheds or aquifers, not to eliminate such boundaries entirely.

249. See Owen, *supra* note 49, at 192-93; Matthew E. Kahn, Pei Lei & Daxuan Zhao, *Water Pollution Progress at Borders: The Role of Changes in China's Political Promotion Incentives*, 7 AM. ECON. J. 223, 225 (2015) (“Upstream regions often locate polluting enterprises close to borders so that pollution is carried downstream.”).

250. See Dave Owen, *Mapping, Modeling, and the Fragmentation of Environmental Law*, 2013 UTAH L. REV. 219, 236-38 (describing coordination challenges).

251. See Koningisor, *supra* note 192, at 1522-23 (describing gaps in media coverage).

252. See OLIVER, *supra* note 193, at 58, 83-85 (describing local-election voting patterns for low-salience issues).

it may seek to exclude areas that will be more expensive to serve.<sup>253</sup> Often, that will mean excluding communities that are poorer and whose infrastructure is in worse shape. This means communities that have already faced disadvantages will likely become increasingly neglected over time.<sup>254</sup> Boundaries also sometimes get drawn for racial reasons.<sup>255</sup> Many municipalities have track records of selectively annexing predominantly white communities, even when those annexations could not be explained on economic grounds.<sup>256</sup> One of many negative consequences of these patterns of inclusion and exclusion is that many poor communities, often populated primarily by people of color, have less access to basic government services, including water supply, than their neighbors.<sup>257</sup>

These problems suggest that some higher-level governing institution, like the state, should play a role in defining water district boundaries. But in the rural West, that generally has not happened. Instead, western states leave decisions about district formation up to local discretion.<sup>258</sup> Likewise, water districts make their own choices about expansion, typically without state oversight or review.<sup>259</sup> Districts can merge or split, and occasionally they do so, generally without any state-government role in the process.<sup>260</sup> Western state statutes say nothing about

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253. See Richard Briffault, *Our Localism: Part I—The Structure of Local Government Law*, 90 COLUM. L. REV. 1, 19–22 (1990).

254. See *id.*

255. See generally Richard Thompson Ford, *Geography and Sovereignty: Jurisdictional Formation and Racial Segregation*, 49 STAN. L. REV. 1365 (1997) (discussing racially segregated electoral districts and local governments).

256. See Anderson, *supra* note 16, at 935–40. See generally Ben Marsh, Allan M. Parnell & Ann Moss Joyner, *Institutionalization of Racial Inequality in Local Political Geographies*, 31 URB. GEOGRAPHY 691 (2010) (providing examples of racially motivated annexations).

257. See Jonathan K. London, Amanda L. Fencil, Sara Watterson, Yasmina Choueiri, Phoebe Seaton, Jennifer Jarin, Mia Dawson, Alfonso Aranda, Aaron King, Peter Nguyen, Camille Pannu, Laurel Firestone & Colin Bailey, *Disadvantaged Unincorporated Communities and the Struggle for Water Justice in California*, 14 WATER ALTS. 520, 540 (2021); Laura Bliss, *Why California's Poorest Towns Still Can't Connect to Water*, BLOOMBERG CITYLAB (Oct. 8, 2015, 3:14 PM EDT), <https://www.bloomberg.com/news/articles/2015-10-08/the-drought-forces-water-system-consolidation-in-california-s-central-valley> [<https://perma.cc/23PT-5WLR>].

258. See, e.g., COLO. REV. STAT. § 37-41-101(1) (2024) (contemplating local formation decisions); OR. REV. STAT. § 545.025(1) (2023) (same). A prominent counterexample is the California legislature's creation, in the mid-twentieth century, of county water districts, some in mixed urban-rural areas. See *supra* notes 139–140 and accompanying text.

259. See, e.g., CAL. WATER CODE §§ 34306, 36502 (West 2024) (calling for water district boards to decide whether to include additional lands); ARIZ. REV. STAT. ANN. §§ 48-2941 to -2943 (2024) (same).

260. See, e.g., OR. REV. STAT. § 545.131 (2023) (giving the merging districts authority over merger decisions); WASH. REV. CODE § 57.04.100 (2024) (providing for local authority over district dissolutions).

state-directed processes for district dissolution or for state takeovers of district operations, and Lexis and Westlaw searches turned up no case law discussing state interventions into district boundary setting or state-ordered terminations of districts.<sup>261</sup> In recent years, one limited exception has emerged: California has enacted and begun to implement legislation designed to compel consolidation of small drinking-water systems.<sup>262</sup> But that initiative remains an outlier.

This emphasis on local decision-making can lead to some problematic geographies. Again, California groundwater management provides an instructive example. Because most GSAs were formed by water districts, either individually or in small groups, groundwater-management-agency boundaries often correspond to water district boundaries. Those boundaries also often have little to do with the geography of underlying aquifers (that is, water-bearing layers beneath the Earth's surface), for water district boundaries were often set by people who were not even considering groundwater governance.<sup>263</sup> Those agencies also often govern multiple noncontiguous areas of land, and the shapes of individual pieces can look like gerrymandering run amok.

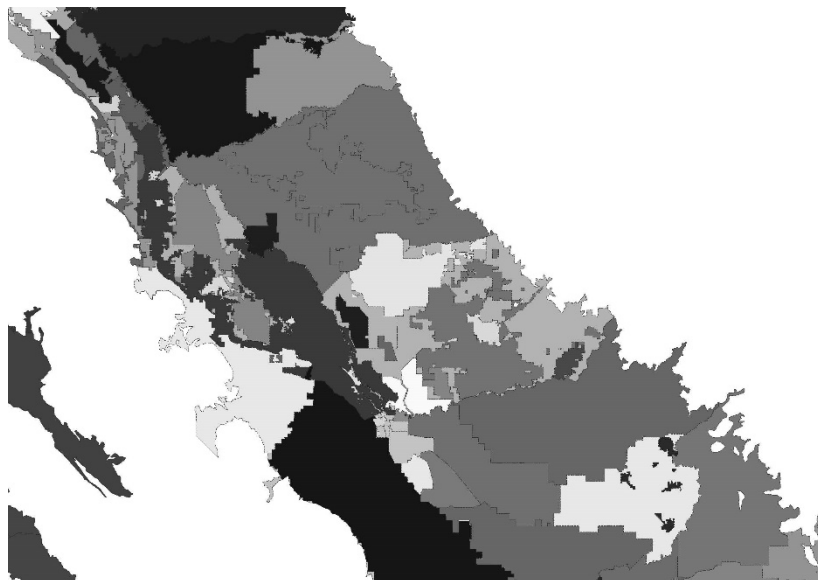
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261. I searched Westlaw's cases database for "water district" and "irrigation district" within twenty words of any form of "dissolve," "dissolved," or "dissolution." Because cases might arise under a variety of other terminologies, I also reviewed the water codes of each western state looking for provisions on state-ordered boundary changes or dissolutions and for associated cases. There is some state law governing the effect of municipal expansions on water districts within city boundaries. *See, e.g., People ex rel. City of Downey v. Downey Cnty. Water Dist.*, 21 Cal. Rptr. 370, 373 (Ct. App. 1962) (stating "the general rule" that the encompassed special district "automatically merges with the municipal corporation and ceases to exist").

262. *See* CAL. HEALTH & SAFETY CODE §§ 116680-116686 (West 2024) (authorizing mandatory consolidations); *Water Partnerships Overview*, CAL. STATE WATER RES. CONTROL BD. (Aug. 19, 2024), [https://www.waterboards.ca.gov/drinking\\_water/certlic/drinkingwater/water-partnership.html](https://www.waterboards.ca.gov/drinking_water/certlic/drinkingwater/water-partnership.html) [<https://perma.cc/26W6-K5GH>] (explaining California's program for water-system partnerships and mergers).

263. These district boundaries predate statewide groundwater regulation by many years. *See* Joseph L. Sax, *We Don't Do Groundwater: A Morsel of California Legal History*, 6 U. DENV. WATER L. REV. 269, 270 (2003) (describing California's lack of groundwater-use regulation).



**FIGURE 2. GSA BOUNDARIES IN CALIFORNIA'S SAN JOAQUIN VALLEY**<sup>264</sup>

The geography of district governance also creates burdens for city and county water managers. Cities may govern relatively contiguous areas of land—though, since city growth can also be strategic and piecemeal, that is not always true<sup>265</sup>—but those areas are often small, which means much of the groundwater pumping that affects the city will occur outside city limits and beyond city control.<sup>266</sup> And in California, because counties serve as the default groundwater regulators,<sup>267</sup> county GSAs generally get the land that water districts do not want, which means they can wind up trying to govern groundwater for a grab bag of small, scattered, and oddly shaped pieces of land.<sup>268</sup>

Of course, the fact that these boundary problems exist does not necessarily mean the state must intervene. There are potential non-state-directed fixes for these problems. Oddly shaped districts can work with their neighbors. For

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<sup>264</sup>. Ben Witeck created this map using data from the California Department of Water Resources.

<sup>265</sup>. See, e.g., Marsh et al., *supra* note 256, at 698, 702 (showing the boundaries of Mebane, North Carolina, and Modesto, California).

<sup>266</sup>. See, e.g., *South Kings GSA*, CAL. DEP'T WATER RES., <https://sgma.water.ca.gov/portal/gsa/print/317> [<https://perma.cc/R43-ZGZ9>] (showing the boundaries of a GSA formed by several small and noncontiguous municipalities).

<sup>267</sup>. See CAL. WATER CODE § 10724 (West 2024).

<sup>268</sup>. See, e.g., *County of San Luis Obispo GSA – Paso Robles Area*, CAL. DEP'T WATER RES., <https://sgma.water.ca.gov/portal/gsa/print/322> [<https://perma.cc/WG4T-Y3DU>].

California groundwater management, some have done so; many groundwater sustainability plans for the San Joaquin Valley cover the territories of multiple groundwater sustainability agencies.<sup>269</sup> But that is only a partial fix, for many smaller and awkwardly shaped planning areas remain,<sup>270</sup> and even the larger areas are often small in comparison to the governed groundwater basins.<sup>271</sup> Additionally, preparing joint plans expands the problems discussed in the previous Section. Cities and counties participating in joint plans must share power with landowner-dominated water districts.<sup>272</sup> Indeed, in some groundwater

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269. See *SGMA Data Viewer*, CAL. DEP'T WATER RES., <https://sgma.water.ca.gov/webgis/?appid=SGMADataViewer#boundaries> [<https://perma.cc/Q6Z6-PXU9>]. Selecting the Groundwater Sustainability Agencies and Groundwater Sustainability Plan Areas data layers allows a viewer to see which GSAs have joined to prepare groundwater sustainability plans.
270. See, e.g., *South Kings GSA Boundary Map*, S. KINGS GROUNDWATER SUSTAINABILITY AGENCY 1 (Apr. 24, 2018), <https://www.southkingsgsa.org/assets/boundary.pdf> [<https://perma.cc/WS2F-HJLW>]. The South Kings GSA, which was formed by five predominantly minority communities and two community service districts, consists of six separate small and noncontiguous areas surrounded by water-district-controlled GSAs. See *About Us*, S. KINGS GROUNDWATER SUSTAINABILITY AGENCY, <https://www.southkingsgsa.org/about.html> [<https://perma.cc/AB8L-5F72>] (identifying the participating entities). The demographic information comes from the Census Bureau's QuickFacts searchable site. See, e.g., *QuickFacts, Fowler City, California*, U.S. CENSUS BUREAU, <https://www.census.gov/quickfacts/fact/table/fowlercitycalifornia/PST045222> [<https://perma.cc/62TR-XCKK>] (showing that the population of Fowler is 65.9% Hispanic or Latino).
271. California's Central Valley Aquifer, for example, is one large aquifer, and the divisions that appear on maps are based on surface-water watersheds rather than groundwater divides. See *Central Valley Aquifer System*, WATER EDUC. FOUND. [1], [https://www.watereducation.org/sites/main/files/file-attachments/groundwater-justpass\\_central\\_valleyformation.pdf](https://www.watereducation.org/sites/main/files/file-attachments/groundwater-justpass_central_valleyformation.pdf) [<https://perma.cc/7JS6-9CP2>]. Likewise, the Salinas Valley contains multiple aquifers, but they are divided by horizontal confining layers, not by geographic features that correspond to GSA boundaries. See *Executive Summary: State of the Salinas River Groundwater Basin Report*, BROWN & CALDWELL [11] fig.ES-1, [12] fig.ES-2, [13] fig.ES-3 (Dec. 10, 2014), <https://www.co.monterey.ca.us/home/showdocument?id=19588> [<https://perma.cc/8Y6C-MHCJ>].
272. See, e.g., Central Delta-Mendota Groundwater Sustainability Agency Joint Powers Agreement art. 6 & art. 8, reprinted in *Final Draft, Groundwater Sustainability Plan for the North and Central Delta-Mendota Regions*, N. & CENT. DELTA-MENDOTA app. A [6], [8]-[9] (Nov. 2019), [https://deltamendota.org/wp-content/uploads/2019/11/Final\\_Draft\\_GSP\\_Nov19/N-C%20DM\\_AppA-CoordAgree\\_Nov19\\_Final.pdf](https://deltamendota.org/wp-content/uploads/2019/11/Final_Draft_GSP_Nov19/N-C%20DM_AppA-CoordAgree_Nov19_Final.pdf) [<https://perma.cc/VFT7-8LW5>] (explaining that each participating agency has one seat and one vote on the board of directors).

sustainability plans that nominally include city and county governments, their power is highly diluted,<sup>273</sup> if they hold any votes at all.<sup>274</sup>

Again, these problems are not unique to California. Irrigation districts in eastern Washington have strange territorial patterns of noncontiguous territories,<sup>275</sup> as do some districts in southern Idaho's Snake River Plain.<sup>276</sup> In Oregon, the issues may be even more acute; because the state does not maintain a map of irrigation district boundaries or even a list of its irrigation districts, it is hard even to know where some of the districts are. Across the nation, jurisdiction over groundwater and surface water is divided in problematic ways.<sup>277</sup> California's geographic challenges are larger, primarily because many water districts in other states operate in smaller valleys where the adjacent mountains provide clear geographic boundaries.<sup>278</sup> But they are particularly acute examples of a common theme.

It is worth acknowledging that there are no complete fixes for the challenges of boundaries in water governance, or in governance more generally. This Article does not contend otherwise. Policymakers always face tensions between the desire for holistic management and the need to break governance responsibilities into manageable pieces.<sup>279</sup> Likewise, policymakers cannot reinvent political

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273. See, e.g., *Delta-Mendota Subbasin Coordination Agreement*, SGMA 25-26 (May 14, 2018), <https://sgma.water.ca.gov/portal/service/gspdocument/download/564> [<https://perma.cc/HF37-ZWMN>]. The agreement sets forth the governance structure for the Delta-Mendota Subbasin Groundwater Sustainability Plan. While numerous cities and three counties are participants in the groundwater sustainability plan, five of the six group representatives are water districts or an entity—the San Joaquin River Exchange Contractors Authority—composed partly of water districts and partly of private companies. *Id.*; see SAN JOAQUIN RIVER EXCH. CONTRACTORS WATER AUTH., <https://www.sjrecwa.net> [<https://perma.cc/Q4ZB-SH57>].
274. See *About CKGSA*, CENT. KINGS GROUNDWATER SUSTAINABILITY AGENCY, <https://ckgsa.org/about> [<https://perma.cc/3Z6Y-Q5T8>]. The Central Kings GSA includes Fresno, Kings, and Tulare Counties, but all board members are from the Consolidated Irrigation District. *Id.* (“The Central Kings GSA is governed by the five-member Board of Directors of the Consolidated Irrigation District.”).
275. See *Washington State Irrigation Districts*, ARCGIS, <https://www.arcgis.com/apps/mapviewer/index.html?webmap=86098ae4107a43cba73cb72302f25357> [<https://perma.cc/W2CT-VZ4U>] (outlining the strange patterns of territories such as Roza in Yakima County).
276. See *Irrigation Organizations Map*, IDAHO DEP’T WATER RES., <https://idwr.idaho.gov/water-rights/irrigation-organizations/map> [<https://perma.cc/P592-GQTM>].
277. See generally Christine A. Klein, *Groundwater Exceptionalism: The Disconnect Between Law and Science*, 71 EMORY L.J. 487 (2022) (describing systematically disjointed management).
278. See, e.g., *NM Irrigation Districts*, N.M. OFF. STATE ENG’R (Feb. 6, 2024), <https://geospatial-data-ose.opendata.arcgis.com/datasets/5dea26405ofd46e991802af84288ab11/explore> [<https://perma.cc/JS9J-RDQH>] (mapping New Mexico’s irrigation districts).
279. See Owen, *supra* note 250, at 236-38 (explaining why some degree of institutional fragmentation is unavoidable).

boundaries for each new challenge that arises; often, they must instead work with preexisting entities and borders.<sup>280</sup> And state intervention sometimes will not be much of a fix, for states have demonstrated in other realms that they are quite capable of drawing highly politicized boundaries.<sup>281</sup> The key question, then, is not whether government is problematically fragmented; it always is. Instead, the questions are whether governance is problematically fragmented in ways and to degrees that are unnecessary, and, if so, whether state intervention, flawed though it inevitably will be, is likely to help. With water districts, the presence of extreme fragmentation and oddly shaped boundaries provides compelling evidence that such an unnecessary degree of fragmentation exists. And if water district configurations are undermining important state policy goals, states will have incentives to find better solutions.

### C. Policy Conflict

In 2020, the State of California sued the U.S. Bureau of Reclamation, which operates a massive water-supply project in California's Central Valley, arguing that water deliveries to water districts in the San Joaquin Valley violated the Federal Endangered Species Act.<sup>282</sup> The State's core argument was that too much water was going to the districts and that too little was remaining in the Central Valley's rivers. On one level, this was unsurprising: California often quarrels with the Bureau of Reclamation, and environmental protection is often a contributing factor to the disputes.<sup>283</sup> On another level, the episode was odd. Why

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280. See Michael Kiparsky, Anita Milman, Dave Owen & Andrew T. Fisher, *The Importance of Institutional Design for Distributed Local-Level Governance of Groundwater: The Case of California's Sustainable Groundwater Management Act*, 9 WATER art. no. 755, at 6 (2017) (explaining reasons why tailoring political boundaries to hydrologic boundaries is often difficult).

281. See Michael S. Kang, *Hyperpartisan Gerrymandering*, 61 B.C. L. REV. 1379, 1388-99 (2020) (chronicling the long history of strategic gerrymandering). As has been true with gerrymandering, assigning boundary redrawing to a neutral administrative body could be a helpful check on overly politicized decisions. See Bruce E. Cain, *Redistricting Commissions: A Better Political Buffer?*, 121 YALE L.J. 1808, 1841-43 (2012) (providing a mixed but generally positive assessment of independent redistricting commissions).

282. See Press Release, Off. of the Att'y Gen., California Dep't of Just., Attorney General Becerra Files Lawsuit Against Trump Administration for Failing to Protect Endangered Species in the Sacramento and San Joaquin Rivers (Feb. 20, 2020), <https://oag.ca.gov/news/press-releases/attorney-general-becerra-files-lawsuit-against-trump-administration-failing> [<https://perma.cc/B776-W9EF>]. For an account of the complex history of the litigation, see CHARLES V. STERN, PERVAZE A. SHEIKH & ERIN H. WARD, CONG. RSCH. SERV., R45342, CENTRAL VALLEY PROJECT: ISSUES AND LEGISLATION 17-20 (2024).

283. See, e.g., *California v. United States*, 438 U.S. 645, 647 (1978) (describing a disagreement over the Bureau of Reclamation's authority to impound waters for the New Melones Dam); *United*

would a state resort to federal-court litigation, using claims that rarely produce lasting relief (and did not do so in this particular case<sup>284</sup>), to try to restrain water deliveries to, and water use by, local-government entities – which are, in theory, just subdivisions of that same state?<sup>285</sup> Yet, odd though it might seem, the situation was not atypical, at least in California, and additional situations in which local water districts are at odds with state policy goals seem certain to recur – and likely to expand across the West.<sup>286</sup>

These conflicts have their roots in the evolving arc of water policy and law. In the late nineteenth and early to mid-twentieth centuries, when most water districts formed and perfected their water rights, the underlying goal of western water law was to put water resources to off-stream use.<sup>287</sup> Initially, those uses were primarily agricultural, and water law was designed to address the “perversity of nature” that let water flow to the ocean rather than to fertile but arid lands.<sup>288</sup> In that era, the interests of rural water districts and the aims of water law were closely aligned. More recently, however, the goals of state water policy have evolved. Some states now seek environmental protection of water resources, which means keeping more water in streams and rivers.<sup>289</sup> Some states also seek more economically efficient water allocations, which often means

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States v. State Water Res. Control Bd., 988 F.3d 1194, 1200 (9th Cir. 2021) (describing disagreements about and the initiation of litigation over water-quality standards for the San Francisco Bay/Sacramento-San Joaquin Delta Estuary (the Bay-Delta)); United States v. State Water Res. Control Bd., 227 Cal. Rptr. 161, 165-66 (Ct. App. 1986) (addressing earlier litigation over Bay-Delta water-quality standards).

284. See Cal. Nat. Res. Agency v. Ross, Nos. 20-CV-00426, 20-CV-00431, 2020 WL 2404853, at \*21-22 (E.D. Cal. May 11, 2020) (ordering a twenty-day change in pumping but otherwise denying preliminary relief); Pac. Coast Fed’n of Fishermen’s Ass’ns v. Ross, 468 F. Supp. 3d 1266, 1270 (E.D. Cal. 2020) (denying additional relief).

285. See Orff v. United States, 545 U.S. 596, 598-99 (2005) (describing Westlands Water District as “a political subdivision of the State of California”).

286. I was unable to find similar evidence of recurring legal battles between local water districts and state authorities in other western states, and the informal consensus view among my water-law colleagues is that other western states do not stand up to their water districts – at least not yet.

287. See Schodde v. Twin Falls Land & Water Co., 224 U.S. 107, 124-25 (1912) (“[T]he largest duty and the greatest use must be had from every inch of water, in the interest of agriculture and home building . . .”).

288. United States v. Gerlach Live Stock Co., 339 U.S. 725, 728 (1950).

289. See generally DAVID M. GILLILAN & THOMAS C. BROWN, INSTREAM FLOW PROTECTION: SEEKING A BALANCE IN WESTERN WATER USE (1997) (describing instream flow protections across western states).

transferring supplies from rural to urban use.<sup>290</sup> Likewise, as western populations grow and climate change wreaks havoc on water availability, water conservation is becoming increasingly imperative,<sup>291</sup> which can create tension with traditional water users' interest in maintaining and maximizing their diversions.<sup>292</sup>

In some states, an increased focus on social equity also heightens the potential for conflicts between water districts and states. Traditional water-supply systems were quite effective at delivering water to agricultural fields and much less effective at delivering quality water to disadvantaged communities, including, sometimes, the same people who worked in those well-watered fields.<sup>293</sup> This problem received little attention for years, but high-profile scandals like the Flint water crisis and initiatives like California's enactment of a human-right-to-water statute have brought drinking-water access into the spotlight.<sup>294</sup> For another traditionally disadvantaged community—Native American tribes—increased in-stream flows may be compelled by litigation.<sup>295</sup> But as is true with bringing water to environmental systems and growing cities, bringing water to disadvantaged communities generally requires taking water from somewhere else. And that somewhere else may be an agricultural area served by a water district.<sup>296</sup>

Those changes have not happened everywhere in the West. In some states, agricultural water users still dominate water politics, and overt conflict between

290. See generally Jedediah Brewer, Robert Glennon, Alan Ker & Gary Libecap, *Transferring Water in the American West: 1987–2005*, 40 U. MICH. J.L. REFORM 1021 (2007) (describing the reasons for and emergence of water transfers).

291. See Douglas S. Kenney, *Understanding Utility Disincentives to Water Conservation as a Means of Adapting to Climate Change Pressures*, 106 J. AM. WATER WORKS ASS'N 36, 36 (2014) (describing why climate change heightens the need for water conservation).

292. See *N. Kern Water Storage Dist. v. Kern Delta Water Dist.*, 54 Cal. Rptr. 3d 578, 590 (Ct. App. 2007) (“[T]he rights holder is subject to forfeiture for *not using* water, a practice generally thought to be socially responsible and usually called ‘conservation.’”).

293. See Pannu, *supra* note 125, at 242–45.

294. See CAL. WATER CODE § 106.3 (West 2024).

295. See, e.g., *Klamath Tribes' Water Rights*, NATIVE AM. RTS. FUND, <https://narf.org/cases/klamath-tribes-water-rights> [<https://perma.cc/A5JJ-247D>] (describing the ongoing history of litigation over water rights in the Klamath River). *But see* *Arizona v. Navajo Nation*, 599 U.S. 555, 558–59 (2023) (rejecting an argument that a treaty obligated the United States to take affirmative steps to help the Navajo Nation take advantage of its water rights). See generally GEOFFREY O'GARA, *WHAT YOU SEE IN CLEAR WATER: INDIANS, WHITES, AND A BATTLE OVER WATER IN THE AMERICAN WEST* (2002) (chronicling water disputes over Wyoming's Big Horn River).

296. See Mergen & Liu, *supra* note 119, at 697 (noting tribal water rights' opponents' argument that “a federal reserved water right will frequently require a ‘gallon-for-gallon’ reduction in the amount of water available to junior private appropriators” (quoting *United States v. New Mexico*, 438 U.S. 696, 705 (1978))).



state and water district goals is rare. But in an increasingly urbanized, water-short, and politically diverse West, tensions between state goals and water district priorities seem likely to arise with increasing frequency.<sup>297</sup> Utah's Great Salt Lake provides a particularly alarming example of that likely future. For well over a century, Utah has been reluctant to regulate water consumption, and even with major urban growth, much of the state's water goes to agricultural use.<sup>298</sup> But decreased inflows into Great Salt Lake now threaten the state with catastrophe.<sup>299</sup> The lake is shrinking, with potential ripple effects on water supplies, air pollution, and the snowpacks that sustain much of Utah's tourist economy.<sup>300</sup> As reluctant as the state may be to assert greater control over water use,<sup>301</sup> it has no real choice. And in a drying West, Utah's challenge, though particularly acute, will not be unique.

Though these types of conflicts are growing, they are not new, and they have not escaped legal attention. They generate some of the central subject matter of a typical course in water law.<sup>302</sup> States (and the federal government) have addressed these challenges in a few ways. They have enacted generally applicable environmental laws, like the Federal Endangered Species Act,<sup>303</sup> Clean Water Act,<sup>304</sup> National Environmental Policy Act,<sup>305</sup> and their state counterparts,<sup>306</sup> and regulators, tribes, and environmental groups have used those laws—

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297. See Thomas C. Brown, Vinod Mahat & Jorge A. Ramirez, *Adaptation to Future Water Shortages in the United States Caused by Population Growth and Climate Change*, 7 EARTH'S FUTURE 219, 225-31 (2019) (predicting increased water shortages).

298. See Sheri Quinn & Ben Winslow, *Lots of Options Are on the Table for Saving the Great Salt Lake. The Simplest? Use Less Water*, SALT LAKE TRIB. (Nov. 15, 2022, 11:37 AM), <https://www.sltrib.com/news/2022/11/15/lots-options-table-saving-great> [<https://perma.cc/KAM8-2A8E>].

299. See Christopher Flavelle, *As the Great Salt Lake Dries Up, Utah Faces an 'Environmental Nuclear Bomb'*, N.Y. TIMES (June 22, 2023), <https://www.nytimes.com/2022/06/07/climate/salt-lake-city-climate-disaster.html> [<https://perma.cc/Y6H2-HM6P>].

300. *Id.*

301. See Olalde, *supra* note 62. As Mark Olalde's reporting shows, Utah's reluctance to curb water use is not limited to agricultural users. *Id.*

302. See generally THOMPSON ET AL., *supra* note 57 (discussing the interactions between traditional water law and newer doctrines emphasizing conservation, transfers, and environmental protection).

303. 16 U.S.C. §§ 1531-1544 (2018).

304. 33 U.S.C. §§ 1251-1387 (2018).

305. 42 U.S.C. §§ 4321 to 4370m-11 (2018).

306. See, e.g., *States and Local Jurisdictions with NEPA-like Environmental Planning Requirements*, NEPA.GOV, <https://ceq.doe.gov/laws-regulations/states.html> [<https://perma.cc/37M2-WZFW>]; Porter-Cologne Water Quality Control Act, CAL. WATER CODE §§ 13000-16104 (West 2024).



sometimes—to constrain traditional water uses.<sup>307</sup> Some states also have used common-law doctrines like the public-trust doctrine to reallocate water, though the impact of these doctrines has fallen well short of the level of attention they receive.<sup>308</sup> States also have encouraged the formation of water markets, which have functioned with varying levels of success, to transfer water from agricultural to urban users.<sup>309</sup> Finally, there have been rumblings for years—at least among some academics and advocates—about transforming western water rights.<sup>310</sup>

But with limited exceptions, the legal focus has been on regulating water uses, not on taking more control of water users. States generally have not tried to resolve their tensions with water districts by assuming direct control of districts’ operations. Even in California, where conflicts between water district priorities and state policymaking are routine, the state does not appear to have even contemplated taking over districts. Nor do state legal regimes create frameworks for such takeovers. They would be constitutional; water districts are creatures of state statutory law, and they do not have the home-rule-doctrine protections enjoyed by some municipal governments in some states.<sup>311</sup> But statutes setting forth criteria and procedures for state management of local water districts do not exist.<sup>312</sup> Consequently, what could be a powerful mechanism for water-policy reform instead remains unused and, for the most part, undiscussed.

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307. See, e.g., PUD No. 1 of Jefferson Cnty. v. Wash. Dep’t of Ecology, 511 U.S. 700, 703, 709-10, 723 (1994) (upholding Clean Water Act-based flow restrictions imposed by state regulators); Baley v. United States, 942 F.3d 1312, 1316 (Fed. Cir. 2019) (describing Endangered Species Act- and tribal-treaty-based restrictions on water diversions from the Klamath River).

308. See Dave Owen, *The Mono Lake Case, the Public Trust Doctrine, and the Administrative State*, 45 U.C. DAVIS L. REV. 1099, 1104-05 (2012).

309. See generally Kurt Schwabe, Mehdi Nemati, Clay Landry & Grant Zimmerman, *Water Markets in the Western United States: Trends and Opportunities*, 12 WATER art. no. 233 (2020) (documenting water-trading levels in Arizona, California, and Texas, and finding low trading levels relative to overall amounts of water use); Philip Womble & W. Michael Hanemann, *Water Markets, Water Courts, and Transaction Costs in Colorado*, 56 WATER RES. RSCH. art. no. e2019WR025507 (2020) (describing Colorado’s particularly active water markets).

310. See, e.g., Eric T. Freyfogle, *Water Rights and the Common Wealth*, 26 ENV’T L. 27, 45 (1996) (“To bring Western water law up-to-date, bold changes are needed.”). See generally Charles F. Wilkinson, *In Memoriam: Prior Appropriation, 1848-1991*, 21 ENV’T L., at v (1991) (celebrating the prior appropriation doctrine’s rise and alleged fall, with tongue firmly in cheek).

311. See *Principles of Home Rule for the 21st Century*, NAT’L LEAGUE OF CITIES 29 (2020), <https://www.nlc.org/wp-content/uploads/2020/02/Home-Rule-Principles-ReportWEB-2-1.pdf> [<https://perma.cc/34GE-68XF>] (distinguishing home-rule entities).

312. See *supra* note 261 for information on my methods of searching state statutes governing water districts. In addition to the search terms described in that footnote, I reviewed state water codes looking for provisions addressing direct management.

### III. REFORMING WATER DISTRICTS

For decades, reforming water district governance has been a subject of only limited and occasional state interest. The previous Part explained why that absence of state intervention is problematic. This Part explains what states can do. It begins, in Section III.A, by articulating a conceptual framework for better legal relationships between states and water districts. I start by explaining why, even in an era when state interventions into local governance are a source of growing concern, this is an area in which heightened state intervention makes sense, and I then discuss a general structure for the exercise of that authority. Section III.B offers specific reforms.

I make no claim that these state interventions would be politically easy. The same politics that have made water districts so powerful will also empower them to block change. But as the West evolves, some political power will shift, perhaps opening windows of opportunity—particularly for changes that are badly needed and that accord with basic democratic principles.

I also make no claim that these interventions will be complete fixes. Getting local governments to serve their disadvantaged residents can be a challenge even where popular voting does exist;<sup>313</sup> boundary challenges will always persist to at least some degree;<sup>314</sup> and difficult experiences like the Flint water crisis have demonstrated that neither state intervention nor multitiered governance is a panacea.<sup>315</sup> Water management also presents challenges that even the most optimal of government institutions would struggle to solve. The more modest claim is that combinations of more democratic governance structures, larger geographic units with more sensible boundaries, and more engaged states will tend to produce improved outcomes.

#### A. *The Water District and the State*

Though water districts may be an unfamiliar topic, the underlying question this Section raises—how different levels in a tiered government system should relate to each other—is familiar. It is the central question faced by much of state- and local-government law and, in a somewhat different setting, by the massive literature on federalism. That literature generally advocates four conceptual models. One is a local-primacy model in which as much authority as possible is

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313. See generally SCHAFFNER ET AL., *supra* note 190 (finding systematic democratic underrepresentation of people of color and poor people).

314. See *supra* notes 279–280 and accompanying text.

315. See Hannah J. Wiseman, *Delegation and Dysfunction*, 35 YALE J. ON REGUL. 233, 260–65 (2018) (describing the Flint water crisis).

devolved to lower-level governments with as little interference as possible from the higher tiers.<sup>316</sup> At the other extreme, scholars and activists will sometimes advocate models in which local governments are subservient to or displaced by central authorities.<sup>317</sup> In between are accounts arguing for interactive governance in spheres of overlapping authority<sup>318</sup> or for regionalist models that empower institutions at scales between federal and local.<sup>319</sup>

The case for local primacy may seem familiar and intuitive, particularly at a time when popular media and academic literature are filled with horror stories about states on the rampage.<sup>320</sup> States recently have taken away local governments' ability to regulate in a wide variety of areas, ranging from limits on e-cigarettes to protections for transgender children, minimum-wage laws, oil and gas drilling, and more.<sup>321</sup> They also have enacted laws designed to gut the basic functioning of some local governments.<sup>322</sup> Some state laws even threaten civil or criminal liability for local-government officials who enact laws at odds with state preemption schemes.<sup>323</sup> Not all the resurgent state activity seeks to impede progressive urban lawmaking—in California, for instance, the primary state push has been for affordable-housing development<sup>324</sup>—but most of it does.<sup>325</sup> And some of that activity comes from states where careful gerrymandering has given conservative politicians near-unassailable legislative control, regardless of the

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316. See, e.g., Henry N. Butler & Jonathan R. Macey, *Externalities and the Matching Principle: The Case for Reallocating Environmental Regulatory Authority*, 14 YALE L. & POL'Y REV. 23, 25 (1996).

317. See *infra* note 337 and accompanying text (noting that this view was common during the civil-rights movement).

318. See *infra* notes 338–341 and accompanying text.

319. See Richard Briffault, *Localism and Regionalism*, 48 BUFF. L. REV. 1, 3–7 (2000) (explaining the basics of regionalism). A somewhat distinct literature considers the possibilities for regional governance at scales between states and a centralized federal government. See, e.g., Jessica Bulman-Pozen, *Our Regionalism*, 166 U. PA. L. REV. 377, 379–82 (2018); Yishai Blank & Issi Rosen-Zvi, *Reviving Federal Regions*, 70 STAN. L. REV. 1895, 1899–1900 (2018); Dave Owen, *Regional Federal Administration*, 63 UCLA L. REV. 58, 62–63 (2016).

320. See, e.g., Davidson, *supra* note 48, at 957–58; Schragger, *supra* note 48, at 1541–42; John Pfaff, *Texas Takes Attacks on Austin to New Level with “Death Star” Law*, SLATE (Aug. 22, 2023, 5:26 PM), <https://slate.com/news-and-politics/2023/08/greg-abbott-texas-attacks-austin-with-death-star.html> [<https://perma.cc/R2A6-4ECX>].

321. See Richard C. Schragger, *The Attack on American Cities*, 96 TEX. L. REV. 1163, 1214–15 (2018); Alexandra B. Klass & Rebecca Wilton, *Local Power*, 75 VAND. L. REV. 93, 107–10 (2022).

322. See Scharff, *supra* note 48, at 1471–74.

323. *Id.* at 1498–1502; see Schragger, *supra* note 321, at 1181–82.

324. See Julia Gill & Jenny Schuetz, *In California, Statewide Housing Reforms Brush Against Local Resistance*, BROOKINGS (June 28, 2023), <https://www.brookings.edu/articles/in-california-statewide-housing-reforms-brush-against-local-resistance> [<https://perma.cc/52GR-R4GP>].

325. See generally Schragger, *supra* note 321 (summarizing attacks on progressive cities).

political preferences of their more centrist constituents.<sup>326</sup> It should come as no surprise, then, that most recent local-government scholarship is about protecting the locality from the state.

That emphasis on localism reflects older themes, and themes that cut across political spectra. Much of the discourse on federalism emphasizes separation and exclusivity.<sup>327</sup> Supreme Court decisions, for example, routinely portray federalism's primary goal as protecting states from an overbearing federal government.<sup>328</sup> Those decisions generally focus on state-federal relationships; to the extent local government appears, the Court rarely distinguishes it from the states.<sup>329</sup> But academic literature and public debates often extend the Court's reasoning about federal-state relationships to the state and local level.<sup>330</sup> The argument, typically, is that local governments replicate or even accentuate the virtues traditional federalism theory assigns to states, and, therefore, that those local governments should be protected against centralized state power.<sup>331</sup> For states and water districts, that argument has clear implications. It suggests that a primary goal of effective governance would be to limit state authority over, and interference with, water districts, lest the benefits of localized governance be lost.

Other accounts of multitiered governance support a very different model, which would emphasize exclusive state primacy. This view is not prevalent in the current literature or jurisprudence of federalism, both of which tend to extoll the virtues of lower-tier governments.<sup>332</sup> Nor is it typical of local-government scholarship, which is driven, to a large extent, by admiration for the achievements of

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326. See Jessica Bulman-Pozen & Miriam Seifter, *The Democracy Principle in State Constitutions*, 119 MICH. L. REV. 859, 910-12 (2021) (describing aggressive gerrymanders in North Carolina and Pennsylvania); Paul A. Diller, *Reorienting Home Rule: Part 1—The Urban Disadvantage in National and State Lawmaking*, 77 LA. L. REV. 287, 336-40 (2016).

327. See, e.g., *Printz v. United States*, 521 U.S. 898, 921 (1997) (“This separation of . . . [federal and state] spheres is one of the Constitution’s structural protections of liberty.”).

328. See *Gregory v. Ashcroft*, 501 U.S. 452, 460 (1991) (warning that federal authority threatens to upset a “delicate balance”); Dave Owen & Hannah J. Wiseman, *Coequal Federalism and Federal-State Agencies*, 55 GA. L. REV. 287, 351 (2020) (describing the tendency to equate federalism with protection of states from federal power).

329. See Gerken, *supra* note 32, at 21 (“[T]he Supreme Court itself has often (if unreflectively) treated local institutions as undifferentiated stand-ins for the state.”).

330. See Owen, *supra* note 49, at 192; Gerken, *supra* note 32, at 23-24.

331. See, e.g., Richard Briffault, “What About the ‘Isms’?” *Normative and Formal Concerns in Contemporary Federalism*, 47 VAND. L. REV. 1303, 1305 (1994) (“Many of [federalism’s] values—increasing opportunities for political participation, keeping government close to the people, intergovernmental competition, the representation of diverse interests—may be served better by local governments than by states.”); *id.* at 1311-17.

332. See *supra* notes 327-331 and accompanying text.

cities.<sup>333</sup> But to some critics, lower-tier governments are inherently more factional and more prone to externalizing costs onto other jurisdictions.<sup>334</sup> And even the boosters of local government would generally admit that small governmental units often face resource challenges.<sup>335</sup> These concerns are particularly salient in literature discussing natural-resource management, where concern with parochial local decision-making has been a longstanding concern,<sup>336</sup> but they also have deep roots in movements for individual rights, which often have been protected by the federal government in the face of state and local opposition.<sup>337</sup> The arguments for centralization might suggest a more drastic change in water district governance, with local districts dissolved and displaced by more centralized state authority.

The options are not limited, however, to exclusive state or exclusive local control. As many commentators have noted, the practical reality of multitiered governance is overlap, not exclusivity.<sup>338</sup> These observations are partly descriptive, but many commentators have built upon these observations to develop normative arguments. Most importantly, they have argued that overlap can better enable sharing of resources and expertise, prompt intrastate dialogue, enhance institutional learning, promote accommodation and coordination, and facilitate the diffusion of useful policies.<sup>339</sup> In a system where every government level will probably perform unevenly and performance will vary over time, checks and interaction also increase the odds that some competent and thoughtful

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333. See *supra* note 181 and accompanying text.

334. See Biber et al., *supra* note 49, at 4-5, 31-32 (noting that smaller-scale governments may underproduce things, like affordable housing, that provide regional benefits); Helen Hershkoff, *State Courts and the "Passive Virtues": Rethinking the Judicial Function*, 114 HARV. L. REV. 1833, 1903 (2001) ("The literature emphasizes, however, that smaller communities are structurally more vulnerable to factional capture, more prone to parochialism and bias, and more likely to generate external costs . . .").

335. See Owen, *supra* note 49, at 215 (quoting local officials on the expertise advantages sometimes enjoyed by state governments).

336. See, e.g., Jason F. Shogren, *Local Control of Nature: Collaboration to Compensation*, 43 NAT. RES. J. 661, 664 (2003) (discussing concerns about local control of resources).

337. See Robert A. Schapiro, *From Dualist Federalism to Interactive Federalism*, 56 EMORY L.J. 1, 2 (2006) ("A central mission of the national government was to protect individuals from their states."); Comment, *Theories of Federalism and Civil Rights*, 75 YALE L.J. 1007, 1014-15 (1966) (explaining how federalism concepts sometimes limited federal intervention in support of civil rights).

338. See Owen & Wiseman, *supra* note 328, at 315-16 & nn.118-22 (summarizing this literature in relation to federal-state overlap).

339. See, e.g., David E. Adelman & Kirsten H. Engel, *Adaptive Federalism: The Case Against Reallocating Environmental Regulatory Authority*, 92 MINN. L. REV. 1796, 1832 & nn.178-182 (2008).

government entity will be involved.<sup>340</sup> And while those arguments most often appear in discussions of federal-state relationships, they can apply with similar force to interactions between states and localities.<sup>341</sup>

An alternative – or potential complement – to interactive governance is regional governance, which means governance at scales that are neither local nor state. A strong push for regionalism emerged in the 1990s, as academics and activists who were alarmed about sprawl and interlocal economic inequities argued that governance structures at the regional scale might provide better management.<sup>342</sup> The political push for such structures has largely faded,<sup>343</sup> but the idea still holds potential. Perhaps governance units with larger service areas would create fewer externalities than small entities and fewer transaction costs than interactive models, without sacrificing the potential benefits of localism.

Each of these frameworks has its justifications. But for several reasons, this Article's recommendations build on an interactive and nonexclusive state-local governance model, sometimes combined with a dash of regionalism. First, while the knowledge and accessibility advantages of smaller-scale governments are easy to overstate, they do exist, which counsels maintaining some local role.<sup>344</sup> Second, interaction, resource sharing, and mutual learning among multiple levels of government have value.<sup>345</sup> Third, there are strong practical arguments favoring more modest reforms over state takeovers. Water districts have their flaws, but they also have decades of experience managing water. To throw that experience aside and create entirely new and state-centered governance structures might make sense in limited circumstances, but making that change across the board would bring enormous disruptions and losses of expertise.<sup>346</sup>

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340. See, e.g., Erwin Chemerinsky, *Empowering States: The Need to Limit Federal Preemption*, 33 PEPP. L. REV. 69, 74 (2005) (arguing that overlapping authority gives multiple governing entities opportunities to address problems that one entity might fail to).

341. See Owen, *supra* note 49, at 216-23.

342. See Briffault, *supra* note 319, at 7-14.

343. See Biber et al., *supra* note 49, at 20 (“[F]ew proposals for regionalization actually were implemented in the United States in the latter half of the twentieth century . . .”).

344. See *id.* at 23 nn.67-69 (quoting commentators describing these advantages).

345. See, e.g., Ann E. Carlson, *Iterative Federalism and Climate Change*, 103 NW. U. L. REV. 1097, 1100-01 (2009) (describing positive interactions and mutual learning among state and federal regulators of air pollution); Schapiro, *supra* note 337, at 8-9 (summarizing the advantages of “interactive federalism”).

346. For similar reasons, I do not advocate systematically eliminating the special-district model and folding all water districts into municipal or county governments. Empirical evidence suggests that both special districts and general-purpose governments can manage water successfully. See MULLIN, *supra* note 32, at 178 (“The previous four chapters examined specific controversies and public policies to assess the impact of specialized governance on the



For these reasons, an interactive-subfederalism vision animates the proposals that follow. The idea is not to retain current systems, in which water district governance involves local primacy within convoluted boundaries and archaic, state-created legal frameworks, but it also is not to displace water district authority completely, except in rare circumstances. Instead, the reform proposals that follow envision water district governance as an area in which states would be more actively involved, sometimes collaboratively and sometimes in tension with water district priorities, and in which the nature of local control might shift and the size of local jurisdictions would often increase, but in which local roles also would continue.

Additionally, although the reforms proposed below would be significant, the underlying framework is not completely new. While water districts exercise largely unfettered primacy in making decisions about boundaries and governance structures, there are areas in which state authority is more robust. States typically establish open-meeting laws, for example, with which water districts must comply.<sup>347</sup> They regulate water rights.<sup>348</sup> California and Washington also have environmental-review laws that govern some water district decision-making.<sup>349</sup> State water agencies have a variety of technical-support programs for

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management of drinking water. A consistent theme has been the contingency of specialization's effects.”).

347. See generally *Open & Public IV: A Guide to the Ralph M. Brown Act*, LEAGUE OF CAL. CITIES (2d ed. 2010), <https://www.cacities.org/UploadedFiles/LeagueInternet/86/86f75625-b7df-4fc8-ab60-de577631ef1e.pdf> [<https://perma.cc/PA97-KVYJ>] (describing California's primary open-government law); *Law Summary: Open Meeting Requirements of the Colorado Sunshine Law*, OFF. OF LEGIS. LEGAL SERVS. (Dec. 1, 2023), [https://leg.colorado.gov/sites/default/files/images/committees/2017/olls\\_oml\\_summary.pdf](https://leg.colorado.gov/sites/default/files/images/committees/2017/olls_oml_summary.pdf) [<https://perma.cc/39CA-CM62>] (describing Colorado's Open Meetings Law).
348. See, e.g., *United States v. State Water Res. Control Bd.*, 227 Cal. Rptr. 161, 171 (Ct. App. 1986) (“[A]ll water rights are subject to governmental regulation.”). See generally *Water Rights in Oregon: An Introduction to Oregon's Water Laws*, OR. WATER RES. DEP'T, <https://www.oregon.gov/owrd/WRDPublications1/aquabook.pdf> [<https://perma.cc/6DT9-GJTM>] (summarizing Oregon water law, including government regulatory roles).
349. See *Voices for Rural Living v. El Dorado Irrigation Dist.*, 147 Cal. Rptr. 3d 480, 482-83 (Ct. App. 2012) (applying the California Environmental Quality Act to an irrigation district's decision to expand service); *State Environmental Policy Act (SEPA)*, WASH. STATE DEP'T NAT. RES., <https://www.dnr.wa.gov/state-environmental-policy-act-sepa> [<https://perma.cc/F2CF-NY9C>] (noting the statute's applicability to water districts). But see John Munding & Todd Everts, *A Guide to the Montana Environmental Policy Act*, LEGIS. ENV'T POL'Y OFF. 25 (Hope Stockwell ed., 2021), <https://leg.mt.gov/content/Publications/Environmental/2021-mepa-handbook.pdf> [<https://perma.cc/A2LD-T6EZ>] (“MEPA [the Montana Environmental Policy Act] . . . does not establish a requirement for agencies of local governments.”).



water districts, too.<sup>350</sup> In short, water districts' spheres of relative autonomy are select; not everything they do is free of state authority or lacking in state support.

### B. Reforms

Consistent with the principles discussed above, this Section proposes three specific and related sets of water district reforms. The first, and most extensive, set of reforms focuses on governance and transparency. The second set focuses on boundaries. The third involves giving states backstop authority to take over water district functions. Importantly, these generally are not interdependent reforms. Though they might be more effective if enacted together, states also could adopt them selectively and incrementally.

These proposals all focus on legislative action, not litigation. There are three main reasons for that focus. The first, discussed earlier, is that litigation does not have a strong track record in this realm. Plaintiffs have generally lost, often setting precedent that made future litigation difficult, and where they have won, the victories have generally been narrow or have quickly become irrelevant.<sup>351</sup> That has happened even when their arguments were strong; the dissents in *Salyer* and *Ball* are compelling.<sup>352</sup> The second reason is that, as other scholars have explored in great depth, litigation often fares poorly as a tool for securing political reform.<sup>353</sup> Third, and perhaps most importantly, legislation is a powerful tool, with the potential of generating much more tailored solutions than a typical judicial decree. Legislation also is very difficult to secure; even seemingly incremental reforms can often spark powerful and effective opposition. But state legislatures can and do act, and in a West where water concerns are increasingly salient, legislatures may be the most promising arenas for reform.

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350. See, e.g., Ronald E. Vore, *Water Management & Conservation Assistance Programs Directory*, WYO. WATER DEV. COMM'N 6-42 (Chris Nicholson, Phil Ogle & Jon Wade eds., 4th ed. May 2009), <https://wwdc.state.wy.us/wconsprog/consdir/ConservationDirectoryFinal.html> [<https://perma.cc/7HZU-YEGK>] (describing a variety of state, local, and private technical-assistance programs); *Free Financial, Managerial, and Technical Assistance for Public Water and Wastewater Systems*, TEX. COMM'N ON ENV'T QUALITY, <https://www.tceq.texas.gov/drinkingwater/fmt> [<https://perma.cc/5NWB-Z7K5>] (describing technical-assistance programs "to help public water and wastewater systems comply with regulations").

351. See *supra* notes 133-138 and accompanying text.

352. See *supra* notes 151-153, 160-162 and accompanying text.

353. See, e.g., GERALD N. ROSENBERG, *THE HOLLOW HOPE: CAN COURTS BRING ABOUT SOCIAL CHANGE?* 338 (1991) ("U.S. courts can almost never be effective producers of significant social reform. At best, they can second the social reform acts of the other branches of government. Problems that are unsolvable in the political context can rarely be solved by courts.").

1. *Voting*

As discussed above, many water districts use voting systems designed to limit public participation. The most important mechanisms for doing so are landowner-weighted voting systems and restrictions on nonlandowner service on boards, but mechanisms like off-cycle voting also discourage public involvement.<sup>354</sup> Many water districts also do little, if anything, to publicize when or how elections occur, and, often, those elections do not occur at all.<sup>355</sup> Additionally, a traditional justification for these voting systems—that water districts are really more like corporate than government entities—ignores the many governmental benefits and powers enjoyed by water districts.<sup>356</sup> Groundwater-use regulation and flood management, for example, are important to many people who are not major landowners.

These problematic voting systems were created by state legislation, and that state legislation could change. Specifically, states could enact legislation requiring one-person, one-vote governance for all water districts, with voting rights limited to human persons. They also could repeal legislation requiring members of water district boards to be landowners. Both changes would be controversial, largely because of the entrenched power of water districts. But neither would be complex. Indeed, models for both changes already exist. In California, most irrigation districts already have one-person, one-vote structures,<sup>357</sup> as do county water districts<sup>358</sup> and some other agencies functioning under different names.<sup>359</sup> That these entities—and the farmers they support—have existed for decades shows that landowner-weighted voting is not inherently necessary, even to rural or agricultural water provision. More generally, the everyday experience of most Americans—that is, the experience of receiving high-quality water, reliably and at reasonable prices, from democratically governed institutions—suggests that governance by a small group of landowners is hardly necessary for effective water management.<sup>360</sup>

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354. See *supra* note 202 and accompanying text.

355. See *supra* notes 204-207 and accompanying text.

356. See *supra* notes 208-216 and accompanying text.

357. CAL. WATER CODE § 20527 (West 2024).

358. *Id.* § 30021.

359. *Id.* §§ 30021, 60010 (regarding county water districts and water replenishment districts, respectively).

360. See BARTON H. THOMPSON, JR., LIQUID ASSET: HOW BUSINESS AND GOVERNMENT CAN PARTNER TO SOLVE THE FRESHWATER CRISIS 70 (2023) (showing the prevalence of public drinking-water suppliers in the United States); Robert B. Sowby, *The Safe Drinking Water Act at 50: A Policy Model for Grand Challenges*, 59 WATER RES. RSCH. art. no. e2023WRO35172, at

Another type of reform would establish stronger limits on the powers assumed by nonrepresentative districts. State legislation might say, for example, that water districts without popular voting cannot take on other governmental functions, like regulating groundwater use.<sup>361</sup> States could prohibit entities with nonrepresentative voting from receiving any grant targeted at government entities (and for federal programs, the federal government also could take this step).<sup>362</sup> They could remove from the protections of governmental tort immunity any function other than delivering irrigation water.<sup>363</sup> Similarly, states could specify that nonrepresentative agencies offering services other than irrigation supply – providing energy or drinking water, for example – must be subject to the same price-control regulatory structures as private utilities.<sup>364</sup> The basic idea would be to make democratic functioning a prerequisite for enjoying benefits normally reserved to government entities.

Finally, legislative reforms can promote voter participation. One straightforward but rarely exercised option is to consolidate the timing of local elections with state and federal elections.<sup>365</sup> Those changes can dramatically increase participation, particularly among voters who are younger, nonwhite, and less wealthy – in other words, among many of the same voters who are already frozen out of water district governance.<sup>366</sup> An additional option would be to require water districts to publicize, on their websites or in other outlets, information about when and how elections will be conducted, along with candidate statements. States should also require that such publications be made in the primary language(s) used by the local population as well as in English. Without

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1 (2023) (“For Americans, safe drinking water has become part of our national identity.”). See generally PATRICIA NELSON LIMERICK, *A DITCH IN TIME: THE CITY, THE WEST, AND WATER* (2012) (using the successes – and also challenges – of Denver Water as an example of ambitious water planning that helped a city thrive).

361. See generally Dyble, *supra* note 42 (arguing for similar reforms, though through litigation rather than legislation).
362. See *supra* notes 116, 211 and accompanying text (describing water districts’ affinity for state and federal grant programs).
363. See *supra* note 212 and accompanying text (noting the existence of these immunities).
364. See Leshy, *supra* note 17, at 356 (observing that districts’ “governmental status accords them a freedom from regulation by state regulatory agencies to which ordinary business entities exercising similar monopoly power have traditionally been subject”).
365. See CAL. ELEC. CODE § 14052 (West 2024) (requiring local governments with low-turnout elections to align their election dates with statewide June or November election dates). *But see* Anzia, *supra* note 202, at 412 (noting that most local-election dates are not concurrent with state or federal elections).
366. See Zoltan L. Hajnal, Vladimir Kogan & G. Agustin Markarian, *Who Votes: City Election Timing and Voter Composition*, 116 AM. POL. SCI. REV. 374, 374 (2022) (“Every published study on election timing and turnout shows that using concurrent elections is the single most important change that local governments can undertake to increase turnout.”).

functioning local media in many rural areas, websites are probably the best way, other than direct meetings and word of mouth, for people to find out about elections, yet most water district websites provide little or no information about candidates or votes.<sup>367</sup> With a state mandate and some modest enforcement efforts, that could change.

These might sound like ambitious reforms, and they would be the most dramatic changes to water district law in decades.<sup>368</sup> But a word of caution – or, depending on your perspective, reassurance – is in order about the likely consequences of the changes. Some water districts might seek to avoid the new obligations by disbanding and reforming as mutual water companies, which are private cooperatives.<sup>369</sup> That could be a mixed outcome: no longer would the companies be semiprivate entities reaping the benefits of public status, but they also would no longer be subject to some public laws, like open-government and environmental-assessment laws.<sup>370</sup> Others would accept the reforms but would still be small, single-purpose entities operating under limited public attention, which means elite dominance of their governance might remain.<sup>371</sup> And even if elite dominance dissipates, democratically elected water district boards are unlikely to become the rural equivalents of the progressive cities that are so often celebrated in local-governance literature.<sup>372</sup> Many would continue to serve conservative and rural constituencies, and the priorities of their communities would likely be represented in their decisions.<sup>373</sup>

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367. I base this claim on my review of dozens of water district websites. See, e.g., DUDLEY RIDGE WATER DIST., <https://www.dudleyridgewd.org> [<https://perma.cc/XKP5-KQYF>] (providing no information on elections); MARICOPA-STANFIELD IRRIGATION & DRAINAGE DIST., <https://www.msidd.com> [<https://perma.cc/CHF7-G7U9>] (same).

368. These reforms also could be implemented on a piecemeal basis.

369. See Nathaniel Logar, James Salzman & Cara Horowitz, *Ensuring Safe Drinking Water in Los Angeles County's Small Water Systems*, 32 TUL. ENV'T L.J. 205, 211 (2019) (defining mutual water companies).

370. See *id.* (noting the lack of oversight of mutual water companies).

371. See OLIVER, *supra* note 193, at 82–84 (noting the tendency for elite dominance of special-purpose institutions).

372. Even the celebration of cities may be somewhat overstated. See SCHAFFNER ET AL., *supra* note 190, at 216, which summarizes their findings that municipal democracy, particularly in rural areas, is prone to overrepresentation of white and wealthy voters. Despite this critique, Bryan F. Schaffner, Jesse H. Rhodes, and Raymond J. La Raja still argue for reforms that could improve representation, like shifting election timing; they do not treat local democracy as a completely lost cause. See *id.* at 195.

373. This could lead to additional limits on actions, like voluntary water transfers, that state policies favor. See, e.g., Andrew Ayres & Daniel Bigelow, *Engaging Irrigation Districts in Water Markets*, in *The Future of Water Markets: Obstacles and Opportunities*, PROP. & ENV'T RSCH. CTR. 53, 57–58 (Eric Edwards & Shawn Regan eds., Sept. 2022), <https://www.perc.org/wp->

Nevertheless, those constituents' priorities might be represented somewhat better. As Madison put it, we hold elections because we believe that no other mechanism is as effective at making leaders responsive to the needs of the people, and because, in the absence of elections, "every government degenerates into tyranny."<sup>374</sup> This is not just a cherished trope or a common-sense intuition, though it is both; it also has research behind it. Studies have found that local officials are more responsive to constituents' requests for services when they are running for reelection.<sup>375</sup> Likewise, when electorate compositions change, so too do elected officials' positions.<sup>376</sup> And, of course, a different electorate could elect different people. Consequently, if water districts are to be more responsive to all the people they serve, those people should be able to vote. States should enact legislation to make that possible.

## 2. *Boundaries*

A second major problem with water district governance is the crazy quilt pattern of service areas. That pattern has arisen largely because state statutes leave boundary setting to local discretion. Even where some review of local jurisdictional boundaries exists – as in California – it often is done by another local entity.<sup>377</sup> A common result is boundaries that align poorly with the geography of present-day resource-management challenges.<sup>378</sup> Completely resolving this issue is not possible; John Wesley Powell's ideal of a West organized completely around watersheds (or aquifers) would be an unworkably drastic change.<sup>379</sup> But even if complete fixes are unattainable, new legislation could help.

Through direct legislation, or through empowering administrative agencies to revise boundaries, states could redraw their water-governance maps. The changes could involve reordering the boundaries of existing entities, possibly by removing enclaves and peninsulas while leaving the entities intact. They could

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content/uploads/2022/09/PPR-Water-Markets-220916-WEB.pdf [https://perma.cc/ENY9-48WW] (explaining how popular voting can increase resistance to water markets).

374. THE FEDERALIST No. 57, at 353 (James Madison) (Clinton Rossiter ed., 1961).

375. See, e.g., Darin Christensen & Simon Ejdemyr, *Do Elections Improve Constituent Responsiveness? Evidence from U.S. Cities*, 8 POL. SCI. RSCH. & METHODS 459, 460 (2018).

376. See Kristina Miler, *Legislative Responsiveness to Constituency Change*, 44 AM. POL. RSCH. 816, 818 (2016).

377. See Jared Eigerman, *California Counties: Second-Rate Localities or Ready-Made Regional Governments?*, 26 HASTINGS CONST. L.Q. 621, 652-53 (2000) (describing and critiquing local agency-formation commissions).

378. See *supra* notes 260-267 and accompanying text.

379. See *supra* notes 246-247 and accompanying text (discussing Powell's vision for western governance).

also involve compelled mergers of multiple districts, potentially creating larger-scale entities.<sup>380</sup> Finally, and most consequentially, states could order that districts be folded into other types of governing entities. For example, rather than empowering a hodgepodge of districts, only some of them democratically governed, to oversee a shared aquifer, the state might enact legislation creating a regional groundwater authority. Nebraska, for example, has done this on a statewide basis.<sup>381</sup> Or, alternatively, states might consolidate water governance in districts that operate as subdivisions of county governments. That would not be unprecedented. In the mid-twentieth century, California created many county water agencies, some with broad control over water provision and treatment within their service areas.<sup>382</sup> Those entities continue to exist—and often, to thrive—to this day.

There are good reasons for states to be careful about these sorts of interventions. As a threshold matter, one should be wary of assuming that a fragmented map necessarily means fragmented governance. People can and do collaborate across boundaries, and no nation of any scale could survive without that cross-boundary work. Consequently, the transaction and disruption costs of creating a new entity or shifting a border might be significantly greater than the inconveniences of working with what seems, at first blush, like a dysfunctional set of boundaries.<sup>383</sup> Additionally, mergers often will involve working with multiple reluctant parties. In California's drinking-water efforts, for example, the state sometimes works with entities that may have an economic need to pool resources but do not trust each other's financial viability or good faith.<sup>384</sup> Compelling two such entities to join without providing financial incentives and a forum for

380. California has already begun doing this with drinking-water systems, though on a very limited basis. See Ryan J. Mahoney, *The State Water Resource Control Board's Mandatory Consolidation Authority: Recommendations for Modification and Improvement*, 50 U. PAC. L. REV. 33, 34-55 (2018) (describing California's consolidation legislation).

381. See *About NRDs*, NEB.'S NAT. RES. DISTRS., <https://www.nrdnet.org/nrds/about-nrds> [<https://perma.cc/X2A5-TV8X>]; Christina M. Hoffman & Sandra Zellmer, *Assessing Institutional Ability to Support Adaptive, Integrated Water Resources Management*, 91 NEB. L. REV. 805, 806-42 (2013) (describing and evaluating Nebraska's natural resource districts).

382. See *supra* notes 139-140 and accompanying text.

383. See Katy Hansen, Megan Mullin & Erin K. Riggs, *Collaboration Risk and the Choice to Consolidate Government Services*, 3 PERSPS. ON PUB. MGMT. & GOVERNANCE 223, 223-24 (2020) (summarizing the tradeoffs involved in collaborate-or-consolidate choices); Nell Green Nylen, Camille Pannu & Michael Kiparsky, *Learning from California's Experience with Small Water System Consolidations: A Workshop Synthesis*, BERKELEY L. CTR. FOR L., ENERGY, & THE ENV'T 4 (May 2018) [https://www.law.berkeley.edu/wp-content/uploads/2018/05/SmallWaterSystemConsolidation\\_2018-05-02.pdf](https://www.law.berkeley.edu/wp-content/uploads/2018/05/SmallWaterSystemConsolidation_2018-05-02.pdf) [<https://perma.cc/5CRT-6MFR>] (describing alternatives to consolidation).

384. See Nylen et al., *supra* note 383, at 12-13 (describing reasons for resistance to consolidation).



sorting out differences might invite disaster.<sup>385</sup> Finally, boundary resetting can create complicated water-rights challenges. Because water rights are typically held by water districts, not by individual water users,<sup>386</sup> shifting boundaries may involve reallocating portions of water rights, which would typically require state-level review.<sup>387</sup>

Nevertheless, even if compelled boundary changes may not become common solutions, some water district boundaries are so nonsensical that this option should at least be on the table. California's Central Valley might be the most obvious place for such reforms; water agencies with jurisdiction over much wider portions of the Central Valley Aquifer, and with integrated authority over groundwater and surface water, would make much more sense than the incredibly balkanized present-day system.<sup>388</sup> And while such changes might sound radical, they could build on existing models. In California's Santa Clara Valley, for example, which is home to rural areas, suburbs, and Silicon Valley cities, a single entity—the Santa Clara Valley Water Agency—holds unified control.<sup>389</sup> Similarly, other western states have at least given a single agency aquifer-wide regulatory authority.<sup>390</sup> Some degree of fragmentation is always inevitable, but that degree could be much lower.

### 3. *Direct State Management*

Suppose a state faces a truly recalcitrant water district. Perhaps the district, despite state prodding and regulatory oversight, is simply unwilling to institute

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385. *Id.* at 6 (“Funding and funding-related incentives are important determinants of whether and how consolidations occur.”).

386. See *Abatti v. Imperial Irrigation Dist.*, 266 Cal. Rptr. 3d 26, 47 (Ct. App. 2020) (“[I]rrigating landowners like Abatti possess an equitable and beneficial interest in the District’s appropriate water rights that is appurtenant to their lands and consists of a right to service.”).

387. See Leon F. Szeptycki, Julia Forgie, Elizabeth Hook, Kori Lorick & Philip Womble, *Environmental Water Right Transfers: A Review of State Laws*, WATER IN THE W. 6 (Aug. 31, 2015), <https://waterinthewest.stanford.edu/sites/default/files/WITW-WaterRightsLawReview-2015-FINAL.pdf> [<https://perma.cc/3YJL-U6JP>] (“In all of these states, transfers of water rights are subject to some form of state oversight and approval.”).

388. See *i03 WaterDistricts*, CAL. STATE GEOPORTAL (Feb. 16, 2022), [https://gis.data.ca.gov/datasets/45d26a15b96346f1816d8fe187f8570d\\_o/about](https://gis.data.ca.gov/datasets/45d26a15b96346f1816d8fe187f8570d_o/about) [<https://perma.cc/ZR7A-NUAY>].

389. See *District Overview*, SANTA CLARA VALLEY WATER DIST. 2-1 (2016), <https://www.valley-water.org/sites/default/files/1.%202016-17%20District%20Overview.pdf> [<https://perma.cc/XM3T-DAW9>] (“The water district’s unique multi-purposes enable it to use a comprehensive regional approach to water resources management and environmental protection that would not be possible if these services were fragmented among several agencies.”).

390. See *About*, EDWARDS AQUIFER AUTH., <https://www.edwardsaquifer.org/ea> [<https://perma.cc/H6XT-M63K>].



needed water-conservation measures, or the district has a long track record of trying to thwart public participation. The state could try to address its differences with the district through regulatory constraints, negotiation, or some combination thereof, but there might come a point when it would be more effective for the state just to take over district operations. On rare occasions, states do this with municipal governments, though the cause typically is persistent financial distress rather than policy disagreement.<sup>391</sup> Takeover should also be an option with water districts.

State management could be structured in several ways. The takeover might be partial or complete. For a partial takeover, the state could place representatives on the district board—possibly also adding staff—while leaving the basic structure of the district in place.<sup>392</sup> That could be a relatively gentle change; if the state appoints a minority of board members, it could have a voice without exercising control. For a complete takeover, the state could dissolve the district and substitute its own personnel, or it could leave the district in place but substitute state decision makers, either permanently or for a temporary period.<sup>393</sup> Similarly, takeovers could come from one-off legislation, or the state legislature could create a structure and a set of criteria for executive action. For municipal takeovers, states typically use the latter option, which has the advantage of being more expeditious to deploy.<sup>394</sup>

This would be strong medicine, and there are good reasons why a state would want to use it rarely, at least with full takeovers. As critics of municipal receiverships have observed, takeovers can short-circuit the functioning of local democracy.<sup>395</sup> If that democracy already was somewhat dysfunctional, as is the case for many water districts, such a takeover is less concerning.<sup>396</sup> But still, reforms focused on making districts more democratic might be preferable to a takeover. Additionally, a state takeover may not get to the roots of the problem with water district governance. As critics also have noted, sometimes the

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391. See generally Anderson, *supra* note 48 (describing and critiquing these takeovers).

392. For a discussion of the merits of such joint arrangements, though in the federal-state context, see Owen & Wiseman, *supra* note 328, at 307-30.

393. This somewhat describes the current situation in Jackson, Mississippi, though in Jackson the takeover is overseen by a federal court. See Ross Reily, *Jackson Water System Handed to the 'Elon Musk of the Water Utility Industry'*, MISS. CLARION LEDGER (Nov. 30, 2022, 8:33 PM CT), <https://www.clarionledger.com/story/news/2022/12/01/jackson-water-system-called-utility-industry-elon-musk/69688444007> [<https://perma.cc/JLC6-JC79>].

394. See Clayton P. Gillette, *Dictatorships for Democracy: Takeovers of Financially Failed Cities*, 114 COLUM. L. REV. 1373, 1391-97 (2014) (describing a range of takeover mechanisms).

395. See Anderson, *supra* note 48, at 581.

396. See Gillette, *supra* note 394, at 1401-12 (arguing that takeovers may be consistent with local preferences).

struggles of a local-government entity arise from reasons beyond that entity's direct control.<sup>397</sup> If, for example, a district is reluctant to align its actions with state policy goals because it lacks the money to do so, an infusion of financial support might accomplish more than a takeover. Finally, if the state does take over a district, it could not simply reallocate the district's water to a completely different set of uses, because the underlying rights would be tied to the district's traditional activities.<sup>398</sup>

For all these reasons, district takeovers should be rare. And because they would be politically fraught, they probably would be rare. But they should at least be on the table as an option, which is more than they typically are today. The possibility of takeovers might spur districts to bring management into closer alignment with state policy goals, or at least to make that management more effective. Actual takeovers could give states a greater ability to implement conservation programs, deliver water to disadvantaged communities, and pursue other state policy goals. The possibility of different degrees of takeover – that is, with varying levels of state authority and varying durations of state intervention – would allow for some nuance in state approaches. And, importantly, state takeovers might be combined with other mechanisms, like boundary rationalization; for example, a state could create new agencies with broader geographic coverage and include state representatives on the governing boards.

## CONCLUSION

Imagine that one is crafting western water-governance structures from scratch. It seems unlikely that anyone would come up with the present system. Instead, the system probably would involve larger jurisdictions, with boundaries aligning more closely with hydrologic divides. It likely would involve strong mechanisms for democratic accountability, particularly given the importance of water management to the public. Because of the compelling local, state, regional, and national interests in water management, it might involve a more integrated mix of state and local (and federal) involvement. And it would not allocate dominance to a relatively select group of landowners whose power traces back to their ancestors' or corporate predecessors' accumulation of wealth in the early twentieth or late nineteenth centuries.

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397. See Omer Kimhi, *Reviving Cities: Legal Remedies to Municipal Financial Crises*, 88 B.U. L. REV. 633, 638-42 (2008) (summarizing literature on external causes of decline).

398. See *Bryant v. Yellen*, 447 U.S. 352, 371 (1980) (describing a water right as equitably tied to the lands of the landowners a district serves). See generally Reed D. Benson, *Whose Water Is It? Private Rights and Public Authority Over Reclamation Project Water*, 16 VA. ENV'T L.J. 363 (1997) (discussing the distribution and ownership of water rights).

Western states still can build systems that come closer to that ideal. And the urgency is growing, for the coming decades are likely to bring enormous challenges.<sup>399</sup> Water management has never been simple, but the combination of growing populations, warming temperatures, widening disparities in precipitation, and continued resource depletion will almost certainly make the challenges harder.<sup>400</sup> So, too, will the persistence of governance structures formed to respond to the conditions – and to serve and perpetuate the power structures – of the nineteenth and early twentieth centuries. But a different path forward is possible. Western state legislatures can enact reforms that modernize water districts by eliminating undemocratic governance systems, rationalizing boundaries, and facilitating state intervention and interaction. None of this will be easy – in much of the West, the traditional power structures remain influential and deeply entrenched – but it is legally possible. And the reforms described in this Article offer concrete steps toward more functional and productive relationships between water districts and states.

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399. See generally Elizabeth A. Payton et al., *Water*, in *Fifth National Climate Assessment*, U.S. GLOBAL CHANGE RSCH. PROGRAM 4-2 (2023) [https://nca2023.globalchange.gov/downloads/NCA5\\_2023\\_FullReport.pdf](https://nca2023.globalchange.gov/downloads/NCA5_2023_FullReport.pdf) [<https://perma.cc/P7D9-L5L8>] (describing major water-related challenges across the nation).

400. See generally *id.* (forecasting approaching challenges in water management).

## APPENDIX

APPENDIX TABLE 1. WATER DISTRICT VOTING ARRANGEMENTS BY STATE<sup>401</sup>

Water District Type	Landowner-Only Boards?	Landowner-Only Voting?
<b>Arizona</b>		
Active Management Area Water District	No <sup>402</sup>	No <sup>403</sup>
Groundwater Replenishment District	No	No <sup>404</sup>
Irrigation District, Water Conservation District <sup>405</sup>	Yes <sup>406</sup>	Yes <sup>407</sup>
Irrigation Water Delivery District	Yes <sup>408</sup>	Yes <sup>409</sup>
<b>California</b>		
California Water District	Yes <sup>410</sup>	Yes <sup>411</sup>
California Water Storage District	Yes <sup>412</sup>	Yes <sup>413</sup>

401. This is not a complete table. It does not include all district types created by special legislation. It also is limited to special districts responsible for managing water supplies; it does not include levee or drainage districts. Readers also should be aware that states sometimes enact legislation creating different voting rules for individual districts.

402. ARIZ. REV. STAT. ANN. § 48-4832 (2024) (requiring election procedures consistent with procedures for county elections).

403. See *id.* § 48-4803 (setting a complex formula for the initial gubernatorial appointment of directors); *id.* § 48-4831(A) (requiring permanent board members to be “qualified elector[s]” but not specifying a landownership requirement).

404. *Id.* § 48-4433(D). Only “members” can vote for at-large directors, however, *id.* § 48-4433(E)(1), and members hold votes in proportion to their “replenishment obligation,” *id.* § 48-4433(E)(2).

405. Districts with both names are governed by Chapter 19 of Title 48 of the Arizona Code. See *id.* §§ 48-2901 to -3256.

406. *Id.* § 48-3011(B).

407. *Id.* § 48-2917(A)(1).

408. *Id.* § 48-3441(A).

409. *Id.* § 48-3444(D).

410. CAL. WATER CODE § 34700 (West 2024).

411. *Id.* § 34027.

412. *Id.* § 40307.

413. *Id.* § 41000.

Water District Type	Landowner-Only Boards?	Landowner-Only Voting?
County Water Agency <sup>414</sup>	No	No
County Water District	No <sup>415</sup>	No <sup>416</sup>
Irrigation District	Yes <sup>417</sup>	No <sup>418</sup>
Municipal Water District	No <sup>419</sup>	No <sup>420</sup>
Reclamation District	Yes <sup>421</sup>	Yes <sup>422</sup>
Water Conservation District	No <sup>423</sup>	No <sup>424</sup>
Water Replenishment District	No <sup>425</sup>	No <sup>426</sup>
<b>Colorado</b>		
Conservancy District	Yes (two of three) <sup>427</sup>	No <sup>428</sup>
Drainage District	Yes <sup>429</sup>	Yes <sup>430</sup>

414. Most California water agencies were created by agency-specific legislation. The board may contain the same people as the county board of supervisors or may be separately elected. *Compare, e.g., Board of Directors, SONOMA WATER*, <https://www.sonomawater.org/board-of-directors> [<https://perma.cc/WZ2G-HJ69>] (explaining that county board members are also water-agency board members), *with How We Operate: Board of Directors, VALLEY WATER*, <https://www.valleywater.org/how-we-operate/board-directors> [<https://perma.cc/YET8-SVVZ>] (describing a directly elected board).

415. CAL. WATER CODE § 30500 (West 2024).

416. *Id.* § 30068 (subjecting voting to general election laws).

417. *Id.* § 21100.

418. *Id.* § 20527. *But see id.* §§ 20527.5-.13 (making exceptions for several irrigation districts).

419. *Id.* § 71501 (requiring residency but not land ownership).

420. *Id.* § 71453.

421. *Id.* § 50600 (requiring board members to be “eligible persons”); *id.* § 50014 (“Eligible person” means a landowner or the legal representative of a landowner.”).

422. *Id.* § 50016.

423. *Id.* §§ 74091, 74200.

424. *Id.* § 74051.

425. No California Water Code provision states that board members must be landowners.

426. CAL. WATER CODE § 60010 (West 2024).

427. COLO. REV. STAT. § 37-3-101(1)(a)(I) (2024) (“[A]t least two [directors] shall own real property in the district . . .”).

428. *Id.* § 37-3-101(1)(a) (requiring court appointments rather than elections).

429. *Id.* § 37-20-112.

430. *Id.* § 37-20-116.

Water District Type	Landowner-Only Boards?	Landowner-Only Voting?
Irrigation District	Yes <sup>431</sup>	Yes <sup>432</sup>
Water and Sanitation District <sup>433</sup>	No <sup>434</sup>	No <sup>435</sup>
Water Conservation District <sup>436</sup>	No <sup>437</sup>	No <sup>438</sup>
Idaho		
Groundwater District <sup>439</sup>	No <sup>440</sup>	Yes <sup>441</sup>
Irrigation District	Yes <sup>442</sup>	Yes <sup>443</sup>
Water and Sewer District	No	No <sup>444</sup>

431. *Id.* § 37-42-108(1).

432. *Id.* §§ 37-41-104(2), -42-108.

433. The same code provisions govern “water districts” and “water and sanitation districts.” *See id.* § 32-1-1006.

434. *Id.* § 32-1-902.7; *id.* § 32-1-103(5)(a) (defining “[e]ligible elector”).

435. *Id.* § 32-1-806; *id.* § 32-1-103(5)(a) (defining “[e]ligible elector”). Nonresident property owners are allowed to vote. *Id.* § 32-1-103(5)(a)(II).

436. In Colorado, water conservation districts are created by district-specific legislation. *See id.* §§ 37-46-101 to -50-142 (establishing districts).

437. *Id.* § 37-46-104(1).

438. *See, e.g., id.* § 37-46-134(1).

439. In Idaho, groundwater districts generally manage water and may sometimes hold water rights but are not water-delivery agencies. *See* Jeffrey C. Fereday, Christopher H. Meyer & Michael C. Creamer, *Water Law Handbook: The Acquisition, Use, Transfer, Administration, and Management of Water Rights in Idaho*, GIVENS PURSLEY LLP 513 (June 11, 2023), <https://www.givenspursley.com/assets/publications/handbooks/handbook-waterlaw.pdf> [<https://perma.cc/Q2GV-LLLP>].

440. IDAHO CODE § 42-5218(1) (2024) (limiting voting to “ground water user[s],” a phrase that section 42-5210 uses interchangeably with water-rights holders); *id.* § 42-5201(8) (excluding solely domestic users from voting).

441. *Id.* § 42-5210 (allowing only holders of “groundwater right[s]” to vote).

442. *Id.* § 43-201(3) (“Every director must be a qualified elector . . .”); *id.* § 43-111(1) (stating that electors must “own lands that are on the district’s assessment book”).

443. *Id.* § 43-111(1).

444. *See id.* § 42-3211(1) (calling for elections governed by Idaho’s Uniform District Election Law).

Water District Type	Landowner-Only Boards?	Landowner-Only Voting?
Water District <sup>445</sup>	No <sup>446</sup>	Yes <sup>447</sup>
<b>Kansas</b>		
Rural Water District	Yes <sup>448</sup>	Yes <sup>449</sup>
Groundwater Management District	Probably <sup>450</sup>	Yes, with a limited exception <sup>451</sup>
Irrigation District	Yes <sup>452</sup>	Yes <sup>453</sup>
<b>Montana</b>		
Conservancy District	Yes <sup>454</sup>	Yes <sup>455</sup>
Drainage District	Yes <sup>456</sup>	Yes <sup>457</sup>
Irrigation District	Yes <sup>458</sup>	Yes <sup>459</sup>

445. In Idaho, a water district, like a groundwater district, is a state subdivision tasked with regulating water use, not a water-delivery entity. I have included it here because its officers are elected by water-rights holders, and therefore by landowners. See Fereday et al., *supra* note 439, at 524; IDAHO CODE § 42-604 (2024).

446. In Idaho, water districts are administered by watermasters, not elected boards. See *Water Districts*, IDAHO DEP’T WATER RES., <https://idwr.idaho.gov/water-rights/water-districts> [<https://perma.cc/WN9Y-23LQ>]. Idaho statutes do not say that the watermaster must be a landowner or water-rights holder. See IDAHO CODE § 42-605 (2024) (describing watermaster elections).

447. IDAHO CODE § 42-605 (2024) (specifying that voters must be holders of water rights).

448. KAN. STAT. ANN. § 82a-617 (2023).

449. *Id.*; see *id.* § 82a-626(b) (specifying that voting is not weighted).

450. See *id.* § 82a-1027 (requiring that appointed directors be qualified electors but not addressing elected directors).

451. *Id.* § 82a-1021(5) (allowing voting by landowners and by users of at least an acre-foot of groundwater per year—an amount that will exceed domestic-use needs).

452. *Id.* § 42-706(a).

453. *Id.* § 42-706(g).

454. See MONT. CODE ANN. §§ 85-9-401, -421 (2023).

455. *Id.* § 85-9-421.

456. *Id.* § 85-8-302(2)(b).

457. *Id.* § 85-8-305(1).

458. *Id.* § 85-7-1501(1)(a).

459. *Id.* § 85-7-1710(1)(a).



Water District Type	Landowner-Only Boards?	Landowner-Only Voting?
<b>Nebraska</b>		
Irrigation District	Yes <sup>460</sup>	Yes <sup>461</sup>
Rural Water District	Yes <sup>462</sup>	Yes <sup>463</sup>
Natural Resource District <sup>464</sup>	No	No
Reclamation District	No	No <sup>465</sup>
<b>Nevada</b>		
Irrigation District	Yes <sup>466</sup>	Yes <sup>467</sup>
Water Authority <sup>468</sup>	No	No
Water Conservancy District	No <sup>469</sup>	No <sup>470</sup>
<b>New Mexico</b>		
Artesian Conservancy District	Yes <sup>471</sup>	Yes <sup>472</sup>
Conservancy District	Yes <sup>473</sup>	Yes <sup>474</sup>
Irrigation District	No <sup>475</sup>	Yes <sup>476</sup>
Water and Sanitation District	No <sup>477</sup>	No

460. NEB. REV. STAT. ANN. § 46-102 (2021) (explaining who is an elector); *id.* § 46-112 (1995) (stating that directors must be electors).

461. *Id.* § 46-102; *id.* § 46-110(2) (2015).

462. *Id.* § 46-1006 (1967).

463. *Id.*

464. For an in-depth evaluation of Nebraska's natural resource districts, see Hoffman & Zellmer, *supra* note 381, at 806-42.

465. No code provision limits board service or voting to landowners.

466. NEV. REV. STAT. ANN. § 539.045 (2023).

467. *Id.* § 539.123.

468. Water authorities are joint entities created by other water-management agencies. *E.g.*, *Mission and History*, S. NEV. WATER AUTH., <https://www.snwa.com/about/mission/index.html> [<https://perma.cc/RGF5-CHEN>].

469. NEV. REV. STAT. ANN. § 541.100 (2023).

470. *Id.*

471. N.M. STAT. ANN. § 73-1-13 (2024).

472. *Id.*

473. *Id.* § 73-14-17.

474. *Id.* § 73-14-71.

475. No code section addresses commissioners' qualifications.

476. N.M. STAT. ANN. § 73-9-5 (2024).

477. No code provisions limit voting or board service to landowners.

THE WATER DISTRICT AND THE STATE

Water District Type	Landowner-Only Boards?	Landowner-Only Voting?
<b>North Dakota</b>		
Irrigation District	Yes <sup>478</sup>	Yes <sup>479</sup>
Water District	Yes <sup>480</sup>	Yes <sup>481</sup>
Water Resource District	Yes <sup>482</sup>	No <sup>483</sup>
<b>Oklahoma</b>		
Conservancy District	No <sup>484</sup>	No <sup>485</sup>
Groundwater Irrigation District	Yes <sup>486</sup>	No <sup>487</sup>
Irrigation District	Yes <sup>488</sup>	Yes <sup>489</sup>
Rural Water District	Yes <sup>490</sup>	Yes <sup>491</sup>
<b>Oregon</b>		
Irrigation District	Yes <sup>492</sup>	Yes <sup>493</sup>
Water Control District	Yes <sup>494</sup>	Partially <sup>495</sup>

478. N.D. CENT. CODE § 61-06-01 (2023).

479. *Id.* § 61-05-01.

480. *Id.* § 61-35-08 (requiring candidates elected to the board to become members); *id.* § 61-35-01(10) (defining “[m]ember[s]” as property owners).

481. *Id.* § 61-35-01(10). The statute refers to “owner[s]” or “tenant[s],” but always in conjunction, implying that the tenant would appear as the owner’s representative.

482. *Id.* § 61-16-08.

483. *Id.* § 61-16-07 (calling for appointment by county commissioners).

484. OKLA. STAT. tit. 82, § 541 (2024).

485. *Id.*

486. *Id.* § 1021.5(B).

487. *Id.* (calling for county appointment).

488. *Id.* § 277.5.

489. *Id.* § 277.1.

490. *Id.* § 1324.7.

491. *Id.*

492. OR. REV. STAT. ANN. § 545.043 (2023).

493. *Id.* § 545.007.

494. *Id.* § 553.210.

495. *See id.* § 553.035 (specifying that elections are covered by Oregon’s general special district election law, but also stating that landowners can vote if there otherwise would be no electors in a district).

Water District Type	Landowner-Only Boards?	Landowner-Only Voting?
Water Improvement District	Yes <sup>496</sup>	No <sup>497</sup>
<b>South Dakota</b>		
Irrigation District	Yes <sup>498</sup>	Yes <sup>499</sup>
Water Project District	No <sup>500</sup>	No, with a limited exception <sup>501</sup>
Water Development District	No <sup>502</sup>	No <sup>503</sup>
Water User District	Yes <sup>504</sup>	Yes <sup>505</sup>
Watershed District	Yes <sup>506</sup>	Yes <sup>507</sup>
<b>Texas</b>		
Freshwater Supply District	Yes <sup>508</sup>	No <sup>509</sup>
Groundwater Conservation District (purely regulatory)	No <sup>510</sup>	No <sup>511</sup>
Irrigation District	Yes <sup>512</sup>	Yes <sup>513</sup>
Water Improvement District	Yes <sup>514</sup>	No <sup>515</sup>

496. *Id.* § 552.208.

497. *Id.* § 552.750 (specifying that elections are covered by Oregon's general special district election law).

498. S.D. CODIFIED LAWS § 46A-4-27 (2024).

499. *Id.* § 46A-4-2.

500. No code provision requires that directors be landowners.

501. S.D. CODIFIED LAWS §§ 46A-18-2.1, -2.2 (2024) (allowing landowner-only voting in districts with populations of less than 150 people); *id.* § 46A-18-47 (limiting voting on special assessments to landowners subject to the assessment).

502. *Id.* § 46A-3B-2.

503. No code provisions restrict voting to landowners.

504. S.D. CODIFIED LAWS § 46A-9-4 (2024).

505. *Id.* § 46A-9-26.

506. *Id.* § 46A-14-38.

507. *Id.* § 46A-14-15.1.

508. TEX. WATER CODE ANN. § 53.063 (West 2023).

509. No code provision limits voting to landowners.

510. TEX. WATER CODE ANN. § 36.051 (West 2023) (describing directors and not mentioning a landowning requirement).

511. *Id.* § 36.059.

512. *Id.* § 58.072.

513. *Id.* § 58.222.

514. *Id.* § 55.102.

515. No code provision limits voting to landowners.

THE WATER DISTRICT AND THE STATE

Water District Type	Landowner-Only Boards?	Landowner-Only Voting?
Water Control and Improvement District	No <sup>516</sup>	No <sup>517</sup>
<b>Utah</b>		
Irrigation District	No <sup>518</sup>	Yes <sup>519</sup>
Metropolitan Water District	Yes <sup>520</sup>	Generally no <sup>521</sup>
Water Conservancy District	No, but one irrigator sometimes required <sup>522</sup>	No <sup>523</sup>
<b>Washington</b>		
Irrigation District	Yes <sup>524</sup>	Yes <sup>525</sup>
Public Utility District <sup>526</sup>	No <sup>527</sup>	No <sup>528</sup>
Water Sewer District	No <sup>529</sup>	No <sup>530</sup>
<b>Wyoming</b>		
Irrigation District	Yes <sup>531</sup>	Yes <sup>532</sup>
Water and Sewer District	No <sup>533</sup>	No <sup>534</sup>

516. TEX. WATER CODE ANN. § 51.072 (West 2023) (stating that a board member can be a landowner or “qualified voter in the district”).

517. No code provision limits voting to landowners.

518. No code provision addresses director qualifications.

519. UTAH CODE ANN. § 17B-2a-504(1) (LexisNexis 2023).

520. *Id.* § 17B-2a-604(4).

521. *Id.* § 17B-1-306(8)(a)(i)(B).

522. *Id.* § 17B-2a-1005(2)(d).

523. No code provision limits voting to landowners.

524. WASH. REV. CODE § 87.03.051 (2024).

525. *Id.*

526. Washington’s public utility districts generally provide power as well as water.

527. WASH. REV. CODE § 54.12.010(3) (2024).

528. *Id.* § 54.08.060.

529. *Id.* § 57.12.039.

530. *Id.*

531. WYO. STAT. ANN. § 41-7-318 (2023).

532. *Id.* § 41-7-317.

533. *Id.* § 41-10-112 (“Each director shall be a voter of the district.”).

534. *Id.* §§ 41-10-101(b), 22-29-104 (providing a default definition of “electors”).

Water District Type	Landowner-Only Boards?	Landowner-Only Voting?
Water Conservancy District	Yes <sup>535</sup>	Yes <sup>536</sup>
Watershed Improvement District <sup>537</sup>	Yes <sup>538</sup>	No <sup>539</sup>

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535. *Id.* § 41-3-740(a).

536. *Id.* § 41-3-740(b) (“[T]heir successors in office shall be elected in the manner provided for the election of irrigation district commissioners . . .”).

537. In Wyoming, watershed improvement districts are subdistricts of conservation districts. *Id.* § 41-8-103.

538. *Id.* § 41-8-112(c) (“No person shall be eligible to be a director of a watershed improvement district who is not an owner of land within the watershed improvement district in which he seeks election . . .”).

539. No code provision limits voting to landowners.