

ARTICLE

LOCAL GOVERNMENT FORMATION AND BOUNDARY CHANGE IN TEXAS: A POST- HARVEY ASSESSMENT

*Kellen Zale**

TABLE OF CONTENTS

I.	INTRODUCTION	106
II.	LOCAL GOVERNMENT FORMATION AND BOUNDARY CHANGE LAWS	108
	A. <i>The State-Local Relationship</i>	108
	B. <i>Local Government Formation and Boundary Change</i>	109
	1. <i>Incorporation</i>	109
	2. <i>Annexation</i>	111
	3. <i>Special Districts</i>	113
III.	THE RESILIENCY IMPLICATIONS OF LOCAL BOUNDARY LAWS	116
	A. <i>Incorporation and the Fragmentation of Metropolitan Region</i>	116
	B. <i>The Unintended Consequences of Ending Unilateral Annexation</i>	119
	C. <i>The Regional Potential and Parochial Reality of Special Districts</i>	121
IV.	CONCLUSION.....	124

* Assistant Professor, University of Houston Law Center. Thank you to Ayla Meyer and the HLRe staff for inviting me to write this Essay. Thanks also to the participants at the 2018 Rocky Mountain Land Use Institute Scholarly Workshop for helpful feedback and to Lindsay Thorpe and Leah Lebeau for their research assistance.

I. INTRODUCTION

Since Hurricane Harvey, lawmakers, planners, engineers, and others have engaged in wide-ranging discussions about what kind of policies and actions should be undertaken to improve the Houston region's resiliency.¹ While these conversations have highlighted a range of crucial issues to be tackled by coordinated action between federal, state, and local governments, local governments will need to be at the forefront of many of these efforts. As the authors of a leading study on coastal resiliency point out: "Strong local participation, which must mean strong local authority, is necessary to foster the distributed decision-making and improvisation that are critical in the face of unexpected storms."²

Yet local governments seeking to engage in resiliency efforts face unique challenges because of their legal status as "creatures of the state." There is no equivalent to the Tenth Amendment for local governments: as a matter of federal constitutional law, local governments are non-entities. This means that local governments may only act if authorized by their state to do so and that local actions can usually be preempted by the state.³ Even more fundamentally, it means that the formation, boundaries, and continued existence of units of local government are dependent on state law.⁴

The existence and boundaries of local governments may appear to be a technocratic and prosaic aspect of governance, but local government formation and boundary change law has a powerful and often underappreciated impact on the ability of local governments to engage in efforts to promote local resiliency. Local government formation and boundary change laws matter because local government boundaries matter. The ability to form

1. The media coverage of these discussions has been extensive and any Google search of "Houston" and "Harvey" and "resiliency" and "local recovery" or similar terms will pull up hundreds of articles. The principle of resiliency is drawn from ecology, and refers to the ability of a system to adapt and return to "normal" functioning after an unforeseen or catastrophic occurrence, rather than simply react to impacts. See *What is Resilience?* NATIONAL OCEANIC AND ATMOSPHERIC ADMINISTRATION, available at <https://oceanservice.noaa.gov/facts/resilience.html>.

2. John S. Jacob and Stephanie Showalter, *The Resilient Coast: The Built Environment*, TEXAS A&M UNIVERSITY, August 2007, at 23.

3. See Kellen Zale, *Compensating City Councils*, 70 STAN. L. REV. 839, 862-64 (2018) (discussing state preemption and local home rule authority).

4. While state control over local boundaries is extensive, it is not absolute. See *Gomillion v. Lightfoot*, 364 U.S. 339 (1960) (holding that a state law that redrew the boundaries of Tuskegee, altering its shape from a square to an "uncouth" 28-sided figure, thereby removing most African Americans from the boundaries of the city, violated the federal constitution). State legislation or state constitutional provisions may also limit the ability of a state to control local government formation and boundary change, or may delegate the state's authority to other institutional actors.

a local government provides a previously informal community with the legal powers of a city, powers which include authority over land use, planning, and stormwater management. The boundaries of a local government unit determine the extent of its regulatory and fiscal jurisdiction. And the ability to change its boundaries determine to what extent a locality can exercise control over land use and other activities in nearby areas which cause impacts but which are outside current boundaries.

Yet as numerous scholars have recognized, legal boundaries rarely line up neatly with the issues local governments must respond to. In the context of stormwater management and flood control, examples of the potential mismatch are myriad. Bayous and rivers flow through multiple cities and counties. Development patterns in one city or county can exacerbate flooding in other cities and counties. Inconsistent land use laws across multiple cities and counties can undermine the efforts of any one locality to address flooding within its own boundaries.

Yet the post-Harvey discussions about local resiliency have largely overlooked the implications of local government formation and boundary law. This Essay seeks to address this oversight and contribute to the post-Harvey dialogue by analyzing the resiliency implications of three key aspects of local boundary law: (i) incorporation, (ii) annexation, and (iii) special districts. While there are other aspects of local government law – such as the scope of home rule and state preemption powers, and state-imposed tax and expenditure limitations – which also impact the ability of local governments to undertake resiliency efforts, this Essay focuses on local boundary change and formation laws because they have been under-studied to date in discussions about local resiliency.

This Essay proceeds as follows. Part II provides an overview of local government formation and boundary change laws, starting with a brief discussion of the state-local relationship. It then unpacks three key legal mechanisms in local boundary law: incorporation, annexation, and special districts. Part III analyzes the resiliency implications of each of these mechanisms, specifically focusing on how the structural constraints imposed by these state laws can complicate efforts by local governments to engage in substantive resiliency efforts with regard to stormwater and flooding. Part IV concludes by considering how the dual nature of local governments, as both top-down, state-created entities and bottom-up, autonomous polities, creates both constraints and opportunities for local resiliency efforts.

II. LOCAL GOVERNMENT FORMATION AND BOUNDARY CHANGE LAWS

A. *The State-Local Relationship*

Before analyzing local government formation and boundary change mechanisms in Texas, it is necessary to briefly address the relationship between local and state governments. That relationship is different from that of the federal government and the states: unlike states, local governments have no inherent sovereign authority.⁵ There is no equivalent to the 10th Amendment for local governments: local governments' relationship with their state receives no formal constitutional protections.⁶

In the seminal decision *Hunter v. Pittsburgh*, the Supreme Court articulated its top-down doctrinal view of local governments. In *Hunter*, residents of the formerly independent city of Allegheny challenged a Pennsylvania state law, the result of which was the consolidation of Allegheny into the city of Pittsburgh.⁷ The court held that the residents of Allegheny had no due process claim for a taking of property and that the state consolidation law at issue was entirely within the state's power: "The State [may] . . . expand or contract the territorial area, unite the whole or a part of it with another municipality, repeal the charter and destroy the [municipal] corporation. All this may be done, conditionally or unconditionally, with or without the consent of the citizens, or even against their protest."⁸

Under *Hunter* and progeny cases, local governments are considered "political subdivisions of the State, created as convenient agenc[ies]" by the state for undertaking state purposes, and the state has "absolute discretion" over them.⁹ This top-down view of

5. *Hunter v. City of Pittsburgh*, 207 U.S. 161 (1907).

6. *Id.*

7. *Id.* The state law provided that the consolidation would occur if a majority of voters in the combined territory of Pittsburgh and Allegheny approved the consolidation proposal. Because the population of Pittsburgh was larger than that of Allegheny, even though a majority of Allegheny voters voted against the proposal, the overall majority of votes was in favor of consolidation. *Id.*

8. *Id.* at 178-79; *see also* *Trenton v. New Jersey*, 262 U.S. 182 (1923) ("In the absence of state constitutional provisions safeguarding it to them, municipalities have no inherent right of self-government which is beyond the legislative control of the State. A municipality is merely a department of the State, and the State may withhold, grant or withdraw powers and privileges, as it sees fit. However great or small its sphere of action, it remains the creature of the State exercising and holding powers and privileges subject to the sovereign will.").

9. *Id.* at 185-86. ("The number, nature and duration of the powers conferred upon these [municipal] corporations and the territory over which they shall be exercised rests in the absolute discretion of the State. . . . 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.").

local government has meant not only that states have extensive control over the formation and boundaries of local government, but also that local power has traditionally been viewed narrowly: unless expressly authorized by the state, local governments are presumed not to have the power to act.¹⁰

However, the value of local autonomy has long been recognized, and most states grant significant autonomy to local governments, primarily through home rule,¹¹ but also through state laws on local government formation and boundary change, which grant a significant amount of bottom-up authority for residents of local communities.¹² The next section outlines three key mechanisms of local government formation and boundary change in Texas and unpacks how these laws balance the tension between the top-down principles of state control articulated in *Hunter*, and the bottom-up values of local autonomy.

B. Local Government Formation and Boundary Change

This Section provides an overview of three key aspects of local government formation and boundary change law in Texas: incorporation, annexation, and special districts.¹³

1. Incorporation. State law establishes the procedures for the creation of a municipal corporation, commonly known as a city.¹⁴ Cities typically are formed through the process of incorporation, in which residents in an unincorporated area of a county utilize the incorporation procedures set forth in state law to form a city.¹⁵

While state law establishes the procedures for incorporation,

10. See Richard Briffault, *Our Localism: Part I – The Structure of Local Government Law*, 90 COLUM. L. REV. 1, 8 (discussing the top-down view of local government). This view of limited local autonomy is also reflected in Dillon’s Rule, under which doubts about the existence of local power are resolved against the municipality. See RICHARD BRIFFAULT & LAURIE REYNOLDS, *CASES AND MATERIALS ON STATE AND LOCAL GOVERNMENT LAW* 329 (8th ed. 2016).

11. See *infra* notes 21-23 and accompanying text for a discussion of home rule.

12. In addition to the broad grant of authority home rule provides local governments, states also empower local governments through specific grants of authority to local governments, even where home rule is not applicable. See Briffault, *supra* note 10 at 9-10.

13. While there are other legal doctrines relevant to local government formation and boundary change – such as consolidation and disincorporation – the three mechanisms discussed herein are the most frequently used mechanisms of local government formation and boundary change. See BRIFFAULT & REYNOLDS, *supra* note 10 at 250.

14. Depending on state law, municipal incorporation may be used to form cities, towns, villages or other local government entities. Cities are the most prevalent form of incorporation, so this essay uses the term “city.”

15. Cities may also come into existence when the residents of an existing city elect to secede from that city, merging back into the unincorporated county, and then re-incorporate into a new stand-alone city.

the decision to incorporate is generally a bottom-up process; that is, residents of an area typically decide that they want to incorporate and follow specified state law mechanisms to do so. Under Texas law, the incorporation process is initiated when a petition to incorporate is signed a specified number or percentage of registered voters of the area proposed for municipal incorporation.¹⁶ The petition is then submitted to a county judge to certify that the proposal meets the statutory population and area requirements for incorporation, and then an election is held.¹⁷ If a majority of voters within the proposed incorporated territory approve the incorporation petition, the city is formed.¹⁸

The reasons for incorporating can range from a defensive maneuver to avoid annexation by an adjoining city (and the associated higher taxes and regulatory requirements usually associated with annexation) to a desire to exercise greater control over land use, provide for increased services, or exercise other regulatory authority which is not being provided for at desired levels by the county.¹⁹ However, while incorporation can provide a community with increased control over service provision, greater land use and other regulatory authority, and the ability to adopt a charter and gain home rule powers, such benefits must be weighed against the costs of incorporation, such as the fiscal (and logistical) costs of running a city government and providing services no longer provided by the county, and the increased taxes typically required to pay for such services.²⁰

Once incorporated, cities in Texas are categorized as either general law cities or home rule cities. Home rule cities are those

16. TEX. LOC. GOV. CODE §§ 7.001-7.008 (providing the procedures for incorporation into a Type B general law municipality); § 6.002 (providing that the procedures for incorporation into a Type A general law municipality are the same as for a Type B); §§ 8.001-8.026 (providing the procedures for incorporation into a Type C general law municipality).

17. *Id.*

18. *Id.*

19. See *Municipal Incorporation Handbook*, MARYLAND MUNICIPAL LEAGUE, Sept. 2014, 9-10, <http://www.md-municipal.org/DocumentCenter/Home/View/1677> (discussing these and other reasons a community might choose to incorporate).

20. See *id.* at 10 (discussing these and other disadvantages of incorporation); see also Brittany Shoot, *What's the True Cost of Incorporation?*, CITYLAB, Oct. 26, 2012, <https://www.citylab.com/equity/2012/10/whats-true-cost-incorporation/3639/> (discussing financial concerns as a major reason that the community of the Woodlands, outside of Houston, has chosen not to incorporate: "Research indicates that becoming a standalone city could raise property taxes in The Woodlands from 32.5 cents up to anywhere from 58.14 cents to a staggering 81.5 cents per \$100 valuation. (By comparison, the property tax rate in Houston hovers around 63 cents.) The costs would include road maintenance, setting up new sewage and water provisions, and establishing a separate police department. Estimates for just those few basic services reach into the hundreds of millions, costs residents fear would be added to their annual tax bills.")

cities which adopt a charter, which is the “constitution” of the city.²¹ Adoption of a charter entitles the city to home rule powers under state law. Home rule refers to the delegation of power by the state to local governments.²² While the scope of home rule authority varies by state, in Texas, home rule cities can act on any matter as long as state law does not prohibit or preempt local action.²³ General law cities are those cities which do not adopt a charter; such cities do not have home rule powers, and are only authorized to undertake such actions which state law specifically allows.²⁴

2. *Annexation.* Annexation is the process by which territory from one local government – typically, an unincorporated county – is transferred to another local government – typically, an incorporated city. Annexation is used by cities to account for growth, coordinate services, and address long-term land use planning needs and concerns.²⁵

State laws vary widely as to the procedures required for annexation, and often provide for more than one mechanism for annexation. Broadly speaking, annexation can be broken down into two types: voluntary (also referred to as consensual or by petition) and unilateral (also referred to as involuntary or coerced).

Voluntary annexation is authorized in almost every state and requires the consent of those in the territory to be annexed, typically through approval of the proposed annexation by a majority of residents or voters or property owners (or some

21. To be eligible to become a home rule city, a general law city must have a population of more than 5,000. TEX. CONST. art. XI, sec. 5. In some states, counties may also be authorized to exercise home rule powers. See, e.g., FLA. CONST. art. VIII, §1 (providing for charter counties, which have “all powers of local self-government not inconsistent with general law, or with special law approved by vote of the electors”); see also *Charter Counties in Florida*, FLORIDA ASSOCIATION OF COUNTIES, available at <https://www.fl-counties.com/charter-county-information> (discussing charter counties in Florida). While at one time Texas authorized home rule for counties, no county in Texas ever adopted home rule, and the state authorization for county home rule was repealed in 1969. *Invisible Government: Special Purpose Districts in Texas*, Texas Senate Research Center, 1, 2 (October 2014), available at http://www.senate.state.tx.us/_assets/srcpub/Spotlight_Special_Purpose_Districts.pdf.

22. See BRIFFAULT & REYNOLDS, *supra* note 10 at 346-51. The parameters of home rule vary, depending both on the type of home rule authority granted by the state, and how courts interpret the scope of the authority. *Id.*

23. *Handbook for Mayors and Councilors*, TEXAS MUNICIPAL LEAGUE, 1, 9 (2017), <https://www.tml.org/Handbook-M&C/Chapter1.pdf>. This type of home rule is known as legislative home rule. *Id.*

24. General law cities are further divided into Type A, B, and C, with the categorization turning on population size and governance structure of the local government. See *id.* at 10-11 (discussing categories of general law cities).

25. Scott Houston, *Municipal Annexation in Texas*, TEXAS MUNICIPAL LEAGUE, Sept. 2017, at 18, <https://www.tml.org/p/ANNEXATION%20PAPER%20TML%20September%202017.pdf>

combination thereof) in the territory to be annexed. Unilateral, or involuntary, annexation is permitted in a minority of states and while the procedures vary, it is “largely defined by the absence of a requirement that the local resident, voter, or property owner consent to the enactment of a proposed annexation.”²⁶

Until the special legislative session in the summer of 2017, Texas law permitted home rule cities to annex unilaterally if their city charters authorized it (which most home rule cities’ charters did).²⁷ But this unilateral annexation authority did not mean home rule cities had an unlimited right to annex: home rule cities could only annex territory within their extraterritorial jurisdiction (and not within another city’s extraterritorial jurisdiction).²⁸ Furthermore, before any unilateral annexation, a home rule city was required to adopt and publish an annexation plan, which was required to be in place for three years before a unilateral annexation could occur, as well as provide for notice and hearing.²⁹

However, in the special legislative session in the summer of 2017, the Texas state legislature enacted SB6, a major change to state annexation law. The law, which took effect on December 1, 2018, eliminates unilateral annexation as possibility for most larger cities in populous Texas counties, requiring instead that all such annexations be approved by a majority of landowners or voters in the territory proposed to be annexed.³⁰ Thus, it is no

26. Christopher J. Tyson, *Localism and Involuntary Annexation: Reconsidering Approaches to New Regionalism*, 87 TUL. L. REV. 297, 304 (2012).

27. Under Texas law, general law cities are largely limited to annexation by petition (voluntary annexation), but under limited circumstances, Texas law authorizes general law cities to annex unilaterally. TEX. LOC. GOV. CODE § 43.0333.

28. Extraterritorial jurisdiction “is the unincorporated area that is contiguous to the corporate boundaries of the municipality and that is located” between one-half mile and five miles from the boundaries of the municipality, depending on the municipality’s population. TEX. LOC. GOV. CODE § 42.021. State law authorizes cities to exercise certain powers within their extraterritorial jurisdiction, such as the ability to enforce subdivision regulations. TEX. LOC. GOV. CODE § 212.003.

29. Ben Luckens, *Annexation and the ETJ*, in A GUIDE TO URBAN PLANNING IN TEXAS COMMUNITIES 2013, AMERICAN PLANNING ASSOCIATION TEXAS CHAPTER, Kimberly Mickelson, ed., 159-79 (2013) (providing an overview on the annexation process in Texas pre-SB6).

30. SB6 divides counties and cities into “Tier 1” and “Tier 2” and uses complicated formulations for when voter approval of annexations is required and when unilateral annexation remains an option, but in the simplest terms, the bill eliminates the use of unilateral annexation and imposes a landowner or voter approval requirement for most annexations by cities located in counties with populations of more than 500,000 as well as in smaller counties that opt-in to the bill through a referendum process. TEX. LOC. GOV. CODE § 43.001 et seq.; see also *Home Rule Cities Take Heed: Municipal Annexation Reform Takes Effect December 1*, TEXAS MUNICIPAL LEAGUE, https://www.tml.org/legis_updates/home-rule-cities-take-heed-annexation-reform-effective-december-1.

longer possible for cities like Houston to unilaterally annex territory in their extraterritorial jurisdiction, regardless of the service burdens, land use impacts, or other costs that residents of adjacent unincorporated territory impose on the city.³¹

3. *Special Districts.* State law authorizes the creation of special districts, which are local government units with a single (or limited) purpose and which have “substantial administrative and fiscal independence from general purpose governments like cities and counties.”³² Special districts may be smaller or larger than general purpose governments whose territory they overlap. Thus, special districts may have a sub-local scope, such as a library district located in a designated area within a city, or they may have a regional scope, such as a flood control district or river authority spanning across multiple cities and counties.

Special districts are a rapidly growing form of local government in Texas, reflecting a broader trend in the growth of special districts the United States.³³ According to a 2014 study by the Texas Senate Research Center, there were approximately 3,350 special districts in Texas (approximately 1000 of which were school districts).³⁴ Special districts are authorized under

31. *Id.* (noting that as a result of SB6, “Texas will become the only state in the nation that denies both state financial assistance *and* annexation authority to its cities”). For a thorough overview of the 2017 changes to annexation in Texas, as well as an overall summary of the annexation process and history of annexation in Texas, see Houston, *supra* note 25.

32. *Individual State Descriptions: 2012, 2012 Census of Governments*, U.S. CENSUS, ix (Sept. 2013) <https://www2.census.gov/govs/cog/2012isd.pdf>.

33. *See Census Bureau Reports There Are 89,004 Local Governments in the United States*, U.S. CENSUS (Aug. 30, 2012), available at <https://www.census.gov/newsroom/releases/archives/governments/cb12-161.html> (“Every five years since 1952, the Census Bureau has completed a comprehensive count of all local governments in the country. The most dramatic changes have been the decline in independent school districts and the notable increase in special districts.”).

34. *Invisible Government: Special Purpose Districts in Texas*, TEXAS SENATE RESEARCH CENTER, 47, 51 (October 2014), available at http://www.senate.state.tx.us/_assets/srcpub/Spotlight_Special_Purpose_Districts.pdf. A 2012 U.S. Census study puts the total number of special districts in Texas somewhat higher. *See Individual State Descriptions: 2012, 2012 Census of Governments*, *supra* note 32 (indicating that as of 2012, Texas had 2,600 special districts (excluding school districts)). The disparities in accounting for the total number of special districts is not surprising considering reasonable minds may differ as to what type of entity should be considered a special district versus an subordinate agency of the state or general purpose local government. For example, the 2012 U.S. Census of Governments lists several dozen “governmental designations in Texas that have certain characteristics of governmental units but that are classified for Census Bureau statistics as subordinate agencies of the state or local governments and are not counted as separate governments.” *Id.* at 271-74. The types of government designations not considered to be special districts in the U.S. Census study include the Harris County Flood Control District, mosquito control districts, and municipal management districts. *Id.* However, the 2014 study of special districts by the Texas Senate Research Center includes both mosquito control districts and municipal

various provisions of the Texas constitution and the procedures for their creation, governance, and powers are set forth in numerous parts of the state code of regulations.³⁵

More than thirty-five different types of special districts are authorized under Texas law to engage in a wide range of specialized tasks, from flood control to aquifer management to emergency services.³⁶ The powers and governance structures of special districts vary widely. For example, special districts may be authorized to impose sales or property tax, issue debt in the form of bonds, levy assessments, or exercise eminent domain.³⁷ Depending on the specifics of the state law authorization, a special district may be governed by an independently elected body, the elected officers of another local government (typically a county board of commissioners), or by appointed leadership.

A number of scholars have written about special districts, analyzing the costs and benefits of this form of local government.³⁸ Advantages include their political independence from general purpose local governments such as counties and cities,³⁹ the potential for efficiency gains by matching the size

management districts as types of special districts, not subordinate agencies. *See Invisible Government: Special Purpose Districts in Texas*, *supra* note 34 at 36-37, 40. And while neither the 2012 U.S. Census of Governments study nor the 2014 Texas Senate Research Center study consider the Harris County Flood Control District to be a type of special district, the district's official website defines it as a "special purpose district created by the Texas Legislature in 1937." *About the District*, HARRIS COUNTY FLOOD CONTROL DISTRICT, available at <https://www.hcfcd.org/about/>. These inconsistencies are pointed out not to fault any particular study, but to emphasize the fact that, as others have recognized, special districts are challenging to research. *See, e.g.*, Galvan, *infra* note 38 at 3044 ("Perhaps the obstacle to such scrutiny is the difficulty in developing a metric of assessment: Too many types of special districts exist, and the scope of districts changes constantly.").

35. *Invisible Government: Special Purpose Districts in Texas*, *supra* note 21 at 2-3.

36. In addition to the creation of special districts, states also typically authorize local governments to engage in cross-boundary efforts through voluntary inter-local agreements and contracts for services. *See* BRIFFAULT & REYNOLDS, *supra* note 10 at 531-32.

37. *See* Tim Brown, *Increasing Number of Special Districts*, COUNTY.ORG (TEXAS ASSOCIATION OF COUNTIES), Aug. 1, 2016, available at <https://county.org/magazine/departments/countyinformationprogram/Pages/Increasing-Number-of-Special-.aspx> ("Texas has experienced explosive growth in the number of special districts collected property taxes since 1992. From that year to 2014, the number increased by 72.2 percent after accounting for the spread of some districts into additional counties. While most of these districts are confined to a relatively few counties, the vast majority of counties have at least one special district collecting property taxes.").

38. *See, e.g.*, Sarah Galvan, *Wrestling with MUDS to Pin Down the Truth About Special Districts*, 75 FORDHAM L. REV. 3041 (2007); Nadav Shoked, *Quasi-Cities*, 93 B.U.L. REV. 1971 (2013); Lisa M. Card, *One Person, No Vote? A Participatory Analysis of Voting Rights in Special Purpose Districts*, 27 T. JEFFERSON L. REV. 57, 59 (2004).

39. *See* Shoked, *supra* note 38 at 1999-2032 (discussing the ability of special districts to promote interests of self-determination and act as an alternative to incorporation, annexation, and secession).

and scope of the government unit to the issue it is tasked with addressing;⁴⁰ and the ability to avoid certain tax and expenditure limitations that apply to general purpose government and which may constrain the ability of those types of governments to provide the types or levels of services desired by residents.⁴¹ However, there are disadvantages to special districts as well. Special districts may result in the disempowerment of general purpose local governments due to special districts siphoning away authority over an increasing number of regulatory areas. Special districts also create the potential for siloization across individual special districts operating pursuant their autonomous powers, resulting in a failure to engage in coordinated action.⁴² And special districts raise concerns about unaccountability and lack of transparency due to the lack of public awareness and centralized information about special districts.⁴³ Relatedly, concerns have

40. See Melissa Maynard, *Cash-Strapped Governments Turn to Special Districts*, THE PEW CHARITABLE TRUSTS, Oct. 2, 2013, <http://www.pewtrusts.org/en/research-and-analysis/blogs/stateline/2013/10/02/cashstrapped-governments-turn-to-special-districts> (noting efficiency is one of the reasons special districts are formed: “Sometimes two or more cities or towns create a joint district to share costs and deliver a particular service more efficiently . . . Advocates of special districts say they are more popular with citizens than general purpose governments because people understand what they are getting for their money. “We fund one service, we do it well, and people are either happy with it or unhappy with it,” said Hasina Squires, government affairs director for the Special Districts Association of Oregon.”).

41. Depending on one’s point of view, the use of special districts to avoid tax and expenditure limitations that apply to general purpose governments may be perceived as a pro or a con. See Frank Shafroth, *The Secret Tax Explosion*, GOVERNING, Sept. 2013, <http://www.governing.com/columns/public-money/col-secret-tax-explosion.html> (“The extraordinary growth in special districts appears to be a response, at least in part, to the spread of tax and debt limitations, as well as popular resistance to general tax increases. . . . The irony: A citizens’ initiative to reduce the size and role of government achieved the obverse. The increase in special-purpose districts is due to local governments’ seeking budget relief, while still desiring to maintain services.”).

42. See Galvan, *supra* note 38 at 3072 (“Today, living in multiple overlapping jurisdictions - school districts, special districts, emergency service zones, fire service districts, counties, or cities - is very common. But fragmentation prevents governments from operating at the same scale as the problems they need to address. In Texas, state laws and policy support the proliferation of hundreds of MUDs and other water districts, whose sheer numbers make addressing issues like land use planning, and water planning for that matter, impossible - calling into question whether MUDs and similar special service districts can indeed be defended on grounds of governmental efficiency.”)

43. See *Invisible Government: Special Purpose Districts in Texas*, *supra* note 21 at 47 (noting that “there is no centralized database that provides information regarding special purpose districts in Texas, nor is there a centralized association or organization that oversees or facilitates the operations of special purpose district.”); Galvan, *supra* note 38 at 2052-57 (discussing the lack of democratic participation and accountability in municipal utility districts (MUDs) in Texas); *Dirty MUDs*, HOUSTON CHRONICLE, Nov. 5, 2015, <https://www.chron.com/opinion/editorials/article/Dirty-MUDS-6613993.php> (“There are plenty of problems with MUDs. They undermine transparency. They perpetuate a system of unsustainable growth in unincorporated communities. They hide massive amounts of debt and new taxes. . . . And unlike Houston’s city government, with its

been raised about the opaque governance of some special districts, which may have no directly accountable leadership or be led by unelected, appointed officers,⁴⁴ and which may not be subject to one person, one vote requirements.⁴⁵

III. THE RESILIENCY IMPLICATIONS OF LOCAL BOUNDARY LAWS

This Part analyzes how each of the local boundary law mechanisms discussed above can constrain local resiliency efforts. In making a connection between local government formation and boundary change and local resiliency efforts, the discussion herein focuses on efforts related to land use and planning. While there are certainly other local resiliency measures that local governments may pursue – such as evacuation planning, insurance, buyouts, and structural mitigation⁴⁶ – such efforts tend to require more formal coordination with federal and state actors.⁴⁷ By focusing on land use and planning, areas which local governments traditionally have more autonomy over, the Essay aims to highlight the impacts of local government formation and boundary change laws.

A. *Incorporation and the Fragmentation of Metropolitan Region*

As a legal process that facilitates individuals joining together to create a democratic form of government, municipal

weekly, livestreamed meetings, most residents probably don't know what goes on at the MUD level, who board members are or what they even do. However, the most distressing aspect of MUD management comes down to how they undermine the notion of representative government. MUDs work with companies such as Stingray Services Inc., which specialize in what they call 'turn-key voter trailer' election services, to provide an illusion of democracy. Stingray moves trailer homes into districts that can act as temporary legal residences for voters who will authorize millions in debt.”)

44. See Nestor Davidson, *Localist Administrative Law*, 126 YALE L.J. 564, 603-04 (2017) (noting accountability concerns with special districts).

45. See Card, *supra* note 38 at 59 (discussing the “negative consequences resulting from one person, one vote not being required for special purpose districts”).

46. There is also a growing consensus that while “hard” mitigation such as levees and sea walls remain important in protecting vulnerable communities, such responses are “more often than not a part of the problem than the solution” and are “no longer considered to be a first-line option.” See Jacob and Showalter, *supra* note 2 at 9, 21 (citing the Association of State Floodplain Managers and other authorities and noting that “protective structural methods are not really adaptation, but rather, in a sense, a denial of reality.”).

47. See Jacob and Showalter, *supra* note 2 at 11-13, 25-27 (discussing the connections between federal policies like the National Flood Insurance Program and public works by the U.S. Army Corps of Engineers and the development and growth of local communities in hazardous areas).

incorporation is undoubtedly an important democratic institution. Incorporation enables the creation of cities, a level of government closest to the people and thus considered to have the greatest potential to serve the values of localism, such as democratic participation and civic engagement.⁴⁸

Yet, as local governance scholars have recognized, localism also means the inevitable fragmentation of metropolitan areas into multiple jurisdictions.⁴⁹ This municipal fragmentation produces a kind of “collective action problem or regional prisoner’s dilemma” that can play out in a range of contexts, from affordable housing to education to land use planning.⁵⁰ The collective action problem results from underlying principles of local government law: All incorporated cities of the same type have substantially similar authority under state law and thus, each has the ability to engage in land use and development policies as authorized under state law. And barring specific state laws to the contrary, each city is under no obligation to coordinate their land use and planning decisions with other cities or to take into account negative externalities their land use and planning decisions may have on communities outside of their local boundaries.⁵¹ Yet, the planning and land use policy-making – or the lack thereof – by one city almost invariably has impacts

48. Localism is an ideological preference for decentralized decision-making at the local level on the grounds that it promotes values such as democratic participation, civic engagement, government responsiveness, effectiveness, and accountability, and a sense of community. An extensive legal literature exists debating the virtues of localism. *See, e.g.*, Gerald E. Frug, *The City as a Legal Concept*, 93 HARV. L. REV. 1057 (1980); Richard Briffault, *Our Localism, Part I: The Structure of Local Government Law*, 90 Colum. L. Rev. 1 (1990); Georgette Poindexter, *Collective Individualism: Deconstructing the Legal City*, 145 U. Pa. L. Rev. 607 (1997); Laurie Reynolds, *Local Governments and Regional Governance*, 39 Urb. Law. 483 (2007).

49. *See, e.g.*, Briffault, *supra* note 10; Reynolds, *supra* note 48; Sheryll D. Cashin, *Localism, Self-Interest, and the Tyranny of the Favored Quarter: Addressing the Barriers to New Regionalism*, 88 Geo. L.J. 1985 (2000).

50. Cashin, *supra* note 49 at 1988; *see also* Bruce Katz and Elizabeth Kneebone, *On Ferguson, Fragmentation, and Fiscal Disparities*, THE BROOKINGS INSTITUTION, Apr. 2, 2015, <https://www.brookings.edu/blog/the-avenue/2015/04/02/on-ferguson-fragmentation-and-fiscal-disparities/> (“governmental fragmentation, a product of state law, is repeated in many metropolitan areas across the country. Suburban fragmentation makes providing public services inefficient; complicates regional planning; and, according to a recent OECD report, diminishes economic growth, productivity, and social mobility.”).

51. The inconsistency of land use and other regulations across a multiplicity of local governments in a region may be mitigated to some extent by communities adopting model ordinances or standards promulgated by third-party organizations (such as the international building code standards adopted by many municipalities as part of their building codes) or by the tendency of local governments to look to other similarly situated governments for governance models. *See, e.g.*, David J. Barron, *Reclaiming Home Rule*, 116 HARV. L. REV. 2255, 2340-41 (2003) (noting that that a policy’s “appearance in one city increases the likelihood of its appearance in another, precisely because it has now become an available policy option.”)

on the residents in other nearby localities.⁵²

A simple hypothetical can illustrate how the problem of fragmentation can play out in the context of stormwater management and flood control. Imagine that City A imposes stringent building standards and development regulations to reduce flooding risk to its residents. However, nearby City B has lax development standards which result in large numbers of buildings and other impermeable surfaces being developed in that city. City B may reap the economic gains in the form of increased property taxes and not suffer any significant additional stormwater runoff or flooding within its own boundaries. However, City A may experience those very same negative impacts because of the aggregate impacts of development just outside its boundaries, and its own resiliency efforts may thus be undermined by neighboring City B's.⁵³

While the goal of having local responses tailored to local conditions and the value of policy experimentation can be well served by having many local governments, municipal fragmentation poses a challenge to effective responses to problems that are more effectively addressed on a regional scale – issues like sprawl, watershed protection, and floodplain management. A number of approaches have been proposed to respond to municipal fragmentation in an attempt to strike a better balance between localism and regionalism, ranging from greater state control to encouraging more voluntary inter-local agreements to the use of regional governments and governance.⁵⁴ It is beyond the scope of this essay to analyze how these proposals might play out in the context of post-Harvey resiliency efforts. However, it is a useful reminder of the fact that while

52. This interconnectedness applies beyond land use and planning. See Briffault, *supra* note 10 at 1171 (“In most metropolitan regions, true autonomy at the local level is illusory. Each locality is affected the decisions of the other localities in the region, much as the inter-local competition to gain tax base and avoid service cost ineluctably constrains each locality’s freedom to make its own decision concerning taxes, services, and regulation.”).

53. This hypothetical has any number of analogous real-life examples. See Tom Foster, *Why Hurricane Harvey Will Happen Again*, TEXAS MONTHLY, Oct. 2017 <https://www.texasmonthly.com/articles/hurricane-harvey-will-happen/> (quoting Samuel Brody, director of Center for Texas Beaches and Shores at Texas A&M–Galveston: “In Meyerland, they are wisely expanding the detention pond and upgrading the storm-water system, because it’s flood prone. But really the problem is miles upstream, toward Katy, where development is putting more volume and velocity into Brays Bayou. People say, “Well, Meyerland shouldn’t have been built in the floodplain.” But it wasn’t actually in the floodplain when it was first built up, in the fifties. The floodplain expanded because of the upstream development. Think about that: not only are we moving into the floodplain but the floodplain is moving toward us.”).

54. See, e.g., Briffault, *supra* note 10; Reynolds, *supra* note 48; Cashin, *supra* note 49; Barron, *supra* note 51 (discussing these and other responses to municipal fragmentation).

the process of incorporation for any one community may appear to merely be a technocratic legal mechanism that facilitates worthy localism goals such as self-governance and civic engagement, local government formation has more complicated implications for local resiliency.

B. The Unintended Consequences of Ending Unilateral Annexation

The timing of the Texas legislature's passage of SB6 just weeks before Harvey hit the Houston area was ironic. While cities like Houston used unilateral annexation for a range of reasons, including some not directly related to resiliency, unilateral annexation had always provided a mechanism for cities to address long-term planning needs in ways that promoted regional resiliency.⁵⁵ By eliminating the ability of cities to use unilateral annexation as part of their resiliency toolkit just weeks before Harvey, the legislature made it more difficult for cities to engage in the very kind of pro-active local planning the state was calling for after Harvey.⁵⁶

The loss of the ability to engage in unilateral annexation is likely to constrain local resiliency efforts.⁵⁷ As has been evident

55. While unilateral annexation certainly can be misused (for example, by a city annexing territory and imposing higher taxes without being equipped to provide necessary services to that territory), the three-year pre-annexation plan became required under reforms to state annexation law in 1999 made such scenarios less likely. See Houston, *supra* note 25. Furthermore, cities are aware that unilateral annexation can be controversial, and thus much of the annexation activity in Texas in recent years has been through voluntary, not unilateral, annexation. *Id.*

56. The bill's sponsor claimed its passage as a victory for "property rights." See, e.g., Donna Campbell, *Texas Annexation Right To Vote Act Passes Senate*, THE SENATE OF TEXAS, July 26, 2017, <http://www.senate.texas.gov/members/d25/press/en/p20170726a.pdf> (quoting the bill's sponsor, State Senator Donna Campbell, Republican, New Braunfels, in a press release issued by her office); *Governor Greg Abbott Signs Legislation to Reform Municipal Annexation Process*, ABBOTT FOR GOVERNOR, Aug. 15, 2017, <https://www.gregabbott.com/governor-greg-abbott-signs-legislation-reform-municipal-annexation-process/> (quoting Governor Abbott, who signed the bill into law: "In Texas, of all places, property rights matter").

While framing the elimination of unilateral annexation as the protection of property rights may be a popular campaign slogan, it fails to accurately reflect fundamental doctrine of local government law. The Supreme Court has made clear that there is no "property right" to being within the jurisdiction of any particular local government. See *Hunter v. City of Pittsburgh*, 207 U.S. 161 (1907) (rejecting plaintiff's federal due process claim that they were deprived of property by a state consolidation law which resulted in their former city being consolidated with another and resulting in higher taxes). And as Professor Christopher Tyson has discussed in an illuminating series of articles on annexation and municipal identity as property, conflating the issue of local government boundaries with property rights "undermines any opportunity to reconceptualize metropolitan governance in a manner than acknowledges and account for the interdependence of the varies communities" in the region. See Christopher Tyson, *Municipal Identity as Property*, 118 Penn St. L. Rev. 647, 654 (2014).

57. The elimination of unilateral annexation is likely to constrain local governments

in the Houston region, development in the form of roads, buildings, and other impervious surfaces has led to significant loss of what were once undeveloped prairies surrounding the city, which provided permeable surfaces that absorbed stormwater.⁵⁸ The channeling of much development to unincorporated county territory, where minimal development regulations made costs less expensive, is on one hand an economically rational decision of developers, as well as of the residents who chose to locate there.⁵⁹ Yet those decisions have had negative externalities, in terms of the loss of permeable surfaces caused by development on the urban fringe, and the downstream flooding exacerbated by the upstream development.

Externalities by definition are effects not taken into account by an actor in making a decision, and it has long been recognized that governance responses are often needed to ensure that actors internalize the full costs of their decisions.⁶⁰ Until the passage of

in other ways as well. See, e.g., Taylor Goldenstein, *Governor Abbott Signs Bill Limiting Annexation Powers of Cities*, AUSTIN-AMERICAN STATESMAN, Aug. 15, 2017, <https://www.statesman.com/news/state—regional-govt—politics/abbott-signs-bill-limiting-annexation-powers-cities/OYYGbRsuKGHhGMgihjgOWL/> (quoting Austin’s mayor pro tem: “It’s unclear to me why the state would be interested in hampering the growth of cities that really represent the economic engines for the state of Texas . . . We need as a municipality the ability to continue to fund services from those who are using them, so annexation offers us the ability to do that.”); Evan Marczynski, *Georgetown Leaders Wary of Reforms to Texas Annexation Law*, COMMUNITY IMPACT, Sept. 21, 2017, <https://communityimpact.com/austin/georgetown/city-county/2017/09/13/georgetown-leaders-wary-reforms-texas-annexation-law/> (noting concerns voiced by David Morgan, the city manager of Georgetown, Texas that SB6 is likely to “make it more challenging to manage future city growth while maintaining connections to utilities and police or fire service areas . . . “Our concern with this is it will provide inefficiencies with government response in the future.”) Other officials have noted that unilateral annexation, rather than being unfair to residents of unincorporated territory resistant to annexation because of the higher taxes that typically result, actually ensures that everyone who benefits from the city pays their fair share: “When there are communities that also border or are contiguous to Austin you have to ask yourself would those communities exist without Austin? And should they be contributing to the Austin taxpayer’s burden, without contributing to the tax base?” See Jo Clifton, *Anti-Annexation Bill Now Biggest Threat to the City*, AUSTIN MONITOR, May 17, 2017, <https://www.austinmonitor.com/stories/2017/05/anti-annexation-bill-now-biggest-threat-to-city/> (quoting the city of Austin’s intergovernmental relations officer).

58. See Foster, *supra* note 53 (quoting Samuel Brody, director of the Center for Texas Beaches and Shores at Texas A&M–Galveston: “There is overwhelming evidence, thousands of articles looking at the issue, that freshwater wetlands reduce flooding and flood damage. And yet parts of Katy Prairie have been converted from naturally occurring wetlands into parking lots, rooftops, and roadways.”).

59. See Jacob and Showalter, *supra* note 2 at 17 (“The existence of strict city plans may result in development moving into the less restrictive ‘unincorporated’ areas of the county, thus circumventing city planning.”). Unlike cities in Texas, which have been delegated a considerable degree of authority over land use and planning by the state, counties in Texas have minimal land use and planning powers. *Id.*

60. See N. GREGORY MANKIW, PRINCIPLES OF ECONOMICS 196, 199 (7th ed. 2014) (defining negative externalities as when the external effects of an activity impose costs on third parties and positive externalities are when the external effects of an activity yield

SB6, unilateral annexation was one such governance mechanism: cities like Houston could use unilateral annexation to ensure that the development in adjacent territory was brought into compliance with city land use laws and that county residents did not develop in ways that were potentially detrimental to the city. Now, with the elimination of unilateral annexation, when residents of cities like Houston experience flooding and stormwater damage due to the aggregate impacts of land use decisions in nearby unincorporated county territory, their options are more limited. While one might hope that upstream residents would not develop in ways that produce negative impacts downstream, or that they would be willing to vote to approve annexation for the greater good (and accept the accompanying higher taxes and regulatory standards associated with annexation), experience has shown that is unlikely, particularly if county residents are not themselves currently experiencing any adverse impacts from their own land use decisions.⁶¹

C. The Regional Potential and Parochial Reality of Special Districts

As a local government formation mechanism, special districts have the potential to enable regional resiliency efforts. The boundaries of special districts can span across boundary

benefits to third parties); Lisa Grow Sun & Brigham Daniels, *Mirrored Externalities*, 90 NOTRE DAME L. REV. 135, 136, 140-41 (2014) (“The existence of externalities is one of the most commonly proffered, and most widely accepted, arguments for government intervention in markets and individual liberty.”).

61. When asked about the resiliency implications of SB6, the bill’s sponsor and supporter claimed that residents in Houston could still sue upstream property owners for nuisance if a scenario like that described above occurred. See *The Limits of Annexation*, TEXAS TRIBUNE FESTIVAL, Sept. 23, 2017, audio available at <https://soundcloud.com/texas-tribune/sets>, (question and answer session with SB6 sponsor Donna Campbell (R-Texas Senate District 25) and supporter Paul Workman (R-Texas House District 47)). However, it is typically the *aggregate* effects of land use and development patterns in unincorporated territory that exacerbates flooding downstream; it is therefore likely to be challenging to identify individual defendants’ activities which caused harm to downstream city residents, as required for a private or public nuisance action. *C.f.* J.B. Ruhl, *Common Law Environmental Protection: Making Nuisance Ecological*, 58 CASE W. RES. 753 (2008) (positing this type of scenario, which he labels as “the Cumulative Impacts Scenario” and noting that “[w]hile the Cumulative Impacts Scenario is likely to present more difficult questions of causation and the substantiality of each individual defendant’s contribution to harm, those are appropriate questions for public nuisance cases, not barriers to bringing the claim.”). Furthermore, nuisance law is an *ex post*, case-by-case approach, as compared to the public law responses like annexation, which apply broadly *ex ante*. See Helen Kang, *Pursuing Environmental Justice: Obstacles and Opportunities - Lessons from the Field+*, 31 WASH. U. J.L. & POL’Y 121, 137 (2009) (discussing environmental justice litigation and arguing “that litigation is insufficient to address cumulative pollution or nuisance sources because, in addition to being resource intensive and difficult to pursue, it does not have the potential to cure the root cause of the problem of cumulative pollution”).

lines of general purpose governments, endowing special districts with a territorial flexibility particularly suited to issues like stormwater management and flood control that rarely observe the boundaries of any single city or county. Special districts thus potentially provide a mechanism for local communities to cooperatively manage these types of issues across jurisdictional lines.

However, the limited-purpose function and authority of special districts can lead to a failure to engage with broader land use and planning considerations that are inherently connected to stormwater management and flood control.⁶² Furthermore, governance features of special districts that make them less democratically accountable and transparent than general purpose local governments can exacerbate their parochial tendencies, with the result that this form of local government fails to fully live up to its potential as a tool for local resiliency.

As noted above, Texas law authorizes over thirty-five different types of special districts. With regard to the power to regulate stormwater drainage and flood control, fifteen different types of special districts are authorized under state law.⁶³ In Harris County alone, over 500 special districts are currently in existence with authority to engage in activities related to water management.⁶⁴ While each of these special districts may indeed be serving a unique and necessary role in stormwater and flood control management, it is impossible to know for certain because the lack of comprehensive information on special districts. Furthermore, the proliferation of special districts tends to exacerbate the fragmentation of governance across a metropolitan region, potentially resulting in an uncoordinated, overlapping, or inefficient multiplicity of governance responses.⁶⁵

62. See Jacob and Showalter, *supra* note 2 at 29 (“Land use has to be a fundamental part of any good hazard mitigation plan, because it is precisely the misuse of land – putting buildings or people in harm’s way – that has brought us to where we are today.”).

63. See *Invisible Government: Special Purpose Districts in Texas*, *supra* note 21 at 48. The list of special districts whose purpose and authority include powers over drainage and flood control includes (but is not limited to): Flood Control Districts, Stormwater Control Districts, Water Control and Improvement Districts, Municipal Utility Districts, Levy Improvement Districts, River Authorities, Subsidence Districts, Soil and Water Control Conservation Districts, Drainage Districts, as well as several other types of special districts authorized under state law. *Id.*

64. *List of Texas Water Districts*, TEXAS COMMISSION ON ENVIRONMENTAL QUALITY, <http://www14.tceq.texas.gov/iwud/dist/index.cfm?fuseaction=ListDistricts&Command=list> (displaying the results of an advance search query for active districts in Harris County). Over half of the water-related special districts in Harris County are MUDs. *Id.*

65. See Galvan, *supra* note 38 at 3068-69 (“The problem of fragmentation, which has its most significant effect in areas such as water supply and land use planning - regional, large-scale issues that are not efficiently addressed by unrelated, small-scale governmental units like MUDs. . . . Perhaps more significantly, increased fragmentation

Concerns about accountability and transparency of governance of special districts can also have implications for local resiliency efforts. A full exploration of the accountability and transparency concerns raised by special districts would require volumes, but a brief discussion of the Harris County Flood Control District (HCFCD) illustrates how these concerns might arise more broadly in the context of special districts.⁶⁶ Unlike some special districts, HCFCD has a relatively high profile in the region and so lack of public awareness of the district is not as much of a concern as with many other types of special districts. However, while the public in the Houston region may be aware of the existence of HCFCD, many would likely be surprised to learn that the district's director for the two decades leading up to Harvey did not believe HCFCD should take into account the scientific consensus that climate change is likely to produce more frequent and intense storms,⁶⁷ or that explosive growth in development in Harris County during his two-decade tenure had any impact on flooding.⁶⁸

Despite the impact of HCFCD decisions on the resiliency of the Houston region and welfare of residents, its leadership could operate with these questionable beliefs and not be held directly accountable to voters. HCFCD's director is appointed by the district's governing board, which itself is not independently elected to that role, but rather is filled by the county commissioners.⁶⁹

has had a profound effect on land use planning (or the lack thereof) and sprawl. MUDs thus impose negative externalities on both the municipal and regional levels, creating a kind of anticommens with an inefficient number of competing regimes.”).

66. As noted in note 34, *supra*, the Harris County Flood Control District identifies itself as a special district but the U.S. Census of Governments does not. While reasonable minds might differ whether to categorize it as a special district or subordinate agency of the county, it has a number of features that are shared in common with other types of special districts and thus provides a useful example of the accountability, transparency, and siloization concerns raised by special districts.

67. Kiah Collier and Neena Satija, *A year before Harvey, Houston-area flood control chief saw no “looming issues,”* TEXAS TRIBUNE, Sept. 7, 2017, <https://www.texastribune.org/2017/09/07/conversation-former-harris-county-flood-control-chief/>.

68. *Id.* When asked by the reporter about his support for this opinion, Talbott responded that they “needed to find some better experts”; when asked who he would suggest talking to, Talbott responded: “Starting here, with me,” and when pressed, refused to answer any further questions on the matter. *Id.* The current director, who was appointed one year before Harvey, has indicated that he agrees with these views of his predecessor. Meagan Flynn, *Harris County Flood Control Doesn't Think Climate Change or Development Cause Floods*, HOUSTON PRESS, Dec. 6, 2016, <http://www.houstonpress.com/news/harris-county-flood-control-doesnt-think-climate-change-or-growth-cause-flooding-9008747>.

69. *History of the District*, HARRIS COUNTY FLOOD CONTROL DISTRICT, available at <https://www.hcfcd.org/about/history-of-the-district/>. While the county commissioners are elected to their county commissioner role, those elections tend to attract much less voter attention and turnout than elections for elected leaders of area cities, such as the Houston

Furthermore, even if a special district's leadership were more accountable, because of the relative narrow mandate and powers granted to special districts under state law, special districts tend to produce siloized policymaking. Thus, despite the recognition that development and land use planning is inextricably linked to stormwater and flood control management, special districts like HCFCD are authorized under state law to operate with only a limited-purpose focus on a specific subject matter.

This is not to say that special districts in general, or the HCFCD in particular, are necessarily ill-conceived or poorly governed. However, the discussion above underscores the point that for special districts to be units of local government that promote local resiliency on a regional basis, the structural tendencies of special district towards siloization, lack of transparency, and unaccountability must be grappled with.

IV. CONCLUSION

As David Barron has recognized in his scholarship on local governments and home rule, scholars and policymakers often “take the current legal structure[s] to be an empty backdrop against which local governments” act.⁷⁰ This is particularly the case in the context of local government formation and boundary change laws, which are understandably perceived as technocratic and procedural legal rules that seem unconnected to substantive policymaking. But as Barron has recognized, “background rules of state law . . . do not operate in this passive fashion.”⁷¹ The substantive ability of communities to proactively engage in resiliency efforts is inextricably linked to underlying conditions created by local boundary laws.

By exploring local government boundaries – how they are formed, how they can change, and why what happens on both sides of local boundary lines matters – this Essay has highlighted how effective local resiliency efforts depend in large part on a recognition of the regional interconnectedness across local boundary lines. It has illustrated how the structural constraints created by local government formation and boundary change laws in Texas complicate this task. Permissive state laws regarding incorporation and the elimination of unilateral annexation for larger cities in

mayor and city council. Furthermore, unlike the mayor and city council of Houston, Harris County commissioners are not subject to term limits, and a number of commissioners have had exceedingly long tenures. Katharine Shilcutt, *So, What Exactly is the Commissioners Court?*, HOUSTONIA, Mar. 31, 2016, <https://www.houstoniamag.com/articles/2016/3/31/peoples-court-harris-country-commissioners-court-april-2016>

70. See Barron, *supra* note 51 at 2344.

71. *Id.*

Texas mean that land use decision-making and planning will almost invariably be fragmented across a region and thus often result in uncoordinated and inconsistent resiliency responses. And although special districts offer a potential mechanism for cross-boundary regional responses, in practice, special districts often fail to live up to that potential because of the problematic structural tendencies noted above.⁷²

Yet the conclusion that local government formation and boundary change laws constrain local resiliency efforts does not mean that local governments – and their residents – cannot become more resilient. By definition, a resilient community is one that has flexible and adaptive legal and policy structures enabling it to respond to changing conditions. By recognizing how state legal regimes on local government formation and boundary change impact that adaptability and flexibility, voters, policymakers, and elected leaders can better engage with each other to work within – and, if needed, work to change – existing local government law structures.

72. Other local government law mechanisms that might facilitate local resiliency efforts across a region are also unlikely to offer a promising path forward. For example, while state law permits local governments to consolidate multiple local governments into one or to enter voluntary inter-local agreements, studies have shown that consolidation is fairly rare and that voluntary inter-local agreements are unlikely to be entered into in the situations which they would be most needed. See BRIFFAULT & REYNOLDS, *supra* note 10 at 250-51 (discussing the infrequency of municipal consolidations); Jered B. Carr and Christopher V. Hawkins, *the Costs of Cooperation: What the Research Tells US about Managing the Risks of Service Collaborations in the U.S.*, 45(4) STATE AND LOCAL GOVERNMENT REVIEW 224, 225-277 (2013) (analyzing the “obstacles to establishing and managing shared service arrangements” between local governments). Local government collaboration is more difficult when there is “preference divergence” because of differences in demographic characteristics, resource levels, and municipal institutions across local communities. *Id.* at 226. Furthermore, even when potential collaborator communities are homogenous and do not face preference divergence, an additional obstacle to voluntary inter-local agreements can be the fact that while local administrators recognize that the benefits of such agreements will be in “long-run savings . . . most of the elected officials expect[] short-run cost savings.” *Id.*; see also Reynolds, *supra* note 48 (“Though affluent segments of metropolitan regions are quick to cooperate when the subject is large infrastructure to provide services more efficiently over a larger customer base, they have not yet used those same governmental devices to work for regional solutions to solve crises in, for instance, affordable housing . . .”). And while formal regional governments exist in a handful of locales in the U.S. and have proven effective in addressing some of the negative effects of municipal fragmentation, the creation of new regional government entities is likely a political non-starter in Texas. See, e.g., Jacob and Showalter, *supra* note 2 at 23 (“Most local communities in the Gulf Coast region have some home rule powers. Few, if any, are going to give up their autonomy to regional planning agencies – no matter how high-minded the governing principles might be.”).