

PROTECTING AMERICA FROM ITSELF: CAN THE EMERGING PRINCIPLE OF NON- REGRESSION HELP THE UNITED STATES RESOLVE THE EXISTENTIAL THREAT OF CLIMATE DISASTER?

Abstract: The non-regression principle is a budding international jurisprudential precept holding that legal protections of public welfare and individual rights, once established, cannot be subjected to erosive roll backs. Over the last decade, several international jurists began to apply the doctrine in the more specific context of environmental law. France has explicitly incorporated the principle by statute, while Brazil has similarly adopted it by Supreme Court decision. Implementation of environmental non-regression comes at a crucial time. The non-regression principle is a promising tool for achieving climate solutions and, given the existential threats posed by human climate disruption, implementing the principle, domestically and abroad, is of crucial importance. It is particularly critical the United States acts decisively—it is the second largest polluter on earth.

An important question, then, is whether the non-regression principle could take root in the United States. This Note uses a potential methane pollution restriction as an example of how an anti-backsliding provision could realistically be made part of this nation's post-Paris Agreement efforts to limit climate change. Statutes like the Energy Policy and Conservation Act and Clean Air Act already contain limited restrictions on regression, known as anti-backsliding provisions. These are first steps, but wider implementation is necessary to achieve the goals of the 2015 Paris Agreement on climate change. Broad constitutional and regulatory adoption of the non-regression principle in the near term are likely politically impractical in the United States. A statute codifying environmental non-regression may have the necessary legal foundation to withstand political challenges in court and become a significant legal tool in achieving crucial climate and environmental protection.

INTRODUCTION

In 2018, the Intergovernmental Panel on Climate Change (IPCC) reported that, if the climate warms to 3° Celsius above pre-industrial levels by the end of the century, the planet will experience large scale poverty and starvation, high levels of political destabilization, unprecedented drought, and even the destruction of coastal cities.¹ As of November 2022, the earth is on pace for a

¹ See Ove Hoegh-Guldberg et al., *Impacts of 1.5°C of Global Warming on Natural and Human Systems*, in *GLOBAL WARMING OF 1.5°C: AN IPCC SPECIAL REPORT ON THE IMPACTS OF GLOBAL*

2.1° to 2.9°C increase by 2100—an increase still capable of causing catastrophic consequences.²

Although projections seem grim, the international community took a big step toward combating climate change in the 2015 Paris Agreement, drafted at the United Nations Climate Change Conference (COP21).³ At the time of COP21, the world was on pace for a 4° to 5°C increase by 2100.⁴ The Paris Agreement saw 194 countries agree to limiting the increase to 1.5°C, with a worst-case scenario ceiling of 2°C.⁵ Achieving this goal would require the world to cut global carbon dioxide emissions by 45% from 2010 levels by the year 2030.⁶ Currently, commitments from Paris Agreement parties are on pace to increase greenhouse gas emissions by 10.6% from 2010 levels.⁷

To make the situation more complex, achieving the greenhouse gas emissions threshold is entirely dependent on the decrease of methane emissions.⁸

WARMING OF 1.5°C ABOVE PRE-INDUSTRIAL LEVELS AND RELATED GLOBAL GREENHOUSE GAS EMISSION PATHWAYS, IN THE CONTEXT OF STRENGTHENING THE GLOBAL RESPONSE TO THE THREAT OF CLIMATE CHANGE, SUSTAINABLE DEVELOPMENT, AND EFFORTS TO ERADICATE POVERTY 175, 280 (Valérie Masson-Delmotte et al. eds., 2018) (explaining the likelihood and possible effects of the worst-case scenario of the Paris Agreement: the planet heating over 3°C by the end of the century).

² See Max Bearak, *Climate Pledges Are Falling Short, and a Chaotic Future Looks More Like Reality*, N.Y. TIMES <https://www.nytimes.com/2022/10/26/climate/un-climate-pledges-warming.html> [<https://perma.cc/DL28-LXR7>] (Nov. 11, 2022) (illustrating the environmental consequences the world will endure if carbon emissions are not substantially cut back).

³ See Paris Agreement to the United Nations Framework Convention on Climate Change, Dec. 12, 2015, 3156 U.N.T.S. 54113 [hereinafter “Paris Agreement”] (memorializing the finished agreement after the twenty-first session of the Conference of the Parties to the United Nations Framework Convention on Climate Change, or COP21); see also *The Paris Agreement*, U.N. CLIMATE CHANGE, <https://unfccc.int/process-and-meetings/the-paris-agreement/the-paris-agreement> [<https://perma.cc/6NP7-M5S5>] (summarizing the Paris Agreement, what it contains, and how progress is tracked).

⁴ See David Wallace-Wells, *Beyond Catastrophe: A New Climate Reality Is Coming into View*, N.Y. TIMES (Oct. 26, 2022), <https://www.nytimes.com/interactive/2022/10/26/magazine/climate-change-warming-world.html> [<https://perma.cc/V4GH-CT7K>] (explaining that the world was previously on pace to heat by 4 or 5°C by the end of the century and, although that projection is no longer accurate, risk of catastrophe remains).

⁵ See Paris Agreement, *supra* note 3, art. 2(1)(a) (agreeing to hold the global temperature rise to “well below 2°C above pre-industrial levels”); *Paris Agreement*, U.N. TREATY COLLECTION, https://treaties.un.org/pages/ViewDetails.aspx?src=TREATY&mtdsg_no=XXVII-7-d&chapter=27&clang=en [<https://perma.cc/N6C6-HPW9>] (providing an up-to-date report of how many countries are parties to the Paris Agreement).

⁶ Press Release, U.N. Climate Change, *Climate Plans Remain Insufficient: More Ambitious Action Needed Now*, U.N. CLIMATE CHANGE (Oct. 26, 2022), <https://unfccc.int/news/climate-plans-remain-insufficient-more-ambitious-action-needed-now> [<https://perma.cc/UY5D-8PN2>].

⁷ *Id.* Although still well short of the intended 45% reduction, a 10% increase is an improvement over the projections from 2021—a 13.7% increase. See *id.* (comparing the 2021 and 2022 U.N. assessments’ projections).

⁸ See Robin McKie, *Sharp Rise in Methane Levels Threatens World Climate Targets*, THE GUARDIAN (Feb. 17, 2019), <https://www.theguardian.com/environment/2019/feb/17/methane-levels-sharp-rise-threaten-paris-climate-agreement> [<https://perma.cc/F9DF-H3Q4>] (explaining that holding

Over a twenty-year period, methane is eighty times more harmful to the atmosphere than carbon dioxide.⁹ Given the potency of the gas, scientists highlighted man-made methane emissions as “the low-hanging fruit” capable of significantly slowing climate change.¹⁰ This effort is becoming increasingly urgent: after falling for twenty-five years, global methane emissions increased again in 2014 and experienced shocking surges during 2020 and 2021.¹¹

Domestically, the United States has the distinction of being a party to the 2015 Paris Agreement, the third largest methane polluter, and the second largest carbon polluter on earth.¹² To honor its commitment in Paris, the United States would need to reduce emissions by 50% to 52% from 2005 levels by

global temperature increases to just 2°C above pre-industrial levels will be almost impossible if global methane emissions continue to increase

⁹ EDF Staff, *The Inflation Reduction Act: A Breakthrough for Lower Energy Costs and Climate Progress*, ENV’T DEF. FUND (Nov. 16, 2022), <https://www.edf.org/blog/2022/11/16/inflation-reduction-act-breakthrough-lower-energy-costs-and-climate-progress> [<https://perma.cc/YU67-E2CA>]; see also *Methane Emissions Are Driving Climate Change. Here’s How to Reduce Them.*, U.N. ENV’T PROGRAMME (Aug. 20, 2021), <https://www.unep.org/news-and-stories/story/methane-emissions-are-driving-climate-change-heres-how-reduce-them> [<https://perma.cc/H5U9-5JTL>] (explaining the dangers posed by methane in the short-term compared to carbon dioxide and methane’s overall contribution to climate change).

¹⁰ Jillian Ambrose, *Fracking Causing Rise in Methane Emissions, Study Finds*, THE GUARDIAN (Aug. 14, 2019), <https://www.theguardian.com/environment/2019/aug/14/fracking-causing-rise-in-methane-emissions-study-finds> [<https://perma.cc/EE4V-UZE2>].

¹¹ Adam Voiland, *Why Methane Surged in 2020*, NASA, <https://earthobservatory.nasa.gov/images/150967/why-methane-surged-in-2020> [<https://perma.cc/RX73-GWGY>]. Although fracking and other natural gas production methods are the primary causes for man-made emissions, wetlands and cows naturally release methane as well. Ambrose, *supra* note 10. That natural process, however, is rapidly proliferating at an unnatural and compounding rate. See Voiland, *supra* (explaining that unusually high temperatures and rainfall caused by climate change led to increased methane release from wetlands). As the climate warms, wetlands release methane into the atmosphere at a faster rate, which further contributes to climate change. *Id.*

¹² *Global Methane Tracker 2022*, INT’L ENERGY AGENCY (2022), <https://www.iea.org/reports/global-methane-tracker-2022/overview> [<https://perma.cc/E7BQ-V7E9>]; *Report: China Emissions Exceed All Developed Nations Combined*, BBC NEWS (May 7, 2021), <https://www.bbc.com/news/world-asia-57018837> [<https://perma.cc/ARF7-BHGA>]; Paris Agreement, *supra* note 3; see also *Major Studies Reveal 60% More Methane Emissions*, ENV’T DEF. FUND, <https://www.edf.org/climate/methane-studies> [<https://perma.cc/WG9G-WK7K>] (explaining that American oil and gas companies emitted a total of thirteen million metric tons of methane a year, enough to provide ten million homes with fuel). As of 2021, the United States was second only to China in yearly greenhouse gas emissions. *Report: China Emissions Exceed All Developed Nations Combined*, *supra*. The United States contributed 11% of the world’s yearly emissions, while China produced 27%—more than the combined total of every other developed nation. *Id.* Over the last sixty years, the United States has contributed 21.5% of total emissions, which makes it the largest long-term polluter. Seth Borenstein, *Climate Questions: Who Are the Big Emitters?*, AP NEWS (Oct. 26, 2022), <https://apnews.com/article/science-china-united-states-climate-and-environment-0ad4b8b987d74e15f7489c29371cbc83> [<https://perma.cc/98N6-4GM3>]. Over that same period, China produced 16.5% of total emissions, placing it in second. *Id.* The enormous amount of emissions from China and the United States alone have led scientists to fear that achieving the goals established in Paris will be impossible without a bilateral agreement between the two powers. *Report: China Emissions Exceed All Developed Nations Combined*, *supra*.

2030.¹³ Currently, it is on pace for a 31% to 44% reduction due to the largely partisan Inflation Reduction Act, which implemented a methane emissions charge and incentivized carbon reduction through a series of tax credits.¹⁴

If America wishes to begin to resolve climate threats and comply with the Paris Agreement, it must overcome significant challenges posed by the turnover of the regulatory agenda accompanying the election of new presidents.¹⁵ Given the massive expansion of agency authority and decision making in recent decades, meeting the Paris Agreement standards will fall largely on the backs of executive agencies.¹⁶ Ultimately, policy-making by executive agencies is entirely dependent on the president.¹⁷ With a significant portion of the Republican Party refusing to acknowledge climate change, it is possible that a

¹³ Ben King, John Larsen & Hannah Kolus, *A Congressional Climate Breakthrough*, RHODIUM GRP. (July 28, 2022), <https://rhg.com/research/inflation-reduction-act/> [<https://perma.cc/DSR6-74FK>].

¹⁴ Inflation Reduction Act, Pub. L. No. 117-169, § 60113, 136 Stat. 1818, 2073, 2076 (2022); see King et al., *supra* note 13 (illustrating that, after the passage of the Inflation Reduction Act, the United States improved its predicted greenhouse gas emissions reduction to 31–44%); Edwin LaMair & Grace Smith, *The Inflation Reduction Act Is a Game-Changer on Methane. Here's Why*, ENV'T DEF. FUND (Jan. 25, 2023), <https://blogs.edf.org/energyexchange/2023/01/25/the-inflation-reduction-act-is-a-game-changer-on-methane-heres-why-2/> [<https://perma.cc/C644-HVRP>] (explaining that the methane regulation program in the Inflation Reduction Act will modernize methane emission tracking, protect communities vulnerable to those emissions, and allow America to reach its climate mitigation goals). Before the Inflation Reduction Act, the United States' policies would result in a 24–35% reduction in emissions. King et al., *supra* note 13. It is most likely that the reduction lands in the middle of the two ranges at 40%. *Id.*

¹⁵ See, e.g., Juliet Eilperin, Brady Dennis & John Muyskens, *Trump Rolled Back More Than 125 Environmental Regulations. Here's How*, WASH. POST (Oct. 30, 2020), <https://www.washingtonpost.com/graphics/2020/climate-environment/trump-climate-environment-protections/ics/2020/climate-environment/trump-climate-environment-protections/> [<https://perma.cc/8SXM-VS7V>] (listing the enormous number of Obama-era environmental regulations rolled back by the Trump Administration); CLARA BARNOSKY, JANE SADLER, RICHARD YATES & ZACHARY ZIMMERMAN, *REVERSING TRUMP ENVIRONMENTAL ROLLBACKS: A 100 DAY ANALYSIS ON THE BIDEN ADMINISTRATION'S REVERSALS 2* (2021) (discussing the hundreds of environmental rollbacks from the Trump Administration that the Biden Administration vowed to reverse).

¹⁶ See Susan E. Dudley, *Milestones in the Evolution of the Administrative State*, 150 DÆDALUS 33, 33–42 (2021) (reviewing the origins and expansion of the American administrative state); see also Benjamin C. Skillin, Note, *Major Questions Require Major Coordination: Enhancing Regulatory Coordination to Combat Nondelegation and Anti-Deference Judicial Scrutiny*, 64 B.C. L. REV. 1283, 1291–1308 (2023) (detailing the history of congressional delegation of authority to executive agencies and the evolution of the judicial approach to reviewing such delegations). The Code of Federal Regulations has over 185,000 pages and is four times larger than the United States Code. Dudley, *supra*, at 34. Likewise, since the 1930s, agencies have enjoyed substantial levels of deference from the judiciary that have allowed for the proliferation of the administrative state. See *id.* at 35 (describing how the administrative state faced such little judicial scrutiny that the non-delegation doctrine seemed to be non-existent). In 1984, in *Chevron, U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, the U.S. Supreme Court's decision facilitated a great deal of this expansion. See *id.* at 42 (explaining how the development of the *Chevron* doctrine of judicial deference amplified the growing power of executive agencies); 467 U.S. 837, 866 (1984) (granting deference to reasonable administrative interpretations if the governing statute is silent on the issue).

¹⁷ See U.S. CONST. art. II, § 1, cl. 1 (vesting the executive power of the U.S. government in the President of the United States).

new administration could roll back climate regulation and cause the United States to fall short of its Paris Agreement commitments.¹⁸

Indeed, in his four years in office, former President Donald Trump rolled back over 125 environmental regulations inherited from his predecessor.¹⁹ These decisions would have caused American emissions in 2035 to be 3% higher than the projected emissions before the rollbacks—had they not subsequently been reversed.²⁰ In 2020, President Trump even pulled the United States out of the Paris Agreement itself.²¹ The inauguration of President Joseph Biden further highlighted the volatility of environmental regulation, as President Biden immediately reentered the Paris Agreement and vowed to reverse 210 Trump-era environmental policies and rollbacks.²²

The Bureau of Land Management's (BLM) methane waste regulation illustrates the issues with this administrative tug-of-war.²³ In 2016, former President Barack Obama's BLM finalized the Methane Waste Rule, which limited oil and gas producers' intentional and unintentional waste of methane, saved \$200 million per year, and reduced the country's methane emissions by 35%.²⁴ Two years later, President Trump's BLM repealed the rule.²⁵ In 2022, President

¹⁸ See Ari Drennen & Sally Hardin, *Climate Deniers in the 117th Congress*, CTR. FOR AM. PROGRESS (Mar. 30, 2021), <https://www.americanprogress.org/article/climate-deniers-117th-congress/> [<https://perma.cc/6W73-XQAL>] (discussing the increased prevalence of members of the U.S. Congress who do not believe climate change is occurring or believe climate change is not a threat to Americans). In the 117th session, 139 members of Congress adopted a stance of climate denial. *Id.* Notably, only members of the Republican Party denied the existence of climate change—specifically 52% of House Republicans and 60% of Senate Republicans. *Id.* The prevalence of climate denial decreased in comparison to the 116th Congress, in which 150 members supported the climate denial position. *Id.* An individual is designated as a climate denier if he or she believes climate change is a hoax or merely a natural cycle, the science around climate change is not settled, or humans are not primary contributors to climate change. *Id.*

¹⁹ Eilperin et al., *supra* note 15.

²⁰ Hannah Pitt, Katie Larsen & Maggie Young, *The Undoing of US Climate Policy: The Emissions Impact of Trump-Era Rollbacks*, RHODIUM GRP. (Sept. 17, 2020), <https://rhg.com/research/the-rollback-of-us-climate-policy/> [<https://perma.cc/XV7L-9FXV>].

²¹ Matt McGrath, *Climate Change: US Formally Withdraws from Paris Agreement*, BBC NEWS (Nov. 4, 2020), <https://www.bbc.com/news/science-environment-54797743> [<https://perma.cc/VHQ9-2B2L>].

²² Press Release, Antony J. Blinken, Sec'y of State, The United States Officially Rejoins the Paris Agreement (Feb. 19, 2021), <https://www.state.gov/the-united-states-officially-rejoins-the-paris-agreement/> [<https://perma.cc/DT3K-GFV5>]; BARNOSKY ET AL., *supra* note 15, at 2.

²³ See *Regulatory Tracker: BLM Methane Waste Prevention Rule*, HARV. L. SCH. ENV'T & ENERGY L. PROGRAM, <https://eelp.law.harvard.edu/2017/09/bam-methane-waste-prevention-rule/> [<https://perma.cc/2NPJ-ZPT5>] (tracking and summarizing the regulatory changes altering the BLM's Methane Waste Prevention Rule across the Obama, Trump, and Biden Administrations, including the legal challenges each administration faced).

²⁴ 43 C.F.R. §§ 3100, 3160, 3170 (2017) (repealed 2018); 81 Fed. Reg. 83008, 83014 (Nov. 18, 2016) (to be codified at 43 C.F.R. pts. 3100, 3160, 3170).

²⁵ 43 C.F.R. §§ 3160, 3170 (2018); 83 Fed. Reg. 49184, 49184 (Sept. 28, 2018) (to be codified at 43 C.F.R. pts. 3160, 3170); see also *Regulatory Tracker: BLM Methane Waste Prevention Rule*, *supra* note 23 (summarizing the multiple litigation challenges the Trump Administration needed to over-

Biden re-opened the rulemaking process to replace the rule a third time.²⁶ The back and forth served little practical purpose, as even the energy companies being regulated voiced their support for the reinstitution of the Obama-era regulations.²⁷

The non-regression principle, which emerged only recently in environmental law, can halt this needless cycle and offer substantial support for any solutions mitigating the climate problem.²⁸ The principle is a doctrine of international human rights law preventing a government from cutting back the fundamental rights of its citizens once they are set to a particular level.²⁹ If adopted in American environmental law, it would prevent agencies from rolling back environmental regulation once a standard is established.³⁰ The non-regression principle is not alien to American law; narrow iterations of the principle already exist within the United States Code.³¹ If the non-regression principle can

come to repeal the Obama Administration's methane rule and the Trump Administration's desire to return the methane rule to its original 1970s form). According to the U.S. Congress, one-third of human methane emissions stem from fossil fuel production and transmission. Methane Emissions Reduction Act of 2021, S. 645, 117th Cong. § 2(3) (2021).

²⁶ 87 Fed. Reg. 73588, 73588 (Nov. 30, 2022) (to be codified at 43 C.F.R. pts. 3160, 3170); see also *Regulatory Tracker: BLM Methane Waste Prevention Rule*, *supra* note 23 (discussing the review process undertaken by the Biden Administration before its ultimate decision to replace the Trump-era methane rule with an updated version).

²⁷ See, e.g., Pioneer (@PXDtweets), X (Apr. 20, 2021, 8:09 PM), <https://twitter.com/PXDtweets/status/1384660646835351552> [<https://perma.cc/JUB4-S56W>] (explaining that consistent rules regulating methane assist members of the industry by providing certainty and encouraging innovation); Shell USA (@Shell_USA), X (Apr. 7, 2021, 12:00 PM), https://twitter.com/Shell_USA/status/1379826433552441353 [<https://perma.cc/SG7R-EPHB>] (urging the Biden Administration to use the Congressional Review Act to restore the methane flaring regulations); Staale Gjervik, *ExxonMobil Supports Methane Regulation*, EXXONMOBIL (Aug. 8, 2019), <https://energyfactor.exxonmobil.com/insights/partners/supports-methane-regulation/> [<https://perma.cc/3XPA-Q4Y4>] (asserting that federal regulation of methane emissions ensures everyone in the industry is doing their fair share and those voluntarily reducing emissions are not bearing too large a burden); *Methane Emissions and Natural Gas*, BRITISH PETROLEUM, https://www.bp.com/en_us/united-states/home/who-we-are/advocating-for-net-zero-in-the-us/methane-emissions.html [<https://perma.cc/F582-ETQ7>] (calling for the federal government to regulate methane to assist the industry with stopping methane leakage and protecting the environment).

²⁸ See Michel Prieur, *Non-Regression in Environmental Law*, 5 S.A.P.I.E.N.S. 53, 53–55 (2012) (detailing the emergence of the non-regression principle since 2010).

²⁹ Robert L. Glicksman, *The Justifications for Nondegradation Programs in U.S. Environmental Law*, in LE PRINCIPE DE NON-REGRESSION EN DROIT DE L'ENVIRONNEMENT 471, 471 (Michel Prieur & Gonzalo Sozzo eds., 2012); see Prieur, *Non-Regression in Environmental Law*, *supra* note 28, at 54 (describing the human rights foundation of the non-regression principle).

³⁰ See Nat. Res. Def. Council, Inc. v. Abraham, 355 F.3d 179, 197 (2004) (holding that the anti-backsliding provision in the Energy Policy and Conservation Act strips the Department of Energy (DOE) from promulgating more lenient energy standards once a stricter standard has already been established and published).

³¹ See, e.g., Energy Policy & Conservation Act (EPCA), 42 U.S.C. § 6295(o)(1) (implementing an anti-backsliding provision for the energy efficiency standards of consumer appliances).

be adopted on a broader scale, the United States may be able to meet the commitment it made in Paris.³²

This Note analyzes the few examples of the non-regression principle in U.S. law to gauge whether wider implementation of non-regression would be viable in the United States.³³ Part I of this Note examines the growing prominence of the non-regression principle internationally and its limited presence within the United States.³⁴ Part II analyzes the previous political and legal environments that led to the infrequent but prominent adoption of non-regression in the United States.³⁵ Part III concludes that application of environmental non-regression to a systemic legislative solution is unlikely, but a more narrow application could provide bipartisan benefits and still significantly impact American climate mitigation.³⁶

I. WALKING FORWARD, NOT BACK: THE NON-REGRESSION PRINCIPLE, ANTI-BACKSLIDING PROVISIONS, AND NON-DEGRADATION POLICIES

In international law, the application of the non-regression principle to environmental law stems from the advancement of human right and acts as a prohibition against deliberate decisions to relax environmental protection standards when more stringent standards are already in place.³⁷ In its American form, the principle is echoed in anti-backslide provisions—laws that are simi-

³² See King et al., *supra* note 13 (asserting that more action will be needed across all levels of government to achieve the 50–52% emissions reduction by 2030). The article did concede that, although more action will be necessary going forward, the Inflation Reduction Act included various provisions that will be important for reaching the 50–52% goal. *Id.* Specifically, the Senate package included tax credits for the development of clean energy sources, carbon capture technology, and electric vehicles. *Id.* Senator Joe Manchin, however, managed to strike a deal with Democratic leadership and include a provision requiring the sale of four oil leases on the Outer Continental Shelf. Press Release, Center for Biological Diversity, Manchin Poison Pills Buried in Inflation Reduction Act Will Destroy Livable Climate (July 28, 2022), <https://biologicaldiversity.org/w/news/press-releases/manchin-poison-pills-buried-in-inflation-reduction-act-will-destroy-a-livable-climate-2022-07-28/> [<https://perma.cc/9MRJ-PEZS>]; King et al., *supra* note 13.

³³ See *infra* notes 37–245.

³⁴ See *infra* notes 37–119.

³⁵ See *infra* notes 120–204.

³⁶ See *infra* notes 205–245.

³⁷ See *Non-Regression in Environmental Law*, *supra* note 28, at 53–54 (detailing the non-regression principle in an environmental context, including its foundations and the factors posing the threat of regression); see also LE CLUB DES JURISTES, TOWARD A GLOBAL PACT FOR THE ENVIRONMENT 50 (2017) (calling for non-regression to be introduced as a principle strengthening international environmental law). In September 2017, Le Club des Juristes drafted its Draft Global Pact for the Environment—the product of over one-hundred lawyers, scholars, and judges from forty different countries. *Id.* at 7. The United Nations then adopted a resolution by the same name, *Towards a Global Pact for the Environment*, to investigate and identify weaknesses in existing international environmental law. See G.A. Res. 72/277, at 2 (May 10, 2018) (establishing an ad hoc group to identify gaps in current environmental law and make recommendations to fill those gaps).

lar in function to non-regression laws but not as sweeping in scope.³⁸ This Note uses American anti-backsliding provisions to assess the viability of the non-regression principle if implemented systemically in the United States.³⁹ The non-regression principle is a relatively new legal concept, but it is already developing influence in the world of environmental law.⁴⁰ Accordingly, this Part details what the non-regression principle looks like on a foreign and international level before turning to discuss non-regression in the American context.⁴¹

Section A of this Part illustrates the growing prominence of the non-regression principle in the United Nations, as well as its emergence within foreign law.⁴² Section B looks within the United States and analyzes the sparse, but enduring, examples of non-regression that have taken root across the legal landscape.⁴³ Finally, Section C introduces recent Supreme Court jurisprudence likely to play an influential role in future environmental regulation.⁴⁴

A. The Non-Regression Principle: Entering the World Stage

Since the inception of the non-regression principle in 2010, international environmental activists have slowly pushed the principle into legal discussions on both the international and foreign level.⁴⁵ Subsection 1 of this Section dis-

³⁸ See, e.g., Clean Water Act (CWA), 33 U.S.C. § 1342(o) (containing a provision prohibiting the renewing of licenses allowing for more lenient emission standards, titled “anti-backsliding”). Though the specific title of “anti-backsliding” does not appear in the EPCA, the Department of Energy’s agency guidance refers to § 6295(o)(1) as “what is known as an ‘anti-backsliding’ provision.” See DEP’T OF ENERGY, APPLIANCE STANDARDS PROGRAM AND TEST PROCEDURES SMALL ENTITY GENERAL COMPLIANCE GUIDE (2023), <https://www.energy.gov/sites/default/files/2023-07/sbrefa-general-compliance-guide.pdf> (stating “EPCA contains what is known as an ‘anti-backsliding’ provision”).

³⁹ See *infra* notes 120–245 (arguing that anti-backsliding provisions have the potential to serve as bipartisan vehicles to help the United States combat the climate crisis).

⁴⁰ See *Non-Regression in Environmental Law*, *supra* note 28, at 55 (discussing the origination of the non-regression principle in 2010).

⁴¹ See *infra* notes 45–119.

⁴² See *infra* notes 45–76.

⁴³ See *infra* notes 77–108.

⁴⁴ See *infra* notes 109–119.

⁴⁵ See *Non-Regression in Environmental Law*, *supra* note 28, at 55 (stating the principle of non-regression originated in California in 2010 in a referendum vote seeking to suspend a climate change statute from 2006); Emmanuel Macron, President of the Republic of France, Speech at the Summit on the Global Pact for the Environment (Sept. 19, 2017), <https://www.diplomatie.gouv.fr/en/french-foreign-policy/united-nations/news-and-events/united-nations-general-assembly/unga-s-72nd-session/article/speech-by-m-emmanuel-macron-president-of-the-republic-summit-on-the-global-pact> [<https://perma.cc/55NX-357H>] (introducing a climate pact containing a legal commitment to non-regression to members of the United Nations). The California referendum, Proposition 23, deferred the Global Warming Act of 2006 until unemployment in California fell below 5.5% for four consecutive financial quarters. *Proposition 23 (2010)*, CAL. CHOICES, <https://www.californiachoices.org/proposition-23-2010> [<https://perma.cc/P87N-753W>]. The Global Warming Act of 2006 required California to cut all greenhouse gas emissions back to 1990 levels by the year 2020. *Id.* Proposition 23 failed by a vote of 3,733,883 to 5,974,564. *Id.*

cusses the principle on the international level.⁴⁶ Subsection 2 then discusses the non-regression principle in the context of foreign law.⁴⁷

1. International Law: Scholars, Think Tanks, and the United Nations

Over the past decade, Professor Michel Prieur of the University of Limoges in France has led the push for the implementation of the non-regression principle on an international level.⁴⁸ In 2012, the United Nations Conference on Sustainable Development, known informally as Rio+20, adopted various guidelines stressing the need for sustainable consumption, development, and economic policies.⁴⁹ In a journal article written shortly after the conference, Prieur criticized the body for removing the phrase “principle of non-regression” from the final text of the outcome document, “The Future We Want.”⁵⁰ Prieur argues the development of a strong non-regression principle by legal scholars is key to a grassroots push against regression; if the public knew the costs that environmental regression imposed on human health, regression would not be tolerated.⁵¹ He believes this goal is achievable, as the principle

⁴⁶ See *infra* notes 48–60.

⁴⁷ See *infra* notes 61–76.

⁴⁸ See generally Michel Prieur, *Le Principe de Non Regression “au Cœur” du Droit de L’Homme a L’Environnement*, in *LA NON REGRESSION EN DROIT DE L’ENVIRONNEMENT* 133, 134–36 (2012) (arguing the right to the environment is a fundamental human right that should be protected by the non-regression principle); see *Non-Regression in Environmental Law*, *supra* note 28, at 55 (summarizing the legal foundations of the non-regression principle).

⁴⁹ *United Nations Conference on Sustainable Development, Rio+20*, U.N. DEP’T OF ECON. & SOC. AFFS., <https://sustainabledevelopment.un.org/rio20.html> [<https://perma.cc/G9EL-L4N6>]. Rio+20 adopted a ten-year framework for sustainable development that included the establishment of a trust fund for sustainability programs and called on the support of donor countries and the private sector. U.N. Conference on Sustainable Development, *A Ten-Year Framework of Programmes on Sustainable Consumption and Production Patterns*, U.N. Doc. A/CONF.216/5, at 7 (June 19, 2012). The Conference’s green economy policies, on the other hand, mostly acknowledged the interplay between sustainability and mitigation of poverty, as well as general recognitions and acknowledgements of the importance of a sustainable economy. G.A. Res. 66/288, annex, *The Future We Want*, at 14–19 (July 27, 2012). Finally, Rio+20 committed to eliminating the consumption of hydrofluorocarbons and fossil fuels due to the impact on the environment and the disproportionate effects on disadvantaged communities. *Id.* at 43.

⁵⁰ See *Non-Regression in Environmental Law*, *supra* note 28, at 55 (criticizing the United Nations for succumbing to the pressure of the United States, Japan and Canada and removing “principle of non-regression” from the language of the “The Future We Want” final document). As the host country, Brazil removed the language from the document, but Prieur suggests affirmative support from the European Union and Switzerland may have allowed Brazil to retain the language. *Id.* Ultimately, Brazil substituted “non-regression” with “do not backtrack.” *Id.*

⁵¹ See *id.* (arguing the public would not permit threats of environmental regression if it knew the impacts on public health and how governments, knowing this fact, hide attempts of regression). According to Prieur, threats of regression come in three forms: political, economic, and psychological. *Id.* at 1. Political threats are spawned by politicians pushing to repeal and deregulate. *Id.* Economic threats stem from the belief that environmental regulation harms economic development and slows poverty reduction. *Id.* Finally, psychological threats are born from the complexity of environmental

already has a strong legal foundation based in legal theory, human rights theory, international law, constitutional law, and domestic environmental law and jurisprudence.⁵²

Prieur found a strong ally in the French legal think tank, Le Club des Juristes.⁵³ In 2017, the group organized an international initiative known as the “International Group of Experts for the Pact” (IGEP).⁵⁴ Later that year, the group produced “the Global Pact for the Environment” (the Pact) in an attempt to codify essential environmental principles in international law, including the non-regression principle.⁵⁵ After publishing the Pact, IGEP took a massive step towards legitimate implementation of non-regression on the international stage: French President Emmanuel Macron promised to present the Pact to the United Nations in September 2017.⁵⁶

issues and standards, which creates the idea that simplifying regulations makes them easier to understand. *Id.*

⁵² *Id.* at 2. Prieur cites Thomas Paine’s *Rights of Man* to support non-regression. *Id.* In *Rights of Man*, Paine rebuked the concept that a future generation is bound by the actions and decisions of a previous generation, calling such post-mortem governance “the most ridiculous and insolent of all tyrannies.” THOMAS PAINE, *RIGHTS OF MAN* 11 (2d ed. 1791). Thus, Prieur argues future generations should not be forced to deal with the destruction of their environment caused by previous generations. See *Non-Regression in Environmental Law*, *supra* note 28, at 55 (citing Paine’s idea that binding future generations “to the end of time” is “morally unthinkable”). The human rights theory is based on the 1990 United Nations Committee for Economic, Social, and Cultural Rights resolutions, which prohibit “any deliberately retrogressive measures” peeling back a human right. High Commissioner for Human Rights, Committee for Economic, Social, and Cultural Rights (CESCR), *CESCR General Comment No. 3: The Nature of States Parties’ Obligations*, U.N. Doc. E/1991/23, at 3 (Dec 14, 1990); *Non-Regression in Environmental Law*, *supra* note 28, at 55. Next, for international law, Prieur cites the Rio Declaration on Environment and Development, which contains language binding all member parties to the commitment of protection and restoration of nature. *Non-Regression in Environmental Law*, *supra* note 28, at 55. Prieur argues this commitment, in inverse, prohibits member-states from intentional regression. *Id.* Prieur then uses the same thought process for the 2007 European Union Treaty of Lisbon. See *id.* (pointing out the treaty calls for the protection and improvement of the environment and forbids parties from ignoring this principle).

⁵³ See LE CLUB DES JURISTES, *supra* note 37, at 50 (introducing Prieur’s non-regression principle in a document bound for a vote before the United Nations).

⁵⁴ *Origins*, GLOB. PACT FOR THE ENV’T, <https://globalpactenvironment.org/en/the-pact/origins/> [https://perma.cc/F3X2-493A]; *Members of the International Group of Experts for the Pact*, GLOB. PACT FOR THE ENV’T, <https://globalpactenvironment.org/en/documents-en/members-of-the-international-group-of-experts-for-the-pact/> [https://perma.cc/KQ9W-XPTP].

⁵⁵ See LE CLUB DES JURISTES, *supra* note 37, at 16–17, 50 (explaining the purpose of the document is to create a foundational document containing the “guiding principles of Environmental Law” and codifying the non-regression principle in Article 17 of the Pact).

⁵⁶ *Id.* at 3. Despite making this promise, Macron acknowledged that securing a ratification of such a document on a global scale would be drawn out. Xinhua, *Macron Promises to Bring Int’l Draft Agreement for Environment to UN*, CHINA DAILY (June 6, 2017), https://www.chinadaily.com.cn/world/2017-06/26/content_29886577.htm [https://perma.cc/7AFE-X6RB].

In 2018, the United Nations General Assembly adopted Resolution 72/277, named “Towards a Global Pact for the Environment.”⁵⁷ The resolution established an ad hoc group tasked with identifying holes in the framework of international environmental law.⁵⁸ The General Assembly endorsed the group’s recommendations in Resolution 73/333 in the following session but stopped short of recommending the adoption of an international document containing an environmental non-regression principle.⁵⁹ In 2022, however, the United Nations adopted an equally important resolution creating the universal human right of access to a clean environment.⁶⁰

2. Foreign Law: Non-Regression Principle in Constitutions and Laws

On a national level, France declared its support for the non-regression principle when it codified environmental non-regression into law in 2016.⁶¹ Article L.110-1 II, a statute passed in 2001, guarantees the protection and restoration of the natural environment in France.⁶² The government subsequently amended the statute in 2016 to add statutory article 9°, which states that the protection of the natural environment is based on the non-regression principle.⁶³ In 2021, President Macron attempted to go one step further by amending

⁵⁷ G.A. Res. 72/277, at 1 (May 10, 2018). Macron followed through on the promise and delivered a speech introducing the Pact at the Summit on the Global Pact for the Environment in New York City before the Assembly adopted Resolution 72/277. Macron, *supra* note 45.

⁵⁸ G.A. Res. 72/277, at 2 (May 10, 2018). The resolution empowered the ad hoc group to recommend a new international instrument if it believed it to be necessary. *Id.* This means the United Nations left the door open for the group to recommend the adoption of the Global Pact that spurred the meeting in the first place. *See id.* (allowing for the recommendation of a new legal document); Macron, *supra* note 45 (calling for the United Nations to take action on the Pact presented to the group shortly after the speech).

⁵⁹ G.A. Res. 73/333, at 2 (Aug. 30, 2019). The main goals of the ad hoc group’s recommendations were “reinforc[ing] the protection of the environment” and ensuring member nations fulfilled promises made under past agreements. *Id.* The resolution called for the United Nations to make recommendations and encouragements to the member states, but not to actually push new legal solutions. *Id.* Adoption of a new international document and the inclusion of the non-regression principle initially had the support of over forty international leaders but ultimately fell short of being recommended by the group. Yann Aguila, *A Global Pact for the Environment: The Logical Outcome of 50 Years of International Environmental Law*, 12 SUSTAINABILITY (SPECIAL ISSUE) 1, 3 (2020), <https://www.mdpi.com/2071-1050/12/14/5636> [<https://perma.cc/E9KQ-DZJT>]. At the most recent U.N. conference, Stockholm+50, the United Nations once again failed to adopt the non-regression principle. *See generally* Stockholm+50: A Healthy Planet for the Prosperity of All—Our Responsibility, Our Opportunity, *Official Report for Stockholm+50*, U.N. Doc. A/Conf.238/9 (Aug. 1, 2022) (failing to include the non-regression principle in the adopted resolutions).

⁶⁰ *See UN General Assembly Declares Access to Clean and Healthy Environment a Universal Human Right*, U.N. NEWS (July 28, 2022), <https://news.un.org/en/story/2022/07/1123482> [<https://perma.cc/S3UX-ZWL4>] (announcing the adoption of a clean and healthy environment as a fundamental human right).

⁶¹ CODE DE L’ENVIRONNEMENT [C. ENV.] [Environmental Code] art. L.110-1 II 9° (Fr.).

⁶² *Id.*

⁶³ *Id.*

the constitution to codify the right to the environment as an inherent freedom of the French people—an indirect non-regression principle.⁶⁴ The Senate, however, defeated the effort, and the government dropped the proposed amendment.⁶⁵

Similarly, many countries have successfully adopted a general principle of non-regression to protect all fundamental, constitutionally guaranteed rights of their citizens—one of which is the right to a clean environment.⁶⁶ For example, the Constitution of Ecuador contains three provisions that collectively act as a non-regression principle: Article 11, Article 14, and Article 441.⁶⁷ First, Article 14 guarantees the right to live in an ecologically balanced environment.⁶⁸ Then, Articles 11 and 441 prevent any government act diminishing individual rights and the passage of constitutional amendments rolling back individual rights.⁶⁹ Similarly, Article 66 of the Portuguese Constitution grants

⁶⁴ See Lucie Duboua-Lorsch, *French Constitutional Change on Environmental Preservation Faces Long Road Ahead*, EURACTIV (Jan. 20, 2021), <https://www.euractiv.com/section/climate-environment/news/france-constitutional-change-on-the-environmental-faces-long-road-ahead/> [<https://perma.cc/5J9B-GTMC>] (detailing President Macron's attempt to modify Article 1 of the French Constitution and enshrine environmental preservation as a fundamental right). Macron's proposed amendment sustained criticism from both the political left and right. *Id.* From the left, environmental lawyer Arnaud Gossement dismissed the amendment as a reiteration of pre-existing rights, arguing progress could only be made by moving the non-regression principle from Article 110 of the Environmental Code and putting it in the French Constitution. *Id.* Meanwhile, Senate President and member of France's right-wing party, Gérard Larcher, argued the amendment should not be added to the preamble of the document because this would have the effect of superseding other inalienable rights. *Id.*

⁶⁵ Constant Méheut, *France Drops Plans to Enshrine Climate Fight in Constitution*, N.Y. TIMES (July 6, 2021), <https://www.nytimes.com/2021/07/06/world/france/france-climate-change-constitution.html> [<https://perma.cc/NY9L-6EYS>]. President Macron's amendment found support in the National Assembly, the lower house of French Parliament; however, the right-wing party controlling the Senate, Les Républicains, eventually killed the amendment. *Id.* The leader of Les Républicains cited fear that the guarantee of environmental protection would smother the right to free enterprise. *Id.* Macron, meanwhile, took fire from climate activists accusing him of proposing the amendment merely as a political charade. *Id.*

⁶⁶ See, e.g., CONSTITUIÇÃO DA REPÚBLICA PORTUGUESA [C.R.P.], art. 66, English translation available at https://www.constituteproject.org/constitution/Portugal_2005 [<https://perma.cc/QW9T-6HDN>] (guaranteeing access to an ecologically healthy and balanced environment as a constitutional right); *id.*, art. 288 (forbidding constitutional revisions drawing back any rights of citizens guaranteed in the constitution).

⁶⁷ See CONSTITUCIÓN POLÍTICA DE LA REPÚBLICA DEL ECUADOR [Ecuador] art. 11 (guaranteeing that all rights in the document will only be developed progressively and not regressively); *id.* art. 14 (guaranteeing the right to an ecologically balanced environment); *id.* art. 441 (prohibiting any amendments that result in the weakening of a constitutionally guaranteed right).

⁶⁸ *Id.* art. 14.

⁶⁹ *Id.* art. 11, art. 441. Ecuador also has the distinction of being the first country to give nature constitutional rights that can be enforced by law. *Id.* art. 71; see Prieur, *Le Principe de Non Regression "au Cœur" du Droit de L'Homme a L'Environnement*, *supra* note 48, at 140 (distinguishing Ecuador as being the first country to "make nature a subject of law" in its constitution). Among nature's legally cognizable rights are the rights to restoration and preservation of its threatened species and ecosystems. See CONSTITUCIÓN POLÍTICA DE LA REPÚBLICA DEL ECUADOR [Ecuador] art. 72 (granting nature the right to be restored); *id.* art. 73 (requiring the state to protect against and prevent activities resulting in extinction and destruction of ecosystems).

the fundamental right to a healthy and ecologically balanced environment and requires private individuals to defend the environment.⁷⁰ Article 288 of the Portuguese Constitution forbids the revision of the constitution in a manner that fails to respect the rights and freedoms already guaranteed to its citizens.⁷¹

Brazil is the only country in which the principle of environmental non-regression is explicitly enshrined in the constitution.⁷² This stems from Article 225 of the Constitution of Brazil, where the government is charged with defending the constitutional right to an ecologically balanced environment for both current citizens and future generations.⁷³ The constitutional right came under fire in 2020 when the Brazilian government revoked three environmental protection statutes, leading to three separate lawsuits.⁷⁴ The Brazilian Supreme Court found the acts to be unconstitutional given that Article 225 contains a non-regression principle—any attempt to remove or weaken regulations violated the Brazilian people’s constitutional rights.⁷⁵ Thus, any attempt to roll back existing environmental protections equates to a violation of Brazilian citizens’ constitutional rights.⁷⁶

B. Anti-Backsliding Provisions and Non-Degradation Policies: Non-Regression in the United States

Although the non-regression principle is far from commonplace in the United States, it is not entirely unseen.⁷⁷ Usually termed “anti-backsliding” or “non-degradation,” American non-regression takes two forms: state constitu-

⁷⁰ CONSTITUIÇÃO DA REPÚBLICA PORTUGUESA [C.R.P.], art. 66. In addition to guaranteeing preservation and enjoyment of the environment, Portugal’s Constitution also requires the state to “promote environmental education and respect for environmental values.” *Id.* This is a unique idea—Ecuador, for example, does not require the state to provide environmental education—but, in practice, Portuguese environmental education is criticized as deeply flawed. *See generally* Luisa Schmidt, Joaquim Gil Nave, Tim O’Riordan & João Guerra, *Trends and Dilemmas Facing Environmental Education in Portugal: From Environmental Problem Assessment to Citizenship Involvement*, 13 J. ENV’T POL’Y & PLANNING 159, 160 (2011) (providing a detailed look at the problems plaguing the Portuguese environmental education infrastructure).

⁷¹ CONSTITUIÇÃO DA REPÚBLICA PORTUGUESA [C.R.P.], art. 288.

⁷² *See* Astrid Milena Bernal, *Developing Brazilian Jurisprudence on the Right to a Healthy Environment*, GLOB. NETWORK FOR HUM. RIGHTS & THE ENV’T (Dec. 17, 2020), <https://gnhre.org/2020/12/developing-brazilian-jurisprudence-on-the-right-to-a-healthy-environment/> [<https://perma.cc/L7AS-WCWH>] (discussing ADPF 747, 748, and 749, the three court cases in which environmentalists revealed the non-regression principle within Brazil’s Constitution).

⁷³ CONSTITUIÇÃO FEDERAL [C.F.] [Constitution] art. 225 (Braz.) (guaranteeing the right to a balanced environment and requiring the state to preserve the environment for future generations).

⁷⁴ Bernal, *supra* note 72.

⁷⁵ *Id.* The Portuguese name of the Brazilian Supreme Court is Supremo Tribunal Federal (STF).

⁷⁶ *Id.*

⁷⁷ *See, e.g.*, MONT. CONST. art. II, § 3 (granting the people of Montana the unalienable right to a clean environment); *id.* art. IX, § 1 (forcing the Montana legislature to protect this right and not allow environmental degradation).

tional guarantees and federal statutory provisions.⁷⁸ Subsection 1 of this Section introduces as an example Montana's constitutional guarantee of environmental anti-backsliding.⁷⁹ Subsection 2 addresses several instances of anti-backsliding provisions in the United States Code.⁸⁰

1. Montana and the Constitutional Guarantee of Environmental Non-Degradation

Like the constitutions of Ecuador and Brazil, six states in the United States have constitutionally guaranteed their citizens' right to the environment.⁸¹ Of the six states, Montana extends protection the furthest.⁸² In Articles II and IX of its constitution, Montana secures the inalienable right to a healthy environment and requires its legislature to adequately protect the environment from degradation.⁸³ The Montana Supreme Court subsequently interpreted these provisions with a great deal of legal strength.⁸⁴ Judicial fortification reached its zenith in 1999 in *Montana Environmental Information Center v. Department of Environmental Quality*, in which the Montana Supreme Court interpreted Arti-

⁷⁸ See, e.g., Clean Water Act (CWA), 33 U.S.C. § 1342(o) (naming the provision preventing EPA from renewing a permit with more lenient standards than the previous permit "anti-backsliding"); APPLIANCE STANDARDS PROGRAM AND TEST PROCEDURES SMALL ENTITY GENERAL COMPLIANCE GUIDE, *supra* note 38 (referring to 42 U.S.C. 6295(o)(1) as an "anti-backsliding provision").

⁷⁹ See *infra* notes 81–85.

⁸⁰ See *infra* notes 86–108.

⁸¹ See HAW. CONST. art. XI, § 9 (guaranteeing the right to "a clean and healthful environment" and including a citizen suit provision); ILL. CONST. art. XI, § 2 (same); MASS. CONST. art. 97 (providing the right to clean air, water, and the general scenic aesthetic of nature, but lacking a citizen suit provision); MONT. CONST. art. II, § 3 (including the right to "a clean and healthful environment," but lacking a citizen suit provision); PA. CONST. art. 1, § 27 (guaranteeing the right to clean air and water, as well as conservation of aesthetic values); R.I. CONST. art. I, § 17 (providing a right to the shore and making it the duty of the legislature to conserve various aspects of nature).

⁸² See Glicksman, *supra* note 29, at 473 (explaining that Montana has the strongest environmental protection guarantee of any state acknowledging environmental concerns in their constitutions). Professor Glicksman notes that, even in states that attempt to enshrine some level of environmental rights, public officials ensure the environmental rights are constrained by social and economic priorities. *Id.* at 491.

⁸³ See MONT. CONST. art. II, § 3 (creating the constitutionally guaranteed, inalienable right to "a clean and healthful environment"); *id.* art. IX, § 1 (charging the legislature with the responsibility to protect Montana's environment from degradation).

⁸⁴ See *Park Cnty. Env't Council v. Dep't of Env't Quality*, 477 P.3d 288, 304, 306 (Mont. 2020) (holding that the state legislature cannot pass laws that grant the opportunity for private business to infringe on citizens' environmental rights before the private action is reviewed by the government); *Mont. Env't Info. Ctr. v. Dep't of Env't Quality*, 988 P.2d 1236, 1249 (Mont. 1999) (holding that the Montana Constitutional Convention intended Articles II and IX to be read together rather than separately, such that a failure to provide sufficient remedies for environmental deterioration by the legislature is a violation of Montana citizens' constitutional rights).

cles II and IX to provide preventative rights capable of stopping environmental degradation before the harm occurs.⁸⁵

2. Federal Anti-Backsliding Provisions: Non-Regression in United States Statutes

Statutory anti-backsliding provisions are the most common form of non-regression in American law.⁸⁶ Although anti-backsliding provisions serve the same function as the non-regression principle, anti-backsliding provisions are not grounded in the protection of individual rights but are instead intended to ensure regulations properly satisfy their economic, technological, and environmental goals.⁸⁷ Specifically, three U.S. statutes contain anti-backsliding provisions: the Clean Air Act (CAA), the Energy Policy and Conservation Act (EPCA), and the Clean Water Act (CWA).⁸⁸

The CAA prohibits backsliding in two areas.⁸⁹ The first is in the context of mobile sources of air pollutants: the CAA authorizes the Administrator of the Environmental Protection Agency (EPA) to review and revise emission standards for motor vehicles.⁹⁰ If the Administrator decides to revise a standard, the new standard must contain an emissions reduction from the previous standard—an increase is prohibited.⁹¹

⁸⁵ See *Mont. Env't Info. Ctr.*, 988 P.2d at 1249 (holding that, because the language in Articles II and IX is “anticipatory and preventative,” citizens of Montana do not need to wait until they are physically injured or their health is degrading to file suits enforcing their rights).

⁸⁶ EPCA, 42 U.S.C. § 6295(o)(1); CWA, 33 U.S.C. § 1342(o); Clean Air Act (CAA), 42 U.S.C. §§ 7471, 7479(3), 7521(b)(1)(C).

⁸⁷ See Glicksman, *supra* note 29, at 471 (explaining how non-regression is based on the protection of human rights and rights guaranteed to the individual, while non-degradation and anti-backsliding are a means of balancing economic considerations, forcing technological development, and creating a safety net in regulatory programs).

⁸⁸ 42 U.S.C. § 6295(o)(1); 33 U.S.C. § 1342(o); 42 U.S.C. §§ 7471, 7479(3), 7521(b)(1)(C).

⁸⁹ Compare 42 U.S.C. § 7521(b)(1)(C) (prohibiting the EPA Administrator from backsliding mobile emission standards), with *id.* § 7479(3) (defining the best available control technology standard to which EPA holds some new, major emitting stationary sources). The CAA developed from several statutes: the Air Pollution Control Act of 1955, the Clean Air Act of 1963, the Air Quality Act of 1967, and the Clean Air Act of 1977. See *Evolution of the Clean Air Act*, EPA, <https://www.epa.gov/clean-air-act-overview/evolution-clean-air-act> [<https://perma.cc/HR9B-FHHU>] (documenting the history of the CAA). The Clean Air Act of 1970 substantially expanded federal authority for regulating air pollution and directly led to the creation of the EPA. *Id.* Congress completed what is now collectively known as the CAA with two rounds of amendments added in 1977 and 1990. *Id.*

⁹⁰ See 42 U.S.C. § 7521(a)(1) (authorizing the EPA Administrator to create emission standards for the different classes of vehicles that he or she reasonably anticipates will endanger public health or welfare).

⁹¹ See *id.* § 7521(b)(1)(C) (stating that the EPA Administrator may revise a standard to protect public health or welfare while considering factors like cost or safety if the new standard imposes a stricter emissions limit).

The second prohibition against backsliding is found in the CAA's Prevention of Significant Deterioration (PSD) program.⁹² This program requires facilities within the program's jurisdiction to implement the best available pollution control technology (BACT) if the facilities wish to acquire an air emissions permit needed for construction.⁹³ BACT is decided on a case-by-case basis and requires the permit holder to use the technology that achieves the maximum degree of emissions control feasible to the permit holder.⁹⁴ Thus, any attempt to retroactively implement a higher polluting technology will violate the BACT requirement of the facilities permit.⁹⁵ Furthermore, in the event the EPA wishes to grant a less demanding permit in a PSD area, the CAA requires a "careful evaluation of consequences" and a process of public participation.⁹⁶

The EPCA contains what is perhaps the purest version of an American anti-backsliding provision: an unqualified prohibition preventing the Secretary of Energy from promulgating any new standards allowing covered products to increase their maximum energy use.⁹⁷ In 2004, in *Natural Resources Defense*

⁹² See *id.* § 7471 (establishing the goal of "prevent[ing] significant deterioration" in the CAA permit program); *id.* § 7479(3) (explaining the requirements that come with the best available control technology (BACT) standard within the Prevention of Significant Deterioration (PSD) program). Areas of the country successfully achieving the national ambient air quality standards (NAAQS) established by EPA are subject to the PSD program. See *id.* § 7472(b) (stating areas in "attainment" are subject to the PSD section of CAA); *id.* § 7407(d)(1)(A)(ii) (defining "attainment" as any area that complies, or over-complies, with the maximum levels of pollutants allowed by NAAQS). A NAAQS is the maximum level at which EPA believes a pollutant is not a threat to public health, including an "adequate margin of safety." *Id.* § 7409. A NAAQS is made for each of the six "criteria pollutants": carbon monoxide, lead, particulate matter, ozone, nitrogen dioxide, and sulfur dioxide. *Reviewing National Ambient Air Quality Standards (NAAQS): Scientific and Technical Information*, EPA, <https://www.epa.gov/naaqs> [<https://perma.cc/M9DV-H6NH>] (Oct. 17, 2023).

⁹³ 42 U.S.C. § 7475(a)(4). The PSD program only regulates "major emitting facilities" in the attainment zone. *Id.* § 7479(1). A major emitting facility is any facility producing 100 tons per year of any air pollutant from select types of stationary sources, such as coal cleaning plants and copper smelters, or any other stationary source producing 250 tons per year of any pollutant. *Id.*

⁹⁴ *Id.* § 7479(3). In the case-by-case analysis determining the BACT, the EPA must consider energy, environmental, and economic costs. *Id.* The EPA is forbidden from applying a BACT that will result in a violation of the applicable NAAQS. *Id.*

⁹⁵ See Glicksman, *supra* note 29, at 484 (explaining the PSD program forces a continual reduction in emissions and subsequently creates an anti-degradation standard that is easy to comprehend). One argument used in Congress in favor of PSD emphasized the benefits the program would provide to national parks and monuments. *Id.*

⁹⁶ See 42 U.S.C. § 7470 (declaring that the purpose of the PSD section of the CAA is to ensure that decisions to allow an increase in pollution within an attainment area is only done after thorough consideration).

⁹⁷ See EPCA, 42 U.S.C. § 6295(o)(1) (prohibiting the Secretary from amending standards in a manner increasing energy use). Compare *id.* (lacking any exceptions to the provision), with CWA, 33 U.S.C. § 1342(o)(1)–(2) (prohibiting the renewal of permits allowing an increase in water emissions, subject to a number of exceptions). The EPCA passed in 1975. *History and Impacts*, DEP'T OF ENERGY, <https://www.energy.gov/eere/buildings/history-and-impacts> [<https://perma.cc/SPL9-MFNC>]. Congress amended the EPCA in 1978 to establish energy standards for consumer appliance products, such as air conditioners and heating equipment and again in 1987 to establish minimum efficiency standards—

Council, Inc. v. Abraham, the U.S. Court of Appeals for the Second Circuit found the statute's language unambiguous—appliance energy standards could only become more demanding—thus defeating an executive challenge to the weight of this anti-backsliding provision.⁹⁸

Lastly, the CWA contains an anti-backsliding provision for the reissuing of permits.⁹⁹ Under the CWA, the Administrator of the EPA may issue permits to owners of point sources—areas or vessels from which pollution is released—allowing for the discharge of a pollutant into a navigable water.¹⁰⁰ These permits set effluent limitations for point sources and require the installation of

the anti-backsliding provision. *Id.*; see 42 U.S.C. § 6295 (authorizing the Secretary of Energy to prescribe energy standards for relevant products). Congress created the EPCA as a direct response to the Organization of Petroleum Exporting Countries (OPEC) oil embargo of 1973. *Nat. Res. Def. Council, Inc. v. Abraham*, 355 F.3d 179, 185 (2d Cir. 2004). OPEC initiated the embargo to punish the United States for its support of Israel in the wake of the 1973 Arab-Israeli War. *Oil Embargo, 1973–1974*, OFF. OF THE HISTORIAN: U.S. DEP'T OF STATE, <https://history.state.gov/milestones/1969-1976/oil-embargo> [<https://perma.cc/QF6K-2UNC>]. The embargo caused oil prices to jump over 200%, and the Act was one of many measures implemented by the U.S. government to reduce domestic energy demands. Kimberly Amadeo, *OPEC Oil Embargo*, THE BALANCE, <https://www.thebalancemoney.com/opec-oil-embargo-causes-and-effects-of-the-crisis-3305806> [<https://perma.cc/6JYU-DRNL>] (Apr. 30, 2022). Other measures included the implementation of a fifty-five miles per hour speed limit on all national highways and the institution of year-long daylight savings time. *Id.*

⁹⁸ See 355 F.3d at 197 (prohibiting the Secretary from issuing more lenient standards once stricter standards have already been published). Multiple states joined the plaintiffs, including Connecticut, Vermont, Maine, Massachusetts, New Hampshire, Rhode Island, New Jersey, Nevada, California, and New York. *Id.* at 184.

⁹⁹ See CWA, 33 U.S.C. § 1342(o)(1) (applying the prohibition against backsliding when the Secretary is renewing a permit of a pre-existing permittee). The CWA is a 1972 amendment to the Federal Water Pollution Control Act (FWPCA) bolstering federal control over water pollution. SHAMBIE SINGER & NORMAN J. SINGER, 3C SUTHERLAND STATUTORY CONSTRUCTION § 77:4 (8th ed. 2022). The need for a comprehensive overhaul of federal water pollution control became clear after enormous amounts of pollution allowed the Cuyahoga River to catch on fire in 1969. *Id.* Despite the infamy of the 1969 fire, the fire served as a symbol of an older problem, rather than as an example of a current threat. See Jonathan H. Adler, *The Fable of the Burning River, 45 Years Later*, WASH. POST (June 22, 2014), <https://www.washingtonpost.com/news/volokh-conspiracy/wp/2014/06/22/the-fable-of-the-burning-river-45-years-later/> [<https://perma.cc/W6A6-GJKX>] (explaining that the Cuyahoga caught fire twelve times before 1969 and how river fires had also previously plagued cities like Baltimore and Detroit). In fact, a fire in 1952 caused Cleveland, Ohio to mobilize and initiate a clean-up of the Cuyahoga. See *id.* (explaining how Cleveland tried throughout the 1960s to clean the river, capped off by a \$100 million project approved in 1968). Thus, by the time of the 1969 fire, efforts to clean up the Cuyahoga were well underway. *Id.* By the time CWA amendments passed, river fires were no longer an issue. *Id.*

¹⁰⁰ See 33 U.S.C. § 1342(a) (authorizing the EPA Administrator to issue permits to point sources subject to 33 U.S.C. § 407); *id.* § 407 (prohibiting the discharge of a pollutant from a point source into a navigable water). “Point source,” as defined in the CWA, is a “pipe, ditch, channel, tunnel, conduit, well” and many other terms describing the same concept: a vehicle intentionally directing pollution from its source to the environment. *Id.* § 1362(14). In 2020, in *County of Maui v. Hawaii Wildlife Fund*, the County of Maui argued “from a point source” only triggers the CWA permit requirement if the point source is physically touching, and directly discharging into, the water; the obligations are lifted if the pollutant travels through “any amount of groundwater.” 140 S. Ct. 1462, 1473 (2020). The Court rejected this argument as far too narrow an interpretation of the term. *Id.*

the best practicable control technology (BPT).¹⁰¹ When renewing these permits, the EPA is subject to an explicit prohibition against reissuing a permit with more flexible effluent limits than previously allowed.¹⁰² Unlike the EP-CA, however, this anti-backsliding provision grants an exception for waters where the water quality standards set by the state have not yet been achieved.¹⁰³

The most significant challenge to an EPA anti-backsliding policy arose in 1984, three years before Congress codified anti-backsliding in the CWA.¹⁰⁴ In 1988, in *Natural Resources Defense Council, Inc. v. EPA*, the U.S. Court of Appeals for the D.C. Circuit heard a challenge from several industry representatives regarding a 1984 EPA regulation requiring permittees to comply with the more stringent effluent limits required by EPA permits rather than the more lenient national, industry-wide guidelines controlling those without permits.¹⁰⁵ The industry co-defendants argued the EPA lacked statutory authority in 1984 because Congress did not authorize anti-backsliding regulation until the 1987 CWA amendments.¹⁰⁶ The court disagreed and held the EPA's regulation was a reasonable interpretation of ambiguous statutory language under the judicial standard set forth in 1984, in *Chevron, U.S.A., Inc. v. Natural Resources De-*

¹⁰¹ See 33 U.S.C. § 1342(a)(1) (requiring the permits to include effluent discharge limits to which the permittees will be subject); *id.* § 1311(b)(1)(A) (requiring the effluent limitations for point sources to include the application of best practicable control (BPT) technology). BPT factors include the cost of technology application compared to the benefits accrued from the technology, as well as the process of application, engineering factors, environmental impact and energy requirements, and other factors left to the Administrator's discretion. *Id.* § 1314(b)(1)(B).

¹⁰² See *id.* § 1342(o)(1) (containing the anti-backsliding prohibition regarding limitations to waste being discharged into bodies of water).

¹⁰³ See *id.* (allowing for a backsliding permit if the permit complies with 33 U.S.C. § 1313(d)(4)); *id.* § 1313(d)(4)(A) (allowing for a backsliding permit if the water is in nonattainment and the revised permit is based on a total maximum daily load that will lead to attainment). Water quality standards institute the total maximum daily load (TMDL) of pollutants acceptable for a body of water. *Id.* § 1313(d)(1)(C). TMDLs are calculated after acquiring data determining what level of pollutants will allow for restoration and maintenance of water integrity, protection of wildlife, recreation in and on the water, and other objectives set by the state. *Id.* § 1314(a)(2).

¹⁰⁴ See *Nat. Res. Def. Council, Inc. v. EPA*, 859 F.2d 156, 195 (D.C. Cir. 1988) (explaining that the anti-backsliding provisions now present in the CWA did not pass until 1987, three years after the promulgation of the regulations being challenged).

¹⁰⁵ See *id.* (explaining that the EPA's 1984 regulation held industry to permit standards that were stricter than the national federal guidelines in place, preventing industry from picking the more lenient of the two standards).

¹⁰⁶ *Id.* at 197. The industrial challengers argued that the EPA's discretionary limits set in permits were merely placeholders until the national guidelines were promulgated. *Id.* At this time, the EPA just launched the CWA permit program, so the EPA needed to set effluent limits to fill the time before the guidelines were passed. See *id.* at 197-98 (describing how Congress intended the discretionary standards to allow the program to begin without waiting for the passage of national standards). Thus, industry made the case that these discretionary limits necessarily gave way to the guidelines because the guidelines were included in the statutory authorization of the permit program. *Id.* at 198.

*fense Council, Inc.*¹⁰⁷ The D.C. Circuit held the regulation to be a permissible construction of the statute because it furthered the ultimate goal of CWA: discharging less pollution.¹⁰⁸

C. The Major Questions Doctrine: The End of the Chevron Analysis?

In 2022, in *West Virginia v. EPA*, the Supreme Court implied the viability of *Chevron* is at risk.¹⁰⁹ To reiterate the substance of *Chevron*, courts defer to an administrative agency's *reasonable* interpretation of a statute so long as Congress did not speak unambiguously on the subject within the statutory text.¹¹⁰ An agency may find authority to act in a particular manner not discussed in the authorizing statute so long as the interpretation is reasonable and not beyond the boundaries of the statute.¹¹¹

In *West Virginia*, the Supreme Court invoked a doctrine possessing an unclear relationship to *Chevron*: the major questions doctrine.¹¹² At issue was an

¹⁰⁷ See *id.* at 201 (holding that the regulation satisfied both prongs of the *Chevron* test). The *Chevron* analysis originated in 1984 in *Chevron, U.S.A., Inc. v. Natural Resources Defense Council*, 467 U.S. 837, 866 (1984). In *Chevron*, the EPA interpreted the term “major stationary source” to mean a facility exceeding emission limits, rather than an individual part within the facility. *Id.* at 855. The CAA, however, did not make the definition of “stationary source” clear, and congressional intent was ambiguous. *Id.* at 861–62. Ultimately, Justice John Paul Stevens concluded that, when a statute is silent on a subject but the agency interprets the statute in a reasonable manner, the decision is due judicial deference. *Id.* at 865. To gain the benefit of a *Chevron* analysis, the agency must be interpreting a statute delegated to that specific agency, like the CAA and the EPA, rather than a statute generally used by all agencies, like the Administrative Procedure Act. See *id.* at 842 (introducing the two-step analysis of *Chevron* by first stating the agency must be interpreting a statute it administers).

¹⁰⁸ See *Nat. Res. Def. Council, Inc. v. EPA*, 859 F.2d at 201 (explaining that, although the statute failed to make clear whether Congress intended to empower a backsliding prohibition, anti-backsliding regulations fall in line with the purpose of the CWA and thus satisfy *Chevron*).

¹⁰⁹ See generally *West Virginia v. EPA*, 142 S. Ct. 2587, 2609 (2022) (introducing the major questions doctrine and choosing not to use the *Chevron* analysis).

¹¹⁰ See *Chevron*, 467 U.S. at 865 (explaining that the agency should be given deference, as it is not the Court's role to judge a reasonable agency interpretation of a statute using the judge's own policy preferences and in a field in which the judge is not an expert). Considering *Chevron*'s extensive usage since 1984, it is ironic that the Court did not intend its holding to be applied beyond the facts of the *Chevron* case. See GARY LAWSON, *FEDERAL ADMINISTRATIVE LAW* 623 (9th ed. 2022) (explaining why the *Chevron* Court undoubtedly intended a narrow reading of its opinion). The U.S. Court of Appeals for the D.C. Circuit is responsible for using the broader interpretation of the holding, which caused its view to become the more popular reading in just two years. See *id.* at 623–24 (discussing how *Chevron*'s holding expanded beyond the facts of the *Chevron* case).

¹¹¹ See, e.g., 4 RICHARD MURPHY, *ADMINISTRATIVE LAW & PRACTICE* § 11:33 (3d ed. 2023) (discussing how courts justified *Chevron* deference by arguing ambiguity in a statute acted as a delegation of power to an agency so long as it is within the reasonable boundaries of the statute).

¹¹² See *West Virginia v. EPA*, 142 S. Ct. at 2609 (holding the major questions doctrine controlled this case). The Trump-era EPA employed the major questions doctrine before the Court subsequently used the term in its opinion. *Id.* at 2605. Looking for a reason to pivot away from the Clean Power Plan that originated under the Obama Administration, the Trump-era EPA argued that the major questions doctrine precluded the EPA from implementing the plan. *Id.* The EPA claimed it failed to find the statutory authority necessary to execute the Clean Power Plan. *Id.*

EPA regulation containing “generation shifting” requirements in coal-fired power plants.¹¹³ If a facility did not pursue generation shifting, it would be impossible to comply with prescribed emission limits.¹¹⁴ The Court denied the EPA use of this power, holding that, when an agency asserts a power of great “economic and political significance” not expressly listed in the authorizing statute, the Court must assume Congress intended to withhold the power from the agency.¹¹⁵ This holding seems to contradict *Chevron*, but neither Chief Justice John Roberts in the majority opinion nor Justice Neil Gorsuch in his concurring opinion mentioned or cited the longstanding 1984 decision.¹¹⁶ In May 2023, the Supreme Court agreed to hear *Loper Bright Enterprises v. Raimondo* to clarify the *Chevron* issue, but, as of November 2023, arguments have not yet been heard.¹¹⁷

Although the Supreme Court did not overrule *Chevron*, future agency interpretations are left on unstable ground.¹¹⁸ Given its current composition, it is

¹¹³ See CAA, 42 U.S.C. § 7411(a)(1) (authorizing the EPA to regulate facilities’ emissions so long as the regulation makes use of the “best system of emission reduction” as determined by the Administrator); *West Virginia v. EPA*, 142 S. Ct. at 2603 (defining “generation shifting” as switching from an unclean source of power to a cleaner or renewable source). When implementing this statute, the Administrator does not require facilities to use a particular technology. 42 U.S.C. § 7411(b)(5). Instead, the Administrator determines what level of emissions the “best technology” can achieve, and the regulated facilities are free to implement whatever means are necessary to meet that standard. See *id.* (stating the statute cannot be reasonably constructed as to require the installation of a specific system).

¹¹⁴ *West Virginia v. EPA*, 142 S. Ct. at 2604. The EPA chose generation shifting as the “best system” because it believed more drastic steps were needed to mitigate climate change. *Id.* at 2603. Technically, the facilities also had two other options outside of generation shifting: reduce the facility’s electricity output or buy more emission credits using a cap-and-trade scheme. *Id.* The EPA did not care which of the three options were chosen because, in practice, the United States would be forced to rely on renewable electricity as a result. See *id.* (pointing out that any of the three choices would result in a shift towards natural gas, wind, or solar energy).

¹¹⁵ See *id.* at 2608 (citing *FDA v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120, 159–60 (2000) for the proposition that “unheralded” claims of power dictating “a significant portion of the American economy” must be met by the major questions doctrine).

¹¹⁶ See *id.* at 2599–2617 (omitting any reference to *Chevron* or *Chevron* deference); *id.* at 2617–27 (Gorsuch, J., concurring) (omitting references to the *Chevron* doctrine). The Court used language from *Brown & Williamson* to question the power asserted by the EPA, although *Brown & Williamson* was a *Chevron* case. *Id.* at 2608; *Brown & Williamson*, 529 U.S. at 121. There, the Court stated that Congress made its intentions clear by denying the FDA the power to regulate tobacco multiple times since the agency’s creation; therefore, the FDA’s interpretation failed the first prong of *Chevron*. See *Brown & Williamson*, 529 U.S. at 159–60 (illustrating Congress did not make its will clear in the statute but did so in various decisions not to act). Justice Elena Kagan pointed this out in her dissent, arguing the majority chose to ignore this context. *West Virginia v. EPA*, 142 S. Ct. at 2635 (Kagan, J., dissenting).

¹¹⁷ See generally *Loper Bright Enters., Inc. v. Raimondo*, 45 F.4th 359 (D.C. Cir. 2022), cert. granted, 143 S. Ct. 2429 (2023) (granting the Court the opportunity to definitively rule on the viability of the *Chevron* doctrine).

¹¹⁸ See, e.g., Alec D. Tyra, *Major Questions for Chevron Deference and Future Environmental Regulations: The Supreme Court in West Virginia v. EPA*, FREEMAN, MATHIS & GARY (July 18, 2022), <https://www.fmglaw.com/business-litigation/major-questions-for-chevron-deference-and-future->

likely the Supreme Court will use *West Virginia* to prevent agencies from exercising reasonable and implicit powers, thus putting itself at odds with precedential *Chevron* deference.¹¹⁹

II. UNDERSTANDING THE ROOTS OF NON-REGRESSION IN AMERICA

Part I of this Note identifies the non-regression principle as a potential solution to combatting climate change in the United States.¹²⁰ Despite its potential, the principle must first be further implemented in some form before it can be considered a solution.¹²¹ Thus, to fully analyze the viability of the principle

environmental-regulations-the-supreme-court-in-west-virginia-v-epa/ [https://perma.cc/ZV4F-9KQZ] (hypothesizing what *West Virginia* means for the viability of *Chevron*).

¹¹⁹ See *West Virginia v. EPA*, 142 S. Ct. at 2587 (voting in favor of the major questions doctrine by a margin of six to three). Agencies' ability to take on legislative responsibility at all comes from the "intelligible principle" doctrine. See LAWSON, *supra* note 110, at 103–27 (giving a detailed history of the case law leading to the development of the modern intelligible principle doctrine). The doctrine holds that Congress may delegate legislative authority to an administrative agency if it also establishes "an intelligible principle" to guide the agency. See *Mistretta v. United States*, 488 U.S. 361, 372 (1989) (prescribing the need for a guiding "intelligible principle" to delegate authority to an agency). It is an exception to the long-established non-delegation principle stemming from the legislative Vesting Clause in Article I, Section 1 of the U.S. Constitution, which prevents Congress from delegating its legislative powers to another branch of government. See *Marshall Field & Co. v. Clark*, 143 U.S. 649, 697 (1892) (Lamar, J., concurring) (expressing the concept of the prohibition on Congress delegating its legislative powers). Delegation is given so much deference that it has only been struck down twice. See *Gundy v. United States*, 139 S. Ct. 2116, 2129 (2019) (affirming that Congress only failed to prescribe an intelligible principle two times in U.S. history, both in 1935). In 2019, however, in *Gundy v. United States*, Justice Neil Gorsuch wrote a fiery dissent calling for the application of a significantly stricter delegation requirement. See *id.* at 2135 (Gorsuch, J., dissenting) (arguing Congress may only delegate authority to fill in details after executive fact-finding, or if the authority is non-legislative in nature). Chief Justice John Roberts and Justice Clarence Thomas both joined Justice Gorsuch's dissent. *Id.* Justice Samuel Alito, in his concurring opinion, expressed a willingness to reexamine the intelligible principle doctrine if the bench secured enough votes. *Id.* at 2131 (Alito, J., concurring). Justice Brett Kavanaugh did not take part in the *Gundy* decision because he joined the bench shortly after the parties argued *Gundy*, but he expressed his agreement with Justice Gorsuch in a separate denial of certiorari dealing with the same statute. See *Paul v. United States*, 140 S. Ct. 342 (Mem.), 342 (2019) (Kavanaugh, J., concurring) (expressing his agreement with Justice Gorsuch's reasoning in *Gundy* regarding the intelligible principle doctrine). Justice Gorsuch may be able to garner a sixth vote from Justice Amy Coney Barrett, who replaced *Gundy* majority member Justice Ruth Bader Ginsburg—although Justice Barrett's views on the subject are not yet known. See Mark Strand & Timothy Lang, *Can the Courts Make Congress Do Its Job?*, 48 NAT'L AFFAIRS 73, 81 (2021), <https://www.nationalaffairs.com/publications/detail/can-the-courts-make-congress-do-its-job> [https://perma.cc/9WUE-KSVL] (stating Justice Barrett's vote on non-delegation is not yet known because she has not heard a case on the subject).

¹²⁰ See *supra* notes 37–119 (introducing the non-regression principle and detailing its application in foreign jurisdictions).

¹²¹ See Energy Policy & Conservation Act (EPCA), 42 U.S.C. § 6295(o)(1) (exemplifying American environmental non-regression); Clean Water Act (CWA), 33 U.S.C. § 1342(o) (same); Clean Air Act (CAA), 42 U.S.C. § 7471, 7479(3), 7521(b)(1)(C) (same); CODE DE L'ENVIRONNEMENT [C. ENV.] [Environmental Code] art. L.110-1 II 9° (Fr.) (exemplifying a legally binding non-regression principle in foreign law).

of non-regression in the United States, it is essential to understand both the political variables allowing American legislatures to codify the principle and the characteristics that allowed the principle to survive legal challenges.¹²²

As of 2020, the majority of the American public, regardless of political alignment, believes climate change is occurring.¹²³ A significant partisan gap, however, exists amongst people who believe climate change will affect them personally, and those who do not.¹²⁴ The partisan gap in Congress regarding belief in climate change is even larger and is unrepresentative of the American people.¹²⁵ Because of this, climate mitigation gets overlooked in favor of more bipartisan issues, like energy prices and energy availability.¹²⁶ If the non-

¹²² See, e.g., *Nat. Res. Def. Council, Inc. v. Abraham*, 355 F.3d 179, 184 (2d Cir. 2004) (affirming the legal strength of 33 U.S.C. § 1342(o)(1), the anti-backsliding provision, and resisting a challenge from the executive branch); *Energy Crisis (1970s)*, HIST., <https://www.history.com/topics/1970s/energy-crisis> [<https://perma.cc/9LSW-BKRB>] (Mar. 8, 2022) (summarizing the social and political desperation created by the OPEC oil crisis and the EPCA's emergence as a solution).

¹²³ See BO MACINNIS & JON A. KROSNICK, RESOURCES FOR THE FUTURE, CLIMATE INSIGHTS 2020: SURVEYING AMERICAN PUBLIC OPINION ON CLIMATE CHANGE AND THE ENVIRONMENT 5 (2020) (summarizing data regarding general partisan beliefs on climate change). According to the report, 94% of Democrats and 67% of Republicans believe in climate change. *Id.*

¹²⁴ *Id.* at 4. In a steep decline from the consensus that climate change is occurring, only 26% of Republicans believe climate change will have a moderate effect on them personally going forward. *Id.* Seventy-six percent of Democrats answering the same question believe they would be personally affected. *Id.* Interestingly, 54% of Republicans believe unchecked climate change will be a “very or somewhat serious problem for the United States.” *Id.* Similarly, 60% of Republicans believe unchecked climate change will also be a “very or somewhat serious problem for the world.” *Id.* Thus, most Republicans believe unchecked climate change will result in serious problems for the world and their own country, but not them personally. *Id.*

¹²⁵ See Press Release, Center for Biological Diversity, *supra* note 32 (detailing the efforts of moderate Democratic Senator Joe Manchin to weaken the environmental remedies in the Inflation Reduction Act in favor of the fossil fuel industry); *Roll Call 420 | Bill Number H.R. 5376*, CLERK OF THE U.S. HOUSE OF REPRESENTATIVES (Aug. 12, 2022), <https://clerk.house.gov/Votes/2022420> [<https://perma.cc/74TX-76SK>] (showing the Inflation Reduction Act passed in the House of Representatives in a vote split entirely down party lines); *Roll Call Vote 117th Congress – 2nd Session*, U.S. SENATE (Aug. 7, 2022), https://www.senate.gov/legislative/LIS/roll_call_votes/vote1172/vote_117_2_00325.htm [<https://perma.cc/GZZ7-C8LX>] (showing the Inflation Reduction Act passed in the Senate entirely down party lines).

¹²⁶ See *Economy Remains the Public's Top Policy Priority; COVID-19 Concerns Decline Again*, PEW RSCH. CTR. (Feb. 6, 2023), <https://www.pewresearch.org/politics/2023/02/06/economy-remains-the-publics-top-policy-priority-covid-19-concerns-decline-again/> [<https://perma.cc/EER9-C5VM>] (revealing that 52% of Americans, including 57% of Democrats and 48% of Republicans, believe improving America's energy system should be a “top priority” of the government); *Voters More Worried About Gas Prices Than Climate Change*, RASMUSSEN REPS. (May 9, 2022), https://www.rasmussenreports.com/public_content/politics/partner_surveys/may_2022/voters_more_worried_about_gas_prices_than_climate_change [<https://perma.cc/6Q7X-M9ZM>] (finding that 82% of voters are concerned about energy and gas prices, and only 14% are not concerned—89% of Republicans and 77% of Democrats are at least moderately concerned); Jeffrey M. Jones, *Americans' Energy Worries Surge*, GALLUP (Mar. 30, 2022), <https://news.gallup.com/poll/391319/americans-energy-worries-surge.aspx> [<https://perma.cc/599J-SMKL>] (revealing that 44% of Americans believe U.S. energy is in a “very serious” situation—equal to or greater than the percentage of Americans in the late 1970s—while only 5% of the population is not worried about energy at all).

regression principle is to be implemented further, it will need to overcome these political hurdles.¹²⁷

This Part overviews the political environment in which the few examples of the non-regression principle in America arose, specifically the Montana Constitutional provisions, the Energy Policy and Conservation Act (EPCA), and the Prevention of Significant Deterioration (PSD) program in the Clean Air Act (CAA).¹²⁸ Section A discusses the political landscape in which the Montana Constitutional Convention took place, as well as the case law giving the provisions force.¹²⁹ Section B then assesses developments that catalyzed an anti-backsliding provision in the EPCA.¹³⁰ Finally, Section C provides the origins of the PSD program.¹³¹

A. Montana's Constitutional Convention and the Inalienable Right to the Environment

The rhetoric and goals of the 1972-1973 Montana Constitutional Convention were very much a reflection of the national attitude towards environmental law at that point in time.¹³² Spurred by the publication of Rachel Carson's 1962 exposé of the chemical industry in *Silent Spring* and horrific images of the 1969 Santa Barbara oil spill, the American public began taking an interest in environmentalism in the 1970s.¹³³ Between 1965 and 1970, the percentage

¹²⁷ See MACINNIS & KROSINICK, *supra* note 123, at 5 (marking the political divide determining whether or not individuals believe climate change will affect them personally).

¹²⁸ See *infra* notes 132–204.

¹²⁹ See *infra* notes 132–160.

¹³⁰ See *infra* notes 161–181.

¹³¹ See *infra* notes 182–204.

¹³² See Amanda Eggert, *How the Montana Constitution Shapes the State's Environmental Landscape*, MONT. FREE PRESS (Mar. 24, 2022), <https://montanafreepress.org/2022/03/24/montana-constitution-environment-stream-access/> [<https://perma.cc/Y6QE-SZW5>] (explaining how the Montana Constitutional Convention captured the nation's attention with respect to environmentalism).

¹³³ See “*Environmental Crisis*” in the Late 1960s, GIVE EARTH A CHANCE, https://michiganintheworld.history.lsa.umich.edu/environmentalism/exhibits/show/main_exhibit/origins/-environmental-crisis—in-the- [<https://perma.cc/K7NF-86SV>] (identifying the events of the late 1960s that drove the wave of environmentalism in the 1970s). Houghton Mifflin originally published Rachel Carson's *Silent Spring* in 1962. RACHEL CARSON, *SILENT SPRING* (1962); *Legacy of Rachel Carson's Silent Spring*, AM. CHEM. SOC'Y, <https://www.acs.org/education/whatischemistry/landmarks/rachel-carson-silent-spring.html> [<https://perma.cc/KP8R-SCA7>]. The book highlighted the dangers inherent in the use of agricultural chemicals, specifically touching upon how the chemicals move through the food chain and harm humans. See *Legacy of Rachel Carson's Silent Spring*, *supra* (detailing Rachel Carson's focus on bioaccumulation and the impact chemicals have on all stages of the food chain). Because of Carson, average Americans began to understand how industrial chemicals affected them and their children, no matter how removed they felt from the issue. Meir Rinde, *Richard Nixon and the Rise of American Environmentalism*, SCI. HIS. INST.: DISTILLATIONS (June 2, 2017), <https://sciencehistory.org/stories/magazine/richard-nixon-and-the-rise-of-american-environmentalism/> [<https://perma.cc/A8PF-EPYL>]. The Santa Barbara Disaster occurred in January 1969 when a drilling platform exploded in the Pacific Ocean near Santa Barbara and drenched thirty-five miles of beaches in oil. “En-

of Americans who considered water and air pollution to be serious problems ballooned from 33% to 70%.¹³⁴ The first Earth Day in 1970 reflected this attitude, when twenty million Americans participated in the display of grassroots environmentalism.¹³⁵

For the first time, environmentalism held enormous political potential, and both major parties frantically tried to appeal to this new bloc of voters.¹³⁶ The Republican Party held the early advantage, as Richard Nixon sat in the White House.¹³⁷ Three months after Earth Day, President Nixon founded the EPA, and, by December, he signed the Clean Air Act (CAA).¹³⁸ In fact, environmental politics were so agreeable and non-partisan in 1970 that many expressed concerns that politicians were using such issues to distract the American public from more pressing issues, like the Vietnam War and civil rights.¹³⁹

This groundswell of environmental concern catalyzed the vote for a new state constitution in Montana.¹⁴⁰ On November 3, 1970, the people of Montana voted to approve a constitutional convention to draft the replacement for the state's original constitution.¹⁴¹ Environmentalism stood at the forefront of the

vironmental Crisis" in the Late 1960s, supra. The spill killed wildlife in a horrific fashion. *See Rinde, supra* (recounting the story of a child watching a loon die in the spill by drowning in oil). The leak from the explosion released 210,000 gallons of oil per day and dominated television broadcasts across the country. *Id.*

¹³⁴ Rinde, *supra* note 133.

¹³⁵ Adam Rome, *Earth Day 1970 Was More Than a Protest. It Built a Movement.*, WASH. POST (Apr. 22, 2020), <https://www.washingtonpost.com/outlook/2020/04/22/earth-day-1970-was-more-than-protest-it-built-movement/> [<https://perma.cc/7T4E-BWB4>].

¹³⁶ *See Rinde, supra* note 133 (characterizing the rush of both Republicans and Democrats to capture the new political phenomenon of environmentalism as a "hysteria").

¹³⁷ *See Eggert, supra* note 132 (pointing out that President Nixon led the White House's approach in capturing the bipartisan support of environmentalism).

¹³⁸ Zoë Carpenter, *In 1970, Environmentalism Was Poised to 'Bring Us All Together.' What Happened?*, THE NATION (Apr. 20, 2015), <https://www.thenation.com/article/archive/1970-environmentalism-was-poised-bring-us-all-together-what-happened/> [<https://perma.cc/G6F7-28EY>].

¹³⁹ *See id.* (expressing the fears various people had with the growing success of environmental politics and what that may mean for other important issues).

¹⁴⁰ *See Eggert, supra* note 132 (stating that the national political climate around environmentalism influenced the Montana Constitutional Convention).

¹⁴¹ Chuck Johnson, *The Montana Constitution, Up Close and Personal*, MONT. FREE PRESS (Mar. 25, 2022), <https://montanafreepress.org/2022/03/25/reporter-chuck-johnson-recalls-montana-constitutional-convention-of-1972/> [<https://perma.cc/MFW8-DAHV>]; *Montana Constitutional Convention Question, R-67 (1970)*, BALLOTEDIA, [https://ballotpedia.org/Montana_Constitutional_Convention_Question,_R-67_\(1970\)](https://ballotpedia.org/Montana_Constitutional_Convention_Question,_R-67_(1970)) [<https://perma.cc/AL96-BR7D>]. The referendum succeeded by a margin of 133,482 votes to 72,643, or 65% to 35%. *Montana Constitutional Convention Question, R-67 (1970), supra.* The state's original constitution passed in 1889 when Montana became a state. Johnson, *supra*. "Copper King" William Clark headed the 1889 convention and crafted extremely friendly language for the copper industry. *Id.* Clark accumulated a wealth of about \$200 million, or \$31 billion today, and was an enormous force in America's Gilded Age economy. Keith Edgerton, *William Clark, The Copper King*, 24 THE MONTANA PROFESSOR (2014), <https://mtprof.msun.edu/Spr2014/edger.html> [<https://perma.cc/45N4-P8MJ>]. His greed and political ambition merged in 1899 when he spent a third of a million dollars bribing the state legislature of Montana to gain its nomination for the U.S. Senate; the

Convention's priorities, and the delegates themselves acknowledged they could not return without enshrining significant environmental protections.¹⁴²

The Convention began in November 1972.¹⁴³ On the thirty-fifth day of the Convention, the original text of Section 1 of Article IX was introduced: "each person must maintain and enhance the environment of the state for present and future generations."¹⁴⁴ This section led to a prolonged debate about what language created the strongest environmental protections.¹⁴⁵ The bulk of the debate centered around whether the adjectives "clean and healthful" should

Senate quickly issued a resolution rejecting his nomination. *William Andrews Clark (1839–1925)*, PBS, <https://www.pbs.org/wgbh/americanexperience/features/lasvegas-clark/> [<https://perma.cc/6AX3-38ER>]. He won a legitimate seat in 1901, which he used largely to benefit his own business ventures. *Id.*

¹⁴² 5 MONTANA CONSTITUTIONAL CONVENTION 1971–1972, VERBATIM TRANSCRIPT 1247 (Mont. Legislature, Mont. Legis. Council, & Const. Convention Editing & Publ'g Comm., 1981) [hereinafter MONTANA CONSTITUTIONAL CONVENTION 1971–1972] (expressing the need to be able to go back to constituents and tell them the Convention delivered the desired protections for the environment).

¹⁴³ 3 MONTANA CONSTITUTIONAL CONVENTION 1971–1972, *supra* note 142, at Table of Contents.

¹⁴⁴ *See id.* (identifying March 1, 1973 as the thirty-fifth day of the Convention); 4 MONTANA CONSTITUTIONAL CONVENTION 1971–1972, *supra* note 142, at 1200 (beginning discussions of the right to a clean and healthful environment). The convention attendees consisted of 100 delegates that were selected through a primary. Johnson, *supra* note 141. Democrats won a majority of the seats (58), followed by Republicans (36), and independents (6). *Id.* None of the delegates were legislators, as office holders were prohibited from becoming delegates. *Id.* In 1971, in *Forty-Second Legislative Assembly v. Lennon*, the Montana Supreme Court held that the Montana Constitution's prohibition against state officers holding more than one office prohibited sitting officials from becoming delegates to the Convention. 481 P.2d 330, 334 (Mont. 1971). During the debates, the Convention eventually amended the section by replacing "enhance" with the word "improve." 5 MONTANA CONSTITUTIONAL CONVENTION 1971–1972, *supra* note 142, at 1249. Delegate Charles B. McNeil put forth the amendment, which succeeded by a margin of sixty-eight to nineteen. *Id.* at 1247–49. The Convention wanted to reflect delegates' desire for the environment only to improve going forward. *See id.* at 1248 (stating that the Convention wanted to ensure the Supreme Court could not interpret the provision in a manner that allowed the degradation of the environment). The group believed "improve" relayed the intention more clearly than "enhance." *Id.*

¹⁴⁵ *See* 4 MONTANA CONSTITUTIONAL CONVENTION 1971–1972, *supra* note 142, at 1201–16; (arguing over whether adjectives were needed to strengthen the environmental protections or if the term was stronger on its own); 5 MONTANA CONSTITUTIONAL CONVENTION 1971–1972, *supra* note 142, at 1217–51 (same). The only delegate to voice a concern regarding the provision's effect on business was Delegate Bates, who misheard the language of the provision. 4 MONTANA CONSTITUTIONAL CONVENTION 1971–1972, *supra* note 142, at 1205. The debate over the adjectives surrounding the term "environment" stretched for about fifty pages of transcript on March first. *See* 4 MONTANA CONSTITUTIONAL CONVENTION 1971–1972, *supra* note 142, at 1201–16 (debating whether the constitution should include the terms "clean" and "healthful" to modify the term "environment"); 5 MONTANA CONSTITUTIONAL CONVENTION 1971–1972, *supra* note 142, at 1217–51 (same). Delegate McNeil summarized the debate between the two sides well, expressing that "we are all searching for exactly the same thing; it's just a matter of what language to use." 4 MONTANA CONSTITUTIONAL CONVENTION 1971–1972, *supra* note 142, at 1205.

be added alongside “environment.”¹⁴⁶ Many of the delegates feared such adjectives would allow industry to pollute Montana’s environment and manipulate the term “healthful” in court.¹⁴⁷ Ultimately, however, the delegates included “clean and healthful” because the adjectives would make the Convention’s objectives clear: no environmental degradation is permissible.¹⁴⁸

In 1999, in *Montana Environmental Information Center v. Department of Environmental Quality*, the Montana Supreme Court assessed the strength of “clean and healthful environment” for the first time.¹⁴⁹ The court reviewed a state statute amending a mining exploration license that allowed for the increased discharge of arsenic into the Blackfoot and Landers Fork Rivers.¹⁵⁰

¹⁴⁶ See 4 MONTANA CONSTITUTIONAL CONVENTION 1971–1972, *supra* note 142, at 1200–16 (debating whether the Convention should include the adjectives “clean” and “healthful”); 5 MONTANA CONSTITUTIONAL CONVENTION 1971–1972, *supra* note 142, at 1217–50 (same).

¹⁴⁷ See 4 MONTANA CONSTITUTIONAL CONVENTION 1971–1972, *supra* note 142, at 1201 (arguing why the provision would be stronger without any modifying adjectives). The Natural Resources and Agricultural Committee made a dramatic argument against inclusion of the term “healthful,” proclaiming the term would allow “those who would pollute our environment to parade in some doctors [into court] who could say that if a person can walk around with 4 pounds of arsenic in his lungs or SO₂ gas in his lungs and wasn’t dead, that that would be a healthful environment.” *Id.* Some delegates saw the word “healthful” as comparative language lacking a subject against which it could be compared. *Id.* at 1204. Others believed the federal government would use its power to annihilate Montana’s environment and find a way to argue it remained “healthful.” 5 MONTANA CONSTITUTIONAL CONVENTION 1971–1972, *supra* note 142, at 1243. Delegate Donald R. Foster spoke passionately about protecting the environment from the federal government. See *id.* (arguing the Convention should not include the adjectives “clean” and “healthful”).

¹⁴⁸ 5 MONTANA CONSTITUTIONAL CONVENTION 1971–1972, *supra* note 142, at 1250–51. The motion to include the adjectives passed by a vote of forty-nine to thirty-eight. *Id.* at 1250. Delegate Bob Campbell finally put forward the motion after arguing on behalf of the adjectives for the entirety of the debate. 4 MONTANA CONSTITUTIONAL CONVENTION 1971–1972, *supra* note 142, at 1200–16; 5 MONTANA CONSTITUTIONAL CONVENTION 1971–1972, *supra* note 142, at 1217–50. Much earlier in the discussion, Delegate Campbell argued that “clean and healthful” maintained a minimum standard that industry or government could not breach. 4 MONTANA CONSTITUTIONAL CONVENTION 1971–1972, *supra* note 142, at 1207. Six days after this vote, the Convention finished Montana’s anti-backsliding provision by codifying “the right to a clean and healthful environment” in the state’s Declaration of Rights. 5 MONTANA CONSTITUTIONAL CONVENTION 1971–1972, *supra* note 142, at 1645.

¹⁴⁹ See *Mont. Env’t Info. Ctr. v. Dep’t of Env’t Quality*, 988 P.2d 1236, 1244–45 (Mont. 1999) (explaining that the Montana Supreme Court had not had an opportunity before this case to discuss the level of scrutiny applied to the environmental rights or the showing necessary to illustrate an implication of constitutional environmental rights).

¹⁵⁰ *Id.* at 1238. The exploration license allowed for well tests at the proposed gold mine site, and these tests produced the arsenic discharge being challenged by the plaintiffs. See *id.* at 1237–38 (explaining the process and results of the well tests). The well tests caused arsenic levels to spike in the fifty feet surrounding the well pumps; however, by the time the water traveled 3,000 feet, the levels of arsenic were diluted and negligible. *Id.* at 1240–41. The court also noted that the Blackfoot River is the habitat of the Bull Trout, which is under the protection of the Endangered Species Act. *Id.* at 1238. Likewise, the Landers Fork River is an essential tributary to the Blackfoot and is the spawning location of the Bull Trout. *Id.* Given this information from the court, it is possible the plaintiffs could have prevented the license from being given through an Endangered Species Act suit. See *Babbitt v. Sweet Home Chapter of Cmty. for a Great Or.*, 515 U.S. 687, 691, 707 (1995) (interpreting the prohibition

The plaintiffs challenged the statute as a violation of Articles II and IX of the Montana Constitution.¹⁵¹ Relying heavily on the records of the Montana Constitutional Convention, the court concluded that the delegates unequivocally instilled Articles II and IX with “anticipatory and preventative” environmental protections.¹⁵² The Montana Constitution does not only protect citizens from adverse impacts against specific individuals, but also from environmental degradation in general—such as limited releases of arsenic.¹⁵³ The court found that any steps taken by the legislature violating these rights must be subject to strict scrutiny and struck down.¹⁵⁴

In 2020, the Montana legislature and a mining company attempted to contravene the constitutional non-regression principle in a different manner.¹⁵⁵ In 2020, in *Park County Environmental Council v. Montana Department of Environmental Quality*, the Montana Supreme Court reviewed a 2011 amendment

against private parties “taking” endangered species to include actions that harm the species by degrading its habitat enough to interfere with essential behavior patterns, like breeding).

¹⁵¹ *Mont. Env’t Info. Ctr.*, 988 P.2d at 1240. The district court acknowledged the plaintiffs had the right to a clean environment but still originally rejected the plaintiffs’ theory. *Id.* at 1241. The court held that the plaintiffs needed to demonstrate tangible harm to human health or the environment—they could not simply point to hypothetical harm. *Id.* Because arsenic only spiked in the surrounding fifty feet of the original discharge and the water quickly diluted the discharge, the court found no actual harm against the plaintiffs. *Id.* At the federal level, the requirement of particularized harm to the plaintiffs is commonly adopted by the Supreme Court; unlike Montana’s state constitution, the U.S. Constitution lacks a codified right to a clean environment. *See, e.g.*, *Summers v. Earth Island Inst.*, 555 U.S. 488, 494 (2009) (declining to find standing in a suit against environmental degradation because the petitioner did not specify an environmental site being destroyed in which he had a personal interest); *Lujan v. Defs. of Wildlife*, 504 U.S. 555, 567 (1992) (rejecting the idea that mere interest in an endangered species, without actually working with or observing the animal, is enough to provide standing under the Endangered Species Act); *Sierra Club v. Morton*, 405 U.S. 727, 734 (1972) (finding a lack of standing because the petitioners were not personally affected by the aesthetic harm being alleged).

¹⁵² *Mont. Env’t Info. Ctr.*, 988 P.2d at 1249. The record of the 1972 Montana Constitutional Convention included a lengthy debate over whether the word “healthful” should be included as a qualifier for “environment.” *Id.* at 1246. Some delegates believed Montana’s environment was already “healthful or unsoiled;” thus, inclusion of those words would only give polluters a chance to argue more arsenic in the environment would still be “healthful.” *Id.* The Convention ultimately included the adjectives because delegates felt the words provided a force their absence would lack. *Id.* at 1248. Thus, the court believed this debate made the Convention’s intentions very clear: the constitutional environmental protections are to be construed as powerfully as possible. *Id.* at 1246.

¹⁵³ *See id.* at 1249 (explaining that only a showing of environment degradation is necessary to implicate the right—the courts do not need to see “dead fish float,” wait for a plaintiff to tangibly experience detrimental health effects, or have an individual become physically endangered to find a violation of the right).

¹⁵⁴ *See id.* at 1246 (explaining that, although rights not specifically listed in Article II’s Declaration of Rights are not normally protected by strict scrutiny, the Constitutional Convention made clear that the obligations Article IX are meant to bolster Article II and are therefore protected by strict scrutiny).

¹⁵⁵ *See Eggert, supra* note 132 (explaining how lawmakers in Montana attempted to undermine the Montana Environmental Policy Act (MEPA) with a 2011 amendment, of which Lucky Minerals then became a beneficiary).

to the Montana Environmental Policy Act (MEPA).¹⁵⁶ The Amendment allowed MEPA permittees or licensees to move forward with an approved project—thus modifying the environment—before considering the environmental impacts of the project.¹⁵⁷ The amendment also prohibited the judiciary from intervening with an injunction.¹⁵⁸ The Montana Supreme Court held the amendment to be in violation of Articles II and IX’s preventative protections, citing the 1972 Convention’s intent to create powerful environmental rights.¹⁵⁹ The court reasoned that providing relief after a company successfully degraded the environment could not be considered an “adequate remedy” for environmental degradation under Article IX, as the constitutional rights of the citizens would already be violated.¹⁶⁰

B. The EPCA and America in the Wake of Crisis

Like the Montana Constitutional Convention, the Energy Policy and Conservation Act (EPCA) was born during the environmental revolution of the

¹⁵⁶ See 477 P.3d 288, 295 (Mont. 2020) (identifying the 2011 MEPA amendment as a potentially unconstitutional statute). MEPA is Montana’s iteration of the National Environmental Policy Act (NEPA). MONTANA LEGIS. ENV’T POLICY OFF., A GUIDE TO THE MONTANA ENVIRONMENTAL POLICY ACT 2 (Hope Stockwell ed., 2019) (stating that MEPA is “patterned” after NEPA). NEPA, like many other American environmental statutes, passed in the 1970s under President Richard Nixon. *What Is the National Environmental Policy Act?*, EPA, <https://www.epa.gov/nepa/what-national-environmental-policy-act> [<https://perma.cc/D5NK-GMPX>] (Oct. 26, 2022). The declaration of purpose for NEPA contains artful language, but it generally “promote[s] efforts which will prevent” environmental harms. National Environmental Policy Act (NEPA), 42 U.S.C. § 4321. To accomplish this, NEPA requires federal agencies authorizing “major federal action” to consider both the environmental impact of the action and any alternative actions that may be available to the agency. *Id.* § 4332(c). Despite only containing procedural requirements, NEPA has proven to be a very successful environmental statute and has stifled federal agencies attempting to take procedural shortcuts for decades. See, e.g., *Sierra Club v. FERC*, 867 F.3d 1357, 1371 (D.C. Cir. 2017) (holding that the federal entity must consider the indirect effects of the federal action being taken); *Thomas v. Peterson*, 753 F.2d 754, 760 (9th Cir. 1985) (holding that an agency cannot separate connected actions simply to avoid creating environmental impact statements); *Calvert Cliffs’ Coordinating Comm., Inc. v. U.S. Atomic Energy Comm’n*, 449 F.2d 1109, 1115 (D.C. Cir. 1971) (holding that an agency must actually consider the environmental impact report developed for NEPA during the agency’s decision making process).

¹⁵⁷ See *Park Cnty. Env’t Council v. Mont. Dep’t of Env’t Quality*, 477 P.3d 288, 303 (2020) (asserting that the provisions of the 2011 amendment to MEPA allow companies to proceed on a project without proper environmental consideration).

¹⁵⁸ *Id.*

¹⁵⁹ See *id.* (pointing out that the delegates at the convention attempted to draft “the strongest environmental protection provision” in the country). The court directly quoted the words of the 1972 Convention two times throughout its opinion. *Id.* at 304, 307. The Court used Delegate Mae Nan Robinson’s language to emphasize how paying someone after their air or water is spoiled with pollution is useless because the environment is already destroyed. *Id.* at 304.

¹⁶⁰ See *id.* (asserting that equitable relief requires providing relief before the damage is done and that monetary relief fails this objective).

1970s.¹⁶¹ Congress passed the law primarily to combat the Organization of the Petroleum Exporting Countries (OPEC) Oil Crisis of 1973.¹⁶² By the 1970s, the United States became overly dependent on foreign oil, believing countries like Saudi Arabia could not afford to lose the profits of American consumption.¹⁶³ When OPEC issued an oil embargo against the United States in 1973, oil prices spiked by 400%, and the American people suffered enormous consequences.¹⁶⁴ The crisis forced drivers to wait at gas stations in lines five miles long, or camp out overnight, for a chance at filling up a tank.¹⁶⁵

The oil crisis provoked an immediate response from the United States, and energy became the foremost issue in national politics.¹⁶⁶ Congress established the Federal Energy Administration and Nuclear Regulatory Commission in 1975 to help mitigate the crisis.¹⁶⁷ That same year, President Gerald Ford spoke extensively on oil and energy in his State of the Union Address and

¹⁶¹ See Eggert, *supra* note 132 (summarizing the period of bipartisan environmentalism occurring in the late 1960s and early 1970s); *History*, SENATE COMM. ON ENERGY & NAT. RES., <https://www.energy.senate.gov/history> [<https://perma.cc/Q4R5-TDJY>] (discussing the creation of the Energy Policy and Conservation Act (EPCA) in the 1970s).

¹⁶² See *Energy Crisis (1970s)*, *supra* note 122 (explaining that the EPCA passed as a reactionary measure to the OPEC oil crisis, which also served as an amplifier for the political power of environmentalists). OPEC also embargoed the Netherlands, South Africa, and Portugal—the staunchest supporters of Israel during the 1973 Arab-Israeli War. *Oil Embargo, 1973–1974*, *supra* note 97.

¹⁶³ See *Energy Crisis (1970s)*, *supra* note 122 (stating the government believed countries in the Middle East could not withstand a loss in revenue stemming from a disruption in the American market). The United States did not account for the increased prices of oil making up for OPEC's lost revenue from oil production and export. *Id.* European powers were not directly embargoed like the United States, but the increase in oil prices still led to great consequences across Europe. See *id.* (listing the steps taken by European countries to respond to the jump in oil prices).

¹⁶⁴ See Michael Bryan, *The Great Inflation*, FED. RSRV. HIST. (Nov. 22, 2013), <https://www.federalreservehistory.org/essays/great-inflation> [<https://perma.cc/LH3U-YHPX>] (illustrating that the OPEC oil crisis kicked off an enormous spike in inflation that lasted until the 1980s); Michael Corbett, *Oil Shock of 1973–74*, FED. RSRV. HIST. (Nov. 22, 2013), <https://www.federalreservehistory.org/essays/oil-shock-of-1973-74> [<https://perma.cc/L2KB-6R3K>] (stating the price of oil jumped from \$2.90 per barrel to \$11.65 per barrel after OPEC ceased exporting oil to the United States).

¹⁶⁵ See Mike Klingaman, *In the 1970s, It Wasn't a Pandemic That Brought Baltimore to a Standstill*, BALT. SUN (May 27, 2020), <https://www.baltimoresun.com/features/retro-baltimore/bs-fe-retro-gas-crunch-20200527-to4adozlk5caneq4zyjw6r2rxu-story.html> [<https://perma.cc/75RQ-2MFB>] (discussing the drastic measures taken by American citizens to purchase gasoline during the oil shock). Some Americans responded to the gasoline shortage by siphoning gas from other cars or fist-fighting with other customers. *Id.* Other individuals even began riding horses again. *Id.* On the other side of the transaction, some gas station owners began selectively doling out gasoline for profit, while others allowed doctors, nurses, and other essential workers to cut the sprawling lines. See *id.* (quoting an article printed in the *Baltimore Sun* during the oil crisis that described some gas station owners as “little oil sheikhs”).

¹⁶⁶ See *History*, SENATE COMM. ON ENERGY & NAT. RES., *supra* note 161 (stating the oil embargo “propelled” energy to the front of national politics).

¹⁶⁷ See *id.* (explaining how the Federal Energy Administration absorbed the pre-existing Federal Energy Office, while the Nuclear Regulatory Commission assumed the responsibilities of the abolished Atomic Energy Commission).

vowed to decrease spending in all areas of government except energy.¹⁶⁸ Two years later, President Jimmy Carter proclaimed the energy crisis to be “the greatest challenge our country will face during our lifetimes.”¹⁶⁹ When the Iranian Revolution set off a second oil shock in 1979, President Carter declared that countering the crises was “the moral equivalent of war.”¹⁷⁰ The oil shocks had such a profound effect on the economy that inflation reached a historic 14.8% by 1980.¹⁷¹

The EPCA served as a solution to the turbulence of the 1970s.¹⁷² The stated purpose of the EPCA was to reduce energy demand, create energy conservation plans, and improve energy efficiency across the country.¹⁷³ The Act enjoyed

¹⁶⁸ See Gerald R. Ford, President of the United States, Address Before a Joint Session of the Congress Reporting on the State of the Union, 1 PUBLIC PAPERS OF THE PRESIDENTS OF THE UNITED STATES: GERALD R. FORD, 1975, at 36–46 (Jan. 15, 1975) (promising to protect the American people from a future oil shock and to continue to mitigate the effects of the 1973 embargo). During his speech, President Ford mentioned “oil” twenty times and “energy” twenty-five times. *See id.* (addressing the concerns of the United States). In comparison, Ford only mentioned “military” four times and “war” once, despite the country’s deeply polarizing and drawn-out engagement in Vietnam. *See id.* (emphasizing the military’s strength but admitting it would not be enough to solve foreign conflict).

¹⁶⁹ Livia Gershon, *Gas Shortages in 1970s America Sparked Mayhem and Forever Changed the Nation*, SMITHSONIAN MAG. (May 13, 2021), <https://www.smithsonianmag.com/smart-news/1970s-gas-shortages-changed-america-180977726/> [<https://perma.cc/3JJC-PPD2>]. Congress and President Jimmy Carter created the DOE to help facilitate the coordination of a national energy policy. *See A Brief History of the Department of Energy*, OFF. OF LEGACY MGMT.: DEP’T OF ENERGY, <https://www.energy.gov/lm/brief-history-department-energy> [<https://perma.cc/MG52-LY7E>]. Before the oil crisis, a national energy policy dictating the actions and direction of the federal government did not exist. *See id.* (stating “no overall energy policy existed” before the 1970s).

¹⁷⁰ Greg Myre, *Gas Lines Evoke Memories of Oil Crises in the 1970s*, NPR (Nov. 10, 2012), <https://www.npr.org/sections/pictureshow/2012/11/10/164792293/gas-lines-evoked-memories-oil-crises-in-the-1970s> [<https://perma.cc/YCM9-94AL>]. The Iranian Revolution caused Iran’s oil production to decrease by 4.8 million barrels a day. Laurel Graefe, *Oil Shock of 1978–79*, FED. RSRV. HIST. (Nov. 22, 2013), <https://www.federalreservehistory.org/essays/oil-shock-of-1978-79> [<https://perma.cc/AML2-6UBG>]. At the time, Iran accounted for 7% of the world’s oil production. *Id.* With the 1973 shock fresh on the world’s mind, fear of a new crisis exacerbated the issue. *See* Samantha Gross, *What Iran’s 1979 Revolution Meant for US and Global Oil Markets*, BROOKINGS INST. (Mar. 5, 2019), <https://www.brookings.edu/blog/order-from-chaos/2019/03/05/what-irans-1979-revolution-meant-for-us-and-global-oil-markets/> [<https://perma.cc/U27D-8FBA>] (identifying panic as a key factor in sparking the oil shock of 1979). Countries began buying excess oil out of panic, driving the inflated price of oil even higher. *See id.* (asserting that buyers began purchasing oil for \$50 per barrel, when the actual price was only \$34 per barrel). President Carter attempted to remedy the situation through price controls, but this only encouraged oil refineries to hoard more gasoline. *See id.* (explaining that price controls were based on the previous month’s demand of oil, encouraging refiners to withhold oil and sell it when the price increased the next month).

¹⁷¹ *American Inflation Rates: 1914 to 2023*, RATE INFLATION, <https://www.rateinflation.com/inflation-rate/usa-historical-inflation-rate/> [<https://perma.cc/9HYT-N9SP>] (Oct. 12, 2023).

¹⁷² *See* EPCA, 42 U.S.C. § 6201 (declaring the purposes of the EPCA to be energy conservation and preservation of the American energy supply); *Energy Crisis (1970s)*, *supra* note 122 (categorizing the EPCA as one of the country’s attempts to overhaul its energy policy and lessen its dependency on fossil fuels).

¹⁷³ Energy Policy and Conservation Act of 1975, Pub. L. No. 94-163, 89 Stat. 871, 874. The EPCA originally had seven purposes listed in its “statement of purposes” section. *Id.* In 1992, Congress

strong bipartisan favor: it originated as a Democratic bill in the Senate, passed with bipartisan support in both chambers of Congress, and Republican President Ford signed it into law in 1975.¹⁷⁴ After ten years and another oil shock, however, the Department of Energy (DOE) still had not produced mandatory energy efficiency standards required by the EPCA.¹⁷⁵ This forced Congress to pass the National Appliance Energy Conservation Act (NAECA) of 1987, the amendment adding the anti-backsliding provision to the EPCA, and to create an unequivocal prohibition against the regression of appliance energy efficiency standards.¹⁷⁶

passed the Energy Policy Act and added an eighth purpose: water conservation through water efficiency. Energy Policy Act of 1992, Pub. L. No. 102-486, 106 Stat. 2776, 2817. Then, in 2000, Congress passed the Energy Act and repealed two of the original purposes calling for an increase in fossil fuel supply and greater use of America's coal supply. Energy Act of 2000, Pub. L. No. 106-469, 114 Stat. 2029, 2029. Now, the current statute contains just six purposes. 42 U.S.C. § 6201.

¹⁷⁴ See *Energy Policy and Conservation Act of 1975*, BALLOTPEdia, https://ballotpedia.org/Energy_Policy_and_Conservation_Act_of_1975 [<https://perma.cc/B2QR-AH7R>] (listing the steps through which EPCA proceeded before becoming law). The EPCA passed in the Senate by a vote of sixty to twenty-five, with nine Republican Senators joining the Democratic majority. See *94th Congress – Senate – Vote 133*, VOTEVIEW, <https://voteview.com/rollcall/RS0940133> [<https://perma.cc/2PAZ-4PUL>] (breaking down how the Senate voted on the EPCA in April 1975). The bill passed in the House of Representatives 255 to 148, with thirty-one Republican Representatives joining the Democratic majority. See *94th Congress – House – Vote 405*, VOTEVIEW, <https://voteview.com/rollcall/RH0940405> [<https://perma.cc/2S7A-G6FY>] (breaking down how the House voted on the EPCA in September 1975). After going through Conference Committee, the EPCA succeeded in the House 300 to 103, but, this time, only seven Republicans voted against the legislation, making it overwhelmingly bipartisan. See *94th Congress – House – Vote 582*, VOTEVIEW, <https://voteview.com/rollcall/RH0940582> [<https://perma.cc/DU8S-5FWY>] (breaking down the House's vote on the EPCA after the bill went through Conference Committee revisions). In his signing statement, President Ford acknowledged the importance of the EPCA in moving the United States towards energy efficiency and its presence as a unifying, bipartisan law. Gerald R. Ford, President of the United States, Statement on the Energy Policy and Conservation Act, 2 PUBLIC PAPERS OF THE PRESIDENTS OF THE UNITED STATES: GERALD R. FORD, 1975, at 1991–92 (Dec. 22, 1975). In President Ford's speech, he acknowledged he was not fully satisfied with the EPCA, likely due to the Democrats' heavy influence on the text. See *id.* (acknowledging that the “legislation [was] by no means perfect” but still in the best interest of the American people).

¹⁷⁵ Nat. Res. Def. Council, Inc. v. Abraham, 355 F.3d 179, 185–86 (2d Cir. 2004). Mandatory energy efficiency standards were not required by the original EPCA but were later implemented through amendments in 1978. *Id.* at 185. The country was still suffering through an energy crisis, and the government could not afford to wait for manufacturers to make products more energy efficient. *Id.* at 185–86. Accordingly, the 1978 amendments directed the DOE to create mandatory standards for home appliances. *Id.* at 186.

¹⁷⁶ 42 U.S.C. § 6295(o)(1); see also *History and Impacts*, *supra* note 97 (explaining that the 1987 amendments were added to establish energy efficiency floors for household appliances). Almost a full decade after the National Energy Act of 1978, the DOE still had not yet produced the mandatory energy efficiency standards desired by Congress, which felt compelled to respond. *Abraham*, 355 F.3d at 186. The 1987 amendments enjoyed even greater bipartisan support in Congress than the original Act. *Senate Vote #28 in 1987 (100th Congress)*, GOVTRACK, <https://www.govtrack.us/congress/votes/100-1987/s28> [<https://perma.cc/Y4C3-7EVF>]. In the Senate, the National Appliance Energy Conservation Act (NAECA) passed eighty-nine to six, with every Democrat and all but six Republicans approving the measure. *Id.*

The EPCA's anti-backsliding provision went unchallenged until 2004, in *Natural Resources Defense Council, Inc. v. Abraham*.¹⁷⁷ In *Abraham*, the Department of Energy published final rules setting energy standards for air conditioners in accordance with the EPCA.¹⁷⁸ Less than a month later, the DOE attempted to rescind these standards and replace them with less demanding standards.¹⁷⁹ The U.S. Court of Appeals for the Second Circuit held that the DOE lacked statutory authority for this action, as Congress explicitly stripped the agency of its discretion to weaken a standard once the DOE published the standard in the Federal Register.¹⁸⁰ The Second Circuit refused to interpret the statute in a manner rendering an express provision—the anti-backsliding provision—useless.¹⁸¹

C. The Clean Air Act and the Jurisprudential Origins of the PSD Program

Unlike Montana's Bill of Rights and the EPCA's anti-backsliding provision, the Prevention of Significant Deterioration (PSD) program originated in the courts rather than the legislature.¹⁸² The Clean Air Act (CAA) of 1970

¹⁷⁷ See 355 F.3d at 184 (representing the first legal challenge to 42 U.S.C. § 6295(o)(1), the anti-backsliding provision).

¹⁷⁸ See *id.* at 189 (discussing the DOE's process of promulgating final rules dictating energy standards for air conditioners throughout the year 2000 before ultimately publishing the rules on January 22, 2001). Consistent with the DOE's historical failure to publish standards on time, the air conditioner standards challenged in this case were originally due for publication in 1994. See *id.* at 188 (laying out the schedule for standard publication as mandated by the EPCA). Once published, affected manufacturers needed to comply by January 23 2006. *Id.*

¹⁷⁹ See *id.* at 189–90 (explaining that the DOE inexplicably tried to delay these standards on February 2, 2001 and promulgated a replacement rule on April 20, 2001). The DOE published this “final rule” specifically to delay the air conditioner standards on February 2, 2001, without giving notice or the chance for public comment—both of which are typically required by the Administrative Procedure Act (APA). See *id.* at 189 (explaining the circumstances in which the DOE delayed the energy efficiency standards). Under the APA, the rulemaking process requires an agency to give public notice published in the Federal Register. Administrative Procedure Act (APA), 5 U.S.C. § 553(b). Once notice is given, the public is given the opportunity for written commentary and participation. *Id.* § 553(c). These steps can only be avoided if an agency finds “good cause” to believe the process would be “impracticable” or “contrary to the public interest.” *Id.* § 553(b)(3)(B). This is the exception the DOE used to avoid comment, stating that the impending date of the rule's publication made it impossible to go through the usual APA process. See *Abraham*, 355 F.3d at 190 (laying out the argument used by the DOE to avoid APA procedure). The DOE then published replacement standards in April 2001, again without going through APA procedure, which quickly resulted in lawsuits. See *id.* (continuing the timeline of the air conditioner standards). In response to the suits, the DOE opened the notice-and-comment period that created the rule challenged in *Abraham*. *Id.* at 190–91.

¹⁸⁰ See *id.* at 196–97 (declaring the publication of the rule in the Federal Register as the action Congress clearly intended to trigger 42 U.S.C. § 6295(o)(1)).

¹⁸¹ See *id.* at 197 (citing cases explaining why the court refuses to interpret a statute in a manner that renders portions of the same statute useless).

¹⁸² See Heather M. Hillaker, *The Death of the Clean Air Act's PSD Provision: The Practical Implications of Circuit Courts' Failure to Properly Apply Chevron Deference*, 93 N.C. L. REV. 821, 828 (2015) (explaining that courts created the PSD requirements in *Sierra Club v. Ruckelshaus*, 344 F. Supp. 253 (D.D.C. 1972)).

served as the foundational document for the court.¹⁸³ The CAA of 1970 aimed to mitigate the growing issue of smog across the United States.¹⁸⁴ In 1953, smog in Los Angeles was “eye-burning, lung-stinging, [and] headache-inducing,” and citizens began showing up to city meetings in gas masks.¹⁸⁵ A year later, smog played a major role in the death of a ten-year-old girl.¹⁸⁶ In New York City, smog killed 200 people on Thanksgiving weekend in 1966.¹⁸⁷ In 1970, the *New York Times* ran an alarming article title: “500% Rise in Emphysema Mortality Rate in Last Decade Reported for City.”¹⁸⁸

In a bipartisan response to the growing crisis, Congress passed the first iteration of the modern CAA in order to “protect and enhance” the country’s air.¹⁸⁹ The EPA interpreted the CAA to allow regions already in compliance

¹⁸³ See *Ruckelshaus*, 344 F. Supp. at 255 (using the text of the 1970 CAA to support the decision).

¹⁸⁴ *Clean Air Act Requirements and History*, EPA, <https://www.epa.gov/clean-air-act-overview/clean-air-act-requirements-and-history> [<https://perma.cc/3JUA-ERSH>].

¹⁸⁵ Reis Thebault, *How Decades of L.A. Smog Led to California’s War with Trump Over Car Pollution*, WASH. POST (Sept. 21, 2019), <https://www.washingtonpost.com/history/2019/09/21/how-decades-la-smog-led-californias-war-with-trump-over-car-pollution/> [<https://perma.cc/XPK8-8UNZ>]. Los Angeles’ history of air pollution began before industrialization because of the surrounding mountains’ ability to trap pollutants within the basin. See *id.* (detailing the Los Angeles basin’s susceptibility to smog and air pollution). Dating back to 1542, Spanish explorers named the area “The Bay of Smoke” due to trapped smoke creating constant, low-hanging clouds. *Id.* During World War II, a cloud of smog descended upon Los Angeles so thick that the people of Los Angeles believed the Japanese military launched a chemical attack. *Id.*

¹⁸⁶ *Id.* The *New York Times* reported the girl’s death on the ninth day of “near-emergency” levels of smog in Los Angeles. *Los Angeles Smog Persists 9th Day*, N.Y. TIMES (Oct. 16, 1954), <https://www.nytimes.com/1954/10/16/archives/los-angeles-smog-persists-9th-day-governor-flies-to-investigate.html> [<https://perma.cc/Q6N7-UF8B>]. The smog was so abundant that the Los Angeles chief of police had his officers giving out citations at roadblocks for any vehicles producing “excessive fumes.” *Id.* Mayor Clarence Winder of Pasadena, California went so far as to call for a public prayer, asking God to save the city from the “scourge” of smog. *Id.*

¹⁸⁷ Jim Dwyer, *Remembering a City Where the Smog Could Kill*, N.Y. TIMES (Feb. 28, 2017), <https://www.nytimes.com/2017/02/28/nyregion/new-york-city-smog.html> [<https://perma.cc/3WTE-MSUF>].

¹⁸⁸ *500% Rise in Emphysema Mortality Rate in Last Decade Reported for City*, N.Y. TIMES (Mar. 12, 1970), <https://www.nytimes.com/1970/03/12/archives/500-rise-in-emphysema-mortality-rate-in-last-decade-reported-for.html> [<https://perma.cc/XRD3-ZTT6>]. The article also reported deaths from chronic bronchitis increased 200% during the same time frame. *Id.* The author identified air pollution as the likely culprit of the deaths, but medical evidence proving the connection did not yet exist. *Id.* The article displays an interesting contrast in medical opinions in the face of scientific uncertainty. See *id.* (quoting multiple doctors with different conclusions regarding the role of air pollution in city sicknesses). Dr. Ernest Wynder expressed his belief that air pollution played no role in the growing rates of lung cancer in cities. *Id.* Meanwhile, Dr. Robert Horton conceded the air pollution issue required regulation to prevent adverse health effects despite an incomplete knowledge of how air pollution works. *Id.* Most significantly for environmentalists, Dr. Horton proclaimed the city had no need for levels of air pollution capable of killing people and that something must be done to protect the citizens of New York City. *Id.*

¹⁸⁹ Clean Air Act (CAA), 42 U.S.C. § 7401(b)(1). In his presidential signing statement, President Nixon credited the CAA’s creation to the bipartisan efforts in the Senate and House of Representatives. See Richard M. Nixon, President of the United States, Remarks on Signing the Clean Air Amendments

with air quality standards to increase pollution, provided the regions remained in compliance after the increase.¹⁹⁰ In 1972, in *Sierra Club v. Ruckelshaus*, environmental organizations sued the EPA to enjoin the agency from approving this policy.¹⁹¹ The respondents maintained the CAA required the EPA to prevent air quality degradation in all regions as a non-discretionary duty.¹⁹² The EPA Administrator, on the other hand, believed such aggressive regulation was beyond the scope of his authority and prevented him from using other strategies he preferred.¹⁹³

The district court found in favor of the respondents, holding that permitting states to degrade their air quality violated the legislative policy of the CAA.¹⁹⁴ The court found the purpose of the act to be clear on its face—Congress intended to “protect and enhance” air quality and avoid any deterioration regardless of whether the air quality was already in compliance.¹⁹⁵ The court turned to the Senate Report produced alongside the CAA.¹⁹⁶ There, the Senate forbade the EPA from approving state implementation plans that did not at least maintain the state’s present air quality.¹⁹⁷ Finally, the court pointed to a 1970 EPA regulation that forbade the regression of air quality throughout each region of every state, holding such action to the contrary of the EPA’s argument in the present case substantially weakened the EPA’s position.¹⁹⁸

of 1970, PUBLIC PAPERS OF THE PRESIDENTS OF THE UNITED STATES: RICHARD M. NIXON, 1970, at 1166–67 (Dec. 31, 1970) (giving credit for the CAA to both Congress and President Nixon himself). The statement also declared 1970 to be the year in which the United States began to progress beyond the issues of unclean air and water. *Id.* President Nixon specifically mentioned the brutal impact of smog in Southern California, which is a reference to Los Angeles’ “scourge” in all but name. *Id.*

¹⁹⁰ See *Sierra Club v. Ruckelshaus*, 344 F. Supp. 253, 254 (D.D.C. 1972) (reciting that the EPA Administrator believed he lacked the power necessary to prevent significant deterioration in areas with complying air quality).

¹⁹¹ *Id.*

¹⁹² See *id.* (alleging the Administrator of the EPA failed to execute a “non-discretionary” duty by refusing to implement the non-degradation policy of the CAA).

¹⁹³ See *id.* (expressing the Administrator’s doubts as to whether he could implement a policy of non-degradation given the statutory language). The Administrator did not make the comments about his perceived authority in court; he instead made the statement in front of the House of Representatives Subcommittee on Public Health and the Environment. *Id.*

¹⁹⁴ See *id.* at 257 (ruling on behalf of the plaintiffs and granting the injunction). The court’s discussion of the CAA’s purpose is extremely short—it uses only two sentences of text before moving on to analyze legislative history. *Id.* at 255.

¹⁹⁵ See *id.* (relying on the plain language of the statute’s declared purpose).

¹⁹⁶ *Id.*

¹⁹⁷ See S. REP. NO. 91-1196, at 2 (1970) (forbidding approval of any implementation plan allowing for degradation of air quality).

¹⁹⁸ See *Ruckelshaus*, 344 F. Supp. at 256 (highlighting the EPA’s own non-degradation regulation as evidence of the EPA’s weak claim that it did not have the necessary authority). The 1970 anti-backsliding regulation held that the primary and secondary air quality standards “shall” not allow for significant deterioration of air anywhere in the country, and the regulation makes no exceptions based on pre-existing air quality. 40 C.F.R. § 50.2(c) (2023); *Ruckelshaus*, 344 F. Supp. at 256. The EPA then followed that regulation with a conflicting regulation that allowed regions in compliance to loos-

In 1973, in *Fri v. Sierra Club*, the federal government appealed to the Supreme Court.¹⁹⁹ The environmentalist respondents argued that, if the EPA did not regulate clean areas to ensure they remain clean, the EPA would simply need to engage in a more expensive clean up once the area inevitably became polluted.²⁰⁰ Furthermore, if degradation occurred, any damage could have irreversible effects, and retroactive remedies would then be unworkable.²⁰¹ Although difficulties would inevitably arise, the respondents reasoned, the only way to “protect and enhance” the environment was to continue to protect the environment despite those difficulties.²⁰² The Supreme Court agreed with the Sierra Club and affirmed the decision.²⁰³ Subsequently, the EPA promulgated PSD regulations in 1974 and credited *Ruckelshaus* for serving as the origin of the non-degradation program.²⁰⁴

III. MATCHMAKER: THE NON-REGRESSION PRINCIPLE’S COMPATIBILITY WITH THE 2020S

With only seven years remaining before the Paris Agreement’s 2030 deadline, it is critical that the non-regression principle is implemented as soon as possible.²⁰⁵ After *West Virginia v. EPA* likely signaled the death of the *Chevron*

en their regulations so long as they do not exceed the secondary standard threshold. *Ruckelshaus*, 344 F. Supp. at 256. The court believed these regulations could not co-exist and only worked to undermine the EPA’s assertion that it did not believe it had authority to require anti-backsliding. *Id.*

¹⁹⁹ *Fri v. Sierra Club*, 412 U.S. 541, 542 (1973).

²⁰⁰ See Brief for Respondent at 10, *Fri v. Sierra Club*, 412 U.S. 541 (1973) (No. 72–804) (relying on an argument utilized by one of the CAA’s sponsors, Congressman Paul Rogers of Florida). Congressman Rogers made the argument in response to a representative from the chemical industry: Myron C. Anthony. *Id.* at 9–10. Anthony wanted Congress to qualify the non-degradation policy with a statutory provision stating non-degradation would be weighed against other interests—namely industrial and economic interests—and would not necessarily take priority in all circumstances. *Id.* at 10.

²⁰¹ See *id.* at 4. (utilizing part of the district court’s holding to advance the theory of non-degradation). The respondents made sure to point out to the Supreme Court that the district court acknowledged the importance of the non-degradation policy imbued into the text of the CAA. *Id.* The respondents also referenced that the court of appeals ruled unanimously in favor of the respondents just five days after oral arguments. *Id.* at 5.

²⁰² See *id.* at 18 (responding to challenges claiming a non-degradation policy would inflict undue burdens upon various regions of the country). This argument came in response to dramatic rhetoric from Senator John Sherman Cooper of Kentucky, who claimed the CAA would have the largest negative socio-economic impact of any bill he had seen during his tenure in Congress. *Id.* Senator Cooper bemoaned the bill would place great strains on industry and government but made no mention of public health. See *id.* (quoting Senator Cooper’s statements from December 18, 1970).

²⁰³ *Fri*, 412 U.S. at 542.

²⁰⁴ See Press Release, EPA, EPA Issues “Significant Deterioration” Regulations (Nov. 27, 1974), <https://www.epa.gov/archive/epa/aboutepa/epa-issues-significant-deterioration-regulations.html> [https://perma.cc/K45K-T9YG] (acknowledging the role of *Ruckelshaus* and *Fri* in the creation of the 1974 regulations); Hillaker, *supra* note 182, at 829 (stating the EPA’s 1974 PSD regulations were the first promulgated by the EPA in response to the *Ruckelshaus* decision).

²⁰⁵ See Hoegh-Guldberg et al., *supra* note 1, at 175 (discussing the future impacts of climate change around the world).

analysis, it is clear progress must be made by statute and cannot be left to administrative action.²⁰⁶ As illustrated by Part I of this Note, other countries around the world have begun codifying the principle into their own national law.²⁰⁷ The United States, too, initially took steps in that direction in the 1970s, a period of chaotic foreign policy and environmental unity.²⁰⁸ Part II of this Note shows that the products of that era are reflections of the national spirit of the time.²⁰⁹ The era created highly effective pieces of legislation with stout anti-backsliding provisions continually upheld by courts.²¹⁰ In order for the non-regression principle to have a resurgence, the political conditions of the contemporary United States must be sufficiently similar to those of the 1970s.²¹¹

Part III of this Note argues systemic implementation of the non-regression principle may not be achievable, but a smaller, more specific application of the principle is quite realistic and could serve as a model for future American environmental statutes.²¹² Section A recognizes that broad climate legislation containing the non-regression principle is unlikely to pass due to the deep partisan divide in contemporary environmental politics.²¹³ Section B argues that this political difficulty may still be overcome to create a narrower, bipartisan statute with an anti-backsliding provision capable of meaningfully mitigating climate change.²¹⁴

A. Grim Outlook? Non-Regression's Viability in 2023

The 1970s exhibited three essential traits allowing for the development of anti-backsliding provisions in sweeping environmental regulations: political unity, national crisis, and tangible effects on citizens.²¹⁵ Under these condi-

²⁰⁶ See generally *West Virginia v. EPA*, 142 S. Ct. 2587, 2614 (2022) (using the major questions doctrine to prevent administrative agencies from making use of regulatory powers not specifically laid out in an empowering statute).

²⁰⁷ See *supra* notes 37–119 (detailing non-regression legislation and constitutional provisions in countries like France, Portugal, and Brazil).

²⁰⁸ See Rinde, *supra* note 133 (detailing the political disruptions of the 1970s and how the Nixon Administration responded by facilitating the passage of multiple pieces of environmental legislation).

²⁰⁹ See *supra* notes 120–204 (introducing non-regression examples in the United States, which take the form of anti-backsliding provisions).

²¹⁰ See *supra* notes 120–204 (illustrating the era of bipartisan agreement over environmentalism that led to the creation of American anti-backsliding provisions).

²¹¹ See, e.g., Bryan, *supra* note 164 (listing the rates of inflation by year throughout U.S. history and showing the enormous spike that occurred during the OPEC oil embargo of 1973); Klingaman, *supra* note 165 (discussing how the OPEC oil crisis impacted the average American and the lengths to which people went in order to acquire gasoline).

²¹² See *infra* notes 215–245.

²¹³ See *infra* notes 215–229.

²¹⁴ See *infra* notes 230–245.

²¹⁵ See, e.g., Bryan, *supra* note 164 (discussing how the OPEC oil crisis resulted in historic inflation rates); Klingaman, *supra* note 165 (explaining the various day-to-day difficulties of Americans

tions, the country crafted systemic solutions to pollution and environmental degradation: the Montana Constitution, the Clean Air Act (CAA), and the Clean Water Act (CWA).²¹⁶ The bipartisan nature of environmental policy in the 1970s not only allowed for the passing of environmental legislation, but also facilitated the inclusion of strong, unambiguous language.²¹⁷

In the 2020s, the United States lacks the widespread environmental unity exhibited in the 1970s.²¹⁸ Although it is encouraging that an overwhelming portion of the country believes climate change is occurring, too few people believe climate change will affect them personally to lead to sweeping change in the form of a non-regression principle.²¹⁹ Before Congress enacted the CAA, smog devastated entire cities, killed hundreds of people over holiday weekends, and resulted in the widely publicized death of a small child.²²⁰ Before the adoption of the CWA, water pollution set rivers on fire.²²¹ These are tangible and unavoidable disasters the average American confronted daily.²²²

during the OPEC oil crisis, such as gas lines); Rinde, *supra* note 133 (describing the bipartisan nature of environmental politics in the 1960s and 1970s).

²¹⁶ See Remarks on Signing the Clean Air Amendments of 1970, *supra* note 189, at 1166–67 (expressing one purpose of the Clean Air Act (CAA) to be combatting the rampant smog issues of previous decades); Eggert, *supra* note 132 (describing the influence the environmental wave of 1970 had on the Montana Constitutional Convention of 1972); Singer & Singer, *supra* note 99 (stating the need for the Clean Water Act (CWA) became obvious after the Cuyahoga River caught on fire).

²¹⁷ See, e.g., MONT. CONST. art. II, § 3 (granting the “right to a clean and healthful environment” in the Declaration of Rights); *id.* art. IX, § 1 (requiring the legislature to protect the right against environmental degradation and to create adequate remedies for violations of that right); EPCA, 42 U.S.C. § 6295(o)(1) (prohibiting the Secretary of Energy from amending energy efficiency standards in a regressive fashion).

²¹⁸ See Drennen & Hardin, *supra* note 18 (calculating the number of climate deniers in the 117th Congress); *Roll Call 420 | Bill Number H.R. 5376*, *supra* note 125 (reflecting the hyper-partisan vote on the Inflation Reduction Act in the House of Representatives); *Roll Call Vote 117th Congress – 2nd Session*, *supra* note 125 (showing the hyper-partisan vote on the Inflation Reduction Act in the Senate).

²¹⁹ See MACINNIS & KROSNICK, *supra* note 123, at 5 (pointing out that, although 67% of Republicans believe climate change is real, only 26% of Republicans believe the effects of climate change will affect them personally).

²²⁰ See Thebault, *supra* note 185 (recounting the story of when smog in Los Angeles was so strong that residents of the city believed Japan launched a chemical attack); Dwyer, *supra* note 187 (recounting when a wave of smog killed hundreds of New Yorkers over Thanksgiving weekend); *Los Angeles Smog Persists 9th Day*, *supra* note 186 (reporting the death of a young girl, who was partially choked by Los Angeles smog).

²²¹ See Adler, *supra* note 99 (explaining that multiple American rivers catching on fire, especially the Cuyahoga River in 1969, highlighted the flaws within the Federal Water Pollution Control Act and ultimately led to the creation of the CWA).

²²² See, e.g., Klingaman, *supra* note 165 (explaining that Americans needed to plan their day around gas lines, either by attempting to avoid lines or getting gas on a day allotted to them by the gas station); Thebault, *supra* note 185 (reporting that some residents of Los Angeles in the 1950s did not even know mountains surrounded the city because smog constantly blocked the mountains from view); *500% Rise in Emphysema Mortality Rate in Last Decade Reported for City*, *supra* note 188 (describing the rampant rates of pulmonary health issues stemming from the thick smog of New York City).

Climate change, on the other hand, promises *future* disasters that Americans might not *currently* see on a day-to-day basis.²²³

Likewise, Congress is too partisan to pass a CAA equivalent for carbon emissions with an anti-backsliding provision.²²⁴ In the 1970s, a candidate could lose an election over a weak environmental policy.²²⁵ Today, moderate Democrats and Republicans alike show an unwillingness to install systemic climate protections.²²⁶ Although this behavior is unrepresentative of their constituents' beliefs, too few Americans consider climate change an "extremely important" priority to force legislators to alter their voting patterns.²²⁷

The CAA and CWA illustrate a grim reality: the United States needs to be firmly pushed by disaster to be pushed into drafting revolutionary environmental legislation.²²⁸ American environmentalism is reactionary in nature, and it is therefore likely that a systemic legislative solution regulating carbon emissions on a non-regressive basis will only pass *after* disasters induced by climate change.²²⁹

²²³ See Bearak, *supra* note 2 (predicting the current levels of emissions will lead to increased intensity for flooding, wildfires, drought, heat waves, and extinction); Hoegh-Guldberg et al., *supra* note 1, at 175 (predicting that large scale poverty and starvation will be a likely outcome if greenhouse gas emissions are not severely curbed in coming years).

²²⁴ See Roll Call 420 | Bill Number H.R. 5376, *supra* note 125 (showing the Inflation Reduction Act passed in the House of Representatives solely off of votes from Democrats); Roll Call Vote 117th Congress – 2nd Session, *supra* note 125 (showing the Inflation Reduction Act passed in the Senate solely from votes of Democrats).

²²⁵ See Rinde, *supra* note 133 (detailing President Nixon's directions to his aides to ensure his environmental policies did not get him in trouble with voters and the efforts of Democratic legislators to frame President Nixon as a bad environmentalist).

²²⁶ See Press Release, Center for Biological Diversity, *supra* note 32 (detailing the attempts of moderate Democratic Senator Joe Manchin to undermine the environmental measures within the Inflation Reduction Act); Roll Call 420 | Bill Number H.R. 5376, *supra* note 125 (revealing that the Inflation Reduction Act failed to secure a vote from a single Republican in the House of Representatives); Roll Call Vote 117th Congress – 2nd Session, *supra* note 125 (revealing that the Inflation Reduction Act failed to secure a vote from a single Republican in the Senate).

²²⁷ See MACINNIS & KROSINICK, *supra* note 123, at 7 (stating that only 4% of Republican voters and 43% of Democratic voters consider climate change "extremely important").

²²⁸ See Remarks on Signing the Clean Air Amendments of 1970, *supra* note 189, at 1166–67 (declaring the CAA to be America's ultimate solution to the rampant smog issue); Singer & Singer, *supra* note 99 (stating the defects of previous legislation became obvious after the Cuyahoga River caught on fire and that Congress introduced the CWA to cure those defects).

²²⁹ See Hoegh-Guldberg et al., *supra* note 1, at 280 (reporting the statistical likelihood of dramatic socioeconomic consequences resulting from unmitigated climate change in the near future); History, SENATE COMM. ON ENERGY & NAT. RES, *supra* note 166 (waiting until after a national crisis struck for the United States to pass the anti-backsliding provision through the EPCA); *Clean Air Act Requirements and History*, *supra* note 184 (waiting until after smog became a health crisis in cities across America to pass the CAA).

B. Anti-Backsliding and Methane: Picking the Lowest Hanging Fruit

The Energy Policy and Conservation Act (EPCA), on the other hand, potentially provides an alternative route through which new, bipartisan anti-backsliding environmental legislation can be established.²³⁰ In addition to having the strongest anti-backsliding provision, the EPCA differentiates itself from the Clean Air Act (CAA) and Clean Water Act (CWA) in that it is primarily an energy statute, rather than an environmental statute.²³¹ The EPCA's anti-backsliding provision also proved its ability to brush off legal challenges and survive in court.²³² As in the 1970s, energy concerns remain bipartisan and very important to the American people.²³³

Unlike regulating carbon, regulating methane provides benefits for energy producers and environmentalists alike.²³⁴ Although methane is “more than eighty times as potent than carbon dioxide” over a twenty-year period, it can also be captured for productive use by energy companies.²³⁵ Thus, when the Biden Administration passed the Inflation Reduction Act, environmental groups hailed the legislation's methane charge as an essential step in climate mitigation.²³⁶ When the White House announced rulemaking to revive the Obama-era methane flaring regulation, a multitude of energy companies voiced their approval.²³⁷ Oil and gas companies waste \$2 billion worth of methane a year—

²³⁰ See Energy Policy & Conservation Act (EPCA), 42 U.S.C. § 6201 (declaring the purposes of the EPCA and omitting any mention of environmental concerns).

²³¹ *History and Impacts*, *supra* note 97; see 42 U.S.C. § 6295(o)(1) (preventing the Secretary from amending standards in a regressive manner).

²³² See Nat. Res. Def. Council, Inc. v. Abraham, 355 F.3d 179, 196–97 (2d Cir. 2004) (holding the DOE lacked authority to weaken the efficiency standard because Congress clearly intended the publication of the rule in the Federal Register to trigger 42 U.S.C. § 6295(o)(1)).

²³³ See *Economy Remains the Public's Top Policy Priority; COVID-19 Concerns Decline Again*, *supra* note 126 (revealing that 52% of Americans, including 57% of Democrats and 48% of Republicans, believe improving the energy system of America should be a “top priority” of the government); *Voters More Worried About Gas Prices Than Climate Change*, *supra* note 126 (finding that 82% of voters are concerned about energy and gas prices, and only 14% are not concerned—89% of Republicans and 77% of Democrats are at least moderately concerned); Jones, *supra* note 126 (revealing 44% of Americans believe U.S. energy is in a “very serious” situation—equal to or greater than the percentage of Americans in the late 1970s—while only 5% of the population is not worried about energy at all).

²³⁴ See Ambrose, *supra* note 10 (explaining that regulating methane emissions holds the possibility to make significant progress towards achieving the Paris Agreement goals before even addressing carbon emissions); see, e.g., Pioneer (@PXDtweets), *supra* note 27 (explaining that consistent rules regulating methane assist members of the industry by providing certainty and encouraging innovation).

²³⁵ See EDF Staff, *supra* note 9 (discussing how substantially more potent of a greenhouse gas methane is compared to carbon); *Major Studies Reveal 60% More Methane Emissions*, *supra* note 12 (explaining the potential for methane emissions to be captured and used as fuel).

²³⁶ See LaMair & Smith, *supra* note 14 (explaining the importance of the Inflation Reduction Act's increased funding, methane emission charge, and emissions tracking program).

²³⁷ See, e.g., Pioneer (@PXDtweets), *supra* note 27 (explaining that consistent rules regulating methane assist members of the industry by providing certainty and encouraging innovation); Shell

statutory regulation would ensure this methane is used to power the homes of Americans instead of being needlessly wasted.²³⁸

Accordingly, a methane waste statute codifying the Obama-era methane waste regulations repealed by the Trump Administration would serve as a common-sense solution to reducing methane emissions, saving energy companies money, and reducing energy costs for the American public—the perfect vessel for a modern anti-backsliding provision.²³⁹ The statute would limit regulation to oil and gas leases on federal land, thus limiting the expansion of federal authority and preventing energy companies from wasting the natural resources belonging to the American people.²⁴⁰ Companies would be required to capture a large percentage of methane burned off, vented, and wasted each year.²⁴¹ The Secretary of the Interior would be allowed to reassess and increase this percentage each year to meet the climate or energy needs of the country, but the Secretary would be forbidden from easing this standard by the statute’s anti-backsliding provision.²⁴² Even if the Secretary chose to follow the modest 2016 Rule standards, doing so would result in a 35% reduction in methane emissions and create a net benefit of \$200 million per year.²⁴³ Similarly, this statute would prevent the dangerous erosion of methane regulation and provide consistent, clear regulations for energy companies to follow.²⁴⁴ Most importantly, the statute would

USA (@Shell_USA), *supra* note 27 (urging the Biden Administration to use the Congressional Review Act to restore the methane flaring regulations); Gjervik, *supra* note 27 (asserting that federal regulation of methane emissions ensures everyone in the industry is doing their fair share and those voluntarily reducing emissions are not bearing too large a burden); *Methane Emissions and Natural Gas*, *supra* note 27 (calling for the federal government to regulate methane to assist the industry prevent leaks and protect the environment).

²³⁸ See *Major Studies Reveal 60% More Methane Emissions*, *supra* note 12 (stating that methane waste from oil and gas companies could have provided a year’s worth of fuel for ten million American households).

²³⁹ See generally 81 Fed. Reg. 83008, 83009–22 (Nov. 18, 2016) (to be codified at 43 C.F.R. pts. 3100, 3160, 3170) (detailing the Obama-era methane flaring and venting regulatory program).

²⁴⁰ See 87 Fed. Reg. 73588, 73590 (Nov. 30, 2022) (to be codified at 43 C.F.R. pts. 3160, 3170) (explaining that the BLM only manages federal and Indian lands and detailing the amount of methane waste that typically occurs as a direct result of gas leases on these lands).

²⁴¹ See 81 Fed. Reg. at 83011 (illustrating that, under the Obama-era methane flaring regulation, companies would have one year before being required to “capture 85 percent of their adjusted total volume of gas produced each month”).

²⁴² See EPCA, 42 U.S.C. § 6295(o)(1) (establishing an unqualified prohibition against the easing of appliance energy efficiency standards within the EPCA regulation framework).

²⁴³ See 81 Fed. Reg. at 83014 (discussing the provisions of the methane gas flaring regulatory program, its benefits, and its influence on natural gas and oil production).

²⁴⁴ See 83 Fed. Reg. 49184, 49184 (Sept. 28, 2018) (to be codified at 43 C.F.R. pts. 3160, 3170) (repealing almost the entirety of the Obama-era methane rule without replacing it with any substantive alternative); Eilperin et al., *supra* note 15 (revealing that President Trump weakened over 125 environmental regulations inherited from the Obama Administration).

stand as a model of non-regression capable of inspiring its wider use when the country is ready for true, systemic climate mitigation.²⁴⁵

CONCLUSION

The non-regression principle offers a tool for crafting solutions to perhaps the most unique environmental hurdle the United States has ever faced: climate change. Smog lifts when industry stops polluting the air. Rivers stop burning when pollution is removed from the water. The symptoms of climate change, however, will only appear after the atmosphere sustains pollution past its breaking point. Once this occurs, recovery is impossible. With only seven years to substantially cut back its greenhouse gas emissions, the United States does not have time to endure the usual cycle of repealing and replacing environmental regulations. Action must be decisive and move only in one direction: forward.

The non-regression principle has proven its ability to prevent erosive, de-regulatory agendas. The few examples of non-regression in America have consistently withstood legal challenges from political and industrial opponents alike. It is time to implement non-regression once again and begin mitigating climate change. America does not presently have the political environment capable of producing a systemic environmental non-regression statute or constitutional amendment. Non-regression can still be achieved, however, through a limited, but impactful, methane waste statute. Methane regulation would mitigate a potent greenhouse gas appeal to industry and speak to one of the American people's most important issues: energy pricing and availability. Although one anti-backsliding provision alone will not avert impending climate disasters, it will prove the potential of the non-regression principle and inspire the creation of more powerful climate mitigation tools.

SHANE SULLIVAN

²⁴⁵ See EPCA, 42 U.S.C. § 6295(o)(1) (providing an example of American environmental non-regression); CWA, 33 U.S.C. § 1342(o) (same); CAA, 42 U.S.C. §§ 7471, 7479(3), 7521(b)(1)(C) (same); CODE DE L'ENVIRONNEMENT [C. ENV.] [Environmental Code] art. L.110-1 II 9° (Fr.) (providing an example of foreign law implementing a legally binding non-regression principle).

