

12-12-2020

## The Clean Air Act: How It Can be Localized to Promote Both Environmental and Social Justice

Tate Kirk

Seattle University School of Law, tatekirk@seattleu.edu

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### Recommended Citation

Kirk, Tate (2020) "The Clean Air Act: How It Can be Localized to Promote Both Environmental and Social Justice," *Seattle Journal of Technology, Environmental & Innovation Law*: Vol. 11 : Iss. 1 , Article 2. Available at: <https://digitalcommons.law.seattleu.edu/sjteil/vol11/iss1/2>

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# The Clean Air Act: How It Can be Localized to Promote Both Environmental and Social Justice

*Tate Kirk\**

## I. INTRODUCTION

Climate change is one of the greatest challenges of the modern era. The impending alteration of our climate threatens to inflict undesirable impacts on many aspects of our lives, from where we grow food to where we live. Climate change presents an urgent need to combat its many dire consequences. Accordingly, one method to prevent these consequences is through the enforcement of the Clean Air Act.

While the Clean Air Act is not perfect, it has significantly reduced the negative impacts of climate change. Since its 1990 amendments, the Clean Air Act has helped reduce emissions by about 50%.<sup>1</sup> However, much must still be accomplished to prevent the anticipated and devastating consequences of an increasingly changing climate. Even though the Clean Air Act has significantly reduced air pollution, the overall reduction of pollutants has stalled in recent years and, in some instances, has reversed.<sup>2</sup> This stagnation in decreases is due to the fact that the Act only targets certain sources of pollution; thus, there are no further sources to target.<sup>3</sup> We must look to other emission sources in order to continue the progress made so far to reduce emissions. To further reduce greenhouse gas emissions, we need to take a more localized look at our emissions sources.

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\* Tate Kirk has always felt passionately about environmental and social justice issues. He graduates from Seattle University School of Law in Spring 2021 and intends to practice law in those areas. He would like to thank all of his friends, family, and editors who have supported him in writing this article.

<sup>1</sup> UNITED STATES ENVIRONMENTAL PROTECTION AGENCY, OVERVIEW OF THE CLEAN AIR ACT AND AIR POLLUTION (January 27, 2019), <https://www.epa.gov/clean-air-act-overview> [<https://perma.cc/T6M2-K9FZ>].

<sup>2</sup> Julia Wick, *Newsletter: Essential California: The war on smog is stalling after decades of improvement*, L.A. TIMES (July 2, 2019), <https://www.latimes.com/newsletters/la-me-ln-essential-california-20190702-story.html> [<https://perma.cc/W2BM-C3E9>].

<sup>3</sup> *Id.*

This article will argue that further discretion should be afforded to local communities and governments to help mitigate the negative effects that continue to result from climate change. A reformed Clean Air Act which works on a local level will operate more efficiently and effectively because local governments are better equipped to handle the precise needs of particular geographical areas. Additionally, operating the Clean Air Act at a local level will allow governments to effectively address the environmental injustices that have arisen from many policy decisions regarding the environment and pollution.

Moreover, this article will argue that to further environmental and social justice, Congress should alter the Clean Air Act to focus on local rather than national issues. By altering the scale of the Act, local governments will be able to better protect the environment as well as provide solutions to help remedy environmental injustice. Additionally, local governments will be more prepared to efficiently address some of the largest environmental issues facing our society today.

This article starts with an overview of the current climate crisis and the processes that are behind the crisis. Next, the article looks at a brief history of the Clean Air Act; specifically, the occurrences which led to its initial enactment as well as how it has evolved over time. Then, this article addresses how localizing the Clean Air Act will benefit the environment in the long term. Afterward, this article discusses the potential legal challenges to localizing the operation of the Clean Air Act in addition to legal theories that can be used to overcome those potential challenges. Finally, this article will explore the impacts a structural change to the Act would have on social justice.

## II. CLIMATE CHANGE: AN OVERVIEW

### A. *What Is Emitted into the Atmosphere?*

Society emits a plethora of gases and particles into the atmosphere. According to the Clean Air Act, the six major air pollutants are sulfur dioxide, nitrogen oxides, carbon monoxide, ozone originating at the ground level, particulate matter, and lead.<sup>4</sup> While many of these pollutants occur naturally, humans significantly contribute to the release of pollutants.<sup>5</sup> There are many ways that humans increase the concentration of

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<sup>4</sup> NANCY K. KUBASEK & GARY S. SILVERMAN, ENVIRONMENTAL LAW 153-58 (2014).

<sup>5</sup> *Id.*

these pollutants in the air. For example, the burning of fossil fuels for energy emits sulfur dioxide.<sup>6</sup> Vehicles, power plants, and industries emit nitrogen oxide.<sup>7</sup> The majority of carbon monoxide emissions come from the operation of motor vehicles.<sup>8</sup> Ground-level ozone occurs when emitted nitrogen oxide reacts with oxygen in sunlight.<sup>9</sup> Mills, power plants, and diesel-powered vehicles, among other sources, emit particulate matter.<sup>10</sup> Finally, common sources of lead emissions include certain paints, lead pipes, and the burning of leaded gasoline.<sup>11</sup>

Society currently emits large amounts of greenhouse gases, mainly from motor vehicles.<sup>12</sup> Greenhouse gases differ from pollutants in that they prevent heat from escaping the Earth's surface.<sup>13</sup> These greenhouse gases include carbon dioxide, methane, chlorofluorocarbons, and nitrous oxide.<sup>14</sup> Along with the major air pollutants identified by the Clean Air Act, greenhouse gases interact with both each other and other substances in the air which leads to the numerous impacts discussed below.

### *B. What Are the Environmental Effects of our Emissions?*

The release of the pollutants discussed above has numerous effects on our environment, which ultimately leads to environmental degradation. For example, sulfur dioxide and nitrogen dioxide react with sunlight and water in the air.<sup>15</sup> This reaction results in sulfuric and nitric acid, which then falls to the Earth as acid rain.<sup>16</sup> Acid rain can result in deposits of acid in the soil, which can be harmful to public health.<sup>17</sup> Additionally, the release of substances such as chlorofluorocarbons and halons into the atmosphere contribute to the depletion of the stratospheric ozone layer.<sup>18</sup>

Greenhouse gases have a complex, detrimental effect on the environment. When greenhouse gases are released into the atmosphere, heat and sunlight become trapped in the Earth's atmosphere—this is known as

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<sup>6</sup> *Id.* at 154-55.

<sup>7</sup> *Id.* at 155.

<sup>8</sup> *Id.* at 156.

<sup>9</sup> *Id.* at 157.

<sup>10</sup> *Id.*

<sup>11</sup> *Id.* at 158.

<sup>12</sup> ELIZABETH KOLBERT, *THE SIXTH EXTINCTION: AN UNNATURAL HISTORY* 3 (2014).

<sup>13</sup> ELIZABETH KOLBERT, *FIELD NOTES FROM A CATASTROPHE: MAN, NATURE, AND CLIMATE CHANGE* 38 (2006).

<sup>14</sup> KUBASEK, *supra* note 4, at 162.

<sup>15</sup> *Id.* at 159.

<sup>16</sup> *Id.*

<sup>17</sup> *Id.* at 159-61.

<sup>18</sup> *Id.* at 161.

the “greenhouse effect.”<sup>19</sup> The greenhouse effect is responsible for an increase in average global temperatures between the years 1880 and 2005.<sup>20</sup> The greenhouse effect is responsible for much of the melted sea ice,<sup>21</sup> which has caused sea levels to rise between eight and nine inches since 1880.<sup>22</sup> Currently, nearly forty percent of the population in the United States lives near a coast, meaning that these populations will have to deal with the rising negative impacts on infrastructure that rising sea levels will have.<sup>23</sup>

In addition to the effect on sea levels, temperature changes resulting from the greenhouse effect are expected to continue to alter precipitation patterns and create climate variation, which has negative effects on agriculture and forest ecosystems.<sup>24</sup> Scientists predict that hurricanes will be stronger due to the atmospheric changes that result from the release of greenhouse gases.<sup>25</sup> Some scientists also suggest that our planet is currently experiencing one of the largest mass-extinction events in history because of these atmospheric changes.<sup>26</sup> Between 2001 and 2014, approximately 173 species went extinct, which is a rate 25 times higher than would be expected in that time period.<sup>27</sup> Pollution is one of the many causes of these extinctions.<sup>28</sup>

Similarly, many vehicles emit carcinogenic substances which are known to cause illnesses such as cancer.<sup>29</sup> Carcinogenic substances released by vehicles can harm plants, which upon exposure, are less likely to survive and lead to lower crop yields.<sup>30</sup> Particulate matter can cause respiratory and cardiovascular diseases and can even lead to premature death.<sup>31</sup> These health effects have a more adverse effect on children, older

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<sup>19</sup> *Id.* at 162.

<sup>20</sup> *Id.*

<sup>21</sup> *Id.* at 164-65.

<sup>22</sup> Rebecca Lindsey, *Climate Change: Global Sea Level*, CLIMATE.GOV (November 19, 2019), <https://www.climate.gov/news-features/understanding-climate/climate-change-global-sea-level>, [<https://perma.cc/6SFQ-WUMJ>].

<sup>23</sup> *Id.*

<sup>24</sup> *Id.* at 165.

<sup>25</sup> Steven G. Davison, *Regulation of Emission of Greenhouse Gases and Hazardous Air Pollutants from Motor Vehicles*, 1 PITT. J. ENVTL. PUB. HEALTH L. 1, 4 (2006).

<sup>26</sup> KOLBERT, *supra* note 13, at 2-3. While there are usually extinctions occurring at a background rate at all times throughout history, currently, extinction rates are spiking; this includes the extinction rates for amphibians, which are approximately 45,000 times the historical background rate and are among the most vulnerable populations. *Id.* at 10-18. Similarly, while not at a rate nearly as high, many other animals are at risk of extinction as well. *Id.* at 17-18.

<sup>27</sup> Ivana Kottasová, *The sixth mass extinction is happening faster than expected. Scientists say it's our fault*, CNN (June 1, 2020), <https://www.cnn.com/2020/06/01/world/sixth-mass-extinction-accelerating-intl/index.html>, [<https://perma.cc/M76E-L6DE>].

<sup>28</sup> *Id.*

<sup>29</sup> Arnold W. Reitze, Jr., *Federal Control of Air Emissions from New Heavy-Duty Road Vehicles*, 44 ENVTL. L. REP. NEWS & ANALYSIS 10216, 10223 (2014).

<sup>30</sup> *Id.*

<sup>31</sup> *Id.*

individuals, individuals suffering from heart disease, and individuals suffering from lung disease.<sup>32</sup>

While there are general climate trends around the world, results can vary regionally. For example, particulate matter that is ten micrometers or less (PM<sub>10</sub>) has sources that vary throughout the country.<sup>33</sup> In 2007, PM<sub>10</sub> emissions from heavy-duty vehicles in Atlanta, Cincinnati, Detroit, Hartford, Los Angeles, Washington, D.C., San Diego, and Santa Fe accounted for between 25% and 38% of the total pollution in the local area. In contrast, the national average for the emissions of PM<sub>10</sub> from heavy-duty vehicles was approximately 20%.<sup>34</sup>

Based on the wide-ranging issues presented by climate change, regulators must immediately implement changes in how we address emissions of pollutants into the atmosphere. The issues caused by climate change demonstrate the need to ensure that society reduces the amount of pollutants released into the air. We cannot continue this dangerous current course without taking drastic action.

### III. THE CLEAN AIR ACT: A HISTORY

In its current form, the Clean Air Act consists of multiple programs. Additionally, many of the regulations under the Clean Air Act are industry-specific.<sup>35</sup> The Environmental Protection Agency (EPA) sets its National Ambient Air Quality Standards (NAAQS), in which it determines the concentration of pollutants permitted in certain geographical areas.<sup>36</sup> The country is divided into regions, and the EPA establishes whether each region meets the NAAQS.<sup>37</sup> If a region meets the NAAQS, the EPA designates it as an attainment area; if it does not meet the NAAQS, the EPA designates the region as a non-attainment area.<sup>38</sup>

The NAAQS task state governments with developing a plan that will allow the region to eventually reach attainment if that region is designated as non-attainment by the standards.<sup>39</sup> Afterwards, the EPA will review the state's plan and determine whether it is adequate in meeting the requirements of the Clean Air Act.<sup>40</sup> Additionally, the Supreme Court has

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<sup>32</sup> Ioannis Manisalidis et al., *Environmental and Health Impacts of Air Pollution: A Review*, 8 FRONTIERS IN PUBLIC HEALTH 1, 7 (2020).

<sup>33</sup> Reitze, *supra* note 29.

<sup>34</sup> *Id.*

<sup>35</sup> Jeanne Marie Zokovirch Paben, *Approaches to Environmental Justice: A Case Study of One Community's Victory*, 20 S. CAL. REV. L. & SOC. JUST. 235, 259 (2011).

<sup>36</sup> Paul Cort, *Getting to Zero: A Roadmap to Energy Transformation in California Under the Clean Air Act*, 21 HASTINGS W.-N.W. J. ENVTL. L. & POL'Y 3, 6 (2015).

<sup>37</sup> *Id.*

<sup>38</sup> *Id.*

<sup>39</sup> *Id.* at 7.

<sup>40</sup> *Id.*

held that the Clean Air Act prohibits state laws aimed at protecting air quality that were created after the enactment of the Act.<sup>41</sup> Thus, if anyone challenges this type of new, local program proposed in this paper, there could be significant problems. However, individual states are prohibited from regulating emissions from newly discovered sources.<sup>42</sup>

The Clean Air Act has successfully reduced air pollutants in the United States. For example, since the 1970s, emissions of the six criteria pollutants under the Clean Air Act have dropped nearly seventy-five percent.<sup>43</sup> These decreases in emissions have had many benefits since the Clean Air Act was implemented; for example, deaths from air pollutants decreased thirty percent between 1990 and 2010 and life expectancy has increased.<sup>44</sup> A 2009 study showed that exposure to PM<sub>10</sub> over longer periods of time could result in a change in life expectancy of 0.7 to 1.6 years.<sup>45</sup> Because of reductions in PM<sub>10</sub> exposure, average life expectancy between 1980 and 2000 rose 2.72 years.<sup>46</sup>

The United States has taken multiple approaches to air pollution, including the enactment of many different statutes. The various U.S. statutes can be grouped into four main categories, which this section will discuss in order: (1) acts prior to the 1970 Clean Air Act Amendments; (2) the 1970 Clean Air Act Amendments; (3) the 1977 Clean Air Act Amendments; and (4) the 1990 Clean Air Act Amendments.

### A. Acts Prior to the 1970 Clean Air Act Amendments

The United States enacted numerous laws to address air pollution prior to the 1970 Clean Air Act amendments. The government first took steps toward addressing air pollution in 1955.<sup>47</sup> Prior to 1967, the government had limited laws on air pollution to solely setting limits on the amount of emissions that were released into the atmosphere.<sup>48</sup>

The first action that the federal government took, the 1955 Air Pollution Control Act (APCA), was a response to the sizeable number of

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<sup>41</sup> *Mass. v. Envtl. Prot. Agency*, 549 U.S. 497, 500, 127 S.Ct. 1438 (2007).

<sup>42</sup> Rory Hatch, *Into Thin Air: Unconstitutional Taking by Preemption of State Common Law Under the Clean Air Act*, 33 REV. LITIG. 711, 712 (2014).

<sup>43</sup> Laura Anthony, *New air quality report gives Bay Area low marks*, ABC 7 NEWS (April 24, 2019), <https://abc7news.com/health/new-air-quality-report-gives-bay-area-low-marks/5268960/> [<https://perma.cc/K83V-AB5E>].

<sup>44</sup> Nadja Popovich, *America's Skies Have Gotten Clearer, but Millions Still Breathe Unhealthy Air*, N.Y. TIMES (June 19, 2019), <https://www.nytimes.com/interactive/2019/06/19/climate/us-air-pollution-trump.html> [<https://perma.cc/R7Y5-8DPA>].

<sup>45</sup> C. Arden Pope III et al., *Fine-Particulate Air Pollution and Life Expectancy in the United States*, 360 THE NEW ENGLAND JOURNAL OF MEDICINE 376, 384 (2009).

<sup>46</sup> *Id.*

<sup>47</sup> Arnold W. Reitze, Jr., *Air Quality Issues Affecting Oil, Gas, and Mining Development in the West*, 2013 No. 1 Rocky Mountain Mineral Law Foundation Paper No. 1, 1-1, 1-3 (2013).

<sup>48</sup> *Id.*

deaths that had occurred in recent years from large amounts of smog.<sup>49</sup> The APCA did not consist of an exhaustive list of requirements for state governments to meet regarding their air quality.<sup>50</sup> Instead, the Act authorized the Surgeon General to collect and distribute data about air pollution and its effects.<sup>51</sup> Although the APCA required that the Surgeon General make the findings of any studies they performed available to the public, the Act did not mandate that the Surgeon General conduct air pollution studies at all.<sup>52</sup> While this was a positive step towards effectively addressing air pollution, the APCA did not require any action by the government.<sup>53</sup> The government needed to create legislation that would encourage these developments.

Later, Congress passed the 1963 Clean Air Act.<sup>54</sup> Congress put this version of the Clean Air Act through subsequent amendments in 1970, 1977, and 1990.<sup>55</sup> The main focus of the initial version of the Clean Air Act was aimed at reducing the amount of air pollutants that entered the interstate air stream as well as providing funding for research on air pollution.<sup>56</sup> The Act required research to be conducted at the federal level.<sup>57</sup> These regulations allowed the 1963 Clean Air Act to improve on one of the APCA's biggest shortcomings: it provided actual requirements for the government to meet.

Two other acts were passed prior to the 1970 Clean Air Act amendments: the 1965 Motor Vehicle Air Pollution Act and the 1967 Air Quality Act. The 1965 Motor Vehicle Air Pollution Act provided the federal government the authority to issue regulations for emissions coming from vehicles; the government began by implementing standards for 1968 model year cars.<sup>58</sup> The 1967 Air Quality Act created a blueprint for the modern Clean Air Act: it set standards for air quality that states were required to meet and preempted states from setting their own vehicle emission standards.<sup>59</sup> Unfortunately, enforcement of the Air Quality Act was difficult and lacking.<sup>60</sup> Ultimately, however, the lax enforcement of the

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<sup>49</sup> Christopher D. Ahlers, *Origins of the Clean Air Act: A New Interpretation*, 45 ENVTL. L. 75, 78 (2015).

<sup>50</sup> *Id.* at 79.

<sup>51</sup> *Id.*

<sup>52</sup> *Id.*

<sup>53</sup> *Id.*

<sup>54</sup> *Id.* at 84.

<sup>55</sup> *Id.*

<sup>56</sup> Reitze, *supra* note 47.

<sup>57</sup> Ahlers, *supra* note 49, at 86-87.

<sup>58</sup> Reitze, *supra* note 47.

<sup>59</sup> *Id.* at 1-4.

<sup>60</sup> *Id.*

Air Quality Act set the stage for the passage of the 1970 Clean Air Amendments.<sup>61</sup>

### B. *The 1970 Clean Air Act Amendments*

Congress amended the Clean Air Act in 1970 which helped strengthen the initial program.<sup>62</sup> The 1970 amendments for the first time created requirements that state governments were required to meet.

First, the amendments established NAAQS, which were to be determined by the Administrator of the then-new EPA.<sup>63</sup> The amendments created a list of criteria pollutants, which eventually reached six in total. The Act intended to reduce the concentration of pollutants in the air.<sup>64</sup> The criteria pollutants identified at the creation of the Clean Air Act were sulfur dioxide, nitrogen oxides, carbon monoxide, ground-level ozone, and particulate matter.<sup>65</sup>

Next, the Clean Air Act amendments set a requirement that sources of emissions use the best available technology when the emission sources are either brand new or significantly modified.<sup>66</sup> The amendments preempted states from setting their own standards. In fact, Congress specifically intended to preempt state governments from designating which products could be sold in their states.<sup>67</sup> Thus, the Clean Air Act amendments moved towards the regulation that was needed while not reaching what was truly needed.

### C. *The 1977 Clean Air Act Amendments*

The Clean Air Act amendments of 1977 were not as drastic of a change as the previous amendments. The main issue addressed in this round of amendments was the differentiation between new sources, which are regulated more strictly, and older, existing sources, which tend to have less strict requirements.<sup>68</sup> In addition, the amendments set up the prevention of significant deterioration (PSD) program, which strengthened the regulatory requirements for new air pollution sources introduced to areas that have less air pollution compared to areas that do not meet the Clean Air Act's standards.<sup>69</sup> Ultimately, the 1977 Clean Air Act amendments

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<sup>61</sup> *Id.*

<sup>62</sup> Ahlers, *supra* note 49, at 117.

<sup>63</sup> Reitze, *supra* note 47, at 1-4.

<sup>64</sup> *Id.*

<sup>65</sup> KUBASEK, *supra* note 4.

<sup>66</sup> Reitze, *supra* note 47, at 1-4.

<sup>67</sup> Brad Lee Bonner, Casenote, *Clean Air Through Statutory Construction: Engine Manufacturers Association v. South Coast Air Quality Management District*, 9 GREAT PLAINS NAT. RESOURCES J. 53, 57 (2004).

<sup>68</sup> Reitze, *supra* note 47, at 1-5.

<sup>69</sup> *Id.*

further strengthened the standards necessary for the Clean Air Act to better regulate pollutants and ensure better air quality protections.

#### *D. The 1990 Clean Air Act Amendments*

Finally, Congress amended the Clean Air Act again in 1990. There were many requirements that were added to the previous obligations in this round of amendments. Importantly, the 1990 amendments increased the number of requisites that had to be met for nonattainment zones.<sup>70</sup> The amendments also added new requirements for mobile sources of emissions, such as vehicles.<sup>71</sup> Lastly, the amendments created a more effective system for addressing hazardous air pollutants.<sup>72</sup>

In addition to the more structural changes mentioned above, the new amendments created requirements for sulfur dioxide, which, as previously noted, is a major cause of acid rain.<sup>73</sup> The amendments also developed a permit program for major emission sources and improved the ozone depletion program that Congress had previously implemented.<sup>74</sup> Overall, the amendments created stricter criminal penalties for any violators of the program.<sup>75</sup> Accordingly, Congress yet again strengthened the teeth of the Clean Air Act and made the consequences much more stringent, and, as such, the Clean Air Act was in a better position to prevent additional pollution. However, the Clean Air Act still operated at a national level. Thus, to fully address the numerous issues at the local level, a localized program was still badly needed.

#### IV. BENEFITS OF LOCALIZING RULES

Historically, advocates for the localization of environmental action have been aplenty. Experts have encouraged the localization of environmental programs because certain ecosystems are unique and will benefit from individual attention. Thus, localization of the Clean Air Act, by allowing local governments to increase or broaden the standards set by the federal government, will strengthen the Act and its administration because (1) local regulation is more efficient than that of a larger governing body; (2) local governments have more familiarity with the environment that is being regulated; (3) issues may be specific to individual areas; and (4) higher level regulations tend to focus on broader issues.

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<sup>70</sup> *Id.* at 1-6.

<sup>71</sup> *Id.*

<sup>72</sup> *Id.*

<sup>73</sup> *Id.* at 1-7.

<sup>74</sup> *Id.*

<sup>75</sup> *Id.*

First, local governments have been more efficient than federal governing bodies at enacting legislation. Indeed, local governments are more incentivized to protect local air quality than a larger, national governmental body because local government officials breathe the same air that their communities breathe.<sup>76</sup> As a result, local officials have a personal interest in keeping this air at the highest quality possible. Additionally, there is less physical and perceived distance between local government officials and their constituents.<sup>77</sup> This proximity increases the likelihood that local government officials will respond to the demands of and feel political pressure from their constituents.<sup>78</sup> Moreover, larger governmental bodies can have difficulty keeping track of everything in their jurisdiction; for example, the California Air Resources Board (CARB) has had issues with blindly approving items through the process.<sup>79</sup> Thus, even the most comprehensive and diligent governmental agencies have difficulty keeping up with its assigned workload.

Local regulators also have more familiarity with the conditions that they are attempting to regulate than federal regulators.<sup>80</sup> Sometimes, the best way to determine how to eliminate pollution in an area is to consult with local experts who are familiar with that physical, geographical area to create a more comprehensive solution.<sup>81</sup> The expertise of local individuals is especially prominent when considering that some problems, such as smog or power plant emissions, are specific to a certain area.<sup>82</sup> Through the present, national regulations such as the Clean Air Act have focused solely on major emitters as compared to smaller, local emitters.<sup>83</sup> If the federal government limited the emissions from smaller emitters, the cumulative impact could be significant.<sup>84</sup>

The most effective laws will take local conditions into consideration.<sup>85</sup> For example, one can look to California, which has a climate uniquely suited to creating ozone.<sup>86</sup> California was granted a waiver by the federal government which allowed it to set its own standards for regulating

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<sup>76</sup> Ryan Hackney, Note, *Don't Mess with Houston, Texas: The Clean Air Act and State/Local Preemption*, 88 TEX. L. REV. 639, 660 (2010).

<sup>77</sup> *Id.*

<sup>78</sup> *Id.*

<sup>79</sup> Cort, *supra* note 36, at 13.

<sup>80</sup> Hackney, *supra* note 76, at 661.

<sup>81</sup> *Id.*

<sup>82</sup> *Id.* at 662.

<sup>83</sup> Rachel Manning, Note, *Reaching the Individual: A Proposed Federal Framework to Reduce Community-Based Greenhouse Gas Emissions*, 30 FORDHAM ENVTL. L. REV. 123, 123 (2018).

<sup>84</sup> *Id.*

<sup>85</sup> *Id.* at 134.

<sup>86</sup> Cort, *supra* note 36, at 13-14.

greenhouse gas emissions.<sup>87</sup> In addition, other states were provided the opportunity to adopt California's standards.<sup>88</sup> California has divided its regulatory responsibilities into two separate categories: (1) the state government regulates mobile emission sources, and (2) local governments regulate stationary emission sources.<sup>89</sup> In addition, California has historically argued that it is subject to unique circumstances vis-à-vis the climate due to its distinctive geography.<sup>90</sup> Since the 1970s, the levels of many pollutants in California's air dropped between 75% and 99%, which has prevented 29,000 deaths per year in California.<sup>91</sup>

Next, individuals in local communities have more direct contact with their local governing bodies.<sup>92</sup> Recently, the city of Houston, Texas, experienced tension with Texas over the state's enforcement of environmental regulations.<sup>93</sup> Houston was a non-attainment zone for ozone, and the state continued to request delays on a deadline to submit its State Implementation Plan (SIP) to the EPA.<sup>94</sup> Houston was concerned that high-level government officials at both the state and federal levels were not as worried about Houston's ozone issue and demanded faster action.<sup>95</sup> Eventually, Houston became disgruntled with the lack of response from the higher levels of government regarding its toxic air pollutants and began to take matters into its own hands.<sup>96</sup> Evidently, providing local communities with the ability to enact legislation will prevent ineffective and inefficient governing and allow for quicker response times with less conflict. Granting Houston more authority to address its situation could have allowed it to reach a solution more quickly than the state.

Houston and California demonstrate what can be accomplished when individuals stand up and work together with an eye towards accomplishing needed change. When groups, individuals, and local governments act, much can be accomplished in bringing needed change to how government responds to and addresses continued air pollution. By localizing rules, the decision-making process will become closer to the people that it

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<sup>87</sup> Gloria Sefton, Notes and Comments, *California's Not Dreamin': Federal Inaction on Greenhouse Gas Regulation Provides an Opening for the State to Regulate*, 30 WHITTAKER L. REV. 101, 104 (2008).

<sup>88</sup> *Id.*

<sup>89</sup> Cort, *supra* note 36, at 11-12.

<sup>90</sup> Davison, *supra* note 25, at 41.

<sup>91</sup> CALIFORNIA AIR RESOURCES BOARD, POLLUTION STANDARDS AUTHORIZED BY THE CALIFORNIA WAIVER: A CRUCIAL TOOL FOR FIGHTING AIR POLLUTION NOW AND IN THE FUTURE (2019), <https://ww2.arb.ca.gov/resources/fact-sheets/pollution-standards-authorized-california-waiver-crucial-tool-fighting-air>, [<https://perma.cc/2QZK-2357>].

<sup>92</sup> Hackney, *supra* note 76, at 640.

<sup>93</sup> *Id.* at 640-41.

<sup>94</sup> *Id.* at 641.

<sup>95</sup> *Id.* at 643-44.

<sup>96</sup> *Id.* at 645.

directly affects. Local officials are not only closer to the issues that the rules are regulating but are also more knowledgeable about the areas and emission sources they are regulating. Local governments are best situated and suited to determine the most productive methods for responding to climate issues in their own cities and counties.

## V. LEGAL CHALLENGES TO LOCALIZING RULES

Many opponents would undoubtedly bring legal challenges against the administration of the Clean Air Act if it was localized. A significant portion of these challenges would focus on the preemption of state level rules in the presence of federal regulations.<sup>97</sup> Even prior to the Clean Air Act, a federal court held that federal regulations preempted action by state governments.<sup>98</sup> In 1970, the City of Chicago filed a complaint in court requesting that the federal government direct major automobile manufacturers to retroactively fit cars currently on the road with emission controls.<sup>99</sup> The court held that Chicago could not enact legislation intended to address car emissions due to preemption from the 1967 Air Quality Act and the Clean Air Act amendments of 1970.<sup>100</sup>

Furthermore, larger corporations may be less inclined to support a Clean Air Act that is not uniform throughout the country. Recently, some automakers supported the federal government's push to create uniform fuel economy standards throughout the country that were less stringent than the regulations in California.<sup>101</sup> However, multiple other automakers chose not to support the reduced standards.<sup>102</sup> It is possible that companies may decide not to challenge the new rules in a similar manner in order to avoid unnecessary costs of such litigation.

Importantly, courts have also held that the Clean Air Act preempts state common law claims in addition to new statutes.<sup>103</sup> While some courts have allowed for state law to prevail against the Clean Air Act, others allow states to set their own standards for how they can implement the Clean

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<sup>97</sup> See, e.g., *City of Chi. v. Gen. Motors Corp.*, 467 F.2d 1262 (7<sup>th</sup> Cir. 1972); *Allway Taxi, Inc. v. City of N.Y.*, 340 F.Supp 1120 (S.D.N.Y. 1972).

<sup>98</sup> *City of Chi. v. Gen. Motors Corp.*, 467 F.2d 1262 (7<sup>th</sup> Cir. 1972).

<sup>99</sup> *Id.* at 1263.

<sup>100</sup> *Id.* at 1265.

<sup>101</sup> Scott Carpenter, *Major Automakers Choose Not To Back Trump Administration On Fuel Economy Standards Rollback*, FORBES (June 26, 2020), <https://www.forbes.com/sites/scottcarpenter/2020/06/26/major-automakers-choose-not-to-back-trump-on-fuel-economy-standards-rollback/#4e083a1934f9>, [https://perma.cc/3HR8-BA78].

<sup>102</sup> *Id.*

<sup>103</sup> Hatch, *supra* note 42, at 712.

Air Act.<sup>104</sup> Action towards obtaining more localized authority under the Clean Air Act can be brought by both states and community groups.

### A. Challenges to States

The first occurrence of the Clean Air Act preempting state common law claims was in the Supreme Court's 2011 decision in *American Electric Power Co., Inc. v. Connecticut*.<sup>105</sup> Many parts of the Clean Air Act preempt state and local governments from setting up their own regulations for new cars and trucks.<sup>106</sup> Specifically, section 209 of the Clean Air Act prohibits states from creating their own standards for motor vehicle efficiency, though states can obtain a waiver from this prohibition.<sup>107</sup> The federal government, under the Clean Air Act, is able to provide waivers to any state which had adopted its own standards prior to March 30, 1966, and was at least as stringent as the Clean Air Act standards.<sup>108</sup> The Act even prohibits states from setting emission standards for engines that are not used in motor vehicles.<sup>109</sup>

Alternatively, a federal court held that local governments can take certain actions toward reducing pollution in local areas. Around the time of the 1970 Clean Air Act amendments, the City of New York issued an ordinance which prohibited taxicabs from using leaded gasoline.<sup>110</sup> In *Allway Taxi, Inc. v. City of New York*, the court held that the Clean Air Act did, in fact, preempt states and cities from regulating fuel if the administrator determined that there was no need for regulations in that area.<sup>111</sup> The court also held that the Clean Air Act prohibits cities from setting air pollution standards for motor vehicles.<sup>112</sup> The court held that, despite these conditions, local governments were still capable of regulating personal vehicles after they have been registered, and local governments could regulate commercial vehicles in their jurisdictions.<sup>113</sup> The court's decision was affirmed by the Court of Appeals.<sup>114</sup>

A similar case has been upheld more recently by a district court in Texas. Dallas, Texas, was designated a non-attainment zone under the

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<sup>104</sup> See *Allway Taxi, Inc. v. City of N.Y.*, 340 F.Supp. 1120 (S.D.N.Y. 1972); *Ass'n of Taxicab Operators, USA v. City of Dall.*, 760 F.Supp.2d 693 (N.D. Texas 2010); *Tex. v. U.S. Evtl. Prot. Agency*, 829 F.3d 405 (5th Cir. 2016).

<sup>105</sup> Hatch, *supra* note 42, at 712.

<sup>106</sup> Davison, *supra* note 25, at 58.

<sup>107</sup> 42 U.S.C. § 7543.

<sup>108</sup> 42 U.S.C. § 7543(b)(1).

<sup>109</sup> 42 U.S.C. § 7543(e).

<sup>110</sup> *Allway Taxi, Inc. v. City of N.Y.*, 340 F.Supp. 1120, 1123 (S.D.N.Y. 1972).

<sup>111</sup> *Id.*

<sup>112</sup> *Id.*

<sup>113</sup> *Id.* at 1123-34.

<sup>114</sup> See *Allway Taxi, Inc. v. N.Y.*, 468 F.2d 624 (2nd Cir. 1972).

Clean Air Act for ozone.<sup>115</sup> In response, the city enacted an ordinance which created incentives for taxi operators at the airport to operate vehicles that run on natural gas instead of regular gasoline.<sup>116</sup> At trial, the court refused to issue an injunction on the ordinance and held that the Clean Air Act had not preempted city governments from enacting laws of this nature toward taxicabs.<sup>117</sup> The court noted that cities had, in the past, been allowed to regulate taxicabs.<sup>118</sup> In addition, the court held that the Clean Air Act had left the operation of vehicles open to cities to regulate.<sup>119</sup>

In addition to the regulation of taxicabs, federal courts have previously allowed states to exercise larger amounts of control over the regulations they are enforcing. For example, the Court of Appeals for the Fifth Circuit has allowed states some leeway when creating their SIPs for meeting NAAQS.<sup>120</sup> Similarly, the same court has noted that states can, in fact, be injured if a Federal Implementation Plan (FIP) is enacted over a SIP.<sup>121</sup> Thus, according to the court, providing states with the autonomy to set their own Clean Air Act standards can protect the states and their constituents from unnecessary harm.

### B. Challenges to Community Groups

Next, community groups can work together in commencing litigation intended to convince courts to interpret the Clean Air Act in new ways. Community groups can encourage the courts to permit additional regulations at the local level that will better combat air pollution. Consider a case out of the Southern District of New York, *National Resources Defense Council v. Train*, where a group sued the EPA for failing to list lead as one of the criteria pollutants regulated by the Clean Air Act.<sup>122</sup> Ultimately, the court held that the EPA was required to list lead as a pollutant.<sup>123</sup>

Similarly, community groups can also bring attention to different issues that are often ignored. In the case of Guayama, Puerto Rico, a local community group, *Sur Contra la Contaminación*, sued the EPA after it issued a PSD permit which authorized the construction of a power plant.<sup>124</sup> Upon review, the First Circuit Court of Appeals, unfortunately, did not

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<sup>115</sup> Ass'n of Taxicab Operators, USA v. City of Dall., 760 F.Supp.2d 693, 695 (N.D. Texas 2010).

<sup>116</sup> *Id.*

<sup>117</sup> *Id.* at 697.

<sup>118</sup> *Id.*

<sup>119</sup> *Id.*

<sup>120</sup> Tex. v. U.S. Envtl. Prot. Agency, 829 F.3d 405, 435 (5th Cir. 2016).

<sup>121</sup> *Id.*

<sup>122</sup> Nat. Res. Def. Council, Inc. v. Train, 411 F.Supp 864, 866 (S.D.N.Y. 1976).

<sup>123</sup> *Id.* at 871.

<sup>124</sup> *Sur Contra La Contaminación v. Envtl. Prot. Agency*, 202 F.3d 443, 445 (1st Cir. 2000).

find any issues with the EPA's issuance of the permit, and ultimately upheld the agency's decision.<sup>125</sup> While the plaintiffs in *Sur Contra La Contaminación* did not achieve the outcome they had hoped for, the case demonstrates the importance and power of local groups coming together to combat pollution by bringing targeted litigation. One strategy to effectively combat air pollution is to continue to bring attention to the issue at a local level.

In the case of *Myersville Citizens for a Rural Community, Inc. v. Federal Energy Regulatory Commission*, local citizens opposed the creation of a natural gas storage facility; this local opposition had been routinely ignored by the Federal Energy Regulatory Commission (F.E.R.C.).<sup>126</sup> Similarly to *Sur Contra La Contaminación*, this case did not end well for the community group.<sup>127</sup> While these cases are not entirely promising for the effort to localize the Clean Air Act, they do demonstrate how effective the local community groups' advocacy is in bringing awareness to environmental issues. By providing this necessary awareness, local groups can continue to both move the discussion forward and advocate for better solutions.

Further, the concept of allowing smaller governments the ability to set their own standards has little support from government officials. Currently, the federal government is looking to take away California's authority to set its own automobile emissions standards.<sup>128</sup> With this development, community groups that continue to work together will undoubtedly help highlight issues that may escape the attention of the federal government.

Proponents should expect opponents to bring several challenges after any attempts to localize the Clean Air Act. Although many federal courts have held that local rules are preempted under the Act, there are some promising decisions where local efforts have been either advanced or protected. Furthermore, there are areas where state and local governments have been granted leeway by the federal government to determine their own rules. However, society must expand the ability of state and local governments to implement their own regulations in order to best address the many problems created and exacerbated by air pollution because these problems are not going away.

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<sup>125</sup> *Id.* at 449.

<sup>126</sup> *Myersville Citizens for a Rural Cmty., Inc. v. F.E.R.C.*, 783 F.3d 1301, 1307, 1308, (D.C. Cir. 2015).

<sup>127</sup> *Id.* at 1328.

<sup>128</sup> Carol Davenport, *Trump Defends Plan to Kill California's Auto-Emissions Authority*, N.Y. TIMES (September 20, 2019), <https://www.nytimes.com/2019/09/18/us/trump-california-emissions.html?searchResultPosition=10> [<https://perma.cc/G6VF-H7VU>].

## VI. LEGAL ARGUMENTS SUPPORTING STATE LEVELS AND STANDARDS

Despite the plethora of potential legal challenges to and arguments against any efforts to localizing the Clean Air Act, there are still many arguments that can be made in favor of any revisions. Therefore, there is a possibility that a court would affirm and uphold regulations under the Act that afford more power to local governments.

The Supreme Court has held that states have standing to encourage and fight for the regulation of their air quality.<sup>129</sup> In *Massachusetts v. Environmental Protection Agency*, the Supreme Court held that states have standing to sue the federal government if environmental regulations are not strong enough.<sup>130</sup> Specifically, the Court opined that states have standing because they will suffer impacts if the government does not address climate change.<sup>131</sup> Thus, the court has held that states have an interest in the outcome of cases regarding the government's Clean Air Act regulations.

In addition, the Supreme Court has traditionally granted the states the right to control their own resources. In a 1907 case, the state of Georgia sued a Tennessee company, Tennessee Copper Co., for its actions near the Georgia border—the Tennessee Copper Co. was emitting sulfur dioxide at its plant.<sup>132</sup> The Supreme Court held that a state has the ability and the right to ensure that it has clean air.<sup>133</sup> This decision was due to the Court's preference for allowing states to have sovereignty over their own resources.<sup>134</sup> Accordingly, a state, citing this decision, may have standing both to sue for damages over emissions coming from areas beyond its borders and to ensure that air coming into its state is relatively free from pollution.

Some provisions of the Clean Air Act allow local governments to write their own guidelines and regulations to combat certain air quality issues. For example, the Act allows states from creating standards for existing mobile sources which are currently in use.<sup>135</sup> Moreover, the Act also allows local government to regulate vehicles that have already been on the road.<sup>136</sup> These holdings could provide necessary precedent to allow states more influence in future air quality and pollutant regulations. Although

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<sup>129</sup> Sefton, *supra* note 87.

<sup>130</sup> *Mass. v. Envtl. Prot. Agency*, 549 U.S. 497, 526, 127 S.Ct. 1438, 1458 (2007).

<sup>131</sup> *Id.*

<sup>132</sup> Sefton, *supra* note 87, at 110; *State of Ga. v. Tenn. Copper Co.*, 206 U.S. 230, 238, 27 S.Ct. 618 (1907).

<sup>133</sup> *Id.*

<sup>134</sup> *Id.*

<sup>135</sup> Davison, *supra* note 25, at 47.

<sup>136</sup> *Id.*

probably not immediately, the courts could use these decisions to expand the powers local governments have in regulating air emission sources.

Similarly, there are many reasons why increased regulatory authority among local governments would benefit attempts to combat air pollution. First, the localization of Clean Air Act regulations provides states the opportunity to test various and experimental methods for reducing air pollution before making more widespread policy decisions; any new method can then be adopted by other states if determined to be a success.<sup>137</sup> In this scenario, states could adopt the standards of other states as has been the case with California's emission standards.<sup>138</sup> However, it is a possibility that multiple states could begin testing out a bad idea or ideas before realizing it is a mistake.<sup>139</sup> But, providing states the ability to respond to their air pollution problems by passing more stringent regulations as necessitated by their individual environments and geographies will best achieve the goal of reducing pollutants and protecting the environment.<sup>140</sup> A local government could quickly abandon a method of combatting air pollution that was determined to be ineffective or even harmful because they are smaller and, thus, better able to adapt to changing circumstances. Finally, if states fail to perform the new implementation plans effectively, citizens are still capable of bringing suits against such states.<sup>141</sup> In this scenario, citizens or community groups could seek to enjoin states from violating the Clean Air Act requirements.<sup>142</sup>

There are many promising trends that have developed in recent years. For one, the EPA has historically both bowed to pressure from states and been willing to go along with the desires of state governments regarding certain emissions regulations.<sup>143</sup> Additionally, some experts have argued that there may be room to bring claims for environmental injustice under Title VI of the Civil Rights Act due to the vagueness of the term "discrimination."<sup>144</sup>

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<sup>137</sup> Sefton, *supra* note 87, at 111.

<sup>138</sup> *Id.* at 112.

<sup>139</sup> *Id.* at 116.

<sup>140</sup> Bonner, *supra* note 67, at 60.

<sup>141</sup> Anuradha Sivaram, Note, *Why Citizen Suits Against States Would Ensure the Legitimacy of Cooperative Federalism Under the Clean Air Act*, 40 *ECOLOGY L.Q.* 443, 480 (2013).

<sup>142</sup> *Id.*

<sup>143</sup> Arnold W. Reitze, Jr., *The CAA Motor Vehicle Inspection and Maintenance Program: Is It Cost Effective?*, 47 *Env'tl. L. Rep. News & Analysis*, 10877, 10879-80 (2017) (citing EPA's response to state pressure when setting vehicle emission standards). For another example, see the EPA's response to pressure from states regarding 1988 rules for regulating oil wastes. Jennifer Dixon, *EPA Said to Bow to Political Pressure in Oil Wastes Ruling*, ASSOCIATED PRESS (July 18, 1988), <https://apnews.com/87790d67435a0ba3eb1e5ecc5ce86c9c> [<https://perma.cc/8H3C-FSD7>].

<sup>144</sup> Brian Crossman, Note, *Resurrecting Environmental Justice: Enforcement of EPA's Disparate-Impact Regulations through Clean Air Act Citizen Suits*, B.C. *ENVTL. AFF. L. REV.* 599, 620 (2005).

Overall, designing a Clean Air Act that gives more power to local communities could withstand legal challenges in court. Not only have there been instances where courts have allowed states and local governments to regulate their own resources,<sup>145</sup> but also the capacity to have more control over their air pollution regulations enables states to adopt the solutions that other states enact.<sup>146</sup> This ability is important because it provides states the opportunity to review multiple methods and determine which of these solutions is best suited for them. If a state or locality feels that its program is not working properly or could work better, it will have the capability and opportunity to look at other regions and adopt a program that may better address its own air quality issues.

## VII. SOCIAL JUSTICE IMPACTS OF A LOCALIZED CLEAN AIR ACT

The U.S. Environmental Protection Agency defines environmental justice as “the fair treatment and meaningful involvement of all people regardless of race, color, national origin, or income with respect to the development, implementation, and enforcement of environmental laws, regulations, and policies.”<sup>147</sup> Essentially, it is the merger of both environmental protection and the promotion of social justice.<sup>148</sup>

Environmental injustice can arise in many ways. There has been at least one documented instance where a company has altered its plans to develop in wealthier communities because of the threat of legal action.<sup>149</sup> This threat led the company to relocate its planned development to a less wealthy area.<sup>150</sup> With this type of situation in mind, the concept of environmental justice suggests that all people should share the burdens of environmental pollution equally instead of concentrating the burdens in specific areas that may be more economically disadvantaged.<sup>151</sup> Through a more localized Clean Air Act, environmental justice can also be advanced.

This section of the article will first address the history of environmental justice. It will then discuss some of the ways in which environmental justice occurs today and how the current implementation of the Clean Air Act leads to environmental injustice. The section will then examine a number of statutes that were intended to prevent environmental injustice,

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<sup>145</sup> See, e.g., *State of Ga. v. Tenn. Copper Co.*, 206 U.S. 230, 238, 27 S.Ct. 618 (1907); Davison, *supra* note 25, at 47.

<sup>146</sup> Sefton, *supra* note 87, at 112.

<sup>147</sup> Paben, *supra* note 35, at 235.

<sup>148</sup> Crossman, *supra* note 144, at 600.

<sup>149</sup> Christopher D. Ahlers, *Race, Ethnicity, and Air Pollution: New Directions in Environmental Justice*, 46 ENVTL. L. 713, 714 (2016).

<sup>150</sup> *Id.*

<sup>151</sup> Gordon Mitchell, Paul Norman & Karen Mullin, *Who benefits from environmental policy? An environmental justice analysis of air quality change in Britain, 2001-2011*, 10 ENVTL. RES. LETTERS 105009, 105010 (2015).

while also discussing the limitations in the federal government's ability to take action to promote environmental justice and the difficulties of bringing claims. Finally, this section will review some of the ways in which localization of the Clean Air Act can be used to achieve environmental justice.

### *A. History of Environmental Justice*

People of color and of lower economic status are more likely to suffer the consequences of environmental injustice.<sup>152</sup> Also, these groups are more likely to receive the brunt of society's and government's inaction in the face of these environmental threats.<sup>153</sup> Thus, it is imperative that society takes whatever steps are necessary to reduce the disproportionate impact on disadvantaged communities.

The environmental justice movement initially began with protests against a site designed for a landfill in Warren County, North Carolina, which was to be placed near a community that was comprised of mainly African Americans.<sup>154</sup> Instances of environmental injustice are aplenty. For example, penalties against companies in violation of the Resource Conservation and Recovery Act (RCRA) in minority communities were 500% lower than the penalties assessed against companies in violation of the RCRA in predominantly white communities.<sup>155</sup>

Instances of environmental injustice stem primarily from the locations that are selected for placement of power plants and the disposal of waste from those power plants and other activities.<sup>156</sup> Likewise, pollution cleanup efforts are not enforced consistently throughout the country.<sup>157</sup> An NAACP study showed that four million people live within three miles of the worst-polluting coal plants.<sup>158</sup> Of those individuals, over half are low-income or of color.<sup>159</sup> Although discrepancies are noticeable, it has not been clearly established whether these offending pollution sources are placed due to the surrounding community or if the community surrounding the pollution source evolves into these disadvantaged communities.<sup>160</sup> One study conducted in the 1980s showed that people of color and people of low economic status were more likely to be negatively impacted by the

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<sup>152</sup> Uma Outka, Comment, *Envtl. Injustice and the Problem of the Law*, 57 ME. L. REV. 209, 211 (2005).

<sup>153</sup> *Id.*

<sup>154</sup> Mitchell, Norman & Mullin, *supra* note 151.

<sup>155</sup> Ahlers, *supra* note 149, at 742.

<sup>156</sup> Jeanne Marie Paben, *Green Power & Environmental Justice – Does Green Discriminate?*, 46 TEX. TECH L. REV. 1067, 1072 (2014).

<sup>157</sup> *Id.* at 1075.

<sup>158</sup> Paben, *supra* note 35, at 1083.

<sup>159</sup> *Id.*

<sup>160</sup> Ahlers, *supra* note 149, at 715.

environmental burdens of living in a modern society.<sup>161</sup> In yet another instance of environmental injustice, many island countries are expected to suffer the worst effects of climate change, despite being among the countries least capable of adapting to the changes.<sup>162</sup>

The executive branch of the federal government responded to these environmental justice issues by issuing Executive Order 12,898.<sup>163</sup> The Executive Order established multiple EPA offices that were intended to combat these trends.<sup>164</sup> The Order also directed agencies to “make achieving environmental justice part of [their] mission[s] by identifying and addressing... disproportionate[...].human health or environmental effects... on minority populations and low-income populations in the United States.”<sup>165</sup> The Order also established a group which was tasked with developing strategies and looking into specific areas of concern.<sup>166</sup> Likewise, the Order also directed agencies to collect data on issues with adverse impacts on minority communities and required studies to be conducted to analyze agency impacts.<sup>167</sup> Since President Clinton issued the Order, agencies have been responding to its direction and have strategized methods for improving the adverse impacts on minority communities.<sup>168</sup> However, through 2010, no presidential administration had used this order to its full extent.<sup>169</sup>

There are also examples of environmental injustice specifically under the Clean Air Act. One example is with New Source Review, which is only available for a plant that is a major source of pollution in a non-attainment zone.<sup>170</sup> Accordingly, many power plants in non-attainment areas continue polluting without conforming to regulations aimed at reducing emissions.<sup>171</sup>

The effects of environmental injustice have continued for significant periods of time. In fact, many of the 2020 United States presidential candidates admitted that addressing environmental injustice is a priority.<sup>172</sup> Whether purposeful or not, society has continuously forced the

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<sup>161</sup> Paben, *supra* note 35, at 237.

<sup>162</sup> KUBASEK, *supra* note 4, at 165.

<sup>163</sup> *Id.* at 238.

<sup>164</sup> *Id.*

<sup>165</sup> Exec. Order No. 12,898 at 7629; 32 C.F.R. § 651.17 (1994).

<sup>166</sup> *Id.* at 7630.

<sup>167</sup> *Id.* at 7631.

<sup>168</sup> Sandra Richardson, Specialty Law Column, *Environmental Justice: A Tool for Community Empowerment*, 27-DEC Colo. Law 55, 56 (1998).

<sup>169</sup> Paben, *supra* note 156, at 1100.

<sup>170</sup> Ahlers, *supra* note 149, at 742.

<sup>171</sup> *Id.*

<sup>172</sup> Maggie Astor, *Environmental Justice was a Climate Forum Theme. Here's Why.*, N.Y. TIMES (September 5, 2019), <https://www.nytimes.com/2019/09/05/us/politics/environmental-justice-climate-town-hall.html?searchResultPosition=3> [<https://perma.cc/VPA7-GKVQ>].

poorest individuals and minority communities into the most polluted geographical areas.<sup>173</sup> Thus, we as a society must work together to ensure that we correct this pattern going forward.

### *B. Occurrences of Environmental Injustice*

There are many ways in which environmental injustice is advanced. First, many environmentally degrading facilities are placed near low-income or minority communities.<sup>174</sup> Second, environmental regulations are not as stringently enforced in minority and lower-income areas as they are in others.<sup>175</sup> Third, the remedies available in many more privileged communities are not available in other disadvantaged communities.<sup>176</sup>

Studies have shown that the operation of hog farms create a large amount of air pollutants which can cause “nausea, increases in blood pressure, respiratory issues[,]... and overall diminished quality of life.”<sup>177</sup> Pollutants from hog farms have been shown to disrupt the livelihood and everyday activities of the individuals surrounding them.<sup>178</sup> These farms have been shown to disproportionately affect individuals that are of African American, Native American, or Hispanic descent.<sup>179</sup> This disproportionate effect is just one of many different ways in which minority communities are disproportionately affected by air pollution in their local communities.

Many experts have claimed that the Clean Air Act itself can lead to environmental injustice through the functioning and enforcement of the Act. For example, the regulations under the Clean Air Act themselves can lead to what one law professor has called “hotspots,” which are areas where the air is more highly polluted than those directly surrounding them.<sup>180</sup> Hotspots tend to be located around areas that emit high levels of pollution, such as highways and oil refineries.<sup>181</sup> These areas also tend to affect disadvantaged communities and people of color at a higher rate.<sup>182</sup>

The prevalence of smog also raises issues of environmental justice. Recently, the EPA allowed for states to keep their inadequate Clean

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<sup>173</sup> *Id.*

<sup>174</sup> Crossman, *supra* note 144, at 600.

<sup>175</sup> *Id.*

<sup>176</sup> *Id.*

<sup>177</sup> Erica Hellerstein & Ken Fine, *A million tons of feces and an unbearable stench: life near industrial pig farms*, THE GUARDIAN (September 20, 2017), <https://www.theguardian.com/us-news/2017/sep/20/north-carolina-hog-industry-pig-farms> [<https://perma.cc/2SDX-W8A7>].

<sup>178</sup> *Id.*

<sup>179</sup> *Id.*

<sup>180</sup> Joanna Kamhi, *Clean Air Act Obscures Polluted “Hotspots,”* THE REGULATORY REVIEW (November 23, 2018), <https://www.theregview.org/2018/11/23/kamhi-clean-air-act-hotspots/> [<https://perma.cc/45FZ-F338>].

<sup>181</sup> *Id.*

<sup>182</sup> *Id.*

Air Act plans in place.<sup>183</sup> Many of the pollution sources which create smog are located in lower-income communities as well as communities comprised primarily of people of color.<sup>184</sup> Environmental injustice is often based, even if unintentionally, on racial discrimination. For example, more than two-thirds of African Americans in the United States live within thirty miles of a coal power plant.<sup>185</sup> The effects of this proximity lead to an asthma rate in African Americans that is 172% higher than that in Caucasian Americans.<sup>186</sup>

The Department of Justice Environment and Natural Resources Division (ENRD) enforces environmental justice from a federal standpoint.<sup>187</sup> The Division attempts to promote environmental justice through multiple means, including brokering a settlement for the continued development of a power plant near tribal lands in New Mexico.<sup>188</sup> The Department worked with the local utility company to secure funds to install pollution controls on the power plant, which is located near the Navajo Nation.<sup>189</sup> The intent of the agreement was to focus on the installment of both sulfur dioxide and nitrous oxide pollution controls at the plant.<sup>190</sup> As such, the agreement requires the power plant to fund studies to learn more about the illnesses that these pollutants cause.<sup>191</sup> The Division had a significant role in defending EPA rules during the Obama administration.<sup>192</sup>

The Clean Air Act must be revamped in order to better serve and protect disadvantaged communities. Even though it is intended to reduce pollution, the Act has allowed environmental injustices to develop through loopholes as well as through its encouragement of regulations that only focus on certain issues—issues that often do not include environmental justice. By localizing the Clean Air Act, environmental justice concerns could be more thoroughly addressed and hopefully solved.

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<sup>183</sup> *Advocates Challenge EPA for Leaving Weak Clean Air Protections in Place in Eight States*, EARTHJUSTICE, <https://earthjustice.org/news/press/2019/advocates-challenge-epa-for-leaving-weak-clean-air-protections-in-place-in-eight-states> [<https://perma.cc/Q8MX-2TZT>].

<sup>184</sup> *Id.*

<sup>185</sup> Paben, *supra* note 156, at 1082-83.

<sup>186</sup> *Id.* at 1083.

<sup>187</sup> John C. Cruden, *The Work of the Department of Justice Environment and Natural Resources Division: Promoting Environmental Rule of Law and the Advancement of Sustainable Development Goals*, 12 S.C. J. INT'L L. & BUS. 145, 146 (2016).

<sup>188</sup> *Id.* at 157.

<sup>189</sup> Nahal Mogharabi, *Reference News Release: U.S. requires Arizona and New Mexico plant owners to reduce emissions at Four Corners Power Plant on Navajo Nation*, UNITED STATES ENVTL. PROT. AGENCY (July 15, 2015), <https://www.epa.gov/enforcement/reference-news-release-us-requires-arizona-and-new-mexico-plant-owners-reduce-emissions> [<https://perma.cc/6D4A-YUVB>].

<sup>190</sup> *Id.*

<sup>191</sup> *Id.*

<sup>192</sup> Cruden, *supra* note 187, at 168.

### *C. Laws Intended to Prevent Environmental Injustice*

Throughout history, the United States has made many attempts to resolve environmental injustice, including enacting legislation. These laws fall into two distinct categories: (1) The Civil Rights Act of 1964 and (2) EPA regulations.

The Civil Rights Act of 1964 includes regulations regarding the rights of minority groups. The rules implemented by the Department of Justice have explicitly outlawed the placement of waste sites in areas based specifically on race.<sup>193</sup> The Act includes factors for evaluating a claim of environmental injustice.<sup>194</sup> These factors include: (1) whether there are disproportionate racial impacts, (2) if it is part of a historical trend, (3) the facts that led up to the decision, (4) whether there were any abnormalities in the decision-making process, (5) if the decision deviates from the norm, and (6) the consideration of the legislative history.<sup>195</sup>

The EPA has its own regulations similar to the Civil Rights Act of 1964. Specifically, these regulations prohibit selecting environmentally degrading sites based on the race of individuals living nearby.<sup>196</sup> These regulations prohibit locating facilities in certain areas based on the race or income of the surrounding area.<sup>197</sup> Thus, there are multiple ways which current laws and regulations encourage environmental justice.

### *D. Limits of Action at the Federal Level*

The federal government is limited in what it can do to promote environmental justice. The way in which the federal government has created certain laws and regulations makes it difficult to take direct action from the federal level. This difficulty is due to (1) inconsistent implementation of environmental justice procedures, (2) flaws in the process of recognizing environmental injustice problems, and (3) difficulties with bringing an environmental injustice claim in court.

First, environmental justice procedures have been and continue to be implemented on an inconsistent basis.<sup>198</sup> These inconsistencies suggest that some individuals, such as those in areas that are not as well represented at the governmental level, may not see the programs that they need implemented with the same stringency and diligence that it may be implemented with in other areas. These discrepancies would help promote the continuation of environmental injustice in these areas.

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<sup>193</sup> Ahlers, *supra* note 149, at 720.

<sup>194</sup> *Id.* at 726.

<sup>195</sup> *Id.*

<sup>196</sup> *Id.* at 720.

<sup>197</sup> 40 C.F.R. § 7.35(c).

<sup>198</sup> Paben, *supra* note 35, at 239.

Second, there may be flaws in the process of identifying an environmental justice problem. These procedural flaws can make solving these environmental justice problems more difficult. For example, the EPA allows citizens to present claims of environmental injustice or discrimination.<sup>199</sup> Through 2016, the agency had not found an instance of environmental injustice.<sup>200</sup> The EPA's procedure, however, suffers from many flaws, such as the inability of the public to participate in hearings.<sup>201</sup> Similarly, it can take a significant amount of time for the EPA to make a determination on whether environmental injustice has occurred.<sup>202</sup> Additionally, some experts are concerned that states hand out permits in a discriminatory fashion.<sup>203</sup> Ultimately, it is difficult for impacted citizens and communities to obtain aid in light of both the discrimination and the many procedural obstacles that they must overcome when bringing a claim.

Last, there are difficulties with bringing an environmental injustice claim in a court of law. Courts tend to give a significant amount of deference to agency decisions, which limits the likelihood of obtaining a ruling against the agency.<sup>204</sup> In addition, the Supreme Court has increased the difficulty for environmental groups to bring forward environmental injustice claims.<sup>205</sup> Compare this court-sponsored inconvenience to the ability of industries and corporations who have a much easier time in both bringing claims and obtaining favorable judgments.<sup>206</sup> Thus, it can be difficult for environmental groups to bring a claim at the federal level because the Supreme Court has made it more difficult to prove that a plaintiff has a right of action.<sup>207</sup>

### *E. Difficulty in Bringing an Environmental Injustice Claim*

There are many difficulties that a plaintiff may experience when asserting a claim of environmental injustice. Difficulties include (1) the inability of individuals to bring claims under the Civil Rights Act and (2) meeting standing requirements.

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<sup>199</sup> *Id.* at 240.

<sup>200</sup> Vann R. Newkirk II, *The EPA's Failure to Protect People from the Environment*, THE ATLANTIC (September 30, 2016), <https://www.theatlantic.com/politics/archive/2016/09/epa-civil-rights-environmental-justice-report/502427/> [<https://perma.cc/XF9K-V4FK>].

<sup>201</sup> Paben, *supra* note 35, at 240.

<sup>202</sup> *Id.*

<sup>203</sup> Williams, Mullen, Christian & Dobbins, *Environmental Justice: Tempest in a Teapot?*, 5 NO. 12 V.A. ENVTL. COMPLIANCE UPDATE 1, 1 (1998).

<sup>204</sup> Paben, *supra* note 35, at 245-46.

<sup>205</sup> Outka, *supra* note 152, at 215.

<sup>206</sup> *Id.*

<sup>207</sup> Crossman, *supra* note 144, at 601.

Firstly, the Supreme Court eliminated the possibility for an individual plaintiff to bring forward a claim under the Civil Rights Act in *Alexander v. Sandoval*.<sup>208</sup> In *Alexander*, the plaintiffs sought to bring an action against the state of Alabama, claiming that, by making English the official language of the state and administering tests for drivers' licenses in only English, the state violated the Civil Rights Act of 1964.<sup>209</sup> The Court held that Congress did not intend to allow private citizens to bring claims under the Civil Rights Act when it was originally passed; thus, individual claims under the Civil Rights Act could not be brought.<sup>210</sup> This decision applies to claims brought based on a theory of environmental injustice. This ruling by the court creates an additional barrier to obtaining environmental justice through the courts.

Secondly, the Supreme Court, through multiple decisions, has made it increasingly difficult for a plaintiff to establish standing.<sup>211</sup> The courts have not adjusted their standing doctrine to protect individuals from corporations that may present an acceptable reason for locating its plant in a particular location in addition to the original and possibly discriminatory reason.<sup>212</sup> The Supreme Court has, instead, stated that plaintiffs need to establish a nexus between the location and the discriminatory purpose.<sup>213</sup> This requirement results in most courts denying review of a plaintiff's petition in some circumstances.<sup>214</sup> Thus, instead of bringing an environmental justice claim under the Civil Rights Act, an individual may choose instead to bring their claim in tort.<sup>215</sup>

Recently, and as explained above, the Supreme Court has increased the difficulty plaintiffs face in bringing a claim under the principles of environmental justice. Additionally, at least at the federal level, action is not being taken to prevent the discriminatory practices of industry. By localizing the Clean Air Act, the government will provide these groups and affected individuals with a method in which they will not only have a greater voice but will also likely have their concerns heard.

#### *F. The Solutions Provided by Localizing the Clean Air Act*

Further regulation and encouragement from the federal government are needed. State governments have a record which is just as disap-

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<sup>208</sup> Paben, *supra* note 35, at 242.

<sup>209</sup> *Alexander v. Sandoval*, 532 U.S. 275, 278-79, 121 S.Ct. 1511 (2001).

<sup>210</sup> *Id.* at 292.

<sup>211</sup> *Id.* at 242-43.

<sup>212</sup> Ahlers, *supra* note 149, at 722.

<sup>213</sup> *Id.* at 724.

<sup>214</sup> *Id.* at 745.

<sup>215</sup> Paben, *supra* note 35, at 250.

pointing in addressing environmental injustice as the federal government.<sup>216</sup> By localizing the Clean Air Act, state and local governments will be required to not only take environmental injustice issues more seriously but also ensure that disadvantaged communities do not continue to be marginalized by environmental regulations.

Governments can provide multiple, effective solutions to environmental injustice by localizing the Clean Air Act. These solutions include further environmental justice training, direction from the top of governmental organizations, a concentric strategy to combat environmental injustice, and the ability to adopt and evaluate the effect of regulations more quickly.

First, providing comprehensive environmental justice training is an important solution to consider. Under the Obama administration, the EPA's environmental justice regulations required government officials to obtain further training on how to address environmental injustice.<sup>217</sup> In addition, the program also required specific training regarding the individual communities in which workers were located.<sup>218</sup> While this requirement is extremely beneficial at a higher level, there are many ways in which additional training can also be beneficial at a local level. If the trainings were administered at a lower level of the government, the system could become more efficient. Less training would be required in order to become familiar with individual communities because the individuals would already have some familiarity with the communities in which they are located.

Second, localizing the Clean Air Act would encourage local governments to develop a concentric strategy to fight environmental injustice. With a concentric strategy, governmental groups can begin to educate individuals that are most impacted by environmental injustice.<sup>219</sup> Then, these individuals and those providing the training could slowly spread this knowledge into more and more communities.<sup>220</sup> This strategy could be used in situations where a local community is in charge of creating an environmental standard. The concentric strategy would make it easier to contact those that were in charge. Further, the concentric strategy would make it easier for the judiciary to imagine and order a remedy because, logistically, obtaining a result could be done more directly.

Third, local governments are able to adopt regulations more quickly and are generally more innovative than larger governmental bodies. For example, San Francisco, California, was the first government to

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<sup>216</sup> Ahlers, *supra* note 149, at 722.

<sup>217</sup> Paben, *supra* note 156, at 1104.

<sup>218</sup> *Id.*

<sup>219</sup> Paben, *supra* note 35, at 258.

<sup>220</sup> *Id.*

use the precautionary principle in making environmental decisions.<sup>221</sup> The precautionary principle encourages exercising caution in allowing activities when there is any uncertainty in how the activities would affect the environment or human health.<sup>222</sup> San Francisco was able to adopt new regulations faster than other communities and was able to make its own decisions on how best to regulate its local environment. While the federal government may be less willing to take a risk with a new program or regulation for a local problem, local governments may be more willing to experiment with new and innovative solutions to a local problems.

Finally, localizing the decision-making process allows affected individuals to be more involved in the process of finding a solution.<sup>223</sup> In addition, this system provides an opportunity for those who are negatively impacted by air pollution to review all of the information and work towards standards that are able to meet the needs of marginalized communities.<sup>224</sup> A system of localized rules allows for further involvement by groups and communities that are most impacted by the effects of air pollution and environmental degradation.

#### *G. Takeaways from Environmental Justice Issues in the Clean Air Act*

There are multiple considerations when addressing environmental injustice issues. First, most action starts with a community. It may be possible to obtain any environmental justice goals at a federal level, but the focus should be on a smaller scale. Federal and state regulators should look beyond the reach of the federal government when enforcing and creating these regulations and instead look to the tools local communities possess to address these issues.

Additionally, it has been difficult for plaintiffs to bring forward environmental injustice claims because the plaintiff must prove the defendant's intent to discriminate. More importantly, courts have stated that plaintiffs need to prove a specific intent to discriminate.<sup>225</sup> Without the ability to determine whether there is an intent to discriminate, plaintiffs are unlikely to be able to move forward with their claims and, therefore, are essentially locked out of courts. By localizing the Clean Air Act, regulations could potentially be altered to eliminate the requirement to prove a specific intent to discriminate. Such regulations would make it easier for

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<sup>221</sup> Paben, *supra* note 156, at 1106-08.

<sup>222</sup> *Id.*

<sup>223</sup> Mitchell, Norman & Mullin, *supra* note 151, at 105023.

<sup>224</sup> *Id.*

<sup>225</sup> Richardson, *supra* note 168, at 57.

affected individuals to seek relief for environmental injustices and thus, ensure that these injustices occur less frequently.

Finally, regulators are more likely to take action at a local level. This trend is due to the fact that local regulators are more likely to be aware of local issues. In addition, local governments are more closely connected and thus more responsive to their constituents.

### VIII. CONCLUSION

Altering the structure of the Clean Air Act to allow for more local authority will benefit both the environment as well as the individuals disproportionately impacted by the effects of air pollution. There is still more that can be done to prevent pollution's negative impacts even though regulating environmental pollution nationally has proven to be beneficial in its own right. A localized Clean Air Act will protect the environment in even more beneficial ways.

Implementing a more localized Clean Air Act will allow for the efficient implementation of programs intended to improve the environmental conditions of our local ecosystems. These efficiencies will develop because local governments are more attuned to the needs of their environments. Therefore, local governments are better positioned and equipped to create the needed regulations and implement the necessary programs to enforce the new regulations.

Finally, delegating enforcement of the Clean Air Act to states and local governments will ensure that environmental justice is achieved. In the pursuit of environmental justice, local governments are better equipped and incentivized to respond to the needs of individual constituents and local communities. Higher responsiveness means that the local groups will have an easier time obtaining the attention of regulators. Moreover, these groups will only have to appeal to local, not national, policymakers and regulators. The increased efficiency from localizing the Clean Air Act will enable communities throughout the country to fight environmental degradation and injustice in a more practical and effective way.