
QUASI-CITIES

NADAV SHOKED*

INTRODUCTION	1972
I. THE SPECIAL DISTRICT IN U.S. LAW	1976
A. <i>Legal History of Special Districts: The Judicial Struggle to Acknowledge a New Form of Government</i>	1977
B. <i>The Growth of Special Districts: New Deal Era Lawmakers' Embrace of a New Form of Government</i>	1986
C. <i>The Modern Legal Status of the Special District: Implications of Being a "Special District" Rather than a City</i>	1987
D. <i>Defining Special Districts</i>	1991
1. Contending Definition Number One: Single Purpose Government.....	1992
2. Contending Definition Number Two: Limited Function Government.....	1993
3. Contending Definition Number Three: A Non-Home Rule Local Government	1995
4. Suggested Definition: A Government Lacking Powers of Regulation Beyond Its Facilities	1997
II. THE QUASI-CITY IN U.S. LAW: AN ASSESSMENT OF THE NEW SPECIAL DISTRICT	1999
A. <i>The Quasi-City as an Alternative to Incorporation</i>	2003
1. The Current Use of the Quasi-City as an Alternative to Incorporation	2003
2. The Potential Normative Benefits of the Quasi-City as an Alternative to Incorporation	2005
3. Conclusion: The Quasi-City as a Transient Stage	2011
B. <i>The Quasi-City as an Alternative to Annexation</i>	2014

* Assistant Professor, Northwestern University School of Law. For invaluable comments, I am grateful to Michelle Anderson, Bernard Black, Oren Bracha, David Dana, Erin Delaney, Paul Diller, Lee Fennell, Ezra Friedman, Gerald Frug, Adam Green, Andrew Koppelman, James Pfander, Sanford Levinson, Katherine Litvak, John McGinnis, Ariel Porat, David Schleicher, Kristen Stilt, and the participants at the Annual Local Government Law Works-in-Progress Conference, The Big Ten Junior Faculty Conference, and at Faculty Workshops in Northwestern University School of Law and the University of Texas School of Law. Nathan Brenner (at Northwestern University School of Law) and Adrian Dunbar (at the University of Texas School of Law) provided outstanding research assistance.

1. The Current Use of the Quasi-City as an Alternative to Annexation	2014
2. The Potential Normative Benefits of the Quasi-City as an Alternative to Annexation.....	2016
3. Conclusion: The Quasi-City as a Remedy for the Spurned	2018
C. <i>The Quasi-City as an Alternative to Secession</i>	2021
1. The Current Use of the Quasi-City as an Alternative to Secession	2021
2. The Potential Normative Benefits of the Quasi-City as an Alternative to Secession	2022
3. Conclusion: The Quasi-City for All or for None.....	2023
D. <i>Summary: The Quasi-City as Useful Alternatives to City Formation</i>	2027
III. THE QUASI-CITY'S CHALLENGE TO U.S. LAW: FLEXIBLE SELF-DETERMINATION	2027
CONCLUSION.....	2031

Local government law relies on a dichotomy between the “city” and the “special district.” While the city is understood as a fundamental building block of the U.S. system of democratic governance, the special district is perceived as a mere bureaucratic entity. This Article argues that this simplistic distinction ignores a third category: the “quasi-city.” The quasi-city is an entity that functions like a city, but is legally a special district. As a result, despite its city-like nature, the quasi-city is not subject to most of the rules that federal and state laws impose on cities but not on special districts – rules that pertain to citizen participation, equality, taxation, financing, and administration, among others. Hundreds of these city-like special districts have recently been created, even though they diverge from the definition and role U.S. law has historically assigned to the special district. U.S. law must thus adopt a new normative theory to evaluate the desirability of the quasi-city’s ability to evade the laws imposed on cities. In certain circumstances, the quasi-city is an effective alternative to cities and thus its exemption from general laws applicable to cities is beneficial. But in other circumstances, the quasi-city undermines the objectives of local government law.

INTRODUCTION

Patricia Sette and her spouse David Shnaider thought they had moved to a city.¹ The place they had relocated to had many city-like features and was not all that different from the cities in which they had resided in the past. It encompassed a defined geographical area in which community residents went

¹ See Liam Dillon, *Ave Maria – a Town Without a Vote: Now and Forever*, NAPLES DAILY NEWS, May 9, 2009, <http://www.naplesnews.com/news/2009/may/09/town-without-vote-now-and-forever>.

about their daily routines and commercial enterprises plied their trades. Its government levied taxes, issued municipal bonds, and condemned private property – all in order to support schools, roads, water supply, sewage, garbage removal, city parks, and urban planning.² But one thing was missing from their new community: there, unlike in all cities in which they had resided before, Sette and Shnaider could not vote.³ The reason was simple, yet startling nonetheless. The place they had moved to was governed like no other city they had known since it was no city at all.

While Sette and Shnaider’s new community was a city in appearance and function, legally it was not a city; it was a mere special district.⁴ Special districts are independent governments first created and recognized in U.S. law to perform humble chores such as mosquito abatement;⁵ yet, as exemplified by the district in which Sette and Shnaider live, special districts have evolved over time from servants of existing governments into virtual cities in and of themselves. This Article argues that many of them are now “quasi-cities”: cities in all but legal name. Overlooked by policymakers and scholars, quasi-cities affect citizens’ lives in new and previously unheard of ways. Moreover, such special districts challenge democracy’s most basic normative ideas about the critical role that cities play in a federal system that prizes local autonomy and responsive government.

While commentators have written extensively on the city and, more recently, other local government units⁶ – reflecting a growing understanding that local governments are the most influential public entities in individuals’ lives – what this Article dubs the “quasi-city” has so far escaped detection and scholarly treatment. As a result, legal practice and scholarship lack the analytical tools necessary to assess quasi-cities such as Florida’s Ave Maria

² See Ave Maria Stewardship Community District Act, ch. 2004-461, 2004 Fla. Laws 360.

³ See Dillon, *supra* note 1.

⁴ See Ave Maria Stewardship Community District Act, ch. 2004-461, 2004 Fla. Laws 360.

⁵ Mosquito-abatement districts are controversial, since for some they represent excessive government spending and waste. See, e.g., Bill Ruthhart, *Push to Eliminate Mosquito-Fighting Layer of Government Stirs Passions on Both Sides*, CHI. TRIB., June 28, 2011, http://articles.chicagotribune.com/2011-06-28/news/ct-met-mosquito-abatement-20110628_1_mosquito-war-american-mosquito-control-association-mosquito-abatement-districts.

⁶ See, e.g., ROBERT J. SAMPSON, *GREAT AMERICAN CITY: CHICAGO AND THE ENDURING NEIGHBORHOOD EFFECT* (2011); Michelle Wilde Anderson, *Mapped out of Local Democracy*, 62 STAN. L. REV. 931 (2010); Richard Briffault, *A Government for Our Time? Business Improvement Districts and Urban Governance*, 99 COLUM. L. REV. 365 (1999); William A. Fischel, *Neither “Creatures of the State” nor “Accidents of Geography”*: *The Creation of American Public School Districts in the Twentieth Century*, 77 U. CHI. L. REV. 177 (2010); Gerald E. Frug, *The City as a Legal Concept*, 93 HARV. L. REV. 1057 (1980); Clayton P. Gillette, *The Tendency to Exceed Optimal Jurisdictional Boundaries*, in *THE TIEBOUT MODEL AT FIFTY* 264 (William A. Fischel ed., 2006).

Stewardship Community District – the community Patricia Sette and David Shnaider joined. Current law and scholarship attempt to place local government entities into simple, formal boxes: a government body either qualifies as a city (with all of the legal powers, disabilities, and obligations associated with that status) or it does not, depending entirely on the designation the state legislature attaches to the government body. When a legislature designates a community a special district, rather than a city, the legislature permits that community to skirt many of the governance obligations that state and federal law would otherwise impose.

While this result should be troubling to those concerned with democracy, efficient local government, and equality, the technique of designating a community a special district, rather than a city, has grown quite widespread. Florida has founded seven districts on the Ave Maria model, covering more than 100,000 acres.⁷ Furthermore, the state hosts no fewer than 600 “community development districts” – entities that, as we shall see, are also quasi-cities.⁸ In 2005, California adopted a statute that provides for the establishment of “community services districts,” which the law declares are “[a] form of governance that can serve as an alternative to the incorporation of a new city.”⁹ As of 2010, 324 such community services districts existed in the state.¹⁰ Similar growth has occurred outside the warm weather ocean-side states; north, east, and west; rural, urban, and suburban; “liberal” or “conservative”; declining or booming; quasi-cities have arisen in regions of all persuasions throughout the country.

One common theme connects all the various quasi-cities: their legal status as a “noncity” matters a great deal. Not being a city empowers Ave Maria, for example, to preclude Patricia Sette and David Shnaider, and their neighbors, from participating in the management of their community; it frees Ave Maria from a host of rules pertaining to representation and voting, debt issuance, administrative law, service provision, and more. At the same time, it also matters that the quasi-city is city-like. Had Ave Maria been organized as a private corporation or homeowners’ association, it could not have issued municipal bonds,¹¹ employed the eminent domain power,¹² or imposed taxes.¹³

⁷ See Dillon, *supra* note 1.

⁸ FLA. CMTY. DEV. DIST. REPORT, <http://www.floridacddreport.com> (last visited Sept. 21, 2013).

⁹ CAL. GOV’T CODE § 61001(b)(3) (West 2010).

¹⁰ CAL. STATE CONTROLLER’S OFFICE, SPECIAL DISTRICT ANNUAL REPORT 1059 (2011).

¹¹ Municipal bonds enjoy a major advantage over private bonds since federal law exempts from federal taxation the interest on state or local bonds. See 26 U.S.C. § 103(a) (2006). A local bond is defined as “an obligation of a . . . political subdivision [of a State].” *Id.* § 103(c)(1). Since Ave Maria is a public body and independent local government created by the state, rather than a private corporation, its bonds qualify as local bonds. See Ave Maria Stewardship Community District Act, ch. 2004-461, 2004 Fla. Laws 360 § 3(2).

¹² *Haw. Hous. Auth. v. Midkiff*, 467 U.S. 229, 245 (1984) (explaining that a purely

Had it been organized as a traditional special district, it could not have provided all municipal services or engaged in land use planning.¹⁴ Quasi-cities thus occupy a hitherto unrecognized middle ground of local government law, somewhere between the traditional special district and the city. And quasi-cities enjoy the best of both legal worlds: the special district's freedom from regulation and the city's powers.

This Article identifies and offers a general theory of these transformed special districts, or "quasi-cities," testing them by the overriding value of community self-determination. Political and legal thinkers of disparate ideological and methodological stripes, as well as courts and legislatures, all praise local self-determination as a central tenet of "city theory," and with good cause. Self-determination promotes the satisfaction of individual preferences, political participation, and the preservation of communities.¹⁵ Yet community self-determination inevitably involves the risk that those not counted as members of the self-determining community will be affected by that community's decisions.¹⁶ Local government law aims in its treatment of traditional government units, such as the city, to strike a balance between these benefits and costs of self-determination. I contend here that the law should aim to strike the same balance vis-à-vis the quasi-city. Accordingly, I argue that the law should accommodate only those quasi-cities that promote the benefits of self-determination or decrease its costs better than a city.

The Article proceeds as follows. To prove that many special districts have vastly outgrown the original legal notion of the special district, I offer in Part I the first comprehensive legal history of special districts.¹⁷ I illustrate how the

private taking of property would be prohibited under the federal constitution).

¹³ *Harward v. St. Clair & Monroe Levee & Drainage Co.*, 51 Ill. 130, 135 (1869) ("If it be a tax, as in the present instance, to which the persons who are to pay it have never given their consent, and imposed by persons acting under no responsibility of official position, and clothed with no authority, of any kind, by those whom they propose to tax, it is, to the extent of such tax, misgovernment of the same character which our forefathers thought just cause of revolution.").

¹⁴ See *infra* Part I.D.

¹⁵ See, e.g., HANNAH ARENDT, *ON REVOLUTION* 269-73 (2006) (discussing local politics as the key to realizing true citizen participation); RICHARD SENNETT, *THE USES OF DISORDER: PERSONAL IDENTITY AND CITY LIFE* 163-71, 190-93 (1970) (describing local politics as necessary for community building); Charles Tiebout, *A Pure Theory of Local Expenditures*, 64 J. POL. ECON. 416, 418-23 (1956) (arguing that greater local control over the provision of government services generates a more efficient allocation of public goods).

¹⁶ See, e.g., *Holt Civic Club v. City of Tuscaloosa*, 439 U.S. 60, 69 (1978).

¹⁷ Commentators have written institutional and economic histories of the special district, see, e.g., JOHN C. BOLLENS, *SPECIAL DISTRICT GOVERNMENTS IN THE UNITED STATES* (1961); KATHRYN A. FOSTER, *THE POLITICAL ECONOMY OF SPECIAL-PURPOSE GOVERNMENT* (1997), and explored how the Supreme Court's modern equal protection jurisprudence – specifically, the one person, one vote rule – applies to the special district, see, e.g., Richard Briffault, *Who Rules at Home?: One Person/One Vote and Local Governments*, 60 U. CHI.

development of these supposedly humdrum entities highlights many of the key tensions animating U.S. law in the nineteenth and twentieth centuries. The strategies that courts have employed to settle these tensions inform the remainder of Part I, which establishes a policy-driven definition of the special district. After navigating the muddled waters of contradictory standards employed by courts, political scientists, and legal scholars, I conclude that those who recognized the special district in U.S. law intended it to have modest governmental powers; the special district was conceived as lacking the power to police individual behavior or to regulate uses of land beyond its own facilities.

In Part II, I review existing special districts that diverge from this traditional legal model of the special district of modest governmental powers: I identify and analyze the new quasi-cities. Rather than argue that the quasi-city be banned and that all existing quasi-cities be treated as cities, I isolate cases in which the establishment of a quasi-city rather than a city is normatively justifiable. For each mode of city formation – incorporation, annexation, and secession – I pinpoint instances in which the quasi-city serves the interests of self-determination better than the city. I argue that quasi-cities should serve as alternatives to incorporation when a transient mode of governance is needed; should replace annexation when the adjoining city resists annexation; and can always substitute for secession, provided that the quasi-city status is offered to all communities in the existing city.

Finally, in Part III I employ Part II's conclusions regarding the benefits of quasi-cities to develop the concept of "flexible self-determination." I then utilize this concept to join the debate over the function of self-determination, address the possibility that private sorting – the decisions of individuals to join or leave a community – can justify the quasi-city regime, and undermine the role of the city as local government law's baseline. The discussion of flexible self-determination reveals the deficiencies of our reliance on the city as the epitome of self-determination. As I illustrate in this Article, the quasi-city, combined with other phenomena, portends a momentous decline in the status of the city in local government law and theory.

I. THE SPECIAL DISTRICT IN U.S. LAW

The Introduction's first paragraph elicits a question: What, if anything, is rotten in Ave Maria? If there is a problem with the local government arrangement created by the Ave Maria Stewardship Community District, it is that Ave Maria enjoys an exemption from representation requirements even though it strikes observers as something more than a special district, something more akin to a city. Yet for that impression to be more than intuition, we must

L. REV. 339 (1993). But none have discussed or attempted to clarify the history of the special district as a legal entity. In a groundbreaking and highly influential article, Gerald Frug subjected the city to such historical analysis but did not extend his analysis to the special district. *See* Frug, *supra* note 6.

first examine how U.S. law traditionally defined a special district and assigned it powers. Only then can we perceive the extent to which Ave Maria and its many peer districts are at odds with the special district the law initially envisioned.

Accordingly, in this Part, I situate the special district in U.S. law, exploring its legal history and explaining how the courts came to accept this government entity. I aim to illustrate that the special district was legally recognized – and then afforded exemptions from general state and federal laws – only after the courts were persuaded that the special district differed in important ways from the city.

A. *Legal History of Special Districts: The Judicial Struggle to Acknowledge a New Form of Government*

Today, the special district is an incredibly important component of U.S. governance. Recently released data indicates that the number of special districts almost equals that of counties, cities, and towns combined.¹⁸ Special districts spend close to \$175 billion and carry more than \$293 billion in debt.¹⁹ Yet despite their prominence, their legal history has remained obscure. The neglect is unfortunate, since the history of the special district illuminates many of the key tensions in U.S. legal thinking of the last two centuries. Furthermore, it reveals the ways in which present-day legislatures may be misusing the legal institution.

Today, a state legislature can create a special district in one of two ways. The state can pass a special act that establishes a specific special district.²⁰ Alternatively, the state can enact a general law that specifies the procedures for founding new districts, which can then be followed anywhere in the state by local governments, residents, and developers.²¹ Originally, legislatures used only the first of these two techniques. As early as 1797, the Rhode Island General Assembly incorporated the East Greenwich Fire District, which provided services to the few houses and businesses located in that community.²² Early in the nineteenth century, the first drainage districts

¹⁸ U.S. CENSUS BUREAU, 2012 CENSUS OF GOVERNMENTS: ORGANIZATION COMPONENT ESTIMATES tbl.2, available at <http://www.census.gov/govs/cog2012> (reporting 38,910 county, city, and town governments as compared to 38,266 special districts).

¹⁹ U.S. CENSUS BUREAU, 2007 CENSUS OF GOVERNMENTS: FINANCE, available at http://www.census.gov/govs/cog/historical_data_2007.html.

²⁰ N.Y. GEN. MUN. LAW § 975 (McKinney 2012) (founding the Town of Islip Foreign Trade Zone Authority).

²¹ *Id.* § 990 (establishing the New York Municipal Theme Districts).

²² INST. OF PUB. ADMIN., LOCAL SPECIAL DISTRICTS AND AUTHORITIES IN RHODE ISLAND 5 (1962). In the Philadelphia area, starting in 1790, special authorities were created for prison administration, port development, public health control, education, and police. By 1850, there were ten such districts. METROPOLITAN ANALYSIS 83 (Stephen B. Sweeney ed., 1958).

appeared across the country.²³ Toll roads, canals, and bridges are also notable early-nineteenth-century examples of special districts.²⁴ In each case, the special act incorporating the specific special district was adopted because a state legislature felt that the relevant public project (such as fire prevention, drainage, toll road, canal, and bridge), if not self-funding in the long run, could and should be paid for from a source other than the general budget of an existing local government.²⁵ The notion of the special district arose from the belief that existing local governments were not up to the task of providing certain infrastructure or specific services.²⁶

In 1869, The Illinois Supreme Court explicitly endorsed this rationale for the creation of special districts, observing that the drafters of the Illinois Constitution were cognizant that “public necessities might require the creation of various and dissimilar corporate authorities, and to be imbued with administrative functions of a nature which could not be properly exercised by any known and existing corporate authority.”²⁷ The Illinois court made this statement, because like courts elsewhere, it was pressed to justify the special district. At the time, courts throughout the country were addressing legal challenges brought by residents and existing local governments against states’ power to create this new entity.

Plaintiffs grounded their opposition to the legislative creation of special districts in three constitutional limits on the power of state legislatures. State constitutions regulate the power of legislatures to create new forms of government, to recognize corporations, and to found cities.²⁸ The legal arguments made in reliance on these three limitations and the manner in which courts handled them illuminate key transformations in U.S. local government law as well as modern law in general. While debating the standing of the special district, courts had to specify the outer limit of the power of legislatures, separate the private from the public, and isolate the essence of local governance.

One of the three ways in which state constitutions had arguably limited the ability of legislatures to create special districts was by explicitly specifying those entities that could be vested with the traditional powers of government – for example, the taxing power.²⁹ Could legislatures freely vest such powers in a newly created, constitutionally unrecognized entity such as the special

²³ BOLLENS, *supra* note 17, at 169.

²⁴ ADVISORY COMM’N ON INTERGOVERNMENTAL RELATIONS, THE PROBLEM OF SPECIAL DISTRICTS IN AMERICAN GOVERNMENT 1 (1964).

²⁵ See *Bd. of Comm’rs v. Harrell*, 46 N.E. 124, 125-27 (Ind. 1897) (discussing the common rationale).

²⁶ See, e.g., *id.*

²⁷ *People ex rel. Wilson v. Salomon*, 51 Ill. 37, 50 (1869).

²⁸ See, e.g., N.Y. CONST. art. IX-X (regulating the legislature’s power to create local governments and form public and private corporations).

²⁹ See, e.g., ILL. CONST. of 1848, art. IX, § 5.

district? In 1869, the Illinois General Assembly created the South Park Commissioners and tasked it with selecting and maintaining lands for parks in three municipalities that now form part of Chicago's South Side.³⁰ Cook County, encompassing the three municipalities, refused to reconcile itself to the new Commissioners' existence.³¹ County officials argued that the act empowered the Commissioners in violation of article IX, section 5 of the Illinois Constitution, which provided that "[t]he corporate authorities of counties, townships, school districts, cities, towns, and villages may be vested with power to assess and collect taxes for corporate purposes . . ."³² By enacting the Act at issue, the Illinois General Assembly had vested the South Park Commissioners with the power to assess and collect taxes, though the Commissioners did not constitute one of the named authorities.

The challenge was a serious one, and one that had persuaded prior Illinois courts.³³ All parties understood that if the county's claim were accepted, the special district phenomenon, at least in Illinois, would be nipped in the bud. Deprived of the power to tax, the special district would be ineffectual. Luckily for the South Park Commissioners and their brethren, the Illinois court rejected the claim. The court held that the taxing power was indeed limited to local or corporate authorities, but that section 5's list of such authorities was not exhaustive: the constitution "does not confine the legislature to any particular corporate authorities, or to any then known instrumentalities of that character."³⁴

Thus the court repelled a strong attack on the legislature's authority to create special districts. It did still more in its decision to reinforce that authority. The court sowed the seeds for the special district's extraordinary powers and capacity to unsettle existing local government patterns when it stated that "[t]here is no prohibition . . . against the creation by the legislature, of every conceivable description of corporate authority, and when created *to endow them with all the faculties and attributes of other pre-existing corporate authorities*."³⁵ In this statement, the court appeared to imply that the legislature could strip existing local governments, such as cities, of any power or function and vest the same in a new government entity, such as a special district.

³⁰ *Salomon*, 51 Ill. at 40.

³¹ *Id.* at 39.

³² ILL. CONST. of 1848, art. IX, § 5.

³³ See, e.g., *Harward v. St. Clair & Monroe Levee & Drainage Co.*, 51 Ill. 130, 134 (1869) (holding that article IX, section 5 "forbid[s] the legislature to grant the power of such local or corporate taxation to any other persons than the local or corporate authorities").

³⁴ *Salomon*, 51 Ill. at 50. For similar rulings in other jurisdictions, see, for example, *Gilson v. Board of Commissioners*, 27 N.E. 235, 237 (Ind. 1891); *Bowles v. State*, 37 Ohio St. 35, 42 (1881).

³⁵ *Salomon*, 51 Ill. at 50 (emphasis added).

Indeed, not long after the decision, courts throughout the country came to view the practice as entirely uncontroversial.³⁶

Thus, the first attempt to find a constitutional limit on the ability of legislatures to create special districts failed: an existing list of local authorities would not constrain the legislature from creating new forms of government, such as the special district, even when the new entity drained governmental powers from existing authorities. But what exactly was the legal standing of this new form of government? Was the special district a corporation? Was it a city of a new persuasion? These questions mattered, since almost all states at the time had restrictions on the ability of legislatures to create and empower corporations and, within a few years, would place similar restrictions on the ability of legislatures to establish cities. Accordingly, restrictions on the ability of legislatures to create corporations served as the second ground on which to challenge the constitutionality of special districts.

The power of legislatures in this regard was limited by bans on special acts of incorporation, which numerous states had adopted following the Jacksonian drive against corporate privileges and for general incorporation laws.³⁷ These prohibitions on individual grants of corporate charters were seized on by those who opposed the special district. They argued that special districts were in effect corporations and thus a legislative act establishing a special district was a constitutionally prohibited individual grant of a corporate charter. Like the first line of attack on the special district, this second line proved unsuccessful. Courts concluded that the special district was not a corporation and, thus, that bars on special acts of incorporation were inapplicable.³⁸ But in their struggle to describe what the special district is, if not a corporation, and grasp its

³⁶ See, e.g., *Straw v. Harris*, 103 P. 777, 781-82 (Or. 1909) (upholding the legislature's power to remove from specific cities their power to control wharves and docks, as well as other privileges, and assign them to a port district); *State ex rel. Baltzell v. Stewart*, 43 N.W. 947, 949 (Wis. 1889) (upholding the legislature's power to assign the existing county board's power to construct county drains to a board of drainage commissioners).

³⁷ Jacksonians denounced special acts of incorporation as mere grants of monopolies to politically well-connected businessmen. See ARTHUR M. SCHLESINGER, JR., *THE AGE OF JACKSON* 334-41 (1945); Herbert Hovenkamp, *The Classical Corporation in American Legal Thought*, 76 *GEO. L.J.* 1593, 1617 (1988).

³⁸ See *infra* notes 39-45 and accompanying text. While courts were reluctant to find that constitutional limits on special acts of incorporation applied to acts to incorporate nonprivate, municipal entities, they had no trouble finding that other constitutional provisions and legislative acts directed at "corporations" did apply to public, quasi-public, and private corporations. See, e.g., *Murphy v. Bd. of Chosen Freeholders*, 31 A. 229, 232 (N.J. 1894) (holding that the Board of Chosen Freeholders, a quasi-public corporation, could be held liable under a statute that subjected persons and "corporations" to liability for death caused by wrongful act, neglect, or default because "in the absence of any language in the act which either expressly or impliedly excludes public corporations, it would upon principle be clear that they were intended to be, and are, included").

relation to the city, courts revealed much about evolving legal notions of corporations and municipalities.

For some courts, cities were corporations, but special districts were mere quasi-corporations.³⁹ Therefore, restrictions on creating corporations by special acts might apply to cities, but not to districts. A special district could not qualify as a corporation proper because unlike cities, special districts “are primarily political subdivisions,—agencies in the administration of civil government.”⁴⁰ They were not cities or corporations because, as one court observed in a different context, “[t]hey have the powers expressly granted them, and such implied powers as are necessary to enable them to perform their duties, and no more.”⁴¹ For these courts, the special district, in contrast to the city, was too feeble an entity, too limited in its powers, to qualify as a corporation.

But as the Supreme Court observed in 1880, “what is meant by the words ‘quasi corporation’ . . . is not always very clear.”⁴² And indeed some courts did not distinguish districts from cities in this respect.⁴³ Both the special district and the city, such courts concluded, were not corporations as far as bans on special acts of incorporation were concerned, because they were established for *municipal purposes*.⁴⁴ “Municipal” in this context, courts explained, meant

³⁹ *Memphis Trust Co. v. Bd. of Dirs.*, 62 S.W. 902, 903 (Ark. 1901) (recognizing the distinction between “municipal corporations” and “inferior corporations” like special districts); *State ex rel. Chouteau v. Leffingwell*, 54 Mo. 458, 472-73 (1873) (observing that a city, a county, and a special district are all public corporations, but only a city is a municipal corporation that may be established by special act).

⁴⁰ *Beach v. Leahy*, 11 Kan. 23, 29 (1873).

⁴¹ *Harris v. Sch. Dist. No. 10*, 28 N.H. 58, 62 (1853); *see also* *Fitzgerald v. Walker*, 17 S.W. 702, 704 (Ark. 1891) (“The fact that an improvement district is organized to accomplish a purpose which in a limited sense may be said to be ‘municipal’ does not make it a ‘municipal corporation.’ It exercises no legislative powers, and lacks many other essential characteristics of a corporation created for the government of a city or town.”).

⁴² *Sch. Dist. v. Ins. Co.*, 103 U.S. 707, 708 (1880).

⁴³ *State ex rel. Baltzell v. Stewart*, 43 N.W. 947, 949 (Wis. 1889) (reasoning that a constitutional provision that prohibited the legislature from enacting any special law that grants corporate power or privilege to an entity other than a city must have the same effect vis-à-vis the noncity quasi corporation as it has vis-à-vis the private corporation, since otherwise the special exception for cities, which are quasi corporations, would be superfluous). Another judicial tactic employed to evade constitutional limits on special acts of incorporation was to equate special districts with counties or townships and to find that both, as subdivisions of the state, did not qualify as corporations. *See, e.g., Keel v. Bd. of Dirs.*, 27 S.W. 590, 594, 596-97 (Ark. 1894) (citing 1 CHARLES FISK BEACH, JR., COMMENTARIES ON THE LAW OF PUBLIC CORPORATIONS § 3, at 7 (1893)).

⁴⁴ Some states incorporated the “municipal purposes” requirement into their constitutions. *See, e.g., CAL. CONST.* of 1849, art. IV, § 31 (“Corporations may be formed under general laws; but shall not be created by special act, except for municipal purposes. All general laws and special acts passed pursuant to this section may be altered from time to

“governmental” or “public.”⁴⁵ A governmental or public nature sets both cities and special districts apart from private corporations.

How did an entity assume this governmental or public nature? The mere fact that an entity provided a public service was clearly not sufficient. An entity could, for example, be tasked with providing a city with water and still count as a private corporation.⁴⁶ Courts explained that for an entity to come to have a public nature and thus be deemed municipal, it must not have any of the features of a private corporation: no subscribed stock, no power to make profits, no private interests of any kind.⁴⁷ As the Oregon Supreme Court, upholding the special port district established in Portland, neatly summarized, a port district’s “members are citizens, not stockholders,” and thus the district could not be a corporation.⁴⁸ Similarly, a district was not a corporation where

time, or repealed.”). In other states, the courts established the exception. *See, e.g.*, *Pell v. City of Newark*, 40 N.J.L. 71, 76 (N.J. Sup. Ct. 1878) (explaining that a constitutional clause declaring that “[t]he Legislature shall pass no special act conferring corporate powers, but shall pass general laws under which corporations may be organized” employs the “the word ‘corporation’ . . . which, in common acceptation, denotes a private corporation” not a municipal one), *aff’d*, 40 N.J.L. 550 (1878).

⁴⁵ *See, e.g.*, *City of Lexington v. Thompson*, 68 S.W. 477, 479 (Ky. 1902) (“A municipality is a state agency for governmental purposes.”); *S. Assembly v. Palmer*, 82 S.E. 18, 19 (N.C. 1914) (“The term [municipal corporations] as used in our Constitution, from the context and its primary significance, evidently refers to municipal corporations proper, as cities and towns, etc., and to those public quasi corporations, such as counties, townships, etc., in which the inhabitants of designated portions of the state’s territory are incorporated for the purpose of exercising certain governmental powers for the public benefit.”); *Irvine v. Town of Greenwood*, 72 S.E. 228, 230 (S.C. 1911) (“[M]unicipal corporations are created solely for public and governmental purpose”). *But see* *Peterson v. City of Wilmington*, 40 S.E. 853, 854 (N.C. 1902) (arguing, in a different context, that a city’s fire department powers are either “public and governmental,” “for the general good,” or “merely private and municipal” and “for its own benefit”).

⁴⁶ *See* *San Francisco v. Spring Valley Water Works*, 48 Cal. 493, 523-25 (1874) (explaining that a law granting a private corporation the franchise to provide the city with water was a special law forming a corporation).

⁴⁷ *Town of E. Hartford v. Hartford Bridge Co.*, 51 U.S. (10 How.) 511, 534 (1850) (“[Municipal corporations] are incorporated for public, and not private objects. They are allowed to hold privileges or property only for public purposes. The members are not shareholders, nor joint partners in any corporate estate, which they can sell or devise to others, or which can be attached and levied on for their debts.”); *Cook v. Port of Portland*, 27 P. 263, 265 (Or. 1891) (“The purposes and powers of the Port of Portland are all public, political, or governmental. It possesses none of the features of a private corporation. There is no stock to be subscribed. . . . There is no power to take tolls, or make profit of any kind. No private interests of any kind are granted or acquired.”).

⁴⁸ *Cook*, 27 P. at 264 (“A corporation, therefore, created for municipal purposes, is a corporation created for public or governmental purposes, with political powers to be exercised for the public good in the administration of civil government, whose members are citizens, not stockholders”); *see also* *Marin Mun. Water Dist. v. Chenu*, 207 P. 251,

local citizens had been asked to agree to its creation and to elect its directors.⁴⁹ Local assent was often key for qualification as a municipal body proper, rather than a private corporation whose individual creation was constitutionally prohibited. While, as we saw, the Illinois court approved the South Park Commissioners, it struck down the Lincoln Park Commissioners – created to provide identical services to Chicago’s North Side – because local voters were not consulted in its establishment, unlike in that of its South Side counterpart.⁵⁰

Though some of the doctrinal details remained fuzzy, by the closing decades of the nineteenth century a transformation in local government law – and in language – was well under way. The Iowa Supreme Court then observed: “The word ‘municipal,’ as originally used, in its strictness, applied to cities only. But the word now has a much more extended meaning, and when applied to corporations, the words ‘political,’ ‘municipal,’ and ‘public’ are used interchangeably.”⁵¹ By stretching the term “municipal,” special districts withstood a wave of suits alleging that they were the product of special acts that unconstitutionally granted private corporate powers. Soon enough, though, it was precisely this linguistic move that exposed the special district to the third and final legal argument against its legitimacy.

A few years after the Oregon Supreme Court upheld the Port of Portland, it struck down an identical act establishing the Port of Columbia – but without reversing its earlier decision.⁵² In the intervening years, Oregon, swept up in a national movement in favor of local empowerment reform, amended its Constitution to ban special legislation.⁵³ Here the term “special legislation” referred not to individual acts creating specific corporations, but to laws singling out a specific city for the grant or withdrawal of powers.⁵⁴ In the post-bellum era, most states adopted constitutional amendments requiring legislatures to favor general legislation – that is, legislation that grants powers to, or withdraws powers from, all localities in the state – over acts that target only specific localities.⁵⁵ These amendments placed a new and final hurdle in

253 (Cal. 1922) (“[A] municipal water district organized under the law for the purpose of collecting and distributing water to the public . . . is not a commercial corporation.”).

⁴⁹ See *Harward v. St. Clair & Monroe Levee & Drainage Co.*, 51 Ill. 130, 135 (1869).

⁵⁰ *People ex rel. McCagg v. Mayor of Chi.*, 51 Ill. 17, 36 (1869) (holding that a legislature cannot compel a city to incur a debt for a local improvement).

⁵¹ *Curry v. Dist. Twp. of Sioux City*, 17 N.W. 191, 191 (Iowa 1883). *But see* *Low v. City of Marysville*, 5 Cal. 214, 215 (1855) (insisting, in a different context, on the difference between “public” and “municipal,” observing that the latter was a more limited term restricted to the “objects of [city] incorporation”).

⁵² *Farrell v. Port of Columbia*, 91 P. 546, 548 (Or. 1907).

⁵³ *Id.* at 546.

⁵⁴ *Id.* at 546-47.

⁵⁵ Robert M. Ireland, *The Problem of Local, Private, and Special Legislation in the Nineteenth-Century United States*, 46 AM. J. LEGAL HIST. 271, 295 (2004). An early example of such measures is Ohio’s constitution. OHIO CONST. of 1851, art. II, § 26.

the way of the special district in Oregon and elsewhere. In 1869, a central legal argument on behalf of special districts in Illinois had been:

[A]s [the General Assembly] may act upon the State at large by general laws affecting the whole country, and all the people, so it may, in its discretion, there being *no prohibition expressly made*, or necessarily implied, make special laws to relate only to separate districts or portions of the State.⁵⁶

Yet within a year of this statement, Illinois adopted a ban on special legislation.⁵⁷ Now the state did have a “prohibition expressly made.” Interpreting a similar constitutional amendment adopted by the people of Oregon, the court in *Farrell* held that the legislature could no longer create individual port districts by special act, and so rejected the act establishing the Port of Columbia.⁵⁸

The Oregon court quickly became an outlier, however. In almost all states, courts were eagerly draining constitutional restrictions on special legislation of most of their meaning.⁵⁹ They were convinced that these constitutional dictates were blind to the reality that specific parts of the state had distinct needs. Accordingly, many courts proved hostile to plaintiffs who relied on constitutional restrictions on special legislation as grounds for an attack on a special district.⁶⁰ The most extreme example was Michigan. There, not only did the legislature plainly resort to special legislation to establish a specific metropolitan district for the Detroit area – the Huron-Clinton Metropolitan Authority; it also undeniably bypassed an existing general act that specified conditions for the creation of exactly such metropolitan districts throughout the state.⁶¹ Still the Michigan Supreme Court dismissed the claim that the legislature had created the Huron-Clinton district in violation of the constitutional prohibition on enacting a special act when a general act can be

⁵⁶ *People ex rel. Wilson v. Salomon*, 51 Ill. 37, 49-50 (1869) (emphasis added).

⁵⁷ ILL. CONST. art. 4, § 13.

⁵⁸ *Farrell*, 91 P. at 546-47.

⁵⁹ *Frug*, *supra* note 6, at 1116. Most importantly, the constitutional restrictions were not interpreted to prohibit general legislation aimed at a class of cities or counties, even if that class contained only a single city or county. *See, e.g.*, *Alanel Corp. v. Indianapolis Redevelopment Comm'n*, 154 N.E.2d 515, 523 (Ind. 1958) (upholding an act that provided for the creation of redevelopment districts in cities of more than 300,000 residents, of which there was precisely one – Indianapolis); *Tranter v. Allegheny Cnty. Auth.*, 173 A. 289, 294 (Pa. 1934) (upholding an act that applied to a class of counties that consisted of just one county).

⁶⁰ *See, e.g.*, *Davies v. Gaines*, 3 S.W. 184, 187 (Ark. 1887) (calling the state constitutional provision against special legislation “merely cautionary”).

⁶¹ *See* MICH. COMP. LAWS § 119.51-.62 (1979) (founding the Huron-Clinton Metropolitan Authority); MICH. COMP. LAWS § 119.1-18 (1979) (establishing the requirements to create a metropolitan district in Michigan).

made applicable.⁶² The reason the court provided was that “conditions exist in the designated metropolitan area, and not elsewhere in the State, which afford ample justification for local legislation.”⁶³

The court offered two more justifications for approving the Huron-Clinton district despite the ban on special acts, which shed additional light on the contemporary standing of the special district in U.S. law. First, the court observed that the special act had been put to a vote by the residents of the affected counties, all five of which voted in favor of the act.⁶⁴ Here we detect again the strong emphasis put on the role of local input in special districts’ establishment – even though their legal genesis was always, as explained at the outset, claimed to be the legislature’s omnipotence.⁶⁵ Second, the court questioned the applicability of the constitutional provision, observing that the provision was not intended “to strip the legislature of the power to create specific and supplemental governmental agencies designed to function in a limited sphere in the accomplishment of public purposes Such agencies do not arise to the dignity of municipal corporations,” which were the concern of the provision.⁶⁶

For the Michigan court, thus, the special district did “not arise to the dignity of municipal corporations.”⁶⁷ Elsewhere, the emergence of the special district changed the meaning of the word “municipal.” Still in other places, special districts were “quasi-municipal corporations.” Clearly, there was little consensus as to the formal status of the special district. Yet the courts had come to agree on one thing by the time the *Huron-Clinton* case was argued: state legislatures could create special districts. In fact, consistently, the contrasting characterizations of the special district were employed to legitimate its creation in varying constitutional climes. Different statuses were assigned by different courts to avoid different constitutional limits. Little wonder then that decades before *Huron-Clinton* was handed down, special districts were already a staple of U.S. governance. Even the ban on special legislation was of little concern, as more and more general statutes for creating special districts of

⁶² *Huron-Clinton Metro. Auth. v. Bds. of Supervisors*, 1 N.W.2d 430, 433-34 (Mich. 1942).

⁶³ *Id.* at 434.

⁶⁴ *Id.* at 432, 434.

⁶⁵ See *supra* notes 29-36 and accompanying text.

⁶⁶ *Huron-Clinton Metro. Auth.*, 1 N.W.2d at 437.

⁶⁷ *Id.*; see also *Memphis Trust Co. v. Bd. of Dirs.*, 62 S.W. 902, 903 (Ark. 1901) (“An incorporated levee district . . . is, like a municipality, a public corporation; but in respect to powers of self-government and legislation it falls far short, and in that regard is clearly distinguished from a municipality such as an incorporated town or city. These are, to a certain extent, miniature governments, having legislative, executive, and judicial powers; but a levee district has few, if any, such powers, and is not intended to have them, being only an agency created for a special and particular purpose.”).

various stripes were added to the law books.⁶⁸ Michigan, for example, already had its Metropolitan Districts Act on the books. And the Oregon legislature, thwarted in its attempt to individually establish the Port of Columbia, adopted a general law for establishing port districts less than two years after *Farrell* was decided.⁶⁹

B. *The Growth of Special Districts: New Deal Era Lawmakers' Embrace of a New Form of Government*

The proliferation of general acts that allowed for the creation of special districts was the culmination of the law's more than half-century-long struggle to come to terms with these new entities. By the middle of the twentieth century, many U.S. courts accepted the special district, since most of them, even when they could not consistently delineate its formal character, understood that it sufficiently differed in nature and powers from both the private corporation and the city.

And this new form of government was swiftly becoming a meaningful presence in America. By 1933, there were over 8500 special districts across the nation.⁷⁰ The origins for this boom in the number of districts can be traced to 1887, when California enacted a general law that provided for the establishment of irrigation districts, which was soon looked to as a model for the rest of the nation.⁷¹ Then another actor destined to play a vital role in the proliferation of special districts appeared on the stage: the federal government. The Reclamation Act of 1902 authorized large-scale participation by the national government in rural irrigation projects. Within a few years, the Federal Bureau of Reclamation began to push for the amendment of state laws and the passage of national legislation that would encourage the creation of irrigation districts and permit the irrigation districts to enter into contracts with the federal government.⁷²

A similar pattern developed with respect to the other two prominent districts founded by general laws at the time: housing districts and soil conservation districts. With respect to housing districts, the most important catalyst to their creation and spread was the federal Housing Act of 1937. The Act offered

⁶⁸ Courts easily dispensed with the rare argument that such general enabling acts were also forms of special legislation. *See Johnson v. Bd. of Park Comm'rs*, 174 N.E. 91, 94 (Ind. 1930) (holding that a general enabling act could be implemented by a number of cities, and so was general and not specific).

⁶⁹ The act was held to be a general law, and thus constitutional, in *Straw v. Harris*, 103 P. 777, 780 (Or. 1909).

⁷⁰ WILLIAM ANDERSON, *THE UNITS OF GOVERNMENT IN THE UNITED STATES* 37 (rev. ed. 1942).

⁷¹ BOLLENS, *supra* note 17, at 143-44. The California law famously survived a constitutional challenge based on the federal Takings Clause. *Fallbrook Irrigation Dist. v. Bradley*, 164 U.S. 112 (1896).

⁷² BOLLENS, *supra* note 17, at 151-54.

federal subsidies to local initiatives,⁷³ and New Dealers in Washington made little effort to conceal their preference for dealing with special districts rather than cities. Soil conservation districts were almost entirely the product of federal advocacy and subsidies.⁷⁴ The districts formed part of the Roosevelt Administration's plan to restore rural lands that had been devastated by the droughts of the 1920s and to protect agricultural lands elsewhere from the threat of flooding and erosion.⁷⁵

The heavy reliance on housing districts and soil conservation districts reflected the Roosevelt Administration's disdain for existing local governments⁷⁶ and its strong support of special districts. Proponents of the New Deal perceived city government as hopelessly indebted⁷⁷ and inefficient.⁷⁸ The special district appeared to be a promising alternative.⁷⁹ It was all the things the city was not: apolitical, specialized, service oriented, and public interest minded. Unlike the city that played an amorphous and political role in citizens' lives, the special district presented the possibility of expertise-driven government, an idea particularly appealing to the New Dealers who were firm believers in science-driven social policies and management.⁸⁰

C. *The Modern Legal Status of the Special District: Implications of Being a "Special District" Rather than a City*

Nineteenth- and early-twentieth-century courts legitimated the special district by observing that legislatures were free to establish new governments, so long as such new governments differed from existing legal forms; special districts, courts eventually concluded, met this proviso. New Deal policymakers eagerly exploited the rationale, detecting the potential of an

⁷³ *Id.* at 118-19.

⁷⁴ *Id.* at 158-59.

⁷⁵ In February 1937, President Roosevelt wrote:

The dust storms and floods of the last few years have underscored the importance of programs to control soil erosion. I need not emphasize to you the seriousness of the problem and the desirability of our taking effective action, as a Nation and in the several States, to conserve the soil as our basic asset. The Nation that destroys its soil destroys itself.

D. HARPER SIMMS, *THE SOIL CONSERVATION SERVICE* 75-76 (1970).

⁷⁶ See MARK I. GELFAND, *A NATION OF CITIES: THE FEDERAL GOVERNMENT AND URBAN AMERICA, 1933-1965*, at 24-26 (1975).

⁷⁷ See *id.*

⁷⁸ See MARTIN J. SCHIESL, *THE POLITICS OF EFFICIENCY* 46-59 (1977).

⁷⁹ See BOLLENS, *supra* note 17, at 119-21.

⁸⁰ By 1900, professional social science had emerged as formal discipline in many U.S. universities. These institutions inspired a belief that social relations, like natural forces, could be studied and effectively managed. They also produced experts who translated these ideas into policy during the Progressive Era. For an exhaustive study of expertise's rise and its effects on the New Deal, see DOROTHY ROSS, *THE ORIGINS OF AMERICAN SOCIAL SCIENCE* (1991).

entity distinct from existing legal forms, most prominently from the political city. As special districts multiplied, this distinction between the political city and the apolitical special district – formerly noted with approval by courts and New Deal administrators – took on substantive legal meaning. An array of modern court decisions and legislative acts created a set of rules that apply to cities, as the primary units of political local government, but not to special districts. As a result, the distinction between a city and a special district in contemporary U.S. law is extremely significant: if an entity is considered a special district, then certain rules respecting representation, financing, and administration apply.

The most prominent legal ramification of special district status pertains to the right to vote. Ever since the 1960s, traditional local government entities, such as cities and counties, have been subject to the one person, one vote principle embedded in the Fourteenth Amendment's Equal Protection Clause.⁸¹ Special districts, however, are for the most part exempt from the rule.⁸² Accordingly, a special district may, for example, confine voting rights to owners or weigh votes differently to reflect landholding or membership in a specific community. In other words, unlike a city or county, a special district may decide that its governing board be elected by "farms, or cities, or economic interests" and represent "trees or acres," as opposed to people.⁸³ Not only may the special district avoid the restrictions that the Equal Protection Clause imposes on elections, it may occasionally avoid the elections themselves. The Equal Protection Clause's one person, one vote rule only applies if elections are held. Thus, if a state legislature decides to appoint local officials, rather than elect them, the rule is irrelevant. That is to say, the rule is irrelevant unless there is a basis for forcing a state legislature to hold elections.⁸⁴ As a matter of federal law, courts are reluctant to prohibit the appointment, rather than election, of special district boards.⁸⁵ For their part,

⁸¹ See, e.g., *Avery v. Midland Cnty.*, 390 U.S. 474, 476 (1968) (holding that the one person, one vote rule applies to units of local government (citing *Reynolds v. Sims*, 377 U.S. 533 (1964))).

⁸² See, e.g., *Ball v. James*, 451 U.S. 355, 370 (1981) ("The functions of the Salt River District are therefore of the narrow, special sort which justifies a departure from the popular-election requirement of the *Reynolds* case."); *Salyer Land Co. v. Tulare Lake Basin Water Storage Dist.*, 410 U.S. 719, 728 (1973) (holding that a water storage district was exempt from the *Reynolds* rule in light "of its special limited purpose and of the disproportionate effect of its activities" on those to whom the district had extended the right to vote).

⁸³ *Reynolds*, 377 U.S. at 562 ("Legislators represent people, not trees or acres. Legislators are elected by voters, not farms or cities or economic interests.").

⁸⁴ *Sailors v. Bd. of Educ.*, 387 U.S. 105, 111 (1967) ("Since the choice of members of the county school board did not involve an election and since none was required for these nonlegislative offices, the principle of 'one man, one vote' has no relevancy.").

⁸⁵ See, e.g., *id.*; *Atlanta v. Metro. Atlanta Rapid Transit Auth.*, 636 F.2d 1084, 1089 (5th Cir. 1981); *Van Zanen v. Keydel*, 280 N.W.2d 535, 538-39 (Mich. Ct. App. 1979).

state constitutions and laws routinely limit the requirement that local governments be elected to cities and counties.⁸⁶

In most states, special districts are also exempt from another widespread and highly consequential constitutional constraint – the limitation on the issuance of debt. Most states cap the amount of debt local governments can assume, or require that they obtain popular consent in referendum before issuing debt. Many states exempt special districts from these requirements.⁸⁷ Similarly,

⁸⁶ See, e.g., IND. CONST. art. VI, §§ 2-3; *Ehm v. Bd. of Trs. of Metro. Rapid Transit Auth.*, 251 F. App'x 930, 932 (5th Cir. 2007); *People ex rel. Vermilion Cnty. Conservation Dist. v. Lenover*, 251 N.E.2d 175, 177 (Ill. 1969).

⁸⁷ See, e.g., *Comm'r v. Shamberg's Estate*, 144 F.2d 998, 1001 (2d Cir. 1944) (“The [special district] is not subject to the debt limiting provisions of the constitution[s] of [New Jersey and New York]; it was created in order to establish an agency with operating power independent of state and municipal debt limitations.”); *Fitzgerald v. Walker*, 17 S.W. 702, 704 (Ark. 1891) (declining to find that a special district was a municipal corporation subject to a constitutional provision that prohibited the state, city, county, town, and other municipalities from issuing debt); *Dortch v. Lugar*, 266 N.E.2d 25, 42 (Ind. 1971); *Walinske v. Detroit-Wayne Joint Bldg. Auth.*, 39 N.W.2d 73, 81 (Mich. 1949) (“Inasmuch as the bonds proposed to be issued by the [special district] are not faith and credit obligations of its incorporators [that is, the city of Detroit and county of Wayne], they need not be voted on by the electorate, nor are they subject to the debt limitations of the municipalities.”); *Boardman v. Okla. City Hous. Auth.*, 445 P.2d 412, 416 (Okla. 1968) (observing that special districts “are not political corporations or subdivisions of the State as those terms are used” in the state constitutional provision that imposes debt limitations); *Tranter v. Allegheny Cnty. Auth.*, 173 A. 289, 298-99 (Pa. 1934). The California Supreme Court has observed with respect to this issue that:

The overwhelming weight of judicial opinion in this country is to the effect that bonds, or other forms of obligation issued by states, cities, counties, political subdivisions, or public agencies by legislative sanction and authority, if such particular bonds or obligations are secured by and payable only from the revenues to be realized from a particular utility or property, acquired with the proceeds of the bonds or obligations, do not constitute debts of the particular state, political subdivision, or public agency issuing them, within the definition of ‘debts’ as used in the constitutional provisions of the states having limitations as to the incurring of indebtedness.

Cal. Toll Bridge Auth. v. Wentworth, 298 P. 485, 486 (Cal. 1931). The Oregon Supreme Court has made a similar observation:

That the [special district] under consideration does not come within the word ‘county’ as used in [the constitutional provision that imposes debt limitations] is manifest, and it has heretofore been held by this court that it is not included in the words ‘towns and cities[,]’ from which it is clear that no limitation is placed upon the indebtedness to be incurred by municipalities of this class.

Straw v. Harris, 103 P. 777, 781 (Or. 1909) (citation omitted). While Florida does subject special districts to the bond referendum requirement, see FLA. CONST. art. VII, § 12, community development districts – the most powerful of Florida’s special districts – are not subject to this rule, see FLA. STAT. § 189.408 (2012). Note that regardless of the exemption from constitutional restrictions on the issuance of local debt afforded by many states to special districts’ bonds, interest paid on special districts’ bonds – as interest paid on other local bonds – is tax exempt. *Shamberg's Estate*, 144 F.2d at 999.

special districts, unlike cities, are often not governed by state constitutional limits on local taxation.⁸⁸

In addition, the special district enjoys more liberty than the city in determining and designing the menu of services it provides to residents. State laws may oblige cities to provide a wide range of predetermined services,⁸⁹ but a special district does not operate under these rules and hence is not required to perform all the tasks listed therein. The special district's liberty to operate outside local government laws does not end here. Since most states subject special districts to corporate law, rather than administrative law, such districts are generally excluded from the civil service, procurement, and pension fund regulations that govern public agencies.⁹⁰ Like private entities, special districts have the discretion to establish personnel policies, salary schedules, management techniques, and operating procedures.⁹¹ And unlike cities and their departments, special districts may sometimes evade freedom of information obligations.⁹²

⁸⁸ For example, the Maryland Constitution limits the power of a municipal corporation to levy new taxes, *see* MD. CONST. art. XI-E, § 5, but the state legislature has exempted special districts from the definition of "municipal corporation," *see* MD. CODE ANN., HOUS. & CMTY. DEV. art. 23A § 9(a) (LexisNexis 2011). The California Constitution, by contrast, limits the ability of cities, counties, *and* special districts to impose taxes. CAL. CONST. art. XIII A, § 4 ("Cities, Counties and special districts, by a two-thirds vote of the qualified electors of such district, may impose special taxes on such district . . .").

⁸⁹ *See, e.g.*, TEX. CIV. PRAC. & REM. CODE ANN. § 101.0215 (West 2011) (holding municipalities liable for damages arising from governmental functions "enjoined on a municipality by law and . . . given it by the state as part of the state's sovereignty, to be exercised by the municipality in the interest of the general public," and providing a nonexhaustive list of such functions); *Pryor v. Miller*, 194 F. 775, 781 (4th Cir. 1911); *Petrushansky v. State*, 32 A.2d 696, 700 (Md. 1943); *Truong v. City of Hous.*, 99 S.W.3d 204, 210 (Tex. App. 2002).

⁹⁰ FOSTER, *supra* note 17, at 10.

⁹¹ *E.g.*, *Fisher v. Se. Pa. Transp. Auth.*, 431 A.2d 394, 396 (Pa. Commw. Ct. 1981); Barbara Coyle McCabe, *Special Districts: An Alternative to Consolidation*, in CITY-COUNTY CONSOLIDATION AND ITS ALTERNATIVES 131, 134 (Jered B. Carr & Richard C. Feiock eds., 2004).

⁹² State access-to-information statutes normally apply to "public agencies"; courts must interpret the scope of this latter term. *E.g.*, Craig D. Feiser, *Protecting the Public's Right to Know: The Debate over Privatization and Access to Government Information Under State Law*, 27 FLA. ST. U. L. REV. 825, 835-36 (2000) (discussing court decisions that view private entities as "public agencies" covered by freedom of information statutes). As a result, the application of certain statutes to special districts is sometimes left in doubt. For example, in *New York Post Corp. v. Moses*, 10 N.Y.2d 199 (1961), the New York Court of Appeals denied a newspaper's request to inspect the Triborough Bridge and Tunnel Authority's records since it was not acting "on behalf" of the city, and thus its records were not public. *Id.* at 200-01. To counter this outcome the state legislature amended the law's definition of public records so that it now applies to all entities empowered to levy taxes. N.Y. GEN. MUN. LAW § 51 (McKinney 2013).

D. Defining Special Districts

All the judicial and legislative moves of the past half century, which have fixed a separate set of rules for the special district, warrant a strategy for resolving a question that was never asked during the formative years of the special district. Today, whenever private plaintiffs ask a court to subject an entity alleging to be a special district to any of the voting, financing, or administrative restrictions just reviewed (and still others),⁹³ the court must ask itself: should the entity be recognized as a special district? So long as special district status conferred few, if any, privileges, the question was merely conceptual. But as the privileges and implications of special district status expanded, courts grew discontented with the practice of mechanically deferring to the legislature's designation of an entity. The district's exemption from diverse general regulations of voting, financing, and administrative practices corresponds to a perceived distinction between the special district and the city. This distinction must have substantive meaning, extending beyond the legislature's choice of labels. Recent courts have noted as much, like their predecessors who first sanctioned the special district, yet they have hardly elaborated on what specific characteristics render an entity a special district exempt from general regulations applicable to cities.

There is no clear answer to this question in current law. Existing scholarship, for its part, is of limited assistance. Special districts were originally embraced by courts and policymakers since they fundamentally differed from cities.⁹⁴ Consequently, they were later granted exemptions from many of the rules that applied to cities.⁹⁵ One thing has thus remained a constant throughout the district's legal history: a special district is not a city. But what exactly does it mean to be not a city?

This Section completes the task set for this Part of the Article by identifying the criterion that sets the special district apart from the city in U.S. law. This exercise enables us to see that Ave Maria and similar entities do not squarely fall on the special district side of the line, and thus that the traditional law of special districts does not provide justification for exempting them from the rules applicable to cities. In an effort to synthesize a definition of the special district that is in accord with the relevant legal history and practices, I review the various criteria used by judges, legislatures, and commentators to distinguish the special district from the city. These criteria are in urgent need of clarification and revision. New Mexico's laws demonstrate as much, probably inadvertently, by defining the powers of several special districts as

⁹³ See Fla. Dep't of Revenue v. Canaveral Port Auth., 642 So. 2d 1097, 1100-01 (Fla. Dist. Ct. App. 1994) (indicating special district status may affect immunity from state taxation); Floyd v. Mayor of Balt., 966 A.2d 900, 913 (Md. 2009) (status may affect the quorum requirement); RESTATEMENT (SECOND) OF TORTS § 895C cmt. a (1977) (status may affect attachment of state's sovereign immunity in torts).

⁹⁴ See *supra* Part I.A-B.

⁹⁵ See *supra* Part I.C.

those belonging to “a public body politic and corporate and constituting a quasi-municipal corporation and political subdivision of the state established as an instrumentality exercising public and essential governmental and proprietary functions to provide for the public health, safety and general welfare.”⁹⁶

1. Contending Definition Number One: Single-Purpose Government

The history of special districts⁹⁷ is filled with fire districts, irrigation districts, park districts, port districts, and the like. Accordingly, the most visible candidate to serve as the special district’s defining feature is a district’s confinement to the performance of one function. Like a city, the special district is an independent unit of government: it has its own governance structure and it enjoys some administrative and budgetary autonomy.⁹⁸ Unlike a city, however, this independent unit of government appears to be authorized by the state to provide only one designated service – for example, fire protection, irrigation, parks, or a port. For several commentators and courts, this characteristic is *the* distinguishing attribute of special districts.⁹⁹

This supposedly distinct feature is intuitively appealing for definitional purposes, but the stark dividing line it offers is illusory. Many districts do not perform only one function. The Census lists numerous districts performing combined functions, such as fire protection and water supply, sewerage and water supply, housing and community development, and industrial development.¹⁰⁰ A district falling into one of the latter two categories often exercises diverse and hardly related powers, as discussed below.¹⁰¹

Even a liberal interpretation of the single-purpose requirement cannot salvage the definition. The Supreme Court tentatively indicated that an entity remains a single-purpose unit notwithstanding that it has more than one function, so long as those additional functions are “incidental” to the unit’s primary function.¹⁰² Yet, as Justice White noted in dissent, it is unclear what makes one function “incidental” to another or indeed what the adjective even

⁹⁶ N.M. STAT. ANN. §§ 72-16-22, 72-19-22, 74-10-27 (West 2012).

⁹⁷ See *supra* Part I.A-B.

⁹⁸ See *Lists & Structures of Governments: Definitions*, U.S. CENSUS BUREAU, <http://www.census.gov/govs/go/definitions.html> (last visited Sept. 21, 2013).

⁹⁹ See, e.g., *Goldstein v. Mitchell*, 494 N.E.2d 914, 920 (Ill. App. Ct. 1986) (holding that drainage districts are created primarily for the “special and narrow” purpose of managing erosion and flooding problems and are thus special districts exempt from the application of the one person, one vote rule under both the federal and Illinois constitutions); BOLLENS, *supra* note 17, at 2; FOSTER, *supra* note 17, at 2.

¹⁰⁰ *Lists & Structures of Governments: Special District Governments by Function and State: 2012*, U.S. CENSUS BUREAU tbl.9, <http://www.census.gov/govs/cog2012> (last visited Sept. 21, 2013).

¹⁰¹ See *infra* Part II.

¹⁰² *Ball v. James*, 451 U.S. 355, 368-69 (1981).

implies – a connection between functions or their relative significance.¹⁰³ Regardless of the way “incidental” is interpreted, some of the districts the Census identifies would inarguably fail to meet even “the one function plus incidentals” test. For in addition to the districts with more than one function, a review of the Census’s 2007 list reveals 2662 districts characterized simply as “multi-function.”¹⁰⁴ For each of these districts, the Census eschewed any attempt at functional grouping. Thus, in current practice, the difference between the special district and the city is not that the former performs only one function (and perhaps others closely associated with it). There is also very little reason why a special district *should* perform only one function. The extreme functional and geographical fragmentation that single-function districts engender is often criticized as undesirable for both political and economic reasons.¹⁰⁵

2. Contending Definition Number Two: Limited Function Government

The first potential definition of the special district – a single-purpose government – offers a functional test that fails empirically and normatively.¹⁰⁶ Still, another variant of the functional test may be plausible. Throughout the special district’s history, courts that have upheld special districts have stressed the fact that the powers of districts were limited. As one court explained, special districts should be upheld because unlike cities “[t]hey have the powers

¹⁰³ *Id.* at 382-83 & n.5.

¹⁰⁴ See U.S. CENSUS BUREAU, 2007 CENSUS OF GOVERNMENT, http://www.census.gov/govs/cog/historical_data_2007.html (last visited Sept. 21, 2013).

¹⁰⁵ See, e.g., Laurie Reynolds, *Local Governments and Regional Governance*, 39 URB. LAW. 483, 510-23 (2007). In 2006, California amended its laws to explicitly encourage local authorities to combine special districts into broader multifunction ones. CAL. GOV’T CODE § 61001(c)(2) (West 2010) (“[I]t is the intent of the Legislature . . . [t]o encourage local agency formation commissions . . . to combine special districts that serve overlapping or adjacent territory into multifunction community services districts.”).

¹⁰⁶ This approach is futile even if the number of maximal functions performed by a special district is set at more than one. The Supreme Court tried to identify “special-purpose unit[s] of government,” by isolating the services whose provision, in the aggregate, equals “normal governmental’ authority.” *Salyer Land Co. v. Tulare Lake Basin Water Storage Dist.*, 410 U.S. 719, 720 (1973). Governments supplying such services could not be characterized as special-purpose units of government. *Id.* at 729. The lists of services the Court provided in its leading cases, however, were contradicting. Compare *id.* (explaining that normal government authority consists of the provision of schools, housing, transportation, utilities, roads, and facilities designed to improve the quality of life within the district’s boundaries), with *Ball*, 451 U.S. at 366 (explaining that normal government authority consists of the ability to tax and the provision of schools, roads, sanitation, health, and welfare services). For an alternate list of services, see Sara C. Galvan, *Wrestling with MUDs to Pin down the Truth About Special Districts*, 75 FORDHAM L. REV. 3041, 3066-67 (2007). Since there is no manner of isolating the quantitative baseline, such lists cannot escape indeterminacy.

expressly granted them . . . and no more.”¹⁰⁷ The distinction thus expressed does not focus on the number of functions that the special district performs or may perform, but rather emphasizes the fact that the special district’s powers are limited – the term “limited” implying not a specific limit but simply the presence of some limit.

This defining attribute has been received so warmly by jurists and commentators that it informs the Census’s description of the special district. For the U.S. Census, the special district has a “*limited* number of designated functions” while the city enjoys “*general* government” powers.¹⁰⁸ This distinction draws a contrast between a government of limited powers and a government of plenary powers, primarily sovereign in character. It is a distinction of kind rather than degree and thus it exhibits an analytical coherence that eluded the first definition suggested for the special district. Yet despite this improvement, this distinction too is untenable, since the structures of U.S. law render it inoperable.

For what are “general” powers? Does U.S. law actually recognize any local government as enjoying plenary powers? The answer is simply no. Local governments in modern U.S. law are all governments of limited powers. They are creatures of the state, and as such, only hold those powers that the state allocates to them. Even after powers are conferred by the state, those powers may be abridged, rescinded, or changed.¹⁰⁹ Pennsylvania’s law, for example, does not provide cities *qua* cities with “general” powers; rather it states that “[e]very city . . . is authorized and empowered to enact ordinances *for the following purposes*, in addition to the other *powers granted* by this act.”¹¹⁰ Similarly, the Illinois Constitution states that cities “shall have *only powers granted* to them by law.”¹¹¹ Exactly like special districts as identified by this second contending definition, cities only have a “limited number of designated functions.” Therefore, the inherent nature of their governmental powers cannot be utilized to tell special districts apart from cities.

¹⁰⁷ Harris v. Sch. Dist., 28 N.H. 58, 62 (1853).

¹⁰⁸ See U.S. CENSUS BUREAU, *supra* note 104. In finding that Midland County was subject to the one person, one vote rule, the Supreme Court based its holding in part on the county’s exercise of “general governmental powers.” Avery v. Midland Cnty., 390 U.S. 474, 484-86 (1968) (imposing the one person, one vote rule on “units with general governmental powers over an entire geographic area”).

¹⁰⁹ See, e.g., Bd. of Supervisors v. Local Agency Formation Comm’n, 838 P.2d 1198, 1205 (Cal. 1992) (“In our federal system the states are sovereign but cities and counties are not . . . they are mere creatures of the state and exist only at the state’s sufferance.”); Harris Trust & Sav. Bank v. Vill. of Barrington Hills, 549 N.E.2d 578, 581 (Ill. 1989) (“It is universally recognized that municipal corporations are creatures of the State and that, absent constitutional restraints . . . they are subject to the will and discretion of the legislature.”).

¹¹⁰ 53 PA. CONS. STAT. ANN. § 23103 (West 2012) (emphasis added).

¹¹¹ ILL. CONST. art. VII, § 7 (emphasis added).

3. Contending Definition Number Three: A Non-Home-Rule Local Government

The special district and the city are both governments of limited powers and thus the second potential definition of special districts is unsatisfactory. Perhaps, however, the traditional judicial claim that special districts are distinct insofar as “they have the powers expressly granted to them . . . and no more” has become valid following constitutional and statutory reforms revising the character of the limit placed on the powers of cities, but not on those of special districts. At different times since the late nineteenth century, almost all states adopted home rule constitutional amendments or statutes.¹¹² Home rule powers vary by state, but normally they grant the home-rule city the power to draw its own charter; some authority to initiate local legislation even without a specific state delegation of power in the field; and, for such legislation, some limited immunity against preemption by state law.¹¹³ The extent, nature, and impact of the autonomy thereby conferred on home-rule cities are debatable.¹¹⁴ Yet given the limitations unarguably still in place – particularly the reservation to the states of extensive powers to preempt city legislation and the confinement of the powers of cities to “local” matters alone – few would argue that home-rule municipalities are no longer governments of limited powers.¹¹⁵ Indeed, in many states, home rule merely amounts to a requirement that limits on city powers be construed narrowly.¹¹⁶

Home rule thus does not imply general powers. But maybe it can be perceived as an approximation – the closest approximation available in U.S. law – and as a stand-in for the general powers envisioned by failed contending definition number two: special districts should be viewed as different from

¹¹² Missouri was the first state to adopt a home rule provision. *See* 21 ANTIEAU ON LOCAL GOVERNMENT LAW § 21.01 (2d ed. 2005) (citing MO. CONST. of 1875, art. IX, §§ 20-25 (applicable only to St. Louis)). Currently, home rule has been granted by either constitutional provision or statute in forty-three states. *See id.*

¹¹³ David J. Barron, *Reclaiming Home Rule*, 116 HARV. L. REV. 2255, 2290 (2003).

¹¹⁴ *See, e.g., id.* (comparing the views of proponents of home rule versus those of antisprawl reformers on the benefits and disadvantages of home rule provisions and proposing an alternate version of home rule); Richard Briffault, *Our Localism*, 90 COLUM. L. REV. 1, 10-18 (1990) (criticizing academics for suggesting states are hostile to “vulnerable” local governments and rebuking them for dismissing “the state constitutional protections of local government”); Frug, *supra* note 6, at 1115-17 (arguing that legislative efforts to protect local autonomy failed to achieve that aim).

¹¹⁵ Even Briffault, a critic of those who view the city as lacking significant legal power, concedes the city’s “technically limited status” and “formal subservience to the state.” Briffault, *supra* note 114, at 15.

¹¹⁶ *See, e.g.,* ILL. CONST. art. VII, § 6(m) (“Powers and functions of home rule units shall be construed liberally.”); N.J. CONST. art. IV, § 7, para. 11 (“The provisions of this Constitution and of any law concerning municipal corporations formed for local government . . . shall be liberally construed in their favor.”).

cities because they are local governments that lack home-rule powers. Several commentators and lawmakers, old and new, have endorsed this definition.¹¹⁷

Unfortunately, the definition is inadequate for four reasons. First, as the historical analysis illustrates, the special district predates the home-rule movement; the special district was a category distinct from the city in U.S. law well before any city held home-rule powers.¹¹⁸ Second, not all states have adopted home-rule amendments; the many cities in states without home-rule laws indicate that lacking home-rule powers does not turn an entity into a noncity.¹¹⁹ Third, even in those states that abide by home-rule principles, not all cities are accorded home rule. For example, in Texas, only cities of over 5000 residents may qualify for home rule.¹²⁰ In such instances, the home-rule-based distinction between cities and districts collapses. Yet these three objections are merely symptoms of the fourth, and most fundamental, problem. The variation in home-rule statutes reflects the fact that home rule, standing alone, is hollow. Since home-rule status does not immunize cities that exercise certain powers from state preemption,¹²¹ it does not connote a core of concrete

¹¹⁷ See, e.g., Fla. Att’y Gen. Op. 96-66 (1996), available at <http://www.myfloridalegal.com/ago.nsf/Opinions/05D8A7264753B5428525639D0046439E> (suggesting that the Florida Supreme Court in a prior ruling “acknowledged that community development districts . . . are authorized to accomplish special, limited purposes and do not possess the broader home rule powers that municipalities and counties have in Florida”); HOWARD LEE MCBAIN, *THE LAW AND THE PRACTICE OF MUNICIPAL HOME RULE*, at v (1916) (defining home rule as the power to self-govern conferred upon a city, from which we can infer that an entity with the power to perform governmental functions could not claim to be a special district).

¹¹⁸ While in Florida, the attorney general argued that home-rule powers lay at the heart of the distinction, Fla. Att’y Gen. Op. 96-66, home-rule powers were not generally made available to local governments in that state until 1968, compare FLA. CONST. OF 1885, art. VIII, § 8 (“The legislature shall have power to establish and abolish municipalities, to provide for their government, to prescribe their jurisdiction and powers, and to alter or amend the same at any time.”), with FLA. CONST. OF 1968, art. VIII, § 2(b) (“Municipalities shall have governmental, corporate and proprietary powers to enable them to conduct municipal government, perform municipal functions and render municipal services and may exercise any power for municipal purposes except as otherwise provided by law.”).

¹¹⁹ Virginia, for example, does not grant home rule to any of its municipalities, yet its law still draws a distinction between the city and the special district: municipal corporations are defined solely as cities and towns, VA. CODE ANN. § 15.2-102 (West 2012), while an array of laws have allowed for the creation of special districts or established specific ones, *id.* §§ 15.2-4200 to -7315.

¹²⁰ TEX. CONST. art. XI, § 5.

¹²¹ The California home-rule amendment, at least on paper, is one of the most “empowering,” providing municipalities with immunity from state preemption – but only if the subject regulated by local ordinance is a “municipal affair.” CAL. CONST. art. XI, § 5. Thus, for example, one court ruled that regulation of predatory practices in mortgage lending was a statewide concern, and so the city was implicitly preempted from acting in the field. *Am. Fin. Servs. Ass’n v. City of Oakland*, 104 P.3d 813, 826-27 (Cal. 2005) (finding

and settled powers that one could say are reserved to cities and not extended to districts.¹²² It thus cannot embody the crucial idea that inspired the legal recognition of districts in the first place and the disparate treatment they received subsequently: that cities, but not districts, exercise the most significant of local governmental powers.

4. Suggested Definition: A Government Lacking Powers of Regulation Beyond Its Facilities

Though each of the contending definitions reviewed in Parts I.D.2 and I.D.3 is untenable, the logic underlying them is valid. As seen in Part I.A-C, the law came to extend more relaxed treatment to special districts pursuant to courts' and New Dealers' conviction that districts suffer a certain disability as compared to cities. Contending definition number two's suggestion that this disability is the absence of "general powers" is not workable since general powers is not a recognizable concept in U.S. local government law. Contending definition number three improved on this definition by offering the lack of home-rule powers – a meaningful concept in U.S. law – as the relevant distinction, but home-rule powers are too amorphous to be regarded as *the* powers withheld from special districts. These failed efforts do inch us closer, however, to the attribute that special districts must lack.

In the United States, local governments do not, and cannot, hold true general powers. They can, however, hold a power so formidable in terms of its impact on citizens' lives that it approximates such powers. That power is the power to regulate.¹²³ More specifically, the power to regulate individual behavior and

legislative intent to preempt local mortgage lending laws was implied despite the lack of an express preemption clause in the state statute covering that field, since mortgage lending had historically been regulated by the state).

¹²² Furthermore, in at least one state, special districts may choose to subject their charter to home-rule amendment procedures. CONN. GEN. STAT. § 7-328a (2013) (allowing districts to make their charters "subject to amendment by home rule action," though charter amendments may not give the district powers in excess of those provided by statute).

¹²³ This is not a notion of inherent police powers. Commentators who treat such powers as the distinguishing feature of cities, for example, McCabe, *supra* note 91, at 132, fail to note that police powers reside with the state, and cities, very much like special districts, do not have inherent police powers. If the city holds police powers, it is only following its definition and delegation by the state. *E.g.*, N.Y. CONST. art. IX, § 2(c)(ii)(10) (delegating to local governments the power to "adopt and amend laws not inconsistent with the provisions of this constitution or any general law relating to . . . [t]he government, protection, order, conduct, safety, health and well-being of persons or property therein" to local governments). Virginia grants municipal corporations similar powers, including:

[Powers] the exercise of which [are] not expressly prohibited by the Constitution and the general laws of the Commonwealth, and which are necessary or desirable to secure and promote the general welfare of the inhabitants of the municipality and the safety, health, peace, good order, comfort, convenience, morals, trade, commerce and industry of the municipality and the inhabitants thereof . . .

the uses of property to an extent beyond that required for the accomplishment of some other independent task. Since this is the most significant of local powers, cities may hold it (by grant of the state legislature),¹²⁴ but special districts may not. Special districts are thus governments that lack the power to independently regulate behavior and land use.¹²⁵ A special district may be afforded the power to police behavior or land uses, but only if and to the extent necessary to sustain the services or infrastructure that it provides. Mostly, these are powers to control behavior within district-operated facilities or in connection with them. For example, a park district may be granted the power to set rules of behavior in the park and even establish a police force to enforce these rules.¹²⁶ A drainage district may be authorized to veto building permits generating excessive runoff into its infrastructure¹²⁷ or exercise floodplain controls.¹²⁸ These powers are extensive, yet their regulatory effect does not extend beyond the particular facilities managed by the district.

The absence of unrelated powers of regulation is not merely a convenient or doctrinally tenable manner of setting districts apart; it comports with the logic and history of special districts. Regulatory powers are antithetical to the special district as traditionally conceived in U.S. law. The Supreme Court has

VA. CODE ANN. § 15.2-1102 (West 2012).

¹²⁴ Since cities, as explained, cannot exercise powers not delegated to them, they can only hold the zoning power (or other regulation powers) through a zoning enabling act enacted by the legislature. *See, e.g.*, STANDARD STATE ZONING ENABLING ACT (U.S. Dep't of Commerce 1926) (adopted by most states) (proposing a standard set of zoning enabling acts for states to employ to ensure "successful zoning" practices in their local governments, because state constitutions and home rule provisions are insufficient to ensure optimal delegation of zoning powers).

¹²⁵ This approach also receives support from several courts that observe – if only in passing and while focusing on other supposedly distinguishing attributes – an entity's lack of regulatory powers is a reason to view it as a special district. *E.g.*, *Kessler v. Grand Cent. Dist. Mgmt. Ass'n*, 158 F.3d 92, 105 (2d Cir. 1998) (averring that the Grand Central Business Improvement District "cannot meaningfully alter the conduct of persons present in the district"); *Leverso v. Southtrust Bank*, 18 F.3d 1527, 1529 n.2 (11th Cir. 1994) (noting, in passing, Florida's Community Development Districts' incapacity to engage in zoning as their distinguishing attribute).

¹²⁶ 70 ILL. COMP. STAT. 1205/4-7 (2012) (allowing the board of any park district to establish a police force and "define and prescribe their respective duties and compensation"); 70 ILL. COMP. STAT. 1325/1 (2012) (describing in more detail the powers of police officers employed by park districts under section 4-7 of the Park District Code).

¹²⁷ ARTHUR L. STOREY, JR. ET AL., HARRIS CNTY. FLOOD CONTROL DIST., POLICY, CRITERIA, AND PROCEDURE MANUAL FOR APPROVAL AND ACCEPTANCE OF INFRASTRUCTURE §§ 2.12-.2 (2010) (describing Harris County Flood Control District criteria for accepting projects affecting their district, which include extensive drainage requirements).

¹²⁸ URBAN DRAINAGE & FLOOD CONTROL DIST., FLOODPLAIN REGULATION (1980) (establishing a series of land use regulations for the district aimed at protecting residents and property from dangers associated with flooding).

observed that a special district “cannot enact any laws governing the conduct of citizens.”¹²⁹ As we saw, special districts were created to provide infrastructure or other services, and thus, in the words of one of their first observers, they “emphasize service rather than regulatory functions.”¹³⁰ The Indiana court similarly explained that “to be valid, a . . . district must have been created to provide for local improvements (not governmental or political in nature) of special benefit.”¹³¹ Special districts were accepted early on by courts, and then championed by New Dealers, as a means to address specific problems, standing in stark contrast to the more traditional forms of local government that are engaged in overall political, economic, and social policymaking. The power to regulate lies at the heart of such policymaking. This power is inescapably associated with “‘normal governmental’ authority,” which the Supreme Court, has observed that districts do not exercise.¹³²

Land use regulation in particular, which is so closely tied to overall planning, is nowadays the most central among the powers of normal governmental authority.¹³³ Cities themselves view it as such. Cities often demand that land use powers be withheld from special districts for fear that, if enabled to exercise land use powers, districts would threaten the position of cities.¹³⁴ That special districts do not “arise to the dignity of municipal corporations,” a fact that allowed early courts to legitimate their establishment,¹³⁵ must entail the denial of this most influential of powers.

From the history of special districts and the rationales for their creation, law should synthesize the following functional definition of special districts: a special district is an entity created by state law that has its own governing structure and enjoys financial and administrative autonomy but does not exercise powers of regulating behavior or controlling land use, except when necessary for policing its facilities.

II. THE QUASI-CITY IN U.S. LAW: AN ASSESSMENT OF THE NEW SPECIAL DISTRICT

But what of an entity created as a special district that does not fit this limited definition? What of a special district that enjoys the power to regulate behavior and control land uses, when not necessary for the policing of its facilities? What of the Ave Maria Stewardship Community District? Formally, such

¹²⁹ Ball v. James, 451 U.S. 355, 366 (1981).

¹³⁰ BOLLENS, *supra* note 17, at 68.

¹³¹ Dortch v. Lugar, 266 N.E.2d 25, 42 (Ind. 1971).

¹³² Salyer Land Co. v. Tulare Lake Basin Water Storage Dist., 410 U.S. 719, 729 (1973) (“[T]he district [does] not exercise what might be thought of as ‘normal governmental’ authority . . .”).

¹³³ Briffault, *supra* note 114, at 3 (“Land use control is the most important local regulatory power.”).

¹³⁴ BOLLENS, *supra* note 17, at 112-13.

¹³⁵ See *supra* Part I.A.

entities are special districts, yet functionally they are something more: they are *special* special districts or, as I suggest, “quasi-cities.” Should the law allow state legislatures to create such hybrids? Should courts treat them as special districts?

In light of Part I’s discussion, the answer should be no. Simply put, a special district that possesses the power to regulate behavior or land uses beyond what is necessary to maintain the services or infrastructure it provides is not a special district at all. A state legislature should not be permitted to create it as such, nor should a court be inclined to treat it as such. Instead, local government law should look beyond the formal label attached to an entity and treat it as its actual powers command. Thus, a “special district” authorized to regulate behavior or the uses of land beyond what is necessary to maintain the services or infrastructure it provides should be subject to the same rules that apply to traditional local governments with respect to voting, indebtedness, and administrative law.¹³⁶

Yet maybe sometimes the quasi-city does offer social benefits *as* a special district – even though it clashes with the historical structure and function of the special district. Perhaps in some instances the ability of a special district to act like a city and yet evade the rules that apply to a city does not undermine the purposes of U.S. local government law. In this Part, I explore the possibility that the quasi-city may be normatively advantageous. Ultimately, I recommend that the law adopt a rebuttable presumption against the quasi-city – a presumption that once an entity enjoys broad regulatory powers it should not be treated as a special district absent a showing that the specific criteria enumerated in this Part have been met.

The mission to locate cases of normatively legitimate quasi-cities begins where the discussion concerning the history and role of the special district left off. Since the quasi-city enjoys those powers that normally are associated with cities rather than special districts, it serves as an alternative to city formation. But is it an attractive alternative? As an alternative to citymaking, the quasi-city should be endorsed only if it addresses the shortcomings of city formation. To the extent it does, then despite its divergence from the special district’s traditional nature, it performs a function closely related to the special district’s

¹³⁶ For a survey of these rules, see *supra* Part I.C. One court came close to adopting the approach suggested in this Article. More than thirty years after the creation of the Municipality of Metropolitan Seattle, a federal court decided to apply the one person, one vote rule to this special district. It observed that though originally only granted the powers to operate a sewage system, over time, the district was awarded other powers, including some planning powers, and thus could no longer be considered a special district. See *Cunningham v. Metro. Seattle*, 751 F. Supp. 885, 890 (W.D. Wash. 1990) (describing in detail the many powers exercised by the district, which “place it clearly within the scope of the one person, one vote principle”).

historical rationale: it accomplishes desirable local-government goals that cities are incapable of achieving.¹³⁷

But before proclaiming that in any given case the quasi-city can promote the goals of city formation better than an actual city, we must establish a baseline. What are the goals that city formation aims to achieve? The normative debate over the value of cities animates many of the concerns of local government scholars and, naturally, is beyond the scope of this Article. For this Article's purposes, I can generalize that city formation is valuable insofar as it fosters self-determination, enabling citizen control over local affairs.¹³⁸ For many citizens, the most vital local affair over which they desire control is land use. Hence, in the preceding Part, I concluded that this power has historically been kept out of the reach of special districts. As a justification and motive for city birth, local control over land use is accompanied by a desire to retain a greater percentage of tax revenues to assure that residents' funds serve only the purposes the residents themselves choose.¹³⁹

City birth is necessary to achieve control over land and tax since, as long as an area does not constitute a city, it forms an "unincorporated" part of the county. Though counties are local-government entities, they lack the capacity to provide for self-determination, as insightful commentators have observed.¹⁴⁰ Counties do not always hold the powers that residents desire – mainly, the power over land use – and even when they do they often choose not to exercise them.¹⁴¹ Counties were originally set to function as local administrators of state policies, and as such they operate bare bones governmental structures and skewed representational schemes that are inhospitable to meaningful self-determination.¹⁴²

¹³⁷ See *supra* notes 25-27, 80-81, and accompanying text.

¹³⁸ See, e.g., *In re Incorporation of Oconomowoc Lake*, 97 N.W.2d 189, 191 (Wis. 1959) ("The state has always recognized the spirit of self-government which is a large part of the American way of life. This includes, and with greater force, the right of local self-government.").

¹³⁹ See, e.g., Russel Lazega & Charles Fletcher, *The Politics of Municipal Incorporation in South Florida*, 12 J. LAND USE & ENVTL. L. 215, 248 (1997) (quoting the vice-mayor of newly incorporated Pinecrest's announcement that Pinecrest residents will retain the same services at a lower cost than before Pinecrest was incorporated, and that the surplus funds will be used for starting up the new city); see also *Edgewood Indep. Sch. Dist. v. Kirby*, 804 S.W.2d 491, 499-500 (Tex. 1991) (holding that the state cannot redistribute property taxes raised in one incorporated locality to serve another). Of course, the two targets for local control are not unrelated: controlling land uses allows for controlling the tax base through socioeconomic engineering of the community.

¹⁴⁰ See Michelle Anderson, *Cities Inside out*, 55 UCLA L. REV. 1095, 1114-15, 1128 (2008) (describing counties' inability to meet needs of residents in unincorporated areas for which they are responsible due to lack of funds, personnel, and knowledge of local issues).

¹⁴¹ ADAM ROME, *BULLDOZER IN THE COUNTRYSIDE* 229 (2001) (describing land use regulatory powers given to counties as well as their rarely employing these powers).

¹⁴² Counties' representation schemes are biased, ironically, since they are subject to the

Self-determination, unattainable at the county level, but available at the city level, is desirable in light of traditional democratic concerns, in that it allows for more effective citizen participation in government, and in light of efficiency concerns, in that it allows individuals to create and choose local environments that best fit their preferences. At the same time, self-determination inevitably has its costs. It excludes outsiders – for example, other county residents – from the political community.¹⁴³ It frustrates economies of scale¹⁴⁴ and it limits the ability to calculate into the decisionmaking process the spillover effects of “local” decisions.¹⁴⁵ Laws regulating the formation of cities attempt to strike a balance between these competing values. The quasi-city may be an attractive alternative in cases where it strikes a better balance. That is to say, the quasi-city should be embraced when, thanks to its exemption as a special district from the laws applicable to cities, it increases the benefits of self-determination as compared to a city, at costs comparable to those of a city, or realizes benefits of self-determination, comparable to those that a city provides while decreasing the associated costs.¹⁴⁶

Accordingly, in this Part, I compare the benefits and costs, in self-determination terms, of forming a quasi-city with those of forming a city, focusing specifically on three ways in which a city may be formed:

one person, one vote rule. Due to its mechanical application, incorporated and unincorporated parts of the county must be represented in an identical manner; even though only the latter rely on the county for important local services and are thus much more impacted by its policies.

¹⁴³ See, e.g., GERALD E. FRUG, CITY MAKING: BUILDING COMMUNITIES WITHOUT BUILDING WALLS 61-69 (1999) (explaining how local boundaries artificially divide citizens into “we” and “they”).

¹⁴⁴ RONALD OAKERSON, GOVERNING LOCAL PUBLIC ECONOMIES 16 (1999) (“[P]rovision-side criteria lead to the establishment of provision units, both small and large, that are not well matched to economies of scale for particular services and service-components.”). For example, it may be less expensive to operate one forensic lab that serves a larger community than to operate two separate labs that serve each of the larger community’s two self-determining halves.

¹⁴⁵ See, e.g., Richard Briffault, *Local Government Boundary Problem in Metropolitan Areas*, 48 STAN. L. REV. 1115, 1132-44 (1996) (recognizing local self-governments’ residents’ lack of appreciation for the ways in which local matters “spillover” to affect a broader region and their disinterest in the healthier conception of membership within a larger metropolitan community, especially problematic today where local governments generally abut one another and residents and goods regularly cross these borders). The fact that the costs or benefits of a local decision may be borne or enjoyed, as the case may be, by those outside of the deciding community.

¹⁴⁶ They can also be attractive when the increase in the value of benefits is greater than the increase in costs or the decrease in benefits smaller than the decrease in costs. Such cases are complicated, since they require an assessment of the relative value of benefits as opposed to costs of city formation, which is subjective.

incorporation, the act of creating a new city in unincorporated parts of a county; annexation, the act of incorporating land into an existing city; and secession, the act of creating a new city in land previously forming part of another city.

A. *The Quasi-City as an Alternative to Incorporation*

1. The Current Use of the Quasi-City as an Alternative to Incorporation

A special district serves as an alternative to incorporation when it enjoys the power to regulate behavior or land uses in unincorporated portions of a county. More and more special districts have been performing this function over the past few years, all while escaping critical analysis. States have enacted general statutes for the creation of such special districts bearing a variety of names: community services districts,¹⁴⁷ metropolitan districts,¹⁴⁸ community development districts,¹⁴⁹ special taxing districts,¹⁵⁰ village districts,¹⁵¹ improvement associations,¹⁵² and special services districts.¹⁵³ Each of these

¹⁴⁷ Originally, in California, the community services district was merely a district that provided more than one special district service. Following a revision of the statute in 2005, community services districts now enjoy wide-ranging powers. CAL. GOV'T CODE § 61100 (West 2010) (authorizing community services districts to perform many tasks commonly associated with cities, such as supplying water, managing waste, and maintaining a police force).

¹⁴⁸ In Colorado, metropolitan districts were originally envisioned as districts that provide more than one service. COLO. REV. STAT. § 32-1-103(10) (2012) (“Metropolitan district’ means a special district that provides for the inhabitants thereof any two or more of the following services . . .”).

¹⁴⁹ FLA. STAT. § 190.002 (West 2013) (“It is in the public interest that . . . basic services for community development districts be under one coordinated entity.”).

¹⁵⁰ *E.g.*, MD. CODE ANN., HOUS. & CMTY. DEV. art. 25A, § 5(O) (LexisNexis 2011 & Supp. 2012) (repealed 2013) (enabling special taxing districts to assess, levy, and collect taxes).

¹⁵¹ *E.g.*, N.H. REV. STAT. ANN. § 52:1 (2012) (providing for the establishment of village districts by town selectmen).

¹⁵² *E.g.*, CONN. GEN. STAT. § 7-324 (2013) (authorizing the continuation of former districts established prior to May 1957, including improvement associations).

¹⁵³ *E.g.*, CONN. GEN. STAT. § 7-339m (Any municipality may establish . . . a special services district . . . to promote the economic and general welfare of its citizens and property owners through the preservation, enhancement, protection and development of the economic health of such municipality.”). In 2007, the Georgia Legislature passed a law authorizing the creation of its own version of the special services district, called the “infrastructure development district.” Act of May 30, 2007, No. 372, § 5, 2007 Ga. Laws 739, 771. The Act, however, was designed to take effect only upon approval of a constitutional amendment, *see id.*, which was defeated in 2008, *see Georgia Election Results*, GA. SEC’Y OF STATE, http://www.sos.georgia.gov/elections/election_results/2008_1104/swqa.htm (last visited Sept. 30, 2013).

districts qualifies as a quasi-city as I define it since each has been granted the power to regulate land use,¹⁵⁴ either through a specific zoning authorization;¹⁵⁵ a general authority to establish a planning¹⁵⁶ or zoning¹⁵⁷ commission; a general authority to adopt building regulations;¹⁵⁸ or a general authority to enforce covenants.¹⁵⁹

Quasi-cities serving as alternatives to new cities have also been created by specific legislative acts – for example, Florida’s Ave Maria Stewardship Community District Act. The latter statute affords that district the authority to decide which areas will be connected by roads and provided with water, sewerage, and other services; it also empowers the district to designate the locations for parks, conservation areas, schools, and other amenities.¹⁶⁰ These all amount to planning and land use regulation authority, making Ave Maria a quasi-city under the definition proposed in this Article.

A more famous Floridian quasi-city to have been created by special act is the Reedy Creek Improvement District accommodating Disney World and covering thirty-nine square miles. Originally a Disney-controlled drainage district, it was transformed into its current form in 1967 by special act of the state legislature.¹⁶¹ While Florida’s drainage districts enjoy limited powers,¹⁶² the Reedy Creek Improvement District, in its post-1967 form, has extensive powers, including the authority to operate nuclear power plants.¹⁶³ It is exempt from county zoning and development rules,¹⁶⁴ and relies instead on its own

¹⁵⁴ Some districts not explicitly granted powers to regulate land uses, were granted powers to adopt and enforce “police regulations,” for example, MICH. COMP. LAWS ANN. § 119.4 (West 2006 & Supp. 2013).

¹⁵⁵ Council of Chevy Chase View v. Rothman, 594 A.2d 1131 (Md. 1991) (special taxing district may be empowered to zone). Village districts can be granted zoning powers by special act, N.H. REV. STAT. ANN. § 675:3 (2008), and some were, *see, e.g.*, Hill-Grant Living Trust v. Kearsarge Lighting Precinct, 986 A.2d 662 (N.H. 2009) (concerning a dispute about a village district that had the authority to promulgate zoning regulations).

¹⁵⁶ CAL. GOV’T CODE § 61100(ac) (West 2010). The planning commission is responsible for land use, including general and specific plans, zoning, variances, subdivisions, and use permits. CAL. GOV’T CODE § 65101.

¹⁵⁷ CONN. GEN. STAT. §§ 7-326, 8-1a (2013) (authorizing districts to establish zoning or planning commissions).

¹⁵⁸ *Id.* § 7-326.

¹⁵⁹ COLO. REV. STAT. § 32-1-1004(8) (2012); FLA. STAT. § 190.012(4) (2012).

¹⁶⁰ Ave Maria Stewardship Community District Act, ch. 2004-461, 2004 Fla. Laws 360 (detailing the powers of the Ave Maria Stewardship Community District).

¹⁶¹ Act of May 12, 1967, ch. 67-764, 1967 Fla. Laws 256 (establishing the powers and functions of the Reedy Creek Improvement District).

¹⁶² FLA. STAT. §§ 298.001-.78 (2012) (conferring certain limited powers on Florida’s drainage districts).

¹⁶³ Act of May 12, 1967, ch. 67-764, 1967 Fla. Laws 256, 295, 296 (conferring the power to utilize nuclear fission and other experimental sources of power and energy).

¹⁶⁴ *Id.* at 311-12 (providing an exemption from county and statewide zoning laws).

development and planning powers, which are identical to those of all other Florida municipalities.¹⁶⁵

Another example of a quasi-city created by special act as an alternative to a new city may be found in Texas. When the United States Army closed bases in Bowie County in 1995, the state legislature did not permit the incorporation of a new city there, but rather transferred control over the abandoned 765 acres of land encompassing over one million square feet of buildings to a new special purpose district: the Red River Redevelopment Authority (the Authority).¹⁶⁶ Pursuant to further base closures, the Authority's land was extended to about 20,000 acres.¹⁶⁷ The Authority was to develop and manage the lands, and, for that purpose, it was granted all powers available to municipalities to engage in economic and housing development.¹⁶⁸

2. The Potential Normative Benefits of the Quasi-City as an Alternative to Incorporation

For those versed in the recent history of the special district and its relationship to citymaking, the above instances in which the creation of a district serves as an alternative to, rather than an enabler of, city incorporation, may come as a surprise. For decades, the special district has facilitated incorporation by relieving small communities of the need to self-finance public services that benefit from economies of scale.¹⁶⁹ The creation of a traditional special district to provide, for example, sewage services to a large geographic area allows the distinct communities within that area to incorporate as separate cities without the burden of needing to fund independent and costly sewage services individually. Thereby, self-determination in the policy areas that matter most to residents – land use and tax – is achieved at a lower price.

The creation of a quasi-city, by contrast, does not facilitate incorporation of a city, but instead replaces it. Can the quasi-city still promote self-

¹⁶⁵ FLA. STAT. § 163.3167(6) (“The Reedy Creek Improvement District shall exercise the authority of this part as it applies to municipalities, consistent with the legislative act under which it was established, for the total area under its jurisdiction.”). Still the state court rejected the claim that the act was “subterfuge to avoid the creation of a municipality.” *State v. Reedy Creek Improvement Dist.*, 216 So. 2d 202, 206 (Fla. 1968).

¹⁶⁶ OFFICE OF ECON. ADJUSTMENT, U.S. DEF. DEP'T, *BASE REALIGNMENT AND CLOSURE COMMUNITY PROFILE* (2009).

¹⁶⁷ *Id.*

¹⁶⁸ Act of June 17, 2005, ch. 729, sec. 3503.101(15), § 1.02, 2005 Tex. Gen. Laws 2322, 2382-83 (granting the Authority all powers available to municipalities to engage in economic and housing development). The Authority promoted a mixed-use development, incorporating housing, a golf course, warehouses, office space, and industrial activities. The acreage later added to the district was used to develop a business and industrial park. *See* OFFICE OF ECON. ADJUSTMENT, *supra* note 166, at 2.

¹⁶⁹ *See* Briffault, *supra* note 6, at 374-78 (summarizing how districts provide public services and investment for financially strapped cities).

determination? Can it do so in a manner that alleviates the costs associated with self-determination via incorporation?

I start with the first question. The quasi-city cannot promote self-determination in the traditional, populist, sense of the term when the power to control the quasi-city's governing body is not vested in the quasi-city's residents. In these instances, the quasi-city clearly fails to provide the level of self-determination offered by the city. Some of the quasi-cities surveyed fall into this category. Florida's community development districts, for example, limit the franchise to landowners,¹⁷⁰ while in other Floridian quasi-cities – for example, Ave Maria Stewardship Community District and Reedy Creek Improvement District – the original legislative act ensures that the developing corporation retains control over local affairs.¹⁷¹ Finally, the board of Texas's Red River Authority consists of appointees of the county and all incorporated

¹⁷⁰ This legislative arrangement was upheld by the Florida Supreme Court despite a one person, one vote challenge in *State v. Frontier Acres Community Development District*, 472 So. 2d 455 (Fla. 1985) (holding that the one-vote-per-acre rule did not violate the Equal Protection Clause).

¹⁷¹ See Act of May 12, 1967, ch. 67-764, 1967 Fla. Laws 256, 284 (establishing Reedy Creek). Disney is the only landowner of Reedy Creek. Disney also picks the few dozen "permanent residents" in the two "cities" in the district, thus providing Disney control over any representative government. Ave Maria presents a more interesting case. According to its establishing act, landowners elect the five board members. Once more than 500 citizens reside in the district, however, the citizens may petition for and approve in elections the following alternative scheme. If less than 25% of the district is already urban (developed and inhabited to meet certain density requirements), one board member will be elected by electors and the other four by landowners. If the urban area is between 25% and 50%, two board members are popularly elected. If between 50% and 70%, three board members. Only when 90% of the land is developed are all of the board members elected. 2004 Fla. Laws at 379-420. This procedure intimates that voters gain control once more than half of the district is developed. However, the planned size of the completed urban area within the district assures that this threshold will not be met. So as to never cede control, the developing partnership opted for a larger sized district: a 10,805-acre district controlling a town of only 5027 acres. See Liam Dillon, *Ave Maria – a Town Without a Vote: Residents' Control Hinges on Trust*, NAPLES DAILY NEWS, May 11, 2009, <http://www.naplesnews.com/news/2009/may/11/town-without-vote-residents-control>. In light of these numbers, the development threshold for resident control can only be met if the partnership decides to develop at least 376 more acres outside of town. A partnership official argued it plans on doing so, and that in the year 2033 residents should control the district. Yet that will only occur if the never-submitted, additional development plans are abided by, and as the official admitted, given current economic, political, and environmental realities, that is far from a certainty. See *id.* As of the spring of 2012, 374 homes and condominiums have been built in Ave Maria, out of the 5120 originally planned for this period. Katherine Albers, *Third Party to Conduct Ave Maria Cost-Benefit Analysis*, NAPLES DAILY NEWS, Apr. 10, 2012, <http://www.naplesnews.com/news/2012/apr/10/third-party-conduct-ave-maria-cost-benefit-analysis>. Regardless, the decision is entirely in the developer's hands.

cities in it, rather than locally elected representatives.¹⁷² Such arrangements can lead, and indeed have led, to the establishment of quasi-cities that, at least for a period of time,¹⁷³ are little more than company towns. Naturally, company towns frustrate rather than promote self-determination, and are thus disfavored by modern law.¹⁷⁴

The other quasi-cities presented in this Section cannot be described as company towns and do serve self-determination. Although not required to do so by relevant constitutional provisions,¹⁷⁵ the general laws that create these quasi-cities call for resident participation in their establishment (normally, approval in popular elections) and management (for example, through board elections).¹⁷⁶ In this regard, these quasi-cities provide the same benefits of self-determination as cities. In certain respects, they may even promote self-determination better than cities. States set minimum criteria for the incorporation of a new city regarding population size,¹⁷⁷ area density,¹⁷⁸ and physical character.¹⁷⁹ Furthermore, states oblige cities old and new to offer a largely preset menu of services.¹⁸⁰ As a practical matter, communities that are demographically and geographically eligible to incorporate may be unable to

¹⁷² Other than county appointees, the board comprises of one appointee from each of the county's cities, except for the largest, Texarkana, which appoints three. Act of June 17, 2005, ch. 729, sec. 3503.052, § 1.02, 2005 Tex. Gen. Laws 2322, 2381-82.

¹⁷³ In Florida's community development districts, for example, residents must be added to the electorate within either six or ten years after the district's inception, depending on the area's physical character. FLA. STAT. § 190.006(3)(a) (2012) (requiring that elections in the district be held on a one person, one vote scheme after six or ten years).

¹⁷⁴ *E.g.*, *People ex rel. Moloney v. Pullman's Palace Car Co.*, 51 N.E. 664, 674 (Ill. 1898) (stating that a town owned and operated by a corporation "is opposed to good public policy, and incompatible with the theory and spirit of our institutions").

¹⁷⁵ *See supra* Part I.C.

¹⁷⁶ *E.g.*, COLO. REV. STAT. §§ 32-1-305 to 305.5 (2012) (defining voters as either owners or residents residing in the district for no less than thirty days). In its current statute, California mandates elections for community service districts. The act's earlier incarnation did not contain this requirement, allowing control by the developing landowner. The California Supreme Court struck it down, as contradicting the federal one person, one vote rule. *Burrey v. Embarcadero Mun. Improvement Dist.*, 488 P.2d 395 (Cal. 1971) (holding that a radical departure from the one person, one vote system can be sustained, if at all, only by the most compelling of state interests). Since this ruling preceded *Salyer* and *Ball*, it is doubtful whether current federal law mandates it.

¹⁷⁷ For example, Florida sets the minimum for incorporation at 1500 persons in counties with populations of 75,000 or fewer and 5000 persons in counties with larger populations. FLA. STAT. § 165.061(1)(b).

¹⁷⁸ For example, Florida requires an average population density of 1.5 persons or more per acre. *Id.* § 165.061(1)(c).

¹⁷⁹ For example, Colorado requires that the area be "urban in character." COLO. REV. STAT. § 31-2-101(3)(a).

¹⁸⁰ *See supra* note 89 (listing relevant cases).

obtain city status since they cannot provide the services that cities must deliver due to their limited size, strained economic condition, or preferences.¹⁸¹ This practical handicap may be transformed into a legal disability, as in California, where incorporation is only approved pursuant to a feasibility study of the proposed city's boundaries, its service provision capacities, and potential revenues.¹⁸²

Communities that for any of these legal or practical reasons are unable to realize self-determination through incorporation can turn to the quasi-city. The quasi-city, as a special district, is not subject to the demographic criteria that apply to cities,¹⁸³ nor is it covered by statutes obliging cities to provide all local services. Consequently, the quasi-city allows the specific community to independently pick, in accordance with its economic capabilities and its residents' preferences, the services its new governing entity will provide.¹⁸⁴ In these cases, the special district's exemption from the statutory requirements applicable to cities actually furthers the legislative goal of sustainable self-determination.

Still, the fact that the quasi-city promotes self-determination in instances where incorporation is not suitable for the task does not automatically render it beneficial. Self-determination, as already noted, comes with costs in the form of externalities. Self-determination sets the community apart, enabling it to make independent decisions even if thereby noncommunity members are forced to bear some of the costs of incorporation and of the newly incorporated entity's future acts.¹⁸⁵ For example, cities often hastily adopt exclusionary zoning and implement other policies that hinder intracounty redistribution. They also tend to work to defeat the county's ability to provide services on a larger and thus cheaper scale.¹⁸⁶

¹⁸¹ Consider East Los Angeles: it attempted incorporation three times and failed each time due to an insufficient tax base. GARY MILLER, *CITIES BY CONTRACT* 138-40 (1981).

¹⁸² CAL. GOV'T CODE §§ 56720, 56800 (West 2010) (requiring commission to make necessary findings and perform comprehensive fiscal analysis prior to approving incorporation).

¹⁸³ For example, while Florida requires a minimum of residents and density for cities' establishment, *see supra* note 178, neither condition is necessary for quasi-cities' creation. *See* FLA. STAT. § 190.005 (providing rules for establishment of community development districts).

¹⁸⁴ *See supra* note 89 and accompanying text.

¹⁸⁵ Therefore, a few states require administrative approval by a state board for incorporation, only granted after effects on the surrounding area are considered. *See* MICH. COMP. LAWS ANN. §§ 123.1001-.1010 (West 2006) (creating state boundary commission to review proposed incorporations); WIS. STAT. ANN. §§ 66.0203-.0207, 66.0207(2)(d) (West 2003 & Supp. 2012) (providing procedures for the incorporation of villages and cities, and standards to be applied by the board). Elsewhere courts can consider such effects when determining whether "the proposed incorporation is reasonable and is required by the public convenience and necessity." MISS. CODE ANN. § 21-1-17 (West 1999).

¹⁸⁶ For more on these costs of incorporation, see MILLER, *supra* note 181.

Given these externalities, local government law may be wary of providing additional opportunities for self-determination by sanctioning the quasi-city. But deeper inspection reveals that, when compared with the city, the quasi-city actually tends to mitigate externalities. The differing legal treatment of the special district¹⁸⁷ allows the quasi-city to improve on the city's ability to provide local self-determination in a socially desirable manner. This beneficial effect is attributable specifically to the quasi-city's exemption from local participation requirements. This exemption prevents "government capture." That is to say, it ensures that pioneer residents do not take advantage of their early arrival to monopolize and misuse local control powers to the detriment of other area residents' legitimate interests. This is true for two reasons.

First, the quasi-city limits opportunities to shift costs of community infrastructure beyond community boundaries: it permits for "development that pays its own way."¹⁸⁸ Without the quasi-city, a county often finds itself diverting tax revenues collected across all its land to fund the development of new infrastructure (for example, new water and sewage facilities, roads, parks) in a specific sub-county area targeted for development. Then, once development is complete and the statutory incorporation criteria met, that area chooses to become a city.¹⁸⁹ Thereafter, the area originally developed with county funds can proceed to exclude the county from revenues accruing from those early investments. The quasi-city prevents this eventuality in the following manner. When an area within the county is targeted for development, the county will mandate the establishment of a quasi-city for that specific area. The quasi-city will then provide the area with extensive infrastructure services, but will also tax it separately from the rest of the county to fund these benefits. In this fashion the residents, owners, or developers of the designated area will be forced to internalize the costs of developing their lands, thus alleviating the tensions between current and future county residents.¹⁹⁰ In Florida, for example, the widespread use of the quasi-city protected many Floridian counties from the specter of bankruptcy as the

¹⁸⁷ See *supra* Part I.C.

¹⁸⁸ See DOUGLAS R. PORTER ET AL., *SPECIAL DISTRICTS*, at vi (1987). ("Because independent districts establish sources of revenue and spending capabilities separate from local governments and the general public, they are powerful tools for expanding the fiscal capacities of communities that need funds.")

¹⁸⁹ The Virginia legislature appears to have feared such an eventuality. It provides a process whereby a court offers a county "immunity" from incorporation in a specific subarea that receives urban-type services from the county. VA. CODE ANN. § 15.2-3304 (2012) (allowing counties to petition for immunity from city-initiated annexation based upon the provision of urban-type services).

¹⁹⁰ E.g., Lane Harvey Brown, *Many Skeptical About Tax Districts*, BALT. SUN, Feb. 16, 2003, http://articles.baltimoresun.com/2003-02-16/news/0302160045_1_harkins-harford-county-tax-districts ("[H]aving new residents pay for roads, sidewalks, curbs and other infrastructure needs for their community makes sense – especially to older residents who watch new areas get these amenities while theirs might be in disrepair.").

housing bubble burst in 2008.¹⁹¹ The community development districts, not their host counties, defaulted on the \$5.1 billion in municipal bonds issued to finance new development infrastructure.¹⁹² Furthermore, while in light of this outcome it is highly unlikely that the credit market accurately priced these bonds, it is rather probable that the risk associated with bonds issued by such quasi-cities is better assessed than when those same bonds are issued by the surrounding county. In the latter case, many times potential lenders must analyze the economic prospects not only of the specific development project but of the broader county as well. In the former case, they need only observe the specific project to be funded by the credit they extend.

The second way in which the quasi-city insulates county dwellers from the externalities of new development also owes to the quasi-city's exemption from the local-participation requirements that apply to cities. Statutes that allow for the creation of special districts typically require the county to approve the creation of a special district, and thus enable the consideration of the district's effects on the county.¹⁹³ Some statutes explicitly require the authorizing body to review the effects on property left outside the district and on other communities.¹⁹⁴ Consequently, the creation of a quasi-city, unlike the incorporation of a new city, cannot terminate meaningful ties to the county. A quasi-city is, to employ a term coined by a California legislative committee, a "county town."¹⁹⁵ In contrast to a new city, a quasi-city cannot serve as a mere

¹⁹¹ *Florida CDD Report Overview*, FLA. CMTY. DEV. DIST. REPORT, <http://www.floridacddreport.com> (last visited Sept. 19, 2013).

¹⁹² The 438 Community Development Districts established between 2003 and 2008 issued \$6.5 billion in municipal bonds to finance their infrastructure. *Id.* Over 168 of the districts are in default. *Id.*

¹⁹³ *E.g.*, COLO. REV. STAT. § 32-1-205 (2012) (requiring the board of county commissioners to issue a resolution approving any proposed special district). In Florida, even in cases where a state agency, rather than the county, approves the creation of the district (that is, districts covering over 1000 acres) the county containing the district makes suggestions, though the agency may ignore them. FLA. STAT. § 190.005(1)(c) (2012) (authorizing counties to hold public hearings and issue resolutions supporting or opposing the establishment of a district).

¹⁹⁴ In Florida, the Land and Water Adjudicatory Commission, which approves community development districts' establishment, must consider the position of the county, and in addition must consider "[w]hether the establishment of the district is inconsistent with any applicable element or portion of the state comprehensive plan or of the effective local government comprehensive plan," and "[w]hether the community development services and facilities of the district will be incompatible with the capacity and uses of existing local and regional community development services and facilities." FLA. STAT. § 190.005(1)(e).

¹⁹⁵ CAL. S. LOCAL GOV'T COMM., COMMUNITY NEEDS, COMMUNITY SERVICES: A LEGISLATIVE HISTORY OF SB 135 (KEHOE) AND THE "COMMUNITY SERVICES DISTRICT LAW" 47 (2006), <http://senweb03.senate.ca.gov/committee/standing/GOVERNANCE/CNCSReport.pdf> (describing a "county town" as a community in which the community services

tool for avoiding the social costs of local policies. By preserving political connections between the developing area and the wider county, while separating the former from the latter for funding and taxing purposes, the quasi-city prevents the developers and first settlers in the area from capturing its government and monopolizing the benefits of development. The quasi-city can thus dramatically mitigate the social costs of self-determination.

3. Conclusion: The Quasi-City as a Transient Stage

When created in unincorporated county lands, the quasi-city serves as an alternative to incorporation. The normative justification for allowing the quasi-city as such an alternative is that it promotes self-determination among communities whose road to incorporation is currently blocked, while limiting the negative externalities associated with self-determination by fostering a close relationship between the quasi-city and the county. In this manner, though it evades incorporation criteria and enjoys exemptions from general laws applicable to cities, the quasi-city does not subvert the legislative intent behind incorporation laws – indeed, it furthers that intent. Yet there is a limit on the cases in which the desirable results just described can materialize, as most advantages identified there are reaped solely when the quasi-city is employed as a stepping stone to incorporation. This is true with respect to both the increase in self-determination benefits and the reduction in self-determination costs that the quasi-city yields.

On self-determination's benefits side, the quasi-city is better than the city in areas that are not yet legally or practically eligible for incorporation. Experimentation with a form of government that approaches cityhood can help residents assess the plausibility and desirability of complete independence. Many localities that embarked on their journey towards self-determination as a quasi-city ultimately matured into a city proper – for example, Mission Viejo in California, Chevy Chase Village in Maryland, and North Charleston in South Carolina.¹⁹⁶

Similarly, with respect to self-determination's costs, the quasi-city tends to minimize costs chiefly in the early stages of organized community formation.

district, municipal advisory council, and area planning commission share overlapping roles).

¹⁹⁶ Mission Viejo was established as a community services district in 1985, and then incorporated as a city in 1988. See Mariann Hansen, *Birth of a City: Mission Viejo Gets Ready for Independence*, L.A. TIMES, Mar. 27, 1988, http://articles.latimes.com/1988-03-27/local/me-583_1_mission-viejo-s-city (detailing chronology of Mission Viejo's cityhood). The South Carolina legislature organized the North Charleston Water, Fire, Sewer and Lighting District in 1936, Act of June 2, 1936, No. 1054, 1936 S.C. Acts 2057, transformed it into a Public Service District, Act of Mar. 17, 1939, No. 434, 1939 S.C. Acts 878, and decades later, approved its incorporation as a city, Act of Aug. 4, 1972, No. 1768, 1972 S.C. Acts 3473. Chevy Chase was created as "special taxing area or district" in 1918, Act of Apr. 10, 1918, ch. 177, 1918 Md. Laws 356, and later incorporated as a city, 1984 Md. Laws 4578.

The quasi-city controls the externalities of development by maintaining the bond between a developing area and the broader county in which it is nested. Incorporation allows pioneer residents to monopolize the benefits of development by providing a means by which residents may break from the county, once the county fisc runs dry. Through incorporation newly arrived residents of a developing section of the county promptly exclude other county residents from their tax base and land. The quasi-city instrument prevents this result: by exploiting the law's formalist dividing line between city and special district, it denies early settlers the power to install a local government that serves only their interests.

Therefore, the establishment of a quasi-city is a promising alternative to the incorporation of a new city – but only initially. Over time, the area covered by a quasi-city is likely to meet demographic and economic benchmarks for incorporation, and accordingly the advantages presented for it by the quasi-city status over city status in terms of self-determination fades. When attainable, incorporation as a city furnishes residents with higher degrees of self-determination, as compared to a quasi-city, since the city offers fuller local control over a greater array of functions. At the same time, as the area governed by the quasi-city completes its development, the quasi-city's function in shielding the surrounding county from the development's costs ceases to legitimize the removal of that area from the reach of traditional rules of local government. Once the locale is no longer small – as a matter of size and as a matter of prominence in people's lives – it should not be allowed to evade restrictions the legislature wished to put on cities. Those restrictions evince a desire on the part of the legislature – and thus, the people – to police government entities that promulgate impactful regulation. The regulatory scheme implemented by a quasi-city surpasses that bar as it grows. Limits on local citizen empowerment cannot perpetually be justified as controls over development's initial externalities.

This is not to say that city independence does not generate externalities past the first postincorporation years, or that residents may not continuously prefer the city-light nature of quasi-cities. But once the quasi-city governs an established community, and not just a recently developed one, any differences in the nature of the served community that may have justified divergent legal treatment of the quasi-city as compared to a city disappear. To the extent the desirability of the quasi-city persists beyond the initial community development phase, it reflects the shortcomings of the city as a legal institution in supplying efficient and fair self-determination. Said shortcomings may be very real, but should be addressed directly as part of an overhaul of incorporation laws and the rules restricting cities. Of course the shortcomings may be less real, in which case the preference for the quasi-city merely reflects a desire to evade restrictions justifiably applicable to cities. In either case, then, the quasi-city cannot be a systematic, fair, and coherent answer to the city's lasting shortcomings.

Thus, I conclude that the quasi-city's lifetime should be capped. Some states appear to agree in practice with this suggestion. For example, in Texas, the legislature made clear its intent that the Red River Authority be dissolved once all of the property in the abandoned bases had been sold.¹⁹⁷ The long-term standing of the Florida quasi-cities established by special act was addressed a few months ago by the Florida legislature. A reform targeting Ave Maria and its ilk purported to facilitate their conversion into cities following resident referenda. Oddly, however, a district whose residents desire to initiate a municipal conversion must first obtain the approval of the district's governing board.¹⁹⁸ Since developers of the district control the board,¹⁹⁹ this reform merely reinforces developers' stranglehold over self-determination.

Florida statutes have offered a more promising model elsewhere, however. The Florida general statute enabling the creation of community development districts requires such districts to hold incorporation referenda once they attain the population standards mandated by the general incorporation law.²⁰⁰ And the developer is afforded no special rights of veto or other interference in the process. This model should be further refined since in its current form it allows the extension of quasi-city status even after incorporation conditions are satisfied. A better scheme would require that, once incorporation criteria are met, the special district's residents be asked to pick between incorporation and reversion to county control; to remain a quasi-city should not be an option.²⁰¹ The quasi-city status is beneficial solely as a transient stage towards incorporation as a new city; if the latter status is not desired even when legally available, then the quasi-city must expire.

In the absence of such legislative reforms, the proposed result ought to be approximated through judicial means: the law should commence treating a quasi-city as a city once it meets incorporation criteria. This would imply, for example, that districts such as Ave Maria eventually be subjected by courts to general voting rules and limits on debt issuance. Such an approach would

¹⁹⁷ Act of May 10, 1999, ch. 62, sec. 396.067(a), § 13.10, 1999 Tex. Gen. Laws 127, 350 ("It is the intent of the legislature that the authority be dissolved after conveyance and sale of all of the property with the approval of the governing bodies of the county and eligible municipalities.").

¹⁹⁸ FLA. STAT. § 165.0615(1)(d).

¹⁹⁹ See *supra* note 171.

²⁰⁰ FLA. STAT. § 190.047 ("Upon attaining the population standards for incorporation . . . any district wholly contained within the unincorporated area of a county that also meets the other requirements for incorporation . . . shall hold a referendum at a general election on the question of whether to incorporate.").

²⁰¹ Connecticut offers a different limit for quasi-cities' duration. Once the relevant municipality, the town, adopts zoning rules, the district's zoning commission is automatically dissolved. CONN. GEN. STAT. § 7-326 (2013) ("[The] board shall be dissolved upon adoption by the town of subdivision or zoning regulations by the town zoning or planning commission."). This is not a satisfactory solution, since it does not assure the district's timely dissolution or that the district functions as a stage towards incorporation.

erode the quasi-city's standing as a permanent alternative to incorporation. The California legislature was amiss to declare that "for many communities, community service districts may be . . . [either] a permanent form of governance . . . [or] a transitional form of governance as the community approaches cityhood."²⁰² Only the latter should be an option.

B. *The Quasi-City as an Alternative to Annexation*

1. The Current Use of the Quasi-City as an Alternative to Annexation

Incorporation, reviewed in the preceding Section, is the process by which unincorporated lands become a new city. Annexation is the process by which such unincorporated lands are absorbed by an existing city adjacent to them. Accordingly, a special district serves as an alternative to annexation when it regulates behavior or land uses – that is, operates as a quasi-city – in unincorporated lands adjacent to a city. As annexation itself is an alternative to incorporation, the quasi-city's function in replacing annexation overlaps with its role in replacing incorporation. A quasi-city established in unincorporated land bordering a city serves as an alternative both to incorporation and to annexation. Since states do not bar the establishment of special districts near existing cities, all the districts described in the preceding Section can double as alternatives to annexation: they may be established next to cities.

It is important to clarify what the term "alternative" means here. Instituting a special district or quasi-city in unincorporated territory does not block a neighboring city from annexing that territory.²⁰³ Establishing a new city does, however, and hence the quasi-city and the city are not equivalents in this context.²⁰⁴ City status is an absolute barrier and alternative to annexation by an adjacent city whereas quasi-city status is not. Thus, for example, North Charleston, South Carolina, was able to annex the St. Phillips and St. Michaels Public Service District, which functioned as a quasi-city for decades. From 1928 until 1957, that district, which spanned more than ten square miles just north of Charleston and served a population of 40,000,²⁰⁵ provided fire protection, drainage, sewage disposal, sanitation, street lighting, street naming,

²⁰² CAL. GOV'T CODE § 61001(b) (West 2008).

²⁰³ *E.g.*, FLA. STAT. § 190.047 (2012) ("[A]ny district contiguous to the boundary of a municipality may be annexed to such municipality."); S.C. CODE ANN. § 5-3-310 (2004) (providing for the annexation of special purpose districts); *Brenwich Assocs. v. Boone Cnty. Redevelopment Comm'n*, 889 N.E.2d 289 (Ind. 2008) (holding that the county's establishment of an economic development area did not preclude the town from completing annexation).

²⁰⁴ For a city to extend its boundaries to include another city (merger), both cities must agree. *E.g.*, S.C. CODE ANN. § 5-3-30 (2004) ("When two or more municipal corporations propose to consolidate, no petition shall be required and each municipal corporation desiring to consolidate may call for the election hereinafter provided by ordinance.").

²⁰⁵ BOLLENS, *supra* note 17, at 112.

and zoning.²⁰⁶ Powerful as this quasi-city was, it was eventually absorbed by North Charleston. As a noncity, the quasi-city could not thwart annexation.

A quasi-city does, however, aid residents in resisting annexation. First, federal or state laws may protect a special district's tax base and mandate, for example, that, after annexation, the city allocate tax proceeds to the defunct district and assume responsibility for its bonds.²⁰⁷ When tied to such financial obligations, annexation's appeal from the perspective of the neighboring city decreases. Second, and more importantly, the quasi-city reduces annexation's appeal from the perspective of the residents of the area targeted for annexation. For local residents of the unincorporated area, annexation's appeal is grounded in the adjoining city's services, which tend to be better than those provided by the county. The necessity of these services often renders resistance to annexation impractical.²⁰⁸ A quasi-city, however, that provides many or perhaps all of the city services an area desires, will reduce or even eliminate the need for inclusion in an existing city. It thus emboldens residents to resist annexation.²⁰⁹

This is not mere hypothesizing. A resident of an unincorporated adjoining neighborhood rationalized her opposition to annexation to Charleston by arguing "paying city taxes is annoying."²¹⁰ Post-annexation, residents find themselves "paying higher taxes, and . . . only get[ting] trash pickup once a week."²¹¹ This complaint was credible solely because the relevant

²⁰⁶ St. Phillips and St. Michaels was first created as a water and fire district, Act of Mar. 1, 1928, No. 830, 1928 S.C. Acts 1783, then transformed into a public service district, Act of May 7, 1936, No. 1046, 1936 S.C. Acts 2045, and granted zoning powers, Act of Apr. 24, 1948, No. 812, 1948 S.C. Acts 2004. Finally, it was attached to North Charleston. Act of June 11, 1957, No. 521, 1957 S.C. Acts 870.

²⁰⁷ *E.g.*, FLA. STAT. § 171.093 (2012) (requiring the municipality for a four year period to pay the district an amount equal to the ad valorem taxes or assessments that would have been collected had the property remained in the district); IND. CODE § 36-7-14-3.5 (1998) ("The county redevelopment commission shall continue to receive allocations of property tax proceeds from the area annexed . . . as long as any bonds or lease obligations payable by the county from allocated property tax proceeds are outstanding."); *James Island Pub. Serv. Dist. v. City of Charleston*, 249 F.3d 323 (4th Cir. 2001) (requiring district to allocate tax revenues to annexed district).

²⁰⁸ KENNETH JACKSON, *CRABGRASS FRONTIER* 145-47 (1985) (tracking the historical trend of annexation leading to increasingly metropolitan government in the United States).

²⁰⁹ *In re Fond Du Lac Metro. Sewerage Dist.*, 166 N.W.2d 225, 229 (Wis. 1969). For this reason, it is not all that surprising that cities often aggressively object to the granting of regulatory powers to special districts located on their border. BOLLENS, *supra* note 17, at 112-13 ("Some city officials and organizations hold that their best defense is to insist that regulatory and land-use control authorizations be legally withheld from these potentially multipurpose districts.").

²¹⁰ Jenny Peterson, *Lawyer Says James Island "Will Not Die,"* POST & COURIER, Apr. 3, 2008, <http://www.postandcourier.com/article/20080403/ARCHIVES/304039898>.

²¹¹ *Id.*

neighborhood formed part of yet another South Carolina quasi-city – the James Island Public Service District – that, among other services, provides for garbage pickup twice a week.²¹² Like the St. Phillips and St. Michaels Public Service District, this district is a quasi-city that serves as an alternative not just to incorporation, but to annexation as well. Created by legislative act in 1961,²¹³ the James Island Public Service District has since enabled 24,000 residents to resist annexation efforts on the part of Charleston – even though the district is located on an island just to the south of peninsular Charleston, and it is punctuated by enclaves already annexed to Charleston.²¹⁴ Charleston invites individual owners in the district to join the city – it accepts applications online – trumpeting municipal services only available through city membership, and observing that “taxes are very competitive with James Island [Public Service District] tax rates.”²¹⁵ Thousands of residents have resisted this call and have exerted tremendous effort to maintain the island’s “independence.” They initiated and successfully pursued three different drives at incorporation, but, in each case, the state supreme court disbanded the city for various reasons.²¹⁶ The city was reincorporated for a fourth time in the spring of 2012.²¹⁷ The residents of James Island have persevered in their battle of attrition with adjacent Charleston thanks in large part to their ability to fall back on services provided by their quasi-city and its regulatory authority.

2. The Potential Normative Benefits of the Quasi-City as an Alternative to Annexation

James Island’s ordeal highlights the peculiar characteristics of the role played by the quasi-city as an alternative to annexation. While it presents many of the same benefits and drawbacks as the quasi-city as an alternative to incorporation, differences arise due to the introduction of another actor into the dynamics of citymaking. In the incorporation scenario the only players are the

²¹² *Id.*

²¹³ Act of May 4, 1961, No. 498, 1961 S.C. Acts 917 (establishing James Island Public Service District in Charleston County).

²¹⁴ *About Us*, JAMES ISLAND PUB. SERV. DIST., http://www.jipsd.org/about_us.html (last visited Sept. 20, 2013).

²¹⁵ See *James Island Annexation Information*, CITY OF CHARLESTON, <http://www.charleston-sc.gov/index.aspx?NID=833> (last visited Sept. 20, 2013).

²¹⁶ *Cabiness v. Town of James Island*, 712 S.E.2d 416 (S.C. 2011) (holding that the town’s petition did not fairly apprise the public of what properties were to be included in the town); *Kizer v. Clark*, 600 S.E.2d 529 (S.C. 2004) (holding a statute, which allowed the proposed municipality to use marshes and waterways previously annexed by another municipality to create necessary contiguity, to be in violation of the constitutional prohibition on special legislation); *Glaze v. Grooms*, 478 S.E.2d 841 (S.C. 1996) (holding that the town lacked the requisite contiguity to incorporate).

²¹⁷ *About the Town*, TOWN OF JAMES ISLAND, http://www.jamesislandsc.us/about_the_town/index.php (last visited Sept. 20, 2013).

quasi-city and the county; in the annexation scenario the players also include a bordering city. As was made apparent on James Island, the need to interact with the bordering city changes the role of the quasi-city and dramatically affects the analysis of its functions, consequences, and social worth.

The existence of the third entity – any existing city bordering unincorporated land – affects the appraisal of the relative self-determination benefits and costs of the establishment of a quasi-city in that land. Once an existing city can annex an unincorporated area that cannot separately incorporate due to population or financial constraints,²¹⁸ a quasi-city is no longer that area's sole option for self-determination, as it was when the quasi-city was an alternative to incorporation alone. Local control can also be achieved by joining the existing city. This form of self-determination comes across as less meaningful than that offered by a quasi-city, since annexation means that local decisions will not be made by district residents alone, but by the entire city populace. Yet, at the same time, the relationship is reciprocal: city membership allows residents of the annexed area to participate in the city's decisionmaking process – an opportunity that had not been available to them as city outsiders.²¹⁹ Beyond this geographical expansion of the annexed area's residents' sphere of influence, city membership expands their influence substantively. When joining the city those residents are afforded comprehensive (yet shared) control over the full complement of city powers.

In this manner, the availability of annexation – in addition to incorporation – alters the assessment of the quasi-city's self-determination benefits. It similarly affects the calculation of the quasi-city's self-determination costs. The presence of a populated yet unincorporated area at a city's doorstep can generate two contrasting forms of costs. First, these “urban fringes” may suffer from underdevelopment. Rural areas that have been developed due to their proximity to a city may be unprepared to handle the challenges presented by burgeoning urbanism. Since counties are inadequate providers of municipal services and regulation,²²⁰ the urban fringe can become the city's dumping grounds for physical and social problems. The urban fringe will house the cheap labor force on which the city draws in substandard buildings and tolerate noxious uses of land that benefit the neighboring city – for example, industries, rundown commercial establishments, and environmental hazards.²²¹ In these cases, the urban fringe endures negative externalities generated by the city.

²¹⁸ See *supra* notes 175-84 and accompanying text.

²¹⁹ OFFICE OF PLAN COMM'N, CITY OF VALPARAISO, IND., ANNEXATION POLICY 4 (2004) (touting that annexation will offer “fringe residents a voice and responsibility in the City in which they live/call home”).

²²⁰ See *supra* notes 141-42 and accompanying text (explaining that counties often lack the resources to adequately address the problems associated with living in the urban fringe).

²²¹ See *generally* Anderson, *supra* note 140 (discussing the lack of democratic channels for citizens on the fringes of county lines).

Conversely, the urban fringe may draw on the city's positive externalities. Urban fringe residents are sometimes affluent members of the metropolitan society exploiting the city's economy and social services but evading its taxes.²²² Prominent examples of this dynamic include Rancho Santa Fe in San Diego County, California, and Barton Creek in Travis County, Texas – two of the nation's most affluent communities.²²³ The James Island District, surveyed above, falls into this category as well.²²⁴

Annexation leads to internalization of both negative and positive externalities generated by the adjoining city, whereas incorporation or the establishment of a quasi-city forces internalization of only negative externalities. All three mechanisms replace the often inadequate direct county control with a more powerful local government that can provide effective regulation and services to an underdeveloped fringe area – though the quasi-city does so less fully than annexation to an existing city or incorporation into a new city. Among the three mechanisms, however, only annexation assures that the fringe's residents partake in the economic and social costs of maintaining the central city on which they rely.²²⁵ For dealing with self-determination's externalities in the urban fringe, annexation is thus the most efficient mechanism while establishment of a quasi-city is often the least desirable option.

3. Conclusion: Quasi-Cities as a Remedy for the Spurned

Since annexation prompts internalization of the city's negative and positive externalities felt at the urban fringe, annexation is an extremely appealing option from a planner's perspective. For decades, commentators have advocated expanding the control of central cities over their metropolitan areas, lamenting annexation's demise as a major tool for city formation.²²⁶ Such support implies opposition not only to unincorporated urban fringe, but also to separately incorporated urban fringe. Yet incorporation promotes self-

²²² Laurie Reynolds, *Rethinking Municipal Annexation Powers*, 24 URB. LAW. 247, 253 (1992) (“The majority of those individuals will spend most of their day within the city limits, yet they will contribute nothing to the city's cost of providing infrastructure to the wide range of in-city activities of which they partake.”).

²²³ Rancho Santa Fe regularly ranks first or second on the national list of highest income communities with at least 1000 households. As of 2000, Barton Creek was the wealthiest location of at least 1000 in Texas by per capita income. CITY-DATA, www.city-data.com (last visited Feb. 24, 2013).

²²⁴ In 2009, the median household income in the James Island district was \$56,310, while in Charleston it was \$47,942. *Id.*

²²⁵ Indeed, for decades commentators have advocated expansion of central cities' control over their metropolitan areas, lamenting annexation's demise as a major city-formation tool. *See, e.g.*, DAVID RUSK, ANNEXATION AND THE FISCAL FATE OF CITIES (2006); Reynolds, *supra* note 222.

²²⁶ RUSK, *supra* note 225; Reynolds, *supra* note 222.

determination in ways that annexation cannot, since annexation dilutes the annexed area's residents' votes.²²⁷ For this reason, the debate over the social, political, and economic effects of segmentation is ongoing.

This debate need not be fully engaged here. To make the argument that annexation is preferable to the establishment a quasi-city, I need not claim that it is also preferable to incorporation. Whether annexation is preferable to incorporation or vice versa, both practices unquestionably share a desirable attribute the establishment of a quasi-city lacks: the eventual inclusion of the subject area in a city. As a result, the establishment of a quasi-city, unlike annexation and incorporation, does not directly address the problem presented by an unincorporated area undergoing urbanization or suburbanization. It allows for the persistence of the area's unincorporated status. State legislatures have announced their preference to see this status disappear: they advocate extending municipal governments into unincorporated suburban areas.²²⁸ As I conclude in the preceding Section, a quasi-city is defensible for as long as an area cannot incorporate. In light of the explicit and sound legislative policy regarding unincorporated areas, the quasi-city should be wound up even earlier – even before incorporation is a viable option – if and when annexation to an existing city becomes feasible.

For annexation of unincorporated area to become feasible, the annexing city must concur: hardly any jurisdiction gives residents of unincorporated land the right to compel a neighboring city to annex them.²²⁹ Often this requirement presents an insurmountable hurdle. Michelle Anderson recently drew attention to low-income, urbanized areas bordering incorporated cities that have been repeatedly passed over for annexation.²³⁰ Underdeveloped areas that house the poor and permit undesirable land activities may be located on the city's doorstep; the city, however, has very little incentive to annex these lands. When the city jilts them, the only routes open to the residents to escape direct county control and proceed towards self-determination are incorporation or the establishment of a quasi-city.

²²⁷ See Clayton Gillette, *Voting with Your Hands: Direct Democracy in Annexation*, 78 S. CAL. L. REV. 835, 836-37 (2005) (discussing the possible costs of annexation); see Howard Husock, *Let's Break up the Big Cities*, CITY J., Winter 1998, at 71 (contending that small, local governments, rather than large metropolitan bodies, foster stronger rates of participation by local citizens and encourage higher voter turnouts).

²²⁸ E.g., COLO. REV. STAT. § 31-12-102 (2012) (declaring the legislatures' preference for extending municipal governments into fringe lands); NEV. REV. STAT. § 268.572 (2011) (same).

²²⁹ E.g., 65 ILL. COMP. STAT. 5/7-1-5 (2012) (requiring a majority vote of the annexing unit's governing body); S.C. CODE ANN. § 5-3-150 (2004) (mandating that even in a simplified method for annexation, applicable when seventy-five percent of owners of land contiguous to a city petition for annexation, the annexation must receive the city's approval). *But cf.* IND. CODE § 36-4-3-5(d) (2006) (allowing a court to force cities to annex in specified circumstances).

²³⁰ Anderson, *supra* note 140.

In such situations, the establishment of a quasi-city may hasten eventual annexation and thus the quasi-city's usefulness as an annexation replacement goes beyond its value as a substitute for incorporation. In an underdeveloped urban fringe, the quasi-city can encourage development and thus render the area a somewhat more attractive candidate for annexation. The county's regulatory powers are lackluster and the opportunities it provides for residents to promote their agenda are hampered by its governmental structure.²³¹ As a result, even when funding is accessible, direct county control often fails to ameliorate conditions in the urban fringe to a level acceptable to the adjoining city. A quasi-city is better equipped to do so, and, consequently, so long as states are reluctant to force annexation on cities, encouraging the creation of temporary quasi-cities may be the best way to entice cities to eventually annex troubled urban fringes.

In light of the social desirability of such annexation, the quasi-city should become defunct once the adjoining city agrees to annex the area covered by the quasi-city. The demise of the quasi-city as suggested here does not imply, however, that the area will actually be annexed, if the residents do not desire this outcome. States require not only that the annexing city approve any annexation, but that the residents of the area to be annexed concur as well.²³² This requirement is almost never statutorily waived,²³³ and, as a result, in the postwar era, incorporation, not annexation, has served as the default local government response to growth in the urban fringe.²³⁴ Thus the proposed ban on quasi-cities bordering cities that are willing to annex the relevant areas will not truly interfere with the self-determination rights of the residents. The residents will be left free to refuse to join the adjoining city and to, if they so desire, eventually pursue separate incorporation.²³⁵ True, they will not be able

²³¹ See *supra* notes 175-86 and accompanying text.

²³² See Jamie Palmer & Greg Lindsey, *Classifying State Approaches to Annexation*, 33 ST. & LOC. GOV'T REV. 60 (2001) (finding that, during the past decades, legislatures reduced municipalities' ability to act unilaterally); see, e.g., CAL. GOV'T CODE §§ 57075, 57078 (West 2010) (requiring approval from both the city electorate and the proposed annexation territory's voters); FLA. STAT. § 171.0413(2) (2012) (same); 65 ILL. COMP. STAT. ANN. 5/7-1-7 (West 2005) (same); S.C. CODE ANN. § 5-3-300 (same).

²³³ 65 ILL. COMP. STAT. ANN. 5/7-1-13 (allowing forced annexation when unincorporated territory contains less than sixty acres and is wholly bounded by a municipality); IND. CODE §§ 36-4-3-3, 36-4-3-11 (1998) (similar scheme, but judicial review is not automatic); VA. CODE ANN. § 15.2-3209 (2012) (annexation requires court, not local, approval).

²³⁴ JACKSON, *supra* note 208, at 148-56.

²³⁵ Cities are mostly barred from annexing incorporated land, and residents in the urban fringe can always turn to defensive incorporation. Only a few states limit incorporation serving defensive purposes, and even then, the constraints apply solely in extremely confined settings. E.g., 65 ILL. COMP. STAT. ANN. 5/2-2-5 (West 2006) (requiring consent of existing city for incorporation when an area of contiguous territory not exceeding four square miles contains fewer than 7500 residents and lies within 1.5 miles of the city); TEX. LOC. GOV'T CODE ANN. § 42.041 (West 2008) (prohibiting incorporation in municipality's

to rely on the quasi-city to help them in this struggle against annexation, as the residents of James Island have been; but in light of costs involved with the persistence of unincorporated urban or suburban lands, there is little reason to add this weapon for combatting annexation to residents' mighty arsenal.

Given considerations of metropolitan fairness and efficiency, as well as the balance of power between city and adjoining unincorporated suburbs, the normative standing of the quasi-city as an alternative to annexation hinges on the source of annexation's absence. When area residents reject annexation, they should not be allowed to turn to a quasi-city. When the adjoining city is blocking annexation efforts, residents ought to be allowed to establish a quasi-city and maintain it until the city is amenable to annexing that adjoining area (or incorporation criteria are met). Indeed, state laws should actively advance quasi-cities in these neglected urban fringes, since they represent an upgrade over direct county control.

C. *The Quasi-City as an Alternative to Secession*

1. The Current Use of the Quasi-City as an Alternative to Secession

Annexation attaches an area to an existing city; secession detaches an area from an existing city. Successful secession results in the seceding area either becoming unincorporated (that is, reverting to direct county control) or incorporating into a new city. The latter scenario is of interest here, given this Article's focus on alternatives to city formation. A special district that offers separate regulation or land use controls – that is, a quasi-city – will perform this secessionist function when created for a subarea within a city. Several of the quasi-cities reviewed, whether established through general enabling acts, for example, Florida's community development districts,²³⁶ or by special acts, for example, Maryland's special tax districts,²³⁷ meet this description because they can be created in parts of existing cities. In such cases, the quasi-city adds a regulatory level below the city level that is confined to a specific subcity area. The result is not equivalent to that which may be achieved by secession, yet is a viable alternative. Quasi-city status does not amount to complete separation from the city since the quasi-city remains part of the city – it is still taxed and supervised by the city. But quasi-city status offers partial separation

extraterritorial jurisdiction without its consent).

²³⁶ *E.g.*, COLO. REV. STAT. § 32-1-1004 (2012); CONN. GEN. STAT. § 7-339m (2013); FLA. STAT. § 190.005(e) (establishing community development districts). Connecticut, as other New England states, presents an ambiguous case. In these states, counties are mostly irrelevant units of government, and practically all lands form part of "towns." Thus, in addition to quasi-cities explicitly authorized within cities, it is appropriate to view intra-"town" quasi-cities as replacing secession (rather than incorporation) when established in a segment of a larger, built-up, populated area of a town.

²³⁷ *E.g.*, 1994 Md. Laws 3258 (enabling Baltimore to establish up to six community benefit district management authorities – specifically naming two – as special tax districts).

since the quasi-city is empowered to severally regulate land uses in the specific area it governs.

2. The Potential Normative Benefits of the Quasi-City as an Alternative to Secession

Secession differs from incorporation and annexation because it does not enable self-determination through participation in city rule where no such participation was available previously. Rather, it replaces self-determination in one city with self-determination in another. Still, the newer, and by definition smaller, city stands to realize self-determination benefits, since the rate of meaningful citizen participation in government increases as the size of the government unit decreases.²³⁸ Moreover, well-defined areas within a city may differ dramatically from the rest of the city in physical, functional, and socio-economic character. Due to an area's limited population, its distinct interests may not be well represented at the city government level. Residents' voices may be muffled by voices from more populous districts and thus residents may be denied effective self-determination. For them to experience "real" self-determination, a new city, tailored to the area's size, must be established through secession.²³⁹

While secession offers greater self-determination to residents of areas within an existing city, it also amplifies self-determination's costs. Residents feel that via secession they are gaining power to direct their destinies, but they are losing and depriving other city residents of the ability to direct the broader region's future and address regional concerns. Secession takes existing metropolitan fragmentation a step further, adding to the difficulties of internalizing local decisions' externalities. As an example, consider the case of Staten Island, a borough of New York City that sought to secede. The Island's residents depended on other New York City boroughs for their employment, while those boroughs depended on Staten Island for public services, such as

²³⁸ See, e.g., ROBERT DAHL & EDWARD TUFTE, *SIZE AND DEMOCRACY* 41-42 (1973) (arguing that the costs of participation are lower in smaller polities); Frug, *supra* note 17, at 1069 ("[L]imited size appears to be a prerequisite to individual participation in political life . . ."); Clayton Gillette, *Regionalization and Interlocal Bargains*, 76 N.Y.U. L. REV. 190, 200 (2001) ("Expansion of boundaries necessarily reduces the competition among localities that is credited with controlling bureaucratic budgets and facilitating monitoring of local officials.").

²³⁹ Such arguments were made by proponents of secession in the San Fernando Valley, a part of the Los Angeles metropolitan area, see Gerald E. Frug, *Is Secession from the City of Los Angeles a Good Idea?*, 49 UCLA L. REV. 1783 (2002), and in Staten Island, a borough of New York City, see Richard Briffault, *Voting Rights, Home Rule, and Metropolitan Governance: The Secession of Staten Island as a Case Study in the Dilemmas of Local Self-Determination*, 92 COLUM. L. REV. 775 (1992).

solid-waste disposal.²⁴⁰ Legal separation could not untie these relationships nor halt the effects that decisions in one borough have on the other.

Due to such inevitable externalities, a quasi-city may be preferable to this and similar attempts at outright secession. The quasi-city represents an improvement in self-determination terms over membership in the consolidated unitary city, where the area's voice is lost, insofar as the quasi-city empowers area residents to participate separately and hence more meaningfully in the regulatory affairs that most closely affect them. Yet at the same time, because a quasi-city is not bound, like a full city, to grant local residents complete rights to manage their affairs, the relationship with the parent city is preserved and the detrimental effects of excessive fragmentation are limited.

A quasi-city within a city puts in place a cooperative local governance model, wherein the city plays a supervisory role over subcity decisions. The neighborhood-based quasi-city adopts regulations applicable to its residents and land, while the city – through its powers to define the scope of the quasi-city's authority, appoint members to the body that manages it, and veto policy decisions that are likely to have detrimental effects beyond the quasi-city – ensures that negative externalities are minimized. This enduring role of the city in the quasi-city's affairs also renders salutary the quasi-city's ability to evade constitutional and statutory restrictions placed on cities. Because the city itself is still subject to these laws, the exemption granted to the quasi-city that operates under the supervision of the city does not undermine the legislative intent behind them. For example, since the city remains constrained by representation and voting requirements, these requirements' underlying democratic concerns are not wholly frustrated when an individual subcity quasi-city is freed of the burden of having to comply with them itself.²⁴¹

3. Conclusion: The Quasi-City for All or for None

The quasi-city is an appealing alternative to the two traditional options offered in secession debates: centralized overbearing big city versus autonomous self-concerned small city.²⁴² It allows differentiation without dissolution. Of course, some would argue that citywide supervision dilutes self-determination, and thus that outright secession is preferable to the

²⁴⁰ *E.g.*, Briffault, *supra* note 239, at 784 n.55 (noting that Staten Island was the site of Fresh Kills Landfill, that received most of New York City's waste); *id.* at 834 (discussing a study showing that most of Staten Islanders' income was earned elsewhere in New York City).

²⁴¹ *Cf.* Holt Civic Club v. City of Tuscaloosa, 439 U.S. 60, 76 (1978) (Stevens, J., concurring) (reasoning that a scheme whereby a city exercises powers over adjacent areas that are not eligible to vote in the city's elections is not unconstitutional, since these city powers were approved and are supervised by the state legislature, which was subject to election).

²⁴² *Cf.* Frug, *supra* note 239, at 1792-98 (explaining why secession does not represent the remedy to the self-determination problems plaguing Los Angeles communities).

establishment of a quasi-city. Yet, given the realities of positive law, this normative debate over local fragmentation can be sidestepped here. Due to the limits that current doctrine places on secession, secession is more a farfetched aspiration than an attainable reality for the vast majority of subcity communities. In U.S. law, municipalities have no vested rights in their boundaries.²⁴³ Most states, however, protect existing cities by confining the possibility of unilateral secession to very particular circumstances.²⁴⁴ The result is that often, for secession to succeed, majority support in the seceding area will not suffice: a majority must also be found in the city as a whole;²⁴⁵ or approval must be granted by the state legislature or a state agency – in which the larger city enjoys a built-in political advantage.²⁴⁶

To create a quasi-city within a city, the smaller community must also normally gain the city's consent.²⁴⁷ But as both logic and experience teach, a city will much more readily assent to the formation of a quasi-city in its midst than to the outright loss of territory. After all, from the city's perspective it stands to lose little if anything by permitting the establishment of a quasi-city. Therefore, even if as an abstract matter secession is preferable in self-determination terms to its alternative embodied in a subcity quasi-city, only the quasi-city is a viable option in current law. The quasi-city meanwhile comports

²⁴³ *Hunter v. City of Pittsburgh*, 207 U.S. 161, 178-79 (1907) (“The State . . . may modify or withdraw all such powers, may take without compensation such property, hold it itself, or vest it in other agencies, expand or contract the territorial area, unite the whole or a part of it . . .”).

²⁴⁴ For example, some states allow secession by court order in response to a resident petition concerning certain agricultural lands located within a city, WIS. STAT. ANN. 62.075 (West 2013), or permit detachment of territory from a municipality less than one year after that municipality's creation and only if other restricting conditions are met, 65 ILL. COMP. STAT. ANN. § 5/7-3-1 (West 2005).

²⁴⁵ *E.g.*, CAL. GOV'T CODE § 56751 (West 2010) (“[A] city from which the detachment of territory is proposed may adopt and transmit to the commission a resolution requesting termination of the proceedings.”); IOWA CODE § 368.19 (Supp. 2013) (after a state board approves a secession petition elections are held in the city, and a citywide majority is necessary). This legal hurdle eventually blocked the attempt, mentioned earlier, by San Fernando Valley to secede from Los Angeles.

²⁴⁶ This was the hurdle that dashed Staten Island's secessionist hopes. The state assembly held that it could not act on the secession bill since the bill interfered with the affairs of a home-rule city: New York. This was hardly a surprise, as nearly half the assembly members hailed from New York City. Robert D. McFadden, *'Home Rule' Factor May Block S.I. Secession*, N.Y. TIMES, Mar. 5, 1994, <http://www.nytimes.com/1994/03/05/nyregion/home-rule-factor-may-block-si-secession.html> (explaining that for Staten Island to become an independent city, New York City itself must request the action). The appellate court refused to intervene. *Straniere v. Silver*, 637 N.Y.S.2d 982, 985-86 (N.Y. App. Div. 1996) (holding that the home rule determination is a legislative act protected by the Speech or Debate Clause of the New York Constitution).

²⁴⁷ But consider Florida, where a community development district larger than 1000 acres may be created by a state agency, even if contained in a city. FLA. STAT. § 190.005 (2012).

with the logic of these current laws. The prevailing statutory scheme is hostile to secession since secession unsettles a compromise struck by local government law. As seen, while local self-determination is desirable, it generates externalities. Modern law has accordingly set a line: local self-determination is by-and-large embraced, but only as long as it does not encroach on existing municipal boundaries. Hence, secession is disfavored. The establishment of a quasi-city within an existing city does not infringe on existing boundaries, and, thanks to the quasi-city's persistent ties to the host city, it only generates limited externalities. Furthermore, in the long run, the autonomy exercised through a quasi-city may sate a community's desire for secession, thereby serving the legislative goal of maintaining existing city boundaries.

The quasi-city delivers many of the interests secessionists covet, without undermining the legislative policies limiting secession. Thus, it appears that current state practices of employing quasi-cities as alternatives to secession should be endorsed. That, however, would be too hasty a conclusion. States are right to permit quasi-cities within a city, but are wrong to designate only specific areas within a city for quasi-city recognition. If a city creates a quasi-city for one of its constituent parts – for one of its neighborhoods – it is hard pressed not to do the same for others. Certain areas in a city may feel they are different from the rest of the city – Staten Island secessionists, for instance, repeatedly alluded to the borough's unique demographic, economic, and physical characteristics – but every neighborhood is unique in one way or another. Is Brooklyn, Queens, or the Bronx less unique than Staten Island? Do their needs not differ from those of Manhattan, and vary among themselves?

At some point in time, every neighborhood feels underrepresented and underserved. Awarding autonomy to one specific subcity area will often reflect not an acknowledgement that the established district is more unique than others, but rather that its lobbying efforts are more effective. Moreover, while in the typical case neighborhood residents seek quasi-city status because it benefits them, the opposite case is imaginable. A stand-alone quasi-city for one subcity area may be used to harm the area's residents. For example, a city might try to single out an area and subject it to a particular tax to raise revenue,²⁴⁸ or turn the area over to a district against the will of the area's residents.²⁴⁹

²⁴⁸ See *Put-in-Bay Island Taxing Dist. Auth. v. Colonial, Inc.*, 605 N.E.2d 21 (Ohio 1992) (striking down a law that allowed cities to create special tax zones for islands located within them and to then subject those zones to higher taxes whose proceeds the municipality can use throughout its territory).

²⁴⁹ Michigan's Metropolitan Districts Act allows a city to transfer land to the district – but owners must approve. MICH. COMP. LAWS ANN. § 119.2 (West 2006) (“[N]o city, village or township shall surrender any such rights, obligations or property without the approval thereof by a majority vote of the electors of any such city, village or township voting on such proposition.”); see also *Marshall v. Mayor of McComb City*, 171 So. 2d 347 (Miss.

For these reasons, state practices creating one specific quasi-city within a particular city by special act,²⁵⁰ or tailoring the enabling act to only aid developers of new subdivisions,²⁵¹ should be abandoned. In anticipation of such legislative reforms, courts should consider techniques for narrowing the effect of current statutes. For example, courts should be more hospitable to equal protection challenges to the creation of specific subcity quasi-cities. Current doctrine opens only narrow avenues for these challenges, since such economic regulation is subject to rational basis review. Courts hesitant to undermine these precedents ought to resort to a piecemeal and limited approach. They should interpret the requirements of enabling acts liberally to allow formation of subcity quasi-cities by as diverse an assortment of neighborhoods as possible. Alternatively, courts should subject the “chosen few” subcity quasi-cities to all restrictions applicable to cities – with respect to voting rights, debt, administrative law, and so forth – to curb their advantageous position as compared to other subcity areas.

As to states that already permit each and every part of a city to establish itself as a quasi-city,²⁵² they too should consider legal adjustments. States should be more proactive in leveling the playing field between different city segments. Once an area petitions for a quasi-city, the city should introduce proposals throughout the city for the creation of other quasi-cities. These proposals are not meant to block the original petition: even if proposals for establishing quasi-cities are rejected in some parts of the city, quasi-cities can be created elsewhere in that same city. Not all areas of the city must choose to have their own quasi-city before one area can establish its quasi-city. Neither should the structure or competencies of all quasi-cities introduced through the suggested mandatory proposals scheme be identical. Different subcity units within the same city are likely to need varying forms of the quasi-city. The role of the mandatory proposals is not to enforce uniformity; rather it is intended to alert uninformed residents of the options open to them, and enable less organized or influential areas to enjoy the degree of subcity self-determination offered by the quasi-city.

If the city deems the differentiation without dissolution promised by subcity quasi-cities desirable, it should offer it to all its constitutive parts. While the quasi-city as an alternative to secession offers local government law a neat compromise between the extreme poles of consolidation and fragmentation, for a given city, it should be an all or nothing proposition. It should be part of an

1965) (approving these city’s contraction ordinance, which undid a mistaken annexation that had overburdened the city with the need to provide expensive services to an underdeveloped area).

²⁵⁰ *E.g.*, 1994 Md. Laws 3258 (enabling the State to create six community benefit district management authorities).

²⁵¹ *E.g.*, FLA. STAT. § 190.005(e) (2012) (allowing the State to create community development districts).

²⁵² *See, e.g.*, CONN. GEN. STAT. § 7-339m (2013).

overall decentralization program, not an ad hoc concession to particularized concerns.

D. *Summary: The Quasi-City as a Useful Alternative to City Formation*

Though bearing the formal title special district, the quasi-city cannot be justified as such since it enjoys the powers to regulate behavior and land uses beyond its facilities. The quasi-city should be considered an alternative form of cityhood, and hence only embraced when it better serves the goals ascribed by law to cities, namely, local self-determination at low social costs. Applying this test, this Part of the Article concludes that a quasi-city should be established as a transient stage leading to incorporation, when an adjoining city refuses to annex an area, or if all parts of the city are offered the opportunity of creating a subcity quasi-city.

III. THE QUASI-CITY'S CHALLENGE TO U.S. LAW: FLEXIBLE SELF-DETERMINATION

Is there a commonality bonding together the three different cases just detected where the establishment of a quasi-city is normatively justifiable? I believe that there is, and that the discussion of this commonality paves the way for future questioning of some of the tenets of local government law. The quasi-cities that are superior to cities all advance what may be termed "flexible self-determination." They challenge the rigidity of local government law's formal categories of city and noncity. Laying out this notion of flexible self-determination, these concluding paragraphs generalize the findings in Parts I and II and address a major potential challenge to the Article's argument.

Part I explained why U.S. law should have a functional, rather than technical, definition of a special district. It drew on the history and institutional logic effectuating special districts to infer that the law should be concerned not with the label a legislature attaches to an entity, but rather with the entity's actual attributes. An examination of these attributes and their policy implications should inform the decision whether to treat an entity as a city or a noncity. Thus, Part I replaced local government law's formal baseline with a substantive one. Part II further elaborated the suggested substantive city/noncity baseline by identifying cases where deviations from it serve the normative goals local government law is designed to promote. Though it straddles the line between city and noncity – indeed, precisely because it straddles that line – in certain situations the quasi-city fulfills the law's normative goals better than city-formation.²⁵³

The problem of the city/noncity line, which crystallizes through this discussion of quasi-cities' potentialities, is the line's rigidity. In many cases,

²⁵³ Duncan Kennedy, *Form and Substance in Private Law Adjudication*, 89 HARV. L. REV. 1685, 1689 (1976) (arguing that formal lines inevitably generate cases where the rule's purposes will be forsaken).

the law forgoes opportunities for effective self-determination because of its dependence on that line. The price of insistence on formal categories is the renunciation of the categories' normative aims.²⁵⁴ The city category was defined in law since the city promotes self-determination, but now because of that definition other entities that fail to meet the category's criteria cannot pursue self-determination. The quasi-city should be used to reinstate the primacy of normative goals over formal categories. Quasi-cities are at their best when toying with the possibilities of local governance: putting in place transient forms of governance when permanent ones have yet to materialize, answering the desires of areas lacking resources for local governance, and offering heterogeneity within unitary units.

In all these places, the quasi-city provides self-determination unattainable through cityhood due to the latter's rigid criteria. The quasi-city is desirable because it avoids these criteria – but not at the cost of the functions these criteria were intended to promote. The rigid criteria for city formation are motivated by a legislative desire to refrain from paying the social price of local self-determination when it is deemed too steep. The law embraces self-determination as a central value and hence pursues local governance, but it also acknowledges self-determination's costs. In U.S. law, as explored in Part I, local self-determination never translates into independence from state intervention.²⁵⁵ Localities are creatures of the state, and thus local self-determination always and inevitably fails to supply cities with freedom from intrusion in local decisionmaking by those situated *above* them, that is, the state. Instead, city status erects walls around residents and isolates them from the possibility that entities and persons located on the *same level* of government as the city – the county, neighboring cities, and residents in unincorporated fringe areas – partake in their local decisionmaking. Cityhood cuts the residents off from their surroundings, leaving them to debate their area's fate. Inevitably, such fragmentation frustrates broader-based decisionmaking processes and attempts at addressing regional concerns.²⁵⁶ In light of the harms generated by local isolation, city formation's rigid criteria set a cap on communities' freedom to cast themselves out.

These rigid criteria that block some communities from entering the realm of self-determination are justifiable since the walls erected around a community post-cityhood are also rigid. By offering attenuated self-determination, the quasi-cities endorsed in Part II address the problem the rigid criteria for self-determination through cityhood were set to solve, without denying the good of self-determination altogether. The quasi-city, like a city, erects walls isolating a community's land use decisionmaking processes. But the walls the quasi-city

²⁵⁴ *Id.* at 1689 (“The choice of rules as the mode of intervention involved the sacrifice of precision in the achievement of the objectives lying behind the rules.”).

²⁵⁵ See *supra* notes 116-22 and accompanying text (discussing state statutes that provide for home-rule cities).

²⁵⁶ See, e.g., JACKSON, *supra* note 208, at 155-56.

constructs are not as impenetrable as those encircling the legal city. In this fashion, quasi-cities can reduce externalities.

The beneficial quasi-city serves a local desire to enjoy some isolation in controlling land uses, but unlike a city, it checks locals' ability to sever all ties to their surroundings. As an alternative to incorporation, the quasi-city can coordinate activities between an emerging community and its wider surrounding area and alleviate tensions between current residents and future transplants.²⁵⁷ As an alternative to annexation, it mitigates metropolitan losses generated by areas stranded outside city walls.²⁵⁸ And as an alternative to secession, it enables interaction between smaller subcity units and the larger city containing them.²⁵⁹

The quasi-city thus casts doubt on the utility of the city as the baseline, as the default provider of self-determination in U.S. law. Quasi-cities should be allowed to circumvent the rigid criteria applicable to cities since the attenuated, flexible self-determination they embody provides self-determination's benefits with lower costs. But they do not perform this function in all cases and accordingly many states' practice of thoughtlessly embracing quasi-cities across the board ought to be abandoned. The subversion of a formal line can promote the general normative purposes the line was meant to serve but that are thwarted in a given case by the line's rigidity. Conversely, however, such subversion can undermine not solely the line, but the line's normative purposes as well.²⁶⁰ In other words, flexibility can run amok. When losing sight of the city/noncity line, lawmakers also sometimes forget the normative values that the line, and more particularly, the city, has been designed to attain. When the flexible self-determination offered by the quasi-city translates into isolating decisionmaking from the local community itself, it can no longer seriously be labeled self-determination. Similarly, when flexible self-determination adds intercommunity walls rather than replaces more rigid walls, it can no longer be labeled flexible.

Accordingly, quasi-cities should lose the law's support when confined to serving a particular powerful local group or benefiting a developer by converting what should be a nimble and transient entity into a perpetual and rigid body. Such were the quasi-cities found in Part II to install long-term company towns,²⁶¹ to empower affluent urban fringe residents to resist annexation,²⁶² and to privilege specific areas within a city.²⁶³ The compliant

²⁵⁷ See *supra* Part II.A.

²⁵⁸ See *supra* Part II.B.

²⁵⁹ See *supra* Part II.C.

²⁶⁰ This is an example of the phenomenon described in Kennedy, *supra* note 253, at 1696 ("Rules . . . allow the proverbial 'bad man' to 'walk the line,' that is, to take conscious advantage of under-inclusion to perpetuate fraud with impunity.").

²⁶¹ See *supra* Part II.A.2.

²⁶² See *supra* Part II.B.3.

²⁶³ See *supra* Part II.C.3.

lawmakers who enable these quasi-cities' founders do not exercise flexibility to promote normative goals, but rather in order to abnegate normative goals.

But maybe even in such measures there is nothing normatively deplorable. A possible, and powerful, objection may be that as long as all parties involved – including residents – are informed of the relevant governmental structure, there is no such thing as too flexible a government, no such thing as denial of self-determination or abnegation of values. This argument challenges this Article's premise. The Article asked what provokes unease over cases such as Ave Maria's, but maybe nothing does. Because the Introduction opens with that case, it is fitting to close by seriously considering this objection. Patricia Sette and David Shnaider claimed to have been misinformed concerning Ave Maria's government structure. Better laws can easily assure that future residents in Ave Maria and elsewhere are on notice. If they are, and still choose to move into the quasi-city, why should they be stopped? Why should citizens not be allowed to pick a place governed by a body functioning as a city but not subject to laws applicable to cities?

The notion that residents may actually seek a quasi-city that does not serve self-determination is not farfetched. Residents flocked to Disney's residential project, the community development district of Celebration, precisely because they found its "benevolent dictatorship" more appealing than traditional democratic government.²⁶⁴ Ave Maria, Celebration, or any other quasi-city, is not an East Berlin.²⁶⁵ Citizens can freely move among municipalities and select the government form that best fits their preferences. If their preference is for a quasi-city rather than a city, why should law interfere with their choice?

Charles Tiebout famously argued that freedom of choice – that is, residents' freedom of movement between local governments – ensures efficient local government.²⁶⁶ The freedom to choose a form of governance serves efficiency and notions of civic liberty. But if the law believes that residents do indeed enjoy this freedom, and that in exercising it they are not inflicting harms on others – assumptions that are naturally subject to debate – it should allow all cities to employ the flexible forms of governance currently available only to quasi-cities. Yet the law does not operate in that fashion. It subjects cities, but not quasi-cities, to obligations regarding representation, debt issuance, and administrative law.²⁶⁷ If law believed that Tiebout's model was operational, no restrictions should have been placed on a city's governance structure or public service provision schemes. The market for local governments should have been

²⁶⁴ Saul Anton, *Disney-Planned*, SALON, Sept. 9, 1999, <http://www.salon.com/1999/09/09/celebration>. Celebration was established in 1994.

²⁶⁵ ROBERT NOZICK, *ANARCHY, STATE, AND UTOPIA* 229 (1974) (describing utopia as "a world which all rational inhabitants may leave for any other world they can imagine . . . an *association*" and not of a "world in which some rational inhabitants are not permitted to emigrate to some of the associations they can imagine, an *east-berlin*").

²⁶⁶ Tiebout, *supra* note 15.

²⁶⁷ See *supra* Part I.C.

left free to regulate all local governments. But cities do not enjoy this complete freedom to compete to attract residents: existing cities cannot choose to evade restrictions legally applicable to cities.²⁶⁸

Our laws thereby express skepticism towards the potentialities of market competition between cities and disbelief in the viability in certain contexts of the assumptions necessary for the beneficial results of autonomous resident sorting and expression of preferences through intercity movement.²⁶⁹ Therefore, mandatory rules are set – regarding representation, debt issuance, and administrative law – with which cities must conform. If the underlying belief regarding the shortcomings of private regulation by residents is valid, then it should not be abandoned wholesale with respect to certain entities – that is, with respect to all quasi-cities. If it is misguided, it should be abandoned with respect to all local government entities, including cities, not just quasi-cities. In either case, there is no justification to a priori opt not to regulate quasi-cities alone.

As long as the law applies legal limits reflexively to all cities, the current practice of exempting all quasi-cities from these limits is both inefficient and unfair. It is inefficient since it artificially interferes in the competition over residents between municipalities, arbitrarily advantaging some actors (that is, quasi-cities that can evade regulation) over others (that is, cities that cannot). It is unfair since it interferes with equal protection rights of city residents, who unlike their quasi-city counterparts cannot choose a governing structure deviating from the law's dictates. There might well be good reasons to doubt the soundness of these dictates and of the inflexible curb on local self-determination they place. The rigidity of current legal categories in local government law – particularly the unyielding formality of the definition of a city and of the restrictions applicable to it – is normatively troubling. This Article's nuanced treatment of the quasi-city as a flexible local government tool should lead to further questioning of the formal and rigid rules binding local governments. Each should be questioned in light of local government law's normative purposes and the ability to attain them in varying circumstances. But until the rules are systematically reformed, mechanically ignoring them whenever a city-like entity is not termed a city is inconsistent both with their positive logic and with the principles of institutional design that should inform them.

CONCLUSION

It is easy to caricature Ave Maria, whose story hovers over this Article, as the place where U.S. notions of localism and government by the people came to die. Ave Maria should have been the apogee of Tocqueville's notion of an

²⁶⁸ Theoretically, a city can decide to dissolve, reverting to county control and then seek quasi-city status.

²⁶⁹ The assumptions were laid out in Tiebout, *supra* note 15, at 419.

American, self-governing, distinct, local community;²⁷⁰ somehow it became the idea's nadir. Yet rash dismissal would be mistaken. True, Ave Maria represents a wrong-headed experiment. Nonetheless, the broader legal movement of which it forms a part propels American law of government forward. Ave Maria and its peers reflect legislatures' willingness to question local government law's formalist categories – categories that, for centuries, have enshrined the city as the baseline in Anglo-American law.

Government forms should not be set in stone. The ability to tinker with existing institutions once their shortcomings are exposed or new challenges emerge sets local government law apart from federal government law – arguably, for the better.²⁷¹ The move from the special district and the city to the quasi-city testifies to such governmental nimbleness. In traditional U.S. law, special districts could not regulate land uses and individual behavior. Yet, in certain cases, modern special districts endowed with these powers – that is, quasi-cities – outperform cities in terms of realizing self-determination benefits while reducing self-determination costs. In other cases, the quasi-city's performance is dismal and thus the overreliance on quasi-cities is troubling. Statutes should be adopted in accordance with this Article's recommendations distinguishing between these two types of cases. In the interim, courts should mine existing law to solve the problem presented by quasi-cities that undermine local government law's goals. More fundamentally, following this Article's assault on the line between city and noncity, one of the last bastions of legal formalism will hopefully wither away.²⁷² Local government law should not be concerned with rigid categories. It must occupy itself with tailoring flexible local governance solutions to serve normative values.

²⁷⁰ The famed French traveler praised U.S. local democracy as key to the young republic's success. 1 ALEXIS DE TOCQUEVILLE, *DEMOCRACY IN AMERICA* 74-76 (F. Bowen ed., 1863).

²⁷¹ See SANFORD LEVINSON, *FRAMED* (2012), for a forceful argument against the rigidity of federal structures.

²⁷² The attack on formalism is associated with early-twentieth century legal realism. The realists believed that legal results should be dictated not by rules, but by normative values. See, e.g., Karl Llewellyn, *A Realistic Jurisprudence*, 30 COLUM. L. REV. 431 (1930).