2022

Never Look Back: Non-Regression in Environmental Law

Nicholas S. Bryner

NEVER LOOK BACK: NON-REGRESSION IN ENVIRONMENTAL LAW

Nicholas S. Bryner*

ABSTRACT

Deregulatory advocates often frame environmental protection and economic well-being as a zero-sum tradeoff. During times of economic crisis, including the long-term fallout from the global covid-19 pandemic, policymakers may seek to withdraw or roll back environmental laws and regulations in an attempt to accelerate economic recovery. In order to safeguard the interests of vulnerable populations that suffer from pollution and other environmental harms, it is imperative to retain environmental regulations, removing or relaxing them only when there is a clear justification for doing so.

Built in environmental legal frameworks in both international and domestic law is a principle of non-regression—no walking back environmental law, regulation, or protection once put in place. Governments and institutions at all levels ought to apply this principle in designing and implementing environmental governance, and judges, in their role of interpreting and applying the law, ought to incorporate the principle in their decisions and ensure the progressive realization of rights guaranteed by environmental law.

This Article brings together a variety of expressions of the principle of non-regression in international treaties, trade agreements, declarations, and in domestic constitutions, statutes, and administrative law—within and outside the United States. Greater recognition of how this principle has worked in practice may be helpful in promoting the notion that, so long as environmental degradation continues to occur and threaten human well-being, environmental standards must continue to move forward, and never look back.

INTRODUCTION

The covid-19 pandemic presents a grave threat to the environmental rule of law.[1] While the pandemic itself is not the primary cause of social inequities or

* Associate Professor of Law; John P. Laborde Endowed Professorship in Energy Law, Louisiana State University Paul M. Hebert Law Center. Thank you to those who provided helpful comments and feedback on drafts of this work, including the participants in the Environmental Law Scholars' Online Workshop hosted by Michael Pappas of the University of Maryland Francis King Carey School of Law. Thanks also to Alejandra Rabasa of the Center for Constitutional Studies (CEC) at the Supreme Court of Mexico for hosting a lecture I gave on this topic in June 2020; comments and questions from that event were helpful in refining my thinking. Finally, thanks go to Justice Antonio Herman Benjamin for inspiring me to look into this topic, which I first saw expressed in the jurisprudence of the National High Court of Brazil (*Superior Tribunal de Justiça*).

[1] The International Union for Conservation of Nature's (IUCN) World Declaration on the Environmental Rule of Law contains the following definition: "The environmental rule of law is understood as the legal framework of procedural and substantive rights and obligations that incorporates the principles of ecologically sustainable development in the rule of law. Strengthening the environmental rule of law is the key to protection, conservation, and restoration of environmental integrity. Without it, environmental governance and the enforcement of rights

environmental crises, it has exposed and exacerbated previously existing racial, gender, and class-based injustices.[2]

As the initial social and governmental response to the pandemic led to economic paralysis in the first several months of 2020, researchers noted some temporary reductions in the level of air pollution that coincided with the pause in industrial activities and decrease in vehicle transportation.[3] Lower air pollution emissions make a significant difference for public health; in addition to the estimated millions of premature deaths worldwide due to air pollution each year, some preliminary evidence suggests that pollution contributes to a higher risk of serious complications for patients diagnosed with covid-19.[4]

These reductions in pollution and consumption, however, have been temporary, at best, and do not reflect intentional, lasting structural changes in energy systems, industrial activity, social and economic behavior, or policy.[5] The consequences of the coronavirus and the halting, insufficient, and inconsistent management of the public health crisis in most of the world have been devastating: millions of illnesses, serious disabilities, and deaths from covid-19; [6] countless negative mental health impacts; widespread loss of employment and economic security;[7] and socioeconomic upheaval.[8]

---

and obligations may be arbitrary, subjective, and unpredictable[.]" IUCN World Congress on Environmental Law, *IUCN World Declaration on the Environmental Rule of Law* (2017), *available at* https://www.iucn.org/sites/dev/files/content/documents/english_world_declaration_on_the_environmental_rule_of_law_final.pdf. The author of this article participated in the drafting committee that prepared the declaration.

[2] *See, e.g.*, Max Fisher & Emma Bubola, *As Coronavirus Deepens Inequality, Inequality Worsens Its Spread*, N.Y. TIMES, Mar. 15, 2020, https://www.nytimes.com/2020/03/15/world/europe/coronavirus-inequality.html.

[3] For example, in China, nitrogen oxide emissions fell sharply in March 2020. *See, e.g.*, Jonathan Watts & Niko Kommenda, *Coronavirus Pandemic Leading to Huge Drop in Air Pollution*, THE GUARDIAN, Mar. 23, 2020, https://www.theguardian.com/environment/2020/mar/23/coronavirus-pandemic-leading-to-huge-drop-in-air-pollution.

[4] Alastair Lewis, *What we do and don't know about the links between air pollution and coronavirus*, THE CONVERSATION, May 12, 2020, https://theconversation.com/what-we-do-and-dont-know-about-the-links-between-air-pollution-and-coronavirus-137746.

[5] In April 2020, due to economic closure, daily global emissions of carbon dioxide decreased by roughly 17% compared to 2019 averages. *See* Corinne Le Quéré et al., *Temporary reduction in daily global CO_2 emissions during the COVID-19 forced confinement*, 10 NATURE CLIMATE CHANGE 647 (2020), https://doi.org/10.1038/s41558-020-0797-x. However, the study indicates that these reductions appears temporary, noting forecasts that emissions will rebound, as has occurred with economic crises in the past. *Id.* at 647-48, 651-52.

[6] Johns Hopkins University maintains data, updated daily, on the global number of diagnosed covid-19 cases and related deaths. Johns Hopkins University, *Coronavirus Resource Center*, https://coronavirus.jhu.edu/map.html (last visited Feb 27, 2021).

[7] Kim Parker, Rachel Minkin, & Jesse Bennett, *Economic Fallout From COVID-19 Continues to Hit Lower-Income Americans the Hardest*, Pew Research Center (Sept. 24, 2020), https://www.pewresearch.org/social-trends/2020/09/24/economic-fallout-from-covid-19-continues-to-hit-lower-income-americans-the-hardest/#:~:text=Fully%2015%25%20of%20adults%20report,they%20are%20currently%20not%20employed.

[8] *See, e.g.*, Nelson D. Schwartz, *They Were on Equal Footing. Then the Ground Shifted*, N.Y. Times, Feb. 27, 2021, https://www.nytimes.com/2021/02/27/business/economy/unequal-

Furthermore, in the short to medium term, the policy response to the coronavirus pandemic and the too-early, too-ambitious resumption of economic activity carry with them the temptation to relax social and environmental laws and regulations under the guise of accelerating economic recovery. In moving toward eventual long-term management of the pandemic and a "full" reopening after successive waves of infection, the time has never been more important to emphasize an emerging principle of human rights law and environmental governance: the principle of non-regression.

In the midst of deepening environmental crises—including anthropogenic climate change,[9] biodiversity loss and extinctions,[10] and impacts on human health from environmental pollution and degradation—it is imperative to retain a guiding principle[11] that, absent special circumstances, legal protection of the environment must not be removed or reduced once it has been put in place.[12] Governments and institutions at all levels ought to apply this principle—no regression, backsliding, or walking back environmental protection—in designing and implementing environmental governance. Judges, in their role of interpreting and applying the law, ought to incorporate the principle of non-regression in their decisions in order to ensure the fulfillment of rights guaranteed by environmental law.

This principle of non-regression dovetails with the mandate toward progressive realization of human rights.[13] In jurisdictions that recognize a

---

economic-recovery.html (chronicling anecdotal experiences of unequal economic experiences during the pandemic); Catarina Saraiva, *How a 'K-Shaped' Recovery is Widening U.S. Inequality*, Wash. Post, Dec. 16, 2020, https://www.washingtonpost.com/business/how-a-k-shaped-recovery-is-widening-us-inequality/2020/12/10/baa6bc08-3aad-11eb-aad9-8959227280c4_story.html (describing asymmetry between workers who have lost jobs and wealthy Americans who made major gains in the stock market in 2020).

[9] *See generally* Intergovernmental Panel on Climate Change (IPCC), *Special Report: Global Warming of 1.5°C* (2019), *available at* https://www.ipcc.ch/sr15/.

[10] *See generally* Intergovernmental Science-Policy Platform on Biodiversity and Ecosystem Services (IPBES), *Summary for Policymakers of the Global Assessment Report on Biodiversity and Ecosystem Services* (2019), *available at* https://ipbes.net/global-assessment.

[11] In this work, I generally refer to "principles" in Dworkin's sense, distinguishing between legal principles and legal rules. According to Dworkin, both principles and rules

> point to particular decisions about legal obligation in particular circumstances, but the differ in the character of the direction they give. Rules are applicable in all-or-nothing fashion . . . [while principles state] a reason that argues in one direction, but does not necessitate a particular decision. . . . [W]hen we say that a particular principle is a principle of our law, [we mean] that the principle is one which officials must take into account, if it is relevant, as a consideration inclining in one direction or another.

Ronald Dworkin, *The Model of Rules*, 35 U. CHI. L. REV. 14, 25-26 (1967).

[12] To note, in this Article, when referring to the non-regression principle, I mean the idea that governments and other institutions must not reduce *the level of protection afforded by laws, regulations, and standards*. This is in contrast to the idea of non-degradation policies, which are that environmental quality (or the condition of a specific ecosystem, species, or landscape) ought not be reduced. A *legal* non-regression principle may support non-degradation in some areas. The concepts are complementary, but in discussing non-regression, the focus here is on law and policy, as opposed to a scientific or ecological measurement.

[13] *See infra* Part I.A.

constitutional human right to a healthy environment,[14] application of the non-regression principle is one demonstration of how that right can lead to specific, concrete outcomes in legislative, executive, and judicial decisionmaking. Of course, principles of law are not absolute, and environmental law, policy, and rights must coexist with other legitimate rights, guarantees, and interests. It is therefore important to explore the limits of the non-regression principle and its relationship with other areas and objectives in the law.

The non-regression principle I am articulating here is not merely aspirational. International treaties, trade agreements, and declarations explicitly include it, prohibiting backsliding in the level of environmental protection.[15] Constitutions and national-level statutes require it.[16] Given our ever-evolving scientific understanding of the world and the interdependence of human life and the ecosystems that surround us, we have greater reason to pursue stronger environmental laws and regulations today than we did in 1992 when the Rio Summit took place or in 1972 when the United Nations first held a major international environmental conference.

The purpose of this Article is to bring all of these expressions of the non-regression principle in environmental law together, with the intent that greater recognition and understanding of the concept will lead to greater respect for the idea in global and local decisionmaking. While environmental degradation continues to threaten quality of life and the quality of the environment for ourselves and future generations, it is imperative, at a minimum, that environmental law move forward as a response, rather than backward.

This Article proceeds in four parts. First, it sets out an introduction and definition of non-regression in environmental law, identifying the legal foundations for this principle in human rights law. Second, the Article discusses examples of the principle's application in international and comparative law: examples in which international and domestic law constrain governments' ability to walk back environmental protections. Third, the Article turns to non-regression in U.S. environmental law. Although the United States does not guarantee a constitutional right to environmental protection, the core environmental statutes create progressive obligations, pushing toward ever-tighter standards over time and either prohibiting or erecting barriers against regression of those standards. These anti-backsliding provisions are bolstered by administrative law doctrine that requires reasoned decisionmaking in changing regulatory policy—doctrine that has, in practice, established a non-regression principle. Fourth, the Article addresses criticisms of the principle and its limits. There are practical and theoretical limitations to the idea of non-regression, and it is important to reconcile the principle with other important rights, theories, and legal concepts. In conclusion, the Article returns to the present to apply the non-regression principle in the context of economic crisis and recovery.

---

[14] *See, e.g.*, Nicholas S. Bryner, *A Constitutional Human Right to a Healthy Environment*, *in* DOUGLAS FISHER (ed.), RESEARCH HANDBOOK ON FUNDAMENTAL CONCEPTS OF ENVIRONMENTAL LAW 168-95 (Edward Elgar Publishing 2016).

[15] *See infra* Part II.A-C.

[16] *See infra* Part II.D.

I. LEGAL FOUNDATION OF THE PRINCIPLE OF NON-REGRESSION

In 2016, the International Union for Conservation of Nature's World Commission on Environmental Law (IUCN WCEL) laid out a definition for the principle of non-regression and its significance for the enjoyment of human rights and for environmental protection. According to the IUCN World Declaration on the Environmental Rule of Law, in its most simple form, the principle is that "States . . . shall not allow or pursue actions that have the net effect of diminishing the legal protection of the environment or of access to environmental justice."[17] Costa Rican environmental law scholar Mario Peña Chacón offers the following explanation of the principle:

> The principle of non-regression or the prohibition of regression affirms that environmental norms and jurisprudence ought not change if so doing will mean backsliding with respect to the level of protection already achieved. It is intended to avoid removing or weakening norms in favor of interests that have not been demonstrated to be higher in importance than the public interest in the environment, given that, in many circumstances, backsliding can lead to environmental consequences that are irreversible or difficult to repair.[18]

This second definition suggests a connection between this principle and concern for intergenerational equity. It also explains that the principle of non-regression is not absolute, which addresses and mitigates some criticisms of the principle;[19] it does not exist in a vacuum, but rather coexists with other considerations, requiring proper and proportionate justification before walking back norms or laws that affect the public's interest in the environment.

The use of "principles"[20] suggests organizing concepts that guide and support the application of a legal discipline or legal system.[21] Thus, we might speak of fundamental principles of constitutional law in the United States, "general principles of law" in international law,[22] or the basic principles of the rule of law.[23] In international environmental law, reference to principles is especially common,

---

[17] *IUCN World Declaration on the Environmental Rule of Law, supra* note 1, prin. 12.
[18] Mario Peña Chacón, *El Principio de No Regresión Ambiental en la Legislación y Jurisprudencia Costarricense, in* Mario Peña Chacón (ed.), El Principio de No Regresión Ambiental en el Derecho Comparado Latinoamericano 12 (U.N. Development Programme 2013) (my translation).
[19] *See infra* Part IV.A.
[20] *See, e.g.*, Dworkin, *supra* note 11, at 22-31.
[21] *See, e.g.*, Black's Law Dictionary, *Principle* (11th ed. 2019) (defining principle as "[a] basic rule, law, or doctrine; esp., one of the fundamental tenets of a system).
[22] Statute of the International Court of Justice, art. 38, 33 UNTS 993 (1946) (including "the general principles of law recognized by civilized nations" as a source of international to apply in disputes before the court).
[23] *See generally* World Justice Project, *What is the Rule of Law? The Four Universal Principles*, https://worldjusticeproject.org/about-us/overview/what-rule-law (last visited July 11, 2020).

both in soft law (dating to the Stockholm Declaration in 1972) and in major treaties, such as the UN Framework Convention on Climate Change.[24]

As a principle, the concept of non-regression has strong legal foundation in human rights law. This connection is strongest where human rights to environmental health and protection are guaranteed, although human rights law is instructive, regardless of the circumstances, in explaining the importance of the principle of non-regression and how it can apply in practice.

A. Progressive Realization of Human Rights

Since the beginning of the human rights era in the mid-20th century and the creation of the United Nations system of international cooperation and governance, international law has consistently included an obligation for each State to undertake the "progressive realization" of human rights. In the preamble to the Universal Declaration of Human Rights, the UN General Assembly proclaimed that "all peoples and all nations" shall take "*progressive measures*, national and international, to secure [the] universal and effective recognition and observance" of human rights.[25]

Later, the International Covenant on Economic, Social, and Cultural Rights ratified the concept, requiring each Party to the Covenant "to take steps, individually and through international assistance and co-operation, especially economic and technical, to the maximum of its available resources, with a view to *achieving progressively the full realization*" of human rights.[26] In the Inter-American system, the American Convention on Human Rights, signed in San José, Costa Rica, in 1969, requires State Parties "to adopt measures, both internally and through international cooperation, especially those of an economic and technical nature, with a view to *achieving progressively*, by legislation or other appropriate means, the full realization" of human rights.[27]

The concept of progressive realization in the major human rights covenants differentiates between those state obligations in recognizing human rights that are immediate and other rights—rights that states also have binding obligations to guarantee, but that may not be fully realized immediately. Despite this difference, human rights law still requires states to make immediate and continuous efforts, taking steps and dedicating resources toward the realization of those rights, recognizing that the implementation of these measures may take time.

The idea of progressive realization for some categories of rights is contentious: it can be used as an excuse for slow progress in guaranteeing

[24] Stockholm Declaration on the Human Environment, in Report of the United Nations Conference on the Human Environment, UN Doc. A/CONF.48/14 (1972) (including a list of 26 principles "for the preservation and improvement of the human environment"); United Nations Framework Convention on Climate Change, art. 3, May 9, 1992, 1771 UNTS 107 (1994) (listing principles that parties to the Convention "shall be guided" by "[i]n their actions to achieve the objective of the Convention and to implement its provisions").

[25] U.N.G.A., Universal Declaration on Human Rights, Dec. 10, 1948 (emphasis added).

[26] International Covenant on Economic, Social, and Cultural Rights, Dec. 16, 1966, art. 2, para. 1 (emphasis added).

[27] American Convention on Human Rights, Nov. 22, 1969, art. 26.

economic, social, and cultural rights. However, the *progressive* nature of these obligations means that, once norms and laws have been put in place to secure the right, the State now has the duty to maintain the enjoyment of the right. According to Peña Chacón, it is in this sense that the principle of non-regression is the "other side" of progressive realization.[28]

B. Human Rights and Environmental Protection

In the past several decades, jurists in various parts of the world have pointed to the link between, or rather, the interdependence of environmental protection and human rights, in two ways. This interrelationship between environmental health and human rights in general is described by the first UN Special Rapporteur on Human Rights and the Environment, John Knox: "Environmental harm interferes with the enjoyment of human rights, and the exercise of human rights helps to protect the environment and to promote sustainable development."[29]

First, because the environment—air, water, soil, and the biosphere—is necessary for and supports human life, damage to the environment implicates fundamental rights that include the right to life and rights to health and safety.[30] Humans, individually and collectively, therefore have the right to the continued maintenance of the ecosystem services that support life.[31] Indeed, many of the judicial decisions around the world that connect the environment and human rights are rooted in the right to life and the duty of governments to protect the life of their citizens.[32]

Second, the full enjoyment of human rights supports environmental protection. Procedural rights and participatory rights, including the right to access to information, to public participation in decisionmaking, and effective access to justice[33] all serve as an important barrier to prevent many activities that would cause environmental damage. These rights, though they may be categorized as civil and political rights,[34] have a profound impact on the environment and on economic, social, and cultural rights by providing effective checks on government action.

---

[28] Peña Chacón, *supra* note 18, at 16.

[29] UN Human Rights Council, Report of the Special Rapporteur on the Issue of Human Rights Obligations Relating to the Enjoyment of a Safe, Clean, Healthy, and Sustainable Environment, UN Docs. A/HRC/37/59, Annex (2018), para. 1.

[30] *See, e.g.*, International Covenant on Civil and Political Rights, art. 6.1 ("Every human being has the inherent right to life. This right shall be protected by law. No one shall be arbitrarily deprived of his life.")

[31] UN Human Rights Council, *supra* note 29.

[32] *See generally* DONALD K. ANTON & DINAH L. SHELTON, ENVIRONMENTAL PROTECTION AND HUMAN RIGHTS 436-544 (2012) (discussing and excerpting cases from domestic courts and international human rights courts or bodies involving substantive human rights and the environment).

[33] Rio Declaration on the Environment and Development, June 14, 1992, UN Doc. A/CONF.151/26/Rev. 1, annex I, prin. 10.

[34] Various portions of the ICCPR address issues of due process, rights to public participation, and access to information. *See* ICCPR, *supra* note 30, arts. 14 (equality before tribunals), 16 (right to recognition as a person), 19 (freedom of expression), 25 (participation in the conduct of public affairs). Regional treaties in Europe and Latin America specifically address the application of

Building on and concurrent with these forays into the connection between human rights and the environment, the recognition of a human right to a clean and healthy environment has more clearly established this interdependence. The majority of national constitutions now in place in the world establish such a right, including nearly every constitution written or substantially revised since the 1970s.[35] In particular, many Latin American countries have led the way with clearly conveyed environmental rights. Bolivia's Constitution of 2009, for example, provides:

> Article 33. Everyone has the right to a healthy, protected, and balanced environment. The exercise of this right must be granted to individuals and collectives of present and future generations, as well as to other living things, so they may develop in a normal and permanent way.
> Article 34. Any person, in his or her own right or on behalf of a collective, is authorized to take legal action in defense of environmental rights, without prejudice to the obligation of public institutions to act on their own in the face of attacks on the environment.[36]

The Inter-American human rights system also recognizes a right to a healthy environment. Article 11 of the San Salvador Protocol to the American Convention on Human Rights provides: "Everyone shall have the right to live in a healthy environment and to have access to basic public services. The States Parties shall promote the protection, preservation, and improvement of the environment."[37]

Paired with the substantive right to a minimum level of environmental quality and health is the State's obligation to guarantee that right. The right to a healthy environment or an ecologically balanced environment is a *human* right, whether with individuals, communities, or entire nations as rightsholders.[38] Yet

---

these "Rio Principle 10" rights with regard to environmental matters. *See* Aarhus Convention (Europe); Escazú Agreement (Latin America).

[35] *See, e.g.*, Nicholas S. Bryner, *A constitutional human right to a healthy environment*, *in* DOUGLAS FISHER (ed.), RESEARCH HANDBOOK ON FUNDAMENTAL CONCEPTS OF ENVIRONMENTAL LAW 168-95 (Edward Elgar 2016).

[36] Constitution of the Plurinational State of Bolivia, arts. 33-34 (2009), *available at* https://www.constituteproject.org/constitution/Bolivia_2009.pdf (English trans. Constitute Project).

[37] Organization of American States, Additional Protocol to the American Convention on Human Rights in the Area of Economic, Social and Cultural Rights (San Salvador), Nov. 17, 1988, OAS Treaty Series No. 69. The Parties to the Protocol as of 2020 are Argentina, Bolivia, Brazil, Colombia, Costa Rica, Ecuador, El Salvador, Guatemala, Honduras, Mexico, Nicaragua, Panama, Paraguay, Peru, Suriname, and Uruguay. *See* Organization of American States Department of International Law, *Signatories and Ratifications*, https://www.oas.org/juridico/english/sigs/a-52.html (last visited July 16, 2020).

[38] Some jurisdictions in the world, led most prominently by Ecuador, now recognize "rights of nature," centered not on humans but on other life and natural objects as the subjects meriting legal protection. *See* Constitución de la República del Ecuador arts. 71-74 (2008). Ecuador's courts have begun, in the past few years, to take on cases involving rights of nature claims, creating a fuller picture of how rights of nature work in practice. *See, e.g.*, Hugo Echeverría, *Rights of*

although this right is anthropocentric, enjoyed by and defined by humans, the accompanying duty of progressive realization, applied in this context, necessarily extends to the condition—the health, integrity, and sustainability—of the environment.

Because there can be no right to a healthy environment without the protection of that environment, if the state bears the duty of progressive realization of this right, there must necessarily be an obligation to progressively enhance environmental protection and prevent activities that may cause environmental damage. In other words, when a government takes action to assure the human right to a healthy environment, human rights law requires continuing to advance toward full enjoyment of that right—and the principle of non-regression prohibits any backtracking in this regard. Any action that results in a reduction of legal protection for ecosystems, biodiversity, air and water quality, or other component of the environment, negatively impacts the right to a healthy environment, and by so doing, violates the principles of progressive realization and non-regression.

This human rights-based justification is a clear legal foundation for the principle of non-regression in environmental matters in any jurisdiction where a human right to environmental quality is recognized. In these places, there is no debate; non-regression is a fundamental concept underpinning the legal system—one that must be applied together with other basic principles and concepts. Notwithstanding, recognizing environmental rights, while a sufficient justification to apply non-regression, need not necessarily be the only justification that supports the principle. The rule of law generally permits the revocation of laws: what a legislature enacts, it may repeal by the same procedure. However, as will be discussed further below, non-regression may be applied to administrative or executive-branch decisionmaking by statute; in the environmental context, basic principles about how decisionmaking processes work will yield this result in practice.

II. THE PRINCIPLE OF NON-REGRESSION IN PRACTICE: INTERNATIONAL AND COMPARATIVE LAW

Setting aside the theory and legal foundation for the principle of non-regression, analysis of some examples illustrates the principle's development and application in practice. As with any other legal principle, the principle of non-regression does not exist in a vacuum. It coexists and correlates with other values, precepts, and commitments. At the international level as well as in national-level constitutions, statutes, and jurisprudence, examples of the non-regression principle help provide the content and contours of the requirement to not walk back environmental rules.

A. Non-Regression in Investment and Free Trade Agreements

Nature: The Ecuadorian Case, 9 REVISTA DA ESCOLA SUPERIOR DA MAGISTRATURA TOCANTINENSE 77 (2017), *available at* http://esmat.tjto.jus.br/publicacoes/index.php/revista_esmat/article/view/192.

First, at the international level, the use of the non-regression principle is common in free trade agreements and investment treaties.[39] Andrew Mitchell and James Munro's study in 2019 found 130 countries in the world with at least one investment treaty that contained a non-regression provision with regard to environmental protection.[40] In these types of provisions, parties to the treaties agree not to roll back environmental regulations (and other regulatory standards related to labor laws, health and safety requirements, etc.) in order to promote foreign investment in the country.

At the regional level, free trade agreements include similar language. From the North American Free Trade Agreement (NAFTA), which was in effect from 1994 to 2020:

> The Parties recognize that it is inappropriate to encourage investment by relaxing domestic health, safety or environmental measures. Accordingly, a Party should not waive or otherwise derogate from, or offer to waive or otherwise derogate from, such measures as an encouragement for the establishment, acquisition, expansion or retention in its territory of an investment of an investor. If a Party considers that another Party has offered such an encouragement, it may request consultations with the other Party and the two Parties shall consult with a view to avoiding any such encouragement.[41]

The new trilateral U.S.-Mexico-Canada Agreement (USMCA) entered into force in July 2020 and maintains similar language: "[A] Party shall not waive or otherwise derogate from, or offer to waive or otherwise derogate from, its environmental laws in a manner that weakens or reduces the protection afforded in those laws in order to encourage trade or investment between the Parties."[42]

These international, regional, and bilateral agreements have in common the norm—the basic principle—that countries should not roll back environmental protections that have already been put in place in order to attract investment. This is environmental non-regression in practice. Non-regression in the investment and trade context is not based on environmental rights or other human rights, but rather on the necessities of effective cross-jurisdictional cooperation.

The rationale for this type of cooperation is familiar in the history of environmental federalism in the United States. Prior to the advent of the major federal environmental statutes in the 1970s, some states had begun enacting restrictions on sources of air and water pollution and other environmental threats. One of the motivating needs for federal legislation was to avoid a "race to the bottom" in which other states, eager to attract investment or business, would

---

[39] Andrew D. Mitchell & James Munro, *No Retreat: An Emerging Principle of Non-Regression From Environmental Protections in International Investment Law*, 50 GEO J. INT'L L. 625 (2019).
[40] *Id.*
[41] North American Free Trade Agreement (Canada, Mexico, and the United States), Dec. 17, 1992 (entry into force Jan. 1, 1994), art. 1114, para. 2.
[42] United States-Mexico-Canada Agreement (USMCA), Dec. 13, 2019 (entry into force July 1, 2020), art. 24.4, para. 3. The USMCA superseded the earlier agreement, NAFTA.

undermine environmental protection efforts by adopting weaker standards—effectively subsidizing polluting activities by failing to impose regulatory costs concomitant with the social costs of pollution.[43]

Of course, despite the application of non-regression provisions, other common norms and principles in investment and trade agreements do not point toward greater environmental protection. Under the GATT and now the WTO, international rules restrict the use of non-tariff trade barriers and require equal treatment for "like" products—generally without regard to the regulation of the differences in environmental impacts across countries.[44] Article XX of the GATT, on its face, authorizes countries to impose environmental regulations that may have an impact on trade.[45] However, major examples, such as the conflicts over the import restrictions of tuna (due to impacts on dolphins) and shrimp (due to turtle bycatch) illustrate that free trade compliance systems exhibit a strong bias against the establishment of new environmental regulations, with a high bar to meet the GATT and WTO exemptions for environmental non-tariff trade barriers.[46]

Environmental criticism of regional and global trade agreements is widespread, and few would argue that free trade and investment treaties are "pro-environment" in their drafting or in their impact. It is precisely in this context that it is relevant to note—despite other norms in trade law that cut against environmental protection—the widespread prevalence of the principle of non-regression. In other to maintain cooperation, once environmental standards are set—with the rights-based obligation to progressively advance these standards—most countries have committed to at least some form of the idea that they cannot be rolled back simply to gain economic advantage.

B. Examples in Multilateral Environmental Agreements

Negotiators in multilateral settings have pushed for the enactment of non-regression provisions in binding environmental treaties and conventions (as well as "soft law" environmental declarations, discussed in the following section). The non-regression principle in international environmental law is based on two ideas,

---

[43] *See* Robert L. Glicksman & Jessica Wentz, *Debunking Revisions Understandings of Environmental Cooperative Federalism: Collective Action Responses to Air Pollution*, *in* Kalyani Robbins & Erin Ryan (eds.), The Law and Policy of Environmental Federalism: A Comparative Analysis (Edward Elgar 2015) (discussing the "race to the bottom" problem the history of the Clean Air Act as a response).

[44] General Agreement on Trade & Tariffs, art. I, para. 1 (1947) ("[A]ny advantage, favour, privilege or immunity granted by any contracting party to any product originating in or destined for any other country shall be accorded immediately and unconditionally to the like product originating in or destined for the territories for all other contracting parties.").

[45] GATT, art. XX(g).

[46] *See, e.g.*, Panel Report, *United States – Restrictions on Imports of Tuna*, GATT, DS21/R – 39S/155 (1991), *available at* https://www.wto.org/english/tratop_e/dispu_e/gatt_e/91tuna.pdf (Mexico's claim against the United States based on U.S. imposed "dolphin-safe" tuna restrictions); World Trade Organization, Panel Report, *United States – Import Prohibition of Certain Shrimp and Shrimp Products*, WT/DS58/R (1998), *available at* https://www.wto.org/english/tratop_e/dispu_e/58r00.pdf (claim by several countries against the United States for restrictions on shrimp requiring devices to protect sea turtles).

both described earlier. First, under the human rights principle of progressive realization, international environmental law pushes toward ever-greater respect for environmental rights in addressing issues of transboundary or global concern (e.g., transboundary air and water pollution, biodiversity loss, ozone depletion, and climate change).[47] Second, international environmental law principles are intended to avoid the "race to the bottom" described above and to avoid "free riding" among countries that might employ lesser measures but share in the benefits of collective action with regard to the environment.[48]

1. Washington Convention

Perhaps the earliest applied example of the non-regression principle in international environmental law dates to the little-known Convention on Nature Protection and Wild Life Preservation in the Western Hemisphere.[49] Signed in Washington, DC, in 1940, the Convention protects flora and fauna "in their natural habitat . . . in sufficient numbers and over areas extensive enough to assure them from becoming extinct" and "protect[s] and preserve[s] scenery of extraordinary beauty, unusual and striking geologic formations, regions and natural objects of aesthetic, historic or scientific value, and areas characterized by primitive conditions . . . ."[50]

Article II of the Convention addresses the establishment of "national parks, national reserves, nature monuments, and strict wilderness reserves" in each country.[51] Once countries have set apart these protected areas, Article III of the Convention employs the non-regression principle: "The Contracting Governments agree that the boundaries of national parks shall not be altered, or any portion thereof be capable of alienation except by the competent legislative authority."[52] The non-regression obligation here is narrow; it does not, by its terms, prohibit legislative action to revoke the creation of national parks or other protected areas. However, it reflects a commitment by the 19 parties to the Convention that the setting aside of areas for environmental protection ought to be permanent.[53] Actions by presidents or other executive officials to weaken those protections are

[47] For example, the Paris Agreement under the UN Framework on Climate Change is discussed *infra*, requiring increased ambition in each round of nationally set climate mitigation targets.
[48] *See, e.g.*, Ana Espínola-Arredondo & Félix Muñoz-García, *Free-riding in international environmental agreements: A signaling approach to non-enforceable treaties*, 23 J. THEORETICAL POL. 111 (2011) (analyzing a model for international environmental negotiation and concluding that free-riding incentives can inhibit countries from joining environmental agreements).
[49] Convention on Nature Protection and Wild Life Preservation in the Western Hemisphere, Washington, DC, Oct. 12, 1940, OAS Treaty Series No. C-8, *available at* https://www.oas.org/juridico/english/treaties/c-8.html.
[50] *Id.* Preamble.
[51] These terms are defined in Article I of the Convention as different classifications of protected areas. *Id.* arts I, II.
[52] *Id.* art. III.
[53] The Organization of American States maintains the list of signatories and ratifications to the Convention. OAS Department of International Law, *Signatories and Ratifications, C-8: Convention on Nature Protection and Wild Life Preservation in the Western Hemisphere*, https://www.oas.org/juridico/english/sigs/c-8.html (last visited July 20, 2020).

illegitimate under the Convention; only the legislature, which represents a more deliberative process—which should be less swayed by the prospect for short-term political or economic gain—may act to reconsider, roll back, or downsize the environmental commitment to preserving wildlife, scenery, and other valuable public resources.

2. Escazú Agreement

The economic region of Latin America and the Caribbean has recently formed an agreement on the rights of participation in environmental matters: the right of the public to participate in decisionmaking, the right to access to information, and the right to effective access to justice.[54] Built on a negotiating platform established at the Rio+20 UN Conference on Sustainable Development in 2012, the Escazú Agreement is a treaty focused on both environmental protection and on human rights.[55]

The Escazú Agreement advances the principle of non-regression as a binding commitment in international environmental and human rights law.[56] Article 3 of the Agreement lists basic principles of international law and environmental law that guide its implementation—both in the interpretation of the Agreement's terms and in its application to each State.[57] Among these are the "Principle of non-regression and principle of progressive realization."[58] The Agreement further requires States to generate and disseminate environmental information and, in so doing, provides that "[e]ach Party shall guarantee that environmental information systems are duly organized, accessible to all persons and *made progressively available . . . .*"[59]

The direct mention of the non-regression principle in the Escazú Agreement is an important milestone for the recognition and scope of the principle. The Agreement is the first binding multilateral treaty to explicitly incorporate non-regression in an environmental context. It also means that the principle is not

[54] Regional Agreement on Access to Information, Public Participation and Justice in Environmental Matters in Latin America and the Caribbean [Escazú Agreement], Mar. 4, 2018, *available at* https://treaties.un.org/doc/Treaties/2018/03/20180312%2003-04%20PM/CTC-XXVII-18.pdf.

[55] At the Rio+20 conference, Latin American countries committed to open a process toward a binding treaty to guarantee the "access rights" laid out in Principle 10 of the 1992 Rio Declaration on Environment and Development. *See* UN Conference on Sustainable Development, Declaration on the Application of Principle 10 of the Rio Declaration on Environment and Development, July 25, 2012, UN Doc A/Conf.216/13, *available at* https://www.cepal.org/rio20/noticias/paginas/8/48588/Declaracion-eng-N1244043.pdf.

[56] The Escazú Agreement required 11 ratifications among signatory nations in order for the treaty to enter into force. Escazú Agreement, *supra* note 54, art. 22. On January 22, 2021, Argentina and Mexico deposited their ratification instruments, becoming the 11th and 12th countries to do so. As such, the treaty enters into force as of April 2021. *See ECLAC Celebrates Prompt Entry into Force of the Escazú Agreement and Highlights the Region's Commitment to Sustainable Development and Human Rights*, https://www.cepal.org/en/news/eclac-celebrates-prompt-entry-force-escazu-agreement-and-highlights-regions-commitment (Jan. 22, 2021).

[57] Escazú Agreement, *supra* note 54, art. 3.

[58] *Id.* art. 3(c).

[59] *Id.* art 6, para. 3 (emphasis added).

limited to the regulation of certain biomes or protected areas or to one type of state action. Rather, the Agreement requires parties to take appropriate measures to guarantee the full enjoyment of access rights throughout the scope of the government's authority, from administrative decisionmaking to judicial systems.

To secure these rights is the treaty's positive obligation of progressive realization, and by applying the principle of non-regression, the treaty requires parties to maintain these measures and keep them in place, with no backsliding.[60] For example, under the Agreement, if a country has established by law or policy a system for public participation and consultation prior to the construction of infrastructure or other developments that may cause environmental damage, the State cannot exempt a project from the established procedural requirements in the face of political or economic pressure. Once the obligation is in place, derogation from it violates the principle of non-regression.

3. Paris Agreement

International negotiations under the UN Framework Convention on Climate Change have had a turbulent history since the Convention was signed in 1992. Early success in the 1990s led to the adoption of the Kyoto Protocol in 1997 that placed binding targets on greenhouse gas emissions for the first time, focused on developed countries and "economies in transition" in Eastern Europe and the former Soviet Union.[61] Although the Kyoto Protocol eventually did enter into force a decade later when it was ratified by Russia,[62] opposition by the United States,[63] in particular, led to a move away from a uniform system of quantitative emission reduction targets set by the UNFCCC parties as a whole.

In the lead-up to the UNFCCC Conference of the Parties in Copenhagen in December 2009, negotiators from Europe and other parts of the world had hoped to put in place a second round of targets, with deeper emissions cuts and the inclusion of a greater number of countries. By the time of the conference, however,

[60] Escazú Agreement, *supra* note 54, art. 3(c).

[61] Kyoto Protocol to the UN Framework Convention on Climate Change, 2303 UNTS 162 (1997). The lists of applicable countries and their numeric targets for the period of 2008-2012 were listed in Annex B to the Protocol. *See id.*, 2303 UNTS at 233-234, Annex B.

[62] Per Article 25 of the Kyoto Protocol, it entered into force 90 days following the ratification of at least 55 Parties representing at least 55% of the global total CO_2 emissions in 1990 among the countries listed in Annex I of the UNFCCC. *Id.* art. 25. This threshold was met when the Russian Federation ratified the Protocol in November 2004; the Protocol therefore entered into force in 2005. *See* UNFCCC, *Russian Federation*, https://unfccc.int/node/61150 (last visited Sept. 8, 2020) (listing the Russian Federation's signature and ratification dates).

[63] In the U.S. Senate, for example, the Byrd-Hagel resolution expressed "the sense of the Senate" in opposition to the terms of what would become the Kyoto Protocol as it was being developed; the resolution passed unanimously, 95-0. S. Res. 98 (105th Cong.) (1997) [commonly known as the "Byrd-Hagel" Resolution]. The Senate never took any vote as to the ratification of the Protocol.

the Kyoto-style agreement had broken apart when the United States, China, and other major emitters balked at the inclusion of a new round of top-down targets.[64]

Instead, coming out of the 2009 meeting was the short Copenhagen Accord (negotiated at the last moments of the conference by a room full of world leaders, including President Obama), which employed what has been termed a "pledge and review" model of international climate target commitments.[65] Rather than having a centrally-defined set of targets for all countries decided by the treaty body and negotiators, individual countries make their own pledges that become mutually reaffirming with pledges made by other parties to the convention.[66] Periodically, countries review their commitments and make revised rounds of pledges.[67]

Climate advocates expressed considerable disappointment and skepticism about the Copenhagen Accord, as there is no international authority for assessing the sufficiency of any country pledges, and no accountability mechanism for the strength of the pledges other than a sort of international "naming and shaming."[68] In the years that followed Copenhagen, momentum eventually built toward negotiating a new agreement that would govern international climate commitments beyond 2020. In November 2014, China and the United States boosted hopes for a globally-encompassing accord when they announced a bilateral agreement under which the United States would cut GHG emissions by 26-28% below 2005 levels by 2025 and China would peak its national emissions no later than 2030, with cuts to follow.[69]

This joint announcement formed the two countries' negotiating positions and plans for the 2015 UNFCCC Conference of the Parties in Paris.[70] Based on this and extensive negotiating efforts around the world, the 2015 Conference resulted in the near-universal adoption of the Paris Agreement.[71] The Paris Agreement follows the pledge and review process, but takes the form of a binding agreement in which each individual country develops its own "nationally determined contributions"[72] of measures and actions toward "achieving the purpose of the Agreement": limiting climate change to 2°C, or ideally to 1.5°C above pre-industrial global surface temperatures.[73]

---

[64] *See, e.g.*, David Hunter, *Implications of the Copenhagen Accord for Global Climate Governance*, Sust. Dev. L & Pol'y 4, 4-6 (Spring 2010) (discussing the setbacks in the "road to Copenhagen").

[65] UNFCCC, Decision 2/CP.15 [Copenhagen Accord] (2009). The Conference of the Parties to the UNFCCC decided simply to "take note" of the Copenhagen Accord, rather than formally adopting it, reflecting division and disappointment among the parties at the outcome of the meeting. *Id.*

[66] *Id.*, paras. 4-5. The Accord calls for targets to be listed in an Appendix, which appeared simply as an empty table following the text as reported by the Conference of the Parties, to be filled by countries on their own terms.

[67] The Accord called for "an assessment" of its implementation by 2015. *Id.* para 12.

[68] *See, e.g.*, Hunter, *supra* note 64, at 4.

[69] *See* The White House, Office of the Press Secretary, *U.S.-China Joint Announcement on Climate Change*, Nov. 11, 2014.

[70] *See id.*

[71] Paris Agreement to the UNFCCC (2015).

[72] *Id.* art.4.

[73] *Id.* art. 2.

Although the Paris Agreement is subject to some of the same criticisms as the earlier Copenhagen Accord, the non-regression principle and companion principle of progressivity are expressed throughout its text. Early on, before specific obligations are listed, Article 3 of the Paris Agreement states that "[t]he efforts of all Parties will represent a progression over time, while recognizing the need to support the developing country Parties for the effective implementation of this Agreement." Article 4 describes the main obligation of nationally determined contributions (NDCs) in greater substance and detail. Paragraph 3 of that article provides:

> Each Party's successive nationally determined contribution will represent a progression beyond the Party's then current nationally determined contribution and reflect its highest possible ambition, reflecting its common but differentiated responsibilities and respective capabilities, in the light of different national circumstances.[74]

As each round of a country's NDC must represent a progression beyond previous commitments, the Paris Agreement therefore is a non-regression treaty; it prohibits backsliding or rolling back, so long as the country continues to participate.[75]

C. Environmental Non-Regression in Soft Law

In the broader field of international environmental law, the principle of non-regression has been emphasized in *soft law*, in global declarations and accords, particularly in the last decade. In negotiations that have led to the development of new environmental agreements, the principle is there, repeated as a reflection of state custom in international environmental law.

As one prominent example, in the final outcome document from the Rio+20 Conference on Sustainable Development in 2012, entitled "The Future We Want," the UN General Assembly addressed the concept, although not as directly as some environmental civil society organizations and national-level negotiators had wanted.[76] The result, in paragraph 20 of the document, is an

---

[74] *Id.* art 4.3.

[75] Note, of course, that the Paris Agreement does allow countries to walk back their climate commitment by withdrawing from the Agreement altogether. *See id.* art. 28. On November 4, 2019, the Trump Administration communicated to the UNFCCC the United States' intent to withdraw, which took effect on November 4, 2020, as per the one-year minimum timeframe in Article 28. *See* Press Statement, *On the U.S. Withdrawal from the Paris Agreement*, Michael R. Pompeo, Secretary of State (Nov. 4, 2019), https://www.state.gov/on-the-u-s-withdrawal-from-the-paris-agreement/. Two months later, on January 20, 2021, only hours after the inauguration of President Joe Biden, the new President signed a one-paragraph instrument re-accepting the Paris Agreement. The White House, *Paris Climate Agreement*, https://www.whitehouse.gov/briefing-room/statements-releases/2021/01/20/paris-climate-agreement/ (accessed Feb. 11, 2021).

[76] *See, e.g.*, Michel Prieur, *Non-regression in Environmental Law*, 5(2) SAPIENS (2012), https://journals.openedition.org/sapiens/1405. Prieur describes the history of the provision leading up to the Rio+20 conference. The French government proposed inclusion of the principle in its

> acknowledg[ment] that, since 1992, there have been areas of insufficient progress and setbacks in the integration of the three dimensions of sustainable development, aggravated by multiple financial, economic, food and energy crises, which have threatened the ability of all countries, in particular developing countries, to achieve sustainable development. In this regard, it is critical that we *do not backtrack* from our commitment to the outcome of the [Rio Earth Summit of 1992]. We also recognize that one of the current major challenges for all countries, particularly for developing countries, is the impact from the multiple crises affecting the world today.[77]

Some countries had wanted a clearer declaration against regression of environmental standards, but faced opposition from the United States, Japan, Canada, and others, in favor of the "do not backtrack" language that eventually was added to the final document.[78] Notably, the declaration, while not binding, refers to the complexity of applying the principle of non-regression in the face of "multiple crises" among many other challenges to achieving sustainable development. As such, it is a recognition that political and economic pressure to roll back environmental protection and the enjoyment of environmental rights can be quite common; balancing the application of the principle of non-regression with other relevant legal principles and interests is critical in assessing whether any "regression" may be justifiable, rational, and proportionate under these circumstances.[79]

D. Examples in Domestic Law

At the national level in many countries, the non-regression principle in environmental law is enshrined in constitutions, statutes, administrative procedures, and in judicial decisions. Ecuador, Costa Rica, and Mexico present contrasting examples—all of which differ significantly from non-regression in the United States—about how law and decisionmaking can reflect a commitment to the non-regression principle.

1. Ecuador

The Constitution of Ecuador is a reference point for the potential to weave the principle of non-regression throughout national law. In the Constitution of

---

recommendations for the conference, and the expression "principle of non-regression" was proposed by the Group of 77 + China during informal negotiations. After it was removed, it was replaced with the language in paragraph 20. *See id.* at paras. 13, 14.

[77] The Future We Want, para. 20, July 27, 2012, UN Doc. A/Res./66/288 (emphasis added).

[78] *See* Prieur, *supra* note 76.

[79] *See* discussion *infra* in Part V on the principle of non-regression in the context of economic crisis during and after the covid-19 pandemic.

2008—known internationally for its recognition of the rights of nature[80]—Ecuador adopted an exhaustive set of constitutional norms regarding the content of a human right to the environment as well as procedural rights and interpretive principles that support the implementation and progressive enjoyment of environmental rights.[81]

Article 11 of the constitution governs the exercise of constitutional rights, laying out, among other principles, the idea that "any action or omission of a regressive nature that unjustifiably diminishes, limits, or annuls the exercise of rights shall be unconstitutional."[82] As environmental rights are spread throughout the constitutional text, this general principle applies in any circumstance in which executive or legislative powers in the country act to reduce environmental protection.

2. Costa Rica

In Costa Rica, the Supreme Court's Constitutional Chamber (*Sala Constitucional*) has incorporated the principle of non-regression in its interpretation of the country's constitutional human right to a healthy and ecologically balanced environment.[83] Scholarship on non-regression from Dr. Peña Chacón and Dr. Edgar Fernández includes analysis of the leading cases.[84]

One prominent case began in 1996, when the country's updated Forest Act (*Ley Forestal*) provided for a reduction in the size of a protected area.[85] The Constitutional Chamber struck down the specific provision of the Act as unconstitutional, inconsistent with the right to a healthy and ecologically balanced environment.[86] The court explained that the principle of non-regression applies to the enjoyment of this right, and given the legal hierarchy that places the Constitution as supreme over ordinary legislation, the legislature's attempt to shrink the protected area must fall. Notwithstanding the result, the court clarified that the principle of non-regression is not absolute and not automatic; the court explicitly rejected the idea that every move to undo environmental protections would be unconstitutional. Rather, before revoking or reducing environmental requirements, proper justification and adequate deliberation must be shown. The court noted in its opinion:

[80] Constitución de la República del Ecuador arts. 71-74 (2008). *See supra* note 38.
[81] In particular, see Constitución de la República del Ecuador arts. 14, 32, 55, 66, 71-74, 395-407.
[82] *Id.* art. 11 (my translation).
[83] Constitution of Costa Rica, art. 50.
[84] In 2013, the UN Development Programme published a book on comparative application of the principle of non-regression in environmental law in Latin America, edited by Dr. Peña Chacón. The book includes several chapters on Costa Rica. *See* MARIO PEÑA CHACÓN (ed.), EL PRINCIPIO DE NO REGRESIÓN AMBIENTAL EN EL DERECHO COMPARADO LATINOAMERICANO (UN Development Programme 2013).
[85] Ley Forestal No. 7575 del 13 de febrero de 1996 (Costa Rica), Artículo 71. The case is described in Edgar Fernández Fernández, *Reflexiones Sobre el Principio de "No Regresión Ambiental" en el Derecho Costarricense*, *in* Peña Chacón, *supra* note 84, at 89-107.
[86] Sala Constitucional, Voto No. 7294-98 de las 16:15 horas del 13 de octubre de 1998 (cited in Fernández, *supra* note 85, at 91.

> To reduce the size of any wild protected area, the Legislative Assembly must do so based on sufficient technical studies necessary to determine that such action will not cause harm to or endanger the environment, and therefore, will not jeopardize the [constitutional right to a healthy environment].[87]

This description of the non-regression principle in environmental law envisions that the appropriate decisionmakers, with proper scientific basis, might conclude that relaxing legal standards will not threaten the environment. It properly roots the non-regression principle in the idea of preventing *harm to the environment*, as opposed to simply preventing *changes in the law*.

Applying the principle of non-regression does not elevate prior decisions or actions, making them immutable. Instead, as the Costa Rican court understood, the principle is in place to avoid changes that are unjustifiable. Based on new information, scientific studies might conclude, for example, that a legal restriction has been successful and run its course (making it no longer necessary),[88] or that the law created unintended side effects that undermined its effectiveness as an environmental measure.[89] In other words, Costa Rica's constitutional right to a healthy environment, together with the principle of non-regression, prohibits regressive legislative action unless it is rational and adequately justified so as to guarantee continued environmental protection and enjoyment of the right.

III. THE PRINCIPLE OF NON-REGRESSION IN THE UNITED STATES

Environmental law in the United States provides a contrast to the examples from Latin America. In the United States, of course, there is no federal constitutional provision addressing the environment or environmental concerns, despite several attempts to include an environmental amendment since the 1970s.[90] Several state constitutions include environmental rights and related guarantees,

---

[87] *Id.* at [ ].

[88] A common and concrete example of this is the removal of protections for an endangered species that has recovered to the point where regulation is no longer necessary. In the United States, the text of the Endangered Species Act provides for this, and several decades of practice show how the process has been implemented. 16 U.S.C. § 1533(f) (on the development of "recovery plans"); *see also* U.S. Fish & Wildlife Service, *Delisting a Species: Section 4 of the Endangered Species Act* (2002), *available at* https://www.fws.gov/pacific/ecoservices/endangered/classification/pdf/delisting.pdf (outlining the steps in the Service's process for determining whether to delist an endangered or threatened species). Delisting a species may be a "regression" in protection but would not violate the principle of non-regression when justified by scientific data.

[89] The movement toward "adaptive management" in natural resources policy includes the idea that some regulation ought to be flexible, allowing for iterative analysis and revisiting to improve the effectiveness and efficiency of natural resources management. *See, e.g.*, Robin Kundis Craig & J.B. Ruhl, *Designing Administrative Law for Adaptive Management*, 67 VAND. L. REV. 1 (2014).

[90] *See, e.g.*, Lynton K. Caldwell, *The Case for an Amendment to the Constitution of the United States for Protection of the Environment*, 1 DUKE ENVTL. L. & POL'Y F. 1, 2 (1991) (noting proposals in the House of Representatives in 1967 and 1968 and in the Senate in 1970, as well as subsequent amendment ideas).

such as public trust provisions on natural resources or specific ecosystems;[91] however, at the federal level, the Constitution remains silent.

Lack of a federal constitutional provision on environmental rights does not eliminate the application of the non-regression principle in environmental law. It does mean, though, that there is no broadly based right for courts to cite to (as is the case in Ecuador or Costa Rica) as a constitutional mandate that would invalidate regressive actions. Instead, to put it in practice, a court or other decisionmaking body in the United States must find support for the principle in statutes, regulations, or other legal authority.

Federal law either prohibits or discourages regression in environmental protection in two key ways. First, substantive environmental statutes and implementing regulations include anti-backsliding provisions in the granting of environmental permits.[92] Second, the Administrative Procedure Act requires rationality in agency decisionmaking, which provides a significant check on agency efforts to undo or revoke environmental protections.[93]

A. Non-Regression in U.S. Environmental Statutes

Congress has written the non-regression principle into specific provisions throughout the environmental law canon. Highlighted here are examples from programs in the Clean Water Act and Clean Water Act, two of the core statutes for pollution control in the United States.

1. Anti-Backsliding in the Clean Water Act

The Clean Water Act's permitting program contains an often-cited example of statutory non-regression mandates.[94] Under Sections 301 and 402 of the Act, any person that discharges a pollutant into "waters of the United States" (essentially, water subject to the Act's jurisdiction) must obtain a permit from the Environmental Protection Agency (EPA).[95]

Section 402 creates the National Pollutant Discharge Elimination System (NPDES) for granting and reviewing permits for pollution discharges.[96] Under the

---

[91] *See, e.g.*, James R. May & William Romanowicz, *Environmental Rights in State Constitutions*, *in* JAMES R. MAY (ed.), PRINCIPLES OF CONSTITUTIONAL ENVIRONMENTAL LAW 305, 315-21 (ABA 2011) (listing state constitutional provisions on environmental and natural resources topics from 23 states and U.S. territories).

[92] Examples from the Clean Air Act and Clean Water Act—two of the most complex regulatory statutes in the United States—are included below.

[93] *See* 5 U.S.C. § 706(2) (providing the relevant standards for courts to set aside administrative agency action);

[94] *See, e.g.*, Melissa A. Thorne, *Antibacksliding: Understanding One of the Most Misunderstood Provisions of the Clean Water Act*, 31 ENVTL. L. REP. 10322 (2001).

[95] Clean Water Act §§ 301, 402 [33 U.S.C. §§ 1311, 1342]. Section 301(a) provides that "[e]xcept as in compliance with this section and [various other sections of the Clean Water Act], the discharge of any pollutant by any person shall be unlawful." 33 U.S.C. § 1311(a). Section 502 of the Act provides definitions and scope for these terms, including a broad definition of "pollutant." 33 U.S.C. § 1362.

[96] 33 U.S.C. § 1342.

Act, either the EPA or state environmental protection agencies that have delegated authority from the EPA establish limits based on technology standards indicated by the Act that are written into a regulated party's permit. For example, a facility may have a permit that authorizes discharges only to a maximum quantity of a pollutant per day or to a maximum concentration or temperature.

At least every 5 years, the EPA or relevant state agency must review (and reissue, if appropriate) each NPDES permit.[97] When doing so, the Clean Water Act prohibits any "backsliding" in the permit:[98] "a permit may not be renewed, reissued, or modified . . . to contain effluent limitations which are less stringent than the comparable effluent limitations in the previous permit."[99] Unless an exception in the statute applies, once an obligation to limit pollution to certain level has been applied, a regulated facility cannot negotiate a looser standard when it comes time to renew the permit.[100] The permit limit may be tightened, in other words, but no backsliding is allowed.

2. Clean Air Act Non-Regression: NAAQS

The Clean Air Act also employs non-regression concepts in regulating regional ambient air quality and in controlling pollutant emissions from motor vehicles. Under the Clean Air Act, the EPA sets National Ambient Air Quality Standards (NAAQS) for several major pollutants,[101] and state authorities develop plans and impose restrictions either to work toward the attainment of the NAAQS or to maintain current air quality if it is already adequate.[102] The EPA conducts a "complete and thorough review" of the NAAQS for each pollutant every five years, based on updated scientific data, to continue to provide standards that adequately protect human health and the environment.[103]

While the EPA may relax the NAAQS for a pollutant, this is rare; in a half century of Clean Air Act implementation, the trend has been toward more stringent NAAQS as atmospheric scientists and public health experts come to a better understanding of the impacts of air pollution. When the EPA does decide to loosen a NAAQS, Congress applied the non-regression principle in the Clean Air Act: the EPA must put in place "anti-backsliding measures for all areas that have not attained that standard as of the date of the relaxation."[104] These measures "shall provide for controls which are not less stringent than the controls applicable to areas designated nonattainment before such relaxation."[105]

---

[97] *Id.* § 1342(b)(1)(B).
[98] *Id.* § 1342(o). This anti-backsliding mandate was first put in place by EPA regulation, and was formally added to the statute by Congress in 1987. *See* Thorne, *supra* note 94, at 10323.
[99] 33 U.S.C. § 1342(o)(1).
[100] *Id.* § 1342(o)(2).
[101] 42 U.S.C. §§ 7408(a), 7409.
[102] *Id.* § 7410 (on the formation of "state implementation plans" for meeting the NAAQS).
[103] *Id.* § 7409(d)(1).
[104] South Coast Air Quality Mgmt. Dist. v. EPA, 882 F.3d 1138, 1145 (D.C. Cir. Feb. 16, 2018) (citing 42 U.S.C. § 7502(e)).
[105] 42 U.S.C. § 7502(e).

The type of situation in which this anti-backsliding requirement comes into play is complex and technical but illustrates the degree and extent to which Congress followed the principle of non-regression in developing the Clean Air Act. As a recent example, in 2018, the D.C. Circuit applied the anti-backsliding provisions and invalidated some of the actions EPA had taken in implementing the NAAQS for ground-level ozone.[106] In 2008, EPA had updated the ozone NAAQS with a (generally) tighter standard than had previously been promulgated in the 1997 ozone NAAQS.[107] However, because the 1997 standard had measured peak pollutant concentrations over a 1-hour period rather than taking the average over an 8-hour period in the 2008 standard, there were some areas out of attainment with the 1997 standard (with higher, but shorter peaks in pollution levels) that were then "in" attainment with the tighter 2008 standard.[108]

At the time, pursuant to the Clean Air Act, EPA retained the restrictions that had been put in place for these areas under the 1997 standard so as to prevent any regression.[109] When EPA removed these restrictions in 2015, the DC Circuit found a statutory violation because EPA could not relax these restrictions without a finding that the areas in question had actually reached attainment with the original 1997 standard.[110]

3. Clean Air Act Non-Regression: Motor Vehicles

Title II of the Clean Air Act begins with a simple provision, committing decisionmaking authority to the EPA about what air pollutants to regulate from motor vehicle tailpipes and how to regulate them. Section 202(a) calls on the EPA to

> prescribe (and from time to time revise) . . . standards applicable to the emission of any air pollutant from any class or classes of new motor vehicles or new motor vehicle engines, which in [the Administrator's] judgment cause, or contribute, to air pollution which may reasonably be anticipated to endanger public health or welfare.[111]

This section dates originally to 1965—prior to the creation of the EPA and to the establishment of most of the familiar Clean Air Act programs that regulate

[106] *South Coast Air Quality Mgmt. Dist.*, 882 F.3d at 1143.
[107] 73 FED. REG. 16,346 (Mar. 27, 2008) (setting a maximum standard of 75 parts per billion (ppb) ground-level ozone measured over an 8-hour period). The 1997 standard was 80 ppb. 62 FED. REG. 38,856 (July 18, 1997).
[108] *South Coast Air Quality Mgmt. Dist.*, 882 F.3d at 1148 (referring to these areas as "orphan nonattainment areas").
[109] 73 Fed. Reg. 16,346, ___.
[110] *South Coast Air Quality Mgmt. Dist.*, 882 F.3d at 1147-1151.
[111] 42 U.S.C.

stationary sources of air pollution.[112] In 1990, Congress overhauled the Clean Air Act, adding new titles and hundreds of pages' worth of changes; among these were added provisions and new language in Section 202.[113]

The new language in 1990 established a *progressive* and *non-regressive* principle to be applied to any changes in pollution standards for mobile sources like cars and trucks. Congress specifically addressed the question of revising motor vehicle emissions standards that the EPA had already put in place, including the following sentence: "Any revised standard shall require a reduction of emissions from the standard that was previously applicable."[114] This was in keeping with the overall tenor of the 1990 amendments. Members of Congress who drafted the legislation viewed with disapproval the way in which air pollution standards had languished in the 1980s after a decade of progressive movement in the 1970s.[115] Therefore, the 1990 statute provided much clearer, more specific directions to the EPA, limiting discretion for changes and providing detailed lists of pollutants and other priorities for the agency to address.[116]

The Trump Administration's changes to fuel economy standards and GHG emissions from cars have put this non-regression provision to the test.[117] The joint EPA/NHTSA rules for new cars for the model years 2021-2026, finalized in April 2020, are lower that what had originally been established through 2025 by the Obama Administration (in conjunction with the state of California, upon an agreement with major auto manufacturers after the 2008 financial crisis and recession).[118] However, based on the non-regression requirement in Section 202, the agencies'—even in their deregulatory zeal—could not actually *lower* fuel economy requirements (in comparison to what applied in prior years), but simply set in place a weaker increase in fuel economy, at a slower pace over the next several years.[119] While the Trump Administration's decision was a rollback in relation to the future standards that had been put in place eight years earlier, the statute at a minimum prevented regression in absolute terms.

In a more recent example, Congress enacted a non-regression standard for motor vehicle emissions in the context of blending with biofuels. The Energy Policy

---

[112] Pub. L. 89-272, 77 Stat. 392 (1965). On the history of the various additions and amendments to the Clean Air Act, see U.S. EPA, *Evolution of the Clean Air Act*, https://www.epa.gov/clean-air-act-overview/evolution-clean-air-act (last visited Feb. 23, 2021).

[113] Clean Air Act Amendments of 1990, Pub. L. 101-549, 104 Stat. 2399, 2472-83.

[114] 42 U.S.C. § 7521(b)(1)(C).

[115] *See, e.g.*, Gary C. Bryner, Blue Skies, Green Politics, at [].

[116] For example, the 1990 amendments to the hazardous air pollutants program in Section 112 of the Clean Air Act included a list of nearly 200 specific toxic pollutants that the EPA became required to regulate (rather than depending on the EPA to make individual, pollutant-by-pollutant determinations that were slow in coming). *See* 42 U.S.C. § 7412(b).

[117] *See* U.S. EPA & NHTSA, *The Safer Affordable Fuel-Efficient (SAFE) Vehicles Rule for Model Years 2021-2026 Passenger Cars and Light Trucks*, 85 FED. REG. 24,174 (Apr. 30, 2020).

[118] *See* U.S. EPA & NHTSA, 2017 and Later Model Year Light-Duty Vehicle Greenhouse Gas Emissions and Corporate Average Fuel Economy Standards, 77 Fed. Reg. 62,624 (2012).

[119] For a brief description of the Trump Administration's final rule, see NHTSA, *The Safer Affordable Fuel-Efficient 'SAFE' Vehicles Rule*, https://www.nhtsa.gov/corporate-average-fuel-economy/safe (last visited Feb. 23, 2021), (noting that the rule provides for fuel economy and GHG "standards that increase 1.5% in stringency each year from model years 2021 through 2026).

Act of 2005 created a Renewable Fuel Standard (RFS) that mandated the blending of renewable biofuels into the gasoline supply in the United States.[120] This was quickly expanded in 2007 under the Energy Independence and Security Act.[121] The updated RFS places an obligation on gasoline refiners to include an increasing volume of renewable fuels, with a mandate for "advanced biofuels" that meet stricter EPA-measured standards for reduction in greenhouse gas emissions below gasoline.[122] Overall, the RFS has been far less successful in inducing a transition to low-GHG renewable fuels than envisioned in the 2007 statute, and has instead been critiqued as a political favor to corn producers in the United States.[123]

While intended as an energy security and a climate mitigation measure, the expanded RFS brought a variety of criticisms, both from the oil industry (concerned about increased competition) and from environmentalists. Environmentalists have been concerned that conversion of corn and other existing cropland to biofuel production alters land use patterns in a way that encourages more intensive or expansive agriculture elsewhere.[124] In addition, higher concentration of ethanol blended into gasoline affects engine performance in cars and trucks and changes the emissions profile for these vehicles.[125]

As a result, in the 2007 statute, Congress called on EPA to undertake a "study to determine whether the [RFS] will adversely impact air quality as a result of changes in vehicle and engine emissions of air pollutants."[126] Congress followed up in the statue with a requirement, after the study is complete, to "promulgate fuel

---

[120] 42 U.S.C. § 7545(o); Energy Policy Act of 2005, Pub. L. 109-58 (adding 42 U.S.C. § 7545(o).

[121] Energy Independence and Security Act of 2007, Pub. L. 110-140 (amending 42 U.S.C. § 7545(o)). In addition to the anti-backsliding requirement in the RFS program, the EISA also reinforced a *progressive* obligation for the National Highway Traffic Safety Administration's (NHTSA) in setting fuel economy standards for new passenger cars and light trucks. *Id.* § 102(a) (adding 49 U.S.C. § 32902(b)(2)(C)) ("Progress Toward Standard Required. . . . [T]he Secretary shall prescribe annual fuel economy standard increases that increase the applicable average fuel economy standard ratably beginning with model year 2011 and ending with model year 2020.") (emphasis added). NHTSA's fuel economy standards are set together with the EPA's regulation of automobile GHG emissions. *See* U.S. EPA & NHTSA, *The Safer Affordable Fuel-Efficient (SAFE) Vehicles Rule for Model Years 2021-2026 Passenger Cars and Light Trucks*, 85 FED. REG. 24,174 (Apr. 30, 2020).

[122] Under the EISA, all renewable fuels must result in 20 percent lower GHG emissions than gasoline based on EPA's lifecycle analysis; "advanced biofuels" must meet a 50 percent reduction standard. 42 U.S.C. §§ 7545(o)(1)(B), 7545(o)(2)(A)(i). In addition to the requirements for gasoline, the statute also includes a smaller mandate for the use of biodiesel.

[123] The renewable fuels program in the Clean Air Act has created a continued, guaranteed market for a large quantity of corn-based ethanol in gasoline, which qualifies for the 20 percent standard but not the 50 percent advanced biofuels standard. The statute gives EPA considerable flexibility to waive the requirements, which has resulted in frequent waivers that undermine any technology-forcing element of the RFS.

[124] *See, e.g.*, Timothy Searchinger et al., *Use of U.S. Croplands for Biofuels Increases Greenhouse Gases Through Emissions from Land-Use Change*, 319 SCIENCE 1238 (2008).

[125] For example, the EPA considered these impacts in 2019 while expanding the "waiver" under the Clean Air Act for the use of E15 gasoline in a greater variety of vehicles and circumstances (gasoline that contains 15% ethanol, as opposed to the typical E10 or 10% ethanol). *See* U.S. EPA, *Modifications to Fuel Regulations to Provide Flexibility for E15; Modifications to RFS RIN Market Regulations*, 84 Fed. Reg. 26980 (June 10, 2019).

[126] 42 U.S.C. § 7545(v)(1)(A).

regulations to implement appropriate measures to mitigate, to the greatest extent achievable, considering the results of the study . . . any adverse impacts on air quality, as the result" of the RFS, unless the EPA makes "a determination that no such measures are necessary.[127]

EPA's understanding of this provision in the Clean Air Act reflects the non-regression principle. The agency itself refers to the study as the "Anti-backsliding Study."[128] With this requirement, Congress has recognized that when it tweaks regulatory programs for air pollution, the intent is to ensure that there is no regression or walking back of progress made. Even while adding another goal to the Clean Air Act (i.e., encouraging the use of renewable fuels to enhance U.S. energy independence and reduce GHG emissions from fossil fuels), the statute prescribes a way to ensure that complementary environmental regulations for conventional tailpipe emissions from motor vehicles remain effective and as protective as before.

In short, major federal environmental statutes in the United States are organized around a principle of non-regression. The Clean Air Act, Clean Water Act, and other major regulatory programs are geared toward progressive realization of human health goals and improvement in environmental quality. Where areas remain relatively unaffected by pollution, the statutes provide for maintenance and protection;[129] in areas suffering the impacts from decades or centuries of development and industrial activity, the statutes contain policies for continual improvement, even if many of the most ambitious goals have yet to be realized.[130]

B. Administrative Law as Non-Regression

As discussed throughout this Article, the non-regression principle in environmental law is not absolute. As one principle among others in a legal system, the non-regression principle bars the weakening or revocation of legal protections unless those changes are adequately justified—whether by new scientific and policy understanding of human health and environmental challenges or by conflicts between existing environmental legal protections and other public needs that outweigh the public's environmental interests.

In the United States, one key function of administrative law is judicial oversight of administrative agencies' use and application of scientific or technical information in the implementation of regulatory and statutory mandates.[131] Although courts are generally deferential to agencies on these questions, administrative law doctrine requires them to take a hard look at agencies'

---

[127] *Id*. § 7545(v)(2).

[128] US E.P.A., *Clean Air Act Section 211(v)(1) Anti-backsliding Study*, EPA-420-R-20-008 (May 2020), *available at* https://nepis.epa.gov/Exe/ZyPDF.cgi?Dockey=P100ZBY1.pdf.

[129] *See, e.g.*, the Clean Air Act's "Prevention of Significant Deterioration" program for areas currently in attainment of the NAAQS. 42 U.S.C. §§ 7470-7492.

[130] The Clean Water Act, for example, called for a complete elimination of water pollution—a mandate of zero discharge by 1985. 33 U.S.C. § 1251 (a)(1) ("it is the national goal that the discharge of pollutants into the navigable waters be eliminated by 1985").

[131] 5 U.S.C. § 706(2) (establishing the scope of judicial review of agency actions, findings, and conclusions).

decisions.[132] When those decisions threaten a regression from established environmental protections, administrative law takes on a non-regressive character and represents the most frequent U.S. application of the non-regression principle in practice.

Administrative law doctrine in the United States under the Administrative Procedure Act (APA)[133] is based on principles of transparency and rationality in government agency decisionmaking. The APA, as the name suggests, lays out procedural requirements for government agencies to follow in fulfilling their respective mandates and implementing federal statutes and programs. Critically, however, the APA also provides a cause of action for interested parties to challenge agency action and seek judicial review. Section 706 of the APA describes the relevant standard of review; for judicial review of substantive decisions in "informal"[134] rulemaking and adjudicatory processes, this judicial inquiry is known as the arbitrary and capricious standard.[135]

On its face, the arbitrary and capricious standard is neither pro- nor anti-regulatory. Yet this neutral standard has evolved into a form of *non-regression-lite* in practice: once administrative agencies put environmental or public health protections in place, they tend to "stick"[136] because scientific evidence will rarely support walking back those regulatory protections.[137] While administrative law does not contain an explicit non-regression mandate, statutory and case law in this area largely follows the principle, allowing regressive decisions only in the

[132] Citizens to Preserve Overton Park v. Volpe, 401 U.S. 402 (1971).
[133] 5 U.S.C. §§ 501 *et seq*.
[134] The APA provides for formal, trial-like processes for certain categories of adjudications or rulemaking processes. *See* 5 U.S.C. § 556, 557. In common administrative law parlance, "informal" action refers to a rulemaking or adjudication that is not subject to these procedural requirements. The rest of the APA and any other subject matter-specific statutory procedures still apply.
[135] As explained below, the Administrative Procedure Act has served as a strong, nearly constitutional-like foundation for administrative law in the United States since its enactment in [1946]. *See generally* [U.S. Atty Gen. Manual on the APA]. It directs courts to set aside agency action that is, among other things, "arbitrary," "capricious," or beyond the scope of constitutional or congressionally delegated statutory authority. 5 U.S.C. § 706(2)(A)-(D). In common usage, the standard in Section 706(2)(A) is flattened as "arbitrary and capricious" review.
[136] *See, e.g.,* Aaron L. Nielson, *Sticky Regulations*, 85 U. CHI. L. REV. 85 (2018).
[137] For examples of this, one need only look at one of the dozens of cases since 2017 in which courts have struck down Trump Administration efforts to revoke or stay the implementation of environmental regulations. Administrative law doctrine generally defers to agency actions, interpretations, and decisionmaking, and yet the Trump Administration has had a shockingly low success rate of 12 out of 110 (11%) in court cases reviewing federal agency actions as of July 2020. *See* Institute for Policy Integrity, *Roundup: Trump-Era Agency Policy in the Courts*, https://policyintegrity.org/trump-court-roundup (last visited Aug. 14, 2020). On the Trump Administration's aggressive use of a variety of different tactics to roll back administrative agency rules and policies, see Bethany A. Davis Noll & Richard Revesz, *Regulation in Transition*, 104 MINN. L. REV. 1 (2019); Bethany A. Davis Noll & Alec Dawson, *Deregulation Run Amok* (Institute for Policy Integrity 2018), https://policyintegrity.org/publications/detail/deregulation-run-amok.

exceptional case—in circumstances when justified or, in some instances, when courts have opted to defer to agencies' deregulatory policy objectives.[138]

Under the APA, agencies that promulgate rules of general applicability (the case for most environmental regulatory actions taken by the EPA and environmentally-consequential actions by land management agencies) must follow at least three steps: providing notice to the public of a proposed rule or action; receiving public input via submitted written comments and/or hearings; and the publication of the final rule or action, typically in the Federal Register.[139]

Broadly speaking, when an agency that has an environmental regulation in place seeks to make a change, administrative law does not permit that agency to instantly revoke the current regulation. The procedural essence of administrative law requires that every action follow the proper pathway.[140] The Supreme Court, in *State Farm* and subsequent precedents, has made clear that a decision to revoke or walk back a regulation triggers the APA's rulemaking provisions and requires the same procedural steps to act as the decision to regulate in the first place.[141]

The process by itself does not establish a principle of non-regression in administrative law decisions regarding the environment. An agency can choose to follow the same steps used by predecessors and revoke or withdraw an environmentally protective rule. However, the process sets up the APA's substantive constraint on administrative decisionmaking—judicial review.[142]

In carrying out the notice-and-comment rulemaking process, administrative agencies must engage with and make decisions based on the evidence before them.[143] The Supreme Court has applied the arbitrary and capricious standard in the APA as a means for ensuring that those decisions are rational or reasonable conclusions, adequately based on the evidence and on congressional directives.[144] Two of the Court's listed factors in the arbitrary and capricious test in *State Farm* are indicative: "Normally, an agency rule would be arbitrary and capricious if the agency . . . entirely failed to consider an important aspect of the problem [or] offered

---

[138] *Chevron* deference, of course, in its namesake case, was about deference to the EPA's deregulatory reinterpretation of the Clean Air Act in a way that served a particular policy goal of flexibility for regulated industry. Chevron v. Nat. Res. Def. Council, 467 U.S. 837 (1984).

[139] 5 U.S.C. § 553 (providing for the rulemaking process).

[140] The APA includes defines "rule making" to include "agency process for formulating, amending, or *repealing* a rule," making clear that the same procedural requirements apply when an agency wants to repeal a prior rule. 5 U.S.C. § 551(5).

[141] *See, e.g.*, Motor Vehicles Mfrs. Ass'n. v. State Farm Mutual Automobile Ins. Co., 463 U.S. 29 (1983) (invalidating an agency decision to undo safety restraint requirements for motor vehicles).

[142] The APA provides jurisdiction for judicial review of "final agency action," 5 U.S.C. § 704, for those who are "suffering legal wrong because of agency action, or adversely affected or aggrieved by agency action within the meaning of a relevant statute"). *Id.* § 702. Section 706 describes the scope and standards for judicial review. *Id.* § 706.

[143] Agencies must be able to justify their decisions based on the record before them at the time the decision was made, rather than by post hoc rationalizations. *See* SEC v. Chenery Corp., 318 U.S. 80 (1943) (commonly referred to as *Chenery I*). In *State Farm*, the Court understood *Chenery II* to say that a "reviewing court . . . may not supply a reasoned basis for the agency's action that the agency itself has not given." Motor Vehicle Mfrs. Ass'n v. State Farm Ins. Co., 463 U.S. 29, 43 (1983) (citing SEC v. Chenery Corp., 332 U.S. 194, 196 (1947) (commonly referred to as *Chenery II*).

[144] *State Farm*, 463 U.S. at 43.

an explanation for its decision that runs counter to the evidence before the agency . . . ."[145]

The arbitrary and capricious standard, in practice, operates as a non-regression mandate any time an agency attempts to rescind an existing environmental standard. The first time an agency moves to implement an environmental statute, it will be operating on a clean slate. Judicial deference doctrines are, in these circumstances, strong: generalist judges are loath to substitute their judgment for that of technical experts.[146] What happens, then, when an agency revises or rolls back an existing regulation in its second or third crack at the issue?

In theory, in administrative law jurisprudence, a court's review of an agency's "second try" regulation follows the same standard as that for the first. In *FCC v. Fox*, Justice Scalia wrote for the Court's plurality that not "every agency action representing a policy change must be justified by reasons more substantial than those required to adopt a policy in the first instance."[147] However, in practice, the bell of regulation cannot be un-rung, and the field is no longer level. Challengers to the regulatory regression have the added ammunition of pointing to a full and complete administrative record of the agency's first decision to regulate—one that likely passed muster in earlier judicial review.

Recognizing this, a more practical reading of Justice Scalia's opinion in *Fox* reflects a reality that there will often be a preference for non-regression. Although a decision to rescind a rule may not be subject to *greater* scrutiny than the decision to regulate, the Court still maintained that an agency must "display awareness that it *is* changing position."[148] Even if the agency does not need to prove that there are "better" reasons for the revocation than the original policy, "the agency must show that there are good reasons for the new policy."[149]

In effect, for an environmental regulation, this means that an agency cannot simply ignore the evidence in front of it that had supported an environmental restriction or standard in the first place.[150] Unless there is new or updated scientific understanding, the decisionmakers must still account for the evidence that supported the original protection of public health or the environment.[151] Consider again the example of the joint EPA/NHTSA fuel economy standards for new cars.[152] The relevant statute for NHTSA requires that the agency set the standard at "the maximum feasible average fuel economy that the [agency] decides the manufacturers can achieve in that model year."[153] In this statute, Congress leaves the factfinding to the agency as expert, providing guidelines as to how a

[145] *Id.*
[146] *See id.*
[147] FCC v. Fox Television Stations, Inc., 556 U.S. 502, 514 (2009).
[148] *Id.* at 515 (emphasis in original).
[149] *Id.*
[150] *Id.*; *see also* Davis Noll & Revesz, *supra* note 137, at 6-7.
[151] *Fox*, 556 U.S. at 516 ("[A] reasoned explanation is needed for disregarding facts and circumstances that underlay or were engendered by the prior policy.")
[152] *See supra* notes 117-119 and accompanying text.
[153] 49 U.S.C. § 32902(a).

determination of "maximum feasible" is to be made.[154] The agency must make tradeoffs among several factors in deciding what is feasible.

Given a clean slate, two different administrations could reasonably come up with different answers. When the Obama Administration's NTHSA and EPA first set rules for model year cars through 2025, the agencies put together a robust explanation of the feasibility of a high fuel economy standard.[155] That explanation was reaffirmed in January 2017.[156] Shortly thereafter, Trump Administration officials at the agencies indicated that they would be revising those findings,[157] and in 2020, the new rule—with a significantly lower level of fuel economy averages required—was finalized.[158]

Deferential judicial review—neutral as to the environmental impacts of any change—looks simply at whether the agency provided an adequate justification for the new rule.[159] That is the *Fox* test. But the substantive statutory standard—"maximum feasible average fuel economy"—has not changed, and the agencies' prior findings remain part of the record. As a result, because Congress set the level at the "maximum," an objective review of such a rolled-back regulation will require employing the non-regression principle. Without new scientific or technical information that calls the earlier decision into question, or without a clear showing that other, more significant principles or public concerns outweigh the environmental considerations, no rolled-back standard can possibly be a reasonable implementation of the statute's clear mandate.

The result of this review is consistent with other expressions of the non-regression principle discussed in this Article. That is, the principle is not an unqualified rule, and does not prevent or prohibit all forms of legal regression with regard to environmental protection.[160] However, any walking back of environmental standards must be justified with evidence showing that the new decision will not harm the environment or public health and/or that the regressive action is supported by principles and welfare concerns greater than that guaranteed by the non-regression principle.

Administrative law doctrine in the United States therefore includes a form of non-regression principle. This has become more significant in recent years, given the frequency of policymaking by agencies and the decline in congressional

---

[154] The statute requires NHTSA to consider "technological feasibility, economic practicability, the effect of other motor vehicle standards of the Government on fuel economy, and the need of the United States to conserve energy." *Id.* § 32902(f).

[155] U.S. EPA & NHTSA, 2017 and Later Model Year Light-Duty Vehicle Greenhouse Gas Emissions and Corporate Average Fuel Economy Standards, 77 Fed. Reg. 62,624 (2012).

[156] U.S. EPA, *Final Determination on the Appropriateness of the Model Year 2022-2025 Light-duty Vehicle Greenhouse Gas Emissions Standards Under the Midterm Evaluation* (Jan. 2017), EPA-420-R-17-001.

[157] U.S. EPA & NHTSA, *Notice of Intention to Reconsider the Final Determination of the Mid-Term Evaluation of Greenhouse Gas Emissions Standards for Model Year 2022-2025 Light Duty Vehicles*, 82 FED. REG. 14,671 (Mar. 22, 2017).

[158] U.S. EPA & NHTSA, *The Safer Affordable Fuel-Efficient (SAFE) Vehicles Rule for Model Years 2021-2026 Passenger Cars and Light Trucks*, 85 FED. REG. 24,174 (Apr. 30, 2020).

[159] FCC v. Fox Television Stations, Inc., 556 U.S. 502 (2009).

[160] *See supra* note 87 and accompanying text.

decisionmaking.[161] However, the administrative law principle is limited in scope. The non-regression principle comes not from any constitutional mandate, but rather from the strength of the substantive environmental statutes (with language such as "maximum"[162] and "best"[163]) and the standard of judicial review.[164] While administrative law restrains arbitrary decisions to revoke environmental protections, judicial review of agency actions does not provide any constraint on legislative action.

IV. CRITIQUES OF THE PRINCIPLE OF NON-REGRESSION

The examples above in international and national-level law illustrate the widespread use and recognition of the non-regression principle in environmental law, regardless of whether it is so named explicitly in constitutions and jurisprudence. There are at least two criticisms of the principle that warrant discussion here before moving further: one normative and one descriptive. A theoretical and normative challenge to the principle is what may seem to be a conflict with democratic values. Non-regression restricts policy options that can be taken in the future, even if withdrawing or rolling back environmental protection might be, on some occasion, democratically favored. Second, descriptively, the major environmental rollbacks in the past several years that have occurred in the United States and in other major countries (developed and developing), such as Australia and Brazil, do call into question the effect and significance of the principle—or at least the extent to which it is obeyed in practice.

In grappling with the role of the non-regression principle in environmental law, these are valid issues to engage with. Democratic process limits the non-regression principle because, absent some justification, future decisionmakers ought to be able to change the course set out today. However, concern about the enjoyment of environmental rights and about the environmental and human health consequences from the undoing of law in the future are precisely the sort of circumstances that justify a departure from the typical majoritarian rules. Further, recent rollbacks highlight the importance of this work in establishing the legitimacy of the principle and the need to reinforce it, to make it more durable. Acknowledging and implementing the principle, while recognizing that it has not been universally respected, is nonetheless a key step in fulfilling human rights with regard to environmental protection.

---

[161] *See, e.g.*, U.S. DEP'T OF JUSTICE, MODERNIZING THE ADMINISTRATIVE PROCEDURE ACT 3 (2020) (discussing proposals for APA reform and noting an "imbalance" in the prevalence of regulatory action vs. congressionally enacted statutes); *see also* Davis Noll & Revesz, *supra* note 137 (addressing expanded use of tools by presidents to thwart predecessors' regulatory actions in the context of a declining number of congressional statutes).

[162] 49 U.S.C. § 32902(f).

[163] *E.g.*, 42 U.S.C. § 7411 (application of the "best system of emission reduction" in the Clean Air Act's New Source Performance Standards); 16 U.S.C. § 1533(b) (requiring Endangered Species Act listing decisions to be made "solely on the basis of the best scientific and commercial data available")

[164] 5 U.S.C. § 706.

A. Democracy and Non-Regression

On the surface, democratic values and generally accepted processes for legislative decisionmaking in democratic systems may appear to conflict with the principle of non-regression. To summarize this challenge in two questions: to what extent may a government or legislature bind future decisionmakers? Is it anti-democratic to prohibit a future legislature or executive authority from revoking or altering environmental laws and policies?

In general, a foundational principle in democratic systems is the idea that a representative legislative body that acts may repeal that act by following the same process. When a statute is enacted with an environmental standard or a piece of legislation sets aside a geographic area for preservation, the implication is that the same decisionmaking body may change its mind and reverse course. In other words, statutory law does not typically provide a vested right to the continuation of that law.[165] Under the non-regression principle, on the contrary, once a level of environmental restriction is applied, future action cannot undo it. Future hands are tied.

This critique of the non-regression principle merits response, but does not defeat the principle. Small-d democrats may wish to avoid a "dead hand" problem that ties current policy to previous conservation efforts.[166] However, failure to incorporate a non-regression principle into decisionmkaing means that future generations are potentially exposed to the same or worse environmental harms that today threaten a panoply of human rights.

Dworkin's description of legal principles includes the idea that any one principle will exist and function in tension with other principles and with other legal considerations.[167] This equitable weighing is both expected and consistent with the rule of law. Constitutional democracy introduces a hierarchy among legal rules, limiting the discretion of lawmakers in the normal, legitimate and democratic legislative process to actions within the scope of constitutional authority—binding democratic bodies to a previously identified set of norms.

Returning to the Costa Rican application of the non-regression principle, the judiciary has recognized that the principle is simply one among a set of constitutionally grounded restrictions on legislative decisionmaking.[168] The substance of that restriction depends on the law or norm previously put in place—i.e., the level of environmental protection that cannot be walked back without sufficient justification.

Judges can indeed apply the principle of non-regression consistently with democratic governance, just as they treat any defined right that might be abridged by government action. Perhaps the most important reason why a polity may enshrine fundamental rights in a constitutional document is to prevent future action

---

[165] *See, e.g.*, Michel Prieur, *Le Principe de Non Regression "Au Coeur" du Droit de l'Homme a l'Environnement*, 1 REVISTA DE DIREITO E SUSTENTABILIDADE 133, 134 (2015) (Braz.).

[166] On the dead hand problem generally in constitutional law, see, for example, Andrew Coan, *The Dead Hand Revisited*, 70 EMORY L. J. ONLINE 1 (2020).

[167] *See, e.g.*, Dworkin, *supra* note 11, at 26.

[168] *See supra* notes 86-87 and accompanying text.

that jeopardizes the exercise of such rights—even and perhaps especially when the action is approved by democratic means.[169] The concept of human rights *per se* envisions this antidemocratic problem, placing negative limitations and positive obligations on state action, even in states with democratic decisionmaking processes.[170] The use of the non-regression principle to overturn a deregulatory action—in furtherance of the human right to a healthy environment—is no different than relying on any other constitutional human right to block a majority-supported infringement to that right.

The judiciary can apply the principle by requiring proportionality and adequate justification for any action that implicate rights guaranteed by the state. In the environmental context, as the Costa Rican court held, environmental protection can only be rolled back if supported by scientific evidence or indication that other countervailing public interests are at stake.[171] Critically, applying the non-regression principle means that the decisionmaker seeking to walk back environmental law must bear the burden of proof in establishing how and why the action is justified—e.g., how the balance of environmental interests at hand should be resolved with other recognized legal principles and considerations that safeguard public wellbeing. In this way, present laws and environmental regulations can claim binding authority on future leaders without running afoul of democratic ideals.

B. Recent Regressions

Setting aside critiques about whether the non-regression principle infringes on democratic decisionmaking, the non-regression principle runs up against a recent track record of backtracking on environmental commitments. Some of these recent rollbacks raise questions about whether strict obedience to the non-regression principle can be maintained when political pressure is strong. The problematic present state of environmental politics suggests a strong need to reinforce the principle of non-regression—first by clearly articulating what it is and where it has worked, but second by grounding it in constitutional provisions, rights, and other means. If constitutional rights can serve as an effective response to regressions in one country, those experiences can provide guidance for other legal systems to do the same. And in the United States, the story of the Trump Administration to highlight is the robustness of the administrative law framework in staving off the systematic regression of environmental protections, even if it did not do so perfectly.

1. Four Years of Rollbacks in the United States

[169] *See generally* JOHN HART ELY, DEMOCRACY AND DISTRUST (1980) (on the countermajoritarian difficulty of judicial review).

[170] Or Bassok & Yoav Dotan describe the case for countermajoritarian judicial review as follows: "[J]udicial review authority serves as a mechanism that ensures adherences to [a society's] chosen course, even against the current desires of the public. Thus, the [countermajoritarian] nature of judicial review authority is understood as a virtue, since it ensures society will continue in the right direction." Or Bassok & Yoav Dotan, *Solving the Countermajoritarian Difficulty?*, 11 INT'L J. CONST. L. 13 (2013), *available at* https://academic.oup.com/icon/article/11/1/13/776170.

[171] *See supra* notes 86-87 and accompanying text.

In the United States, the essence of the Trump Administration's environmental policy from 2017 to 2021 was the repeated violation of the non-regression principle. The list of examples—rollbacks announced, begun (and never finished), or completed—is so extensive that not even a partial treatment can be made here.[172] Various institutions and publications dedicated major resources and efforts to track the status of environmental deregulatory actions.[173] The most significant of these regressions include the United States' (temporary) departure from the Paris Agreement on climate change;[174] the rescission and replacement of the Clean Power Plan (regulation of CO_2 emissions from coal- and natural gas-fired power plants);[175] presidential proclamations slashing the size of national monuments designated for the preservation of desert ecosystems and Native American sacred cultural and archaeological sites in Utah;[176] and the push to reduce standards for fuel economy and GHG emissions from cars[177]—the single action

---

[172] *See, e.g.*, Nadja Popovich, Livia Albeck-Ripka, & Kendra Pierre-Louis, *The Trump Administration Is Reversing 100 Environmental Rules. Here's the Full List.*, N.Y. TIMES, July 15, 2020, https://www.nytimes.com/interactive/2020/climate/trump-environment-rollbacks.html.

[173] Harvard Law School maintained a website that tracks federal environmental regulations that have been or are in the process of being revoked or rolled back, as well as the status of litigation challenging these regulatory changes. *See* Harvard Environmental & Energy Law Program, *Regulatory Rollback Tracker*, https://eelp.law.harvard.edu/regulatory-rollback-tracker/ (last visited Feb. 26, 2021). The tracker now also covers re-regulatory efforts under the Biden Administration. *Id*.

[174] President Trump and his first EPA Administrator, Scott Pruitt, prioritized the exit from Paris as an early statement of the Administration's isolationist policy on climate change, announcing the U.S. withdrawal in 2017. The United States formally submitted its withdrawal from the agreement to the UN on November 4, 2019; per the terms of the agreement, the withdrawal took effect one year later, on November 4, 2020. *See* Lisa Friedman, *Trump Serves Notice to Quit Paris Climate Agreement*, N.Y. TIMES, Nov. 4, 2019, https://www.nytimes.com/2019/11/04/climate/trump-paris-agreement-climate.html. Upon his inauguration, one of President Biden's first acts was to sign a one-paragraph statement re-accepting and re-joining the Paris Agreement. White House Briefing Room, *Paris Climate Agreement* (Jan. 20, 2021), *available at* https://www.whitehouse.gov/briefing-room/statements-releases/2021/01/20/paris-climate-agreement/.

[175] U.S. E.P.A., *Repeal of the Clean Power Plan; Emission Guidelines for Greenhouse Gas Emissions From Existing Electric Utility Generating Units; Revisions to Emission Guidelines Implementing Regulations*, 84 Fed. Reg. 32520 (July 8, 2019) (referred to as the "Affordable Clean Energy" Rule or ACE), https://www.govinfo.gov/content/pkg/FR-2019-07-08/pdf/2019-13507.pdf.

[176] Proclamation No. 9681, *Modifying the Bears Ears National Monument* (Dec. 4, 2017); Proclamation No. 9682, *Modifying the Grand Staircase-Escalante National Monument* (Dec. 4, 2017). The author and others have argued that these executive actions diminishing the size of the monuments are illegal. *See* Mark Squillace, Eric Biber, Nicholas S. Bryner, & Sean B. Hecht, *Presidents Lack the Authority to Abolish or Diminish National Monuments*, 103 VA. L. REV. ONLINE 55 (2017).

[177] U.S. E.P.A. & Dep't of Transportation, *The Safer Affordable Fuel-Efficient (SAFE) Vehicles Rule for Model Years 2021-2026 Passenger Cars and Light Trucks*, 85 Fed. Reg. 24174 (Apr. 30, 2020). This includes the EPA's effort, contested in court, to revoke the state of California's authority to regulate GHG emissions from cars as well as the state's existing Clean Air Act waiver covering its program for conventional tailpipe emissions. *See* U.S. E.P.A. & Dep't of Transportation, *The Safer Affordable Fuel-Efficient (SAFE) Vehicles Rule Part One: One National Program*, 84 Fed. Reg. 51310 (Sept. 27, 2019). On the California wavier, see Nicholas Bryner &

from the Obama Administration that had the greatest projected impact in mitigating climate change.[178]

Of course, this was not the first time that the United States had experienced regression in environmental protection. Many of the Trump Administration's tactics, especially in its first year in2017, were reminiscent of the first term of the Reagan Administration in the early 1980s.[179] In parallel, both administrations installed some agency leaders (in cabinet-level and other positions, and throughout the government, not only in environmental agencies) openly hostile to the mission of implementing congressionally enacted environmental laws.[180]

Out of the Reagan era came some environmental regressions, but also came a more resilient environmental legal framework. Both the *State Farm* and *Chevron* cases described earlier are products of this time.[181] *State Farm*, while neutral on its face, operates with pro-regulatory and progressive-oriented statutes as a bulwark against regression.[182] *Chevron*, for its part, allowed the EPA the flexibility to take an environmentally regressive statutory interpretation.[183] Adherence to the non-regression principle—in tandem with a statutory interpretation method cognizant of environmental impacts[184]—would have altered the outcome in *Chevron*. However, in the intervening decades of legislative stagnation, deference to agencies has more often fostered pro-regulatory moves; not coincidentally, the sharpest criticism in the past several years comes from conservative, rather than liberal jurists.[185]

2. Worldwide Environmental Regression

Meredith Hankins, *Trump Administration and California are on Collision Course over Vehicle Emissions Rules*, THE CONVERSATION, Aug. 2, 2018, https://theconversation.com/trump-administration-and-california-are-on-collision-course-over-vehicle-emissions-rules-100574.

[178] *See, e.g.*, Timothy Cama & Miranda Green, *Trump Moves to Roll Back Obama Emission Standards*, THE HILL, Aug. 2, 2018 (noting that "the Obama rules [covering 2012-2025 model year cars] were estimated to reduce emissions by 6 billion metric tons" over the life of those vehicles).

[179] *See, e.g.*, Leif Fredrickson et al., *History of US Presidential Assaults on Modern Environmental Health Protection*, 108 Am. J. Pub. Health 595 (2018), *available at* https://www.ncbi.nlm.nih.gov/pmc/articles/PMC5922215/; Dan Farber, *It's Déjà Vu All Over Again*, LEGAL PLANET (Dec. 20, 2016), https://legal-planet.org/2016/12/20/its-deja-vu-all-over-again-2/.

[180] On the trajectory of President Trump's first EPA Administrator, Scott Pruitt, including the various scandals that preceded his resignation, see Jeremy Diamond, Eli Watkins, & Juana Summers, *EPA Chief Scott Pruitt Resigns Amid Scandals, Citing 'Unrelenting Attacks,'* CNN.com (July 5, 2018), https://www.cnn.com/2018/07/05/politics/scott-pruitt-epa-resigns/index.html.

[181] Chevron v. Nat. Res. Def. Council, 467 U.S. 837 (1984); Motor Vehicle Mfrs. Ass'n v. State Farm Ins. Co., 463 U.S. 29 (1983).

[182] *See supra* Part III.B.

[183] *Chevron*, 467 U.S. at 845, 857-59.

[184] *See* Nicholas S. Bryner, *An Ecological Theory of Statutory Interpretation*, 54 IDAHO L. REV. 3 (2018)

[185] *See, e.g.*, Gutierrez-Brizuela v. Lynch, 834 F.3d 1142 (10th Cir. 2016) (Gorsuch, J., concurring).

Several other countries have elected leaders in the past decade who have prioritized similar rollbacks. In Australia, for example, Labor Party leaders put in place a carbon pricing scheme, which began in 2012 as a fixed-price tax per metric ton of GHGs emitted and was planned to transition toward a cap-and-trade climate regulatory system.[186] However, the carbon tax was short-lived: following an election campaign that turned in part on the policy, Liberal Party leaders came to power and quickly repealed the program in 2014.[187] Thus, in Australia, the highest per-capita GHG emitter among major developed countries, climate policy has since languished.[188] In Bolivia, despite legal advances in the recognition of environmental and indigenous rights, as well as the rights of nature,[189] the past decade has also been marked by regressions in legal protections. These include changes in protected areas that relax environmental restrictions and decisions to grant permits and licenses for the construction of environmentally damaging transportation infrastructure and pipelines, as well as for the carrying out of extractive industry projects.[190]

In Brazil, the past decade has also been marked by pushes to relax legal protections on forested lands. Since 1965, the country's Forest Code has maintained strict limits on the clearing of rural forested land, preserving riparian zones and the headwaters of streams and rivers.[191] In 2012, despite objections from environmental organizations in the country, Brazil revised its Forest Code, maintaining strict limits on the clearing of rural forested land generally, but expanding exemptions and

---

[186] *See, e.g.*, Claudia Irigoyen, *Case Study: The Carbon Tax in Australia*, Centre for Public Impact, May 5, 2017, https://www.centreforpublicimpact.org/case-study/carbon-tax-australia/ (describing the history leading up to Australia's Clean Energy Act of 2011, the basic elements of the program, and the subsequent backlash); *Australia Introduces Controversial Carbon Tax*, BBC NEWS, July 1, 2012, https://www.bbc.com/news/world-asia-18662560.

[187] *See, e.g.*, Lenore Taylor, *Australia Kills Off Carbon Tax*, THE GUARDIAN, July 16, 2014, https://www.theguardian.com/environment/2014/jul/17/australia-kills-off-carbon-tax (reporting on the Australian Senate's vote to repeal the tax and citing then-Prime Minister Tony Abbott's "'pledge in blood' to 'axe the tax'").

[188] *See, e.g.*, Charles Komanoff, *Australia's Brief, Shining Carbon Tax*, Carbon Tax Center (Jan. 7, 2020), https://www.carbontax.org/blog/2020/01/07/australias-brief-shining-carbon-tax/.

[189] Ley Marco de la Madre Tierra y Desarrollo Integral para Vivir Bien, Ley No. 300, de 15 de octubre de 2012 (Bolivia), *available at* http://www.fao.org/fileadmin/user_upload/FAO-countries/Bolivia/docs/Ley_300.pdf.

[190] *See, e.g.*, Paola D. Cortés Martinez, *El Estado de Derecho Ambiental, el Rol de la Justicia y la Importancia del Principio de No Regresión en Materia Ambiental*, Sept. 8, 2020, https://paoladcortesm.wordpress.com/2020/09/08/el-estado-de-derecho-ambiental-el-rol-de-la-justicia-y-la-importancia-del-principio-de-no-regresion-en-materia-ambiental/. These actions have taken place both under the government of President Evo Morales and the interim government of Jeanine Áñez that began leading the country following his ouster in 2019. On the political crisis in Bolivia and its ramifications, see, for example, Anatoly Kurmanaev, *In Bolivia, Interim Leader Sets Conservative, Religious Tone*, N.Y. TIMES, Nov. 16, 2019, https://www.nytimes.com/2019/11/16/world/americas/bolivia-anez-morales.html.

[191] Lei No. 4.771, de 15 de setembro de 1965 (Braz.), *superseded by* Lei No. 12.651, de 25 de maio de 2012. The author has discussed Brazilian court decisions interpreting the Forest Code in Nicholas S. Bryner, *Brazil's Green Court: Environmental Law in the* Superior Tribunal de Justiça *(High Court of Brazil*), 29 PACE ENVTL. L. REV. 470, 486-496 (2012).

providing immunity for landholders that had cleared forests in the past.[192] While the federal government under President Lula da Silva's Workers' Party from 2002 and 2010 had devoted significant resources and political capital to controlling deforestation in the Amazon, the cattle ranching and agricultural lobbies grew in political power in the Party's governing coalition under President Dilma Rousseff.[193]

Current Brazilian President Jair Bolsonaro, elected in 2018, has been openly hostile toward existing environmental laws, halting the demarcation of indigenous lands in the forests and appointing officials uninterested in enforcing the Forest Code or other statutory requirements.[194] The result of the rollback in legal requirements and in enforcement is a new, sharp rise in deforestation.[195] Although deforestation rates remain below the historic highs in the late 1980s, 1990s, and early 2000s, the slowdown in forest clearing has stopped, and in the period from 2012-2019, has climbed back up—the trend accelerating since President Bolsonaro took office.[196]

3. Re-establishing the Principle

As a descriptive matter, recent actions like the above raise questions as to whether decision-makers are likely to be influenced by the principle of non-regression in environmental law. Dramatic environmental policy changes arise when governments transition, particularly when those transitions are led by leaders from different political parties and ideologies. Political change coincides with political pressure to change course or undo the policies of predecessors, as has been the case in the United States, Brazil, and other countries that have taken a 'right turn' toward anti-conservation chief executives.[197]

---

[192] Lei No. 12.651, de 25 de maio de 2012 [CÓDIGO FLORESTAL] (Braz.), *available at* http://www.planalto.gov.br/ccivil_03/_ato2011-2014/2012/lei/l12651.htm.

[193] For example, President Rousseff appointed Kátia Abreu, a noted figure among the *ruralista* voting bloc in Congress that pushed for revision of the Forest Code, as Minister of Agriculture in 2014. *See, e.g.*, Jonathan Watts, *Brazil's 'chainsaw queen' appointed new agriculture minister*, THE GUARDIAN, Dec. 24, 2014, https://www.theguardian.com/world/2014/dec/24/brazil-agriculture-katia-abreu-climate-change.

[194] *See, e.g.*, Ernesto Londoño & Letícia Casado, *As Bolsonaro Keeps Amazon Vows, Brazil's Indigenous Fear 'Ethnocide,'* N.Y. TIMES, Apr. 19, 2020, https://www.nytimes.com/2020/04/19/world/americas/bolsonaro-brazil-amazon-indigenous.html (reporting on the concerns of indigenous people in the State of Rondônia, in the Amazon Basin near the border with Bolivia).

[195] *See* Rhett A. Bulter, *Amazon Deforestation Increases for 13th Straight Month in Brazil*, MONGABAY, May 9, 2020, https://news.mongabay.com/2020/05/amazon-deforestation-increases-for-13th-straight-month-in-brazil/.

[196] *See id.*

[197] Even in December 2016, one month before President Trump's inauguration, the stance of his administration on environmental issues was clear, given the makeup of his transition team that had been preparing to take control of various administrative agencies. *See, e.g.*, Oliver Milman, *Trump's Transition: Sceptics Guide Every Agency Dealing with Climate Change*, THE GUARDIAN, Dec. 12, 2016, https://www.theguardian.com/us-news/2016/dec/12/donald-trump-environment-climate-change-skeptics.

Calls for regression almost invariably include some form of the argument that an increase in environmental protection represents a step backward for economic development.[198] Despite a great deal of evidence that this is a false dichotomy,[199] the zero-sum economic framing carries popular political weight.

The propensity for recent regressions in many parts of the world highlights the great need for recognition of the non-regression principle in environmental law. However, the idea that a legal principle can prevent these recursions on legal protection for the environment during political transitions may seem idealistic. Effectively making the connection between progressive application of environmental law and the progressive realization of human rights can build normative and political support to apply the principle of non-regression. Despite failings in some respects, the legal response to many regressions over the past several years has demonstrated the way in which the principle can and ought to work in practice to safeguard environmental rights—laying out examples that can be followed.

First, administrative law has proven an important bulwark against the excesses of politically driven rollbacks, at least in recent years in the United States.[200] Hasty decisions to rescind or replace regulations ignored administrative law procedure, failing to respond to the guideline embodied in the non-regression principle—that is, that changes must be justified, either by scientific study that demonstrates an environmental rule is no longer needed or on a deliberate, rational determination that the change is of sufficient benefit to other public interests to outweigh environmental considerations.[201] The hasty nature of administrative actions under President Trump, particularly in 2017, led to a remarkably poor success rate for the administration in defending against challenges to deregulatory action, despite strong deference doctrines in federal courts.[202]

Commitment to the non-regression principle signifies that popular political pressure alone for rolling back environmental law is not a sufficient justification. The idea of this, and similar legal principles (and constitutional decisionmaking) is that it can resist short-term majoritarian impulses. Even in a legal system that does not recognize a rights-based approach to environmental conservation, such as the

---

[198] For example, in President Trump's remarks in June 2017 regarding his intent to withdraw from the Paris Agreement, the speech was replete with (highly dubious) claims about job losses and economic impacts projected from U.S. compliance with the Agreement. *Statement by President Trump on the Paris Climate Accord*, June 1, 2017, https://www.whitehouse.gov/briefings-statements/statement-president-trump-paris-climate-accord/.

[199] *See, e.g.*, Marshall Burke, W. Matthew Davis, & Noah S. Diffenbaugh, *Large Potential Reduction in Economic Damages under UN Mitigation Targets*, 557 NATURE 549 (2018) (modeling net global economic benefits from mitigating climate change). In the United States, cost-benefit analyses of every major environmental regulation since the 1980s demonstrate, time and again, the economic benefit of reducing pollution; further, environmental regulatory transitions typically do not have major long-term effects on employment in affected industries, or may lead to net growth in other job sectors. *See, e.g.*, Institute for Policy Integrity, *Does Environmental Regulation Kill or Create Jobs?* (2017), https://policyintegrity.org/files/media/Jobs_and_Regulation_Factsheet.pdf.

[200] *See* Institute for Policy Integrity, *supra* note 137.

[201] *See supra* notes 85-87 and accompanying text.

[202] *See supra* note 137 and accompanying text.

United States, administrative law can slow down political decisions that harm public interests. While some scholars have criticized the 'ossification' of administrative decisionmaking in the U.S. system, the value of deliberate process and a requirement for rational, expert decisionmaking, is that it can serve as a counterweight to politicking that would undo socially beneficial regulation.[203]

In countries with constitutionally recognized human rights to environmental protection, this dynamic—defending environmental law against short-term politics—is ever clearer. The non-regression principle, as a corollary to the mandate for progressive realization of environmental rights, means that the political branches' decisions are and ought to be constrained. Momentary political decisions to weaken environmental protection would run roughshod over the environmental rights of frontline communities and vulnerable minorities (as well as the diffuse environmental rights enjoyed by all) and are therefore prohibited.

While setbacks and exceptions to the principle, in practice, are inevitable, experience in human rights discourse generally suggests that raising attention to the principle of non-regression—including an explanation of the examples and applications referred to throughout this Article—can help develop the normative case for the principle and build expectations for decisionmakers to implement it and respect it.

V. CONCLUSION: ENVIRONMENTAL NON-REGRESSION IN A PUBLIC HEALTH AND ECONOMIC CRISIS

Environmental law today faces an additional challenge. In the face of contemporary environmental backtracking in several countries—and in finding appropriate responses to roll regulation forward—it is important to put the principle of non-regression in the context of the covid-19 pandemic that has upended the world and has led to devastating loss of life.[204] The pandemic, as well as the political and social responses to it, brought on a severe economic crisis, beginning in the early months of 2020 and continuing as successive waves of infection hit multiple countries around the world.[205]

---

[203] *See generally* Aaron L. Nielson, *Optimal Ossification*, 86 GEO. WASH. L. REV. 1209 (2018) (discussing various critiques of delay in administrative law and defending ossification as beneficial to perceptions of agency legitimacy).

[204] As of February 2021, as reported by Johns Hopkins University, the global total of deaths related to covid-19 had surpassed 2.5 million, including over 500,000 deaths in the United States. Johns Hopkins University Center for Systems Science and Engineering, *COVID-19 Dashboard*, https://coronavirus.jhu.edu/map.html (last visited Feb. 26, 2021).

[205] In June 2020, the International Monetary Fund projected that the global economy would decline by 4.9% for the year 2020. *See* Alan Rappeport, *I.M.F. Predicts Deeper Global Downturn Even as Economies Reopen*, N.Y. TIMES, June 24, 2020, https://www.nytimes.com/2020/06/24/business/imf-world-economic-outlook.html. Surveys indicate that consumer pessimism in many countries was worse in 2020 than at the height of the Great Recession in 2008-2009. *See* Mara Mordecai & Shannon Schumacher, *In Many Countries, People are More Negative about the Economy Amid COVID-19 than During Great Recession*, Pew Research Center (Sept. 14, 2020), https://www.pewresearch.org/fact-tank/2020/09/14/in-many-countries-people-are-more-negative-about-the-economy-amid-covid-19-than-during-great-

Environmental crises have exacerbated the human impact of covid-19, and the economic impact of covid-19 threatens to undermine progress in environmental law and policy—both by diverting all available resources and attention to addressing the pandemic (in necessary ways) and by adding to the perceived economic pressure to do away with burdensome or costly environmental regulations.

Cautionary examples abound. In March 2020, early on in the U.S. experience with the spreading virus, the EPA issued a memorandum with a temporary enforcement policy during the pandemic that kneecapped the EPA enforcement office's ability to hold environmental violators accountable.[206] The memorandum applied the EPA's enforcement discretion to signal to regulated industries that the EPA would not be enforcing environmental monitoring requirements:

> In general, the EPA does not expect to seek penalties for violations of routine compliance monitoring, integrity testing, sampling, laboratory analysis, training, and reporting or certification obligations in situations where the EPA agrees that COVID-19 was the cause of the noncompliance and the entity provides supporting documentation to the EPA upon request.[207]

In Brazil, the Environment Minister, Ricardo Salles, sparked outrage for expressing that he saw the pandemic as an opportunity to jam through deregulatory policies while the public and media were not paying attention.[208] In a recording from an April 2020 meeting, the Minister was overheard advocating for "efforts now, while we have a quiet moment in terms of media coverage" of environmental issues, to "push the herd of cattle through" the opening.[209]

The pandemic has caused a worldwide economic earthquake. Rapid progress on the development of several vaccines has been encouraging, and vaccination programs in at least some countries have brought hope of eventually bring the public health crisis under control.[210] Yet we are still locked in debates

---

recession/. (In Pew's study, the United States was one exception, with 77% of Americans saying the current economic situation was "bad" in 2008/2009 and 69% in 2020).

[206] U.S. E.P.A., Office of Enforcement and Compliance Assurance, *Memorandum: COVID-19 Implications for EPA's Enforcement and Compliance Assurance Program* (March 26, 2020), *available at* https://www.epa.gov/sites/production/files/2020-03/documents/oecamemooncovid19implications.pdf.

[207] *Id.* at 3.

[208] *Ministro do Meio Ambiente defende passar 'a boiada' e 'mudar' regras enquanto atenção da mídia está voltada para a Covid-19*, GLOBO.COM (May 22, 2020), https://g1.globo.com/politica/noticia/2020/05/22/ministro-do-meio-ambiente-defende-passar-a-boiada-e-mudar-regramento-e-simplificar-normas.ghtml.

[209] *Id.* (my translation).

[210] *See, e.g.*, Smriti Mallapaty, *Vaccines are Curbing COVID: Data from Israel Show Drop in Infections*, 590 NATURE 197 (2021), https://www.nature.com/articles/d41586-021-00316-4.

about how to recover and reopen society and industry as we confront additional waves of infections and new variants of the coronavirus.[211]

In what will assuredly be a prolonged recover process, we have the potential to transform environmental law and policy. But based on experiences in the United States, China, Brazil, and elsewhere, we have reason to worry. Economic recession and recovery cycles have, as in the past, inevitably led to political pressure to cut regulatory corners.

While the 2020s have begun as a worrisome decade, now is not a time for backtracking. The principle of non-regression in environmental law is well documented in national constitutions, statutes, and regulations; international treaties and declarations; and in the theory and jurisprudence around human rights and the environment. The purpose of this Article is in bringing together the variety of legal expressions of environmental non-regression—to demonstrate that there is indeed solid legal footing for applying the principle in political discussions and in judicial review of regressive executive and legislative actions.

Moving forward, policymakers will need to grapple with the mismatch between non-regression in environmental *law*—moving forward with two steps forward for every step back—and rapid degradation of global environmental conditions.[212] Environmental law as its own field began with great purpose and ambition in the first steps made 50 years ago.[213] Yet sharp declines in biodiversity, rising temperatures and seas, growing global GHG concentrations, water scarcity, increased deforestation, a host of other problems—all appear, empirically, more severe than just a decade ago.

As we traverse the long-term pandemic response throughout the world, there will be better examples to follow as well. Economic recovery policies—if designed with foresight—represent a rare opportunity to redirect governmental and economic priorities to facilitate a just, green transition.[214] At a time when fossil fuel prices are low due to demand declines, economic stimulus could cut or eliminate fossil fuel subsidies for exploration that is no longer economically viable and instead invest public resources in putting people to work in building green infrastructure, improving energy efficiency, and other areas where economic and environmental interests align. The movement for a Green New Deal predates the

[211] Centers for Disease Control and Prevention, *US COVID-10 Cases Caused by Variants*, https://www.cdc.gov/coronavirus/2019-ncov/transmission/variant-cases.html (accessed Feb. 27, 2021) (tracking the reported cases of identified SARS-CoV-2 virus variants B.1.1.7, B.1.351, and P.1 in the United States).

[212] *See* Tommy Koh, *The Earth Summit's Legacy: An Assessment* (June 15, 2019), https://cil.nus.edu.sg/publication/the-earth-summits-legacy-an-assessment/.

[213] *E.g.*, Stockholm Declaration of the United Nations Conference on the Human Environment (1972); National Environmental Policy Act (1970), *codified at* 42 U.S.C. §§ 4321 *et seq*.

[214] Ann Eisenberg's thorough exposition of the "just transitions" movement describes two meanings of the concept—to ensure that a low-carbon transition is "fair to the most vulnerable populations" and to protect "workers and communities who depend on high-carbon industries from bearing an undue burden of the costs of decarbonization." Ann M. Eisenberg, *Just Transitions*, 92 S. CAL. L. REV. 273, 275 (2019).

pandemic, but if successful, even in part, will drive a more environmentally sustainable recovery.[215]

So long as environmental degradation continues—and so long as those environmental impacts implicate human health, human life, and human rights—those who develop environmental protection under the law must never look back. The environmental rule of law requires respect for human rights and respect for the principle of non-regression. May it guide us forward.

[215] One persuasive case for a Green New Deal is KATE ARONOFF, ALYSSA BATTISTONI, DANIEL ALDANA COHEN, & THEA RIOFRANCOS, A PLANET TO WIN: WHY WE NEED A GREEN NEW DEAL (2019). The author of this work has also written on the legal challenges in crafting an effective and equitable Green New Deal. Nicholas S. Bryner, *The Green New Deal and Green Transitions*, 44 VT. L. REV. 723 (2020).