Advancing Water Security in Colonias*

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Colonias are small, generally unincorporated communities of predominantly Hispanic residents located near the U.S./Mexico border that suffer disproportionately from water insecurity associated with inadequate drinking water quality and reliability and flooding risks. Many of the water insecurity challenges facing colonias' residents stem from inadequacies in water law and environmental law. However, many legal obstacles to achieving water security in colonias stem from seemingly unrelated legal challenges, including voting rights, land title and land use issues, and lack of access to effective legal assistance, particularly in securing support from existing federal programs. Each of the four border states–Texas, New Mexico, Arizona, and California–have dealt with water insecurity challenges facing colonias in a variety of ways. In this article, we explore those challenges facing colonias' residents in Arizona by examining available federal programs, approaches taken in other border states, and possible legal reforms and opportunities in water law and environmental law, as well as in voting rights and real property law.

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INTRODUCTION

Border regions present unique water challenges. Along international borders, different legal regimes and cultures relevant to water management blend and conflict as water flows under and across, and in many instances forms, the boundaries between nations. Water takes on a unique meaning as a symbol of sovereignty and can aggravate tensions surrounding nationalism, racism, and anti-immigrant sentiments. Add these challenges to the arid conditions of the southwestern borderlands of the United States and the region presents one of the most complicated water management environments in the world.

Despite these complex problems, the region and its communities have proven resilient, adaptive, and culturally vibrant.[1] Colonias are quintessential border communities, hosting a kaleidoscope of water security obstacles and opportunities. Colonias are generally unincorporated and predominantly Hispanic communities located near the U.S./Mexico border and experiencing

1. Chloe Jones, *Untold Arizona: Colonia of Rillito 'A Forgotten Town'*, KJZZ (Feb. 26, 2021, 8:02 AM), https://theshow.kjzz.org/content/762353/untold-arizona-colonia-rillito-forgotten-town [hereinafter Jones, Untold Arizona] [https://perma.cc/X2LP-YQZ7].

disproportionate water security concerns in comparison to other U.S. towns. The water security challenges facing colonias require a multidisciplinary approach grounded in community knowledge and engagement. The National Science Foundation's Growing Convergence Research program has funded an interdisciplinary team to better understand water insecurity in colonias and support colonias residents in advancing water security. This article is part of that interdisciplinary research project.

In this article, we explore how federal and state law have defined colonias, what federal and state programs support an effort to achieve water security in colonias, and what existing legal structures frustrate those efforts. We evaluate these programs through the lens of Arizona colonias and what Arizona can learn from approaches in other border states and federal programs. Our research focuses on environmental, natural resource, and water law issues, as well as the importance of other legal challenges to the goals of advancing water security in colonias, including land use, real estate rights, voting rights, and judicial protections in cases of eviction or foreclosure.

I. UNDERSTANDING COLONIAS AND WATER INSECURITY

The word "colonia" in Spanish translates colloquially to "neighborhood," but both media outlets and academics often use unneighborly language to describe the communities of hundreds of thousands of hard-working people, like by calling them "dreadful."[2] Colonias undoubtedly suffer from extreme poverty, which leads to dangerous conditions for their infrastructure and public health, particularly due to their private, unregulated water and wastewater systems.[3] But colonias deserve an analysis through a critical lens that stresses the importance of water quality and quantity regulation while respecting a colonia's right to self-determination.

Colonias are primarily Hispanic communities that have existed since the mid-twentieth century because of the formal and informal economies that

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2. *See, e.g.*, Roderick R. Williams, *Cardboard to Concrete: Reconstructing the Texas Colonias Threshold*, 53 HASTINGS L.J. 705, 705–06 nn.2–7 (2002); David L. Hanna, *Third World Texas: NAFTA, State Law, and Environmental Problems Facing Texas Colonias*, 27 ST. MARY'S L.J. 871, 872–73 (1996) ("Colonias . . . make the slums of urban America look like upscale neighborhoods."); Don J. Usner, *At the Border of the American Dream*, SEARCHLIGHT NEW MEXICO (Apr. 27, 2022), https://searchlightnm.org/at-the-border-of-the-american-dream/ [https://perma.cc/P2CX-QTRX].

3. *See* Jane E. Larson, *Free Markets Deep in the Heart of Texas*, 84 GEO. L.J. 179, 185–91 (1995) (describing the lack of modern, organized water and wastewater utilities and the atrocious living conditions in Texas colonias).

comprise the mosaic of the U.S./Mexico border region.[4] However, these communities began growing at a faster rate upon the ratification of the North American Free Trade Agreement (NAFTA).[5] NAFTA's new policy of trade liberalization transformed the socio-economic landscape of the border region, sprouting a new need to easily produce goods and services near the border. Moreover, to jointly administer water infrastructure projects and regulations, the United States and Mexico are parties to the International Boundary and Water Commission.[6] In 1983, the United States and Mexico entered into the La Paz Agreement, which "represent[ed] the first real cooperative commitment to address environmental problems along the border."[7] However, seeking to address lingering environmental problems near the border, the United States and Mexico entered into the BECC/NADBank Agreement.[8] This agreement promised cross-border cooperation on environmental protection within the one-hundred-kilometer boundary of the border and funded projects through the North American Development Bank.[9] However, these instruments remain virtually unenforceable, often inadequately funded, and stuck in a bureaucratic quagmire.[10]

Maquiladoras remain a primary impetus to the increased growth of colonias.[11] Maquiladoras are owned by companies in Mexico that make and import materials and parts duty-free to American-owned corporations.[12] The use of maquiladoras offered American companies advantageous customs and tariffs treatment, though the significance of this advantage diminished somewhat when NAFTA phased out tariffs between Mexico and the United States.[13] Maquiladoras are primarily located in the border regions, and thus the workers must reside nearby the maquiladora facilities, leading to the growth of colonias.[14] Unfortunately, maquiladoras often cause severe public

4. Williams, *supra* note 2, at 707–09.

5. North American Free Trade Agreement, Dec. 17 1992, 32 I.L.M. 289 (entered into force Jan. 1, 1994) [hereinafter NAFTA]. NAFTA has since been superseded by the United States-Mexico-Canada Agreement (USMCA), effective July 1, 2020. United States-Mexico-Canada Agreement Implementation Act, Pub. L. No. 116-113, 134 Stat. 11 (2020).

6. Hanna, *supra* note 2, at 892–93.

7. *Id.* at 893.

8. *Id.* at 902.

9. *Id.* at 902–06.

10. *Id.* at 898, 901–02, 904–05.

11. David Voigt, *The Maquiladora Problem in the Age of NAFTA: Where Will We Find Solutions?*, 2 MINN. J. GLOB. TRADE 323, 323, 328 (1993).

12. *Id.* at 324–26.

13. *Id.* at 327.

14. *See id.* at 328.

health issues from the untreated water.[15] The COVID-19 pandemic has only exacerbated the problems faced by workers in maquiladoras, leading employers to cut worker wages and increase the rate of virus transmission when they incentivize or coerce their workers to return to facilities.[16]

A. Federal Definitions of Colonias and Related Programs

Congress in 1990 created a federal definition of colonias upon passage of the Cranston-Gonzalez National Affordable Housing Act.[17] In passing Cranston-Gonzalez, Congress intended to expand investment and construction of affordable housing to low-income and moderate-income families.[18] Specifically, colonias were explicitly targeted for the first time as "underserved" in rural housing programs and were subject to a mandated five-percent funding "[s]et-aside."[19] Under this program, eligible entities, such as state housing agencies and non-profit housing entities, may apply to the Secretary of Housing and Urban Development for appropriated funds to develop affordable housing in colonias.[20] A federal definition now covers these communities across all jurisdictions:

> For purposes of this subsection, the term "colonia" means any identifiable community that—
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> (A) is in the State of Arizona, California, New Mexico, or Texas;
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> (B) is in the area of the United States within 150 miles of the border between the United States and Mexico, except that the term does not include any standard metropolitan statistical area that has a population exceeding 1,000,000;
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> (C) is determined to be a colonia on the basis of objective criteria, including lack of potable water supply, lack of

15. *Id.*

16. *See* María Encarnación López, *The Lives of Mexico's Maquiladora Workers Are Being Put at Risk by Lax COVID-19 Rules and the Demands of International Trade*, LONDON SCH. ECON. & POL. SCI. (May 25, 2020), https://blogs.lse.ac.uk/latamcaribbean/2020/05/25/the-lives-of-mexicos-maquiladora-workers-are-being-put-at-risk-by-lax-covid-19-rules-and-the-demands-of-international-trade/ [https://perma.cc/2F23-ZNXY].

17. Cranston-Gonzalez National Affordable Housing Act of 1990, Pub. L. No. 101-625, 104 Stat. 4079.

18. 42 U.S.C. § 12703.

19. *See id.* § 1479(f)(4)(A).

20. *Id.* § 1479(f)(6).

> adequate sewage systems, and lack of decent, safe, and sanitary housing; and
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> (D) was in existence as a colonia before November 28, 1990.[21]

The United States Department of Agriculture, in Section 504 of the Housing Act of 1949, made housing funding available to families and low-income persons, including for cooperative housing and facilities, and in rural areas through the Rural Housing Service.[22] Congress, in 2002, after passing the Consolidated Farm and Rural Development Act, created in Section 306C a system for rural communities to apply for and receive loans and grants from the Department of Agriculture for water and wastewater systems.[23] This program is specifically geared for "communities whose residents face significant health risks" from a lack of infrastructure for water and wastewater systems.[24] There is a preference for awarding such loans and grants to individuals who reside in a rural subdivisions commonly referred to as colonias.[25]

The Rural Housing Service promulgated regulations in the same year that created "water and waste disposal grants" specifically for colonias.[26] Among housing funding, the agency promulgated regulations creating a water and wastewater disposal (WWD) grants and loans program that explicitly prioritizes low-income residents in colonias, regardless of their status as a renter or buyer.[27] The federal regulations also set forth a definition mirroring that of the statute, but to qualify for this program the unincorporated area must have a population "not in excess of 10,000 inhabitants," based on the most recent census data.[28] The grants may be used to "[e]xtend service lines," "[c]onnect service lines to resident's plumbing," "[p]ay reasonable charges or fees for connecting to a system," and "[p]ay for necessary installation of plumbing and related fixtures within dwellings lacking such facilities . . . limited to one bathtub, sink, commode, kitchen sink, water

21. *Id.* § 1479(f)(8).
22. *See id.* § 1474; 7 U.S.C. § 6943.
23. 7 U.S.C. § 1926c.
24. *Id.* § 1926c(a)(1).
25. *Id*. § 1926(c)(2).
26. 7 C.F.R. § 1944.664 (2022).
27. *Id.* § 1944.51 ("The intent is to make Rural Development housing assistance programs available to very low- and low-income rural residents in colonias and designated counties."); *id.* §§ 3550.101, .107, .115.
28. 7 C.F.R. § 3550.116(c) (2022).

heater, and outside spigot."[29] The grant also covers improvements to the residential water and wastewater infrastructure, certain bathroom construction, and "reasonable costs for closing abandoned septic tanks and water wells when necessary to protect the health and safety of recipients . . . and is required by local or State law."[30] Colonias under the self-help model have similar guidelines.[31]

These grants, furthermore, have restrictions. Namely, the "grants may not exceed a cumulative total of $5,000" and may not be used to pay debts, other financial liabilities, or "individuals for their own labor."[32] Regulations also stipulate "acceptable" ownership requirements, which are flexible to a variety of instruments or documents that prove one's ownership.[33] The "dwelling" must also be "modest for the area," not yield profits, and be built "in accordance with local construction codes and standards."[34] Furthermore, there are standards for the applicants themselves: they must be an owner-occupant of "a dwelling located in a colonia;" be impoverished, as defined by the federal poverty guidelines; not be tax delinquent; and must present employment records and federal tax returns to verify their income.[35] Whereas the housing grants in Section 504 require applicants to be sixty-two years of age or older, the WWD grants do not have the same age limit.[36] The regulations further set forth basic credit qualifications and "[i]ndicators of unacceptable credit" for applicants.[37] Lastly, applicants for these programs must be either U.S. citizens or non-citizen legal aliens.[38] Congress denied availability of these programs to non-resident aliens, unless it would allow families to remain living together.[39]

Under the U.S.-Mexico Border Water Infrastructure Program (BWIP), the Environmental Protection Agency offers grants to applicants seeking funds to maintain water and wastewater projects along the U.S.-Mexico border.[40] These funds seem easier to access, as evidenced by tangible projects at

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29. *Id.* § 3550.117(a)–(d).
30. *Id.* § 3550.117(e)–(g).
31. *See* 42 U.S.C. § 1490c; *see also* 7 C.F.R. § 1822.264.
32. *Id.* § 3550.118.
33. *See id.* § 3550.107.
34. *Id.* § 3550.106.
35. *Id.* § 3550.119.
36. *Compare id.* § 3550.103(b), *with id.* § 3550.119(a).
37. *See* 7 C.F.R. § 3550.103(i) (2022).
38. *Id.* § 3550.103(d).
39. *See* 42 U.S.C. §1436a.
40. *U.S.-Mexico Border Water Infrastructure Grant Program*, U.S. ENV'T PROT. AGENCY (Aug. 29, 2002), https://www.epa.gov/small-and-rural-wastewater-systems/us-mexico-border-water-infrastructure-grant-program [https://perma.cc/P5K3-QKXY].

colonias, such as at the Bay Acres Colonia in Douglas, Arizona.[41] Projects for this program are funded by joint grants between the North American Development Bank and Mexico's water regulatory commission, Comisión Nacional de Agua (CONAGUA), and must be also approved by a state's respective public utilities commission.[42]

While the infrastructure grant program is not codified in federal statutes or regulations, Congress continues to appropriate to the Environmental Protection Agency each fiscal year funds for water and wastewater infrastructure along the U.S.-Mexico Border. Despite varying Executive Branch budgetary requests regarding water systems infrastructure in the border region, which at times have been zero,[43] Congress continues to designate funds for the Border Water Infrastructure Grant Program.[44] The White House has proposed for the 2022 fiscal year budget $35,000,000 for the BWIP.[45] Further, President Biden has indicated a strong interest in infrastructure funding for distressed communities. For example, the Infrastructure Investment and Jobs Act, colloquially referred to as the Bipartisan Infrastructure Law, reauthorizes the Drinking Water State Revolving Funds Grants program[46] and the Clean Water State Revolving Funds program.[47] Notably, there are "[g]rants for construction and refurbishing of individual household decentralized wastewater systems for individuals with low or moderate income."[48] While perhaps intentionally ambiguous, colonias likely can apply for grants from the EPA under this program for repairing wastewater systems.

Notably, Congress attaches strings to the funds: only localities with enforceable rules preventing further construction of colonias communities, or

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41. *See generally U.S.-Mexico Border Water Infrastructure Grant Program – Public Environmental Documents*, U.S. ENV'T PROT. AGENCY (Nov. 15, 2021), https://www.epa.gov/small-and-rural-wastewater-systems/us-mexico-border-water-infrastructure-grant-program-public [https://perma.cc/J7SE-Q3MD].

42. U.S. ENV'T PROT. AGENCY, *supra* note *40*40.

43. *See, e.g.*, *FY 2021 EPA Budget in Brief*, U.S. ENV'T PROT. AGENCY 1, 78, 82 (Feb. 2020), https://www.epa.gov/sites/default/files/2020-02/documents/fy-2021-epa-bib.pdf (noting the 2021 Executive Branch's request of $0.0 for the US-Mexico Border and Infrastructure Assistance for the Mexico Border) [https://perma.cc/D2RA-KQ28].

44. *See id.* at 82 (estimated FY 2020 enacted budget of $25 million for "Infrastructure Assistance: Mexico Border").

45. Department of the Interior, Environment, and Related Agencies Appropriations Act, 2022, S. 3034, 117th Cong. (2021) (see (2) under the "State and Tribal Assistance Grants" section).

46. Infrastructure Investment and Jobs Act, Pub. L. No. 117-58, § 50102, 135 Stat. 429, 1136–37 (2021).

47. *Id.* § 50210, 135 Stat. at 1169.

48. *Id.* § 50208, 135 Stat. at 1166; *see* 33 U.S.C. § 1302(d).

other development of structures that lack access to water and wastewater within these areas, can receive the funds.[49] Since the EPA has granted the funds to states that have adopted a public policy of self-help, the EPA seems to have broadly interpreted the statutory text and allowed grants to be given to states that both forbid the construction of new colonias and simultaneously adopt a policy of self-help.[50]

The Clean Water Act (CWA), officially called the Federal Water Pollution Control Act, empowers the EPA, through the Administrator, to oversee a national policy of eliminating the discharge of pollutants into navigable waters of the United States and to ensure that communities can access clean water supplies.[51] The CWA serves Congress' strongly intended federalist framework, whereby states will administer many of the regulatory goals of the Act.[52] For example, the Arizona Department of Environmental Quality has primacy to promulgate rules for and regulate the state's water supplies. Primacy is given to states when they meet nine specific statutory factors. Specifically, in Arizona's case, the U.S. Supreme Court held that the EPA may devolve regulatory authority under the CWA as long as it meets the nine statutory requirements.[53] The CWA thus established the National Pollutant Discharge Elimination System, which is overseen by state agencies upon a governor submitting a plan and its approval by the program's Administrator.[54]

Precisely defining the meaning of a "water of the United States" has proven to be a challenge over the past few years, mired by politics and litigation. In 2006, the Supreme Court took on the challenge in *Rapanos v. United States*,[55] but the Court's split decision only created more uncertainty. Justice Scalia's plurality opinion held that the Act more narrowly applied to the term "navigable waters," encompassing only standing bodies of water, not those that are free-flowing.[56] Under President Barack Obama, the EPA and the Department of the Army promulgated the "Waters of the United States" Rule, which garnered more scrutiny from various concerned

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49. *See* Consolidated Appropriations Act, 2021, Pub. L. No. 116-260, 134 Stat. 1182, 1512 (2020) (see (2) under the "State and Tribal Assistance Grants" section).

50. *See, e.g.*, *City and Las Palmas Colonia, Presidio County – Drinking Water Infrastructure Construction Project*, U.S. ENV'T PROT. AGENCY (May 8, 2017), https://www.epa.gov/sites/default/files/2020-01/documents/eafnsi_presidiotx05082017.pdf [https://perma.cc/A6LY-8LGV].

51. *See* 33 U.S.C. § 1251.

52. *See id.* § 1251(g).

53. *See* Nat'l Ass'n of Home Builders v. Defs. of Wildlife, 551 U.S. 644, 671–73 (2007).

54. 33 U.S.C. § 1342(b).

55. 547 U.S. 715, 719–21 (2006).

56. *See id.* at 739.

communities.[57] In 2017 President Donald Trump signed Executive Order 13778, which rescinded the Obama Administration's "Waters of the United States" Rule.[58] The EPA then promulgated a new rule in 2020, effectively adopting Justice Scalia's plurality opinion in *Rapanos*.[59] On January 20, 2021, President Biden signed Executive Order 13990, which rescinded President Trump's guidance;[60] however, the executive order was partially enjoined by the U.S. District Court for the Western District of Louisiana on February 11, 2022, which was then stayed by the Fifth Circuit and left undisturbed by the Supreme Court.[61] On August 30, 2021, the U.S. District Court for the District of Arizona vacated the Trump Administration's "Waters of the United States" Rule, holding that it violated the Administrative Procedure Act and the Clean Water Act.[62] The Biden Administration announced that it is engaged in a new rulemaking process for a new "Waters of the United States" Rule, with a proposed rule published on the *Federal Register* earlier in 2022.[63] As of this writing, the pre-2015 definition of "waters of the United States" remains effective.[64]

Amidst this regulatory uncertainty, and as of this writing, the Clean Water Act does not extend to colonias, small water systems that do not invoke interstate commerce, since they are not covered under a "water of the United States." However, colonias are certainly covered under the jurisdiction of the Safe Drinking Water Act (SDWA). The SDWA covers small, public water systems, namely those systems with "at least fifteen service connections or [that] regularly serve[] at least twenty-five individuals."[65] States also have primacy to execute the statute,[66] and each state may adopt regulations to

57. Clean Water Rule, 80 Fed. Reg. 37054 (June 29, 2015).

58. Exec. Order No. 13778, 82 C.F.R. § 3 (2017).

59. *See* Navigable Waters Protection Rule, 85 Fed. Reg. 22250 (Apr. 21, 2020).

60. *See* Protecting Public Health and the Environment and Restoring Science to Tackle the Climate Crisis, 86 Fed. Reg. 7037 (Jan. 20, 2021).

61. *See* Louisiana v. Biden, No. 2:21-CV-01074, 2022 WL 438313, at *21 (W.D. La. Feb. 11, 2022). As of this writing, the Biden Administration has appealed this ruling to the U.S. Court of Appeals for the Fifth Circuit. On May 26, 2022, the Supreme Court denied the application to vacate the Fifth Circuit's stay.

62. *See* Pascua Yaqui Tribe v. U.S. Env't Prot. Agency, 557 F. Supp. 3d 949, 957 (D. Ariz. 2021).

63. *See* Revised Definition of "Waters of the United States," 86 Fed. Reg. 69372 (Dec. 7, 2021).

64. *Current Implementation of Waters of the United States*, U.S. ENV'T PROT. AGENCY (Dec. 20, 2021), https://www.epa.gov/wotus/current-implementation-waters-united-states [https://perma.cc/8KZT-M3F2]. *But see infra* note 271.

65. 42 U.S.C. § 300f(4)(A).

66. *See id.* § 300g-2(a).

enforce the statute. Notably, when Congress amended the SDWA in 1996,[67] it explicitly recognized the funding needs of colonias and allowed the EPA to designate funds to border states for colonias "subject to a significant health risk" to ensure they can create safe drinking and wastewater systems.[68] Even though Congress has made appropriations to other border programs, FY1999 was the last time Congress specifically earmarked funds for the colonias grant statute.[69]

States discharge much of the SDWA and the CWA, specifically in ensuring drinking water is free of toxic pollutants.[70] For example, the Arizona Department of Environmental Quality (ADEQ) oversees two primary safe drinking water programs: the Underground Injection Control Program (UIC) and the Groundwater Protection Program (GPP). Federal law authorizes states to establish a program for underground injection to ensure the safety of drinking water under the SDWA.[71] Under primacy, ADEQ discharges the EPA water permitting process under a set of requirements.[72] Further, federal regulations establish the hydrological and water safety requirements for state agencies executing the program.[73] In 2018 Arizona Governor Doug Ducey signed legislation authorizing rulemaking authority for the ADEQ under the SDWA.[74] Furthermore, the ADEQ has promulgated regulations to effectuate water quality standards for small water systems under the SDWA.[75]

While the federal water standards certainly apply to water and wastewater systems in colonias, it remains questionable whether the state agencies equally enforce the statutes, especially in colonias. Colonias already face disparate enforcement of the law, such as in land deed and eviction disputes, so it is unlikely that state agencies are able to effectively enforce the state's safe drinking water laws ex ante, rather than after a public health crisis occurs. While colonias engage in extra-legal self-regulatory remedies on a regular

67. Safe Drinking Water Act Amendments of 1996, Pub. L. No. 104-182, 110 Stat. 1613.

68. 42 U.S.C. § 300j-16(c).

69. *Id.* § 300j-16(e); ELENA HUMPHREYS & MARY TIEMANN, CONG. RSCH. SERV., RL31243, SAFE DRINKING WATER ACT (SDWA): A SUMMARY OF THE ACT AND ITS MAJOR REQUIREMENTS 28 (2021).

70. *See generally* A. Dan Tarlock, *Safe Drinking Water: A Federalism Perspective*, 21 WM. & MARY ENV'T L. & POL'Y REV. 233 (1997) (discussing how federalism plays a crucial role in executing the Safe Drinking Water Act).

71. *See* 42 U.S.C. § 300h.

72. *See* 48 Fed. Reg. 14189 (Apr. 1, 1983); 40 C.F.R. § 144 (1983).

73. *See* 40 C.F.R. § 146.

74. *See* 2018 Ariz. Legis. Serv. Ch. 170 (codified at *ARIZ. REV. STAT.* § 49-257.01).

75. *See* 18 ARIZ. ADMIN. CODE § 11 (2019).

basis, the State's intervention seems disparate, thus lessening a colonia's reliance on state agencies to regulate their water supply.[76]

B. State Definition of Colonias and Related Programs

Each border state faces similar challenges to supporting colonias in their efforts to improve water security. However, each state also has unique conditions. Texas has far more colonias than the other border states. California has larger urban centers near the border than the other border states. Arizona has more tribal reservation land near the border than the other border states. New Mexico has two relatively large transboundary rivers—the Pecos and the Rio Grande. The similarities shared across the border region and these unique conditions result in a patchwork of state approaches to supporting colonias in advancing water security and opportunities to learn from each state's failures and successes.

1. Arizona and Advancing Water Security in Colonias

Counties in Arizona have broad authority. As in other states, they are extensions of state authority and may only act with the authorities granted to them by the Arizona legislature.[77] Further, under the Arizona Constitution, the Arizona legislature sets forth the power of counties to form charters, and even non-charter counties have similar functions.[78] Counties may empanel planning and zoning commissions to create reports, hold meetings, and make formal recommendations about proposed land use projects.

Arizona's counties hold discretion to impose various zoning regulations in the counties.[79] For example, each county has the planning authority to "provide for the future growth and improvement of its area of jurisdiction."[80] In addition to planning commissions, counties must adopt "comprehensive plan[s]," which plan a variety of common features, including "projects affecting conservation of natural resources . . . , water quality, and floodplain zoning."[81] Most notably, counties must consider the availability of all water supplies, including the "known legally and physically available surface

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76. *See, e.g.*, Anietie Maureen-Ann Akpan, *Tierra y Vida: How Environmental Injustice Has Adversely Impacted the Public Health of Rural Brown Populations in South Texas,* 43 TEX. ENV'T L.J. 321, 327 (2013) (discussing the lack of safety code enforcement in Texas colonias).

77. *See* ARIZ. CONST. art. XII, § 7.

78. *Id.*

79. *See* ARIZ. REV. STAT. § 11-802(A) (2022).

80. *Id.*

81. *Id.* § 11-804(A) (2022).

water, groundwater and effluent supplies."[82] Counties must also evaluate existing and future projected growth and how demand will affect a county's plans to ensure available water supplies.[83] One notable exception, however, may spell trouble for colonias: "the comprehensive plan does not require . . . the county to be a water service provider."[84]

Some Arizona counties along the border, most of which have a population of less than two million people, may also be allowed to adopt "specific zoning plans for designated parcels of land."[85] This may be an option for counties looking for a way to assert some authority over colonias. However, the water supply issue becomes subject to other patchwork regulations.

Since the Arizona legislature has not explicitly defined colonias in the statutes, looking at the state's definition of subdivided land and a county's authority to regulate it becomes crucial. First, county boards of supervisors oversee the subdivision of lands outside of incorporated municipalities through planning commissions.[86] The county also must approve all recordings of subdivisions in unincorporated areas,[87] subject to a certificate of assured water supply from the Arizona Department of Water Resources, if inside an active management area, or a written commitment of water service for each subdivision.[88] The Groundwater Management Act of 1980 further ensures that there exists a one-hundred year supply of water for subdivisions within active management areas.[89] County recorders are thus prohibited from recording or accepting plats that fail to meet the statutory requirements.[90]

State law further creates an exception for an assured water supply if a county board of supervisors unanimously votes to allow plats outside active management areas—those counties within a jurisdiction of an adequate water supply.[91] Notably, Arizona law includes a list of exemptions whereby a county board of supervisors may unanimously vote to allow certain subdivision plats to be approved without an adequate water supply.[92]

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82. *Id.* §§ 11-804(B)(3)(a)–(c) (2022).
83. *Id.*
84. *Id.* § 11-804(D)(2) (2022).
85. *Id.* § 11-807(A) (2022).
86. *Id.* § 11-821(A) (2022); *see* ARIZ. REV. STAT. § 9-463.01 (2022).
87. ARIZ. REV. STAT. § 11-822(A) (2022).
88. ARIZ. REV. STAT. § 45-576(A) (2022).
89. *Id.* § 45-576(L)(1).
90. ARIZ. REV. STAT. § 11-822(A) (2022).
91. *Id.* § 11-823(A) (2022).
92. *Id.* §§ 11-823(B)(1)(a) to (d) ("The board may include in the general regulations an exemption from the provision for a subdivision that the director of water resources has determined

County "land splits," colloquially referred to as "wildcat subdivisions," are where counties have limited regulatory authority to regulate subdivisions in unincorporated areas of splits of five or fewer parcels of land.[93] Nonetheless, county boards of supervisors cannot require any utility or municipality to provide these land splits with water. Herein lies the problem: colonias are technically wildcat subdivisions. State law limits the authority of county boards of supervisors to regulate these subdivisions; thus, many of these subdivisions lack reliable water supplies. Many of these subdivisions require water-hauling, whereby residents pay companies to ship them water.[94] Further, many residents, citing the "Wild West" mentality, often prefer to live with these informal utility arrangements.[95] In 2018, the Arizona Department of Housing published a list of colonias that fall within the federal definition.[96] Arizona law may incentivize these divisions through limitations on county regulation and oversight of certain land divisions.[97]

Arizona's water law is as unique as, and reflective of, the state's trailblazing history and political culture. For example, in 1935 Arizona nearly sparked a civil war with California due to construction on a dam at the borders of the Territory of Arizona and the State of California.[98]

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will have an inadequate water supply because the water supply will be transported to the subdivision by motor vehicle or train if all of the following apply:

> (a) The board determines that there is no feasible alternative water supply for the subdivision and that the transportation of water to the subdivision will not constitute a significant risk to the health and safety of the residents of the subdivision.
>
> (b) If the water to be transported to the subdivision will be withdrawn or diverted in the service area of a municipal provider as defined in § 45-561, the municipal provider has consented to the withdrawal or diversion.
>
> (c) If the water to be transported is groundwater, the transportation complies with the provisions governing the transportation of groundwater in title 45, chapter 2, article 8.
>
> (d) The transportation of water to the subdivision meets any additional conditions imposed by the county.").

93. *See* ARIZ. REV. STAT. § 11-831(A) (2022).

94. Mark Robichaux, *Rural Sprawl in Arizona Creates a Rash of 'Wildcat' Subdivisions*, WALL ST. J. (Jan. 30, 2001, 12:01 AM), https://www.wsj.com/articles/SB980809472459124185 [https://perma.cc/Q6KY-GTPF].

95. *See id.*

96. *Arizona Designated Colonias*, ARIZ. DEP'T OF HOUSING, https://housing.az.gov/arizona-designated-colonia [https://perma.cc/9E7W-98E8].

97. *See* ARIZ. REV. STAT. § 11-831 (2022) (enforcing minimum county zoning requirements but limiting scope of county oversight of land divisions of five or fewer lots).

98. *See* Rhett B. Larson, *Interstitial Federalism,* 62 UCLA L. REV. 908, 917 (2015) (noting the story of the governor of Arizona spying on the construction of the nearby Parker Dam and sending troops to defend the waters of Arizona from California).

Indeed, one of the U.S. Supreme Court's longest-running legal trilogies—including the longest oral argument in history—concerns Arizona's water rights in the Colorado River basin.[99] There, the U.S. Supreme Court upheld Arizona's water rights obligations on the Colorado River, thereby ushering in an era of urban development in the desert state. Presently, even though new technologies and water conservation efforts allow for development, Arizona's primary "constitution" of its groundwater rights regime remains a feat of political compromise and success.

The Groundwater Management Act of 1980 (GMA) began as a decision from the Arizona Supreme Court that enjoined the excessive pumping of groundwater from nearby water users, including a farm owned by an investment company, a copper mine, and the City of Tucson.[100] At the time, no law existed to curtail the perpetual mining of groundwater supplies faster than they could be recharged back into the ground, thereby causing an impending crisis between rapidly growing cities, agricultural interests, and mining interests. However, this decision finally compelled the hand of the legislature, leading them to engage in intense negotiations between powerful political interests to agree upon a law creating a more certain property rights regime for water rights.[101] The Arizona legislature charged the Arizona Department of Water Resources (ADWR) with overseeing the groundwater code.[102]

Essentially, the law creates five Active Management Areas (AMAs) in certain regions of the state in which groundwater use is subject to more regulation.[103] Each AMA has a "management goal," which ADWR

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99. *See generally* Arizona v. California, 373 U.S. 546 (1963) (opinion); *accord* Arizona v. California, 272 U.S. 340, 353 (1964) (decree) (upholding water rights for Arizona under the Boulder Canyon Project Act and the Colorado River Compact). For a history on the passage of the Boulder Canyon Project Act, see generally JACK L. AUGUST, JR., VISION IN THE DESERT: CARL HAYDEN AND HYDROPOLITICS IN THE AMERICAN SOUTHWEST (2005).

100. *See* Farmers Inv. Co. v. Bettwy, 558 P.2d 14, 21 (Ariz. 1976) ("Water may not be pumped from one parcel and transported to another just because both overlie the common source of supply if the plaintiff's lands or wells upon his lands thereby suffer injury or damage.").

101. For more information on the legislative negotiations and the conditions culminating in the enactment of the Groundwater Management Act of 1980, see the free documentary, Groundwater Movie, *Groundwater: To Enact a Law for the Common Good*, YOUTUBE (Apr. 21, 2020), https://youtu.be/sNJbqCE9sXU [https://perma.cc/23F9-PPRE]. *See also Stirring Documentary on Arizona Groundwater Now Available*, ARIZ. DEP'T OF WATER RESOURCES (Dec. 21, 2017), https://new.azwater.gov/news/articles/2017-21-12 [https://perma.cc/BC6A-XFFV].

102. Rhett Larson & Brian Payne, *Unclouding Arizona's Water Future*, 49 ARIZ. ST. L.J. 465, 483 (2017) (summarizing the Groundwater Management Act) (citing ARIZ. REV. STAT. §§ 45-401 to -704).

103. *Id.* at 483 n.143.

approves.[104] While four counties have a goal of safe yield,[105] Pinal County has a special goal of "preserv[ing] existing agricultural economies."[106] None of the AMAs will meet their goals by the statutory year of 2025. Water users within an AMA must adhere to strict regulations and limits on groundwater pumping and reporting in relation to their specified types of water rights, and users may face enforcement actions from ADWR for failing to follow the law.[107]

Notably, there are subdivision sale restrictions for lots that fall within an AMA—and even for those that fall out of the jurisdiction of an AMA. There are two programs in the GMA: Assured Water Supply and Adequate Water Supply. The five AMAs fall under the requirements of the Assured Water Supply program, whereby a developer must demonstrate a certificate of one hundred years of water supply from ADWR—or a commitment to receive that supply—in order to sell subdivided lots.[108] ADWR has also promulgated rules to clarify that the water must be "physically available" and that the uses align with the goals of the AMA.[109] The GMA also prescribes ways by which developers can obtain water rights from surface water supplies or from other storage credits from ADWR.[110]

Developers outside AMAs face less stringent regulations with the Assured Water Supply program, such as being able to show one hundred years of supply without renewable surface water supplies. Furthermore, developers are not legally enjoined from selling subdivided parcels without a certificate, but the developer must disclose the water inadequacy to buyers.[111] Notwithstanding the lessened restrictions, a county board of supervisors may still require a one-hundred-year supply of water for subdivided parcels upon unanimous passage of an ordinance, which the counties of Cochise and Yuma have successfully done.[112] Voters may also petition their counties to call an

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104. *See* ARIZ. REV. STAT. § 45-562 (2022).
105. *Id.*
106. *Id.*
107. *Id.* § 45-632.
108. *Id.* §§ 45-576, 11-822.
109. ARIZ. ADMIN. CODE §§ R12-15-716 to -718, R12-15-704(F) to -710(E) (2022).
110. ARIZ. REV. STAT. §§ 45-852.01(A)–(C) (2022).
111. Id. § 32-2181(F)(2).
112. *Id.* §§ 11-823(A), 45-108.

election to form an AMA,[113] which two groups in Cochise County have successfully done by obtaining enough signatures from residents.[114]

Colonias in Arizona are found both within and outside AMAs, so there is some regulatory uncertainty for leaders within colonias as to determining which rules apply to them when considering their well registration rules.[115]

This problem has erupted recently in an unincorporated community in northeastern Maricopa County, Arizona, in an area called the Rio Verde Foothills, west of the community of Rio Verde and east of the City of Scottsdale.[116] The City of Scottsdale recently announced in a news release to the residents of the Rio Verde Foothills that the city will cease hauling water to the community in January 2023.[117] Scottsdale's decision, primarily due to increased price and scarcity of water supplies in Arizona from the Tier I shortage cuts on the Colorado River basin, set Rio Verde Foothills residents in a frenzy to find statutory and political recourse for their impending water woes.[118]

One existing legal remedy available for the residents of Rio Verde Foothills may be a portion of a statute pertaining to the ability of residents of unincorporated areas to petition their board of supervisors to form a

113. *Id.* § 45-415.

114. *See* Paul Hirt, *Lawmakers Won't Protect Our Groundwater, So We're Taking this Fight to Voters*, AZCENTRAL (Mar. 22, 2022, 6:00 AM), https://www.azcentral.com/story/opinion/op-ed/2022/03/22/asking-voters-protect-rural-groundwater-willcox-douglas-ama/9457686002/ [https://perma.cc/62QF-JKP6]; *FAQs for Douglas AMA*, ARIZ. DEP'T OF WATER RES., https://new.azwater.gov/ama/faqs-douglas-ama (Aug. 31, 2022) [https://perma.cc/7LZQ-Z63W]; *see also FAQs for Willcox AMA*, ARIZ. DEP'T OF WATER RES., https://new.azwater.gov/ama/faqs-willcox-ama [https://perma.cc/CV6E-5Y4J].

115. *See State of Arizona–Department of Housing's–Designated Colonias*, ARIZ. DEP'T OF HOUS., https://housing.az.gov/sites/default/files/documents/files/Arizona-Designated-Colonias-7.22.2022.pdf [https://perma.cc/W4Z3-QUS2].

116. Rachel Monroe, *The Water Wars Come to the Suburbs*, NEW YORKER (June 29, 2022), https://www.newyorker.com/news/letter-from-the-southwest/the-water-wars-come-to-the-suburbs [https://perma.cc/8M6N-FG59].

117. Press Release, Valerie Schneider, City of Scottsdale, Water Hauling To Halt January 2023 for Non-Residential Customers (Nov. 1, 2021), https://s3.documentcloud.org/documents/21176854/rvf-water-hauling-letter-from-scottsdale.pdf [https://perma.cc/TQ3V-FCMS].

118. *See* Hunter Bassler, *Hundreds of Homes in Rio Verde Foothills Are About To Lose Water; They Won't Be the Last*, 12NEWS (Aug. 17, 2022, 9:27 AM), https://www.12news.com/article/news/regional/scorched-earth/rio-verde-foothills-water-rural-arizona-law-valley/75-6ae2ef4d-7cd1-4a93-babb-9eea7a0634a6 [https://perma.cc/S977-ZBFY].

"domestic water [or wastewater] improvement district" (DWID).[119] This special taxing district allows a community to construct and manage their own water systems, including the ability to govern itself and manage its own finances.[120] DWIDs could enable colonias to maintain self-governance while falling into an official legal framework, allowing them to finance projects, gain resources, and establish a more than informal relationship with their local county board of supervisors. But many residents oppose this for fear of government involvement.

Instead, the Arizona Corporation Commission will likely intervene and order an existing private water utility to serve Rio Verde Foothills, which would supplant the need for the community to form a DWID.[121] The Maricopa County Board of Supervisors is working with the Commission to investigate alternative means to providing water to the residents of Rio Verde Foothills which do not involve forming a special taxing district.[122] But the legislature may need to open a new groundwater basin to private utilities if they are able to serve new residents—an entirely different political battle.[123]

The Arizona legislature in 2022 is showing some interest in county improvement districts, like DWIDs. For example, one bill that clarifies the petition signature collection process for communities interested in forming DWIDs was recently signed by the governor.[124] Counties themselves are facing novel legal questions over DWIDs, particularly in the way districts deliver supplies and the shared powers between counties and districts.[125]

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119. ARIZ. REV. STAT. § 48-1011(3) (2022) ("'Domestic water improvement district' means a county improvement district that is formed for the purpose of constructing or improving a domestic water delivery system or purchasing an existing domestic water delivery system and, if necessary, making improvements to the system or a district that is converted pursuant to section 48-1018.").

120. *Id.* § 48-1018.

121. Press Release, Office of Maricopa County District 2 Supervisor Thomas Galvin, Statement on Corporation Commission Involvement in Rio Verde Foothills Water Issue, https://content.govdelivery.com/accounts/AZMARIC/bulletins/320ec66 [https://perma.cc/7BNG-DU77]; *Board Votes Down Special Taxing Districting Proposal for Rio Verde Foothills Community*, ABC 15 (Aug. 31, 2022, 10:45 AM), https://www.abc15.com/weather/impact-earth/board-votes-down-special-taxing-district-proposal-for-rio-verde-foothills-community [https://perma.cc/5JTV-PUD2].

122. Letter from Commissioner Anna Tovar (July 12, 2022) Ariz. Corp. Comm'n Docket No. W-00000A-22-0194 (Arizona Corporation Commission Investigation Into Alternate Water Service for Rio Verde Foothills Community), https://docket.images.azcc.gov/E000020104.pdf?i=1658357148303 [https://perma.cc/R48F-E7MH].

123. *See* Hirt, *supra* note 114.

124. 2022 Ariz. Leg. Serv. Ch. 92 (codifed at ARIZ. REV. STAT. § 48-903).

125. Op. Ariz. Att'y Gen. No. I20-011 (Aug. 4, 2020).

DWIDs could become the ideal legal framework to assist colonias in managing their water systems, but questions of feasibility and accessibility remain.

The key remains balancing the residents' interest in a lifestyle reasonably attenuated from the government while maintaining their ability to access the elixir of life: water.

2. New Mexico and Advancing Water Security in Colonias

New Mexico, like Arizona, gives counties authority to regulate subdivisions not within the jurisdictions of municipalities.[126] County commissioners in New Mexico promulgate ordinances to effectuate the planning and regulation of subdivisions, including the plats and water conservation measures.[127] Furthermore, counties effectuate their comprehensive plans for covered subdivisions through their zoning authority,[128] and laws further grant authority to counties to regulate any areas outside the regulatory jurisdiction of municipalities.[129] State law provides for extensive regulation of subdivided parcels, with explicit requirements for adequate amounts of water for both consumption and waste.[130]

New Mexico county commissions possess broad regulatory authority to regulate the subdivisions within their boundaries. Specifically, counties must regulate the availability and quality of water supplies for subdivisions.[131] Further, current law disallows most forms of colonias and imposes stricter water availability requirements. A county commission may not approve a subdivision without proof from a water provider or the state engineer that the subdivision can provide adequate water supply for both indoor and outdoor domestic uses.[132] New Mexico law also created inclusive frameworks for colonias and a regulatory framework to allow county commissions to properly plan and oversee them, while arguably preserving community autonomy.[133]

The attorney general of New Mexico can also impose criminal sanctions, including injunctive relief and mandamus, so these statutes contain

126. N.M. STAT. ANN. § 4-37-1 (2022).

127. *Id.* § 47-6-9.

128. *Id.* § 3-21-2.

129. *Id.* § 3-21-3.

130. *Id.* § 47-6-11.

131. *Id.* § 47-6-9.

132. *Id.* § 47-6-11(B)(1).

133. *See id.* § 47-6-11 (delineating between multiple types of subdivisions and respective approval requirements for each, depending on their acreage).

significant regulatory teeth.[134] County commissions are also required to consult with Indigenous communities within the county when ascertaining the availability of water supplies and other requirements to approve plats.[135]

New Mexico law also allows for mixed methods of self-government in colonias. In 2010 the New Mexico legislature passed a series of statutes, called the Colonias Infrastructure Act, declaring a state interest in the health, safety, and infrastructure of colonias communities.[136] Specifically, the legislature decided to intervene to create a system of self-governance to ensure funds were properly distributed for water and wastewater infrastructure needs.[137] To facilitate decentralized governance, the legislature formed the "colonias infrastructure board" to oversee disbursement of funds.[138] Four of the seven voting members must be residents of a colonia.[139] There are also five non-voting members who come from local government councils.[140] The legislature also formed a separate colonias "authority," which "provide[s] staff support to the board; administer[s] the project fund; . . . process[es], review[s], and evaluate[s] applications for financial assistance from qualified entities; and . . . administer[s] qualified projects that receive assistance."[141] All of this is "at the direction of the board."[142]

Furthermore, the legislature created a "colonias infrastructure trust fund," whereby the state designates investment funds from the State Land Trust to construct infrastructure in colonias.[143] The state requires a certain percentage of trust funds remain in the account, and $10,000,000 are to be appropriated to the state project fund each year.[144] The legislature thereafter created a separate project fund, administered by combining revenues from the aforementioned State Trust Fund with tax bond revenue, loans, and other investment income.[145] The "authority" also has rulemaking authority.[146]

Most notably, the legislature also created a five-member "community governance attorney commission" for colonias, which will provide legal

134. *Id.* §§ 47-6-26 to -27.
135. *See id.* § 47-6-11(F)(5).
136. N.M. STAT. ANN. § 6-30-2 (2022).
137. *See id.*
138. *See id.* §§ 6-30-4 to -5.
139. *Id.* § 6-30-4(C).
140. *See id.* § 6-30-4(D).
141. *Id.* § 6-30-6(A)–(D).
142. *Id.*
143. *See id.* § 6-30-7(A).
144. *See id.* § 6-30-7(B).
145. *See id.* § 6-30-8.
146. *See id.* § 6-30-8(E).

services and counsel to residents of colonias.[147] One of these members must specifically "be a current or past member of the colonias infrastructure board and a resident of a colonia."[148] This model could prove extremely effective for ensuring that colonias not only continue to exist, but also that they can engage in legal defense and receive proper legal advice when engaging in legal activities. The statute allows for colonias to engage with institutions to employ an attorney.[149] Ideally, other border states may enact similar statutes to ensure fuller independence for colonias communities, so they need not be dependent on state resources—or outside, private resources—to vindicate their rights in a court of law. Thus, New Mexico's model provides a strong approach to ensuring self-governance in colonias.

3. Texas and Advancing Water Security in Colonias

Unlike other states, the Texas legislature has explicitly recognized colonias and has created legal frameworks within which they can govern themselves, engage and coordinate with state and local government, and receive funds. The Texas water code[150] and transportation code,[151] for example, create special application procedures for colonias. Whereas the policy devolves much of the decision-making responsibilities to the colonias themselves, the attorney general of Texas also maintains a state interest in "prevent[ing] colonias" with a specific division, thus sending some mixed signals on the policy of the state.[152] Perhaps the legislature has reacted by assisting existing colonias while the executive officials have taken a diverging approach by enforcing those laws that prevent prospective growth of colonias communities and enforcing the health and safety code.[153] The legislature has also illuminated the importance of water and wastewater safety for subdivisions in "economically distressed areas" when it required that the Model Political Subdivision Rules "assure . . . adequate sewer facilities"[154] and "adequate drinking water,"[155] in addition to requiring the

147. *See* N.M. STAT. ANN. § 21-21Q-4(C)(4) (2022).

148. *Id.* § 21-21Q-4(A)(3).

149. *Id.* § 21-21Q-4(C)(4).

150. *See* TEX. WATER CODE ANN. § 5.1781 (2022).

151. *See* TEX. TRANSP. CODE ANN. § 201.116 (2022).

152. *Colonias Prevention*, ATT'Y GEN. TEX., https://www.texasattorneygeneral.gov/divisions/colonias-prevention [https://perma.cc/G8UF-4KVN].

153. *See id.*

154. TEX. WATER CODE ANN. § 16.343(c)(1) (2022).

155. *Id.* § 16.343(b)(1).

Model Rules to "prohibit more than one single-family, detached dwelling . . . on each lot."[156]

Texas has taken a different approach to colonias. Instead of delegating zoning responsibilities to counties, the legislature now favors "self-help."[157] Colonias may act themselves to create self-help centers to serve colonias, in consultation with colonia resident advisory committees.[158] Self-help centers are formed for every five colonias and are awarded contracts from the state to help lower-income families finance, design, and construct homes, among other responsibilities.[159] There is a statutory process for appointing members to serve on the advisory committees.[160]

This governing structure becomes important for the state's colonia set-aside fund, which is managed by the Texas Department of Housing and Community Affairs.[161] This fund assists colonia resident advisory committee members in operating and managing self-help centers.[162] The fund also creates the finance mechanism by which the Department and the Texas Water Development Board transmit funds for water infrastructure.[163] Specifically, the funds are used to finance water supply systems, sewer service systems, and hookup funds and equipment for those services.[164] Thus, the legislature supersedes counties and municipalities entirely in the context of colonias, creating a unique local-state partnership that fosters community-based governance and planning of water systems.

4. California and Advancing Water Security in Colonias

Most of California's colonias do not fit within the federal definition of "colonia," and thus cannot apply for funding from the Department of Housing and Urban Development. All fifteen of eligible colonias are in Imperial County, an agricultural county on the border.[165] Nonetheless, California still

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156. *Id.* § 16.343(d).
157. *See* TEX. GOV'T CODE ANN. § 2306.583 (2022).
158. *Id.* § 2306.585.
159. *Id.* §§ 2306.583(b), 2306.586(a).
160. *Id.* § 2306.584.
161. *Id.* § 2306.589.
162. *Id.* § 2306.589(c)(1).
163. *Id.* § 2306.589(b).
164. *Id.*
165. *Designated Colonias in California*, U.S. DEP'T OF HOUS. & URB. DEV., https://www.hud.gov/states/california/groups/coloniascalifornia [https://perma.cc/4Y8J-3PRQ] (last visited Nov. 6, 2022); *Colonias History*, U.S. DEP'T OF HOUSING & URB. DEV., https://www.hudexchange.info/programs/cdbg-colonias/colonias-history/ [https://perma.cc/CG7E-RE2C] (last visited Nov. 6, 2022).

gives broad discretion to counties in land use and planning, especially for counties that adopt their own charters.[166] County general plans must consider water supplies and other conservation elements,[167] specifically to ensure that counties are planning for future water resources in a detailed manner.[168] Counties must further detail groundwater sustainability plans when amending their plans, including the adequacy of systems in light of water amount and quality, depending on certain factors.[169]

California law has effectively eliminated any loophole that could give way to a colonia, and all subdivision classification laws strictly enforce water availability rules. First, all proposed subdivisions must have a "sufficient water supply," which includes a twenty-year availability of water certification from the California Water Resources Control Board—if it is covered by the groundwater code—and various controls for public water systems serving the subdivision.[170] Counties may also disapprove maps if wastewater would be discharged into an existing community sewer system.[171] Further, counties must deny any permits for new developments of property in subdivisions if doing so would cause a public health or safety concern.[172]

In addition to requiring local governments to consult water suppliers upon approval of a subdivision,[173] the California Department of Water Resources may provide recommendations to counties—and counties must consider those recommendations—if the subdivision map would affect supplies within or around the covered territory.[174] California law prohibits any transactions of parcels out of compliance with water resource availability requirements and voids deeds of property at the discretion of the buyer.[175]

C. Learning from State Efforts To Advance Colonias' Water Security

The statutes across the four border states vary based on the level of regulation, the deference and delegation to local counties and municipalities, and the level of autonomy and self-governance. Texas perhaps creates the most interesting legal framework for colonias—not only explicitly

166. CAL. CONST. art. XI, § 7; see also CAL. GOV'T CODE § 65302 (2022).
167. CAL. GOV'T CODE § 65302 (2022).
168. *Id.* § 65352.5.
169. *Id.*
170. *Id.* § 66473.7.
171. *Id.* § 66474.6.
172. *Id.* § 66499.34.
173. *Id.* § 66455.3.
174. *Id.* § 66455.1(c).
175. *Id.* §§ 66499.30, 66499.32.

recognizing them as independent entities, but also creating methods of self-governance outside the full regulation of the state. While this can create some advantages, there remain some issues of safety and oversight. Conversely, this progressive framework does not attempt to force counties or elected officials to regulate and enforce anti-splitting laws; rather, it accepts colonias as a living arrangement and allows them autonomy while creating pathways to crucial resources, such as water infrastructure.

California's regulations, however, are starkly different in juxtaposition to those of Texas. California has eliminated most or all legal loopholes that would usually allow colonias to grow, and even common law counties have imposed strict regulations that prevent subdivisions without adequate access to water. Thus, California has few colonias, and those few colonias likely have access to water and wastewater service. On the other hand, New Mexico's regulations also recognize colonias and have enforcement mechanisms, but few resources and feasibility to do so. Essentially, New Mexico suffers from a problem of over-enforcement and under-enforcement, since there is little political will for elected prosecutors to stop land divisions. Arizona's statutes may favor colonias slightly better, but counties are unable to stop these "wildcat" subdivisions themselves and there is no affirmative requirement that subdivisions have access to water. At the same time, there is a statutory framework for unincorporated areas within counties to form districts to finance and manage water infrastructure, but the ability of communities to use the statute is dependent on their resources.

Texas' counties have little authority to oversee zoning and planning of subdivisions. This may have led the legislature to create a special statutory definition and framework for colonias so that they can access resources while maintaining their way of life. For New Mexico, the broad statutory definitions of a subdivision—two or more lots[176]—combined with the weak enforcement mechanisms creates a situation where the government cannot stop the outgrowth of colonias, and there is no statutory remedy for colonias to gain better access to water and wastewater services. Colonias in Arizona fall outside the enforcement coverage, depending on the creation of special districts to gain access and legal recognition. California has effectively precluded any further expansion of colonias with strong enforcement mechanisms and elimination of loopholes through broad definitions and targeted oversight by counties. Arizona has the least number of regulations on colonias, but likely because colonias are seen by some as an extension of Arizona's libertarian, western character; thus, there exists little political will to change the subdivision laws.

176. N.M. STAT. ANN. § 47-6-2(M) (2022).

II. LEGAL OBSTACLES AND OPPORTUNITIES FOR COLONIAS

Perhaps the greatest legal challenges facing colonias do not pertain to water law issues but pertain instead to issues unrelated to typical natural resources law. In this part, we will discuss how election law and voting rights issues may impact colonias communities from exercising their potential. We will then examine land title issues, such as land installment contracts and the lack of legal remedies for colonias. Lastly, we will examine general water quality and adaptive management solutions to address existing water protection statutes.

A. Voting Rights and Water Security in Colonias

Irrigation districts are unique, special taxing districts wherein the residents exercise a decentralized process of self-governance over the resources held within the district provided for the benefit of its residents. Arizona provides a prime example of irrigation districts, which may provide "[i]rrigation, power, electrical, agricultural improvement, drainage, and flood control districts, and tax levying public improvement districts."[177] In addition, special districts have the same powers as municipalities.[178] Irrigation districts may also supply water to people outside of the boundaries of the district.[179] Thus, in *Hohokam Irrigation and Drainage District v. Arizona Public Service Co.*, the Arizona Supreme Court traced back not only the history of life in early Arizona, but also looked at the statutory text and legislative history to conclude that irrigation districts could sell electric and other utilities to residents outside the district boundaries, just as any municipal corporation could.[180] The court also highlighted that the constitutional protections for irrigation districts must "have a legitimate relationship to the legal objectives for which the District is organized."[181]

Some colonias lie in irrigation districts, or they may organize themselves under a special district statute if a state lacks a formalized program for

177. Hohokam Irrigation & Drainage Dist. v. Ariz. Pub. Serv. Co., 64 P.3d 836, 839 (Ariz. 2003) (citing ARIZ. CONST. art. XIII, § 7).

178. *Id.*; for a discussion of Arizona's special taxing districts, see Arizona State Senate Research Staff, *Arizona's Special Taxing Districts*, AZ. STATE SENATE (Aug. 3, 2018), https://www.azleg.gov/Briefs/Senate/ARIZONA'S%20SPECIAL%20TAXING%20DISTRICTS%202018.pdf [https://perma.cc/WY48-TG6T].

179. *Hohokam Irrigation & Drainage Dist.*, 64 P.3d at 839.

180. *See id.* at 841 (citing John D. Leshy, *Irrigation Districts in a Changing West—An Overview*, 1982 ARIZ. ST. L.J. 345, 353 (1982)).

181. *See id.* at 841 (citing Salt River Valley Water Users' Ass'n v. Giglio, 549 P.2d 162, 165 (Ariz. 1976)).

colonias.[182] Those falling within an irrigation district may thus be able to vote in the irrigation district board elections, but a maze of state and federal laws lies in the path of representation. Ordinarily, all voting jurisdictions fall under coverage of the federal Voting Rights Act of 1965 and subsequent amendments, as well as their own state's respective election laws and jurisprudence. This means every legal citizen in the United States is entitled to a base voting right called "one person, one vote." This right is applicable to congressional districts under a higher level of scrutiny as applied in *Baker v. Carr*,[183] and to state legislative districts as outlined in *Reynolds v. Sims*.[184] The Court elaborated that this principal also applied to local governments, as they are instrumentalities of the state.[185] And for some time, the Court consistently applied the equal protection principle to local governmental entities, like municipalities, under the rationale that these local districts exercised "important governmental powers" which fell under the equal protection principle.[186] The Court also applied the same rationale to local school district board elections.[187]

But then something changed: the Court began to consider exceptions for special circumstances, like special districts, on which the Court had previously been silent.[188] In *Salyer Land Co. v. Tulare Lake Basin Water Storage District*,[189] the Court held that the "one person, one vote" principle does not apply to "special district[s] with water-related responsibilities, including water storage, flood control, and watershed management," since they did not invoke "important governmental powers," like taxation.[190] However, Justices Douglas, Brennan, and Marshall dissented under the argument that water operations actually do invoke "important governmental powers" and that the majority "disenfranchised" residents of powerful utility

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182. *See, e.g.*, ARIZ. REV. STAT. § 48-903 (2022).

183. *See* 369 U.S. 186, 207–08 (1962); *see also* Wesberry v. Sanders, 376 U.S. 1, 18 (1964) (applying the level of scrutiny used in Baker v. Carr).

184. *See* 377 U.S. 533, 573 (1964).

185. Louise Nelson Dyble, *Aquifers and Democracy: Enforcing Voter Equal Protection to Save California's Imperiled Groundwater and Redeem Local Government*, 105 CAL. L. REV. 1471, 1488 (2017) (citing Avery v. Midland Cnty, 390 U.S. 474, 479–80 (1968) ("The Equal Protection Clause reaches the exercise of state power however manifested [and] . . . [w]hatever the agency of the State taking the action.")).

186. *Id.* at 1489 n.107 (citing Hadley v. Junior Coll. Dist. of Metro. Kan. Cty, 397 U.S. 50, 54 (1970)).

187. *Id.* at 1489 n.109 (citing Kramer v. Union Free Sch. Dist., 395 U.S. 621, 633 (1969)).

188. *See id.* at 1489.

189. 410 U.S. 719, 734–35 (1973).

190. *See* Dyble, *supra* note 185185, at 1489 (citing *Salyer*, 410 U.S. at 727–35).

districts which electrify and supply water to their households every day.[191] Essentially, non-voting members of the district would be unable to partake in the community decision-making process regarding the crucial necessities of life, like water.

The Court again considered a case from Arizona in 1981, *Ball v. James*, regarding the Salt River Project, which allocates votes for the irrigation association and district's board elections to landowners based on their amount of acreage under ownership.[192] The Court chronicled the vibrant, resilient history of the Salt River Project and its founders, who were farmers and ranchers during Arizona's territorial era who needed to organize themselves to repay loans from funds that Congress authorized.[193] Nonetheless, the Court held that, notwithstanding the modernization of the Salt River Project to produce a considerable amount of hydroelectric power and water for ratepayers urban and agricultural alike, this case was sufficiently similar to *Salyer* and thus that the Salt River Project's acreage-based election system could stand.[194] Essentially, this was merely an agricultural district, not a district that provided transportation or education. The four dissenters, again, admonished the majority for misunderstanding and minimizing the authorities of the Salt River Project as a lifeblood of a growing region of Arizona.[195] In the eyes of the dissent, the Court improperly employed the lowest standard of constitutional scrutiny, rational basis review, and thus gave broad deference to the Arizona legislature in the approval of the Salt River Project's voting system.[196] The dissent cited another case from Arizona regarding the City of Phoenix's disenfranchisement of non-property owners in city bond elections.[197] There, the Court held that the City of Phoenix's plan violated the equal protection principle in voting, and thus the system needed to be stricken since issuing bonds is a decision concerning all voters, not merely those owning property.[198]

One of the greatest legal challenges facing colonias in Arizona, for example, is the inability to organize themselves under the existing

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191. *See id.* at 1489–90.

192. 451 U.S. 355, 357 (1981).

193. *See id.* at 357–60.

194. *See id.* at 371.

195. *See* Dyble, *supra* note 185, at 1491–92.

196. Jeffrey L. Snyder, Ball v. James *and the Rational Basis Test: An Exception to the One Person-One Vote Rule*, 31 AM. U. L. REV. 721, 744–48 (1982) (arguing that the Constitution's deference to states in determining the qualifications of electors rationalizes the Court's extension of the *Salyer* exception to the Salt River Project).

197. *See Ball*, 451 U.S. at 375 (White, J., dissenting) (citing City of Phoenix v. Kolodziejski, 399 U.S. 204, 209 (1970)).

198. *See Kolodziejski*, 399 U.S. at 213.

improvement districts statute.[199] Under Arizona law, only qualified electors of the state may vote in a special district election. This creates a quandary for colonias, whose residents are predominately Hispanic, and some of whom lack the proper documentation to be a citizen of the United States.[200] Thus, this voting rule could potentially be ripe for voting rights litigation.

Section 5 of the Voting Rights Act of 1965[201] was perhaps the most effective legal vehicle through which the federal government could stop rules, tests, or election systems in covered jurisdictions that diluted the voting power of people of color in violation of the Fourteenth and Fifteenth Amendments.[202] Then, the U.S. Supreme Court began to cast doubt on the preclearance formula in section 4(b), upon which section 5 rests. In a case regarding a utility district in Austin, Texas, the Supreme Court considered whether the district was able to "bail out" of the preclearance regime, and whether the entire regime was constitutional.[203] Section 5 permits a voting district to apply to the U.S. Department of Justice or a three-judge federal district court panel to "bail out" of coverage if they meet certain statutory factors of no longer engaging in discriminatory voting practices.[204] Thus, in *Northwest Austin Municipal Utility District No. One v. Holder*, Chief Justice Roberts, cryptically writing for the Court, upheld 4(b) but signaled a strong interest in eventually invalidating the coverage formula since "blacks now

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199. ARIZ. REV. STAT. § 48-1012(G) ("[A]ny natural person who is a qualified elector of this state and who is a real property owner within the district is eligible to vote in a district election without regard to that person's residency.").

200. *See* Maria Esquinca & Andrea Jaramillo, *Colonias on the Border Struggle with Decades-Old Water Issues*, TEX. TRIBUNE (Aug. 22, 2017), https://www.texastribune.org/2017/08/22/colonias-border-struggle-decades-old-water-issues/ [https://perma.cc/W86G-P3DP].

201. *See* 52 U.S.C. § 10301.

202. *See generally* Samuel Issacharoff, *Is Section 5 of the Voting Rights Act a Victim of Its Own Success?*, 104 COLUM. L. REV. 1710, 1710–12 (2004) (describing the plainly astounding success of the Voting Rights Act's preclearance regime in halting discriminatory voting procedures); *Section 4 of the Voting Rights Act*, U.S. DEP'T. OF JUST., https://www.justice.gov/crt/section-4-voting-rights-act (showing consent decrees for bailed-out jurisdictions) [https://perma.cc/N7E3-PK4B].

203. Northwest Austin Mun. Util. Dist. No. One v. Holder, 557 U.S. 193, 196–97 (2009) (invoking the doctrine of avoidance to decline answering the underlying constitutional question while clarifying the VRA's bailout provision).

204. 52 U.S.C. § 10303(a)(1) (listing conditions to terminate coverage status under the Voting Rights Act).

register and vote at higher rates than whites"[205] and "[t]hings have changed in the South."[206]

Therefore, in *Shelby County v. Holder*, it was not surprising that the Court then invalidated section 4(b), thus rendering inoperative section 5 of the Voting Rights Act.[207] Just like that, colonias cannot file a suit under section 5. However, section 2 remains, and that may be an avenue to achieving remedies if a colonia could establish standing and meet the new standard for challenging voting rules under section 2. *Brnovich v. Democratic National Committee*[208] held that courts must use a "totality of the circumstances" analysis with the "guideposts" created by Justice Alito, in conjunction with the other section 2 jurisprudence. These guideposts include the size of the burden; the degree to which a rule departs from the 1982 Amendments' standard practice; the size of the disparities in a rule's impact; the opportunities provided by a state's entire system of voting; and the strength of state interests served by a challenged rule.[209] Many questions remain for challenges under the new *Brnovich* standard in section 2 challenges, but a different standard of review may be more flexible and better-suited for a challenge to the Arizona law requiring a qualified elector status.[210]

Under the *Anderson-Burdick*[211] balancing analysis, which courts can virtually apply to any challenge, like those relating to state ID requirements for voter registration,[212] courts consider the extent to which the state's interests make it necessary to burden the plaintiff's rights. The more significant the imposition on the plaintiff's rights, the more rigorously the

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205. *Northwest Austin*, 557 U.S. at 201. Notably, Congress in 2006 had just re-authorized the Voting Rights Act for another twenty-five years. *See id.* at 200.

206. *Id.* at 202.

207. 570 U.S. 529, 557 (2013).

208. 141 S. Ct. 2321, 2336–40 (2021) (holding that Arizona's ballot collection and out-of-precinct voting statutes did not violate section 2 of the Voting Rights Act and establishing a multi-factor extra-textual balancing test for section 2 claims).

209. *Id.* at 2338–40 (outlining the new "totality of the circumstances" analysis for voting rules while "equal openness remains the touchstone").

210. *Cf.* Christopher Brown, *The Special Purpose District Reconsidered: The Fifth Circuit's Recent Declaration That the Edwards Aquifer Authority Is a Special Purpose District Under the Voting Rights Act, and the Tortured History That Led to That Decision*, 27 HASTINGS ENV'T L.J. 3, 65–67 (2021) (illustrating that voting districts, particularly irrigation and agricultural districts, may need to look to other judicial remedies to vindicate their voting rights post-*Shelby County*).

211. *See* Anderson v. Celebrezze, 460 U.S. 780, 789 (1983); *see* Burdick v. Takushi, 504 U.S. 428, 434–38 (1992).

212. *See* Crawford v. Marion Cnty. Election Bd., 553 U.S. 181, 202–04 (2008) (upholding Indiana's voter identification law since the State asserted a reasonable interest narrowly tailored).

court will scrutinize the law.[213] If the plaintiff's rights are severely restricted, the regulation must be narrowly drawn to advance a compelling state interest.[214] This flexible balancing tends to favor the government over plaintiffs,[215] but there is a circuit split over the level of scrutiny applied to these challenges.[216] At the outset, plaintiffs from a colonia may face difficulty in obtaining injunctive relief or other forms of relief in election law cases since it is questionable whether they suffered any injury-in-fact, traceable to the defendant, redressable by a positive decision.[217]

Thus, colonias seeking to engage in litigation may simply want to attack the underlying rationale of *Ball* and *Salyer*, since the Courts there reasoned that water management does not invoke "important governmental function[s]."[218] That reasoning may simply be antiquated in light of changing facts related to the aridification of the western United States and growing water scarcity.[219] States are now negotiating amongst themselves to curtail

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213. *See Burdick*, 504 U.S. at 434 ("[T]he rigorousness of our inquiry into the propriety of a state election law depends upon the extent to which a challenged regulation burdens First and Fourteenth Amendment rights.").

214. *Id.* ("[W]e have recognized when those rights are subjected to 'severe' restrictions, the regulation must be 'narrowly drawn to advance a state interest of compelling importance.'" (quoting Norman v. Reed, 502 U.S. 279, 289 (1992))).

215. *See, e.g.*, Pub. Integrity All., Inc. v. City of Tucson, 836 F.3d 1019, 1027–28 (9th Cir. 2016) (en banc) (upholding the City of Tucson's at-large ward primary system since the City asserted a reasonable interest).

216. Michael Milov-Cordoba, *The Racial Injustice and Political Process Failure of Prosecutorial Malapportionment*, 97 N.Y.U. L. REV. 402, 420–21 n.106 (2022) ("acknowledging the circuit split on the appropriate level of scrutiny for one-person, one-vote challenges and applying *Anderson-Burdick* review without deciding 'which level of scrutiny applies to all one-person, one-vote challenges'") (quoting Navajo Nation v. San Juan Cnty., 929 F.3d 1270, 1283 (10th Cir. 2019))).

217. *See* Yazzie v. Hobbs, 977 F.3d 964, 968 (9th Cir. 2020) ("While we are sympathetic to the claimed challenges that on-reservation Navajo Nation members face in voting by mail, we lack jurisdiction because Yazzie and the other individual plaintiffs do not satisfy 'the irreducible constitutional minimum of standing.'" (quoting Lujan v. Defs. of Wildlife, 504 U.S. 555, 560 (1992))).

218. Ball v. James, 451 U.S. 355, 368–71 (1981).

219. *See, e.g.*, Brahm Resnik & Dylan Dulberg, *Northern Arizona May See Drinking Water Cutoff as Lake Powell Continues To Dry Up*, 12NEWS (June 19, 2022, 11:04 AM), https://www.12news.com/article/news/local/water-wars/arizona-water-crisis-cutoff-drinking-water-supply-lake-powell-page/75-c2f25f52-bbdc-4adb-a427-3412ab90d84f [https://perma.cc/U2TA-U8LT] (highlighting decreasing water levels of Lake Powell due to drought that has unearthed archeological sites and dead bodies); Kirk Siegler, *Where the Colorado River Crisis is Hitting Home*, NAT'L PUB. RADIO (Sept. 22, 2022, 10:00 AM), https://www.npr.org/2022/09/22/1124150368/where-the-colorado-river-crisis-is-hitting-home

their water usage and keep water in the Colorado River for downstream users to slow further mandated cuts.[220] Perhaps *Ball* and *Salyer* were decided at a time when water scarcity was of a lessened national concern and there was less awareness of the importance of local governance of water supplies. It may be possible that the Court sought to create some defining boundaries of the voting rights jurisprudence, which compelled the Court's hand on a frequent basis to solve local election disputes that the Federal Constitution primarily leaves to states in the absence of congressional preemption.[221] Nonetheless, district-level governance of water supplies is arguably more crucial than ever, and perhaps the *Salyer* exception should be revisited since it drastically limits the ability of small communities to determine the fate of their water supplies.

Public utility commissions, like the Arizona Corporation Commission, are powerful governmental bodies that set the rates of water from private water companies and may exercise significant authority to meet their constitutional and statutory responsibilities.[222] The Arizona Constitution explicitly enumerates as Arizona's public utilities commission the Arizona Corporation Commission—an elected, multimember body with term limits—with substantial plenary authority to set rates "just and reasonable," and regulate

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[https://perma.cc/NQ7X-KBRV]; Press Release, Dept. of the Interior, Biden-Harris Administration Announces New Steps for Drought Mitigation Funding from Inflation Reduction Act (Oct. 12, 2022), https://www.doi.gov/pressreleases/biden-harris-administration-announces-new-steps-drought-mitigation-funding-inflation [https://perma.cc/DBS9-5WMY]; Press Release, Dept. of the Interior, Interior Department Announces Next Steps to Address Drought Crisis Gripping the Colorado River Basin (Sept. 22, 2022), https://www.doi.gov/pressreleases/interior-department-announces-next-steps-address-drought-crisis-gripping-colorado [https://perma.cc/5TMB-E5UL].

220. *See* Bobby Magill, *Historic Drought Forces Feds To Withhold Water from States*, BLOOMBERG L. (May 3, 2022, 1:17 PM), https://news.bloomberglaw.com/environment-and-energy/worsening-drought-forces-interior-to-withhold-water-from-states [https://perma.cc/2KR5-S5QG].

221. U.S. CONST. art. I, § 2, cl. 1 ("The House of Representatives shall be composed of Members chosen every second Year by the People of the several States, and the Electors in each State shall have the Qualifications requisite for Electors of the most numerous Branch of the State Legislature."); *see also* Joshua S. Sellers & Justin Weinstein-Tull, *Constructing the Right To Vote*, 96 N.Y.U. L. REV. 1127, 1169–70 (2021) (outlining the decentralized nature of election administration in America as a result of the Elections Clause); *cf.* Breedlove v. Suttles, 302 U.S. 277, 283–84 (1937) (upholding a state law requiring a poll tax), *overruled by* Harper v. Va. State Bd. of Elections, 383 U.S. 663, 669 (1966).

222. *ACC Mission and Background*, ARIZ. CORP. COMM'N, https://www.azcc.gov/divisions [https://perma.cc/5ZJ6-66VT].

corporations, railroads, securities, telephones, and private water utilities.[223] The Constitution also sets forth the investigatory powers of the Commission, including the ability to examine the books of regulated utilities, among other tasks of the Commission.[224] Today the Commission is a five-member, partisan commission, with members elected at-large.[225]

The Arizona Corporation Commission has extraordinary powers to patrol private water utilities around Arizona, including through stringent rate-setting processes that foster water conservation through its Certificate of Convenience and Necessity (CC&N).[226] Even though Arizona's Groundwater Code requires a demonstration that a developer applying for a CC&N for a new development has a one-hundred years supply of water, the Commission may issue "Orders Preliminary" on applications outside AMAs, which displace the conditional CC&N usually granted while construction proceeds.[227] Notably, the Arizona Supreme Court recently released an opinion which could drastically change the structural power and judicial deference to the Arizona Corporation Commission, and the case stems from a complicated ratemaking proceeding from a consolidated water utility.

In *Sun City Home Owners Ass'n v. Arizona Corp. Commission*, the court considered whether the Commission caused unlawful rate discrimination through a large water utility's consolidation of multiple wastewater districts and whether the courts must give "extreme deference" to the Commission's decisions.[228] Justice Clint Bolick, writing for the unanimous court, affirmed in part and vacated in part the Commission's order, holding that while the

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223. *See* ARIZ. CONST. art. XV, §§ 1(B), 3 (establishing the Arizona Corporation Commission).

224. *Id.* § 4 (stipulating the Arizona Corporation Commission's "power to inspect and investigate").

225. *Id.* § 1.

226. *Id.* § 3; *see* Kris Mayes, *Encouraging Conservation by Arizona's Private Water Companies: A New Era of Regulation by the Arizona Corporation Commission*, 49 ARIZ. L. REV. 297, 313–15 (2007) (describing the broad constitutional powers of the Arizona Corporation Commission in compelling utilities to conserve water through regulation); *see* State v. Tucson Gas, Elec. Light & Power Co., 138 P. 781, 786 (Ariz. 1914); *see also* Ethington v. Wright, 189 P.2d 209, 216 (Ariz. 1948) ("[I]n the matter of prescribing classifications, rates, and charges of public service corporations . . . the Corporation Commission has full and exclusive power."). For most of Arizona's history, this notably broad deference to questions of law had almost precluded any judicial review of the Commission's statutory and constitutional authority, until 2020 when the Court shed doubt on the Commission's authority to promulgate clean energy rules, Johnson Utils., L.L.C. v. Ariz. Corp. Comm'n, 468 P.3d 1176, 1189 (Ariz. 2020) (upholding the appointment of an interim manager to run a troubled utility), and then in 2021 when the Court decided Sun City Home Owners Ass'n v. Ariz. Corp. Comm'n, 496 P.3d 421 (Ariz. 2021).

227. *See* Mayes, *supra* note 226226, at 300–01.

228. *Sun City Home Owners Ass'n*, 496 P.3d at 424.

Commission's decision to consolidate five separate wastewater districts into one single district did not violate the state constitution's prohibition against discriminatory rates, the Commission is not entitled to extreme deference in its ratemaking decisions.[229]

The court clarified that the Commission's power is plenary (broad with statutory and constitutional constraints) as to its ratemaking and classification authority.[230] Further, the Commission's factual findings are subject to a substantial evidence review, and its decisions are presumed to be constitutional.[231] However, the Commission's interpretation of its constitutional and statutory authority is now reviewed *de novo* with no deference to the Commission.[232] The court stated that the Commission is not a "fourth branch" of government.[233] Lastly, the full consolidation did not amount to rate discrimination.[234] The Commission may also use the cost causation rationale as a defense to a claim of discriminatory ratemaking, thereby rejecting the plaintiff's core argument.[235]

But Justice Bolick concurred in his own opinion, offering his qualms with the entire model of utility regulation in Arizona. In his opinion, Arizona should implement a model of retail competition instead of regulated monopoly; that would, in his view, solve this entire case.[236] Secondly, decisions should not be presumed to be constitutional, for the presumption defeats the entire purpose of judicial review.[237] Lastly, he lamented the inefficiency and insularity of the entire administrative process:

> In the current closed monopoly system, a simple phone call hardly suffices. To obtain recourse for higher rates requires consumers to engage in a costly, lengthy, and labyrinthian administrative process, facing armies of lobbyists and lawyers with vast experiential and resource advantages. It is a process

229. *Id.* at 423, 428.

230. *Id.* at 425 (citing Johnson Utils., L.L.C. v. Ariz. Corp. Comm'n, 468 P.3d 1176, 1183 (Ariz. 2020)).

231. *Id.*

232. *Id.*

233. *Id.*

234. *Id.* at 427–28.

235. *Id.* at 428 ("If the rates are equal for like and contemporaneous service, they are not discriminatory.").

236. *See id.* at 428 (Bolick, J., concurring) ("From my vantage point, the [regulated-monopoly] model has not fulfilled this aspiration [to protect the public].").

237. *Id.* at 428–29.

> in which the odds, to paraphrase *The Hunger Games*, are decidedly not in their favor.[238]

Colonias can and should intervene in the rulemaking and ratemaking processes at the Commission. The primary obstacle is simply access to legal counsel, who often represent clients before the Commission. Thus, as discussed below, a law clinic can easily remedy this issue and amplify diverse voices in regulatory proceedings.

B. Land Title Issues and Water Security in Colonias

Colonias often comprise of land buyers who receive the right to their home through an installment land contract.[239] While there is no precise definition of an installment land contract, the Restatement (Third) of Property: Mortgages defines it as "a contract for the purchase and sale of real estate under which the purchaser acquires the immediate right to possession . . . and the vendor defers delivery of a deed until a later time to secure all or part of the purchase price."[240] Despite the flexibility of installment land contracts for developers and landowners, the limited rights they convey to land buyers are ambiguous and incomplete, often tantamount to a form of a lease.[241] Since many residents of colonias may have uncertain citizenship status and work in transient professions,[242] colonias remain subject to uncertain regulations and dubious enforcement of contractual promises. Officially, installment land contracts are not rerated as mortgages but, at the same time, the title holder is under an obligation to pay back the financing as a mortgage.[243] There remains uncertainty over the legal protections of installment land contracts.[244] For example, impoverished colonias residents, who are primarily Hispanic

238. *Id.* at 428.

239. *See* Elizabeth M. Provencio, *Moving from Colonias to Comunidades: A Proposal for New Mexico To Revisit the Installment Land Contract Debate*, 3 MICH. J. RACE & L. 283, 285–88 (1997) (detailing the use of installment land contracts in colonias in New Mexico); *see also id.* at 285 n.7 (citing Nancy L. Simmons, *Memories and Miracles—Housing the Rural Poor Along the United States-Mexico Border: A Comparative Discussion of Colonia Formation and Remediation in El Paso County, Texas, and Doña Ana County, New Mexico*, 27 N.M. L. REV. 33, 70 (1997)).

240. Grant S. Nelson, *The Contract for Deed as a Mortgage: The Case for the Restatement Approach*, 1998 BYU L. REV. 1111, 1112 (1998) (quoting the RESTATEMENT (THIRD) OF PROPERTY: MORTGAGES § 3.4(a) (1997)).

241. Provencio, *supra* note 239239, at 286 nn.9–10.

242. *See id.* at 284 n.3.

243. *See id.* at 285 n.8.

244. *Id.*

and may have little knowledge of the intricacies of housing finance, are made deceptive promises by sellers that are never fulfilled, such as those pertaining to the supply of water.[245]

Perhaps buyers of these land installment contracts can challenge them in court, and it is possible the plaintiffs could prevail, but there are two challenges. First, colonias residents will need to retain legal counsel willing to help them for potentially little to no compensation or governmental assistance.[246] Second, the legal counsel will need to advance their arguments under a contractual theory of unconscionability, which depends on a court's willingness to rely on the doctrine in this unique circumstance.[247] One other issue is the way these deeds are made and recorded. These promises are often on an informal sheet of paper,[248] lacking recordation,[249] or made orally and never on paper. Thus, many buyers have little or no recourse if they face eviction.[250] None of these disparities are ameliorated by federal law, which forbids the disbursement of funds if the locality has not implemented rules prohibiting the future construction of colonias or does not require the provision of water and wastewater supplies.[251] Even more, attacking colonias developers is extremely difficult since many of them are also elected officials in rural counties near the border, which only perpetuates the issues faced by colonias, especially in enforcing the existing laws.[252] In most land installment contracts, the forfeiture clause also removes some of the protections of a foreclosure proceeding and thus jeopardizes the housing stability of the distressed contract buyer.[253] In Arizona, for example, a purchaser's interest

245. Megan S. Wright, *Installment Housing Contracts: Presumptively Unconscionable*, 18 BERKELEY J. AFR.-AM. L. & POL'Y 97, 120–22 (2016) (detailing the legal possibility of challenging installment housing contracts under the contractual theory of the doctrine of unconscionability).

246. *See id.* at 122 n.156 ("[O]ne way to remove barriers to litigation for low-income persons is to implement the suggestion that attorneys' fees be awarded to the prevailing party upon a finding of unconscionability.").

247. *Id.* at 127 (asserting that courts have failed to properly apply the doctrine of unconscionability).

248. Provencio, *supra* note 239239, at 284 ("New Mexico's burgeoning class of landowners living in colonias often holds nothing more than a scrap of paper as evidence of ownership.").

249. Wright, *supra* note 245, at 121.

250. *See id.* at 121 n.149 (providing examples of exploitative seller behaviors in the absence of a recorded contract).

251. *See* Consolidated Appropriations Act, 2021, Pub. L. No. 116-260, 134 Stat. 1182, 1512 (2020). See (2) under the "State and Tribal Assistance Grants" section.

252. *See* Joann Matthiesen, *What Now for the Texas Colonias?*, 27 N.M. L. REV. 1, 12–14 (1997) (discussing the challenges for prosecutors when dealing with entrenched local officials who perpetuate poor colonias conditions).

253. Wright, *supra* note 245245, at 117–18.

in a land installment contract is subject to forfeiture under certain conditions.[254]

Furthermore, in Arizona, this informal contractual arrangement could impact a colonia's ability to obtain water rights under the groundwater code. Colonias already struggle with access to stable water supplies, and the ability of colonias to obtain permits to drill for water wells in counties within and outside AMAs could be jeopardized due to the use of installment contracts. The code requires that, even outside AMAs, drillers and drilled wells, along with their locations, must be registered with the Arizona Department of Water Resources, and the water must be used "for reasonable and beneficial use."[255] Lastly, water availability for colonias could also be impacted by interstate water management conflicts due to the Supreme Court's decision in *Sporhase v. Nebraska*.[256] There, colonias at the outskirts of El Paso County, Texas had to reconsider their sources of water in light of the failure to gain water supplies on the Rio Grande River.[257]

One case from Texas, *Flores v. Millennium Interests, Ltd.*, illustrates a common situation surrounding property law claims from residents of colonias. Dissatisfied with the remedies, or lack thereof, under Texas state law for the defendant seller's failure to send complete statements for their installment land contracts, two couples sued the seller and loan servicer in U.S. District Court for the Southern District of Texas under the federal Fair Debt Collection Practices Act.[258] The district court held in favor of the servicer and the seller under both state and federal claims since the plaintiffs failed to show "actual injury" from the error in the incomplete data on the loan's monthly statements.[259] The plaintiffs subsequently appealed to the U.S. Court of Appeals for the Fifth Circuit, which then certified questions to the Supreme Court of Texas regarding whether the defendants needed to strictly comply with Texas state law regarding the omissions of statutorily

254. *See* ARIZ. REV. STAT. § 33-742 (2022).

255. §§ 45-453, -593; *see also id.* § 45-834.01.

256. *See* A. Dan Tarlock & Darcy Alan Frownfelter, *State Groundwater Sovereignty After* Sporhase: *The Case of the Hueco Bolson*, 43 OKLA. L. REV. 27, 35–41 (1990) (detailing how *Sporhase*'s holding that groundwater is an article of interstate commerce could impact colonias, such as in El Paso, Texas).

257. *See id.*

258. Flores v. Millennium Ints., Ltd., 273 F. Supp. 2d 899, 901 (S.D. Tex. 2003), *aff'd*, 464 F.3d 521 (5th Cir. 2006).

259. *Id.* at 901–02.

required data and the level of harm the plaintiffs must prove to recover damages.[260]

The Supreme Court of Texas answered that the statute did not require strict compliance with state law, and thus the defendants did not violate state law and the plaintiffs were not entitled to damages.[261] In concurrence, Justice Wainwright examined further the legislative history surrounding efforts to stop "abuses in the acquisition of homes in the colonias."[262] Nonetheless, he concurred in the judgment so as not to punish "good faith efforts of sellers to comply."[263] The dissent disputed the lackadaisical statutory interpretation by the Court and argued that it disregarded the legislature's intent by interpreting the compliance requirement to mean something less, thus favoring colonias developers and sellers.[264] Based on these answers, the appeals court affirmed the district court's summary judgment in favor of Millennium Interests, Ltd.[265]

There remain questions about obstacles to achieving better water quality and supplies in colonias. For example, under Arizona's bifurcated water rights regime, the subflow, or the waters which are disputed as part of either the groundwater regime or the surface water regime, creates a highly litigious issue.[266] Culminating in a multi-part series of litigation in the Gila River General Stream Adjudication (GSA), the Arizona Supreme Court defined a test to determine whether subflow was within the "saturated floodplain Holocene alluvium."[267] The Court elaborated that all wells located outside the saturated floodplain Holocene alluvium were not subject to the GSA, but if the cone of depression from pumping reaches a subflow zone and thereby

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260. Flores v. Millennium Ints., Ltd., 390 F.3d 374, 376–77 (5th Cir. 2004), *certified questions accepted* (Dec. 3, 2004), *certified questions answered*, Flores v. Millennium Ints., Ltd., 185 S.W.3d 427, 427 (Tex. 2005).

261. *Flores*, 185 S.W.3d at 430–34 (examining the Texas Legislature's amendments to TEX. PROP. CODE § 5.077(b) and holding the standard of statement deficiency must "be something other than a good faith attempt by the seller to inform the purchaser . . . of their contractual relationship").

262. *See id.* at 434–35 (Wainwright, J., concurring) (delineating installment land contracts from mortgages in the legal title and discussing the lack of remedies for deceiving claims, but discussing the statute's deafening silence on penalty limits).

263. *Id.* at 435.

264. *See id.* at 437–39 (Brister, J., dissenting).

265. Flores v. Millennium Ints., Ltd., 464 F.3d 521, 524 (5th Cir. 2006) (per curiam) (affirming that the statutory text only requires compliance by a good-faith effort, not strict compliance with the statement requirements for land installment contracts).

266. Larson & Payne, *supra* note 102, at 480 n.117 (citing the *Gila II* decision regarding subflow).

267. *Id.* at 480–81 nn.122–25.

impacts the availability of surface water to senior priority rights holder, the well would be included in the GSA.[268]

Ultimately, colonias may find themselves engaged in water rights conflicts if they unknowingly drill wells near someone else's cone of depression from a well that entails a subflow zone, even if the well itself lies outside the boundaries of a subflow zone. This could become an issue in Cochise County in southern Arizona, near the San Pedro National Conservation Area, for example, where litigation concerns nearby developers who want to build homes near an area with federally reserved water rights under *Winters*.[269] In addition, colonias may face well-siting and compliance issues related to the cone of depression, since it is a complex hydrological and water law topic that may be unbeknownst to the residents of colonias.

The uncertainty surrounding the legal jurisdiction of federal super-statutes, such as the Clean Water Act and the Safe Drinking Water Act, also create legal quandaries for colonias attempting to faithfully comply with the law. For example, the Supreme Court is constantly re-evaluating the definition of "waters of the United States," and the Executive Branch is constantly changing the definition through the administrative rulemaking process. In 2022, the Supreme Court voted to stay a lower court decision which vacated the Trump Administration's Clean Water Act rule, thus restoring the Trump-era rule until the EPA promulgates a new one.[270] Also in 2022, the Supreme Court announced they will again hear an appeal from the U.S. Court of Appeals for the Ninth Circuit regarding *Rapanos*' jurisdictional question regarding what a "water of the United States" is.[271]

Colonias residents have found adaptive management solutions to the obstacles they face each day, some of which are extra-legal. Residents, for example, have created informal partnerships with local employers and engage in a symbiotic relationship to maintain the communities.[272] Residents have also begun to install their own sewage systems, since they often cannot afford

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268. *See id.*

269. *See id.* at 480–81 nn.120–22 (citing *Gila III*, which held that *Winters v. United States* extends to state groundwater rights). Additionally, colonias within the Tohono O'odham Nation are subject to federally reserved Winters rights for their groundwater. *See generally* Agua Caliente Band of Cahuilla Indians v. Coachella Valley Water District, 849 F. 3d 1262, 1265 (9th Cir. 2017).

270. Louisiana v. Am. Rivers, 142 S. Ct. 1347, 1347 (2022) (mem.) (staying a lower court decision which vacated the past CWA § 401 guidance on discharge certifications).

271. Sackett v. U.S. Env't Prot. Agency, 8 F.4th 1075, 1075 (9th Cir. 2021), *cert. granted in part sub nom*. Sackett v. Env't Prot. Agency, 142 S. Ct. 896 (2022).

272. *See* Jones, *supra* note 1 (citing the Rillito Colonia's relationship with CalPortland Cement through donations of children's goods and supplies for community projects).

professionally installed systems.[273] But doing this causes significant water quality concerns, and sometimes untrained individuals put their sewage systems near where drinking water is stored, causing a public health crisis, including higher rates of hepatitis A.[274] Even building a well can be too costly, so families often purchase hundreds of water bottles at a time for drinking water and use unpotable well water to clean themselves.[275] Grassroots organizations, operating as governing entities outside the regulation of state law, empower families to gain resources and education for themselves, including getting medical care from local medical schools and associations.[276]

Upon an examination of narratives of people who live in colonias, there is a pattern of residents who enjoy living there while simultaneously acknowledging the struggles of living in an informal, extra-legal community. Colonias represent an entire "informal economy," where government exercises little regulation or authority, and thus residents are left to fend for themselves in many aspects of life.[277] This informality leads to illegality as a response from government officials; thus, in Texas, for example, the 1995 subdivision law amendments, which include new reporting requirements and rudimentary infrastructure requirements, effectively disincentivized buyers from constructing new colonias.[278] At the same time, the availability of colonias has incidentally increased home ownership for colonias households.[279] Yet, this increased home ownership is possible because developers and sellers can escape almost all regulation and neglect to install basic necessities for a household. Even the title on a household in a colonia offers less protections to buyers than does a typical home. While informality

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273. *See* Meredith Hoffman, *Inside Las Colonias, the Texas Border Towns Without Electricity or Running Water*, VICE (Nov. 18, 2015, 7:00 PM), https://www.vice.com/en/article/8gkpd4/inside-colonias-the-texas-border-towns-without-electricity-or-running-water (describing the issues with self-installed sewage systems) [https://perma.cc/E7WR-MAF3].

274. *Id.*

275. *See* Maria Esquinca & Andrea Jaramillo, *Colonias on the Border Struggle with Decades-Old Water Issues*, NEWS21 (Aug. 14, 2017), https://troubledwater.news21.com/colonias-on-the-border-struggle-with-decades-old-water-issues [https://perma.cc/3HDT-6EWN].

276. *See* Jordana Barton et al., *Las Colonias in the 21st Century*, FED. RESERVE BANK OF DALLAS 18 (Apr. 2015), https://www.dallasfed.org/~/media/documents/cd/pubs/lascolonias.pdf [https://perma.cc/RCY7-QW6B].

277. Jane E. Larson, *Informality, Illegality, and Inequality*, 20 YALE L. & POL'Y REV. 137, 141–44 (2002) (describing a cycle that perpetuates lack of water infrastructure in colonias).

278. *Id.* at 147 (describing trends after the Texas legislature amended the county subdivision statutes).

279. *Id.* at 151 nn.70–72.

can be an advantage, especially to a primarily working-class, immigrant community looking to perhaps purchase their first property, there remains a need for some regulation.[280]

III. COMPARATIVE APPROACH TO REFORM IN COLONIAS' WATER POLICY

One of the greatest challenges facing federal programs, whether it be EPA's internal programs or a congressionally authorized program, is the will of the political branches each fiscal year. Congress must appropriate the funds each year for federal programs. But infrastructure funding at the border can be intertwined with immigration politics, even though the two are not directly connected, thus leading elected officials to play political games with funding for crucial necessities for impoverished communities. The Trump Administration's proposed budgets, for example, zeroed out completely funds for the EPA Border Water Infrastructure Program.[281] Thus, perhaps deference to experts at agencies would be ideal for solving issues in colonias, since these communities face myriad issues, including civil rights and economic disparities.

However, the U.S. Supreme Court has become highly suspect of deference to executive branch agencies when interpreting the law. First, questions of law—particularly questions of the agency's own interpretation of its enabling constitutional provisions and statutes—are reviewed under *Chevron* deference, which was devised by the U.S. Supreme Court to give generally broad deference to an agency's interpretation when those provisions are ambiguous.[282] One of the touchstones of administrative law is the *Chevron* "two-step," which reviewing courts use when interpreting a statutory delegation of power to a federal administrative agency. The first question is "whether Congress has directly spoken to the precise question at issue."[283] If Congress spoke clearly when enacting the statute, the agency and the court "must give effect to the unambiguously expressed intent of Congress."[284] However, if the statute "is silent or ambiguous with respect to the specific issue," then the reviewing court "does not simply impose its own construction," but rather determines whether "the agency's answer is based on a permissible construction."[285] After the *Chevron* two-step, courts will then determine whether the agency action was "arbitrary and capricious," and

280. *See id.* at 161–62 nn.119–22.
281. *FY 2021 EPA Budget in Brief*, *supra* note 43.
282. Chevron, U.S.A., Inc. v. Nat. Res. Def. Council, Inc., 467 U.S. 837, 862 (1984).
283. *Id.* at 842.
284. *Id.* at 842–43.
285. *Id.* at 843.

if so, the reviewing court may reverse and remand the action to the agency with the court's directions.[286]

Recently, Justices on the U.S. Supreme Court indicated their dissatisfaction with the Court's agency deference jurisprudence. In 2019, the Court considered a case regarding a delegation of power to the attorney general and the Department of Justice.[287] A plurality deferred to the attorney general's interpretation and upheld the delegation.[288] However, the remaining three justices, with one noting a strong distaste in concurrence, signaled their interest in reviving the nondelegation doctrine—the pre-1935 legal theory that Congress strictly cannot delegate its legislative authority to an executive agency.[289] Currently, the "intelligible principle" test allows Congress to delegate a degree of its legislative power to agencies, but only when it does so within the bounds of the Constitution.[290] Some scholars proceeded to call the new standard "the Gorsuch test," where Congress could delegate power "(1) to 'fill up the details'; (2) to make the application of a rule dependent on certain executive fact-finding; or (3) to assign non-legislative responsibilities to either the judicial or executive branch."[291]

The Supreme Court's recent decision in a case concerning the EPA's authority to regulate greenhouse cases under the Clean Air Act[292] has reaffirmed a new trend against carte blanche agency deference. The Court's holding in *West Virginia v. Environmental Protection Agency* suggests that agencies should anticipate "hard look" review when engaging in rulemaking and ensure the proposed rule comports with the authority conferred from the plain text of the statute.[293] The "major questions doctrine" henceforth should be understood to prevent agencies from broadly or generously interpreting

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286. *Id.* at 844.

287. Gundy v. United States, 139 S. Ct. 2116, 2116 (2019).

288. *Id.*

289. *See id.* at 2130–48.

290. *See, e.g.*, A.L.A. Schechter Poultry Corp. v. United States, 295 U.S. 495, 551 (1935).

291. Johnathan Hal, *The Gorsuch Test:* Gundy v. United States*, Limiting the Administrative State, and the Future of Nondelegation*, 70 DUKE L.J. 175, 177 (2020); *see Gundy*, 139 S. Ct. at 2131, 2136–37 (Gorsuch, J., dissenting).

292 W. Virginia v. EPA, 142 S. Ct. 2587 (2022) (holding that Congress did not grant the EPA the authority to promulgate President Obama's "Clean Power Plan," and defining the "major questions doctrine" pronounced in *FDA v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120, 159 (2000) (suggesting that questions of "economic or political significance" are precluded from agency rulemaking, absent an explicit conferral of authority)).

293. *Id.* at 2614.

their delegated authority[294], and rather interested parties should instead seek explicit legislative authorizations (which mostly exist for colonias[295]).

Thus, looking to Congress itself may prove most resilient to the cycle of Executive Branch rulemaking and subsequent judicial review. One member of Congress who represents colonias, Congresswoman Veronica Escobar, has proposed a bill, H.R. 3238, that would amend the Safe Drinking Water Act's colonias provision to, among other things, re-authorize the colonias grant program, since funding had previously lapsed, with $100 million of funding through fiscal year 2026.[296] It would also allow local jurisdictions to bypass the state government and directly apply for funding from the federal government.[297] Lastly, the bill would require the Department of Transportation to establish a colonias repair grant program for infrastructure in colonias.[298] Congresswoman Escobar also announced funding for water and wastewater projects in colonias in the 2022 appropriations package for environmental agencies.[299]

Local institutions perhaps will play the most crucial role in the governance of the natural resources in colonias. If they are not properly funded or supported through legislation giving them regulatory or enforcement authority, these institutions will falter.[300] State legislatures should support funding for water-based agencies, like the Arizona Department of Water Resources and other state environmental regulatory agencies, to support increased hiring, technology, enforcement, and responsiveness to local communities. Looking at other state programs, it likely would help if all legislatures began to formalize their relationships with colonias and empower them to prosper just as they are. While Texas and New Mexico have codified varying forms of self-help for colonias, Arizona and California are lacking as

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294. *Id.* at 2618-23 (Gorsuch, J., concurring) (spelling out when Congress has clearly delegated agency authority).

295. *See supra* Section I.A.

296. Colonias Infrastructure Improvement Act of 2021, H.R. 3238, 117th Cong. § 2 (2021).

297. *Id.* § 4.

298. *Id.*

299. *See* Press Release, Veronica Escobar, U.S. Congresswoman, Congresswoman Escobar Secures $1.1 Million in Funding for Critical Water Infrastructure in El Paso Colonias (Jul. 15, 2021), https://escobar.house.gov/news/documentsingle.aspx?DocumentID=729 [https://perma.cc/UR5Z-GMNU].

300. *See* Larson, *supra* note 98, at 959–60 (arguing for federalism in local interstitial institutions to improve adaptive management and avoid regulatory morass). *But see* Rena I. Steinzor, *Unfunded Environmental Mandates and the "New (New) Federalism": Devolution, Revolution, or Reform?*, 81 MINN. L. REV. 97, 220–26 (1996) (arguing that the devolution of regulation to state agencies under SDWA has failed local communities and perpetuates inequities in water quality enforcement).

neither have legally recognized the status of colonias as communities requiring different policy solutions.[301] New Mexico's allowance of colonias to make contracts to find their own legal counsel is particularly important for litigation. Texas' explicit legislation around devolving decision-making to the colonias themselves is sullied, though, by the local behaviors of developers who find every way possible to evade regulation and rules. Effective policymaking can balance the interests between self-help and safety.

Multiple Arizona state programs can also be adapted to assist colonias. For instance, the Groundwater Management Act's adequate water supply program could be amended or adapted via rulemaking to accommodate the special circumstances of colonias. That may first require the political branches to become of one mind regarding the state's public policy towards colonias; however, the Assured Water Supply program should be amended to require more transparency and reporting for land sellers when engaging in transactions with potential buyers about the lack of water supply in colonias. Towards subdivision regulations,[302] the legislature has two options. First, it can adopt California's regulation-heavy approach which has effectively prohibited the outgrowth of any colonias, but which exacerbates issues for existing colonias and prevents other impoverished Hispanics from being able to own property. Second, the legislature can take New Mexico's and Texas' approach to subdivision regulation, which now precludes the growth of many colonias, but whose other statutes recognize colonia self-help to facilitate the transfer of resources. The Arizona Water Infrastructure Financing Authority, in addition to the Clean Water Revolving Fund, is also an area ripe for reform, and it could prove helpful as a local institution that can approve funding for colonias infrastructure projects. On the other hand, the legislature approves funds and establishes the criteria for financing from that agency, so it could be an unstable funding source subject to political will.[303]

Elected leaders have recently demonstrated a heightened concern for the growing scarcity of water in the western United States. For example, after Arizona Governor Doug Ducey announced his interest in creating a state agency to manage the state's water rights and supply, the legislature re-fashioned an existing agency, the Water Infrastructure Finance Authority.[304] In addition to a $1 billion budget appropriation over three years, the

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301. *See supra* Sections aa.2–3.

302. *See supra* Section II.C.

303. In 2022, Governor Ducey approved H.R. 2057, 55th Leg., 2nd Reg. Sess. (Ariz. 2022), which allows WIFA to consult in the planning of projects and increases the loan cap amount, among other loan administration issues.

304. 2022 Ariz. Legis. Serv. Ch. 366 (S.B. 1740) (West).

legislature created a nine-member, bipartisan board to hear matters relating to acquisition and sale of water resources as well as providing financing for new water-related projects.[305] The law also creates a Federal Water Programs Committee to advise the Authority's board on applications for funds from the Clean Water Revolving Funds Program, with seats allotted from individuals from DWIDs.[306] One of the most significant water governance reforms in Arizona since 1980, WIFA is an innovative method to allocate funds to water infrastructure in colonias and may be instrumental in financing new water rights and projects across Arizona.

Land installment contracts and property financing in colonias could be fixed with one reform: adopting the Restatement's approach to land installment contracts.[307] This would simply treat them as mortgages, thereby giving contract buyers more protections than do other existing remedies. Initiating litigation on the doctrine of unconscionability also could prove helpful in changing the law if legislatures are unresponsive.[308] Mandatory purchase counseling with a program compliant with the rules under Dodd-Frank could substantially improve the circumstances of buyers in colonias.[309] Community outreach campaigns may also be helpful, especially if they are culturally-appropriate in the applicable language.[310] Lastly, legislatures could create an implied warranty of habitability, but for installment land contracts, such as a "warranty of quality."[311]

A law school law clinic aimed at assisting colonias with legal issues would be an enriching, immersive experience for faculty, law students, and colonias community members alike. Colonias also face many issues merely because they lack access to counsel, so this effort would be tremendously helpful in avoiding legal turmoil. For example, a law clinic could assist in educating community members about land installment contracts and remedies for poor conditions or deceiving promises. Clinicians could also work with community members in compliance with the Clean Water Act, where

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305. *Id.* (*enacting* A.R.S. § 49-1206).

306. *Id.* (*enacting* A.R.S. § 49-1207).

307. *See* Provencio, *supra* note 239, at 299 nn.79–80, 303 n.95.

308. *See* Wright, *supra* note 245, at 127 n.191.

309. Caelin Moriarity Miltko, *"What Shall I Give My Children?": Installment Land Contracts, Homeownership, and the Unexamined Costs of the American Dream*, 87 U. CHI. L. REV. 2273, 2313–14 nn.244–46 (2020) (detailing CFPB regulations on purchase counseling to prevent predatory transactions); *see* Dodd-Frank Wall Street Reform and Consumer Protection Act, Pub. L. No. 11-203, § 1442, 124 Stat. 2163 (2010).

310. *See* Provencio, *supra* note 239239, at 303 n.96.

311. Milkto, *supra* note 309309, at 2317.

applicable, and the Safe Drinking Water Act, which could include initiating citizen suits.[312]

The clinic could also advise colonias about election law issues and solutions, which could include self-organizing as improvement districts under the respective state laws and subsequently organizing the communities for this effort. This could involve educating the community about lobbying their county board of supervisors to form a district, gathering signatures, and subsequently defending themselves from possible legal attacks. A law clinic would generally be an excellent way for students to educate and help counsel colonias residents who need help with important tasks, like understanding their land contract. A law clinic could also help the colonias as a whole with completing complex paperwork, guiding them through administrative processes with government agencies, and assisting them in obtaining state and federal funding for projects. A clinic may also be crucial in helping colonias understand their legal responsibilities for well drilling and water rights issues and could perhaps represent colonias in adjudicatory proceedings. A law school clinic would be instrumental in uniting lawyers and the community for the common good.

IV. CONCLUSION

Evaluating the legal challenges facing the water security of colonias requires looking at both legal and extra-legal approaches, in addition to a wide array of state and federal statutes, regulations, and guidance. First, each state has adopted different approaches to land use and zoning, creating opportunities for creative adaptation for local colonias with a backdrop of federal regulation of safe drinking water and wastewater regulations and programs. Second, there are advantages and disadvantages to each approach that require a fair balancing of the interests of the colonias residents and their autonomy with the public safety risk and lack of recourse for colonias. Thereafter, there are other areas of law which will be crucial in assisting colonias attain water security: election law and property law, both of which require a deeper dive to understand how colonias are impacted.

A legal aid clinic held within a law school environment would be instrumental in uniting members of the community and across academic disciplines. It would also be an immersive, exciting experience for law students to work directly with communities. Not only would students gain experience navigating complex government agencies and rulemaking procedures, but they may also assist in hands-on legal work through

312. *See* 42 U.S.C. § 300j-8.

counseling, litigation, and other skills that every lawyer needs. A legal aid clinic can also bring in election professionals, land use experts, and other water scholars to help the residents of colonias improve their quality of life.