Environmental Justice and the Constitution

by Sheila R. Foster

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In a recent essay, David Coursen asks an important and unexamined question: Are environmental justice policies, which seek to avoid disproportionate environmental burdens on minority and poor communities, on a "collision course" with the Equal Protection Clause?[1] In concluding that a potential collision is more illusory than real, Coursen offers a number of reasons why governmental actions to promote environmental justice have not been challenged in court and, even if they were to be, would not be subjected to strict judicial scrutiny. The most compelling of these reasons is what I would call the "democratic process" rationale. This rationale explains that courts are likely to defer to environmental justice policies because they are instigated as part of the core governmental function of either the legislative or executive branches of government. Other reasons cited by Coursen include the fact that no "legally protected interest" is at stake in environmental justice policies, that such policies involve special attention to "groups" and not "individuals" and thus fall outside of the clause's scope of protection for individual rights, and that a potential claimant challenging an action based on environmental justice would lack standing to pursue such a claim. These other reasons are far less compelling and in some instances rest on a flawed understanding of equal protection jurisprudence.

At the outset, Coursen's Article is important for highlighting the curious fact that, to date, no equal protection challenge to an environmental justice policy has been adjudicated in the courts, even though these policies are explicitly race-conscious and would seem vulnerable to such challenge.[2] Yet, one might fairly ask whether Coursen's quest to explain this fact at once proves too much and too little. On the one hand, Coursen makes too much of the potential constitutional obstacles that a challenger might face if a claim were to be brought. On the other hand, Coursen makes too little of the fact that existing environmental justice policies fall short of using race as a decisionmaking criterion to alter or change the structure of environmental regulatory decisions, which are largely based upon technical, quantitative decisions subject to judicial deference. It is this latter reason, one might plausibly argue, that accounts for the lack of constitutional challenges to existing environmental justice policies. That is, perhaps environmental justice policies have remained relatively uncontroversial, both as a constitutional and policy matter, because they have not sought to use race as a criterion or means to adjust or redistribute levels of environmental protection to vulnerable minority populations.

I. The Role of Distribution in Equal Protection Scrutiny

Coursen makes two interrelated procedural arguments for why strict scrutiny would not apply in an equal protection challenge to an environmental justice policy. The first is that regulatory statutes to protect the environment do not deprive anyone of a "legally protected interest," in part because such statutes do not distribute the "benefits" or "burdens" of environmental protection. The second is that it would be difficult for a plaintiff to show the "concrete and particularized injury" necessary for standing to challenge an environmental policy or regulatory action, even if race were used improperly by government regulators. These arguments rest on an incomplete understanding of the role of distribution in triggering constitutional scrutiny under the Equal Protection Clause.

Coursen argues that "it fundamentally mischaracterizes both the purpose and the consequences of regulatory actions implementing environmental protection laws to equate them with decisions to distribute" a "finite quantity" of government goods, e.g., school spots, employment positions, and government contracts.[3] Because environmental regulation does not "distribute" environmental protection to individuals or groups, regulatory choices, even if they result in different levels of environmental protection for different individuals or groups, cannot constitute an "absolute deprivation" of a good entitled to protection under the Equal Protection Clause.[4] In

1. David F. Coursen, *Equal Protection, Strict Scrutiny, and Actions to Promote Environmental Justice*, 39 ELR 10201 (Mar. 2009).
2. *Id.* at 10201 ("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 legislating *mandating* affirmative steps to ensure preferential treatment regarding financial assistance for minority communities.").
3. *Id.* at 10204.
4. Unlike depriving an applicant of a contract or a school seat, Coursen argues that 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 judg-

other words, there is no right to a particular level of environmental protection and, thus, regulatory actions that result in disparate levels of protection (regardless of which group benefits) cannot constitute a denial of equal protection.

Coursen's central mistake in making this argument is to misapprehend the role of distribution in equal protection jurisprudence. The principle of equal protection simply requires that government action not be based on irrational or invidious distinctions or decisionmaking criteria. The core focus of heightened judicial scrutiny in modern equal protection jurisprudence is based on decisionmaking inputs, not their outputs.[5] What this means in practice is that courts will be highly deferential toward an otherwise facially neutral government action even though that action results in adverse disparate impacts on an historically and socially disadvantaged group. Even where such disparate impacts exist, courts require a showing of discriminatory intent, i.e., that the governmental actor purposively sought to bring about adverse impacts on the group.[6] Thus, in the environmental justice area, federal courts have consistently rejected claims that a pattern of issuing permits for, or otherwise allowing the siting of, polluting facilities in minority neighborhoods violates the Equal Protection Clause. In each case, courts cite the failure of plaintiffs to demonstrate that the challenged decisions were made with a racially discriminatory intent.[7]

Similarly, when there is an allegation of race-dependent government action, it is the racial classification itself that triggers strict scrutiny, not the distributive purpose or outcome of the decision. The application of strict scrutiny in affirmative action and contracting cases such as *City of Richmond v. J.A. Croson*,[8] *Adarand Constructors, Inc. v. Peña*,[9] *Grutter v. Bollinger*,[10] and *Parents Involved in Community Schools v. Seattle School District No. 1*[11] is not premised on an "absolute deprivation" of an "entitlement" to a government contract or a public school or university seat. Rather, the court applies strict scrutiny based on the government's improper consideration or influence—either explicitly or implicitly—of a criterion that has been used in the past to treat individuals and groups unequally. Thus, while it is true that many of the cases in which the courts invalidate government action as violating the Equal Protection Clause involves the loss of a government good or benefit, that fact is not what triggers heightened scrutiny. As the U.S. Supreme Court has repeatedly held, a plaintiff may state a justiciable claim under the Equal Protection Clause simply by alleging the "harm" of race-dependent decisionmaking itself, regardless of the distributive consequences of the racial classification.[12] Coursen is simply mistaken when he opines that "a claim that the government used race improperly, by itself, would not establish" standing to bring an equal protection suit without a more "concrete and particularized injury" or "evidence that the claimant was injured in some more direct and personal way."[13]

II. Democratic Process Concerns as a Limit on Judicial Review of Race-Conscious Government Policies

Coursen does agree that strict judicial scrutiny would be triggered if environmental justice policies were found by a court to contain a racial classification, a term that the Supreme Court has never defined with any precision. He explains the deference by the Court in the absence of such explicit classifications as consistent with democratic process concerns—namely, the Court's respect for the core functions of other branches of government. But Coursen takes this democratic process explanation one step further and argues that, under certain circumstances, the Court will defer to core functions of other branches of government even when their actions are explicitly race-conscious. In other words, Coursen argues, whether race-conscious governmental action even rises to the

ments 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. . . . [E]ven 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 benefit; "relative differences in the quality of" the benefit do not implicate equal protection. *Id.* at 10205.

5. *See, e.g.*, City of Richmond v. J.A. Croson, 488 U.S. 469, 493 (1989) (purpose of strict scrutiny is to "smoke out" illegitimate uses of race, namely to identify a compelling governmental purpose for the use of race and to ensure that the means chosen "fit" this compelling goal so closely that the motive for the classification is not based upon illegitimate racial prejudice or stereotypes); Michael Klarman, *An Interpretive History of Modern Equal Protection*, 90 Mich. L. Rev. 213, 284 (1991) (noting the focus on judicial review "towards purging legislative decision making of certain considerations rather than guarding against particular substantive outcomes").
6. *See* Personnel Adm'r of Massachusetts v. Feeney, 442 U.S. 256 (1979) (challenger must show that decisionmaker acted "'because of,' not merely 'in spite of'" the disparate impacts); Arlington Heights v. Metropolitan Hous. Dev. Corp., 429 U.S. 252 (1977) (disparate impact relevant to a circumstantial showing of discriminatory intent, but is not dispositive); Washington v. Davis, 426 U.S. 229 (1976) (discriminatory purpose rule established for facially neutral government action).
7. *See* South Camden Citizens in Action v. New Jersey Dep't of Envtl. Prot., No. Civ. A 01-702(FLW), 2006 WL 1097498 (D.N.J. Mar. 31, 2006); Cox v. City of Dallas, 3:98-CV-1763-BH, 2004 WL 2108253 (N.D. Tex. Sept. 22, 2004), *aff'd*, 430 F.3d 734 (5th Cir. 2005); R.I.S.E., Inc. v. Kay, 768 F. Supp. 1144 (E.D. Va. 1991), *aff'd without opinion*, 977 F.2d 573 (4th Cir. 1992); East Bibb Twiggs Neighborhood Ass'n v. Macon-Bibb County Planning & Zoning Comm'n, 706 F. Supp. 880 (M.D. Ga. 1989), *aff'd,* 896 F.2d 1264 (11th Cir. 1989), *opinion replaced by* 846 F.2d 1264 (11th Cir. 1989); Bean v. Southwestern Waste Mgmt., 482 F. Supp. 673 (S.D. Tex. 1979), *aff'd without opinion*, 782 F.2d 1038 (5th Cir. 1986).
8. 488 U.S. 469, 493 (1989).
9. 515 U.S. 200 (1995).
10. 539 U.S. 306 (2003).
11. 551 U.S. __, 127 S. Ct. 2738 (2007).
12. *See, e.g.*, *Adarand,* 515 U.S. at 227 (because the Fourteenth Amendment "protect[s] *persons*, not *groups*," all "governmental action based on race—a *group* classification long recognized as in most circumstances irrelevant and therefore prohibited—should be subjected to detailed judicial inquiry to ensure that the *personal* right to equal protection of the laws has not been infringed"); Shaw v. Reno, 509 U.S. 630 (1993) (white plaintiffs stated a complaint upon which relief can be granted by alleging that the placement of voters into separate districts on the basis of race, without regard for traditional districting principles and without sufficiently compelling justification, violated their constitutional right to participate in a "color blind" electoral process, even though there was no "vote dilution").
13. He also says that the "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." Coursen, *supra* note 1, at 10206. These statements are simply not consistent with the Supreme Court's jurisprudence in this area.

level of a "racial classification" depends on whether the action challenged is a core legislative or executive one. If the action is a core function of either the executive or legislative branch, the use of race will not trigger strict judicial scrutiny out of respect for separation of powers and relative institutional competence. If the action is not a core function, the Court is apt to be less tolerant of the use of race by the government and more likely to apply strict scrutiny. Thus, Coursen argues, environmental justice policies are not likely to be subject to strict scrutiny if challenged, in part because they are instigated by a core executive function—Pres. William J. Clinton's Executive Order on environmental justice—and apply to executive branch agencies exercising "core governmental functions."[14]

Coursen's democratic process explanation for why courts would be less likely to scrutinize race-conscious environmental justice policies seems to cohere much of Supreme Court equal protection doctrine and is thus quite persuasive.[15] Coursen points to various cases that demonstrate the Court's tendency to exercise a higher degree of tolerance or deference toward core legislative and executive actions, e.g., legislative gerrymandering of voting districts,[16] prosecutorial decisions about whether or not to prosecute and whom to charge,[17] etc., by requiring a higher evidentiary showing that race overwhelmed other discretionary and legitimate decisionmaking criteria.[18] On the other hand, the Court has seemed less tolerant and deferential toward government action not involving core executive or legislative functions, e.g., federal agency contracting,[19] public school admissions policies, etc.[20] In these latter cases, the Court has been much more apt to trigger strict scrutiny based on a showing that the government was acting in a race-conscious manner. This is in stark contrast to the former class of cases, in which the Court tolerated "awareness" or "consciousness" of race so long as the government did not categorize or classify by race in ways that crowded out other decisionmaking factors.

In line with this explanation, it may be true that courts would tolerate the "race-consciousness" of environmental justice policies that express concern for the environmental health of racial minority populations and communities because they emanate from and are applied as a matter of core legislative or executive functions. Thus, for example, presumably courts would be more deferential to state legislation that prohibited siting of a polluting facility near an "environmental justice community," defined as a low-income or racial minority community with a concentration of existing polluting facilities.[21] Courts would similarly be, under Coursen's theory, deferential toward an environmental justice policy promulgated by a state environmental agency that required regulators to identify and actively consult with minority and low-income communities before issuing a permit for a polluting facility in the host community.

Nevertheless, even if we buy Coursen's argument that a hypothetical case challenging an environmental justice policy would likely receive a great degree of judicial deference, his central inquiry remains largely unanswered. That is, it remains a bit of a mystery why there have been no challenges to the many race-conscious environmental justice policies that have proliferated, on both the federal and state level, over the past decade or two. Coursen's arguments really speak to whether such a case is likely to succeed should it be, or when it is, brought before a court. However, his arguments do not satisfactorily explain the lack of challenges, particularly in a legal and political environment prone to entertain challenges to race-conscious government policies.

III. Explaining the Lack of Legal Challenges to Environmental Justice Policies

I want to return to Coursen's point about environmental regulation and its distributive consequences (or lack thereof). While I have argued that this explanation has very little purchase in explaining judicial scrutiny under the Equal Protection Clause, Coursen's focus on the distributive consequences of environmental regulatory decisions may lead us to an explanation for the dearth of constitutional challenges to environmental justice policies. I suspect that we would see much more of a real collision between environmental policies and the Equal Protection Clause if those policies sought to invoke race as a criterion or means by which to reduce the

14. Federal Actions to Address Environmental Justice on Minority Populations and Low-Income Populations, Exec. Order No. 12898, 59 Fed. Reg. 7629 (Feb. 11, 1994).
15. I too have argued, in the context of the Court's approach to facially neutral actions that have a racially disparate impact, that democratic process concerns have long shaped the Court's approach to adjudicating claims of discrimination under the Equal Protection Clause. *See* Sheila Foster, *Intent and Incoherence*, 72 Tul. L. Rev. 1065 (1998) (demonstrating that the Supreme Court applies different levels of deference in applying the discriminatory intent standard to facially neutral actions having a disparate impact, depending on whether the challenge is to legislative, executive, or administrative action).
16. Bush v. Vera, 517 U.S. 952 (1996) (racially gerrymandering claim); Miller v. Johnson, 515 U.S. 900 (1995).
17. U.S. v. Armstrong, 517 U.S. 456 (1996) (racially based selective prosecution claim).
18. *Bush*, 517 at 958-59 ("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"); *Armstrong*, 517 U.S. at 465 (the claimant must "dispel the presumption that a prosecutor has *not* violated equal protection" by presenting "clear evidence to the contrary" (emphasis added)); *Miller*, 515 U.S. at 915, 916 ("although race-based decision making is inherently suspect, until a claimaint makes a showing sufficient to support that allegation the good faith of a legislature must be presumed"; courts must exercise "extraordinary caution in adjudicating claims that a state has drawn district lines on the basis of race").
19. Adarand Constructors, Inc. v. Peña, 515 U.S. 200 (1995) (applying strict scrutiny and striking down race-based presumption of social and economic disadvantage in government contracting program); City of Richmond v. J.A. Croson, 488 U.S. 469 (1989) (applying strict scrutiny and invalidating race-based set-aside for minority businesses in government contracting program).
20. Parents Involved in Community Schs. v. Seattle Sch. Dist. No. 1, 551 U.S. __, 127 S. Ct. 2738 (2007) (invalidating under strict scrutiny race-based student assignment plans as not narrowly tailored to achieve the compelling goal of diversity); Grutter v. Bollinger, 539 U.S. 306 (2003) (upholding under strict scrutiny race-conscious law school admission policy as narrowly tailored to achieving a compelling interest in a diverse student body); Gratz v. Bollinger, 539 U.S. 244 (2003) (invalidating use of racial preferences in undergraduate admissions as not narrowly tailored to achieve the compelling interest in student body diversity).
21. The author is not aware of any such legislation. For an overview of state siting and other regulations designed to address environmental justice issues, see Nicholas Targ & Steven G. Bonorris, *State Environmental Justice Programs and Related Authorities*, *in* The Law of Environmental Justice: Theories and Procedures to Address Disproportionate Risk (Michael B. Gerrard & Sheila R. Foster eds., 2008) (surveying state legislation and agency environmental justice programs).

disparate impact of environmental regulatory decisions on minority communities.

Let us take as a starting point that the core claim of the environmental justice movement (and its associated scholars) is the need to acknowledge, and account for, the racial and economic distributive consequences of environmental regulation. Environmental justice scholars have highlighted, for example, how regulatory choices involved in risk assessments and standard-setting often deprive low-income and minority communities of adequate or equal levels of environmental protection.[22] Thus, many health-based standards used to determine the amount of ambient air pollution that is safe are based on faulty exposure assumptions that ignore higher exposure to the most dangerous pollutants in the most vulnerable ethnic and low-income populations.[23] Moreover, agency decisions about the cleanup of contaminated sites and the permitting of new polluting facilities have, at least historically, disproportionately left minority communities worse off than comparable non-minority communities.[24]

One might imagine a policy that required regulators to set allowable pollution limits to be more protective of minority populations on the presumption that such populations are more likely to be overexposed to higher levels of a particular pollutant. Or imagine a permitting process for polluting facilities that required regulators to avoid issuing a permit that would result in higher levels of overall or cumulative pollution in a minority community as compared to other areas within a specific geographic area or region. Both types of policies use race as a key decisionmaking criterion to be more protective of vulnerable minority populations. These policies are not only explicitly race-dependent, but also very likely will impose much higher costs on others as a consequence of being more protective of minority populations. For example, the regulated community might bear additional costs of compliance with the higher emissions limitations in the first example. In the second example, communities who might otherwise not have been identified as a host for a particular facility may now be more likely to have one imposed upon them. The individuals and communities who would bear these costs would surely be motivated to bring an equal protection lawsuit to challenge the policy at issue, and the fact that the policy is race-dependent, or uses race as a dominant decisionmaking criterion, would certainly give rise to a justifiable reason for a court to subject it to a higher level of scrutiny. My view is that none of the reasons cited by Coursen would prevent (and perhaps would not deter) claimants from bringing such a claim under the Equal Protection Clause.

Rather, policies that explicitly require or allow regulators to utilize racial criteria as a means to increase levels of environmental protection for, or to decrease adverse health impacts on, vulnerable minority populations simply do not exist. One could argue that some policies come very close to the line, either by expressing a concern for reducing disparate impacts on minority communities or being clearly motivated by a desire to avoid those impacts. In the end, however, most environmental justice policies fall far short of the type of "racial classification" that federal courts have been willing to find justifies strict judicial scrutiny of such policies. In other words, as Coursen himself acknowledges, mere race-consciousness is not enough to trigger such scrutiny, especially where core legislative and executive functions are being challenged. The decision must in significant part rely upon a racial criterion, either by ignoring other pertinent, race-neutral criteria or subordinating race to those criteria. I am not aware of any environmental justice policy that requires or allows the use of race in making regulatory decisions such as standard-setting, permitting facilities, or prioritizing the cleanup of contaminated sites.

Coursen cites federal legislation that he argues mandates affirmative steps to ensure preferential treatment regarding financial assistance for cleanup of contaminated sites in minority communities.[25] On its face, though, the legislation—the Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA)[26]—does not mandate using race to achieve its objective. While it is motivated by a desire to lessen adverse impacts on minority communities, it leaves open the possibility of using race-neutral means such as health indicators or other quantitative data to identify health or environmental impacts on a specific population and to reduce those impacts.[27] There are other examples of decisions that might be motivated by racial considerations but that in fact base the regulatory decision predominantly, if not exclusively, on race-neutral factors (often empirical or quantitative ones). For example, the U.S. Environmental Protection Agency's (EPA's) decision to revise its methodology for setting

22. Tseming Yang, *Melding Civil Rights and Environmentalism: Finding Environmental Justice's Place in Environmental Regulation*, 26 Harv. Envtl. L. Rev. 1, 15 (2002) ("Precisely because regulatory standards are intended to achieve the greatest good for the greatest number of people, such standards fail to take into account the special characteristics and vulnerabilities of minority populations and the poor.").

23. For example:

> [S]tudies have shown that some poor and racial minority groups consume significantly more fish caught in contaminated water bodies than their white, male counterparts because of their reliance on it as an important subsistence supplement to their diet. Yet, pollution limits set by agencies to protect humans from toxins accumulated in fish have traditionally been based on the consumption patterns of white, male sport fishers. Not surprisingly, racial minority groups and the poor have suffered exposure to much higher levels of pollutants and toxins.

Id. at 15.

See also U.S. Gen. Accounting Office (GAO), Pesticides: Improvements Needed to Ensure the Safety of Farmworkers and Their Children (2000) (highlighting elevated toxic exposures of farmworkers, many of whom are members of racial minority groups and the failure of current exposure limits to adequately protect them), *available at* http://www.gao.gov/archive/2000/rc00040.pdf; Catherine A. O'Neill, *Variable Justice: Environmental Standards, Contaminated Fish, and "Acceptable" Risk to Native Peoples*, 19 Stan. Envtl. L.J. 3, 11-14 (2000).

24. *See, e.g.*, Luke W. Cole & Sheila R. Foster, From the Ground Up: Environmental Racism and the Rise of the Environmental Justice Movement app. A (N.Y. Univ. Press 2001) (listing many of the relevant studies establishing this disproportionate impact).

25. Coursen, *supra* note 1, at 10201 n.4.

26. 42 U.S.C. §§9601-9675, ELR Stat. CERCLA §§101-405.

27. CERCLA instructs EPA to "establish a system for ranking grant applicants" 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. 42 U.S.C. §9604(k)(5)(C)(x), ELR Stat. CERCLA §104(k)(5)(C)(x). This is hardly language that requires the Agency to use race as a criterion of decisionmaking, in part because there are many race-neutral means to facilitate the reduction of threats to the health of minority communities.

water quality standards to incorporate a higher default fish consumption rate is also race-neutral, relying predominantly on quantitative data.[28] The Agency did not revise its methodology solely or predominantly using race, even though revisiting its risk assessment and standard-setting was motivated at least in part by evidence that Native American subsistence populations tend to consume far greater quantities of self-caught fish than the general population and, thus, were disproportionately harmed by the existing standard.[29] Similarly, a few states have passed "anti-concentration" legislation that prohibits, or creates a rebuttable presumption against, the placement of a waste (or other polluting) facility within a certain distance of existing facilities.[30] None of these policies require or take into explicit account whether any of the affected communities are minority ones, even if they are motivated by a desire to avoid harm to such communities.

IV. Conclusion

Existing "environmental justice" policies, although arguably motivated by a desire to avoid harm to minority communities, are easily able to avoid a collision with the Equal Protection Clause. They do so because, unlike the racial presumptions in a case like *Adarand*, the policies do not force regulators to assume harm or the need for more environmental protection solely or predominantly on the basis of race (or socioeconomic status, for that matter). Instead, environmental regulatory decisions rely almost exclusively on quantitative decisionmaking techniques that maximize aggregate social welfare even as they ignore both "non-quantifiable and intangible impacts" as well as the cumulative effect of quantifiable and intangible impacts on vulnerable populations.[31]

Thus, in spite of the proliferation of environmental justice policies, environmental regulators continue to rely predominantly on their own quantitative assessments of harm. To the extent that regulators make a decision to increase levels of environmental protection on a racial minority group, they do so almost exclusively based on quantitative data. To the extent that such data do not exist or are considered weak, there is no environmental justice policy of which I am aware that requires or counsels that racial considerations are an allowable substitute for that data in the decisionmaking process. Absent such a policy, environmental justice policy and equal protection law are far from being on a collision course with each other. About that, Coursen and I are in total agreement.

28. 72 Fed. Reg. 18504, 18588 (Apr. 15, 1998) ("EPA is also using an updated fish consumption rate for Native American subsistence populations of 70 g/day, based on two studies . . . this consumption rate represents an average fish consumption rate for Native Americans"). *See also* O'Neill, *supra* note 23 at, 36-37 ("Until quite recently . . . studies quantifying fish consumption of Native American subpopulations have been nonexistent. The lack of quantitative, as opposed to 'anecdotal' or qualitative, evidence has meant that the higher fish consumption rates of these subpopulations have gone unaccounted for. According to agency risk assessors, the risk assessment equation calls for a quantified, peer-reviewed expression of fish consumed.").

29. Compare this to EPA's approach to pesticide tolerances for farmworkers, which have been challenged by environmental justice advocates and scholars for failing to adequately account for increased, cumulative exposure and risks to farm children (predominantly Latino) from multiple pathways, i.e., children often accompany their parents to work in the fields, and are further exposed from their parents' clothing, dust tracked into the homes, contaminated soil where they play, food eaten directly from the field, contaminated well water, and breast milk. Eileen Gauna, *Farmworkers as an Environmental Justice Issue: Similarities and Differences*, 25 Environs Envtl. L. & Pol'y J. 67, 68-69 (2002). EPA has questioned whether the quantitative evidence supports the argument that this population is more exposed than others in nonagricultural areas and have found the studies inconclusive and limited in number. Nevertheless, EPA admits that the issue needs further research and analysis and that the government is currently engaged in this research on exposure of farmworker children to pesticides. U.S. GAO, *supra* note 23, at 12-13 (relying on interviews with Agency officials and reviewing the lack of data on pesticide exposure and concluding that "the degree to which farmworkers generally, and their children specifically suffer adverse effects from pesticide exposure compared with the general population is not conclusively known").

30. *See, e.g.*, Ala. Code §22-30-5.1(c) (2005) (provides that only one commercial hazardous waste treatment facility or disposal site may be situated within a county; and requires submission to the legislature of a written proposal addressing socioeconomic issues involved in the siting); Ark. Code Ann. §8-6-1504 (2004) (creates a rebuttable presumption against permitting a "high impact solid waste management facility" within 12 miles of any existing "high impact solid waste management facility"); Ga. Code Ann. §12-8-25 (2004) (limits the number of solid waste facilities within a given area and requires that certain public notification and participation requirements be met).

31. Yang, *supra* note 22, at 21 (discussing EPA's civil rights Title VI complaint process and critiquing its adjudication and rejection of the first complaint that challenged the issuance of a permit on the grounds that it would create an adverse disparate impact in a minority community; EPA focused almost exclusively on particular quantifiable pollutants and ignored the question of whether compliance with technical standards adequately addresses the complainants' concerns about the proposed steel mill's impact on the community). *See also* Sheila Foster, *Piercing the Veil of Economic Arguments Against Title VI Enforcement*, 10 Fordham Envtl. L.J. 33, 36 (1999) (arguing that the threshold showing required by EPA to prove disparate impact is conceived so narrowly that most affected communities will conclude it is futile to file such complaints).