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Scrutinizing Strict Scrutiny: Environmental Justice After Adarand Constructors, Inc. v. Pena

Christine M. Foot*

INTRODUCTION

Environmental justice is achieved when no subset of the population bears a disproportionate share of the environmental burden. Unfortunately, studies repeatedly show that low-income and minority communities bear an elevated share of environmental contamination and its negative health effects. While many have emphasized litigation strategies for those claiming disproportionate environmental exposure, governmental strategies to reduce the incidence of environmental injustice have received less attention.

Since the early 1990s, the U.S. Environmental Protection Agency ("EPA") has taken definite steps toward addressing this inequity. However,

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2. The author acknowledges the sensitivities associated with the term “minority” and employs it strictly as a demographic term referring to those in the racial minority in the United States.


many people became concerned in 2005 when the EPA made a dramatic shift by deemphasizing race in its strategy for identifying potential environmental justice areas of concern. EPA’s proffered rationale for this reversal is that it is mandated by Adarand Constructors, Inc. v. Pena’s holding that federal race-based decision-making must withstand the “strict scrutiny” standard of judicial review: that is it must be narrowly tailored to achieve a compelling governmental purpose.

This Note examines that contention. Part I provides background on environmental justice and the EPA’s different approaches to it. Part II describes the origins of the equal protection clause and examines the Supreme Court’s approach to governmental uses of race. Despite the common simplification of Adarand as applying strict scrutiny to all such uses, several cases suggest the Court actually alters how it determines whether to invoke strict scrutiny based on the context in which the action occurs. As the Court has not yet reviewed race-conscious decision-making in the context of federal environmental protection, Part III predicts how it would analyze such actions. Part III.A describes why strict scrutiny would not apply in this context, while Part III.B outlines why the EPA’s environmental justice strategy could nevertheless survive this rigorous level of review.

I. ENVIRONMENTAL JUSTICE

A. The Problem: Disproportionate Environmental Burden

“[S]cores of studies” have consistently found that all communities in the United States are not equally protected from environmental degradation and its attendant health consequences. Particularly, low-income and minority communities shoulder an environmental burden disproportionately greater than

Hendrick, supra note 3, at 176–77.


their representation in the general population. While environmental justice is now recognized as "a social justice problem, a public health problem, and an environmental problem," this is a relatively recent development. Two landmark studies brought this phenomenon to light in the 1980s. The 1983 General Accounting Office study found that three out of four hazardous waste facilities in the Southeast were located in largely African-American communities—far outpacing the proportion of the region those communities comprised. The 1987 United Church of Christ study found that race was the single best predictor in the location of toxic waste sites throughout the country. Time and again the correlation between demographics and environmental burden has been corroborated: sixty-three of sixty-four studies conducted after the United Church of Christ study found environmental disparities as a result of race or income. Further, the association of race alone—indeed, independent from income—with environmental burden has also been repeatedly documented, undermining simple market explanations for environmental injustices.

The causes of this disparity are varied and can be difficult to trace. While intentional discrimination is likely to blame for a portion of it, much is also due to forces less overt and sinister but equally harmful to those affected. Often, the process of locating environmentally burdensome sites naturally follows the path of least resistance, which leads to placing these sites in communities with diminished access to decision-making processes. Because they often have fewer advocates and resources for voicing their opposition and less political power to wield, low-income and minority communities often get saddled with more "locally undesirable land uses" in their midst. Sometimes that

10. Uma Outka, Comment, Environmental Injustice and the Problem of the Law, 57 ME. L. REV. 209, 258 (2005); see also Hurwitz & Sullivan, supra note 4, at 11.
11. See generally COMM'MN FOR RACIAL JUSTICE, UNITED CHURCH OF CHRIST, TOXIC WASTES AND RACE IN THE UNITED STATES: A NATIONAL REPORT ON RACIAL AND SOCIOECONOMIC CHARACTERISTICS OF COMMUNITIES WITH HAZARDOUS WASTE SITES (1987) [hereinafter UCCCRJ Study]; GAO Study, supra note 9, at 4.
12. GAO STUDY, supra note 9, at 4, App. I.
13. UCCCRJ STUDY, supra note 11, at xiii.
15. Godsil, supra note 8, at 1117-31.
18. See Hernandez, supra note 1, at 187-88; Mahoney, supra note 16, at 368 & n.56; see generally Vicki Been, What's Fairness Got to Do with It? Environmental Justice and the Siting of
inaccessibility to the political system is even intentionally exploited.  

Unequal treatment by government actors further exacerbates the problem. While there are several federal agencies responsible for enforcing environmental laws, the EPA is the lead agency responsible for protecting the environment. In 1992, a National Law Journal article documented racial disparities in the EPA's actions, including that: (1) the EPA's penalties for environmental violations were 500% higher in white communities than in minority communities; (2) hazardous waste sites in minority communities took 20% longer to get on the EPA's cleanup list than those in white communities; and (3) the EPA consistently began clean-up projects later in minority communities than in white communities. These findings strongly suggest that "there is a racial divide in the way the U.S. government cleans up toxic waste sites and punishes polluters." Further, the same study found that the EPA was more likely to choose "containment" of hazardous waste sites in minority communities, in which the hazard is "capped" but left in place, while in white communities the EPA was more likely to opt for full remediation and removal.  

The EPA's mission, "to protect public health and safeguard the natural environment," applies equally to all Americans, a premise backed by the equal protection principles of the Constitution. However, limited resources force the EPA to make decisions about how and where to expend them; these decisions are inevitably influenced by political factors. To the extent that this purportedly unbiased process disfavors low-income and minority communities, those affected have tried constitutional (equal protection) and statutory (Title VI of the Civil Rights Act) claims against the government. However, these strategies have been ineffective because courts have required a demonstration


19. See, e.g., Robert D. Bullard, Anatomy of Environmental Racism and the Environmental Justice Movement, in CONFRONTING ENVIRONMENTAL RACISM: VOICES FROM THE GRASSROOTS 18 (Robert D. Bullard ed., 1993) (quoting a consultant's report on where to locate a waste site as recommending: "All socioeconomic groupings tend to resent the nearby siting of major facilities, but middle and upper socioeconomic strata possess better resources to effectuate their opposition. Middle and higher socioeconomic strata neighborhoods should not fall within the one-mile and five-mile radius of the proposed site.").

20. TOOLKIT, supra note 1, at Preface; see ZYGMUNT J.B. PLATER ET AL., ENVIRONMENTAL LAW AND POLICY: NATURE, LAW, AND SOCIETY 300–01 (3d ed. 2004).


22. Id. at S1.

23. Id. at S2, S6.

24. TOOLKIT, supra note 1, at Preface; see U.S. CONST. amend. V, XIV.

25. Hurwitz & Sullivan, supra note 4, at S2–53; Hernandez, supra note 1, 42 F.3d, 190 & n.49.

of discriminatory *intent* by the actor.27 The Court has refused to interfere with generalized "societal discrimination alone" because the equal protection clause applies only to governmental actions—without an identifiable discriminatory purpose, the *government* has not discriminated.28 The required showing of purposeful discrimination behind actions contributing to environmental injustice has proved insurmountable.29

Not only does the equal protection clause require the EPA to correct its pattern of unequal environmental protection, governmental initiatives are especially critical given the utter lack of success of private litigation based on disparate environmental impact on low-income and minority communities.30 The government is uniquely positioned to address a social problem of this scale, but it may require considering the "racial and distributional implications of decision-making and institutional structures, and tak[ing] more race-conscious actions."31

**B. A Solution? EPA’s Approach Evolves**

After consistent documentation of the inequitable distribution of environmental burden, the federal government recognized its responsibility to address it.32 In 1992, President George H.W. Bush’s EPA established the Office of Environmental Equity—later renamed the Office of Environmental Justice (“OEJ”)—in response to a report prepared by the Agency’s newly formed Environmental Equity Workgroup.33 This report provided support for a prior finding by the Congressional Black Caucus that the EPA was “unfairly

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27. Arlington Heights v. Metro. Hous. Dev. Corp., 429 U.S. 252, 265, 269, 270 (1977) (finding that although the action did "arguably bear more heavily on racial minorities" such a disparity alone does not require strict scrutiny: there is no equal protection violation when actions are not shown to have been motivated by a "discriminatory purpose"); Washington v. Davis, 426 U.S. 229, 242–48 (1976).


29. See Hurwitz & Sullivan, supra note 4, at 51–52 ("With a total of nearly 60 Title VI complaints having been filed, there has not been one finding of a violation.").

30. Outka, supra note 10, at 210 ("Most legal claims directly addressing environmental injustice fail, recent developments in civil rights case law are discouraging, and current constructions of environmental laws are proving theoretically inadequate to protect communities already subjected to disproportionate toxic exposure or threatened by new pollution.").


applying its enforcement inspections and that environmental risk was higher in racial minority and low-income populations."\textsuperscript{34}

\textbf{1. A Step Forward: Executive Order 12,898}

Soon after, President Clinton sought to increase the federal government’s focus on environmental justice: he issued Executive Order 12,898 ("EO 12,898" or "Order"): "Federal Actions to Address Environmental Justice in Minority Populations and Low-Income Populations."\textsuperscript{35} It directed each federal executive agency to "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...."\textsuperscript{36} In response, several agencies promulgated rules incorporating environmental justice concerns into their day-to-day activities and decision-making.\textsuperscript{37} The Order further instructed agencies to develop strategies to address disparate impacts, to identify programs and policies for revision, to enhance public participation in agency programs, and to collect, maintain, and analyze information to monitor environmental justice issues.\textsuperscript{38}

These and the other actions required by EO 12,898 all focus procedurally on how agencies should incorporate environmental justice concerns in their actions: it does not specify any substantive results the agencies must achieve.\textsuperscript{39} It aims "only to improve the internal management of the executive branch," and so does not "create any right... or...responsibility...enforceable at law or equity..."\textsuperscript{40} The Order serves as a public—and ideally preventative—counterpart to private Title VI and equal protection litigation which is necessarily remedially focused.\textsuperscript{41}

As required by EO 12,898, the EPA developed an agency-wide strategy for achieving environmental justice.\textsuperscript{42} The Agency defined environmental

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\textsuperscript{34} U.S. Envtl. Prot. Agency, supra note 5; see generally EEW REPORT, supra note 33.
\textsuperscript{36} Id. § 1-101.
\textsuperscript{37} See, e.g., 7 C.F.R. § 4280.114(c) (2006) (Department of Agriculture rule stating that before committing resources to a proposed project, it will "conduct a Civil Rights Impact Analysis (CRIA) with regards to environmental justice."); 24 C.F.R. § 58.5 (2006) (Department of Housing and Urban Development rule stating that EO 12,898 is one of many "laws and authorities" with which it requires an entity to comply in its "environmental review, decision-making and action."); 32 C.F.R. § 651.17 (2006) (Department of Defense rule requiring proponents of projects triggering environmental analysis to "determine whether the proposed action will have a disproportionate impact on minority or low-income communities.").
\textsuperscript{38} EO 12,898, supra note 35, §§ 1-103, 3-302, 5-5.
\textsuperscript{39} See generally id.
\textsuperscript{40} Id. § 6-609.
\textsuperscript{41} See generally id.; see also Hurwitz & Sullivan, supra note 4, at 15.
\textsuperscript{42} See generally EO 12,898, supra note 35, § 1-103; U.S. ENVTL. PROT. AGENCY, THE
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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." In the ensuing years, the EPA issued several guidance documents outlining how to incorporate environmental justice into its National Environmental Policy Act analyses, permitting processes, and enforcement strategies. The EPA also issued regulations pursuant to Title VI prohibiting "discriminatory effects" in the actions of recipients of federal funds.

2. Maintaining Momentum After Adarand Constructors, Inc. v. Pena

If the 1995 Adarand decision contravened federal attempts to implement EO 12,898, it took the federal government ten years to recognize it. When that decision, discussed in Part II.A.2, infra, held that strict scrutiny applies to most government uses of race in decision-making, the federal government reexamined its activities to ensure compliance with it. Shortly after, the Department of Justice ("DOJ") issued a preliminary legal guidance to the General Counsels of all the administrative agencies regarding Adarand's...

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43. See, e.g., Toolkit, supra note 1, at 9. These terms are further defined:

Fair treatment means that no group of people, including racial, ethnic, or socioeconomic groups, should bear a disproportionate share of the negative environmental consequences resulting from industrial, municipal, and commercial operations or the execution of federal, state, local, and tribal environmental programs and policies. Meaningful involvement means that: 1) potentially affected community residents have an appropriate opportunity to participate in decisions about a proposed activity that will affect their environment and/or health; 2) the public's contribution can influence the regulatory agency's decision; 3) the concerns of all participants involved will be considered in the decision-making process; and 4) the decisionmakers seek out and facilitate the involvement of those potentially affected. Id.


45. See, e.g., 40 C.F.R. §§ 7.30, 7.35 ("Nondiscrimination in Programs or Activities Receiving Federal Assistance from the Environmental Protection Agency"); Hendrick, supra note 3, 164. Although the Court later found no private right of action in such regulations. Alexander v. Sandoval, 532 U.S. 275, 293 (2001).

implications on "federal affirmative action programs." This guidance outlined the decision, DOJ's understanding of it, and factors to consider when evaluating a given program for consistency with it. Although this guidance did not address any program or agency specifically, EPA's subsequent environmental justice initiatives were taken by a government fully aware of the decision and suggest a perceived compliance with it.

In 2001, EPA Administrator Christine Todd Whitman reaffirmed the George W. Bush administration's commitment to ensuring environmental justice. While regional EPA offices devised methodologies for incorporating environmental justice concerns into their day-to-day permitting, inspection, and enforcement activities, the Office of Enforcement and Compliance Assurance - the office responsible for enforcing the Nation's environmental laws and which houses OEJ - concurrently created an Agency-wide enforcement strategy. The initial result, the "Environmental Justice Smart Enforcement Targeting Strategy" ("EJSETS"), outlined a plan for ensuring equitable treatment for low-income and minority communities in the EPA's selection of which compliance violations to take enforcement action against. EJSETS employed four categories of factors by which every community would be evaluated: health vulnerabilities, regulatory compliance, environmental conditions, and social demographics. The factors included: disease incidence rates and infant mortality rates (health), compliance rates and enforcement history (compliance), emission rates and ozone attainment status (environmental), and race, income and age (demographic). The use of race and income was consistent with every environmental justice analysis, EO 12,898, and the EPA's environmental justice definition.

While this strategy aimed to identify communities with increased environmental burden, this is an elusive goal because environmental justice

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47. DOJ Guidance, supra note 46.
48. Id.
52. See EJSETS, supra note 7, at iii, 1, 2.
53. Id.
54. Id. at 4-10.
55. See id. at 7; see, e.g., EO 12,898, supra note 35; TOOLKIT, supra note 1, at 7; GAO STUDY, supra note 8, at 3; UCCCRJ STUDY, supra note 10, at ix-x.
issues are often extremely localized. Accurate environmental burden analyses generally require data at the town, or ideally, neighborhood levels, while health and environmental data is often tracked at the state or county levels. For example, the health commission in a large city might track the incidence rates of certain diseases in its various neighborhoods, but such detailed data is not collected in every town in the country, nor is the data collected using a consistent methodology which would allow comparisons between towns. Although comprehensive environmental and health data is often lacking at a small enough scale to reveal localized pockets of negative health effects of environmental burden, extremely localized demographic data is available via the U.S. Census Bureau. Thus, given the extensive research documenting the correlation between race and income and elevated environmental burden, those demographic characteristics can be used as a proxy for targeting communities at an increased risk for environmental justice concerns while comprehensive environmental and health data acquisition lags.

3. A Major Reversal: Limiting Role of Race in Analysis

Although President George W. Bush left EO 12,898 intact, his administration departed significantly from prior environmental justice approaches. Around the time it reaffirmed its commitment to environmental justice in November 2005, it also began to cite Adarand as forbidding any consideration of race in its environmental justice decision-making. This came nearly ten years after that decision and DOJ’s analysis of it, as well as thirteen years after the EPA’s acknowledgement of the role race plays in environmental disparities.

At the same time, the EPA revised EJSETS into the “Environmental Justice Smart Enforcement Assessment Tool” (“EJSEAT”). EJSEAT is very

56. See EJSEAT, supra note 7, at 11–12, 15 (acknowledging data shortfalls).
57. See id.
58. See id. at 12; Healthy Places Act of 2007, H.R. 398, 110th Cong. (2007) (legislation recognizing the paucity of comprehensive health and environmental data in requiring federal agencies to gather information to fill in data gaps on health effects and exposure rates and pathways to better inform federal regulatory decision-making).
60. See EJSEAT, supra note 7, at 15 (acknowledging the need for surrogate variables).
61. See Bullard, supra note 6, at 16–37 (tracking notable environmental justice developments from 1987–2007); EJSEAT, supra note 7, iii.
63. See generally Adarand, 515 U.S. 200; DOJ Guidance, supra note 46; notes 33–35, supra.
64. See EJSEAT, supra note 7, at 1.
similar to its predecessor, except that it removes race from EPA’s “Smart Enforcement” targeting strategy. Changes to this tool are significant because the Agency intends to use it as a model for achieving environmental justice in programs other than enforcement.

Thus far, no guidance prescribes how EJSEAT will be used in decision-making. The EPA is considering whether to modify enforcement memoranda “to incorporate EJSEAT information.” The enforcement office plans to use EJSEAT to “make informed, efficient, and fair decisions to ensure that attention is given to the most significant public health and environmental problems....” It will evaluate the EJSEAT factors and employ a ranking system “to ensure identification of facilities, sectors, and geographic areas that may have, or contribute to, disproportionately high and adverse human health or environmental impacts.” However, there is no indication that simply being ranked highly by the EJSEAT will automatically qualify an area for action.

This paper assumes that the EJSEAT will be used as a tool for gathering information when considering facilities for enforcement action and that the EPA would retain the current practice of evaluating other factors like available resources, strategic priorities, and severity of violation, as part of its larger decision-making process.

Changes to an administrative agency’s procedural activities are largely discretionary. Courts have confirmed that procedural executive orders like EO 12,898 are not legally binding on agencies and can only be enforced at the President’s discretion, not by citizens. Only subsequent administrations would

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65. See EJSEAT, supra note 7, at iii. This version retains race as a post-action measurement tool for gauging its success in equitable environmental protection. See id. at iii, 3, 4. While EPA continues to revise EJSEAT, the removal of race is a constant. This paper refers to the version from November 2005.

66. OFFICE OF INSPECTOR GEN., U.S. ENVTL. PROT. AGENCY, EPA NEEDS TO CONDUCT ENVIRONMENTAL JUSTICE REVIEWS OF ITS PROGRAMS, POLICIES, AND ACTIVITIES 7 (2006) (“OEJ envisions that other...offices will develop similar guidance documents...”).


68. EJSEAT, supra note 7, at 15. Absent an express change incorporating EJSEAT into existing enforcement procedures, those currently in force will persist. See supra note 67.

69. EJSEAT, supra note 7, at 3.

70. See id. at 2, 11, 15.

71. See id. at i ("This document provides guidance to EPA staff...[It] does not confer legal rights or impose legal requirements on anyone.").

72. See id. at iii; supra note 67.

73. See U.S. CONST. art. II (vesting in the president the power to define bureaucratic policies and guidelines consistent with his role as head of the executive branch).

74. See Hernandez, supra note 1, at 205–06. But see S. 642, 110th Cong. (2007) and H.R. 1103, 110th Cong. (2007) (These companion bills would codify much of EO 12,898, while eliminating the bar against judicial review of the government’s compliance with it, thus opening
have equal authority to rescind this reversal. Therefore, those concerned about the EPA's reversal have little legal recourse beyond publicly evaluating the contention that Adarand mandates this change.

II. THE PROMISE OF EQUAL PROTECTION

A. A Constitutional Requirement

Immediately following the Civil War, the Constitution gained three amendments. The Thirteenth Amendment abolished slavery; the Fourteenth Amendment outlawed governmental discrimination by states and extended citizenship to all people born or naturalized in the United States (including former slaves); and the Fifteenth Amendment affirmed voting rights for these new citizens. Their passage acknowledged the lingering effects of slavery on the Nation's newly-free but still-subjugated black citizens and attempted to secure equal civil rights for them.

The Fourteenth Amendment contains the only express mention of equal protection in the Constitution. Section one states:

No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

It was designed to protect black Americans from invidious discrimination by state actors—that is, action motivated by racial animus.

While the Fourteenth Amendment governs only state action, it is largely analogous to the Fifth Amendment, which applies to the federal government. That amendment provides, in part: "No person shall...be deprived of life, liberty, or property, without due process of law...." Although the Fifth

the possibility of raising complaints of environmental justice violations in court.)

75. See U.S. CONST. art. II.
76. See, e.g., EJSEAT, supra note 7, at iii. See also supra note 30 (describing the difficulties of environmental justice litigation).
78. Id.
79. See id. at 282.
80. See generally U.S. CONST.
83. Bolling v. Sharpe, 347 U.S. 497, 499–500 (1954); CHEMERINSKY, supra note 77, at 643. Although the Court has acknowledged that "[t]he 'equal protection of the laws' is a more explicit safeguard of prohibited unfairness than 'due process of law....'" Bolling, 347 U.S. at 499.
84. U.S. CONST. amend V.
Amendment contains no express equal protection clause, the Court has held that equal protection principles are imputed onto the federal government through its due process clause. The Court subsequently resolved any lingering question in Adarand: "[e]qual protection analysis in the Fifth Amendment area is the same as that under the Fourteenth Amendment."

Governmental actions that distinguish between classes of people based on certain traits raise equal protection questions. Courts apply three levels of scrutiny, depending on the basis for the classification, to determine whether equal protection principles have been violated. Under the rational basis test, the governmental action must only be rationally related to a legitimate governmental purpose. Intermediate scrutiny requires the action be substantially related to an important governmental purpose. The most rigorous standard, strict scrutiny, requires these actions to be narrowly tailored to serve a compelling governmental interest.

Because "legal restrictions which curtail the civil rights of a single racial group are immediately suspect," they are one of the triggers for strict scrutiny. This reflects that the "central purpose" of the Fourteenth Amendment was "to eliminate all official state sources of invidious racial discrimination."

Questions remained, however regarding the level of scrutiny for remedial race-based affirmative action measures—that is, those designed to help rather than harm a racial group. Because these actions also employ racial classifications, despite their good intentions, they risk unequal treatment to members of the racial classes not benefiting from the remedial measures. Therefore, the Court now subjects most remedial race-based measures to the same judicial standard as invidious ones.

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85. Bolling, 347 U.S. at 499 (explaining that "discrimination may be so unjustifiable as to be violative of due process").
86. Adarand, 515 U.S. at 217 (quoting Buckley v. Valeo, 424 U.S. 1, 93 (1976)); see Bolling, 347 U.S. at 500 (concluding that "it would be unthinkable that the same Constitution would impose a lesser duty on the Federal Government" than on the states).
87. CHEMERINSKY, supra note 77, at 644.
88. Id. at 645.
89. Id. at 646.
90. Id. at 645.
91. Id.
93. Loving v. Virginia, 388 U.S. 1, 10 (1967).
94. See CHEMERINSKY, supra note 77, at 704.
96. CHEMERINSKY, supra note 77, at 704. This is despite many scholars, and justices, insisting on a critical distinction between government actions designed to perpetuate rather than eliminate racial inequality. See, e.g., Charles J. Falletta, Casenote, Fifth and Fourteenth Amendments—Due Process and Equal Protection—Federal Affirmative Action Programs, Like Those of a State, Must Serve a Compelling Governmental Interest and Must Be Narrowly Tailored to Further that Interest—Adarand Constructors, Inc v. Pena, 115 S. Ct. 2097 (1995), 6 SETON HALL CONST. L.J. 295, 338–39 (1995). Further, the need to prove discriminatory intent to trigger
However, not every governmental use of race is subject to strict scrutiny.97 Further, the Court varies the way it decides whether strict scrutiny applies with the context in which the action occurs.98 A distinction has emerged which suggests that the Court uses one method of analysis for contexts which impact a financial interest—such as employment, education, and contracting—while another is used in contexts lacking such an interest—as in legislative redistricting.99

B. Strict Scrutiny Standard of Review for Uses of Race in Contexts Impacting a Financial Interest

The Court’s treatment of remedial uses of race by government, in contexts involving a financial interest, has tightened in the past thirty years. The Court established first that remedial state actions would be subject to strict scrutiny just as invidious ones are.100 Initially, comparable federal actions were reviewed with the more lenient intermediate scrutiny, but in Adarand Constructors, Inc. v. Pena, the Court applied the strict scrutiny standard to remedial federal actions as well.101 All of the cases in this line of precedent, however, implicated a financial interest: contracting (Fullilove, Croson, Adarand), employment (Wygant, Paradise), business licenses (Metro Broadcasting), and higher education (Bakke, Grutter, Gratz).102 These cases help indicate the concerns which prompt the Court to apply strict scrutiny in financial contexts and help suggest which actions can survive it.

1. Strict Scrutiny for State Actions

The Court has consistently reviewed remedial (also referred to as
“benign”) uses of race by states with strict scrutiny.\textsuperscript{103} While it has acknowledged that the Fourteenth Amendment was designed to compensate for the consequences of slavery and past racial subjugation, it remained concerned about requiring innocent white individuals to bear a burden to advance the interests of a group as a whole.\textsuperscript{104} It has also expressed concern about reinforcing stereotypes about the abilities of those in the protected group.\textsuperscript{105} Therefore, it closely examines the asserted government interest to ensure that it is sufficiently compelling to resort to the use of race to achieve.\textsuperscript{106}

\textbf{a. Establishing a Compelling Governmental Interest}

The Court has not held that a state actor can \textit{never} use race-based measures, but it does require a compelling reason for doing so.\textsuperscript{107} The Court has recognized a compelling governmental interest in remedying identified discrimination.\textsuperscript{108} This can be either the governmental entity’s own discrimination or that of private actors within its jurisdiction if the government has become a “passive participant” in the discrimination.\textsuperscript{109}

In \textit{City of Richmond v. J.A. Croson Co.}, the city council of Richmond, Virginia asserted such discrimination was to blame for the abysmally low percentage (0.67\%) of subcontracts being awarded to such businesses, despite half of the City’s population being minority.\textsuperscript{110} Accordingly, it adopted a minority set-aside provision that required recipients of city construction contracts to award at least thirty-percent of their subcontracts to minority business.\textsuperscript{111} In applying strict scrutiny the Court held that to establish a compelling interest in remedying identified discrimination, the government actor must satisfy two conditions: (1) the discrimination must be specifically identified, supported by (2) a “strong basis in evidence” to conclude that remedial action was necessary.\textsuperscript{112} Such “searching judicial inquiry into the justification for race-based measures” is needed to distinguish truly benign measures from those “motivated by illegitimate notions of racial

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\item\textsuperscript{104} \textit{Wygant}, 476 U.S. at 282, 283–84; \textit{Bakke}, 438 U.S. at 289–90 (stating that “the guarantee of equal protection cannot mean one thing when applied to one individual and something else when applied to a person of another color”).

\item\textsuperscript{105} \textit{Bakke}, 438 U.S. at 298–99.

\item\textsuperscript{106} \textit{See Croson}, 498 U.S. at 505 (finding insufficient support for the government’s assertion of discriminatory practices).

\item\textsuperscript{107} \textit{See Bakke}, 438 U.S. at 301; CHEMERINSKY, \textit{supra} note 77, at 705; Falletta, \textit{supra} note 96, at 319–20.

\item\textsuperscript{108} \textit{Wygant}, 476 U.S. at 274; \textit{Paradise}, 480 U.S. at 167.

\item\textsuperscript{109} \textit{Croson}, 488 U.S. at 479–80.

\item\textsuperscript{110} \textit{Id.} at 479–80, 492.

\item\textsuperscript{111} \textit{Id.} at 479.

\item\textsuperscript{112} \textit{Id.} at 507 (quoting \textit{Wygant}, 476 U.S. at 277 (plurality opinion)), 510.
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The City failed to convince the Court of the existence of any discriminatory practices in the City’s contracting methods which would warrant corrective action. Without such a showing, it was unclear that “remedial action was necessary,” since the Court has never held that “societal discrimination alone” is sufficient to justify a racial classification.

b. Clarifying Narrow-Tailoring

In its initial cases, the Court did not clarify what characteristics were needed for an action to be considered appropriately narrowly tailored: stating that the government simply needed to find “[o]ther, less intrusive means” of achieving its goals (Wygant) and that a given quota appeared arbitrary (Croson). Two subsequent cases help clarify what actions will satisfy the narrow tailoring requirement. On June 23, 2003, the Court handed down differing decisions on challenges to admission policies at two University of Michigan schools. Grutter v. Bollinger concerned the Law School, while Gratz v. Bollinger focused on the College of Literature, Science and the Arts (“LSA”). While it acknowledge that diversity in higher education could be a compelling state interest, the Court found that the Law School’s policy was narrowly tailored but the LSA’s was not.

White applicants who were denied admission to the LSA challenged the “practice of racial discrimination pervasively applied on a classwide basis.” The admissions policy awarded points for several factors, including grades, test scores, school quality, curriculum challenge, alumni connections, leadership, as well as the racial identity of applicants. LSA automatically added twenty extra points to candidates belonging to an “underrepresented minority” group. As a result, borderline applicants with equivalent applications prior to the consideration of race were treated differently—the minority applicant would be promptly admitted while a decision for the white applicant would be postponed and possibly rejected.

The Court confirmed that, as in Bakke, “the consideration of race as a factor in admissions might in some cases serve a compelling government interest” like educational diversity. But it then determined that the automatic

113. Id. at 493.
114. Id. at 505.
115. Id. at 500 (quoting Wygant, 476 U.S. at 277), 505.
117. See generally Gratz, 539 U.S. 244; Grutter, 539 U.S. 306.
118. See generally Gratz, 539 U.S. 244; Grutter, 539 U.S. 306.
119. Gratz, 539 U.S. at 275; Grutter, 539 U.S. at 343.
120. Gratz, 539 U.S. at 253.
121. Id.
122. Id. at 255, 270.
123. Id. at 254.
124. Id. at 257 (citing Bakke, 438 U.S. at 317).
point-adding system was not narrowly tailored to such an interest because it did not provide individualized consideration of candidates.125

Similarly, when white applicant Grutter was denied admission to the Law School, she challenged the use of race in the school’s admission policy.126 However, the Law School’s race-conscious admissions policy differed from the LSA’s because it did not insulate any individual from comparison with all of the other candidates.127 Though it did consider minority status “a plus,” it conducted a flexible and “highly individualized, holistic review” of every applicant.128 This satisfied the Court that the process did not “unduly burden individuals who are not members of the favored racial and ethnic groups,” and the policy therefore withstood strict judicial scrutiny.129

2. Changing Standard for Federal Action

Even as the Court repeatedly applied strict scrutiny to state remedial uses of race, it initially afforded federal actions greater latitude.130 In *Fullilove* v. *Klutznick*, the Public Works Employment Act required (absent a waiver) that ten percent of the federal funds granted for public works projects be reserved for services or supplies from minority-owned or operated businesses.131 Similarly, in *Metro Broadcasting, Inc.* v. *FCC*, the Court reviewed a Federal Communications Commission policy of reserving a specified percentage of certain radio and television broadcast licenses for minority-controlled businesses.132 Despite the uses of quotas, the Court held that intermediate scrutiny was the appropriate standard of review because Congress had the authority and expertise to take remedial measures in these contexts.133 Therefore, the policy needed to be substantially related to serving an important governmental objective.134

In both cases, the Court emphasized that deference was due to Congress.135 Consistent with its decisions on school districting schemes that considered the racial makeup of a student body,136 the Court rejected the notion

128. *Id.* at 337.
129. *Id.* at 341 (citing *Metro Broadcasting*, 497 U.S. at 630) (O’Connor, J., dissenting).
131. *Fullilove*, 448 U.S. at 453–54. The plurality opinion actually left the level of scrutiny it used in *Fullilove* unclear, but later courts interpreted it as intermediate scrutiny. *See* CHEMERINSKY, *supra* note 77, at 705; DOJ Guidance, *supra* note 46.
133. *Id.* at 564–65, 569, 572.
134. *Id.* at 564–65.
that "in the remedial context the Congress must act in a wholly 'color-blind' fashion."\textsuperscript{137} Though whites might take issue with the consequences, the Court explained that "[w]hen effectuating a limited and properly tailored remedy to cure the effects of prior discrimination, such 'a sharing of the burden' by innocent parties is not impermissible."\textsuperscript{138} The Court also approvingly noted that the provision did not allocate federal funds according to "inflexible percentages solely based on race or ethnicity."\textsuperscript{139}

This greater latitude for the federal government ceased in 1995 when the Court established that any federal racial classifications must also be narrowly tailored to serve a compelling governmental interest.\textsuperscript{140} Sub-contractor Adarand Constructors, Inc. challenged a federal Department of Transportation practice of providing financial incentives to recipients of federal contracts who subcontract to small businesses certified as being controlled by "socially and economically disadvantaged individuals."\textsuperscript{141} When its low bid was passed over for a subcontract on a construction project in favor of a certified small disadvantaged business, it alleged an equal protection violation.\textsuperscript{142}

The Court began by re-establishing that equal protection analysis under the Fifth Amendment was consistent with that under the Fourteenth Amendment.\textsuperscript{143} Despite the intervening Metro Broadcasting decision adopting a lower standard of review for the federal government,\textsuperscript{144} once the Court established the Fifth/Fourteenth symmetry, it looked to the standard applied at the state level in Croson.\textsuperscript{145} It again expressed concern that without strict scrutiny, it was difficult to distinguish remedial classifications from those based on illegitimate racial stereotypes or prejudices.\textsuperscript{146} Then the Court emphasized that equal protection principles "protect persons, not groups," and that it was the Court's responsibility to examine any group-based classification to ensure that "the personal right to equal protection of the laws has not been infringed."\textsuperscript{147}

\textbf{C. Varying Standard of Review for Uses of Race in Redistricting Context}

The preceding cases all involve a financial interest, whether in

\textsuperscript{137} Id.
\textsuperscript{138} Id. at 484 (quoting Franks v. Bowman Transp. Co., 424 U.S. 747, 777 (1976)).
\textsuperscript{139} Id. at 473.
\textsuperscript{140} Adarand, 515 U.S. at 227.
\textsuperscript{141} Id. at 205.
\textsuperscript{142} Id. at 205–06.
\textsuperscript{143} Id. at 213–18.
\textsuperscript{144} Metro Broadcasting, 497 U.S. at 564–65.
\textsuperscript{145} Adarand, 515 U.S. at 234–35.
\textsuperscript{146} Id. at 226.
\textsuperscript{147} Id. at 227; see Hirabayashi v. United States, 320 U.S. 81, 100 (1943).
employment, contracting, business, or higher education.\textsuperscript{148} While they establish that the Court now reviews both federal and state remedial actions in these contexts with strict scrutiny, the Court has held certain other governmental uses of race in decision-making to a lesser standard of review.\textsuperscript{149} As the following cases show, in determining the applicable level of scrutiny for electoral redistricting methods, the Court has consistently based its decision on not whether race was used, but how.\textsuperscript{150}

1. Strict Scrutiny if Race Was “Dominant and Controlling” in Decision-Making

In \textit{Shaw v. Reno} (“\textit{Shaw I}”), residents of a newly-drawn majority-minority North Carolina congressional district filed an equal protection complaint that the Legislature had aimed to “create Congressional Districts along racial lines.”\textsuperscript{151} The Court held that because of the grave risks posed by “[c]lassifications of citizens solely on the basis of race,” they need to withstand strict scrutiny.\textsuperscript{152} That standard is needed where the result is “unexplainable on grounds other than race.”\textsuperscript{153} However, it was careful to explain that mere “race consciousness does not lead inevitably to impermissible race discrimination.”\textsuperscript{154}

\textit{Miller v. Johnson} came down in 1995 after both \textit{Croson} and \textit{Adarand} had held that race-based governmental decision-making triggers strict scrutiny in the contexts of employment and contracting.\textsuperscript{155} As in \textit{Shaw I}, the Court held that if a state legislature drew voting districts on the basis of race, strict scrutiny would apply.\textsuperscript{156} But, it slightly broadened how to determine whether race was “the basis” for the action: it dropped \textit{Shaw I}’s requirement of race being the “sole” factor, holding that race need only to have been the “predominant factor” in line-drawing to warrant strict scrutiny.\textsuperscript{157} The use of race must be shown to have “subordinated traditional race-neutral districting principles.”\textsuperscript{158}

In selecting the appropriate level of review, the Court evaluated whether “legitimate districting principles” were essentially disregarded in favor of racial

\begin{itemize}
  \item \textsuperscript{148} See Part II.B., supra.
  \item \textsuperscript{149} See \textit{Easley}, 532 U.S. at 257.
  \item \textsuperscript{150} See \textit{id.} at 241, 257; \textit{Bush v. Vera}, 517 U.S. 952, 958 (1996).
  \item \textsuperscript{151} \textit{Shaw v. Reno}, 509 U.S. 630, 635, 637 (1993) [hereinafter \textit{Shaw I}].
  \item \textsuperscript{152} \textit{id.} at 643 (emphasis added).
  \item \textsuperscript{153} See \textit{id.} at 643 (quoting \textit{Arlington Heights}, 429 U.S. at 266).
  \item \textsuperscript{154} \textit{id.} at 646.
  \item \textsuperscript{155} See generally \textit{Miller v. Johnson}, 515 U.S. 900 (1995); \textit{Croson}, 488 U.S. 469; \textit{Adarand}, 515 U.S. at 205–06.
  \item \textsuperscript{156} \textit{Miller}, 515 U.S. at 920.
  \item \textsuperscript{157} \textit{id.} at 916.
  \item \textsuperscript{158} \textit{id.} Justice O’Connor’s concurrence was even more explicit: strict scrutiny only applies where “the State has relied on race in substantial disregard of customary and traditional districting practices.” \textit{id.} at 928 (emphasis added)
\end{itemize}
considerations. It found that strict scrutiny did apply because while not solely based on racial classifications, the evidence that the districts were dominated by racial considerations was "exceptional." The state had "substantially neglected" traditional districting criteria, focusing from the outset on creating majority-minority districts. Because racial considerations predominated in the decision-making process, strict scrutiny was required.

The Court applied the same analysis the next year in Shaw v. Hunt (Shaw II). Again, race could be one factor in the redistricting process, and yet the "constitutional wrong [only] occurs when race becomes the 'dominant and controlling' consideration." The Court also restated the test outlined in Croson for determining whether there was a compelling interest in remedying past discrimination.

2. Intermediate Scrutiny If Race Did Not Predominate in Decision-Making

The 2001 decision in Easley v. Cromartie marked the first time the Court refrained from applying strict scrutiny to race-conscious legislative redistricting. It affirmed yet again that the application of strict scrutiny to redistricting decisions turns not on whether race was used, but how it was used. The Court confirmed that the fact that the legislature "considered race, along with other partisan and geographic considerations...says little or nothing about whether race played a predominant role...." While the state had considered race, there was ample evidence that other factors were also considered. It had not considered race instead of traditional districting criteria, and there was no evidence in the record that race played a predominant role. Lacking proof of such a use, the Court did not apply strict scrutiny. The Court also emphasized the need to afford states additional deference in this context because it falls within their traditional sphere of competence.

159. Id. at 959. The court distinguished purely political, ergo non-justiciable, gerrymandering tactics. Id. at 964.
160. Id. at 972–73.
161. Id. at 962 (emphasis added).
162. Id.
164. Id. at 905 (citing Miller, 515 U.S. at 911, 915–16).
165. Miller, 515 U.S. at 922 (citing Croson, 498 U.S. at 500–01).
166. Easley, 532 U.S. at 257. Interestingly, this was the fourth time the Court examined redistricting of North Carolina's twelfth district. Both Shaw I and Shaw II addressed a prior version of District Twelve, while Easley and its predecessor Hunt v. Cromartie, 526 U.S. 541 (1999), reviewed a 1997 revision of that district. Id. at 237–38.
167. Id. at 253.
168. Id. at 257.
169. Id.
170. See id. See also Veith v. Jubelirer, 541 U.S. 267, 305–06 (2004) (finding that strict scrutiny did not apply to redistricting scheme because there was no evidence that race predominated in the decision, rendering it a non-justiciable political question).
171. Easley, 532 U.S. at 242 ("[T]he legislature 'must have discretion...to balance
III. ANALYZING EPA'S ENVIRONMENTAL JUSTICE EFFORTS

Despite the characterization of Adarand Constructors, Inc. v. Pena as barring federal uses of racial classifications, a broader review of Supreme Court decisions confirms that the Court finds race-conscious governmental decision-making acceptable under certain conditions. Although the Court has yet to consider an equal protection case in the context of federal environmental protection, existing jurisprudence provides a basis for predicting how it would evaluate EPA's use of a targeting tool like EJSEAT. It suggests that Adarand will have limited applicability for this type of action, given its similarity with the redistricting cases which warrant a lesser standard of review. Under such an analysis, the Court is not likely to apply strict scrutiny, although precedent suggests that use of EJSEAT could survive even this high level of review.

A. EPA's Use of EJSEAT Would Not Trigger Strict Scrutiny

The Court reviews race-conscious redistricting methods more leniently than it does the use of race in financial contexts. This indicates that it perceives a difference between this type of action and the more traditional "affirmative action" measures. Justice Stevens expressly acknowledged this dichotomy, writing that "a contextual approach to scrutiny is altogether fitting." He pointed out in Parents Involved in Community Schools v. Seattle School Dist. No. 1, that "hundreds of state and federal statutes and regulations use racial classifications..." Justice Kennedy also acknowledged that these measures, like redistricting, do not require strict scrutiny. Because environmental protection has more in common with redistricting than actions impacting financial interests, as discussed below, the Court's method of

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172. See EJSEAT, supra note 7, at iii, 3, 4; DOJ Guidance, supra note 46; supra Parts II.C.
173. See supra notes 66–71, for the assumptions regarding the use of EJSEAT upon which this paper is based; Parts II.B–C., supra.
174. See supra Parts II.B–C.
175. See Shaw I, 509 U.S. at 680 (Souter, J., dissenting) ("[T]he Court has analyzed equal protection claims involving race in electoral districting differently from equal protection claims involving other forms of governmental conduct... "). Although Justice Souter qualified this statement with "until today," an analysis of the Court's subsequent redistricting cases suggests that a distinction between the types of cases persists. See supra Parts II.B–C.
176. Seattle, 127 S.Ct. at *36 (Steven, J., dissenting).
177. Id. at *61 (Stevens, J., dissenting). See also id. at *27 (noting that "without being exhaustive, [he had] counted 51 federal statutes [and over 100 state statutes] that use racial classifications").
178. Id. at *9 (Kennedy, J., concurring in part and concurring in the judgment). Justice Kennedy's concurrence, then, suggests that a five member majority of the Court acknowledges that certain race-conscious federal actions are indeed shielded from strict scrutiny, just as state redistricting efforts may be.
determining the standard of review is likely to be more similar to the former.\textsuperscript{179} That analysis would not require strict scrutiny for using EJSEAT.\textsuperscript{180}

1. EPA’s Use of EJSEAT Is More Akin to Redistricting Than to Actions Impacting a Property Interest

Environmental protection differs in significant ways from the majority of the Court’s remedial equal protection cases. Differences include the interests at stake, the target of the action, the purpose and form of action, and the deference due to the actor in the given context.\textsuperscript{181} These qualities all render environmental protection more analogous to the redistricting cases than the other equal protection cases.

a. No Financial Interest at Stake

Aside from cases dealing with redistricting, the major Supreme Court cases considering equal protection challenges to a government’s remedial measures have occurred in contexts involving competition for access to a financial interest.\textsuperscript{182} Those interests break into the categories of employment, contracting, business, and higher education.\textsuperscript{183} Jobs, acquisition of business licenses or contracts, and admission to college, medical school or law school, all involve specific and tangible financial impacts. They directly result in either income or increased prospects for it. When affirmative action measures benefit minorities by providing enhanced access to such an interest, white candidates are burdened because their ability to compete for the financial interest is hampered by their race. Conversely, neither redistricting nor the EPA’s use of EJSEAT in pursuit of environmental justice have this same potential to benefit or burden individuals in a financial capacity.

The interest in race-conscious redistricting is in ensuring minority voters the opportunity to elect a representative.\textsuperscript{184} Minorities are not afforded a benefit which whites are denied.\textsuperscript{185} Regardless of where district boundaries are drawn, all citizens retain an equal right to have their votes counted.\textsuperscript{186} Thus, these measures do not impose a burden on anyone, as that concept is traditionally understood in equal protection analyses, because no individual must forgo having his or her vote counted.\textsuperscript{187}

\begin{itemize}
  \item \textsuperscript{179} See infra Part III.A.1.
  \item \textsuperscript{180} See infra Part III.A.2.
  \item \textsuperscript{181} See infra Parts III.A.1.a–d.
  \item \textsuperscript{182} See supra Part II.B.
  \item \textsuperscript{183} See id.
  \item \textsuperscript{184} See CHEMERINSKY, supra note 77, at 717.
  \item \textsuperscript{185} Shaw I, 509 U.S. at 681–82 (Souter, J., dissenting); see generally Reynolds \& Sims, 377 U.S. 533 (1964).
  \item \textsuperscript{186} Shaw I, 509 U.S at 682.
  \item \textsuperscript{187} See id. at 682 & n.4 (emphasizing that race-conscious redistricting does not diminish
Similarly, the interest in the EPA's use of EJSEAT is not financial; rather, it is in ensuring adequate consideration of all environmentally burdened communities in administrative actions.\textsuperscript{188} While some might claim a property interest in the apportionment of governmental spending, courts have been clear that no property interest exists where a claimant has no \textit{entitlement} to it.\textsuperscript{189} No entitlement exists in discretionary agency decision-making regarding the most effective way to equitably achieve its mission.\textsuperscript{190} EJSEAT expressly disavows any expectation of entitlement.\textsuperscript{191} All citizens have equal interest in the federal government's exercise of its discretion in maximizing environmental protection.\textsuperscript{192} No one bears a burden because no one is deprived of the right to have his or her community's need for enforcement action evaluated.\textsuperscript{193}

b. Action Targets Places Rather than People

Another major difference between the redistricting cases and those with a financial element is that the governmental action targets geographic areas, not individuals.\textsuperscript{194} The Court has historically been concerned with the \textit{individual} right to equal protection.\textsuperscript{195} Typical affirmative action measures risk burdening white individuals who have not committed any wrong, in order to offer a benefit to members of a minority racial group.\textsuperscript{196} Legislative redistricting focuses on delineating \textit{areas}.\textsuperscript{197} All individuals within each area receive equal treatment—every resident of each district retains the right to one vote.\textsuperscript{198} Likewise, the focus in EPA's use of EJSEAT is on areas—those that warrant

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\textsuperscript{188} See \textit{EJSEAT}, \textit{supra} note 7, at 3 ("[T]his information will help OECA make informed, efficient, and fair decisions to ensure that attention is given to the most significant public health and environmental problems..."").
\textsuperscript{189} See Bd. of Regents of State Colls. v. Roth, 408 U.S. 564, 577 (1972) (finding no property interest in desired reemployment where no legitimate entitlement existed).
\textsuperscript{191} See \textit{EJSEAT}, \textit{supra} note 7, at 3.
\textsuperscript{192} See \textit{EJSEAT}, \textit{supra} note 7, at i.
\textsuperscript{193} See \textit{generally id.}
\textsuperscript{194} See \textit{Adarand}, 515 U.S. at 277 (citing \textit{Hirabayashi}, 320 U.S. at 100) and \textit{Reynolds} v. Sims 377 U.S. 533 (1964) (both emphasizing individual rights); cf. \textit{Shaw II}, 517 U.S. at 905–06 (1996) \textit{and Vera}, 517 U.S. at 957, 965 (both emphasizing geography of contested districts).
\textsuperscript{195} See \textit{Adarand}, 515 U.S. at 239 (Scalia, J., concurring in part and concurring in the judgment); \textit{Croson}, 488 U.S. at 493.
\textsuperscript{196} \textit{Adarand}, 515 U.S. at 239 (Scalia, J., concurring in part and concurring in the judgment) ("Under our Constitution there can be no such thing as either a creditor or a debtor race. That concept is alien to the Constitution's focus upon the individual."); \textit{CHEMERINSKY}, \textit{supra} note 77, at 717.
\textsuperscript{197} See, \textit{e.g.}, \textit{Shaw II}, 517 U.S. at 905–06; \textit{Vera}, 517 U.S. at 957, 965.
\textsuperscript{198} \textit{Shaw I}, 509 U.S. at 618–82 (Souter, J., dissenting); \textit{CHEMERINSKY}, \textit{supra} note 77, at 717.
\end{flushright}
regulatory action—and not on individuals. To the extent that a benefit is conferred on anyone, it is conferred on all inhabitants of a geographic area equally. Therefore, it does not risk violating the individual right to equal environmental protection based on an individual’s race.

Furthermore, the “area versus individuals” distinction prevents both redistricting and environmental protection from posing one of the key risks associated with traditional property-focused affirmative action. A powerful argument against affirmative action in those contexts is that while well-intentioned, it risks conferring a stigma of inferiority upon its beneficiaries. The logic is that others will view minorities as needing “special treatment” because they are inherently less equipped to compete for the interest on their own merits. Therefore, affirmative action would have the unintended effect of breeding more of the very discrimination it aims to eliminate. Irrespective of whether this argument has merit in a financial context, it has little relevance in the electoral redistricting or environmental protection. Designing electoral districts to eliminate constraints on citizens’ ability to elect political representatives of their choice without perpetually being overruled by the racial majority poses little risk of stigmatizing any individual. Similarly, identifying communities with greater likelihood of disproportionate environmental burden says little of the inherent abilities of their residents.

c. Corrective Rather Than Compensatory Purpose

Race-conscious redistricting also differs from affirmative action affecting financial interests in its purpose. The most common affirmative action objective is remedying discrimination. Attempts to compensate for prior

199. See generally EJSEAT (focusing on the selection of communities).
200. See CHEMERINSKY, supra note 77, at 719; cf. Seattle, 127 S.Ct. 2738, 2751 (Kennedy, J., concurring in part and concurring in the judgment) (“It is well established that when the government distributes burdens or benefits on the basis of individual racial classifications, that action is reviewed under strict scrutiny.”) (citing Johnson v. California, 543 U.S. 499, 505-06 (2005)). See Part III.A.1.a., supra, regarding whether regulatory action can properly be considered a benefit.
201. See, e.g., Croson, 488 U.S. at 493.
202. Id. (citing Bakke, 438 U.S. at 298) (warning of “danger of stigmatic harm... [which may] promote notions of racial inferiority”).
203. Croson, 488 U.S. at 517 (Stevens, J., concurring) (quoting Fullilove, 448 U.S. at 545). This is artfully presented as “the soft bigotry of low expectations,” but it ignores the fact that affirmative action is undertaken not because of beliefs about inherent deficiencies in the abilities of minority individuals, but in recognition of the powerful and persistent sociopolitical forces working against them. See George W. Bush, Speech to NAACP’s 91st Annual Convention (2000), transcript available at http://www.washingtonpost.com/wp-srv/onpolitics/elections/bushtext071000.htm.
204. See Croson, 488 U.S. at 493.
205. CHEMERINSKY, supra note 77, at 717.
206. See Croson, 488 U.S. at 493; cf. EJSEAT, supra note 7; at 3. See also CHEMERINSKY, supra note 77, at 708.
207. CHEMERINSKY, supra note 77, at 709. The others are increasing educational diversity,
discrimination against minorities typically involve conferring a given benefit on representative members of a certain race, while disadvantaging white individuals. The Court is very wary of this because it is now “far too late to argue that the guarantee of equal protection to all persons permits the recognition of special wards entitled to a degree of protection greater than that accorded others.”

Race-conscious redistricting and the EPA’s use of EJSEAT may be most similar to this type of affirmative action, but they differ in an important way: they are corrective of existing discrimination, not compensatory for past discrimination. Race-conscious redistricting does not attempt to make up for past discrimination. It aims to correct identified patterns obstructing minority access to equal electoral representation and does not reach beyond that, stopping short, for example, of trying to compensate for prior harms by mandating representation beyond that which would be proportionate.

Similarly, the EPA’s environmental justice approach does not reach beyond what is necessary to equitably provide environmental protection for all to compensate for prior inequities. It is a self-corrective measure taken in response to documented deficiencies in its efforts to ensure equal environmental protection according to the constitutional requirement of equal protection. Given that EPA itself has stated that “[n]umerous independent studies have concluded that minority, tribal, and low-income populations experience disproportionate exposure to environmental harms and risks...[suggesting] that populations facing environmental justice issues (e.g., cumulative impact and health vulnerabilities) require focused attention,” EPA would be abdicating its responsibility to equal protection if it did not consider those links in its actions. It aims to make decisions with an awareness of where its strategies have historically proven ineffective, given current understandings of the disparate impacts its regulations and policies have on low-income and minority communities. Courts recognize that governments

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providing minority role models and enhancing services in minority communities. Id.

208. See, e.g., Bakke, 438 U.S. at 295, 298.
210. See id. at 294–95; cf. EJSEAT, supra note 7, at 3 (noting that the goal is the make “fair decisions,” rather than to favor any particular group).
211. See CHEMERINSKY, supra note 77, at 709 (distinguishing between past and current discrimination and suggesting that affirmative action is only employed in the former).
212. See id. at 717 (citing goal as simply to “increase likelihood that minority groups will be able to choose a representative.”); cf. Croson, 488 U.S. at 507–08 (1989) (employing a quota well above the proportion of minority businesses in the market).
213. EJSEAT, supra note 7, at 1.
215. See EJSETS, supra note 7, at iii. Quote not found.
216. CHEMERINSKY, supra note 77, at 709; see generally EJSEAT, supra note 7.
have authority to tailor their actions to the situations they are facing.\footnote{217}{See Whitney v. State Tax Comm'n of New York, 309 U.S. 530, 542 (1940) (Differences in circumstances may call for differences in law: the equal protection clause "was not designed to compel uniformity in the face of difference."); Martin-Trigona v. Underwood, 529 F.2d 33, 36 (7th Cir. 1975) (Equal protection guarantee "does not require things which are different in fact...to be treated in law as though they were the same.") (citing Tigner v. Texas, 310 U.S. 141, 147 (1940)).}

Attempts to achieve equity in regulatory administration do not equate to preferential treatment based on race.\footnote{218}{EJSEAT, supra note 7, at iv ("[T]his framework is intended to identify potential disproportionately high and adversely affected areas in a uniform manner and use available data to assist OECA in making fair and efficient resource deployment decisions, consistent with Executive Order 12,898 and existing environmental and civil rights law.").} Because the EPA's attempts to eliminate on-going institutionalized discrimination do not reach beyond providing equal protection to all, they should not be viewed as remedial affirmative action because they do not attempt to compensate anyone for past discrimination.\footnote{219}{See CHEMERINSKY, supra note 77, at 709.}

Additionally, redistricting measures and EPA's environmental justice strategy share a lack of strict numerical quotas, unlike traditional affirmative action affecting financial interests.\footnote{220}{See Part II.B, supra (noting property-based cases, the majority of which employed a form of a quota).} Many remedial equal protection challenges involved schemes that reserved access to a benefit for a specified number or percentage of members of a racial minority.\footnote{221}{See id. at i.} The Court considers this measure extreme and is very wary of it.\footnote{222}{See, e.g., Croson, 488 U.S. at 508; Bakke, 438 U.S. at 316 (consider entering a parenthetical).}

However, race-conscious redistricting does not involve a strict numerical quota of minority residents per district: rather, race is used in conjunction with other traditional methods of districting that prevent race from being outcome-determinative.\footnote{223}{Cf. Gratz, 539 U.S. at 254, 270–71 (parenthetical?).} Likewise, the EPA does not reserve a portion of its resources only for minorities.\footnote{224}{See EJSEAT, supra note 7, at 4–10.} Communities flagged by EJSEAT are not solely comprised of minorities, and considering all of the other variables evaluated, they may not even be largely comprised of minorities.\footnote{225}{See id.} Furthermore, the EPA does not set aside a portion of its resources for communities ranked highly by EJSEAT.\footnote{226}{See id. at i.} Once a community is flagged as having the potential for environmental justice concerns, the EPA is careful to stress that this designation does not constitute entitlement to any special treatment nor does it confer any extra benefits or rights.\footnote{227}{See id.} Rather, the EPA factors this designation
into a larger prioritization effort that additionally evaluates available resources, strategic priorities, among other factors.\(^2\) The lack of any quota at any level of its multi-layered analysis is a critical distinction from the common affirmative action approaches that the Court has consistently rejected.\(^2\)\(^9\)

d. Greater Degree of Deference Due to Actor

Finally, in evaluating what level of scrutiny to apply, the Court considers the degree of deference due to the actor in the context in question.\(^2\)\(^3\) The Court is hesitant to subvert an actor’s judgment about how to conduct activities in realms within its traditional sphere of competence.\(^2\)\(^3\)\(^1\) Both state-level redistricting and federal administrative agency procedures are traditionally afforded considerable deference.\(^2\)\(^3\)\(^2\)

Furthermore, the Court affords more deference to state legislatures in redistricting cases than those where property interests are implicated because states have traditionally retained responsibility for defining their own legislative districts.\(^2\)\(^3\)\(^3\) Similarly, in recognition of an agency’s expertise in a particular regulatory domain, the Court shows considerable deference when examining how administrative agencies conduct activities.\(^2\)\(^3\)\(^4\) Indeed, the complex nature of environmental protection was the “primary policy rationale” for the creation of the administrative state.\(^2\)\(^3\)\(^5\) This is because environmental regulation requires a level of technical expertise and nuanced approach unattainable by the other branches of government.\(^2\)\(^3\)\(^6\) Therefore, courts traditionally accord agencies great leeway in deciding how to fulfill their missions.\(^2\)\(^3\)\(^7\) Accordingly, the EPA’s environmental justice efforts, which are simply the Agency’s best attempt to apply the “appropriate...tools to achieve optimal environmental outcomes,” are due deference, just as states are due in redistricting cases.\(^2\)\(^3\)\(^8\)

\(^{228}\) See notes 66–71, supra, regarding EPA enforcement policies.

\(^{229}\) See, e.g., Croson, 488 U.S. at 508; Bakke, 438 U.S. at 316.

\(^{230}\) See Easley, 532 U.S. at 241, 242. See also Vera, 517 U.S. at 1047–48 (Souter, J., dissenting) (citing U.S. CONST. art. I, § 2, cl.1).

\(^{231}\) See Easley, 517 U.S. at 1047–48.


\(^{233}\) See, e.g., Easley, 532 U.S. at 241, 242; see Part II.C., supra.

\(^{234}\) Chevron, 467 U.S. at 865–66; Vermont Yankee, 435 U.S. at 524–25.

\(^{235}\) Yang, supra note 31, at 221.

\(^{236}\) Id. at 174–75. “[R]eliance on administrative agencies” is especially necessary in this area: Administrative agencies are able to develop the necessary technical skills and expertise and, at the same time, integrate many other non-legal considerations, such as social and economic factors, into their decision-making. . .[T]hey can approach problems with a persistence and a focus that is necessary to develop rules on a systematic basis. . .[thus promoting] the interests of the entire society rather than particular individuals or small groups. Id.

\(^{237}\) See Chevron, 467 U.S. at 865–66; Vermont Yankee, 435 U.S. at 524–25.

\(^{238}\) EJSETS, supra note 7, at iii. Quote not found
2. Review of EJSEAT's Use of Race Under a Redistricting-Style Analysis Would Not Trigger Strict Scrutiny

The commonalities between redistricting actions and the EPA's environmental justice strategy—that is the interests, purpose and form of action, recipients, and actors involved—suggest that the Court would use a similar method of analyzing what level of scrutiny to apply to the EPA's EJSEAT. Under such an analysis, strict scrutiny would likely not apply.

The redistricting cases indicate that strict scrutiny will not apply unless the EPA's consideration of race predominated in the decision-making process, and subordinated traditional decision-making factors like compliance rates, strategic priorities, environmentally sensitive areas, and cumulative exposure rates. This analysis makes it critical to understand and evaluate the role that race would play in any Agency decision-making. The identification of minority communities in EJSEAT is based on comparing a given community's minority percentage to that of a larger reference area that serves as a baseline. Flagged communities almost invariably include some nonminority residents regardless of where EJSEAT sets threshold triggering identification of a “minority community.” Moreover, race is only one of the factors considered in the social demographics category, which in turn is just one of four categories of factors in the EJSEAT methodology. The other three categories add numerous variables to the analysis that ultimately capture people of every demographic stripe.

Furthermore, once EJSEAT identifies communities as having a higher likelihood of being exposed to disproportionately high and adverse effects of environmental degradation their residents are not guaranteed any special treatment or benefit. Rather, EJSEAT is a single tool that the EPA uses in a larger, more holistic decision-making process. Individual enforcement coordinators still evaluate many additional factors traditionally used in

239. See Part III.A.1., supra.
240. See Easley, 532 U.S. at 257; Miller, 515 U.S. at 919; Shaw I, 509 U.S. at 646; note 67, supra.
241. See notes 66–71, supra.
243. See generally U.S. Census Bureau, supra note 59 (indicating minute number of communities comprised wholly of minorities).
244. EJSEAT, supra note 7, at 4–10; see Part I.A.2–3., supra.
245. See EJSEAT, supra note 7, at 4–10; Part I.A.2–3., supra.
246. See EJSEAT, supra note 7, at i.
247. See id. at 3 (noting that it is a tool “to assist. . .in making. . .decisions”).
planning enforcement actions. These factors include EPA-identified high-priority sectors, geographic distribution of polluters, degree of violation, and strength of enforcement case. This process, which ultimately leads to decisions about where to focus resources, would continue to reside with regional EPA enforcement teams because of their knowledge of local conditions.

Therefore, race does not "predominate" in (1) final EPA decision-making, (2) EJSEAT analysis, or (3) the assessment of a community's demographics. As in Easley, the Court would likely subject the EPA's environmental justice strategies to intermediate rather than strict scrutiny.

B. EPA's Use of EJSEAT Is Likely to Survive Even Strict Scrutiny

While the Court is unlikely to apply strict scrutiny to the EPA's environmental justice strategies, it is possible that it would consider this test appropriate. However, EJSEAT is likely to survive even this rigorous standard of review because it is narrowly tailored to serve a compelling government interest. The current EJSEAT guidance implies that Adarand requires that race be removed from EPA's method of identifying potential environmental justice areas of concern. This is an unnecessarily conservative interpretation of the holding in that case. The Court explicitly stated that subjecting an action to strict scrutiny "says nothing about [its] ultimate validity." Justice O'Connor took pains to dispel the notion that "strict scrutiny is 'strict in theory, but fatal in fact.'" In fact, the Court expressly recognized that 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." Therefore, the purpose of strict scrutiny is to "distinguish legitimate from illegitimate uses of race," as it did in Grutter v. Bollinger. As in that case, the Court would likely

248. See notes 66–71, supra.
249. See id.
250. See id.
251. Id.; EJSEAT supra note 6, at 3; see Easley, 532 U.S. at 253; Miller, 515 U.S. at 916.
252. See Easley, 532 U.S. at 257.
253. See infra Parts III.B.1–2.
254. EJSEAT, supra note 7, at iii, 3, 4.
255. For a persuasive rebuke of a similarly cautious interpretation in the federal contracting context, which is even more debatable due the property interest involved, and which alleges "an erroneous interpretation and complete misreading of Adarand," please see U.S. COMM'N ON CIVIL RIGHTS, FEDERAL PROCUREMENT AFTER ADARAND 79 (2005), available at http://www.usccr.gov/pubs/080505fedprocadarand.pdf (dissenting statement of Commissioner Michael Yaki).
256. Adarand, 515 U.S. at 230.
257. Id. at 237 (quoting Fullilove, 448 U.S. at 519 (Marshall, J., concurring in judgment)).
258. Id.
259. Id. at 228. See generally Grutter, 539 U.S. 326 (establishing that not all governmental
find the EPA’s consideration of race in its EJSEAT to be legitimate.

1. Compelling Governmental Interest in Remediaying Discrimination

If the Court were to apply strict scrutiny to EPA’s environmental justice efforts, it would necessarily reject the contention in Part III.A., supra, that those efforts are prospective rather than remedial. While generalized, “societal discrimination alone” is insufficient, Croson confirmed that “the government can seek to remedy the effects of its own discrimination.” Discrimination in the EPA’s approach to environmental justice is apparent. The EPA’s enforcement rates, cleanup strategies, penalties, and timelines, coupled with the agency’s own acknowledgement that low-income and minority communities are not equally protected from environmental burden supports this fact. Therefore, the EPA has a compelling governmental interest in remediaying its own identified discrimination, namely its failure to provide equal environmental protection to low-income and minority communities.

Moreover, to the extent its actions could be viewed as targeting private discrimination, a governmental actor “has the authority to eradicate the effects of private discrimination within its own jurisdiction.” The EPA’s jurisdiction includes the regulated community; thus, if private entities are benefiting by abusing those communities lacking political power to oppose them, then it falls to EPA to regulate their actions equitably. Similarly, in the subsequent Adarand litigation, the courts found that while the debate continued as to whether its means were narrowly tailored, the government had nevertheless identified a compelling interest for its subcontractor clause in both the government’s discrimination and that by private industry within its domain so that the government does not become a “passive participant” in the discrimination.

uses of race subject to strict scrutiny are invalidated by it); DOJ Guidance, supra note 46 (“[T]he Court declined to interpret the Constitution as imposing a flat ban on affirmative action...”).

260. See Wygant, 476 U.S. at 274; Paradise, 480 U.S. at 170; CHEMERINSKY, supra note 77, at 710–11.

261. See generally Lavelle & Coyle, supra note 21; EEW REPORT, supra note 33; notes 20–22, 32–35, supra.

262. See Croson, 488 U.S. at 509; see generally Lavelle & Coyle, supra note 21; EEW REPORT, supra note 33; notes 20–22, 32–35, supra.

263. Adarand, 515 U.S. at 222; Croson, 488 U.S. at 492 (“It is beyond dispute that any public entity, state or federal, has a compelling interest in assuring that public dollars, drawn from the tax contributions of all citizens, do not serve to finance the evil of private prejudice...”); DOJ Guidance, supra note 46 (citing Croson, 488 U.S. at 492 (plurality opinion) & 519 (Kennedy, J., concurring in part and concurring in the judgment)); see Derek M. Alphran, Proving Discrimination After Croson and Adarand: "If It Walks Like a Duck", 37 U.S.F. L. REV. 887, 889 (2003).

264. See Alphran, supra note 263, at 891–92.

265. Alphran, supra note 263, at 938. See, e.g., Adarand Constructors, Inc. v. Slater, 228 F.3d 1147, 1164, 1176, 1187 (10th Cir. 2000). While at the end of Adarand’s nine-year journey through the courts, the subcontractor compensation clause failed strict scrutiny, related
To establish a compelling interest, it must show specific, "identified discrimination," for which there is a "strong basis in evidence...that remedial action is necessary."266 Uncertainty remains over what level of findings amount to a "strong basis in evidence" that identified discrimination warrants remedial action.267 While formal findings are probably not necessary, the government must have strong or convincing evidence of past discrimination.268 Indeed, the Adarand court held that the academic research, local disparity studies, statistics, and Congressional testimony documenting discrimination in the contracting industry met the even higher standard needed when the discrimination reaches beyond the actions of the governmental unit in question.269

The EPA has a "strong basis" that its race-conscious action is necessary.270 Considerable evidence documenting environmental injustice of the caliber courts have credited in the past exists.271 Innumerable studies have documented the phenomenon of disproportionate environmental burden in minority and low-income communities, and the EPA itself has acknowledged this fact.272 Further, several weighty studies have specifically identified the EPA's role in this phenomenon, whether through lower enforcement rates, smaller penalties, or less ambitious cleanup strategies.273 This body of findings is likely to be found to be a prima facie showing of evidence that remedial action is needed.274

2. EPA's Use of EJSEAT is Narrowly-Tailored to Its Compelling Interest in Remediying Prior Discrimination

The second prong of the strict scrutiny analysis is whether the governmental action is narrowly-tailored to the identified compelling interest.275 This is a high standard that the Court is hesitant to find satisfied, but the language it has used when striking down measures is instructive of what would be required to survive it.276 Furthermore, some measures have had the requisite tailoring.277 In addition to the elucidation provided by Gratz v.

regulations, including a race-based rebuttable presumption of "social disadvantage," survived. Id. at 1180; Alphran, supra note 263, at 939.
266. Croson, 488 U.S. at 507, 510 (quoting Wygant, 476 U.S. at 277).
267. See Aiken v. City of Memphis, 37 F.3d 1155, 1162–63 (6th Cir. 1994); Alphran, supra note 263, at 960.
268. Wygant, 476 U.S. at 277.
269. Slater, 228 F.3d at 1167–72.
270. See Vera, 517 U.S. at 982.
271. See, e.g., Slater, 228 F.3d at 1167–72.
272. Hendrick, supra note 3, at 186–87; see supra Parts I.A–C.
273. See generally Lavelle & Coyle, supra note 21; EEW REPORT, supra note 33.
274. See Croson, 488 U.S. at 500; DOJ Guidance, supra note 46.
275. See Adarand, 515 U.S. at 227.
276. See supra Parts II.A–C.
277. See, e.g., generally Paradise, 480 U.S. 149; Grutter, 539 U.S. 306; Slater, 228 F.3d
Bollinger and Grutter v. Bollinger, the post-Adarand DOJ Guidance listed some of the factors assessed in the Court's "narrow tailoring" test: (1) whether race-neutral alternatives were considered; (2) whether there is a waiver mechanism allowing exemption from the scheme to make the action more flexible; (3) whether race is outcome-determinative or just one factor in a larger decision-making process; (4) whether any numerical target was based on actual numbers of minorities in the targeted pool; (5) whether the program is subject to periodic review so that it does not last longer than needed; and (6) whether some were forced to bear a burden, and if so, of what type and degree.\textsuperscript{278} Seattle later approvingly noted that the use of race in Grutter was just "one factor in a 'highly individualized, holistic review," unlike those situations in which race "is determinative standing alone."\textsuperscript{279}

The EPA's use of EJSEAT incorporates many race-neutral variables.\textsuperscript{280} Though it is now attempting to reformulate EJSEAT to solely rely on alternatives, there is little evidence to suggest that an entirely race-neutral method will be successful in ensuring environmental justice.\textsuperscript{281} All of its pre-EO 12,898 efforts were facially race-neutral, and yet the problem of environmental justice festered.\textsuperscript{282} Even ten years of awareness of the link between race and environmental burden has not eliminated the phenomenon of disproportionate burden.\textsuperscript{283} Finally, while relying solely on environmental and health data would be theoretically enough to eliminate the problem in a race-neutral way, there is a serious shortfall of the requisite data available at the geographic scales that would be necessary to give an accurate picture of the burden at the community level.\textsuperscript{284} The consistently proven correlation between race and increased likelihood for disproportionate environmental burden renders race an effective proxy in the absence of comprehensive environmental and health data.\textsuperscript{285} The fact that any demographic variables are used indicates the value of using certain population characteristics as indicators of greater

\textsuperscript{1147} Alphran, supra note 263, at 890.
\textsuperscript{278} See Grutter, 539 U.S. 306; Gratz, 539 U.S. 244; DOJ Guidance, supra note 46. See also Slater, 228 F.3d at 1176-1187 for a similar treatment of these factors.
\textsuperscript{279} Seattle, 127 S.Ct. at *15, *33 (discussing Grutter and Gratz).
\textsuperscript{280} See EJSEAT, supra note 7, at 4-10.
\textsuperscript{281} See Godsil, supra note 8, at 1117-31 (chronicling research that undermines the contention that "market dynamics" are primarily responsible for disproportionate environmental burden in minority communities).
\textsuperscript{282} See supra Part I.A.1.
\textsuperscript{283} See generally EO 12,898, supra note 35; BULLARD, supra note 6 (documenting persistent environmental injustices ten years after EO 12,898).
\textsuperscript{284} EJSEAT, supra note 7, at iv (stressing the importance understanding the limitations of the data, which do not enable making "definitive statements regarding public health and environmental burdens."). Further underscoring this difficulty of acquiring comprehensive datasets, EJSEAT cautions that "[a]lthough some of the proposed indicators have data sources that are currently available, others may not have readily available data sources at this time." Id. at 15.
\textsuperscript{285} See supra Part I.A.; EJSEAT, supra note 7, at 15 (citing the use of proxy variables).
environmental burden. Removing race would not eliminate the EPA's use of demographic proxies for increased environmental risk, just the one with the strongest correlation. EJSEAT uses every race-neutral alternative available, but retains race as a surrogate while the optimal data remains unavailable.

While the DOJ Guidance pointed out that the Court looks favorably on programs that provide for waivers which allow for an exemption from the measures, it is important to note that such a mechanism has no real purpose in a flexible program in which there is no quota: the process is not so rigid as to warrant one. Therefore the waiver question lacks relevance in the EJSEAT context.

As discussed in Part II.A.1.c., infra, race is far from being eligibility-determinative. It is one of dozens of factors in EJSEAT, which in turn is only a tool used in the larger final decision-making process. EJSEAT emphasizes that the methodology should be tailored to each geographic area to which it is applied. Demographic percentages are compared to "relative threshold[s] based on state averages to account for regional differences" instead of a single national average for that demographic trait. EJSEAT itself instructed that because "different initiatives will have different data-targeting needs, the specific health, demographic, compliance, and environmental indicators selected should be tailored."

The EPA's use of EJSEAT is flexible. EJSEAT itself employs no quota or set-aside to assure that a certain number of minority communities are flagged. The methodology incorporates many factors and does not aim to identify a predetermined number of areas for any specific treatment. More importantly, irrespective of how EJSEAT identifies areas, that process alone does not equate to decision-making. There is no policy that requires a certain percentage of agency enforcement actions to take place in areas identified solely through the EJSEAT methodology, let alone communities with large minority populations. Rather, additional factors like sector and agency priorities are also involved. Therefore, race is one of dozens of factors in a tool that itself only comprises a part of the decision-making process.

286. See EJSEAT, supra note 7, at 15.
287. See id.
288. See notes 51–53, 64, supra.
289. EJSEAT, supra note 7, at 4–10; see supra notes 66–71.
290. EJSEAT, supra note 7, at iii.
291. Id. at 14.
292. EJSETS, supra note 7, at iii.
293. See generally EJSEAT, supra note 7.
294. See generally id.
295. Id. 4–10; see supra notes 66–71.
296. See supra notes 66–71.
297. See supra note 66.
298. See supra notes 66–71.
299. EJSEAT, supra note 7, at 4–10; see supra notes 51–53, 64.
“holistic review” of all the relevant factors is unlike the situation the Court was wary of in *Gratz v. Bollinger*, where a candidate’s race could be the deciding factor in admission selection.\(^3\)

Finally, the Court looks more favorably upon “affirmative action” measures that are limited in scope and duration, so that they “will not last longer than the discriminatory effects it is designed to eliminate....”\(^3\) EJSEAT explicitly provides that there should be “periodic review [of the] criteria and data sources to determine if more representative surrogates and data sources have been made available.”\(^3\) Therefore, once superior data sources are developed, the EPA will be able to revise its environmental justice strategy in response.

**CONCLUSION**

By requiring a demonstration of discriminatory intent, the judicial system places significant obstacles on citizen attempts at environmental justice litigation. However, the federal government retains great power, and indeed responsibility, to address environmental justice within the existing legal framework. The EPA’s current interpretation of the implications of *Adarand Constructors, Inc., v. Pena* on its environmental justice efforts threatens to slow the Agency’s progress in combating this inequity. A review of Supreme Court equal protection jurisprudence beyond *Adarand* reveals distinctions in when the Court chooses to apply strict scrutiny that suggest the EPA’s environmental justice strategy could escape this level of review. Furthermore, the nature of the strategy is consistent with measures that have survived strict scrutiny.

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301. *Adarand*, 515 U.S. at 238 (quoting *Fullilove*, 448 U.S. at 513 (Powell, J., concurring)).
302. EJSEAT, *supra* note 7, at 15.