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Aquifers and Democracy: Enforcing Voter Equal Protection to Save California's Imperiled Groundwater and Redeem Local Government

Louise Nelson Dyble*

California's Sustainable Groundwater Management Act ("SGMA") allows local entities that represent landowners, government agencies, or private companies, rather than the public, to take on exclusive power to regulate and manage imperiled groundwater resources. In at least some cases, under SGMA these entities are governed and controlled in ways that violate the one person, one vote requirement of the Equal Protection Clause, and even the rational basis requirement for local government representational structures. By establishing the state's first comprehensive requirements for monitoring and managing groundwater, SGMA attempts to fill a critical gap in California water regulation, the consequences of which have culminated in a statewide crisis. This Note examines the ways in which SGMA implicates the Fourteenth Amendment, and, specifically, the requirements for proportional representation in local government that Avery v. Midland County and Board of Estimate v. Morris established. It argues that voter accountability and proportional representation in groundwater governance are important to actually achieving the ultimate goal of the legislation: effective management and regulation of imperiled common pool resources in California. It also contributes to solving a bigger problem. Special districts are the most numerous type of local government in the United States, with policy-making and administrative responsibility for vital environmental resources, infrastructure, and services. Enforcement of the one person, one vote requirement for the special districts responsible for California groundwater under SGMA would provide a powerful legal precedent for citizens seeking to promote democracy and equality in local government throughout the United States.

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INTRODUCTION

California’s Sustainable Groundwater Management Act (“SGMA” or “the Act”) allows local entities that represent landowners, government agencies, or private companies to independently “decide” to take on exclusive power to regulate and manage groundwater resources.¹ In at least some cases, under SGMA these self-designated entities are governed and controlled in ways that violate the “one person, one vote” requirement of the Equal Protection Clause, and even the requirement that local government representational structures have a rational basis. Local agencies eligible to take on new powers under the Act include water and irrigation districts whose leaders are elected by landowners, including private corporations, whose voting power is based on the extent of their acreage.² The Act also incentivizes the creation of new entities with byzantine representational and decision-making structures that make tracing authority or ensuring public accountability difficult or impossible.

SGMA reflects a strong political and ideological commitment to localism.³ It explicitly promotes the presumption that “groundwater resources are most effectively managed at the local or regional level.”⁴ Its primary stated goal is to “manage groundwater basins through the actions of local governmental agencies to the greatest extent feasible, while minimizing state intervention to only when necessary to ensure that local agencies manage groundwater in a sustainable manner.”⁵ Rather than provide for state regulation directly, the legislature provided incentives for local management. The law set standards for long-term outcomes, bolstered by the threat of eventual state intervention if those standards are not met within a defined timeframe.⁶ But without requirements for

1. See CAL. WATER CODE § 10723(a) (West 2017) (“any local agency or combination of local agencies overlying a groundwater basin may decide to become a groundwater sustainability agency for that basin.”); WATER § 10723.8.

2. See *infra* Part I.B.

3. For a critical discussion of localism and its implications for power and equity, see Richard Briffault, *Our Localism: Part I—The Structure of Local Government Law*, 90 COLUM. L. REV. 1 (1990) (discussed below).

4. SUSTAINABLE GROUNDWATER MANAGEMENT ACT, UNCODIFIED FINDINGS § (a)(6) (2015), http://groundwater.ca.gov/docs/2014_Sustainable_Groundwater_Management_Legislation_with_2015_amends_11-10-2015_clean-2.pdf [<https://perma.cc/6MSS-P5LN>].

5. WATER § 10720.1(h).

6. According to an analysis published by Stanford’s Center for Water in the West, “a credible threat of state intervention will be critical to the success of SGMA. If groundwater agencies do not

transparency and public accountability, SGMA could not only fail to achieve the goal of sustainability but also have devastating consequences for local democracy.

The Act established a process by which any agency with “water supply, water management, or land use responsibilities within a groundwater basin”⁷ may “decide”⁸ to become a Groundwater Sustainability Agency (“GSA”) at the option of its governing board, subject only to minimal public hearing and notice requirements.⁹ Local agencies that have decided to designate themselves as GSAs include general-purpose local governments (i.e., cities and counties),¹⁰ special districts with governing boards that represent people,¹¹ special districts that represent landowners only,¹² and a variety of appointed authorities and other hybrid entities.¹³ Many new GSAs have representational schemes, voting requirements, or qualifications for office that privilege landowners, agricultural enterprises, or other private interest groups.¹⁴ Additionally, many are

believe that the state is willing to step in and take over management of the basin . . . then in certain basins there will be limited motivation or long-term commitment to take the difficult actions . . .” TARA MORAN & AMANDA CRAVENS, WATER IN THE WEST, CALIFORNIA’S SUSTAINABLE GROUNDWATER MANAGEMENT ACT OF 2014: RECOMMENDATIONS FOR PREVENTING AND RESOLVING GROUNDWATER CONFLICTS 12 (2015), http://waterinthewest.stanford.edu/sites/default/files/SGMA_RecommendationsforGWConflicts_2.pdf [<https://perma.cc/GZJ9-FH5Y>]; see also MICHAEL KIPARSKY ET AL., WHEELER WATER INST., DESIGNING EFFECTIVE GROUNDWATER SUSTAINABILITY AGENCIES: CRITERIA FOR EVALUATION OF LOCAL GOVERNANCE OPTIONS 17 (2016), <https://www.law.berkeley.edu/research/clee/research/wheeler/groundwater-governance-criteria> [<https://perma.cc/Z69U-JG4W>] (observing that the threat of state intervention is vague: “it remains unclear exactly how the Board will or will not exercise its backstop. The Board needs to decide exactly how and when it will intervene, and what exactly the consequences of these interventions will be.”).

7. WATER § 10721(n).

8. WATER § 10723(a).

9. *Id.*

10. For example, Imperial County decided to manage groundwater within its jurisdiction. However, special districts’ competing claims to management have prevented Imperial County’s official designation as the GSA in many areas under rules adopted by the state Department of Water Resources. See *infra* note 66. *GSA Formation Notifications*, CAL. DEP’T OF WATER RES., http://www.water.ca.gov/groundwater/sgm/gsa_table.cfm#table [<https://perma.cc/JX9E-FEH3>] (listing GSA notifications of intent and dates of designation).

11. SGMA includes a provision naming fifteen existing local and regional agencies that already administer groundwater management programs as presumed GSAs. Many of these agencies are democratically-elected special districts. WATER § 10723(c)(1).

12. For descriptions of these districts, including the Westlands Water District, the Turner Island Water District, Reclamation District No. 787, and the Dunnigan Water District, see *infra* Part III.A.

13. For example, the San Joaquin River Exchange Contractors’ Water Authority, an entity comprised of two landowner-elected special districts and two private mutual water companies, has decided to serve as the GSA for a four-county, 240,000-acre area in the Central Valley. Its members are the Central Valley Irrigation District, the Firebaugh Canal Water District, the St. Louis Canal Company, and the Columbia Canal Company. See San Joaquin River Exchange Contractors Water Authority, <http://www.sjrecwa.net/> [<https://perma.cc/DL2G-PDSR>]. The Authority was designated as the exclusive GSA for most of the Delta-Mendota sub-basin on December 29, 2015. See *GSA Formation Notifications*, CAL. DEP’T OF WATER RES., *supra* note 10; *GSA Interactive Map*, CAL. DEP’T OF WATER RES., http://www.water.ca.gov/groundwater/sgm/gsa_map.cfm [<https://perma.cc/P3R5-67M3>].

14. See *infra* Part III.A.

“combination agencies” consisting of voluntary alliances of multiple agencies that are governed by appointed delegates who are far removed from voters and lack public accountability.¹⁵

SGMA was a hard-won legislative victory.¹⁶ By the time it finally passed, California’s lack of groundwater regulation was contributing to a statewide crisis, and in some places, to an environmental and economic emergency.¹⁷ SGMA is an important law, and it has already attracted attention from scholars of environmental law and policy.¹⁸ But policymakers and scholars have largely ignored SGMA’s implications for democracy.¹⁹ This Note examines SGMA in the context of Fourteenth Amendment Equal Protection, specifically the requirement for proportional representation in local government under *Avery v.*

15. WATER § 10723.6(a). “Combination agencies” may be formed through a joint powers agreement or a memorandum of understanding or “other legal agreement.” See *infra* Part I.B.

16. See Tina Cannon Leahy, *Desperate Times Call for Sensible Measures: The Making of the California Sustainable Groundwater Management Act*, 9 GOLDEN GATE U. ENVTL. L.J. 5, 34–39 (2015) (noting that Central Valley farmers and agriculture-related business were the primary opponents of groundwater legislation, fearing that it would have “the potential to fundamentally alter the livelihoods of California’s farmers and the millions of Californians whose employment is directly or indirectly tied to agriculture”).

17. As SGMA was being developed, adopted and implemented, Gov. Jerry Brown proclaimed a “state of emergency” in California and issued a series of executive orders to address the water crisis. See Gov. Edmund G. Brown, Jr., A Proclamation of a State of Emergency (Jan. 17, 2014); Gov. Edmund G. Brown, Jr., Proclamation of a Continued State of Emergency (Apr. 25, 2014); Exec. Order No. B-26-14 (Sept. 18, 2014); Exec. Order No. B-27-14 (Oct. 6, 2014); Exec. Order No. B-28-14 (Dec. 22, 2014); Exec. Order No. B-29-15 (Apr. 1, 2015); Exec. Order No. B-36-15 (Nov. 13, 2015); Exec. Order No. B-37-16 (May 9, 2016), all available at *Governor’s Drought Declaration*, CAL. DEP’T OF WATER RES., <http://www.water.ca.gov/waterconditions/declaration.cfm> [https://perma.cc/R8MG-UCLF].

18. See, e.g., Lindsey Pace, Note, *The Reasonability of California Groundwater Policies in Light of the Drought*, 43 HASTINGS CONST. L.Q. 163, 178 (2015) (arguing that “California’s water crisis is too extreme to give local agencies the potential to self-regulate when they are given so much discretion [under SGMA],” and that an assertive application of the reasonable use doctrine under Article X of the California constitution or other state intervention is necessary in order to achieve the goal of sustainable groundwater management); Chelsea Scharf, Note, *California’s Groundwater Crisis: A Case for the Regulation of Groundwater Substitution Transfers*, 22 HASTINGS W.-NW. J. ENVTL. L. & POL’Y 173, 184 (2016) (describing the urgent need for better enforcement of existing groundwater transfer oversight by the State Water Resources Control Board, due to the fact that SGMA delays any state enforcement until at least 2040); see also Justin Anthony Brown, Note, *Uncertainty Below: A Deeper Look into California’s Groundwater Law*, 39 ENVIRONS 45, 94–95 (2015) (considering whether SGMA potentially invokes Fifth Amendment protections against uncompensated government takings); Micah Green, Note, *Rough Waters: Assessing the Fifth Amendment Implications of California’s Sustainable Groundwater Management Act*, 47 U. PAC. L. REV. 25, 39–48 (2015) (same); Paul J. Pearah, Note, *Keeping the Desert at Bay: Adapting California Water Management to Climate Change*, 22 HASTINGS W.-NW. J. ENVTL. L. & POL’Y 137, 160–67 (2016) (same).

19. See Adam Keats & Chelsea Tu, *Not All Water Stored Underground is Groundwater: Aquifer Privatization and California’s 2014 Groundwater Sustainable Management Act*, 9 GOLDEN GATE U. ENVTL. L.J. 14 101–07 (2015) (describing the policy and political implications of a complex representational scheme that privileges landowners in the Paso Robles Basin Water District). The only major policy paper that addresses the issues of democratic representation and transparency under SGMA is KIPARSKY ET AL., *supra* note 6 at 38–43.

*Midland County*²⁰ and *Board of Estimate of City of New York v. Morris*.²¹ It argues that these requirements for accountability and representation in groundwater governance are crucial to actually achieving the goal of the legislation: effective management and regulation of critically imperiled groundwater resources.

The importance of effective groundwater management to the future of California is difficult to overstate, but there is even more at stake for voting rights and equal protection in local government elections. Special districts are the most numerous type of local government entity in the United States, and their responsibilities extend far beyond water and irrigation.²² They often operate under the public radar, insulated from voter accountability and public scrutiny.²³ Enforcing existing requirements for “one person, one vote” representation in local government will promote much-needed accountability and equity in the management of a wide variety of important resources, systems, and services throughout the United States. Part I of this Note describes the adoption, characteristics, and provisions of SGMA, as well as some of the foreseeable problems with its implementation. Part II describes the evolution and contours of Fourteenth Amendment proportional representation requirements as they apply to local governments. This includes the critical triggering question for the “one person, one vote” requirement: whether an agency wields “general governmental powers.” It also discusses the application of equal protection to

20. 390 U.S. 474 (1968).

21. 489 U.S. 688 (1989).

22. In 2012, the Census of Governments reported 90,056 local governments in the United States, including 38,266 special districts. Special districts are defined for purposes of the census as “independent, special purpose governmental units that exist as separate entities with substantial administrative and fiscal independence from general purpose local governments.” There are more special districts than there are cities, counties, or school districts in the United States. See CARMA HOGUE, U.S. CENSUS BUREAU, CENSUS OF GOVERNMENTS: GOVERNMENT ORGANIZATION SUMMARY REPORT: 2012 (2013), http://www2.census.gov/govs/cog/g12_org.pdf [<https://perma.cc/9YZX-34GX>].

23. See generally JOHN C. BOLLENS, SPECIAL DISTRICT GOVERNMENTS IN THE UNITED STATES (1957) (observing that the “phantom-like quality” of special districts “does not diminish their collective and sometimes individual importance. It merely increases the difficulty of comprehending [them]”); KATHRYN A. FOSTER, THE POLITICAL ECONOMY OF SPECIAL-PURPOSE GOVERNMENT (1997) (explaining the rise, consequences, and policy implications of special-purpose governments, and concluding that their political insulation and lack of visibility allows them to avoid “derailment” but that it also undermines accountability and responsiveness to social needs); MEGAN MULLIN, GOVERNING THE TAP: SPECIAL DISTRICT GOVERNANCE AND THE NEW POLITICS OF WATER (2009) (reviewing the record and challenges of water governance by special districts, including the benefits of institutional specialization and issues of coordination, transparency, and accountability); LOUISE NELSON DYBLE, PAYING THE TOLL: LOCAL POWER, REGIONAL POLITICS, AND THE GOLDEN GATE BRIDGE (2009) (observing that special districts were deliberately designed by early proponents to be insulated from political interference and examining reasons why their officials often avoid public scrutiny); Sara C. Galvan, *Wrestling with MUDs to Pin Down the Truth About Special Districts*, 75 FORDHAM L. REV. 3041 (2007) (observing that “few people bother to vote in [special district] board elections or take an interest in district affairs” and observing that the lack of public involvement “opens the door for widespread private abuse and capture of public entities.”).

appointed agencies that take on general governmental powers. Part III examines SGMA as applied, identifying a variety of agencies that have already been empowered under its provisions in violation of equal protection. It also identifies a number of GSAs that could serve as models for more equitable and accountable governance. The Note concludes with a discussion of options for democratic groundwater governance under SGMA, including the empowerment of existing traditional governments and special districts that comply with the “one person, one vote” standard.

I.

SGMA POLITICS AND PROVISIONS

A. *SGMA Overcame Local Opposition with Local Control.*

SGMA was passed by the California legislature and signed into law by Governor Edmund G. “Jerry” Brown in August 2014 in the midst of a severe, extended statewide drought.²⁴ Prior to SGMA, groundwater extraction in much of California was an unregulated usufructuary property right.²⁵ Despite decades of state incentive programs for local management, only a few localities had adopted any meaningful restrictions on groundwater extraction.²⁶ Effective management and regulation was imperative—unrestrained pumping without adequate recharge or conservation programs endangered vast aquifers that irrigated some of the nation’s most productive and lucrative farmland.²⁷ The threat of depletion and contamination also put many cities and rural communities

24. CAL. WATER CODE § 10720, §§1720–17036 (West 2017). The California Sustainable Groundwater Management Act was comprised of three bills: S.B. 1168, 2013–2014 Reg. Sess. (Cal. 2014) (Sen. Pavley), Assemb. B. 1739, 2013–2014 Reg. Sess. (Cal. 2014) (Assemb. Dickinson), and S.B. 1319, 2013–2014 Reg. Sess. (Cal. 2014) (Sen. Pavley). It was modified in 2015 by S.B. 13, 2015–2016 Reg. Sess. (Cal. 2015) (Sen. Pavley).

25. For an overview of groundwater law in California, see Wesley A. Miliband, *Regulating Groundwater in California: Will Groundwater Sustainability Agencies Change the Landscape?*, 45 ENVTL. L. REP. 11104, 11105–06 (2015).

26. Much of the authoritative groundwater management that existed in California prior to 2015 resulted from lawsuits: in “adjudicated basins,” courts have imposed limits on groundwater extraction in recognition of imminent or irreversible damage due to overdraft. See CAL. DEP’T OF WATER RES., BULLETIN 118 UPDATE 2003, 40–43 (2003), http://www.water.ca.gov/groundwater/bulletin118/docs/Bulletin_118_Update_2003.pdf [<https://perma.cc/KVH2-9WV5>]. In 1992, Assembly Bill 3030 set forth guidelines for voluntary groundwater management planning, which supported the establishment of local monitoring and management programs in many basins (codified at WATER §§ 10750–10767). Senate Bill 1938 (2002) and Assembly Bill 359 (2011) established incentives for planning. SGMA provided the first state mandates for management of chronically overdrafted basins. For an overview of the “patchwork quilt” of local groundwater policy and poor outcomes of AB 3030, see Gregory S. Weber, *Twenty Years of Groundwater Export Legislation in California: Lessons from a Patchwork Quilt*, 34 NAT. RESOURCES J. 657, 677–698, 741–49 (1994).

27. See ELLEN HANAK ET AL., *MANAGING CALIFORNIA’S WATER: FROM CONFLICT TO RESOLUTION* 153–56 (2011), http://www.ppic.org/content/pubs/report/R_211EHR.pdf [<https://perma.cc/QB76-MSBQ>]

at risk by threatening their access to safe and affordable drinking water.²⁸ A tragedy of the commons was in the making: local responsibility for protecting vital natural resources had proven inadequate.²⁹

The most difficult political question facing lawmakers attempting to prevent groundwater tragedy was *who* should be in charge of establishing and enforcing the state's first comprehensive groundwater regulations.³⁰ With SGMA, the legislature abdicated responsibility for answering that question. Rather than creating or designating any specific public agency or agencies to regulate groundwater, lawmakers left it to unspecified local officials to decide where authority will reside through a decision-making process of their own determination.³¹ By adopting this approach, the legislature enabled some of the most powerful local government entities in the state—special districts and authorities governed by corporate landowners and insulated from public accountability—to take on groundwater responsibility and to thereby augment their existing control over surface water and land use.³² For decades, the most intractable opposition to groundwater regulation had come from water and

28. See CALIFORNIA LEGISLATIVE ANALYST, LIQUID ASSETS: IMPROVEMENT MANAGEMENT OF THE STATE'S GROUNDWATER RESOURCES 5–7, 13, 20 (2010), http://www.lao.ca.gov/reports/2010/rsrc/groundwater/groundwater_032410.pdf [<https://perma.cc/48SP-ESN6>]; ALEX N. HELPERIN, DAVID S. BECKMAN & DVORA INWOOD, N. RES. DEF. COUNCIL, CALIFORNIA'S CONTAMINATED GROUNDWATER: IS THE STATE MINDING THE STORE? v–ix (2001), <http://www.nrdc.org/water/pollution/ccg/ccg.pdf> [<https://perma.cc/ZJ75-BAMF>] (observing that 50 percent of California's population depends upon groundwater for drinking water, that in critically dry years as much as two-thirds of the state's water supply comes from groundwater, and that widespread problems of contamination threaten groundwater throughout the state).

29. See HANAK ET AL., *supra* note 27, at 7–8 (“[California’s] water management system is highly decentralized, involving many hundreds of local and regional agencies responsible for water supply, wastewater treatment, drainage management, food control, and land use decisions. This decentralization across scales and functions of government has created many responsive but narrowly focused stakeholders who drive most water policy today. Having many self-interested stakeholders in a system of decentralized governance encourages each party to hold out for a better deal. . . . Each faction, while acknowledging the growing problems of decline, fears policy change and seeks only those changes that serve its own interests, thus collectively preventing anything but small changes in management despite growing prospects for catastrophe.”); HELPERIN, BECKMAN & INWOOD, *supra* note 28, at 73–74, 79–80 (asserting that groundwater contamination is likely to continue “as long as the legal systems in place treat California’s groundwater as a common pool resource, without any underlying structure to force polluters to internalize the costs of their polluting activities”); Philip Laird, *Overdrafting Toward Disaster: A Call for Local Groundwater Management Reform in California’s Central Valley*, 37 U.S.F. L. REV. 759, 761, 780 (2013) (warning of an impending “economic and environmental disaster” in California’s Central Valley and observing that the “threat of running out of groundwater” appears insufficient to motivate action to reduce overdraft, thereby invoking a “tragedy of the commons”).

30. See CAL. LEGISLATIVE ANALYST’S OFFICE, *supra* note 28; see also CAL. N. RES. AGENCY, CALIFORNIA WATER ACTION PLAN 1–4, 13–15 (2014), http://resources.ca.gov/docs/california_water_action_plan/2014_California_Water_Action_Plan.pdf [<https://perma.cc/FH4Z-SNAH>] (outlining goals and strategies that were later reflected in SGMA).

31. CAL. WATER CODE § 10723(b).

32. For analysis of the reasons behind longstanding opposition to groundwater regulation from local water agencies, see S. Trager, *California’s Groundwater: Who’s in Charge?*, 2 CAL. WATER L. & POL’Y RPT. 81, 81–85 (1992).

irrigation districts.³³ State lawmakers appeased those interests, represented by the Association of Local Water Agencies (ACWA), by giving them the power to determine groundwater governance under SGMA.³⁴ Many of the same interest groups opposed legislation for state monitoring of groundwater levels in 2009, fearing that even the act of gathering information on possible overdraft threatened property rights.³⁵ SGMA's provisions allowing local agencies a "maximum degree of local control and flexibility" in carrying out the requirements of the Act reflect efforts to ameliorate this opposition.³⁶

B. Any Local Agency with Water Responsibilities May Independently Decide to Become a GSA under SGMA.

SGMA established a two-and-a-half-year window during which any "local public agency that has water supply, water management, or land use responsibilities within a groundwater basin," could "decide" to become a GSA and thereby to take on all the legislative and regulatory powers that the Act confers.³⁷ This meant that an extremely broad range of incredibly varied agencies could take on new power at their own discretion. All cities and counties could take on groundwater management responsibilities.³⁸ Several cities and city agencies and at least two counties affirmatively decided to become GSAs.³⁹ A wide variety of special districts were also able to designate themselves as GSAs, including community services districts, sanitation districts, county water

33. See HANAK ET AL., *supra* note 27, at 7 ("[The political] deadlock is particularly prominent in the management of the Sacramento-San Joaquin Delta—the fragile hub of the state's water supply network—which is experiencing an ecological collapse and faces the prospect of a major physical collapse as well. Consensus processes over almost 15 years have been unable to develop effective long-term policies Searching for consensus seems only to have continued the deteriorating status quo.").

34. ACWA was among the most prominent advocates in developing the legislation that ultimately passed. See Leahy, *supra* note 16, at 31–34. Agricultural interests and legislators representing the Central Valley, where some of the most severely overdrafted basins are located, nevertheless remained staunchly opposed to any regulation. See Jeremy B. White, *Groundwater Bills Go to Governor: First State-Level Pumping Rules Pass in Spite of Urban-Rural Split*, SACRAMENTO BEE, Aug. 30, 2014, at A1.

35. See generally Josh Patashnik, Note, *All Groundwater Is Local: California's New Groundwater Monitoring Law*, 22 STAN. L. & POL'Y REV. 317 (2011) (observing that nearly-fatal opposition to 2009 legislation requiring groundwater monitoring "stemmed largely from a fear among water users in some parts of the state that it might open the door to intrusive statewide groundwater management from Sacramento").

36. CAL. WATER CODE § 10725(b) (2016).

37. WATER §§ 10721(n), 10723.8.

38. Counties were the default presumed GSA if no agency decided to take on groundwater planning and management responsibilities. If a county that is designated by default affirmatively opts out, the Department of Water Resources will take over GSA responsibilities. WATER §§ 10724(a), 5202(a)(2) (2016).

39. The San Francisco Public Utilities Commission has been designated a GSA, and several cities in the Central Valley including Chico, Tracy, and Oroville have elected to become GSAs but have not been designated due to overlapping claims. Colusa and Imperial counties elected to become GSAs but were only designated for parts of their jurisdictions. See *GSA Formation Notifications*, CAL. DEP'T OF WATER RES., *supra* note 10.

districts, flood control and water conservation districts, harbor and port districts, irrigation districts, metropolitan water districts, municipal improvement districts, municipal utility districts, municipal water districts, public utility districts, reclamation districts, recreation and park districts, water conservation districts, water replenishment districts, water storage districts, and water maintenance districts.⁴⁰ Among these agencies, water districts, water storage districts, levee districts, and reclamation districts are the products of general enabling statutes requiring landowner-only elections (with a limited exception enabling some water districts to voluntarily expand their eligible electorate to include all residents).⁴¹ Landowner-elected governing boards govern many irrigation districts.⁴² The California legislature has also passed hundreds of special acts to create unique special districts, many of which provide for representational schemes and voting requirements that privilege landowners or farmers.⁴³ All are eligible to govern groundwater under SGMA.

In addition to the individual agencies that had the authority to designate themselves as GSAs, SGMA allowed any “combination of local agencies” to “decide to become a groundwater sustainability agency.”⁴⁴ The level of formality

40. These special districts exercise water supply, water management, or land use responsibilities. Special districts can be created individually, by a special act of the legislature, or by local initiative through general enabling legislation. General enabling statutes authorize dozens of different kinds of special districts, with varied representational schemes. *See, generally*, CALIFORNIA ASSOCIATION OF LOCAL AGENCY FORMATION COMMISSIONS, WHAT’S SO SPECIAL ABOUT SPECIAL DISTRICTS? A CITIZEN’S GUIDE TO SPECIAL DISTRICTS IN CALIFORNIA 4TH ED. (2010), https://calafco.org/sites/default/files/resources/Whats_So_Special.pdf [<https://perma.cc/5HZJ-R7ED>].

41. California Water Code §§ 34000–38501 governs water districts, and § 35003 requires that “each voter shall have one vote for each dollar’s worth of land to which he or she holds title.” Water district elections may be expanded to include non-landowner resident voters only if there is a finding that at least 50 percent of the area of the district is devoted to residential, industrial, or nonagricultural commercial use. *See* CAL. WATER CODE §§ 35040, 35041 (West 2017). California Water Code §§ 39000–48401 govern water storage districts and under § 41000, “[o]nly the holders of title to land are entitled to vote at a general election.” California Water Code §§ 70000–70272 govern levee districts, and voters must be resident property owners under § 70120. California Water Code §§ 50000–53901 govern reclamation districts. Voters must be landowners but need not be residents, and there are complex provisions for weighting votes. *See* WATER § 50016 (West 2017).

42. California Water Code §§ 20500–29978 govern irrigation districts. The provisions for irrigation district director elections are complex, but most provisions at least require directors to be landowners even if all residents may vote in elections. *See* WATER §§ 21100–21292. (West 2017); *see also* Thompson v. Bd. of Dirs. of Turlock Irrigation Dist., 55 Cal. Rptr. 689, 693–94 (Cal. Ct. App. 1967) (“[T]he Legislature was not required to set up a voting procedure for the election of the members of its Board of Directors. . . . Proceedings to form such a district are not initiated by residents but by petition of landowners owning fifty per cent of the assessed value of the lands within the proposed boundaries. . . . The members of the Board of Directors may be elected at large or from divisions, depending upon the wishes of the landowners as expressed in the formation petition.”).

43. Special acts authorize the creation of new special districts individually, with characteristics specific to the purpose of the agency and the circumstances in which they are created. Requirements for voting and weighting of votes vary. *See* CAL. SPECIAL DIST. ASS’N, COMPREHENSIVE OVERVIEW OF TYPES OF SPECIAL DISTRICTS 6–17 (2012), http://www.fresnolafco.org/documents/Comprehensive_guide_districts.pdf [<https://perma.cc/EK5C-VPQU>].

44. CAL. WATER CODE § 10723(a) (2016).

required for the formation of a GSA as a “combination of agencies”⁴⁵ ranges from the adoption of a non-binding, voluntary “agreement,”⁴⁶ to the creation of a durable new entity with independent legal status under the Joint Exercise of Powers Act.⁴⁷ Amendments to SGMA passed in 2015 as part of “clean-up legislation” explicitly allow these combination agencies to include private corporations: “A water corporation regulated by the Public Utilities Commission or a mutual water company may participate in a groundwater sustainability agency through a memorandum of agreement (“MOA”) or other legal agreement.”⁴⁸ According to analysis by the California Water Foundation, one of the leading proponents of the Act, GSAs formed under MOAs are not subject to independent auditing, open meetings, or public records requirements.⁴⁹

In short, the range of institutional options for groundwater management is staggering. Individual agencies can elect to take on power and responsibility, or they may form or join a combination agency with almost limitless possibilities for representation and decision-making. SGMA’s explicit commitment to local control is reflected in its wide-open grant of authority, which is designed “to provide the maximum degree of local control and flexibility consistent with [its] sustainability goals.”⁵⁰

The process of agency self-designation under SGMA does not include review or approval by voters, by state officials, or by existing local governments. Any eligible agency or entity may initiate and carry out the required procedural steps for GSA designation. After deciding to designate their agency as a GSA, aspiring GSA leaders must hold a hearing or hearings “in the county or counties

45. WATER § 10723(a).

46. WATER § 10723.6(b).

47. WATER § 10723.6(a). California’s Joint Powers Act allows two or more agencies with powers in common to enter into a contract to create a new, independent agency to exercise those powers, presumably to achieve efficiencies of scale or more effective policy. Many joint powers authorities (JPAs) have responsibilities related to water and land use, so would presumably be eligible for GSA self-designation even without this explicit authorization. *See* CAL. GOV’T CODE §§ 6500–6599.3 (West 2012). The significant provision of SGMA is the language allowing any “other legal agreement” to suffice to form a GSA.

48. S.B. 13, 2015–2016 Reg. Sess. (Cal. 2015) (Pavley) (codified at WATER § 10723.6(b)). The bill adding this important provision passed unanimously without any substantive discussion. Bill analysis described it as making “minor ‘clean-up’ amendments” and reprinted the author’s statement that “[t]his bill makes numerous technical and clarifying amendments necessary to help implement the Sustainable Groundwater Management Act (SGMA). I do not intend to change any of the policies embodied SGMA in this measure.” No other commentary was included in any committee reports, and no opposition was recorded. *See* S.B. 13, 2015–2016 Reg. Sess. (Cal. 2015) (Pavley) S. Floor Analyses Aug. 21, 2015; S.B. 13, 2015–2016 Reg. Sess. (Cal. 2015) (Pavley) Assemb. Appropriations July 13, 2015; S.B. 13, 2015–2016 Reg. Sess. (Cal. 2015) (Pavley) Assemb. Comm. on Water, Parks and Wildlife, June 26, 2015; S.B. 13, 2015–2016 Reg. Sess. (Cal. 2015) (Pavley) S. Floor Analyses Apr. 29, 2015; S.B. 13, 2015–2016 Reg. Sess. (Cal. 2015) (Pavley) S. Floor Analyses Apr. 17, 2015; S. B. 13, 2015–2016 Reg. Sess. (Cal. 2015) (Pavley) S. Comm. on Nat. Res. and Water Mar. 20, 2015.

49. *See* VALERIE KINCAID & RYAN STAGER, KNOW YOUR OPTIONS: A GUIDE TO FORMING GROUNDWATER SUSTAINABILITY AGENCIES 1, 10 (2015) http://californiawaterfoundation.org/wp-content/uploads/2015/09/CF_GSA_Guide_09.30.15_web.pdf [<https://perma.cc/5CSD-PR8X>].

50. WATER § 10725(b).

overlying the basin.”⁵¹ Then they must submit a notice to the DWR that includes the resolution, the proposed service boundaries, any “new” agency bylaws, ordinances, or authorities, and “a list of interested parties . . . and an explanation of how their interests will be considered in the development and operation of the groundwater sustainability agency and . . . plan.”⁵² During the formation period, SGMA also requires consideration of “the interests of all beneficial uses and users of groundwater, as well as those responsible for implementing sustainability plans.”⁵³ The Act does not specify what constitutes meaningful consideration.

Once an agency has decided to become a GSA, the state process for confirming their designation is entirely ministerial. The DWR carries out a “completeness review” to verify that the notice includes all required elements, and then posts the results online.⁵⁴ Agencies that submitted notifications before January 1, 2016, were automatically designated as GSAs after 90 days.⁵⁵ “Clean-up legislation” passed in 2015 required local agencies to eliminate jurisdictional overlap before designation.⁵⁶ Notices submitted and posted more than 90 days before this provision went into effect on January 1, 2016, resulted in the designation of GSAs even if there were multiple agencies electing to manage and regulate exactly the same place—as with many SGMA requirements, local officials were left to address any resulting conflicts or problems on their own.

C. SGMA Automatically Delegates Substantial Power To Self-Designated GSAs.

SGMA endows GSAs with substantial independent authority. Once local agencies designated themselves as GSAs, they “may perform any act necessary or proper to carry out the purposes of [SGMA],” including the adoption of “rules, regulations, ordinances, and resolutions.”⁵⁷ GSAs may acquire and develop property and facilities, monitor and investigate groundwater and related surface water use, and limit or suspend groundwater extractions.⁵⁸ They may also act to enforce the laws that they create; SGMA grants GSAs the power to impose civil penalties for excessive extraction or for violation of any “rule, regulation,

51. The Act requires that the agency publish two notifications of these hearings in newspapers over the course of two weeks. WATER § 10723(b); CAL. GOV'T CODE § 6066 (West 2017).

52. WATER § 10723.8(a)(4).

53. WATER § 10723.2.

54. DEP'T. WATER RES., GSA FORMATION NOTIFICATION GUIDELINES FOR LOCAL AGENCIES: ACTIONS FOR LOCAL AGENCIES TO FOLLOW WHEN DECIDING TO BECOME OR FORM A GROUNDWATER SUSTAINABILITY AGENCY 3–4 (Jan. 6, 2016), http://www.water.ca.gov/groundwater/sgm/pdfs/GSA_Notification_Requirements_v2_2016-01-06.pdf [<https://perma.cc/4VSC-SAWJ>].

55. WATER § 10723.8(c).

56. WATER § 10723.8(c); S.B. 13, 2015–2016 Reg. Sess. § 8 (Cal. 2015) (effective Jan. 1, 2016) (codified at WATER § 10723.8).

57. WATER § 10725.2(a)–(b).

58. WATER §§ 10725.2(a), 10725.4, 10726.2, 10726.4(a)(2).

ordinance or resolution” that they have adopted.⁵⁹ GSAs may impose fees for well permits and extractions to cover the costs of administration, planning, monitoring, enforcement, and other activities that support groundwater management.⁶⁰

The Act includes few restraints on GSA power. Principally, SGMA requires a GSA to develop and adopt a plan that can achieve “sustainability” in all medium- and high-priority basins and sub-basins within twenty years of its implementation.⁶¹ The Act allows considerable leeway in meeting this requirement by defining “sustainable groundwater management” broadly as “the management and use of groundwater in a manner that can be maintained during the planning and implementation horizon without causing undesirable results.”⁶² Of course, the “significant and unreasonable” standard leaves ample leeway for interpretation and leniency in SGMA’s enforcement.⁶³

GSAs must submit plans to the DWR either in 2020 or 2022, depending on the rate of overdraft in the area they manage, in order to trigger SGMA’s state oversight provisions.⁶⁴ SGMA then requires agencies to achieve sustainable management within twenty years of plan implementation, subject to two five-year extensions.⁶⁵ The Act only supports state intervention if GSAs fail to achieve sustainability, as defined by the Act and determined by the DWR, within this thirty- to thirty-five-year period.⁶⁶

Thus, SGMA endows self-designated GSAs with a wide variety of management powers but does not require them to exercise those powers. As analysts have noted, the legislature’s choice to use the word “may” rather than “shall” in many sections of the Act allows GSA creators and governing boards to limit the authority of these agencies.⁶⁷ Nevertheless, the authority granted by

59. WATER § 10732(a)(2).

60. WATER §§ 10730(a), 10730.2.

61. WATER § 10727.2(b).

62. WATER § 10721. The definition of “undesirable results” is limited to: (1) Chronic lowering of groundwater levels indicating a significant and unreasonable depletion of supply if continued over the planning and implementation horizon; (2) Significant and unreasonable reduction of groundwater storage; (3) Significant and unreasonable seawater intrusion; (4) Significant and unreasonable degraded water quality, including the migration of contaminant plumes that impair water supplies; (5) Significant and unreasonable land subsidence that substantially interferes with surface land uses; (6) Depletions of interconnected surface water that have significant and unreasonable adverse impacts on beneficial uses of the surface water. WATER § 10721(x).

63. WATER § 1071(x).

64. See *California State Groundwater Elevation Monitoring (CASGEM)*, Cal. Dep’t of Water Res., <http://www.water.ca.gov/groundwater/casgem/index.cfm> [<https://perma.cc/Z7RW-X7FM>].

65. WATER § 10727.2(b).

66. WATER § 10735. Although many basins and sub-basins comprise hydrologically interrelated systems, SGMA provides no mechanisms for resolving conflicts or coordinating GSAs in order to support comprehensive management. Its advocates argued that the prospect of eventual state intervention would be enough to incentivize local cooperation without state interference. See, e.g., MORAN & CRAVENS, *supra* note 6, at 12–14.

67. See KIPARSKY ET AL., *supra* note 6, at 16.

the Act is not limited to any specific time or stage of implementation.⁶⁸ Any self-imposed restriction on a GSA may be lifted at any time—the legislature’s broad grant of power remains available to all GSAs once they have been designated.

Along with substantial power to regulate and manage groundwater under SGMA, GSAs have the ability to delay or obstruct regulation. Once established, GSAs have exclusive jurisdiction in the territory they manage.⁶⁹ The Act precludes state intervention until deadlines have passed, regardless of how dire the situation might become.⁷⁰ Given that SGMA allows as many as thirty-five years to pass before sustainable management is required,⁷¹ and given its extremely vague and permissive definitions of sustainability,⁷² it is possible that GSAs will *fail to act* to protect vulnerable resources. This should be at least as concerning as the danger that they will take overly aggressive action that could threaten the rights or interests of groundwater extractors. These agencies are just as powerful potential obstacles to effective groundwater management as they are potential stewards or enforcers, particularly when there are multiple agencies with different constituencies and interests managing interrelated groundwater systems. It is therefore questionable whether the Act will contribute in any meaningful way to preventing the dire economic and environmental consequences of groundwater contamination or depletion in many of the most vulnerable basins.

D. SGMA’s Radical Localism Compounds Foreseeable Policy Dilemmas and Conflicts of Interest.

SGMA’s deference to local political power not only justifies a questionable process for GSA designation. It also compounds foreseeable policy problems both by defining natural resources based on political criteria and by failing to require management or even coordination on a scale that corresponds with actual hydrological systems.

SGMA allows local politics to influence how natural resources are identified and defined. SGMA does not employ the well-established scientific concept of an “aquifer,” which can be precisely defined and is standard terminology in the legal standards of most states.⁷³ Instead, California lawmakers created regulatory requirements for “basins,” water resource units (as well as

68. See *supra* Part II.B.

69. See WATER § 10723.8(b).

70. See WATER § 10735.

71. See WATER § 10727.2(b).

72. See John J. Perona, *A Dry Century in California: Climate Change, Groundwater, and a Science-Based Approach for Preserving the Unseen Commons*, 45 ENVTL. L. 641, 650–52 (2015) (explaining why and how the narrative standards and timeframe set forth in the Act are inadequate to support the goal of sustainability).

73. See Weber, *supra* note 26, at 669–71 (discussing the problematic relationship between aquifers, which are the natural features recognized by hydrologists, and basins, which are constructions of California law).

natural resources) that state officials have defined with reference to local governmental institutions.⁷⁴ In 2003 the DWR established the boundaries of 431 basins and 108 sub-basins in California based on “geologic and hydrogeologic conditions *and consideration of political boundary lines* whenever practical.”⁷⁵ All these basins and sub-basins were evaluated under the DWR’s California State Groundwater Elevation Monitoring Program (CASGEM) and assigned a priority level based on criteria including projected population growth, local reliance on groundwater, and adverse impacts on or deterioration of groundwater quality.⁷⁶ The DWR designated forty-three high-priority basins and sub-basins and eighty-four medium priority basins and sub-basins.⁷⁷ This 2003 DWR designation is the standard that determines basin boundaries under SGMA.⁷⁸

Compounding the political influence on basin boundaries, SGMA created a process by which local agencies could request basin boundary modifications by the DWR during a limited, three-month window that ended on March 31, 2016.⁷⁹ DWR regulations allowed both “scientific modifications” and “jurisdictional modifications,” which lacked a scientific basis.⁸⁰ The boundaries of many basins now correspond exactly to the boundaries of existing water agencies, suggesting that the importance of political considerations in the boundary drawing process.⁸¹ One of the consequences of establishing basin boundaries based on political criteria is that unrelated or even antagonistic local agencies may manage hydrologically integrated or interrelated basins. Problems of coordination, or even adversarial competition among GSAs, are therefore likely. Moreover, groundwater hydrology is inseparable from surface water systems; actual groundwater sustainability will require changes in land use and surface water management as well.⁸²

74. WATER § 10722; CAL. DEP’T OF WATER RES, BULLETIN 118, *supra* note 26, at 106 (citing § 12924 of the California Water Code (effective through Feb. 2, 2010)) (emphasis added).

75. CAL. DEP’T OF WATER RES, BULLETIN 118, *supra* note 26, at 15.

76. WATER § 10933(b); *see also California State Groundwater Elevation Monitoring Program*, CAL. DEP’T OF WATER RES., *supra* note 64.

77. CAL. DEP’T OF WATER RES, *supra* note 26, at 106. These numbers are subject to change based on agency-initiated revision requests. WATER § 10722.2. *See Basin Boundary Modifications*, CAL. DEP’T OF WATER RES., http://water.ca.gov/groundwater/sgm/basin_boundaries.cfm [<https://perma.cc/J423-973H>].

78. WATER § 10722.

79. WATER § 10722.2.

80. CAL. CODE REGS. tit. 23 § 342 (2017). *See Basin Boundary Modification*, CAL. DEP’T OF WATER RES., http://water.ca.gov/groundwater/sgm/basin_boundaries.cfm [<https://perma.cc/5DDP-7XUH>]; CAL. DEP’T OF WATER RES., PROPOSED BASIN BOUNDARY EMERGENCY REGULATIONS 2–3 (2015), http://water.ca.gov/groundwater/sgm/pdfs/Basin_Boundary_Emergency_Regulations_Factsheet_Final.pdf [<https://perma.cc/U7XP-EG48>].

81. *See GSA Interactive Map*, *supra* note 13.

82. *See CALIFORNIA LEGISLATIVE ANALYST’S OFFICE*, *supra* note 28, 15–16; *see generally* JANNY CHOY, BEFORE THE WELL RUNS DRY: IMPROVING THE LINKAGE BETWEEN GROUNDWATER AND LAND USE PLANNING (2014) (explaining and discussing the close relationship between land use, surface water, and groundwater and the importance of integrated management with reference to four

Despite the importance of coordinating land and water resources at an appropriate scale to achieve sustainable management, SGMA nevertheless allows local agencies to collectively decide which, and how many, GSAs will be responsible for each basin or sub-basin.⁸³ Multiple GSAs may manage a single basin or sub-basin subject only to a requirement that they develop a “coordination agreement” for implementation of the multiple resulting plans.⁸⁴

SGMA ignores the potential for confrontation between GSAs and other local governments with conflicting interests and policy agendas. In many high-priority basins, multiple GSAs have self-designated to manage a single groundwater system.⁸⁵ Even with aggressive recharge programs, these agencies will be competing for a finite amount of available water. SGMA provides no mechanism or procedures to guide coordination or compromise among multiple GSAs managing and competing for limited water in a single basin. Thus, conflicts and competition making sustainability impossible to achieve are likely. The timeframe SGMA sets before state agencies may intervene allows for decades of delay while overdraft and contamination may continue. And while it fails to establish requirements for meaningful coordination among GSAs, it creates perverse incentives to maximize extraction and profits before governments impose regulations or wells run dry.⁸⁶

II.

LOCAL GOVERNMENT AND ONE PERSON, ONE VOTE

The law regarding local government accountability and representation is just as tangled and complex as local governmental institutions themselves. Addressing the legal shortcomings of SGMA requires addressing one of the thorniest issues in substate politics and representation: the parameters of the one

California case studies)
http://waterinthewest.stanford.edu/sites/default/files/Before%20The%20Well%20Runs%20Dry%20-%20Water%20in%20the%20West%20Stanford_0.pdf [https://perma.cc/VK28-ERSN].

83. WATER §§ 10721(d), 10727(b)(3).

84. See WATER §§ 20721(d), 10727(b)(3); see also WATER EDUC. FOUND., THE 2014 SUSTAINABLE GROUNDWATER MANAGEMENT ACT: A HANDBOOK TO UNDERSTANDING AND IMPLEMENTING THE LAW, Ch. 2 at 6 (2014), http://www.watereducation.org/sites/main/files/file-attachments/groundwatermgthandbook_oct2015.pdf [https://perma.cc/3PST-3QNH].

85. For example, in the Colusa Groundwater Basin (Bulletin 118 designation 5-21.52) at least fourteen local governments self-designated as GSAs. See *GSA Formation Notifications*, CAL. DEP’T OF WATER RES., *supra* note 10.

86. See Kelly Nishikawa, *End of an Era: California’s First Attempt to Manage Its Groundwater Resources Through Its Sustainable Groundwater Management Act and Its Impact on Almond Farmers*, 28 ENVTL. CLAIMS J. 206, 218 (2016) (observing that for water-intensive crops such as almonds, rather than promoting conservation, “[SGMA’s] protracted timetables for implementation make it even more economically sensible in the short term . . . to continue extracting groundwater at their current usage rates, or even increase these rates. This is because groundwater is one of the only sources of water that farmers currently have access to, and now they are on notice that in the future this access will be restricted and regulated, and therefore the farmers may try to use as much groundwater as they can while they can.”).

person, one vote requirement for local governments with general governmental powers under *Avery v. Midland County*.⁸⁷ This Part considers the limits of the exception to proportional representation requirement for local government that the Supreme Court established for landowner-controlled special districts in *Salyer Land Co. v. Tulare Lake Basin Water Storage District* and in *Ball v. James*.⁸⁸ It argues that the powers granted by SGMA put GSAs outside of the boundaries of that exception, triggering the one person, one vote requirement. It explains how the Supreme Court clarified and restricted that exception by emphasizing the importance of legislative powers.⁸⁹ It then addresses exemptions for appointed agencies, arguing that when entities cannot themselves wield the power of another agency, they should not be able to appoint representatives to govern that agency. Such an arrangement “offends the constitution” and violates equal protection.⁹⁰

A. “One Person, One Vote” Applies to All Local Elected Agencies with General Governmental Powers.

Before the 1960s, the Supreme Court avoided intrusions into the “political thicket” of state elections, holding challenges to state voting requirements and representational schemes to be nonjusticiable political questions.⁹¹ That changed in 1962 with *Baker v. Carr*.⁹² Considering the egregious malapportionment of the Tennessee state legislature, the *Baker* plurality departed from decades of deference on questions related to state elections to hold that the equality of votes was a justiciable issue implicating Fourteenth Amendment equal protection guarantees.⁹³ The Court explained that “the mere fact that [a] suit seeks protection of a political right does not mean it presents a political question.”⁹⁴

Two years later in *Reynolds v. Sims*, an eight-to-one decision authored by Chief Justice Warren, the Court ordered legislative reapportionment based on a “one person, one vote” standard.⁹⁵ *Reynolds* initiated a process of redistricting that transformed the political landscape nationwide.⁹⁶ The Court held that the

87. 390 U.S. 474, 475–76 (1968).

88. 451 U.S. 355 (1981); 410 U.S. 719 (1973).

89. See *N.Y.C. Bd. of Estimate v. Morris*, 489 U.S. 688, 694–96 (1989).

90. *Hadley v. Junior Coll. Dist. of Metro. Kansas City*, 397 U.S. 50, 58 (1970).

91. In *Colegrove v. Green*, the Court’s first case directly addressing inequality in voting power at the state level, Justice Frankfurter famously warned courts that they “ought not to enter [the] political thicket” of apportionment, but rather leave it to Congress to remedy inequality, or to voters “to secure Legislatures who will apportion properly.” 328 U.S. 549, 556 (1946). The Warren Court defied this admonishment, issuing a series of decisions to protect state and local voters starting with *Baker v. Carr*, 369 U.S. 186 (1962).

92. *Baker*, 369 U.S. at 186.

93. *Id.* at 209.

94. *Id.*

95. 377 U.S. 533, 558 (1964).

96. Jonathan L. Entin, *Introduction to Law Review Symposium 2011: Baker v. Carr after 50 Years: Appraising the Reapportionment Revolution*, 62 CASE W. RES. L. REV. 941 (2012) (discussing the consequences of reapportionment for state politics).

overrepresentation of rural areas violated voters' fundamental rights: "Legislators represent people, not trees or acres. Legislators are elected by voters, not farms or cities or economic interests."⁹⁷ Vigorous dissents in both *Baker* and *Reynolds* challenged this apparently common-sense assertion, highlighting a jurisprudential divide and foreshadowing broad future exceptions. Justice Frankfurter pointed out that historically, unevenly weighted voting was a dominant and pervasive pattern in state government.⁹⁸ Justice Harlan considered policy, arguing that it was not unreasonable to favor rural interests in order to "protect . . . agricultural interests from the sheer weight of numbers of those residing in [] cities."⁹⁹

In *Avery v. Midland County*, the Court ventured even further into the political thicket.¹⁰⁰ The Court held that as direct manifestations of state plenary power, local governments are subject to the same Constitutional requirements as state legislatures.¹⁰¹ "The Equal Protection Clause reaches the exercise of state power however manifested [and]. . . [W]hatever the agency of the State taking the action."¹⁰²

Avery made it clear that traditional, general-purpose local governments were subject to the proportionality requirements established by *Reynolds*: "We see little difference . . . between the exercise of state power through legislatures and its exercise by elected officials in [] cities, towns, and counties."¹⁰³ The Court confirmed that even dormant, unused power must be considered in determining equal protection requirements under the Fourteenth Amendment: "a decision not to exercise a function within the court's power—a decision, for example, not to build an airport or a library, or not to participate in the federal food stamp program—is just as much a decision affecting all citizens of the county as an affirmative decision."¹⁰⁴

97. *Reynolds*, 377 U.S. at 560–62.

98. *Baker*, 369 U.S. at 301–02.

99. *Id.* at 336.

100. 390 U.S. 474 (1968).

101. Not only did the *Avery* Court apply equal protection requirements to local government elections, it also undermined a century-old doctrine endorsed by the Court that local governments were subordinate instrumentalities of state legislatures, which had undivided responsibility for and authority over all aspects of their governance. See Richard Briffault, *Our Localism Part I*, *supra* note 3, 86–91. This doctrine, associated with Iowa Supreme Court Justice John F. Dillon, held the following in *Hunter v. City of Pittsburgh*: "Municipal corporations are political subdivisions of the state, created as convenient agencies for exercising such of the governmental powers of the state as may be entrusted to them. . . . The state, therefore, at its pleasure, 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 with another municipality, repeal the charter and destroy the corporation. . . . [C]onditionally or unconditionally, with or without the consent of the citizens, or even against their protest. In all these respects the state is supreme." 207 U.S. 161, 178–79 (1907). See also *Reynolds*, 377 U.S. at 575 (distinguishing the relationship between local governments and state legislatures from that between states and the U.S. Senate).

102. *Avery*, 390 U.S. at 479–80 (emphasis added).

103. *Id.* at 481.

104. *Id.* at 484.

B. Only When Local Agencies Have a Specialized, Narrow Purpose and Limited Powers are Landowner-Only Elections and Acreage-Based Voting Permissible.

Avery left unanswered the question of whether special districts and other special-purpose governments such as authorities and boards (defined in contrast with traditional, general-purpose governments such as cities, counties, and states), were required to respect voter equal protection. By the 1960s these agencies comprised the numerical majority of local governments.¹⁰⁵ A series of subsequent decisions established that agencies with limited purposes were not exempt from proportionality requirements and could not exclude voters from elections based on a narrow definition of legitimate interest.¹⁰⁶ In *Hadley v. Junior College District*, the Court ruled that even a small district limited to operating a regional college had “important governmental powers” that were “general enough and have sufficient impact throughout the district” to invoke voter equal protection.¹⁰⁷ Such “important governmental powers” included the power to tax, to make contracts, and to exercise eminent domain.¹⁰⁸ Additionally, in *Kramer v. Union Free School District*, the Court established that any restrictions on the franchise in school district elections had to be supported by a compelling state interest; the vote could not be limited to property owners unless “all those excluded are *in fact substantially less interested or affected* than those the statute includes.”¹⁰⁹

Hadley and *Kramer* established a very high standard for proportionality and threw the validity of thousands of landowner-elected special districts into question. It was not until 1973, after the Court underwent a major ideological shift under Chief Justice Warren Burger, that the Court carved out an exception to protect special districts from reform. In *Salyer Land Co. v. Tulare Lake Basin Water Storage District*, the Court distinguished a special district with water-related responsibilities, including water storage, flood control, and watershed management, from the agencies responsible for education in *Hadley* and *Kramer*.¹¹⁰ While the powers required to operate public schools or junior colleges qualified as “general governmental powers,” the *Salyer* majority reasoned, the powers required for water management did not.¹¹¹ Therefore, “the popular election requirements enunciated by *Reynolds* . . . and succeeding cases are inapplicable to elections such as the general election of the appellee Water

105. By 1967 there were 81,000 local governments, approximately 43,000 of which were special districts. 1 U.S. CENSUS BUREAU, 1972 CENSUS OF GOVERNMENTS, GOVERNMENTAL ORGANIZATION 1 (1973).

106. See *Hadley v. Junior Coll. Dist. of Metro. Kansas City*, 397 U.S. 50 (1970); *Kramer v. Union Free Sch. Dist.*, 395 U.S. 621, 633 (1969).

107. *Hadley*, 397 U.S. at 54.

108. *Id.* at 53–54.

109. *Kramer*, 395 U.S. at 632 (emphasis added).

110. 410 U.S. 719, 727–29 (1973).

111. *Id.*

District.”¹¹² Applying a rational basis standard,¹¹³ the Court upheld voting schemes that restricted elections to landowners and weighted votes based on acreage: “by reason of its special limited purpose and of the disproportion[al] effect of its activities on landowners as a group, the [water district] is the sort of exception to the rule laid down in *Reynolds*”¹¹⁴ The Court confirmed that landowners did not need to reside in the district, or even to be human beings in order to participate in elections: “. . . it is quite understandable that the statutory framework for election of directors of the [district] focuses on the land benefited, rather than on [people] as such. . . . The franchise is [reasonably] extended to landowners, whether they reside in the district or out of it, and indeed whether or not they are natural persons who would be entitled to vote in a more traditional political election.”¹¹⁵

Justice Douglas, joined by Justices Marshall and Brennan, dissented in *Salyer*. They pointed out that the water district’s representational structure put “the corporate voter . . . in the saddle” as it “disfranchised” residents with unmistakable interests in the agency’s operations. A 1969 flood submerged a non-voting resident’s home under fifteen and a half feet of water as the result of district intervention to protect farmland owned by the largest corporate landowner in the district.¹¹⁶ Douglas observed:

“[California has taken] a radical and revolutionary step. . . . by allowing corporations to vote in these water district matters that entail performance of vital governmental functions. . . . Four corporations can exercise these governmental powers as they choose, leaving every individual inhabitant with a weak, ineffective voice. The result is a corporate political kingdom undreamed of by those who wrote our Constitution.”¹¹⁷

Despite these concerns, a bare majority of the Court broadened and reinforced the special district exception in 1981 with *Ball v. James*.¹¹⁸ An Arizona irrigation district with acreage-based and landowner-restricted elections had the power to tax, issue tax-exempt bonds (both general obligation and revenue bonds), and exercise eminent domain.¹¹⁹ It supplied water to several cities¹²⁰ and owned and operated a hydroelectric dam, selling electricity to nearly half of the state population.¹²¹ The Court nevertheless found that “the District’s

112. *Id.* at 730.

113. *Id.* at 734–35 (holding that “the voter qualification statutes for California water storage district elections are rationally based, and therefore do not violate the Equal Protection Clause.”).

114. *Id.* at 728.

115. *Id.* at 729–30.

116. *Id.* at 735–38 (Douglas, J., dissenting).

117. *Id.* at 742 (Douglas, J., dissenting).

118. 451 U.S. 355 (1981).

119. *Id.* at 360.

120. 25 percent of its water was delivered to municipalities, though it was provided through the assignment of landowner allotments. *See id.* at 365 n.9, 367 n.13.

121. *Id.* at 357, 365.

purpose is sufficiently specialized and narrow and its activities bear on landowners so disproportionately as to release it from the strict demands of the *Reynolds* principle.”¹²² The provision of water to the residents of cities was not significant, the majority held, because water rights were distributed according to land ownership and subsequently assigned to other users.¹²³

This agency and similar special districts, according to the majority, were only “nominal public entities.”¹²⁴ Therefore, the voting scheme for these “essentially business enterprises” only required a plausible justification to satisfy due process requirements: “the State could rationally limit the vote to landowners [and] . . . rationally make the weight of [landowners’] vote dependent upon the number of acres they own, since that number reasonably reflects the relative risks they incurred as landowners and the distribution of the benefits and the burdens of the District’s water operations.”¹²⁵

Although *Salyer* and *Ball* shifted the critical question in voter equal protection analysis to whether an agency has “general governmental powers,” these decisions only muddied the waters for courts attempting to determine whether special purpose agencies actually wield such power. The Court noted that the water storage district in *Salyer* was dedicated to acquiring, storing, and distributing water for farms exclusively, providing “no other general public services such as schools, housing, transportation, utilities, roads, or anything else of the type ordinarily financed by a municipal body.”¹²⁶ Similarly, in *Ball*, the Court listed the implicitly significant powers that the water district did *not* wield: “The District cannot impose ad valorem property taxes or sales taxes. It cannot enact any laws governing the conduct of citizens, nor does it administer such normal functions of government as the maintenance of streets, the operation of schools, or sanitation, health, or welfare services.”¹²⁷ In both cases, the Court stopped short of stating that those powers invoked voter equal protection.¹²⁸ And of course, that the district in *Ball* actually wielded some of the powers listed in *Salyer* as the financier, owner, and operator of a major public utility undermines any guidance those lists might provide.¹²⁹

A four-justice dissent in *Ball*, led by Justice White, objected to a special-purpose agency with broader influence on all district residents: “This is not a single-purpose water irrigation district, but a large and vital municipal corporation exercising a broad range of initiatives across a spectrum of operations. . . . The effects of the provision of water and electricity on the

122. *Id.* at 355.

123. *Id.* at 367.

124. *Id.* at 368.

125. *Id.* at 371.

126. *Salyer Land Co. v. Tulare Water Dist.*, 410 U.S. 719, 728–29 (1973).

127. *Ball*, 451 U.S. at 366.

128. *Ball*, 451 U.S. at 366; *Salyer Land Co.*, 410 U.S. at 728–29.

129. *See Ball*, 451 U.S. at 386 (White, J., dissenting).

citizens of the city are as major as they are obvious.”¹³⁰ The *Ball* majority focused on the nature, not scope, of the agency’s power. Because it found that the agency did not wield general governmental powers, it sufficed that the landowner-only franchise “[bore] a reasonable relationship to statutory objectives” for the exception to apply.¹³¹

SGMA grants new powers to agencies that previously fell within the *Salyer/Ball* exception—among them, the very landowner-controlled irrigation and water districts that the exception was created to protect. California legislators are empowering these agencies to take on new powers, not simply to expand the scope of their existing power. They assume that the special district exception will hold regardless of the nature of these new powers, but subsequent cases indicate that it will not.

C. Equal Protection Requires Proportional Representation in All Elected Agencies with Legislative Power.

Fortunately for non-landowning natural persons seeking to participate in local elections, in 1989 the Court revisited the exceptions to proportional representation granted to special purpose agencies, shoring up voter equal protection. In *Board of Estimate of City of New York v. Morris*, the Court unanimously agreed that an entity with broad budgetary and planning powers had general governmental powers that subjected it to the “one person, one vote” rule.¹³²

The New York Board of Estimate had control over land use, franchising, and contracting on behalf of seven million city residents.¹³³ The Court found that it fit “comfortably” among “governmental bodies whose ‘powers are general enough and have sufficient impact throughout the district.’”¹³⁴ The Court emphasized the “major significance” of the fact that “the board shares *legislative functions* with the city council,” including the power to modify and approve the city budget.¹³⁵ The Court also articulated the principle underlying requirements for proportional representation: “Electoral systems should strive to make each citizen’s portion equal. . . . Hence the Court has insisted that seats in legislative bodies be apportioned to districts of substantially equal populations. Achieving ‘fair and effective representation of all citizens is . . . the basic aim of legislative apportionment,’ . . . and [it is] for that reason that [*Reynolds*] insisted on

130. *Id.* at 381, 385.

131. *Id.* at 371.

132. 489 U.S. 688 (1989) (Blackmun, J., concurring in the judgment).

133. The Board of Estimate comprised the city’s five borough presidents along with three citywide elected officials: the mayor, the comptroller, and the president of the city council. The Court rejected the district court’s finding that they were not elected because they took their positions on the board automatically upon election. *Id.* at 694.

134. *Id.* at 696 (quoting *Hadley v. Junior Coll. Dist. of Metro. Kansas City*, 397 U.S. 50, 54 (1970)).

135. *Id.* at 696 (emphasis added).

substantial equality of populations among districts. . . . That the members of New York City’s Board of Estimate trigger this constitutional safeguard is certain.”¹³⁶ Following the ruling, a city charter revision expanded and reformed the city council, assigning all responsibilities to existing agencies based on proportional representation.¹³⁷

Since *Board of Estimate*, federal appellate courts have ruled that agencies with general governmental powers violate Fourteenth Amendment voter equal protection in at least two cases.¹³⁸ In *Cunningham v. Seattle*, a Washington State district court considered the constitutionality of the Municipality of Metropolitan Seattle (known as Metro). Metro was a regional special district headed by a combination of appointed and elected officials empowered to regulate sewage treatment and disposal in the Puget Sound Area, as well as to finance and operate regional transit.¹³⁹ The court held that under *Board of Estimate*, the agency’s governance violated equal protection and ordered state and local officials to devise a means of complying with the “one person, one vote” imperative within two years.¹⁴⁰ Local cities and counties convened a “regional governance summit” that produced a successful ballot measure assigning responsibility for all of Metro’s existing facilities and operations to King County, the jurisdiction encompassing Seattle.¹⁴¹ A few years later, voters authorized the creation of a new regional transit authority headed by state appointees.¹⁴²

In *Hellebust v. Brownback*, the Tenth Circuit upheld a lower court ruling that the regulatory authority of the state Board of Agriculture constituted general governmental powers and therefore invoked the “one person, one vote” requirement.¹⁴³ The district court had emphasized the Board’s control over water use, including its authority to institute conservation measures:

[T]he Board has significant power over the use and control of water
 . [that] does not merely apply to farmers or agricultural uses but also

136. *Id.* at 693–94 (citing *Reynolds v. Sims*, 377 U.S. 533, 565–66 (1964)).

137. *See* N.Y. Statewide Coal. of Hispanic Chambers of Commerce v. N.Y.C. Dep’t of Health & Mental Hygiene, 23 N.Y.3d 681, 704–10 (2014) (citing N.Y.C. CHARTER REVISION COMM’N, FINAL REPORT 1 (1989), http://www.nyc.gov/html/charter/downloads/pdf/1989_final_report.pdf [<https://perma.cc/MDY2-X7VU>]).

138. *See* *Hellebust v. Brownback*, 824 F. Supp. 1511 (D. Kan. 1993), *aff’d*, 42 F.3d 1331 (10th Cir. 1994); *Cunningham v. Metro. Seattle (Cunningham I)*, 751 F. Supp. 885, 890 (W.D. Wash. 1990); *see also* *Fumarolo v. Chi. Bd. of Educ.*, 566 N.E.2d 1283, 1295 (Ill. 1990) (requiring proportional representation for “local school councils [as] essential units of educational governance, empowered to make important budgetary, educational and administrative decisions”); *see also* *Heite v. Camden-Wyoming Sewer & Water Auth.*, No. CIV. A. 12089, 1992 WL 29816 (Del. Ch. Feb. 14, 1992) (requiring proportional representation for a sewer and water authority headed by elected officials).

139. *Cunningham I*, 751 F. Supp. at 890.

140. *Cunningham v. Metro. Seattle (Cunningham II)*, 751 F. Supp. 899, 902 (W.D. Wash. 1990).

141. *See id.* at 900–01; Danny Westneat, *Metro Dies Today*, SEATTLE TIMES, Jan. 1, 1996, at A1.

142. *See* Walt Crowley, *Roads, Rails, and Regional Planning*, SEATTLE TIMES, Oct. 24, 2000, at B7.

143. *Hellebust v. Brownback (Hellebust IV)*, 42 F.3d 1331, 1334 (10th Cir. 1994).

reaches water rights held by cities, utilities and individuals not connected with agriculture. . . . If too much water is being taken out of a particular river or waterway, [Board officials] can stop anyone from taking water out of it altogether.¹⁴⁴

The Tenth Circuit reinforced this emphasis on the general public interest in water management, and its importance in constituting general governmental powers:

Once a state agency has the authority to affect every resident in matters arising in their daily lives, its powers are not disproportionate to those who vote for its officials. The quality of meat and dairy products consumed by everyone in the state; the accuracy of the scales upon which people are charged for consumer goods; the right to divert and use water; the use of pesticides on residential lawns, city parks, and farmlands . . . [all] unremittingly influence every person within the State of Kansas. . . . [and] comprise part of the normal functions of state government. Thus, although the Board exercises powers that uniquely benefit the agricultural industry, its core governmental powers deprive the Board of the umbra of *Ball* and *Salyer*.¹⁴⁵

The court emphasized the clear line between agencies that are exempt from proportional representation requirements and those whose powers require it: “once the line is crossed into the governmental powers arena, one person, one vote applies.”¹⁴⁶

The plaintiffs in the case challenged the method for selecting the members of the board, who were delegates from private agricultural associations elected in an annual gathering without any public involvement.¹⁴⁷ Upon remand from the Tenth Circuit, the district court ordered the state legislature to remedy the violation, chastising its members for failing to act after the initial ruling and imposing a deadline less than two months after the order was issued.¹⁴⁸ The Board now consists of gubernatorial appointees.¹⁴⁹

In *Avery* the Court remarked that local agencies were complex and did not fit easily into “neat categories” when it shifted the focus of equal protection analysis to the nature of power.¹⁵⁰ *Board of Estimates, Cunningham*, and *Brownback* all confirm the observation that the nature of a specific power is

144. *Hellebust v. Brownback (Hellebust I)*, 824 F. Supp. 1511, 1514 (D. Kan. 1993) (citations omitted).

145. *Hellebust IV*, 42 F.3d at 1335.

146. *Id.* at 1334.

147. These associations included “county agricultural societies, each state fair, each county farmer’s institute, each livestock association having a statewide character, and each of the following with at least 100 members: county farm bureau associations, county granges, county national farmer’s organizations, and agricultural trade associations having a statewide character.” *Id.* at 1332 & n.1.

148. *Id.*

149. See *About Us*, KAN. DEP’T OF AGRICULTURE, <http://agriculture.ks.gov/about-kda/state-board-of-agriculture> [https://perma.cc/2NP3-QSC7].

150. 390 U.S. 474, 485 (1968).

much easier to identify than the nature of an agency. Under *Board of Estimates*, the significance of SGMA is in the *powers* it grants to established agencies. Those powers encompass legislative authority, including the power to “adopt rules, regulations, ordinances and resolutions.”¹⁵¹ The agencies that the Court exempted from proportionality requirements in *Salyer* and *Ball* did not have any legislative powers, such as passing ordinances or developing and enforcing regulations.¹⁵²

On the other hand, self-designated GSAs are automatically granted the power to pass ordinances and to develop and enforce regulations.¹⁵³ While such legislative powers are not necessary for a finding of general governmental powers, they are themselves sufficient to trigger the “one person, one vote” requirement for local governments.¹⁵⁴ SGMA grants GSAs broad power to adopt and enforce law and policy to support sustainable groundwater management.¹⁵⁵ It also empowers them to finance projects, collect fees, and impose penalties.¹⁵⁶ While *Board of Estimate* stopped short of explicitly requiring proportional representation in all agencies with legislative power, the Supreme Court has not foreclosed such a rule. The powers that the California legislature has delegated through SGMA trigger the “one person, one vote” standard, and therefore landowner-elected special districts and agencies governed by their delegates may not serve as GSAs.

D. Any Exception for Appointed Agencies Must Not Offend the Constitution.

Board of Estimate broadened the definition of “elected agency” by holding that whenever an official takes any office automatically upon election, then that office must also be considered elected.¹⁵⁷ It also held that a board with mixed representation—where appointees or representatives elected at-large sit alongside representatives of discrete places or districts—must still satisfy the “one person, one vote” requirement.¹⁵⁸ The decision, however, failed to address a looming question: When, if at all, are agencies governed entirely by appointed officials exempt from proportionality requirements? SGMA not only empowers landowner-controlled special districts, but also permits the creation of “combination” agencies to serve as GSAs governed by appointees of other

151. CAL. WATER CODE § 10725.2(b) (2016).

152. See *Ball v. James*, 451 U.S. 355, 366 (1981); *Salyer Land Co. v. Tulare Water Dist.*, 410 U.S. 719, 723–24 (1973).

153. See WATER § 10725.2.

154. See *N.Y.C. Bd. of Estimate v. Morris*, 489 U.S. 688, 694 (1989).

155. WATER §§ 10725.2(b), 10732(a)(2).

156. WATER §§ 10730(a), 10730.2.

157. 489 U.S. at 694.

158. *Id.*

governments and private companies.¹⁵⁹ This Note seeks to address whether these entities are also subject to Fourteenth Amendment voter protections.

While the Supreme Court has never directly ruled on whether local agencies with legislative powers—such as those SGMA confers upon any agency that designates itself a GSA—may avoid proportional representation requirements if appointees govern them, two cases following *Avery* addressed this question in dicta. In *Sailors v. Board of Education of the County of Kent*, the Court found that a regional school board comprised of delegates from elected school districts was not subject to the “one person, one vote” requirement.¹⁶⁰ It concluded that there was “no constitutional reason why state or local officers of the nonlegislative character involved here may not be chosen by the governor, by the legislature, or by some other appointive means.”¹⁶¹ It explicitly stayed the question of whether elections could be required for legislative agencies.¹⁶² In *Hadley*, which involved an elected agency, the Court addressed this unresolved issue: “where a State chooses to select members of an official body by appointment rather than election, and that choice does not itself offend the Constitution, the fact that each official does not ‘represent’ the same number of people does not deny those people equal protection of the laws.”¹⁶³

Several state courts have interpreted the dicta in *Sailors* and *Hadley* to excuse all appointed agencies from “one person, one vote” requirements regardless of their power.¹⁶⁴ In *People ex rel. Younger v. County of El Dorado*, the California Supreme Court affirmed the validity of an interstate commission with very broad powers to protect Lake Tahoe from pollution and its surrounding areas from excessive development.¹⁶⁵ The decision established a blanket exception from proportionality requirements for appointed agencies: “We think the true meaning of *Sailors* and *Hadley* is that the legislative or administrative nature of the activities performed by an officer is irrelevant; if the officer is

159. See WATER § 10723.6(a).

160. 387 U.S. 105, 109 (1967).

161. *Id.* at 108 (emphasis added).

162. *Id.* at 109–10.

163. *Hadley v. Junior Coll. Dist. of Metro. Kansas City*, 397 U.S. 50, 58 (1970) (emphasis added).

164. See, e.g., *Eastern v. Canty*, 389 N.E.2d 1160, 1168–69 (Ill. 1979) (“[T]here is no constitutional requirement that the appointed governing body of a district be so constituted that a majority of its members ‘represent’ the more populous of the areas which compose the district. Indeed, when an officeholder need not be elected at all, it seems questionable to speak of him as a ‘representative.’”); *State ex rel. List v. Cty. of Douglas*, 524 P.2d 1271, 1276–77 (Nev. 1974) (concluding that “the principle of ‘one man, one vote’ has no relevancy to appointive boards”); *People ex rel. Hanrahan v. Caliendo*, 277 N.E.2d 319 (Ill. 1971) (holding that there is no requirement for proportionality in the appointment of Illinois officials); cf. *Oaks v. Bd. of Trustees*, 385 F. Supp. 392, 395 (N.D. Miss. 1974) (considering both appointive selection and the fact that delegated power was entirely administrative in holding a junior college district board exempt from proportionality requirements).

165. 487 P.2d 1193, 1211 (Cal. 1971).

elected, ‘one person, one vote’ applies. If he is appointed, the principle does not apply.”¹⁶⁶

Younger could be interpreted to allow agencies with restricted elections to take on general governmental powers, including legislative powers, simply by creating subordinate agencies and appointing representatives to govern them. Through its provision for “combinations of agencies,” SGMA provides an easy way for local interests, including landowner-elected districts and private corporations, to establish control over groundwater management. But as *Board of Estimates* and *Brownback* stipulate, it is the nature of an agency’s power, not the means of selecting its leaders, that is decisive to the requirements of the Fourteenth Amendment. Moreover, both *Sailors* and *Hadley* indicate that there are circumstances where the appointment of officials may “offend the Constitution.”¹⁶⁷ One such offense includes using the appointment loophole to allow entities that are themselves ineligible to wield legislative power to participate as members of appointed agencies. An overly broad exception for appointed agencies from the “one person, one vote” standard not only undermines equal protection for voters. It also promotes undesirable outcomes, including the surrender of public control over critical governmental functions—including groundwater regulation—to agencies controlled by private companies and corporate landowners. The appointment of representatives to “combinations of agencies” or joint powers authorities (JPAs) should not insulate them from requirements for fair and effective representation under the Fourteenth Amendment.

E. The Equal Protection Clause Applies to Local Agency Representation.

In *Quinn v. Millsap*, the Supreme Court used strong language to correct a “significant misreading” of *Salyer* and *Ball* by the Missouri Supreme Court, which had mistakenly interpreted them to mean that “the Equal Protection clause has no relevancy” for agencies lacking general governmental powers.¹⁶⁸ The Court ruled unanimously that the representational scheme of *all* local agencies, including appointed agencies lacking general governmental powers, must be rationally related to a legitimate government interest.¹⁶⁹ Under this rule, courts must at least apply rational basis review to SGMA’s provisions for governance. More specifically, they must consider whether failing to provide any requirements for the governance of agencies with state-delegated regulatory and legislative powers has any rational basis.

The *Quinn* Court held that an appointed, landowner-only board with the power to establish and revise city and county boundaries failed equal protection scrutiny. The Court found that “it is a form of invidious discrimination to require

166. *Id.*

167. *Hadley*, 397 U.S. at 58 (citing *Sailors v. Bd. of Educ.*, 387 U.S. 105 (1967)).

168. 491 U.S. 95, 96 (1989).

169. *See id.* at 104–06.

land ownership of all appointees to a body authorized to propose reorganization of local government.¹⁷⁰ The ruling was consistent with several other decisions that have applied rational basis scrutiny to strike down local agency franchise restrictions. For instance, in *Turner v. Fouche*, the Court struck down landownership requirements for an appointed school district board based on rational basis review.¹⁷¹ And in *Chappelle v. Greater Baton Rouge Airport District*, the Court held that a land ownership requirement for appointed board members had no rational basis, even though the agency had significant land use powers.¹⁷² In those instances, the Court has shown willingness to strike down landownership requirements for officeholding based on rational basis scrutiny even in appointed local agencies.

SGMA is unique in the degree of its commitment to localism. While SGMA requires agencies to wield some power over water or land use in order to be eligible to be self-designated as a GSA, the law provides no standards regarding the characteristics of those agencies. They can be elected or appointed, and they can represent landowners, private companies, or other elected or appointed agencies. SGMA advocates have correctly emphasized the innovative, unprecedented nature of its measures for protecting local power.¹⁷³ The Supreme Court has never considered a challenge to a statute that delegates substantial powers to *any local agency* without specifying the characteristics or type of local agency and thereby implicit requirements for its governance.

The claim that “groundwater resources are most effectively managed at the local or regional level”¹⁷⁴ is the sole justification for a policy of “manag[ing] groundwater basins through the actions of local governmental agencies,” with state review and intervention “only when necessary to ensure that local agencies manage groundwater in a sustainable manner.”¹⁷⁵ Any facial challenge to SGMA must determine whether the Act’s claim provides a rational basis for granting unrestricted discretion to self-designate as a regulatory body to any local agency. This inquiry must also consider the fact that a seemingly contradictory conclusion justifies SGMA, “[t]he *people of the state have a primary interest in*

170. *Id.* at 107.

171. *Id.* at 106–09 (citing *Turner v. Fouche*, 396 U.S. 346, 364 (1970)).

172. *Id.* at 104, 108 (citing *Chappelle v. Greater Baton Rouge Airport Dist.*, 431 U.S. 159 (1977) (*per curiam*) (invalidating a requirement for election to a regional airport commission)); *see also* *Bullock v. Carter*, 405 U.S. 134, 140–41 (1972) (“Although we have emphasized on numerous occasions the breadth of power enjoyed by the States in determining voter qualifications . . . this power must be exercised in a manner consistent with the Equal Protection Clause of the Fourteenth Amendment.”); *Evans v. Cornman*, 398 U.S. 419, 422 (1970) (“[T]he right to vote, as the citizen’s link to his laws and government, is protective of all fundamental rights and privileges. . . . And before that right can be restricted, the purpose of the restriction and the assertedly overriding interests served by it must meet close constitutional scrutiny.”).

173. *See, e.g.*, *Pace*, *supra* note 18, 165–66, 184; *Leahy*, *supra* note 16, 27, 39–40 (praising the “exceptional leadership” by a “visionary Governor” and the “extraordinary coalition” that developed SGMA).

174. S.B. 1168, 2013–2014 Reg. Sess., Uncodified Findings § (a)(6) (Cal. 2014) (Sen. Pavley).

175. CAL. WATER CODE § 10720.1(h) (2016).

the protection, management, and reasonable beneficial use of the water resources of the state, both surface and underground, and that the *integrated management of the state's water resources is essential to meeting its water management goals.*"¹⁷⁶

F. SGMA Violates State Law Standards for Legislative Delegation and Requirements for "Safeguards Adequate to Prevent Abuse."

SGMA raises state as well as federal constitutional questions. Article XI, Section 11 of the California Constitution states that "the Legislature may not delegate to a private person or body power to make, control, appropriate, supervise, or interfere with county or municipal corporation improvements, money, or property, or to levy taxes or assessments, or perform municipal functions." On its face SGMA may not violate this constitutional provision, but without any standards for the governance of agencies that may decide to become GSAs, the state legislature has allowed for automatic delegations of power to combination agencies that include private persons and bodies.

Many of the largest and most influential agencies that have taken on GSAs responsibilities are JPAs, agencies formed at the initiative of one or more local governments under a general enabling act that allows them to delegate any of their shared power.¹⁷⁷ JPA formation does not require any direct legislative action and may include private entities.¹⁷⁸ JPAs cannot be validly used as a means of circumventing limitations on local government authority, however. Soon after the legislature authorized JPAs, California courts interpreted the statute to establish the "common powers rule" requiring that "each of the agency's members had the power to perform the contested acts—whether each had the power 'to do unilaterally what was actually done.'"¹⁷⁹ JPAs and other combination agencies must consist of local agencies that could legally and constitutionally take on independent GSA status.

California courts have generally been reluctant to enforce the prohibition of Article IX, Section 11; rather, they have held that it only applies to delegations by the legislature, not by local governments.¹⁸⁰ Although it has been narrowly

176. S.B. 1168, 2013–2014 Reg. Sess., Uncodified Findings § (a)(1) (Cal. 2014) (Sen. Pavley) (emphasis added).

177. *See supra* note 47.

178. Originally the Joint Exercise of Powers Act limited JPA members to public agencies, but in 1994 it was amended to allow private mutual water companies to join. CAL. GOV'T CODE § 6525 (West 2017); Assemb. B. 2014, (Cal. 1994).

179. *Robings v. Santa Monica Mountains Conservancy*, 115 Cal. Rptr. 3d 828, 834 (Cal. Ct. App. 2010) (quoting *Beckwith v. Stanislaus Cty.*, 345 P.2d 363, 364 (Cal. Dist. Ct. App. 1959)).

180. *See, e.g., People ex rel. Younger v. County of El Dorado*, 487 P.2d 1193, 1200 (Cal. 1971). Under this standard substate governments have more authority and leeway to delegate power to secondary bodies than the legislature does, a testament to the power of localism in California. Of course, this does not apply to SGMA because the process of GSA formation does not involve the delegation of power by local agencies. Rather, the legislature delegates power directly and automatically to GSAs once they have self-designated. *See supra* Part II.F.

interpreted, the prohibition remains valid. In *County of Riverside v. Superior Court*, the court struck down a state law based on a provision that required cities and firefighters' and police officers' unions to submit to binding arbitration for salary disputes, holding that "the Legislature has impermissibly delegated to a private body—the arbitration panel—the power to interfere with county money . . . and to perform municipal functions."¹⁸¹ The court rejected the county's central argument that the very act of delegation transforms that a private entity into a public body.¹⁸² SGMA's delegation of power to JPAs that include private entities creates a similar constitutional conflict. Neither the legislature nor local governments can transform private entities into public agencies simply by granting them voting rights in an agency with governmental powers.

SGMA may also run afoul of California law by violating requirements for safeguards or standards that ensure the likelihood that delegations of power will actually achieve the goals of the legislature when it delegated that power. In *Kugler v. Yocum*, the California Supreme Court approved a statute that set the rate of pay for city firemen based on the average pay of a neighboring city.¹⁸³ The court remarked that "the fact that a third party, whether private or governmental, performs *some role* in the application and implementation of an established legislative scheme [does not] render the legislation invalid as an unlawful delegation."¹⁸⁴ California courts of appeals have interpreted this observation to effectively nullify the state constitution's prohibition on delegation to private entities.¹⁸⁵ Nonetheless, *Kugler* did not deal with any actual delegation of power or even any private entity.¹⁸⁶ Rather, *Kugler* required provisions that protect the public interest, (even in allowing some influence over policy by another entity); the court held that any authority to shape policy, direct or indirect, must either be "channeled by a sufficient standard" or "accompanied by safeguards adequate to prevent its abuse."¹⁸⁷

SGMA undermines the broad public interest in governmental accountability and democratic representation reflected in both state and federal law. Although courts have carved out exceptions for the sake of pragmatism and flexibility, SGMA is testing and arguably exceeding the limits of those exceptions.

181. 66 P.3d 718, 724 (Cal. 2003).

182. *Id.* at 729. In *County of Sonoma v. Superior Court*, a California appeals court struck down an amended version of the same law that provided for the rejection of the arbitration panel's decision by the county, but only with a unanimous vote. 93 Cal. Rptr. 3d 39, 64 (Cal. Ct. App. 2009).

183. 445 P.2d 303, 304–05 (Cal. 1968).

184. *Id.* at 309 (emphasis added).

185. *See, e.g., Wilkinson v. Madera Community Hosp.*, 192 Cal. Rptr. 593, 596 (Cal. App. 5th Dist. 1983).

186. *See, e.g., Wilkinson v. Madera Cmty. Hosp.*, 192 Cal. Rptr. 593, 596 (Cal. Ct. App. 1983).

187. *Kugler*, 445 P.2d at 306 (quoting *Wilke & Holzheiser, Inc. v. Dept. of Alcoholic Bev. Control*, 420 P.2d 735, 748 (Cal. 1966)).

III.

SGMA APPLIED: ENSURING ACCOUNTABLE, EQUITABLE, AND DEMOCRATIC
GROUNDWATER GOVERNANCE

The implications of SGMA's radical commitment to local control are just beginning to materialize. The window for local agencies to designate themselves as GSAs under SGMA opened on January 1, 2015, and closed on June 30, 2017.¹⁸⁸ An amendment to the law that requires local agencies to agree to eliminate any overlaps in jurisdiction before they can be officially designated as GSAs went into effect on January 1, 2016.¹⁸⁹ As of February 17, 2017, thirty-eight agencies have been designated as GSAs, thirteen have "decided" to become GSAs and are slated for automatic designation within ninety days, and approximately sixty more have elected GSA status but must resolve conflicting jurisdictional claims before designation occurs.¹⁹⁰ And at least six landowner-elected special districts have decided to take on regulatory authority under SGMA and have been designated as GSAs through SGMA's ministerial process.¹⁹¹

Complex new entities are also being formed in response to SGMA. Many more landowner-elected districts, as well as private entities, are members of joint powers authorities or other "combinations of agencies" that have self-elected as a GSAs.¹⁹² These "combinations" have governing boards made up of the elected officials of other agencies, appointees representing other entities, or combinations of the two. Finally, there are a number of GSAs that meet the requirements for proportional representation under *Reynolds* and *Avery* that can serve as models for equal protection and effective local groundwater management.

*A. Landowner-Elected Special Districts Have Been Designated as GSAs
in Violation of Voter Equal Protection.*

SGMA allows any special district with water or land use responsibilities to become a GSA, regardless of its leadership or representational structure. Several landowner-elected special districts have already been designated as GSAs, and many more have submitted notifications but have not been officially designated because of overlapping claims. The restricted franchise of these agencies disqualifies them from wielding the general governmental powers, including legislative powers, that were delegated by SGMA, even if their leaders choose not to exercise the authority that they are granted when designation occurs.

188. After that date, counties will become presumed GSAs in areas where no designation has been made. See CAL. WATER CODE § 10724 (2016).

189. WATER § 10723.8(c) (as amended by S.B. 13, 2015–2016 Reg. Sess. (Cal. 2015) (Sen. Pavley)).

190. See *GSA Formation Notifications*, CAL. DEP'T OF WATER RES., *supra* note 10.

191. *Id.*

192. See WATER § 10723.6(a).

The Turner Island Water District is a landowner-elected special district with four water users and a five-member board of directors. As of December 8, 2015, Turner Island Water District claimed GSA authority over a small portion of the Merced sub-basin.¹⁹³ The Dunnigan Water District claimed jurisdiction over a sub-basin in Yolo County including territory outside of its own jurisdiction, and it was designated as a GSA on May 15, 2015.¹⁹⁴ Reclamation District No. 787 was designated as a GSA over a portion of Yolo County on November 5, 2015, and Reclamation Districts 2054 and 1004 have presided in Sutter County since early 2016.¹⁹⁵

The first few landowner-elected special districts that self-designated as GSAs were relatively small agencies controlling only portions of sub-basins. That these agencies are small in acreage and in population does not mean that they are insignificant or powerless. Each GSA operating within a basin could forestall or even obstruct sustainability for decades (time that SGMA provides for local action) before any state intervention may occur. After all, the fragmented, uncoordinated management of basins and water systems that are hydrologically interdependent will inevitably undermine efforts for their effective management.

SGMA does not limit landowner control to small, discrete areas. Further, the Act empowers powerful landowner-controlled special districts. A case on point is the Westlands Water district, the first large and influential¹⁹⁶ landowner-elected district to exercise its power to become a GSA. Westlands is the largest agricultural water district in the United States¹⁹⁷ and it is one of just a few massive water districts that dominate the southern reaches of California's Central Valley. Westlands' acreage-based elections ensure that a handful of very large

193. See MERCED CTY. LOCAL AGENCY FORMATION COMM'N, FINAL REPORT: COUNTY OF MERCED: AGRICULTURAL IRRIGATION SERVICE PROVIDERS MUNICIPAL SERVICE REVIEW 37 (2008), http://www.lafcomerced.org/pages/pdfs/Ag_Irrigation_Service_Providers.pdf [<https://perma.cc/E69A-KCEJ>].

194. See YOLO CTY. WATER DISTS., FINAL REPORT: COMBINED MUNICIPAL SERVICE REVIEW AND SPHERE OF INFLUENCE STUDY 20–24 (2013), <http://www.yolocounty.org/home/showdocument?id=24620> [<https://perma.cc/TY5K-7T4U>].

195. For current GSA notifications and designations, see *GSA Formation Notifications*, CAL. DEP'T OF WATER RES., *supra* note 10.

196. On the agencies' influence, see Michael Wines & Jennifer Medina, *Farmers Try Political Force to Twist Open California's Taps*, N.Y. TIMES (Dec. 30, 2015), <http://www.nytimes.com/2015/12/31/us/farmers-try-political-force-to-twist-open-californias-taps.html> [<https://perma.cc/64QV-RZ38>] (“A water utility on paper, Westlands in practice is a formidable political force, a \$100 million-a-year agency with five lobbying firms under contract in Washington and Sacramento, a staff peppered with former federal and congressional powers, a separate political action committee representing farmers and a government-and-public-relations budget that topped \$950,000 last year.”).

197. See *About Westlands*, Westlands Water District, <http://wwd.ca.gov/about-westlands/maps/> [<https://perma.cc/ZL4F-3LAU>].

growers dominate its governance.¹⁹⁸ Its 600,000 acres overlie critically overdrawn groundwater basins.¹⁹⁹ In August 2016, its board of directors passed a resolution to self-designate as the GSA for basins that comprise a substantial portion of one of the state’s largest and most imperiled aquifers.²⁰⁰

Westlands has faced intense controversy since its creation in 1952.²⁰¹ Even as Westlands takes on substantial new power under SGMA, recent scandal,²⁰² investigations,²⁰³ and prosecutions²⁰⁴ are reinforcing its reputation for environmental neglect and political and financial manipulation.²⁰⁵

198. See *In The Matter Of Westlands Water District*, U.S. Securities And Exchange Commission, *SEC Docket*, Vol. 113, No. 13 at 3 (March 7–11, 2016), <https://www.sec.gov/litigation/admin/2016/33-10053.pdf> [<https://perma.cc/2JV4-EPHC>].

199. A “GSA Interactive Map” developed by the DWR allows users to view the boundaries of local agencies in juxtaposition with basins and their overdraft levels. See *GSA Interactive Map*, *supra* note 13.

200. See *GSA Formation Notifications*, CAL. DEP’T OF WATER RES., *supra* note 10.

201. See Lloyd G. Carter, *Reaping Riches in a Wretched Region: Subsidized Industrial Farming and its Link to Perpetual Poverty*, 3 *GOLDEN GATE U. ENVTL. L.J.* 5, 7 (2009) (surveying the history of Westlands and how its controlling landowners benefited from a “massive government aid program for large industrialized agribusiness operations [that] . . . drives small farmers off the land [and] perpetuates rural poverty because agribusiness requires huge numbers of low-paid, seasonal harvest workers . . .”); Mary Louise Frampton, *The Enforcement of Federal Reclamation Law in the Westlands Water District: A Broken Promise*, 13 *U.C. DAVIS L. REV.* 89, 90 (1979) (describing how acreage restrictions designed to ensure water subsidies have broad benefits “have been continually thwarted in the Westlands water district” in the interest of a few large-scale absentee corporate landowners including Southern Pacific Railroad, Standard Oil, and Harris Ranch, the corporate owner of the world’s largest feedlot); see also MARK ARAX & RICK WARTZMAN, *KING OF CALIFORNIA: J.G. BOSWELL AND THE MAKING OF A SECRET AMERICAN EMPIRE* 382–85 (2003) (describing the creation of Westlands with a focus on one powerful land owner’s influence); DONALD WORSTER, *RIVERS OF EMPIRE* 292–95 (1985) (describing Westlands as a “private fiefdom of a few exceptionally big owners” who operated the district as a “shell game” to circumvent regulations and secure huge public subsidies associated with public water projects).

202. Elen Knickmeyer, *Water Giant Gave \$1.4 Loan to Official*, ASSOCIATED PRESS, June 9, 2016 (describing a potentially illegal low-interest loan to a former Westlands official), <http://www.businessinsider.com/ap-ap-exclusive-water-giant-gave-14m-loan-to-official-2016-6> [<https://perma.cc/K532-ZF2T>].

203. See Press Release, *California Legislators Launch Investigation into Westlands Water District*, (April 14, 2016), <https://Huffman.House.Gov/Media-Center/Press-Releases/Huffman-California-Legislators-Launch-Investigation-Into-Westlands-Water> [<https://perma.cc/42KG-M4R7>]; Memorandum, Congressional Research Service To Hon. Jared Huffman (March 18, 2016), <https://huffman.house.gov/sites/huffman.house.gov/files/CRS%20memo%20re%20Westlands%20Drainage%20Settlement%20final.pdf> [<https://perma.cc/83TC-BNA>].

204. See *In The Matter Of Westlands Water District*, U.S. Securities And Exchange Commission, *SEC Docket*, Vol. 113, No. 13 (March 7–11, 2016) (imposing fines on the District and two of its top officials for “misrepresentations and omissions” in its financial situation to investors in association with a \$77 million bond offering), <https://www.sec.gov/litigation/admin/2016/33-10053.pdf> [<https://perma.cc/J9G8-SD9D>]; see also U.S. Securities and Exchange Commission, Press Release, *California Water District to Pay Penalty for Misleading Investors* (March 9, 2016) (noting that the Westlands fine was the second ever to be levied against a municipal bond issuer), <https://www.sec.gov/news/pressrelease/2016-43.html> [<https://perma.cc/D6DD-ZH6B>].

205. See, e.g., Robin Abcarian, *A tour of California’s water supply lays bare the tension between farmers and fish*, *LOS ANGELES TIMES*, August 12, 2016, <http://www.latimes.com/local/abcarian/la-me-abcarian-westlands-tour-20160812-snap-story.html> [<https://perma.cc/VL27-ZPKE>]; Dan Backer, *Westlands Water District Relieves Tom Birmingham of General Counsel Duties*, *DAILY KOS*, June 27,

Westlands is just one of dozens of landowner-elected special districts that operate in Central Valley of California, where the largest and most imperiled groundwater basins in the state are concentrated. Camille Pannu has described some of the consequences of policy supporting the interests of those agencies:

Through a series of state and federal programs, California has subsidized and prioritized the provision of water for agricultural irrigation, but it has not yet intervened in agricultural contamination of rural drinking water sources, particularly when those sources draw upon groundwater. The result is a rural water approach that focuses almost exclusively on irrigation while missing the importance of ensuring clean drinking water for rural, non-city residents.²⁰⁶

The results are dire for the areas that these districts control, as they are “home to California’s most contaminated drinking water sources, and many of the state’s most at-risk communities fall off the regulatory monitoring grid.”²⁰⁷

Lloyd G. Carter has documented the consequences of Westlands’ policy for the places where it governs. Westlands controls the water of some of the poorest communities in California, which face “problems ranging from high unemployment to gang and drug problems, high teen-pregnancy rates, an appalling high school dropout rate . . . and other side effects of poverty.”²⁰⁸ Indeed, Carter notes, the area’s “grinding poverty” has helped enrich the Westlands’ largest growers:

The subsidized factory farm economy . . . has helped foster a culture of unsustainable farming practices, caused large scale environmental degradation, and has created a massive socioeconomic rift between land owners and their primarily Latino workforce. . . . [T]he political clout of the nation’s most powerful irrigation district . . . [perpetuates a] culture of social, economic, and natural inequity.²⁰⁹

By empowering entities like Westlands to take on exclusive responsibility for groundwater regulation, SGMA allows small numbers of absentee corporate landowners (operating through opaque processes and unaccountable agencies) to

2016, <http://www.dailykos.com/story/2016/6/27/1542932/-Westlands-Board-Relieves-Tom-Birmingham-of-General-Counsel-Duties> [<https://perma.cc/62XP-ZAFB>]; Michael Wines and Jennifer Medina, *Farmers Try Political Force to Twist Open California’s Taps*, NEW YORK TIMES, Dec. 30, 2015, http://www.nytimes.com/2015/12/31/us/farmers-try-political-force-to-twist-open-californias-taps.html?_r=2 [<https://perma.cc/PWP5-3F67>]; Michael Hitzik, *How a rich water district beat the federal government in a secret deal*, LOS ANGELES TIMES (Sept. 18, 2015), available at <http://www.latimes.com/business/hiltzik/la-fi-hiltzik-20150920-column.html> [<http://perma.cc/YR6M-PALD>].

206. Camille Pannu, *Drinking Water and Exclusion: A Case Study from California’s Central Valley*, 100 CALIF. L. REV. 223, 241 (2012).

207. *Id.* at 242.

208. Carter, *supra* note 201, at 7.

209. *Id.* at 40.

control a common pool resource that is essential to the health as well as the economic well-being of many California communities.

B. Combination Agencies Governed by Appointees of Ineligible Entities Have Been Designated as GSAs.

There are many combination agencies and JPAs that do not meet the “one person, one vote” requirements under *Avery* but that are nevertheless already serving as GSAs—too many to provide comprehensive information about their governance here. These include JPAs and other combination agencies governed by appointees of agencies that are ineligible to wield general governmental powers. This Section examines a few representative agencies that have taken on general governmental powers under SGMA, and the various ways in which they run afoul of Fourteenth Amendment equal protection.

The Fox Canyon Groundwater Management Agency, the very first entity to submit a notice of intent to become GSA,²¹⁰ is governed by five directors whom both public agencies and private entities appoint.²¹¹ One director represents Ventura County, and another must be an elected city council member from one of five cities located within the basin. The United Water Conservation District, a resident-elected special purpose agency, appoints a third director. A fourth director represents five smaller water providers operating within the basin, including private mutual water companies, which make the appointment collectively. The other directors choose the final director, who is designated to represent farmers, from a slate of candidates selected by private business advocacy groups, the Ventura County Farm Bureau and the Ventura County Agricultural Association.²¹²

The governing board of the Mid-Kaweah Groundwater Subbasin Joint Powers Authority, another early self-designated GSA, is comprised of two representatives appointed by the landowner-elected Tulare Irrigation District, two members of the Visalia City Council, and two representatives chosen by the City of Tulare (who must either be members of the city council or of the city public utilities board).²¹³ Because it was formed as a joint powers authority,

210. See FOX CANYON GROUNDWATER MGMT. AGENCY (FCGMA), NOTICE OF INTENT TO BECOME A GROUNDWATER SUSTAINABILITY AGENCY (2015), http://www.water.ca.gov/groundwater/sgm/gsa_notification/002-Fox_Canyon_GW_Management_Agency_2015-02-11.pdf [<https://perma.cc/7YCB-PAK2>].

211. See *Board of Directors*, FCGMA, <http://www.fcgma.org/about-fcgma/board-of-directors> [<https://perma.cc/XD39-C32N>].

212. For an official history of the agency, which was created by a special act of the legislature in 1982, see FCGMA, BRIEF HISTORY OVERVIEW (2015), http://www.fcgma.org/images/phocadownload/PublicDocuments/FCGMA_History_Edit_PK.pdf [<https://perma.cc/PDV3-YHG7>].

213. MID-KAWEAH GROUNDWATER SUBBASIN JOINT POWERS AUTH., NOTICE OF FORMATION AND ELECTION TO SERVE AS A GROUNDWATER SUSTAINABILITY AGENCY Exhibit C, p. 9 (Joint Powers Agreement dated Sept. 14, 2015),

which requires only that the governing boards of member agencies issue a resolution and notify the Secretary of State,²¹⁴ its creation did not involve any direct legislative review or approval. And of course, its self-selection as a GSA, by which it took on powers and authority beyond those of its member agencies, involved no state approval or review.

The San Joaquin River Exchange Contractors Water Authority, a self-designated GSA and a JPA, is governed by the representatives of two private companies and two landowner-elected special districts. It has decided to govern groundwater extraction in a 240,000-acre area spanning four counties, including non-contiguous parts of a single critically overdrafted sub-basin.²¹⁵ This agency is already a powerful and controversial actor in Central Valley water politics.²¹⁶ It controls valuable historic surface water prior appropriation rights dating back to the nineteenth century Miller & Lux agricultural empire.²¹⁷

The Pajaro Valley Water Management Agency is problematic because of a requirement designed to ensure that its board members are bona fide farmers. The Agency has been designated as the exclusive GSA for a large coastal basin spanning Monterey, San Benito, and Santa Cruz Counties. It has a mixed board with four elected members and three appointees chosen from among county Farm Bureau nominees with the following qualifications: “The appointed members of the board shall reside within the jurisdiction of the appointing power, [and] shall derive at least 51 percent of their net income from the production of agricultural products.”²¹⁸

These agencies indicate the variety of representational schemes and governance structures that can meet the criteria for GSA self-designation—but they only skim the surface of the potential for governmental complexity under SGMA, if its standard-less provisions for governance go unchallenged. SGMA

http://www.water.ca.gov/groundwater/sgm/gsa_notification/025_Mid-Kaweah_Groundwater_Subbasin_JPA_GSA_2015-09-25.pdf [<https://perma.cc/5Y7E-TD2F>].

214. CAL. GOV. CODE § §§ 6500–6599.3 (West 2017) authorizes joint powers authorities. For an explanation of JPAs, see CAL SENATE LOCAL GOV'T COMM., GOVERNMENTS WORKING TOGETHER: A CITIZENS GUIDE TO JOINT POWERS AGREEMENTS (2007), http://www.calafco.org/docs/Senate_LG_JPA_Report.pdf [<https://perma.cc/PUD2-2GHN>].

215. See NOTICE OF THE SAN JOAQUIN RIVER EXCHANGE CONTRACTORS WATER AUTHORITY'S INTENT TO SERVE AS GROUNDWATER SUSTAINABILITY AGENCY FOR A PORTION OF THE DELTA-MENDOTA SUBBASIN (2015), <http://sgma.water.ca.gov/portal/service/gsadocument/download/43> [<https://perma.cc/U54W-C9RQ>].

216. See, e.g., Peter Fimrite, *Growers Group Awash in Water While Neighbors' Crops Die*, S.F. CHRON. (Aug. 8, 2014), <http://www.sfgate.com/science/article/Growers-group-awash-in-water-while-neighbors-5677922.php> [<https://perma.cc/AH56-N59F>].

217. On the history of water rights in the Central Valley associated with the Miller & Lux Empire, see, generally, DONALD PISANI, FROM THE FAMILY FARM TO AGRIBUSINESS: THE IRRIGATION CRUSADE IN CALIFORNIA, 1850–1930 (1984) (describing the institutional development and political economy of irrigation districts and mutual water companies, and the consolidation of control over water resources by large landowners in California's Central Valley); see also DAVID IGLER, INDUSTRIAL COWBOYS: MILLER & LUX AND THE TRANSFORMATION OF THE FAR WEST 60–91 (2001) (describing the consolidation of corporate control over irrigation in the San Joaquin Valley in the late 19th century).

218. CAL. WATER CODE APP. § 124-402 (West 2016).

empowers these and many other agencies that do not meet the “one person, one vote” requirement to take on “general governmental powers” in violation of fundamental Constitutional principles.

C. Democratically Elected Agencies with Proportional Representation are Serving as GSAs and Offer Models for Legal, Equitable, and Effective Groundwater Governance.

There are many institutional means available to meet the challenge of providing transparent, accountable, and democratic groundwater governance at the local level while also fulfilling the “one person, one vote” requirement of the Fourteenth Amendment.

The majority of special districts with water responsibilities operating in California already conform to the “one person, one vote” rule, with boards elected by equal population districts.²¹⁹ Many have already been designated as GSAs, including the Santa Clara Valley Water District and the Desert Water Agency.²²⁰ The state legislature could declare landowner-elected special districts ineligible to serve as GSAs or adopt provisions allowing them to change their representational structures. Board members could be elected by district, elected at-large, or by a combination thereof. There are no constitutional limitations on the authority of elected agencies *with* proportional representation to take on the responsibilities and powers held by special districts—or granted by SGMA.

Another viable, constitutionally sound option is for traditional, general-purpose local governments, under which the “one person, one vote” standard has controlled since *Avery*, to take responsibility of GSAs. SGMA not only authorizes this option, but also classifies counties as GSAs when other agencies fail to self-elect.²²¹ Traditional governments, including cities and counties, all have land use powers and therefore all qualify as “local agencies” even if they do not operate water systems or manage water resources.²²²

Finally, JPAs and other combination agencies whose boards are appointed only by eligible member agencies may be another viable option. One such entity that elected GSA status early on was the Sacramento Valley Groundwater Authority. Its board consists entirely of officials that cities and counties appoint.²²³ Some appointed agencies are explicitly identified to act as

219. For an argument that all special districts should be subject to the “one person, one vote” standard and that “the Court’s treatment of elections in these districts has important negative ramifications for the democratic process,” see Lisa M. Card, *One Person, No Vote? A Participatory Analysis of Voting Rights in Special Purpose Districts*, 27 T. JEFFERSON L. REV. 57 (2004).

220. CAL. WATER CODE APP. § 100-8 (West 2017); CAL. ELEC. CODE §§ 10500–10556 (West 2017) (Uniform District Elections Law).

221. CAL. WATER CODE § 10724 (2016).

222. WATER § 10721(n).

223. See SGA Board, SACRAMENTO GROUNDWATER AUTH., <http://www.sgah2o.org/sga/about/board> [<https://perma.cc/5XPR-SR59>]; JOINT POWERS AGREEMENT BETWEEN THE CITY OF CITRUS HEIGHTS, THE CITY OF FOLSOM, THE CITY OF SACRAMENTO AND THE COUNTY OF SACRAMENTO CREATING THE SACRAMENTO GROUNDWATER AUTHORITY § 7 (2002),

representatives of ineligible organizations or entities, or specific interest groups.²²⁴ Two appointees represent “agriculture” and “self-supplied industry.”²²⁵ One appointee represents each of fourteen organizations, including six landowner-elected water agencies and three private water companies.²²⁶ All of the appointees on the authority’s governing board—even the ones assigned to represent particular interest groups—are therefore directly accountable to democratically elected local governments that are themselves eligible to serve as GSAs.

While SGMA explicitly allows for JPAs and MOAs as the basis for “combinations of agencies,” it does not preclude the creation of new elected agencies that could serve as GSA.²²⁷ General enabling acts already allow for the formation of certain kinds of agencies, and the legislature routinely passes special acts to create new special districts. The deadline for the designation of GSAs is generous for existing agencies but demanding for creating new ones. Still, the most rational and effective approach to groundwater management in terms of efficiency and political participation may be to establish new regional agencies that correspond with natural hydrological systems. Fortunately, SGMA does not preclude the legislature from designating agencies as GSA after the window for their self-designation has closed. And of course the legislature retains its authority to restructure or replace local agencies at its discretion.

CONCLUSION: LOCALISM THAT SUPPORTS DEMOCRACY, ACCOUNTABILITY,
AND SUSTAINABILITY.

Given the importance of groundwater to the environment, economy, and the future of California, and the dire consequences of its contamination or depletion, the lack of public engagement in SGMA’s development and implementation is remarkable. State officials worked with just two major NGOs to develop the Act, with little outside input other than from narrowly-defined stakeholders, primarily large-scale groundwater users in threatened basins.²²⁸ Scholars have advised local governments about how to form new agencies,

<http://www.sgah2o.org/wp-content/uploads/2016/06/100.1-Modified-SGA-JPA-03-02.pdf>
[<https://perma.cc/SV7Q-S7CX>].

224. JOINT POWERS AGREEMENT BETWEEN THE CITY OF CITRUS HEIGHTS, THE CITY OF FOLSOM, THE CITY OF SACRAMENTO AND THE COUNTY OF SACRAMENTO CREATING THE SACRAMENTO GROUNDWATER AUTHORITY *supra* note 223, at § 5(c)–(e)

225. *Id.* at § 5(d)–(e)

226. *Id.* at § 5(a)–(c).

227. *See supra* pp. 119–20.

228. The Association of California Water Agencies (ACWA), comprised of water and irrigation districts including the Westlands Water District, was actively engaged in the development of SGMA, working closely with Sen. Roger Dickinson of Sacramento. Leahy, *supra* note 16, at 31. The other major NGO involved was the California Water Foundation, which worked closely with the bill’s other major sponsor, Senator Fran Pavley of Los Angeles. *Id.* at 31–32. The Governor’s Office of Planning and Research brokered discussions in what Tina Leahy describes as a process of compromise between these two influential NGOs. *Id.* at 31–33

secure resources and data for planning, or finance programs and infrastructure to manage groundwater.²²⁹ They have also criticized the Act's lax definition of sustainability and lack of quantitative standards.²³⁰ But pundits and policy analysts have remained virtually silent on what is arguably its most problematic political and legal characteristics: the Act's total lack of governance standards, its delegation of power to unaccountable and undemocratic organizations, and its potential to exacerbate existing power imbalances in the control of critical natural resources in rural California.

Departures from the "one person, one vote" rule allowing for landowner-elected agencies are exceptions to the rule of equal voter protection in local elections.²³¹ The power granted by SGMA, including broad legislative authority to adopt ordinances and implement and enforce regulations, exceeds the scope of those exceptions.

SGMA supporters may argue that the legislature's abdication on the question of governance was necessary to allow the flexibility needed to appease local opposition by stakeholders, most importantly existing local water agencies.²³² Leading analysts support voluntary, collaborative, consensus-based processes for resolving conflicts through informal deliberation without any binding requirements for public representation or mechanisms for ensuring accountability.²³³ But even if the legislature could not manage to pass a bill that included any requirements for public representation or accountability in the face of entrenched opposition, courts have the responsibility and the authority to enforce the requirements of the Fourteenth Amendment. Under *Avery* and *Board of Estimate*, a significant number of the entities that have already taken on

229. See generally, e.g., KINCAID & STAGER, *supra* note 49 (providing guidance for local agencies on the formation and funding of GSAs and the requirements for GSPs); TARA MORAN, WATER IN THE WEST, FULFILLING THE PROMISE OF CALIFORNIA'S SUSTAINABLE GROUNDWATER MANAGEMENT ACT: IMPROVING GROUNDWATER DATA COLLECTION AND UNDERSTANDING (2016), http://waterinthewest.stanford.edu/sites/default/files/Brief_GW-DataSurveyReport.pdf [<https://perma.cc/9QL3-DGW3>] (advising local governments on best practices and available funding for collecting and analyzing groundwater data); TARA MORAN ET AL., WATER IN THE WEST, FROM THE GROUND DOWN: UNDERSTANDING LOCAL GROUNDWATER DATA COLLECTION AND SHARING PRACTICES IN CALIFORNIA (2016), <http://waterinthewest.stanford.edu/sites/default/files/GW-DataSurveyReport.pdf> [<https://perma.cc/HYS7-97EG>] (same).

230. E.g., Perona, *supra* note 72, at 651, 654–58.

231. See *infra* Part II.B (discussing *Ball v. James*, 451 U.S. 355 (1981) and *Salyer Land Co. v. Tulare Water Dist.*, 410 U.S. 719 (1973)).

232. See, e.g., TARA MORAN & DAN WENDELL, WATER IN THE WEST, THE SUSTAINABLE GROUNDWATER MANAGEMENT ACT OF 2014: CHALLENGES AND OPPORTUNITIES FOR IMPLEMENTATION 9–10 (2015), http://waterinthewest.stanford.edu/sites/default/files/WitW_SGMA_Report_08242015_0.pdf [<https://perma.cc/H2NA-JHBG>] ("Ensuring appropriate representation of all groundwater users, stakeholders and interested parties in the decision-making process will be necessary for GSAs to avoid local litigation. . . . GSAs may need to develop more flexible governance structures capable of providing additional flexibility in the decision-making process.")

233. See, e.g., MORAN & CRAVENS, *supra* note 6, at 12, 14–22, 24. For analysis of the advantages and disadvantages of consensus-based policy making in the groundwater context specifically, see HANAK ET AL., *supra* note 27, at 407 (and sources cited therein).

groundwater authority, including landowner-controlled special districts and locally-created authorities, are ineligible to serve as GSAs.

The implications of SGMA's standard-less provisions for governance based on its explicit localist ideology should not be ignored. As Richard Briffault has observed, advocates of localism perceive the devolution of power and policymaking as a means of promoting community-based decision making and efficient management.²³⁴ Localism as it actually operates, however, often increases inequality and undermines public participation:

Localism reflects territorial economic and social inequalities and reinforces them with political power. . . . Localist ideology and local political action tend not to build up public life, but rather to contribute to the pervasive privatism that is the hallmark of contemporary American politics. Localism may be more of an obstacle to achieving social justice and the development of public life than a prescription for their attainment.²³⁵

SGMA's localism may effectively placate the interests of those with the most to lose from groundwater regulation. These include local water agencies representing large-scale agricultural interests, particularly those in the threatened basins with hydrological connections to the Sacramento-San Joaquin Delta, the "fragile hub of the state's water supply network."²³⁶ But, as it stands, SGMA undermines or eliminates many of the theoretical benefits of localism for voters and communities. It has the potential to severely hinder democratic decision-making by empowering unelected agencies with limited accountability: unpopular landowner-elected special districts that already exercise an enormous influence over water policy in many high-priority basins; appointed authorities far removed from voters whose governing boards are comprised of representatives of other agencies and entities including private corporations; or combination agencies created through legal memoranda or agreements and that may be exempt from public disclosure and open meetings laws.²³⁷ SGMA also undermines the development of effective management. The institutional fragmentation that SGMA allows likely will result in radical inefficiency, exacerbated by the mismatch between units of governance and the natural scale of groundwater systems closely related to surface water resources and land use.

There are tested, practical options for groundwater management through agencies that comply with the "one person, one vote" requirement. All traditional governments, including cities and counties, meet this requirement. In addition, many special districts have boards that are elected by equi-population districts

234. Richard Briffault, *Our Localism: Part II—Localism and Legal Theory*, 90 COLUM. L. REV. 347, 392–435 (1990).

235. See Briffault, *supra* note 3, at 1–2.

236. See HANAK ET AL., *supra* note 27, at 7.

237. See KINCAID & STAGER, *supra* note 49.

or at-large.²³⁸ These agencies are eligible to take on groundwater responsibilities under SGMA, and many already have. Because SGMA provides as much as thirty-five years for GSAs to fulfill its fundamental requirements,²³⁹ there is ample time to adopt and implement better approaches without compromising or even delaying the ultimate goal: sustainable groundwater management. Safeguards for the delegation of substantial power and authority, particularly legislative authority, will promote open, accessible decision-making processes and improve public accountability in the complex thicket of substate government. Empowering democratically elected agencies can uphold the Act's commitment to local control without ceding power to private interests or compromising requirements for sustainability.

Sustainable groundwater management is vital to the future of all California residents, who have a right to representation by the agencies that control groundwater regulation. The powers delegated by SGMA trigger the "one person, one vote" requirement of the Fourteenth Amendment. By enforcing equal protection requirements, courts have the power to improve the prospects for achieving fair and effective groundwater management in California, as well as to dramatically increase the democratic accountability of local government throughout the United States.

238. See *Baird v. Consol. City of Indianapolis*, 976 F.2d 357, 362 (7th Cir. 1992) (holding metropolitan council elected entirely at-large to satisfy the "one person, one vote" requirement).

239. See CAL. WATER CODE § 10727.2(b) (2016).

