

DIALOGUE

Equal Protection, Strict Scrutiny, and Actions to Promote Environmental Justice

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[Editors' Note: A counterpoint article by Sheila Foster will appear in the May issue.]

It once might have seemed that the federal policy of promoting environmental justice was on a collision course with limitations the Equal Protection Clause imposes on federal actions to benefit minorities. In February 1994, Executive Order (EO) 12898 directed federal agencies to take special steps to ensure environmental protection for low-income and minority communities.¹ In June of the following year, the U.S. Supreme Court effectively outlawed using race in federal decisionmaking by subjecting such uses to strict judicial scrutiny,² a standard so rigorous and demanding that it has

been described as “strict in theory, fatal in fact.”³

No such collision occurred. Not only have there been no significant reported decisions applying strict scrutiny to government actions to promote environmental justice, but the U.S. Congress has enacted legislation *mandating* affirmative steps to ensure preferential treatment regarding financial assistance for minority communities.⁴ This Article discusses four⁵ reasons why federal actions to promote environmental justice are not subject to strict judicial scrutiny: (1) the EO applies to actions by executive branch agencies exercising the core governmental function of executing federal law, and Article III limitations on the judicial power preclude federal courts from applying strict scrutiny to other branches' performance of core governmental functions; (2) equal protection applies to governmental actions that “deprive” individuals of a “legally protected interest,”⁶ but no individual has such an interest in a type or level of environmental protection; (3) environmental justice protects groups—“minority . . . or low income populations”—but equal protection is an individual, not a group right⁷; and (4) a claimant challenging government action

1. EO 12898, Federal Actions to Address Environmental Justice on Minority Populations and Low-Income Populations (Feb. 11, 1994), §1-101 directs that [t]o the greatest extent practicable and permitted by law, . . . each federal agency shall make achieving environmental justice part of its mission by identifying and addressing, as appropriate, disproportionately high and adverse human health or environmental effects of its programs, policies and activities on minority populations and low-income populations in the United States

2. “[W]e hold today that all racial classifications, imposed by whatever federal, state, or local governmental actor, must be analyzed by a reviewing court under strict scrutiny. In other words, such classifications are constitutional only if they are narrowly tailored measures that further compelling governmental interests.” *Adarand Constructors, Inc. v. Peña*, 515 U.S. 200, 228 (1995). By contrast, the use of classifications based on the other focus of environmental justice, economic status, does not require strict scrutiny. *San Antonio Independent Sch. Dist. v. Rodriguez*, 411 U.S. 1 (1973).

The original purpose of strict scrutiny of racial classifications was “to protect ‘discrete and insular minorities from majoritarian prejudice or indifference.’” *City of Richmond v. J.A. Crosson*, 488 U.S. 469, 495 (1989) (quoting *United States v. Carolene Prods.*, 304 U.S. 144, 153 n.4 (1938)). Thus, it was applied to groups that had been “saddled with such disabilities, or subjected to such a history of purposeful unequal treatment, or relegated to a position of powerlessness as to command extraordinary protection from the majoritarian political process.” *Rodriguez*, 411 U.S. at 28.

But the closely divided Court has extended strict scrutiny to racial classifications used to benefit minorities. *Parents Involved in Community Schs. v. Seattle Sch. Dist. No. 1*, 551 U.S. ___, 127 S. Ct. 2738 (2007) (Seattle School); *Adarand*, 515 U.S. at 228. Four dissenting Justices reject strict scrutiny for classifications to benefit minorities: “No case . . . has ever held that the test of ‘strict scrutiny’ means that all racial classifications . . . must in practice be treated the same.” *Seattle School*, 127 S. Ct. at 2817 (Breyer, J., dissenting). And Justice Anthony Kennedy, who joined the majority, wrote separately to suggest that “it is unlikely” that all “race conscious” mechanisms used in decisionmaking “would demand strict scrutiny to be found permissible. . . . Strict scrutiny does not apply merely because” a governmental decision “is performed with consciousness of race,” and “a constitutional violation does not occur whenever a decisionmaker considers the impact a given

approach might have on [members] of different races.” *Id.* at 2797 (Kennedy, J., concurring) (internal citations, quotation omitted).

3. *Adarand*, 515 U.S. at 237 (internal quotation, citation omitted). As discussed more fully below, challenged actions rarely survive strict scrutiny.

4. The Comprehensive Environmental Response, Compensation, and Liability Act, §104(k)(5)(C)(x), 42 U.S.C. §9604(k)(5)(C)(x), authorizes grants of up to \$200,000 for brownfield sites, and mandates that the U.S. Environmental Protection Agency (EPA) “shall establish a system for ranking grant applications . . . that includes” as a criterion the “extent to which a grant would address or facilitate the identification and reduction of threats” to the health of minority communities. That suggests greater attention to minority communities than to identically situated non-minority communities.

5. Another factor reducing the chance of a collision between the EO and equal protection is that the EO “focus[es] attention on the environmental and health conditions in minority communities,” in order “to promote non-discrimination in Federal programs.” Presidential Memorandum on EO 12898 (Feb. 11, 1994). Promoting non-discrimination is an important purpose of the Equal Protection Clause, and the use of racial information is an essential tool in identifying discrimination. *See, e.g., Williams v. Hansen*, 326 F.3d 569 (4th Cir. 2003) (rejecting the application of strict scrutiny to a decision to question only minority police officers in an investigation to determine if there are discriminatory practices).

6. *Adarand*, 515 U.S. at 211.

7. *Id.* at 227.

to promote environmental justice would likely be unable to establish standing to pursue such a claim.

I. Constraints on Applying Strict Scrutiny to Regulatory Actions to Implement Environmental Justice

A. Core Governmental Functions

A principal bar to applying strict judicial scrutiny to actions to promote environmental justice is the limited role Article III assigns to the judiciary. Federal courts lack either the institutional competence or the judicial authority to apply strict scrutiny to an executive branch agency's exercise of a core constitutional function⁸ such as executing federal laws to protect the environment.

Strict scrutiny, in fact, is antithetical to a limited judicial role. Courts ordinarily review actions by other branches deferentially, presuming their validity and upholding them if there is a "rational basis" for the challenged action.⁹ But with racial classifications,¹⁰ courts invert that approach by applying strict scrutiny, which requires that government affirmatively justify the racial classification by showing its use is "narrowly tailored" to further "a compelling governmental interest."¹¹ That effectively reverses the presumption that government is acting lawfully with a presumption that because there is a racial classification, the action is *not* lawful. Moreover, as already noted, strict scrutiny imposes a high standard for justifying a racial classification that makes courts reluctant to draw favorable inferences from even powerfully suggestive evidence,¹² and few programs survive strict scrutiny.¹³

8. *United States v. Armstrong*, 517 U.S. 456, 467 (1996).

9. *Williams v. Lee Optical Co.*, 348 U.S. 483 (1955).

10. The rationale for this is that racial "classifications are simply too pernicious to permit any but the most exact connection" between the purpose of the action and the use of race to further that purpose. *Seattle School*, 127 S. Ct. at 2752 (internal quotation omitted).

11. *Adarand*, 515 U.S. at 235.

12. See, e.g., *City of Richmond v. J.A. Crosson*, 488 U.S. 469, 480, 506-07 (1989) (requiring more direct evidence of intent to discriminate than the fact that a city's population is 50% African-American, but only 0.67% of prime contracts for city construction work go to African Americans).

13. The Court has taken pains to note that some actions have survived strict scrutiny:

Finally, we wish to dispel the notion that strict scrutiny is "strict in theory, but fatal in fact." The unhappy persistence of both the practice and the lingering effects of racial discrimination against minority groups in this country is an unfortunate reality, and government is not disqualified from acting in response to it. As recently as 1987, for example, every Justice of this Court agreed that the Alabama Department of Public Safety's "pervasive, systematic, and obstinate discriminatory conduct" justified a narrowly tailored race-based remedy. See *United States v. Paradise*, 480 U.S. [149] at 167, 190, 196 [(1987)]. When race-based action is necessary to further a compelling interest, such action is within constitutional constraints if it satisfies the "narrow tailoring" test this Court has set out in previous cases.

Adarand, 515 U.S. at 237 (internal citations omitted). Subsequently, the Court upheld the Michigan Law School's admission policies against a strict scrutiny challenge. *Grutter v. Bollinger*, 539 U.S. 306 (2003). But the fact that there has been only a single decision upholding a program against a strict scrutiny challenge since 1987 does less to "dispel the notion" that the application of strict scrutiny is fatal to the challenged government program than to confirm it. Another way to put this is that the only program that has survived strict scrutiny

Such intrusive judicial review of the action of a co-equal branch of government, exercising a core constitutional power, conflicts with commonly accepted separation-of-powers principles regarding what activities are appropriate to the legislative, executive, and judicial branches.¹⁴ The Court has explained why courts limit their review of the actions of other branches: "[I]t is because legislators and administrators are properly concerned with balancing numerous competing considerations that courts refrain from reviewing the merits of their decisions, absent a showing of arbitrariness or irrationality."¹⁵

For example, when the Court considered an equal protection challenge to a prosecutor's criminal enforcement decision, the Court characterized such decisions as a "special province" of the executive.¹⁶ The Court presumed that executive branch employees act properly in their official duties, and required claimant to "dispel the presumption that a prosecutor has *not* violated equal protection" by presenting "clear evidence to the contrary."¹⁷ "Judicial deference to the decisions" of executive officers exercising enforcement discretion, the Court explained, rests both "on an assessment of the relative competence of prosecutors and courts," and on a judicial "concern not to unnecessarily impair the performance of a core executive constitutional function," by "subjecting the prosecutor's motives and decisionmaking to outside inquiry."¹⁸ Agencies have broad discretion to decide how best to exercise their legal authorities and use their limited resources and such discretion "is at its height when the agency decides not to bring an enforcement action."¹⁹ Even decisions regarding civil enforcement "are generally committed to an agency's absolute discretion"²⁰ and "an agency's refusal to initiate enforcement proceedings is not ordinarily subject to judicial review."²¹

The Court has shown similar deference in reviewing how legislatures have used race in exercising of the core legislative branch function of creating and configuring voting district boundaries. Noting the "wisdom of the traditional limitations on the Court's function," the Court has expressed reluctance to "intrude in an area in which it has traditionally deferred" to the legislative branch.²² The Court acknowledged the judiciary's institutional obligation to defer to a state legislature's judgments about how to perform the core legislative function of drawing voting district lines:

States must have discretion to exercise the political judgment necessary to balance competing interests. Although race-based decisionmaking is inherently suspect, until a claimant makes a showing sufficient to support that allegation the good

in more than 20 years was one developed using the legal expertise of an eminent law school.

14. *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 559-60, 22 ELR 20913 (1992).

15. *Arlington Heights v. Metropolitan Hous. Dev. Corp.* 429 U.S. 252, 265 (1977).

16. *United States v. Armstrong*, 517 U.S. 456, 465 (1996).

17. *Id.* at 465 (emphasis added, internal quotation omitted). See also *Batson v. Kentucky*, 476 U.S. 79 (1986) (requiring that equal protection claimant challenging prosecutor's use of peremptory challenges to exclude minority jurors must show intent to discriminate).

18. *Armstrong*, 517 U.S. at 465 (internal quotations omitted).

19. *Id.*

20. *Heckler v. Chaney*, 470 U.S. 821, 831, 15 ELR 20335 (1985).

21. *Massachusetts v. EPA*, 127 S. Ct. 1438, 1459, 37 ELR 20075 (2007).

22. *San Antonio Independent Sch. Dist. v. Rodriguez*, 411 U.S. 1, 41-42, 58 (1973).

faith of a legislature must be presumed The distinction between being aware of racial considerations and being motivated by them may be difficult to make [but courts must] exercise extraordinary caution in adjudicating claims that a State has drawn district lines on the basis of race.²³

Thus, the fact that race is considered in making a decision will not necessarily trigger strict scrutiny:

Our precedents have used a variety of formulations to describe the threshold for the application of strict scrutiny. . . . Strict scrutiny does not apply merely because redistricting is performed with consciousness of race. . . . For strict scrutiny to apply, the plaintiffs must prove that other, legitimate districting principles were “subordinated to race.” . . . By that we mean that race must be “*the predominant* factor motivating the legislature’s [redistricting] decision.”²⁴

The reasons for limiting judicial review of exercises of core governmental functions apply with comparable force to agency actions to promote environmental justice. Environmental justice focuses on activities and decisions with “human health or environmental effects.”²⁵ Regulatory agencies such as the U.S. Environmental Protection Agency (EPA)²⁶ address those types of effects by actions implementing federal laws to protect human health and the environment.²⁷ Those actions include standard-setting,²⁸ issuing licenses or registrations,²⁹ permitting facilities,³⁰ reviewing and approving state plans for implementing federal laws,³¹ and carrying out inspec-

tions.³² Such actions are paradigmatic exercises of the executive branch’s “most important constitutional duty,” its Article II, §3 responsibility to “take care that the laws be faithfully executed.”³³

Thus a federal agency implementing federal laws has “broad discretion to choose how best to marshal its limited resources and personnel to carry out its [statutory] responsibilities,”³⁴ and its actions in doing so are properly reviewed under the standards set forth in the Administrative Procedure Act (APA).³⁵ The APA limits judicial review of agency actions to whether they are “arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with the law.”³⁶ Article III courts lack the constitutional power, the statutory authority, or the institutional expertise to go beyond the APA framework by applying the more exacting strict scrutiny standard of review to those actions when they are informed by racial considerations.

As discussed more fully below courts apply strict scrutiny when government “distributes burdens or benefits, on the basis of individual racial classifications.”³⁷ Thus, strict scrutiny applies to a narrow range of government distributional—not regulatory—activities addressing such matters as school admission, employment, and contracting.³⁸ Far from implicating core governmental functions, such distributional activities are not even uniquely or necessarily governmental.

B. Deprivations of Legally Protected Interests

A second barrier to applying strict scrutiny to regulatory actions promoting environmental justice is that equal protection applies only to government actions that deprive a claimant of a “legally protected interest.”³⁹ A federal equal protection “claim arises under the Fifth Amendment to the Constitution, which provides that ‘No person shall . . . be deprived of life, liberty,⁴⁰ or property, without due process of law.’”⁴¹ Although

23. *Miller v. Johnson*, 515 U.S. 900, 915-16 (1995).

24. *Bush v. Vera*, 517 U.S. 952, 958-59 (1996) (quoting *Miller*, 515 U.S. at 916 (emphasis added in *Bush*)).

25. EO 12898, §1-101.

26. The EO applies to all federal agencies, but identifies EPA as the lead agency for an Interagency Federal Working Group. EO 12898 §1-102. And EPA has recognized that it has an important role to play in implementing the EO. *See, e.g.*, Memorandum from Steve Johnson, EPA Administrator, to EPA staff: “Reaffirming the U.S. Environmental Protection Agency’s Commitment to Environmental Justice” (Nov. 4, 2005) (EPA “maintains an ongoing commitment to ensure environmental justice”).

27. *See generally* Memorandum from Gary Guzy, EPA General Counsel, to EPA Assistant Administrators: “EPA Statutory and Regulatory Authorities Under Which Environmental Justice Issues May Be Addressed in Permitting” (Dec. 1, 2000) [hereinafter Guzy Memo]. The Resource Conservation and Recovery Act (RCRA), 33 U.S.C. §§6901-6992k, ELR STAT. RCRA §§1001-11011 authorizes EPA to regulate the generation, transportation, treatment, storage, and disposal of hazardous wastes and the management and disposal of solid waste, to issue guidelines and recommendations to state solid waste permitting programs, to issue permits, and to award grants. Guzy Memo at 2. The Clean Water Act, 33 U.S.C. §§1251-1387, ELR STAT. FWPCA §101-607 prohibits the discharge of any pollutant into a water of the United States unless that discharge complies with specific requirements of the Act, with compliance achieved by permits. Guzy Memo at 5. The Safe Drinking Water Act, 42 U.S.C. §§300f to 300j-26, ELR STAT. SDWA §1401-1465, includes regulatory programs establishing requirements for the quality of drinking water supplied by public water systems and controls on the underground injection of fluids to protect underground sources of drinking water. Guzy Memo at 8. The Clean Air Act, 42 U.S.C. §§7401-7671q, ELR STAT. CAA §§101-618, establishes programs for permitting new sources of air emissions, requires operating permits for stationary sources of air pollutants and prescribes public participation procedures for the issuance, significant modification, and renewal of such permits, and authorizes EPA to establish siting requirements for solid waste incinerators. Guzy Memo at 10-13.

28. *E.g.*, 33 U.S.C. §1314(a).

29. *E.g.*, 7 U.S.C. §136.

30. *E.g.*, 42 U.S.C. §6925.

31. *E.g.*, *id.* §110.

32. *E.g.*, *id.* §6927.

33. *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 577, 22 ELR 20913 (1992).

34. *Massachusetts v. EPA*, 127 S. Ct. 1438, 1459, 37 ELR 20075 (2007).

35. 5 U.S.C. §§551-559, 701-706, 1305, 3105, 3344, 5372, 7521.

36. “A person suffering legal wrong because of agency action, or adversely affected or aggrieved by agency action within the meaning of a relevant statute is entitled to judicial relief thereof.” *Id.* §702. And agency action made reviewable by statute “and final agency action for which there is no other adequate remedy in a court” are subject to judicial review. *Id.* §704. A court reviews a challenged action to determine if it was “arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with the law.” *Id.* §706. This is obviously a more deferential standard than strict scrutiny.

37. *Parents Involved in Community Schs. v. Seattle Sch. Dist. No. 1*, 551 U.S. ___, 127 S. Ct. 2738, 2751 (2007).

38. *See* cases cited at notes 45-48, listing major strict scrutiny decisions since 1978.

39. *Adarand Constructors, Inc. v. Peña*, 515 U.S. 200, 211 (1995).

40. Liberty interests address “freedom from bodily restraint, . . . the right of the individual to contract, to engage in any of the common occupations of life, to acquire useful knowledge, to marry, establish a home and bring up children, worship God according to the dictates of his own conscience, and generally to enjoy those privileges long recognized as essential to the orderly pursuit of happiness by free men.” *Board of Regents of State Colls. v. Roth*, 408 U.S. 564, 572 (1972). These interests all exist apart from and independent of any statutes addressing such rights. By contrast, a protected interest in environmental protection under a federal environmental statute would be created and defined by the statutory source of the right, and thus, as explained below, would be a property, not a liberty interest.

41. *Adarand*, 515 U.S. at 213.

the Fourteenth Amendment's Equal Protection Clause applies only to states, courts follow "precisely the same" approach in analyzing federal actions under the Fifth Amendment, treating the coverage of the two clauses as "co-extensive."⁴² The Court has explained constitutional protection of property as follows:

The Fourteenth Amendment's procedural protection of property is a safeguard of the security of interests that a person has already acquired in specific benefits. These interests--property interests, may take many forms To have a property interest . . . a person must have . . . a legitimate claim of entitlement. . . . Property interests, or course, are not created by the Constitution. Rather they are created and their dimensions are defined by . . . rules or understandings that secure certain benefits and that support claims of *entitlement* to those benefits. . . . A claim of entitlement [is ordinarily] created and defined by statutory terms.⁴³

The source of such an entitlement is easy to identify in cases applying strict scrutiny to governmental decisions allocating a finite quantity of government-created benefits among a pool of competing applicants seeking school admission,⁴⁴ contracts,⁴⁵ or employment.⁴⁶ The selections are based on articulated criteria that create and define the legal rights of potential claimants either to receive the benefits or be fairly considered for them.⁴⁷ A claimant either receives the benefit or does not, and unsuccessful claimants who believe that race was improperly used in the decision can raise an equal protection claim that will be reviewed under strict scrutiny.

1. No "Legally Protected Interest"

This framework does not apply to agency regulatory actions implementing environmental protection statutes with human health or environmental effects on minority populations. Such statutes regulate the conduct of persons engaging in certain

activities but do not authorize or create legally protected interests or entitlements to specific types or degrees of environmental protection for persons not regulated by the statutes.

For example, the Clean Water Act's⁴⁸ broad purpose is to "restore and maintain the chemical, physical, and biological integrity of the Nation's waters."⁴⁹ It advances that goal by prohibiting the discharge of a pollutant from a point source into waters of the United States⁵⁰ unless that discharge complies with specific requirements of the Act.⁵¹ Other federal environmental protection statutes manage and regulate activities or substances with broadly dispersed human health or environmental effects: air pollutants⁵²; hazardous substances⁵³; pesticides⁵⁴; toxic substances⁵⁵; and, the like. As already noted, agencies implement such statutes through such paradigmatically regulatory measures as standard-setting,⁵⁶ issuing licenses or registrations,⁵⁷ permitting facilities,⁵⁸ reviewing and approving state plans for implementing federal laws,⁵⁹ carrying out inspections,⁶⁰ and conducting enforcement actions.⁶¹ Such regulatory actions address regulated persons and activities. But the statutes authorizing those regulatory actions create no legal rights or entitlements for persons seeking environmental protection, but whose actions are not being regulated. And when environmental protection statutes authorize citizens to bring suit to challenge regulated activity or agency action,⁶² the rights of such citizens are created and defined by, and implemented through, the statutory provisions that authorize judicial review, or the APA.⁶³ But apart from that, regulatory statutes to protect the environment do not create any property interest, right, or entitlement for any person to a given type or level of environmental protection.⁶⁴ Without such an entitlement no claimant has the "legally protected interest"⁶⁵ needed for an equal protection claim.

2. No Distribution or Deprivation

Moreover, it fundamentally mischaracterizes both the purpose and the consequences of regulatory actions implementing environmental protection laws to equate them with decisions to distribute or award such benefits as contracts, education, or

42. *Id.* at 217 (internal citation omitted); *see generally id.* at 217-18 ("Court's approach to Fifth Amendment equal protection claims has always been precisely the same as that under the Fourteenth Amendment" (quoting *Weinberger v. Wiesenfeld*, 420 U.S. 636, 638 n.2 (1975)); "Equal protection analysis in the Fifth Amendment area is the same as that under the Fourteenth Amendment" (quoting *Buckley v. Valeo*, 424 U.S. 1, 93 (1976))).

43. *Roth*, 408 U.S. at 576-77 (emphasis added).

44. *Seattle School, Missouri v. Jenkins*, 515 U.S. 70 (1995); *Regents of Univ. of California v. Bakke*, 438 U.S. 263 (1978) (opinion of Powell, J., noting need for heightened scrutiny of use of racial classifications in school admission decisions). *See also Johnson v. California*, 543 U.S. 499 (2005) (relying on analysis used in school desegregation cases in applying strict scrutiny to decision to segregate prisoners by race).

45. *Adarand*, 515 U.S. at 200; *City of Richmond v. J.A. Crosson*, 448 U.S. 469 (1989); *But see Fulilove v. Klutznick*, 448 U.S. 448 (1980) (upholding minority contracting set-aside, rejecting strict scrutiny).

46. *United States v. Paradise*, 480 U.S. 149 (1987); *Wygant v. Jackson Bd. of Educ.*, 476 U.S. 267 (1986). Even in one recent decision where the Court did not apply strict scrutiny to a race-based formula for allocating broadcast licenses, the Court recognized that use of race can be subject to strict scrutiny, but declined to apply that standard to actions to benefit minorities. *Metro Broadcasting, Inc. v. FCC*, 497 U.S. 547 (1990). *Adarand* repudiated that reasoning and mandated application of strict scrutiny to all racial classifications. *Adarand*, 515 U.S. at 227.

47. *See, e.g., Adarand*, 515 U.S. at 211 ("The injury in cases of this kind is that a discriminatory classification prevents the plaintiff from competing on an equal footing" for the contract) (internal citation omitted.).

48. 33 U.S.C. §§1251-1387, ELR STAT. FWPCA §§101-607.

49. *Id.* §1251(a).

50. *Id.* §1311(a).

51. *See, e.g., id.* §§1342, 1344.

52. *See, e.g., id.* §§7401 to 7671q.

53. *See, e.g., id.* §§6901 to 6992.

54. 7 U.S.C. §136 to 136y.

55. 15 U.S.C. §§2601 to 2671.

56. *See, e.g.*, 33 U.S.C. §1314(a).

57. *E.g.*, 7 U.S.C. §136.

58. *E.g.*, 42 U.S.C. §6925.

59. *E.g., id.* §110.

60. *E.g., id.* §6927.

61. *E.g., id.* §§6928, 7413.

62. *E.g.*, 33 U.S.C. §1365.

63. 5 U.S.C. §§551-559, 701-706, 1305, 3105, 3344, 5372, 7521.

64. In some cases, environmental protection statutes authorize financial assistance, which must be awarded consistently with due process. *See, e.g.*, 42 U.S.C. §9617(e) (authorizing grants to groups of citizens to obtain technical assistance at Superfund sites); 40 C.F.R. pt. 35, subpt. M (regulations governing technical assistance grants). And of course regulated entities have due process rights to fair treatment when their conduct is regulated.

65. *Adarand Constructors, Inc. v. Peña*, 515 U.S. 200, 211 (1995).

employment. Decisions to implement environmental laws do not “distribute” the “benefits” or “burdens” of environmental protection to specific persons within a pool of “competing” applicants. Rather, agencies use their expertise and professional judgment to choose how best to exercise their discretion in selecting from among a statutorily defined universe of potential actions and targets. The selections are based on professional judgments about what regulatory measures will accomplish the statutory purpose most effectively, not on how the benefits from such regulation will be distributed. And any benefits to specific individuals from the government’s action are a byproduct—not a purpose—of the government’s decision implementing the generally applicable law. Legally creating and recognizing an entitlement to environmental benefits and applying strict scrutiny to verify that such benefits are distributed *equally*, would subvert or redefine the congressionally defined purpose of the statutes, which is to ensure that environmental protection is implemented *effectively*,⁶⁶ to maximize protection of human health or the environment.

Finally, even if there were a constitutional entitlement to environmental protection, government actions implementing laws for environmental protection would not meet the constitutional standard for a cognizable “denial” of such an entitlement. A denial of equal protection can arise only from “an absolute deprivation of a meaningful opportunity” to obtain a benefit⁶⁷; “relative differences in the quality of” the benefit do not implicate equal protection.⁶⁸ When an agency decides how to regulate to protect the environment, it may assign a higher priority to some types of actions or areas than to others, but it would not, and consistent with its statutory authorities *could* not, ignore a potential action or area so completely as to cause an “absolute deprivation” of environmental protection to any person.⁶⁹ At most, a claimant could show only that it received lower priority, or less environmental attention; that would not constitute a deprivation. By contrast, an applicant for school admission, or employment, or a contract, either receives the benefit or does not.

C. Equal Protection for Individuals; Environmental Justice for Groups

Perhaps the most obvious reason strict scrutiny is not applied to regulatory actions to promote environmental justice for minority communities is that equal protection applies to “*persons*, not *groups*”⁷⁰ or geographic areas. Equal protection rights

are “guaranteed to the individual. The rights established are personal rights.”⁷¹ Thus, courts apply strict scrutiny to use of “individual racial classifications,”⁷² to protect “the personal right” to equal protection of the laws.⁷³ But environmental justice, as defined in EO 12898, addresses human health or environmental effects “on minority populations,” that is, on groups of people and the geographic areas or communities where they work or live. For example, the Presidential Memorandum transmitting EO 12898 directs federal attention to environmental and human health conditions “in minority communities.”⁷⁴ That focus on communities, groups, or areas is collective, not individual, which places environmental justice outside the scope of the purely individual protection guaranteed by the Equal Protection Clause.⁷⁵

Indeed, the Court recognizes that “the Equal Protection Clause relates to equal protection of the laws ‘*between persons as such rather than between areas*.’”⁷⁶ For example, the Court recognizes “no rule that counties, as counties, must be treated alike.”⁷⁷ Consistent with that principle, the Court did not apply strict scrutiny to a decision by a state not to provide public schools in one county—with a large minority population—even though it provided public schools in every other county.⁷⁸ The Court’s deferential review of that treatment of differing communities reflected the principle that governmental choices between communities, as opposed to choices between individuals, are appropriately addressed through the political, not the judicial process.

The Court has also recognized the practical problems of applying strict scrutiny to choices between communities. Faced with an equal protection claim by residents of a 96% minority school district alleging that it received fewer resources than

71. *City of Richmond v. J.A. Crosson*, 488 U.S. 469, 493 (1989).

72. *Parents Involved in Community Schs. v. Seattle Sch. Dist. No. 1*, 551 U.S. ___, 127 S. Ct. 2738, 2751 (2007) (emphasis added).

73. *Adarand*, 515 U.S. at 224 (equal protection violations impinge upon personal rights of individuals).

74. Presidential Memorandum on EO 12898 (emphasis added).

75. See also *Arlington Heights v. Metropolitan Hous. Dev. Corp.*, 429 U.S. 252, 263 (1977) (recognizing that corporation has no racial identity). The only way the individual classifications that are the concern of equal protection could be implicated by a comparison between communities would be if every individual in one community or group were of a different race than every individual in the other community or group; otherwise, no individual claimant could show that the choice between the two communities or groups was based on an individual racial characteristic because that individual’s classification would be shared by at least one member of the other community.

76. *Griffin v. County School Bd. of Prince Edward County*, 377 U.S. 218, 230 (1964) (quoting *Salsburg v. Maryland*, 346 U.S. 545, 551 (1954)) (emphasis added).

77. *Griffin*, 377 U.S. at 230.

78. *Id.* Despite recognizing that the state’s policy “bears more heavily on Negro children,” the Court reviewed the policy deferentially:

A State, of course, has a wide discretion in deciding whether laws shall operate statewide or shall operate only in certain counties A State may wish to suggest . . . that there are reasons why one county ought not to be treated like another. But the record in the present case could not be clearer that Prince Edward’s public schools were closed and private schools operated in their place with state and county assistance, for one reason, and one reason only: to ensure, . . . that white and colored children in Prince Edward County would not, under any circumstances, go to the same school. Whatever nonracial grounds might support a State’s allowing a county to abandon public schools, the object must be a constitutional one, and grounds of race and opposition to desegregation do not qualify as constitutional.

Id. at 230-31.

66. Moreover, as discussed more fully in the analysis of standing below, regulatory agencies have at best only an indirect and limited role in determining which individuals receive the benefits or burdens of their actions. Government regulatory actions are directed at regulated conduct, and the effects of such actions on third parties, beneficial or otherwise, are the result of how regulated entities adjust their behavior in response to regulation. That makes it impossible to assess the action and its effects with the precision needed to apply strict scrutiny in determining whether the government action is narrowly tailored to further a compelling interest.

67. *San Antonio Independent Sch. Dist. v. Rodriguez*, 411 U.S. 1, 21 (1973).

68. *Id.*

69. Agency action that completely denied environmental protection to anyone could be challenged under the APA, 5 U.S.C. §§702, 704, as arbitrary or contrary to law. *Id.* §§706 (2)(A)-(C).

70. *Adarand*, 515 U.S. at 227.

more affluent districts with smaller minority populations, the Court cited the difficulty of applying strict scrutiny to “review a system that allegedly discriminates against a large, diverse, and amorphous class, unified only by the common factor of residence.”⁷⁹ Similarly, the Court has recognized the difficulty of protecting the rights of groups sharing the common characteristic of “geographic location.”⁸⁰

Consistent with the principle that strict scrutiny is not applied to choices between geographic areas or communities, Congress recently enacted the statute mentioned above directing EPA to consider a community’s minority status in allocating grants: EPA shall “establish a system for ranking grant applications that includes [t]he extent to which a grant would address . . . threats to the health or welfare of children, pregnant women, *minority* or low income *communities*, or other sensitive populations.”⁸¹ This mandates preferences for protecting children and pregnant women as individuals, and for collectively protecting communities with large numbers of minority or low-income residents. Because it does not use “individual” racial classifications, this preference for minority “communities” has not triggered strict scrutiny.

In sum, because equal protection applies to individuals, and strict scrutiny applies to individual racial classifications, use of race to inform decisions regarding what geographic areas or communities receive environmental attention does not raise an equal protection issue that would trigger strict scrutiny.

II. Standing

A final obstacle to strict scrutiny review of governmental actions to implement environmental justice is the requirement that a claimant demonstrate a justiciable case or controversy by showing standing to bring a claim. The characteristics of governmental actions to promote environmental justice would likely preclude potential claimants from establishing standing to challenge such actions on equal protection grounds. The “core component of standing is an essential and unchanging part of the case-or-controversy requirement of Article III of the Constitution”⁸² that precludes a federal court from adjudicating a legal question unless a plaintiff meets the burden⁸³ of demonstrating all three elements of standing.⁸⁴ To show standing, a litigant must “demonstrate that it has suffered

a concrete and particularized injury that is either actual or imminent, and that the injury is fairly traceable to the defendant, and that it is likely a favorable decision will redress that injury.”⁸⁵

A claim that an action to promote environmental justice violates equal protection could potentially arise from any regulatory choice between a minority and a non-minority geographic area or community. A claimant—minority or non-minority—in the area where the regulatory action was not taken would argue that race was improperly used in deciding where to take the action, violating equal protection principles.

A person raising such a claim, without more, could not show a concrete and particularized injury.⁸⁶ To support standing, an injury must be “distinct and palpable,”⁸⁷ affecting the plaintiff in a personal and individual way.⁸⁸ Courts will not “entertain suits to vindicate the public’s non-concrete interest in the proper administration of the laws,”⁸⁹ and an injury sufficient to establish standing cannot arise from a generalized violation of “every citizen’s interest in proper application of the Constitution and laws.”⁹⁰ Thus, a claim that the government used race improperly, by itself, would not establish a sufficiently concrete and particularized injury to establish standing without evidence that the claimant was injured in some more direct and personal way.

To overcome that problem, a claimant might assert that the regulatory decision resulted in a reduced level of environmental protection for the area where claimant lived or worked, and that the reduced level was injurious to the claimant. Such a claim might allege a concrete and particularized injury, but would make it difficult for the claimant to show either of the remaining standing elements: causation and redressability.

Causation requires an injury fairly traceable to some action by the defendant and not the result of the independent action of a third party not before the court.⁹¹ Redressability, which often overlaps with causation,⁹² requires that claimant seek relief that “directly and tangibly benefits him,”⁹³ and that it

79. *Id.* at 12. *Rodriguez*, briefed and argued long after *Griffin*, did not even consider that the racial composition of the two communities would trigger strict scrutiny of a claim based on the minority community’s receiving substantially fewer resources; instead, plaintiffs’ unsuccessfully argued for strict scrutiny based on economic status. But the practical difficulties of applying strict scrutiny to choices between communities apply as readily to racial as economic classifications.

80. *See City of Mobile v. Bolden* 446 U.S. 55, 79 n.26 (1980) (rejecting claim for equal treatment of “political groups,” noting practical difficulties of determining “geographic location” of group claiming protection).

81. 42 U.S.C. §9604(k)(5)(C)(x).

82. *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560, 22 ELR 20913 (1992).

83. The party invoking federal jurisdiction bears the burden of showing each element of standing. *Lujan*, 504 U.S. at 561. Each element must be supported in the same way as other matters on which the plaintiff bears the burden of proof, with the manner and degree of evidence required at the applicable stage of the litigation: general factual allegations at the pleading stage; specific facts to raise a material issue at the summary judgment stage; and facts sufficient to meet the burden of persuasion at the final stage. *Id.*

84. *Id.* at 561.

85. *Massachusetts v. EPA*, 127 S. Ct. 1438, 1453, 37 ELR 20075 (2007). Moreover, the standing requirement does not “turn on the source of the asserted right,” but applies identically to constitutional or statutory claims. *Lujan*, 504 U.S. at 576. *See, e.g., Adarand Constructors, Inc. v. Peña*, 515 U.S. 200, 211-12 (1995) (analyzing standing for constitutional equal protection claim).

86. To show the first element of standing, a concrete and particularized injury, a claimant must present specific facts establishing that he or she faces a realistic threat from the government action. *Friends of the Earth v. Laidlaw Envtl. Servs. (TOC), Inc.*, 528 U.S. 167, 180-84, 30 ELR 20246 (2000). A concrete injury is one that is actual or imminent, not conjectural or hypothetical, *id.* at 180, or speculative. *Lujan*, 504 U.S. at 565 n.2. The injury must be real and immediate, or “certainly impending.” *Whitmore v. Arkansas*, 495 U.S. 149, 158 (1990).

87. *Allen v. Wright*, 468 U.S. 737, 751 (1984).

88. *Lujan*, 504 U.S. at 560 n.1.

89. *Massachusetts*, 127 S. Ct. at 1253 (internal quotation omitted).

90. *Hein v. Freedom From Religion Found.*, 127 S. Ct. 2553, 2563-64 (2007) (quoting *Lujan*, 504 U.S. at 573-74). *Lujan*, 504 U.S. at 568 (quoting *Allen*, 468 U.S. at 759-60). *See Lujan*, 504 U.S. at 575 (no standing based on violation of “right to have the Government act in accordance with law”), 575-76 (no standing based on right “to a particular kind of Government conduct, which the government has violated by acting differently”) (internal quotation, citation omitted).

91. *Lujan*, 504 U.S. at 560.

92. Questions of causation and redressability often overlap, and the two requirements were initially articulated as two facets of the causation requirement. *See Allen*, 468 U.S. at 753 n.19.

93. *Lujan*, 504 U.S. at 573-74.

be “likely, as opposed to merely speculative” that a favorable decision will redress the injury.⁹⁴

Ordinarily, the environmentally harmful activity that is the source of the claimant’s injury is fairly traceable to the person engaging in the inadequately regulated activity, rather than a government decision to take or withhold regulatory action. And redress will come, not from a decision by the court to grant requested relief, or an agency action in response to the court, but when the regulated party responds to the regulatory action, e.g., by stopping the injurious action. In sum:

[When] a plaintiff’s asserted injury arises from the government’s allegedly unlawful regulation (or lack of regulation) of someone else . . . causation and redressability ordinarily hinge on the response of the regulated (or regulable) third party to the government action or inaction—and perhaps on the response of others as well. The existence of one or more of the essential elements of standing depends on the unfettered choices made by independent actors not before the courts and whose [actions] the courts cannot presume either to control or to predict, and it becomes the burden of the plaintiff to adduce facts showing that those choices have been or will be made in such manner as to produce causation and permit redressability of the injury. Thus, when the plaintiff is not himself the object of the government action or inaction he challenges, standing is not precluded, but it is ordinarily substantially more difficult to establish.⁹⁵

Compounding the difficulty, courts analyzing causation and redressability will not draw “speculative inferences to connect [a plaintiff’s] injury to the challenged actions of the defendant.”⁹⁶

That means that a claimant seeking to establish causation from an action to promote environmental justice would need to show that an injury is fairly traceable to the government regulatory decision, rather than the regulated party’s actions. The barriers to showing redressability are even higher. A claimant would need to show, with the required specificity and certainty, what action the regulatory agency would take in response to a court’s order granting the requested relief and how the new regulatory action would cause the regulated party to stop the injurious action.

This speculative undertaking involves a series of predictions more appropriately made by regulatory agencies than courts. The first prediction, what action the agency might take, is one an Article III court has no legal authority to make: in areas where governmental entities “retain broad discretion to make ‘policy decisions’ . . . Federal courts may not assume a particular exercise of [such] discretion in establishing standing.”⁹⁷

94. *Friends of the Earth v. Laidlaw Envtl. Servs. (TOC), Inc.*, 528 U.S. 167, 187, 30 20246 (2000). Thus, for example, a favorable decision would need to be binding on the parties allegedly causing the injury. *See Lujan*, 504 U.S. at 570 (no redressability where decision “would not have been binding upon the agencies” allegedly causing the injury).

95. *Id.*

96. *DaimlerChrysler Corp. v. CUNO*, 547 U.S. 332, 346 (2006) (internal citations, quotations omitted).

97. *Id.* *See Lujan*, 504 U.S. at 568 (agency actions “to carry out their legal obligations . . . are rarely if ever appropriate for federal court adjudication” (quoting *Allen*, 468 U.S. at 759-60)).

And the second prediction, how regulated parties will respond to a particular governmental regulatory decision is the type of factual prediction that courts are ill-equipped to make; it is more properly the province of agencies, with their knowledge and expertise regarding the regulatory process and its effects, than of courts. Allowing standing in circumstances that would enmesh a court in such a speculative morass runs directly counter to a key purpose of the standing requirement, to enforce “the proper—and properly limited—role of the courts in a democratic society.”⁹⁸

A final type of claim would be a regulated entity’s assertion that race was improperly used in the decision to impose a regulatory restriction or take an enforcement action that injured the claimant. Such a claim would fail on standing grounds because the claimed injury would fall outside the “zone of interest” protected by the Equal Protection Clause. The zone of interest test is a prudential⁹⁹ standing requirement “that a plaintiff’s grievance must arguably fall within the zone of interests protected or regulated by the statutory provision or constitutional guarantee invoked in the suit.”¹⁰⁰ To meet that test, the regulated party raising an equal protection claim would need to establish that *its* equal protection rights were violated in some way by improper use of a racial classification.¹⁰¹ That would likely be impossible.¹⁰²

III. Conclusion

In sum, two sets of constitutional constraints preclude application of strict judicial scrutiny to governmental actions to implement environmental justice. The source of the first set of constraints is the limits the U.S. Constitution places on judicial power. Separation-of-powers principles preclude courts from the type of intrusive judicial review necessary to apply strict scrutiny to exercises of the core executive branch function of executing laws to protect the environment. And a second limitation on the judicial power, the case or controversy requirement, limits courts to considering only claims that are justiciable; standing is an element of justiciability, and a claimant raising an equal protection challenge to a regulatory action to promote environmental justice would face substan-

98. *Warth v. Seldin*, 422 U.S. 490, 498 (1975).

99. Standing “involves both constitutional limitations on federal-court jurisdiction and prudential limitations on its exercise.” *Warth*, 422 U.S. at 498, *quoted in* *Bennett v. Spear*, 520 U.S. 154, 162, 27 ELR 20824 (1997). Prudential limitations are limitations that courts impose on themselves to enforce the proper—and properly limited—role of courts in a democratic society. *Bennett*, 540 U.S. at 162. Without such limitations, courts “would be called upon to decide abstract questions of wide public significance even though other government institutions may be more competent to address the questions.” *Warth*, 422 U.S. at 500. Unlike a constitutional limitation, a prudential limitation can be modified or abrogated by Congress. *Bennett*, 520 U.S. at 162. *See Massachusetts v. EPA*, 127 S. Ct. 1438, 1453, 37 ELR 20075 (2007) (“Congress has the power to define injuries and articulate chains of causation that will give rise to a case or controversy where none existed before.”) (internal quotation omitted).

100. *Bennett*, 520 U.S. at 162.

101. *See Arlington Heights v. Metropolitan Hous. Dev. Corp.*, 429 U.S. 252, 263 (1977) (corporation has no racial identity).

102. A claimant who could establish such a claim, that race, rather than regulated conduct was the reason for the governmental action, would likely be able to show that the regulatory action was not authorized by the statute. A showing of such a violation of the statute would make it unnecessary to reach the question whether the action was constitutional.

tial problems showing each element of standing: injury; causation; and redressability.

A second set of constraints arise from the nature of the equal protection guarantee. Equal protection limits how government can treat people as individuals, asserting personal rights; it does not apply to actions that promote environmental justice by providing protection for groups or classes of people whose only common characteristic is residence in a geographic area or community. Moreover, the equal protection guarantee applies only to government actions that deprive someone of a protected legal interest. Regulatory laws to protect the nation's environment do not create such interests.

In sum, strict scrutiny of equal protection claims, by its nature, is a judicial tool that cannot be used to analyze governmental actions to promote environmental justice. Thus, strict scrutiny and environmental justice, far from being on a collision course, inhabit separate legal realms that cannot intersect, much less collide.