Dumping on the Waiʻānae Coast: Achieving Environmental Justice through the Hawaiʻi State Constitution

Chasid M. Sapolu*

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* J.D. Candidate Class of 2010, William S. Richardson School of Law; B.S., University of Hawai`i at Manoa. The author is a product of Oahu’s Waiʻānae Coast, born and raised in the area to which he now writes and dedicates this article. His awareness of these issues is attributed to his experience as a resident of the Coast and from seeing, hearing, and sharing in the contempt that many residents feel towards the treatment of their communities. He also, however, shares in the immense pride that outbalances this contempt and propels those who endeavor to bring prosperity to the Coast.
I. INTRODUCTION

“After eighteen years, the people of the Wai‘ānae Coast literally feel dumped on.”¹ This sentiment, from a Hawai‘i State Senator, reflects the established attitudes of the residents of the Wai‘ānae Coast. Sentiments not muttered in private, but echoed at the most basic levels of public forum.

The setting is a Neighborhood Board Meeting held in an elementary school by the recently founded Nānākuli Neighborhood Board. The Board carries on with its agenda, including reports on various State and Local projects, reports from the offices of elected officials, various committee inquiries, and a host of other community affairs that must be acknowledged in these monthly meetings. The Chair then announces the next section on the agenda, community concerns; immediately thereafter, residents form a line behind the standing microphone.

An elderly gentleman steps to the microphone and proceeds to explain the reason for his appearance. He lives in Nānākuli, near the industrial waste landfill run by the PVT Company. He explains how he has spent his entire life living in this community, and worked for many years to ensure the safety, security, and comfort of his family. He then continues to explain how his home is coated daily with a white dust-like substance that falls on his porch, and in his home. He describes watching his wife change the bed sheets every night because of the dust, and emotionally explains how his attempts to seek relief from the PVT Company are in vain. The timer beeps, informing the elderly man that his allotted time has expired. The chairman, however, nods allowing the man to finish his concern with a last comment. He simply explains that all he seeks now is the satisfaction that he has provided all he can for his family, and to live out his retiring years in comfort and peace.

The scene is a sobering one, which is exacerbated when more residents head to the microphone to discuss comparable concerns and hostilities toward the landfills. Tonight’s scene is not unique. It is one played out at every neighborhood board meeting, where residents voice their fervent opposition to the unseemly concentration of waste facilities on the Wai‘anae Coast and their continued indignation at the unfair treatment this coast receives. Community resentment over this mistreatment is a common feature of these meetings and an emotional subject for residents. This sentiment even led to the formation of a communal legal fund, with the sole purpose of financing legal action against any attempt to establish another landfill on the Wai‘anae Coast.2

This comment will examine the injustice of the Wai‘anae Coast dumping and discuss a means for relief through the attainment of environmental justice for the residents of the Wai‘anae Coast. The first part of this comment discusses the general environmental justice movement and the ultimate goal it seeks to achieve, including an analysis on relevant cases where attempts at obtaining this justice are frustrated by an impaired model of analysis. The second part documents the existence of environmental injustice on the Wai‘anae Coast of O‘ahu and the urgency surrounding this situation. The third part discusses the extent to which environmental justice goals are realized in Hawai‘i, notwithstanding the continued inability of Wai‘anae Coast residents in attempts to receive much needed relief. Part four of this comment examines the current, and potential, legal environment in the State of Hawai‘i for achieving environmental justice, with particular attention to Article XII of the State Constitution and the path leading to current levels of enforcement. The final part of this comment offers recommended language, in light of the accomplishments of Article XII, and discusses the potential advantages of enacting an amendment to the Hawai‘i Constitution that will benefit the communities of the Wai‘anae Coast, bringing environmental justice to the State of Hawai‘i.

II. THE ENVIRONMENTAL JUSTICE MOVEMENT

“Racial communities are not all created equal,” a concept recognized by many as the bedrock of environmental injustice.3 Environmental justice is described as the union of the civil rights and environmental movements.4 Its inception is based on the uncomfortably


common occurrence concerning the distribution of general societal burdens on low-income and ethnic minority communities.\(^5\) This part presents a brief history of environmental justice in the United States, the noble goals it seeks to achieve, and how the means utilized to reach this end are met with difficult legal hurdles.

A. The Emergence of a Movement

In 1982, over 500 demonstrators protested against North Carolina State officials to resist the siting of an experimental landfill in a predominantly black county, in a manner “strikingly similar to the Civil Rights Movement of the 1960s.”\(^6\) This incident, although a failed campaign, is often referred to as the origin of the environmental justice movement launching the issue to the “forefront of American consciousness.”\(^7\)

The Warren County incident prompted the U.S. General Accounting Office (“GAO”) to produce a study examining the relationship between racial minority communities and the locations of hazardous waste facilities.\(^8\) The areas examined by the GAO included eight southeastern States which comprised the Environmental Protection Agency (“EPA”)’s “Region IV.”\(^9\) Results demonstrated that the majority of communities

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\(^6\) Meagan Elizabeth Tolentino Garland, Addressing Environmental Justice in Criminal Sentencing Process: Are Environmental Justice Communities “Vulnerable Victims” Under 3A1.1(B)(1) of the Federal Sentencing Guidelines in the Post United State v. Booker Era?, 12 ALB. L. ENVTL. OUTLOOK 1, 12 (2007) [hereinafter Garland]. Warren County was a poor and majority black community. Id. The citizens of Warren County opposed the siting of an “experimental” landfill near their homes. Id. The landfill would experiment in accepting contaminated soil in lieu of traditional solid waste. Id. Community leader, Ken Ferruccio, recognized that “the trend [was] very clear…they would rather experiment with poor black people, [and] poor white people, than to experiment with middle and upper classes.” Id. Although the protests and demonstrations did not deter the state of North Carolina from placing the landfill in Warren County, the campaign created a highly visual scene of “massive non-violent civil disobedience.” Id. This attracted national media attention and caused many to wonder just how many other minority and low-income communities were faced with similar an injustice.” Id.

\(^7\) Id. at 12.


\(^9\) Id. EPA’s Region IV is comprised of Alabama, Florida, Georgia, Kentucky, Mississippi, North Carolina, South Carolina, and Tennessee.
where landfills are located are predominantly black, and at least twenty-six percent of these communities have income levels below the poverty level. In 1987, following the GAO report, the United Church of Christ Commission for Racial Justice (“UCCCRJ”) produced a study “analyzing the relationship between race and the location of hazardous wastes” throughout the nation. The report found that “race [was] the predominant factor relat[ing] to the presence of hazardous wastes in residential communities throughout the United States.” The report also found that socio-economic status “play[ed] an important role in the location of commercial hazardous waste facilities.” However, race was singled out as “more significant” in the siting of these facilities. One of the more disturbing conclusions of the UCCCRJ report was a recognition that three out of every five Black and Hispanic Americans in the country lived near toxic waste sites. The conclusions of both reports led to the recognition of a new “form of racial discrimination.” Use of the term, “environmental racism,” originally coined by Reverend Dr. Benjamin Chavis, was born along with the concept of environmental justice.

B. The Demand for Government Action

Moving into the early 1990s, the environmental justice movement gained momentum in compelling the government to recognize the existence of environmental justice issues and taking action to address them accordingly. Particularly, in 1991, with the help of the UCC, the first National People of Color Environmental Leadership Summit convened in

10 Id.
12 Id.
13 COMMISSION FOR RACIAL JUSTICE, UNITED CHURCH OF CHRIST, TOXIC WASTES AND RACE IN THE UNITED STATES (1987), available at http://www.ucc.org/about-us/archives/pdfs/toxwrace87.pdf. “Commercial” is defined by the United Church Commission’s report as “any facility (public or private), which accepts hazardous wastes from a third party for a fee or other remunerations.” Id. “Hazardous wastes facility” is defined by the United Church Commission’s report as “any land and structure thereon which are used for treating, storing, or disposing of hazardous waste.” Id.
14 Godsil, supra note 11, at 395.
15 Id.
16 Lazarus, supra note 4, at 257. Reverend Dr. Benjamin Chavis is a long time civil-rights activist and community organizer; he is also the former executive director of the National Association for the Advancement of Colored People (NAACP). Id. A controversial figure in the civil rights movement, he reportedly coined the phrase “environmental racism” as he was “preparing to present to the National Press Club the report that he had coauthored with Charles Lee on toxic waste sites and race in the United States.” Id.
Washington D.C.\textsuperscript{17} The Summit assembled “delegates from all fifty states and over [three hundred] representatives from various grassroots organizations.”\textsuperscript{18} The participants discussed multiple environmental justice issues and created seventeen “principles of environmental justice.”\textsuperscript{19}

1. Prompting the EPA into Action

In 1992, a gathering of academics at the University of Michigan shared their “collective findings of disparate treatment in environmental matters” and urged William Reilly, then administrator of the EPA, to take pertinent actions concerning their findings.\textsuperscript{20} In response, William Reilly formed the Environmental Equity Work Group that would later become the Office of Environmental Justice in 1992.\textsuperscript{21} The EPA then created its own report, entitled “Environmental Equity: Reducing Risks for All Communities,” which recognized at last “the fact that some populations shoulder greater environment health risks than others.”\textsuperscript{22}

2. Executive Order NO. 12898

As a result of these combined efforts, President William Clinton signed Executive Order No. 12898, entitled \textit{Federal Actions to Address Environmental Justice in Minority Populations and Low-Income Populations}.\textsuperscript{23} The Executive Order (EO) sought “to address environmental injustice within existing federal laws and regulations” by reinforcing the “Civil Rights Act of 1964, Title VI,” which outlaws discriminatory practices in federally funded programs.\textsuperscript{24} The order directs every federal 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 in the United States.”\textsuperscript{25}

\begin{flushleft}
\begin{itemize}
  \item \textsuperscript{17} Garland, \textit{supra} note 6, at 1.
  \item \textsuperscript{18} \textit{Id.} at 15.
  \item \textsuperscript{19} \textit{Id}.
  \item \textsuperscript{21} Robert D. Bullard et al., \textit{Toxic Wastes and Race at Twenty: Why Race Still Matters After all These Years}, 38 ENVTL. L. 371, 381 (2008) [hereinafter Bullard et al.].
  \item \textsuperscript{22} \textit{Id}.
  \item \textsuperscript{23} \textit{Id}.
  \item \textsuperscript{24} \textit{Id.} at 382.
  \item \textsuperscript{25} Exec. Order No. 12,898, 59 Fed. Reg. 7629 (Feb. 16, 1994).
\end{itemize}
\end{flushleft}
The EO also created an interagency working group that would assist federal agencies in developing “environmental justice strateg[ies].”\textsuperscript{26} This Working Group not only developed criteria for “determining disproportionately high and adverse human health effects on [vulnerable] populations,”\textsuperscript{27} it also held public sessions “for the purpose of fact-finding, receiving public comments, and conducting inquiries concerning environmental justice.”\textsuperscript{28} Although this presidential order contained strong favorable language, its compelling appearance is discredited by the fact that its intended goals have yet to be realized.\textsuperscript{29}

Generally, EOs only carry the effect of law, if the President “imposes certain duties upon federal agencies,” making the order more than a mere procedural request.\textsuperscript{30} President Clinton’s failure to impose these specific duties, within his presidential decree, predictably led its intent and goals to be ignored.\textsuperscript{31}

3. The Declining Movement

Adding to this neglect was a change in the Federal Administration, and intentional resistance within the EPA via “proposed budget and program cuts.”\textsuperscript{32} These factors would lead to a stall in the environmental justice movement by the early 2000s.\textsuperscript{33} Soon after, reports were released by such government agencies as the U.S. Commission on Civil Rights, shed light on this troubling decline.\textsuperscript{34}

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28 \textit{Id.} at § 1-102(b)(6), 5-5(d).

29 Hernandez, \textit{supra} note 26, at 200.

30 \textit{Id.} at 205.

31 \textit{Id.} For an Executive Order to retain the force of law and create a cause of action it must meet various guidelines. \textit{Id.} The Eighth Circuit in \textit{Independent Meat Packers Assoc v. Butz}, 526 F.2d 228 (8th Cir., 1975), allowed this only where “the order’s language establishes an intent to create a cause of action,” and this would be shown by language imposing obligations and sanctions, limiting the discretions and agencies, and demands for immediate compliance. \textit{Id.} This order failed to contain any such language and as such was doomed to fail. \textit{Id.}

32 Bullard et al., \textit{supra} note 21, at 382.

33 \textit{Id.}

34 U.S. COMM’N ON CIVIL RIGHTS, \textit{NOT IN MY BACKYARD: EXECUTIVE ORDER 12898 AND TITLE VI AS TOOLS FOR ACHIEVING ENVIRONMENTAL JUSTICE} (2003). Although this report confirmed previous findings that “minority and low-income communities [were] most often exposed to multiple pollutants from multiple sources . . . ,” the report also found, that there were currently no policies that assessed the risks faced by these communities based on a social and economic framework. \textit{Id.}
In 2004, the Office of the Inspector General created an evaluation report, entitled “EPA Needs to Consistently Implement the Intent of the Executive Order on Environmental Justice.” The report documented the environmental justice movement under the Bush administration, and found that ten years after the signing of the EO, the EPA not only failed to create a clear definition of environmental justice, it also failed to identify the very minority and low-income populations addressed in the EO. In 2005, another report from the GAO verified the EPA’s deficiency in this area. It was entitled, Environmental Justice: EPA Should Devote More Attention to Environmental Justice When Developing Clean Air Rules. This report found that the EPA had not considered environmental justice issues when drafting its clean air rules. Further contributing to this decline were actions by the EPA that demonstrated an intent to purposely disregard the EO.

Lack of progress by the EPA and continued EPA attempts at undermining the goals of the EO leave ethnic minority and low-income communities with little faith in the federal government’s ability to recognize and alleviate the effects of environmental racism. Since the government fails to grant needed relief, communities look to the courts. Unfortunately, the judicial system has also proved inadequate in addressing environmental justice issues.

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35 Bullard et al., supra note 21, at 383.


37 Bullard et al., supra note 21, at 383.

38 Id.

39 Id. The EPA received further complaints in 2005 when it proposed dropping “race” and “class” as “factor[s] in identifying and prioritizing populations that may be disadvantaged” in its draft of the Environmental Justice Strategic Plan. Id. Then in 2007, the GAO released another report criticizing the EPA, entitled “Environmental Right-to-Know: EPA’s Recent Rule Could Reduce Availability of Toxic Chemical Information Used to Assess Environmental Justice.” The GAO attacked the EPA’s attempts at eliminating reports containing detailed information on thousands of facilities that released thousands of pounds of chemicals every year. Id. at 384.

40 Id. Even in 2006, the EPA “continued to dismantle long-standing environmental justice initiatives around the country.” Id.

41 Hernandez, supra note 26, at 207.
C. Barriers to Judicial Relief

Communities have sought to find judicial relief from environmental racism under two sources of federal law: the Equal Protection Clause of the Fourteenth Amendment to the U.S. Constitution, and Title VI of the Civil Rights Act of 1964. Each approach is limited, however, due to ineffective legal standards that deprive minority and low-income communities a legitimate path to environmental justice.

1. Equal Protection Clause

Although the Warren County incident occurred in 1982, the first actual environmental justice case was brought before a Texas court in 1979. In Bean v. Southwestern Waste Management Corp., the residents of Harris County contested the State Department of Health granting a permit to a private company for the operation of a solid waste facility. The plaintiffs contended that the permit was granted due to racial discrimination and provided statistical evidence of this disturbing “pattern of practice.” Despite recognition of these unsettling facts, the court held that the plaintiffs simply failed to prove the required discriminatory intent. The court’s reasoning is based on traditional equal protection analyses that demand evidence of discriminatory intent, regardless of unequal realities, for a claim of racial discrimination to stand.

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42 Vig, supra note 5, at 912.
43 Id. at 915.
44 R. Gregory Roberts, Environmental Justice and Community Empowerment: Learning From the Civil Rights Movement, 48 Am. U.L. Rev. 229 (1998). Environmental Justice litigation has been defined as “any litigation that seeks to prevent or remedy, directly or indirectly, the disproportionate burdens of environmental harm borne by people of color and poor people.” Id. at 234.
46 Id.
47 Id. The court recognized the possibility of inferring discriminatory intent from the statistical data, but the court held that the proffered data did “not rise to that level.” Id. at 677.
48 Id. The court mentioned in its opinion that it did not understand the State Department’s decision to grant this permit when the placement was near a residential area and a high school which did not have any air conditioning. Id. But the Court held that it was not its responsibility to make these determinations, rather it simply had to decide whether or not the plaintiffs deserved a preliminary injunction regardless of the fact that “the decision to grant the permit was both unfortunate and insensitive.” Id. at 678-80 (emphasis added).
This equal protection analysis is founded in Supreme Court precedent, starting with its holding in *Washington v. Davis*, requiring actual discriminatory intent despite a showing of disparate impact.\(^50\) A year after *Washington*, the Supreme Court, in *Arlington Heights v. Metro Housing Development Corp.*, further established the strict standard to be applied in race discrimination cases.\(^51\) The Supreme Court identified five factors that will collectively establish discriminatory intent: “(1) evidence of disparate impact; (2) historical background of the decision; (3) specific events preceding the decision; (4) departures from the normal decision-making process; and (5) administrative history of the decision.”\(^52\)\(^53\) Consequently, this traditional equal protection analysis makes it impossible to raise discrimination claims in court unless plaintiffs can prove a clear intent to discriminate.\(^54\)

A more recent case, and one directly addressing environmental justice claims under the Fourteenth Amendment, is *Residents Involved in Saving the Environment v. Kay*, ("R.I.S.E.").\(^55\) In R.I.S.E. the plaintiff, an organization comprised of white and black residents of King and Queen County, Virginia, challenged the County’s decision to grant the construction of a landfill in its community.\(^56\) As a basis for the claim, R.I.S.E. produced evidence of three prior landfill sitings placed in communities with at least ninety-five percent black populations.\(^57\) The

\(^{50}\) In *Washington v. Davis*, 426 U.S. 229 (1976), two African Americans had applied for the Washington, D.C., police department. *Id.* After being denied positions, they brought suit arguing that the department had used racially discriminatory hiring practices that favored the admittance of white applicants over African Americans. *Id.* The Court ruled that an official act would not be held unconstitutional solely because it resulted in a racially disproportionate impact, but rather *only on the finding of discriminatory intent.* *Id.* at 230 (emphasis added).

\(^{51}\) *Arlington Heights v. Metro. Hous. Dev. Corp.*, 429 U.S. 252 (1977). The facts of this case deal with a zoning ordinance that barred the construction of a multi-family housing facility in a Chicago suburb. *Id.* The effect was the preclusion of families with certain racial and socio-economic backgrounds. *Id.* at 258.

\(^{52}\) *Id.* at 253.

\(^{53}\) Vig, *supra* note 5, at 914. The court also added that meeting these five elements was not dispositive of the plaintiff’s claim, but that the defendant would be able to defeat the challenge by showing that the result would be the same even lacking discriminatory intent. *Id.*

\(^{54}\) Manus, *supra* note 49, at 278.


\(^{56}\) *Id.* at 1145.

\(^{57}\) *Id.* (1) The Mascot landfill was created in 1969. When it was first approved the “estimated racial composition of the population living within a one mile radius of the site was 100% black.” *Id.* at 1148. (2) The Dahlgren landfill was created in 1971. At the time of creation the estimated population living in the area was 95% black. *Id.* (3) The Owenton landfill, created in 1977, was placed in an area where “an estimated 100% of
court, although presented with this troubling pattern of practice, held that under the Equal Protection Clause, officials did not have an “affirmative duty to equalize the impact” of their decisions, and that the plaintiffs’ burden of establishing intentional discrimination was not met.58 This unfavorable interpretation is the reason why environmental justice claims are being undermined through the judicial system. In discussing these cases, commentators argue that the “discriminatory intent standard” ignores the difficulty of ascertaining intent.59 This has led to numerous calls for changes in the law that place more weight on disparate impacts and factual statistics in lieu of unattainable invidious intent.60

R.I.C.E. and other similar cases demonstrate the difficult and ultimately futile attempts at finding relief under the Fourteenth Amendment of the U.S. Constitution.61 Although recommendations are proposed to fix this problem, there are no guarantees they will ever materialize in time, or at all.62 This unfortunate result leads environmental justice advocates to pursue their goals through different legal paths.63

the residents living within a half-mile radius of the landfill were black.” Id.

58 Id. at 1150.

59 Edward Patrick Boyle, It’s Not Easy Bein’ Green: The Psychology of Racism, Environmental Discrimination, and the Argument for Modernizing Equal Protection Analysis, 46 VAND. L. REV. 938 (1993). The author also discusses in depth the existence of “unconscious racism” whereby individuals may make decisions that seem “the product of an unbiased, objective mind but actually reflects the person’s unconscious racial biases.” Id. at 945. The author also describes the sources of a person’s unconscious racism as being a “natural by-product of a child’s development.” Id. at 963.

60 Id. at 979. The situation is further aggravated because many environmental policy decisions are made according to procedures dictated by the National Environmental Policy Act (“NEPA”). See 42 U.S.C. § 4331 (1969). As such, challenges to these policy decisions may be defended on the grounds that decisions were made in accordance with NEPA and not on the basis of any discriminatory intent, thus, further compounding the legal obstacles that prevent realization of environmental justice. See Vig, supra note 44, at 915.

61 See also 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). This was also a case where a challenge was brought against the siting of a landfill in a community that was predominantly black. Id. at 885. The court held that the plaintiffs failed to prove that discriminatory intent was a “motivating factor.” Moreover, despite recognition that the landfill would affect to a “somewhat larger degree” the black community, the policy was upheld. Id. See also NAACP v. Gorsuch, No. 82-768-CIV-5 (E.D.N.C. Aug. 10, 1982). In Gorsuch, residents of a community in North Carolina challenged the siting of a PCB disposal facility in their community, which contained the highest percentage of minority residents. The court held for the defendants on the grounds that the plaintiff had failed to show “one shred of evidence that race has been a motivating factor.” Id.

62 See Godsil, supra note 11, at 421. This article recommended an Act of Congress that would be similar to Title VII of the Civil Rights Act of 1990. Id. The author explained that the Supreme Court had interpreted Title VII to be directed at the
2. Civil Rights Act

The second approach plaintiffs use to fight environmental racism is to bring challenges under the Civil Rights Act of 1964, particularly under the two main components of Title VI: sections 601 and 602. This approach emerged as an alternate principally because under Title VI, challenges are brought under a showing of disparate impact presumably without the discriminatory intent requirement. Title VI prohibits the federal government from financing any program that operates in a racially discriminatory manner. Although initially promising, challenges pursued under this approach have encountered comparable legal obstacles to those met under the Equal Protection Clause. The Supreme Court has struggled to establish the scope of Title VI and the available relief for successful claims. More specifically, the Supreme Court wrestled with the issue of an individual’s right of action and whether it exists only for intentional discrimination, or whether it extends to discriminatory impact as well. This indecisiveness is reflected in the following cases.

An early case discussing this issue was Lau v. Nichols, where the Supreme Court held that the plaintiff’s showing of disparate impact was sufficient to prove a violation of Title VI. Although the language seems

consequences of employment policies and not at discriminatory intent. Id. An act that extended Title VI to this same interpretation would provide better grounds for communities to bring environmental justice challenges. Id.

65 See Vig, supra note 5, at 915. “Section 601 ensures that no person shall be deprived of the benefits of a federally-funded program or agency based on his or her race, color, or national origin. Section 602 authorizes recipients of federal funds to promulgate regulations effectuating the guarantee of section 601.” Id.
66 Roberts, supra note 63, at 236.
67 42 U.S.C. § 2000(d) (1988). “No person in the United States shall, on the ground of race, color, or national origin, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance.” Id.
68 See Roberts, supra note 63, at 236.
69 See Vig, supra note 5, at 916.
70 Id.
71 Lau v. Nichols, 414 U.S. 563 (1974). In Lau, Chinese-speaking students in the California school system were not provided with supplemental English courses to assist in their education. Id. The Court held that because the schools were receiving federal funding, and due to various federal regulations that required schools rectify language deficiencies, the schools were in violation of Title VI. The Court reversed and remanded in favor of the Chinese students. Id. at 569.
72 Id. Disparate impact discrimination is barred even absent purposeful design.
favorable to environmental justice advocates, the Supreme Court diminished this confidence in its Regents of the University of California v. Bakke holding.\textsuperscript{73} In Bakke, although lacking a majority opinion, a joint concurrence of five Justices found Title VI provided “absolutely coextensive” protection under the Equal Protection Clause, and “did not reach disparate impact.”\textsuperscript{74} This opinion conflicts with the Court’s finding in Lau, but when presented with an opportunity to clarify the two cases, the Court divided once again.\textsuperscript{75}

In Guardians Association v. Civil Service Commission of the City of New York,\textsuperscript{76} the Supreme Court faced an employment discrimination challenge in the New York Police Department.\textsuperscript{77} The question before the Court was whether or not there existed a requirement of discriminatory intent in order to claim a violation under Title VI.\textsuperscript{78} In the majority opinion, the Court held that Title VI indeed reached both disparate impact and discriminatory intent. However, the plaintiffs’ lack of evidence failed to prove intentional discrimination, and as such they “were not entitled to compensatory relief.”\textsuperscript{79} Although disagreements within the majority existed,\textsuperscript{80} the majority did require intentional discrimination to be made evident, whereas the dissent was more favorable to giving the “force of law” to federal regulations that proscribed disparate impact discrimination under Title VI.\textsuperscript{81}

A recipient of federal funding “‘may not . . . utilize criteria or methods of administration which have the effect of subjecting individuals to discrimination’ or have ‘the effect of defeating or substantially impairing accomplishment of the objectives of the program as respect individuals of a particular race, color, or national origin.’ Id. at 568 (emphasis added).

\textsuperscript{73} Regents of the Univ. of California v. Bakke, 438 U.S. 265 (1978).

\textsuperscript{74} Vig, supra note 5, at 917.

\textsuperscript{75} Id. at 918.

\textsuperscript{76} Guardians Ass’n v. Civil Serv. Comm’n of the City of New York, 463 U.S. 582 (1983).

\textsuperscript{77} Id. The Guardians case involved Black and Hispanic residents who filed a legal claim on the grounds that the police department’s employment practices (hiring and firing policy) disproportionately impacted Blacks and Hispanics and was based on a discriminatory purpose. Id.

\textsuperscript{78} See Vig, supra note 5, at 917-18.

\textsuperscript{79} Id.

\textsuperscript{80} Id. at 918. Justice Powell concurred in the opinion but disagreed with Justice White’s interpretation of Title VI finding that “Title VI only extend[ed] to cases relating to intentional discrimination actionable under the Fifth or Fourteenth Amendments.” Id. at 918. Justice O’Connor, although a member of the majority, found that “section 602 regulations proscribing disparate impact discrimination did not provide a right of action under Title VI.” Id.

\textsuperscript{81} Id. at 918-19.
Justice Stevens, joined by Justices Brennan and Blackmun in the dissent, maintained that although discriminatory intent was required under section 601 of Title VI, the same did not apply under section 602. The Justices argued that a showing of disparate impact was sufficient to bring legal claims under section 602 regulations, which they considered “valid federal law.” The multiple and differing opinions from this case led Justice Powell to rightly conclude that “[o]ur opinions today will further confuse rather than guide.”

Despite the uncertainty left in the wake of *Guardians Association*, the favorable reasoning communicated in the dissent was echoed in the majority opinion of the Supreme Court in *Alexander v. Choate*. The Court held that “regulations promulgated under section 602” could lead to actionable claims under a disparate impact showing. Although seemingly beneficial, in the absence of any such promulgated regulation that provides specific environmental justice claims under a mere showing of disparate impact, this decision does little for environmental justice advocacy.

Although the scope of Title VI claims was discussed in the above mentioned Supreme Court cases, the first environmental justice case to utilize a Title VI claim was heard in the Third Circuit Court of Appeals. In *Chester v. Seif*, the plaintiffs challenged a local Department’s decision to grant a permit for the construction of a waste facility in Chester County, a predominantly black community. The court examined the plaintiffs’ claims under sections 601 and 602 of Title VI. The court held that, under section 601, the plaintiffs were required to establish intentional discrimination, which the plaintiffs failed to do. Under section 602, however, the Court found that according to *Guardians* and *Alexander*,

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82 *Id.*

83 *Id.* Furthermore, Justice Stevens’ dissent, in *Guardians*, pointed to one example in the *Lau* case, where the Supreme Court looked at departmental regulations under Title VI that prohibited programs that had a discriminatory “effect even though no purposeful design [was] present” as support for their reasoning that section 602 regulations were valid law to be recognized by the Court in this case. *Guardians*, 463 U.S. at 616.

84 *Id.* at 608.


86 See Vig, *supra* note 5, at 919.

87 *Chester Residents Concerned For Quality Living v. Pennsylvania Dep’t of Env’t Protection*, 132 F.3d 925, 927 (9th Cir. 1997).

88 See Vig, *supra* note 5, at 922.

89 *Chester*, 132 F.3d at 928.
actionable claims existed under both intentional and disparate impact discrimination.90

This ruling is extremely helpful for environmental justice advocates.91 It places greater burdens on defendants, under section 602, to produce a greater showing that a disparate impact is somehow “manifestly related” to the agency’s action.92 As helpful as it may be, however, the decision of the Third Circuit was vacated by the Supreme Court after the defendant withdrew its application for a landfill permit.93 The Supreme Court held that the issue presented in Chester was now “moot.”94 As a result, the question of whether a cause of action exists and can be brought under section 602 is still undecided and left to the uncertainty of the Guardians and Alexander cases.

The difficulties faced by bringing environmental justice challenges in court are discouraging to the general movement. These failures reflect the “absence of legal mechanisms designed specifically to address environmental racism.”95 This lessens the likelihood that Hawai‘i communities will find relief through the same venues. Moreover, attempts to raise similar claims in Hawai‘i are further hindered due to the unique ethnic make-up of Hawai‘i’s population, which is notably distinct from mainland populations.

D. Hawai‘i’s Unique Make-up

Hawai‘i poses a unique stage for environmental justice advocacy, in light of the above-mentioned cases, because the ethnic makeup of the islands is so diverse.96 The cases above focus their analysis primarily on the basis of race, and more particularly on the disparate effects on “minorities.” Their definition of “minorities,” however, is somewhat limited to what some scholars have termed as “racial dichotomizing.”97

90 See Vig, supra note 5, at 923.
91 Id. at 934.
92 Id. at 930. The decision in Chester would give environmental justice plaintiffs the ability to overcome the huge obstacle of proving discriminatory intent.
93 Id. at 934.
94 Id.
Academics have discussed the limitations of categorizing race into “oversimplified and dichotomous” definitions (i.e., “black” and “white”). This “racial dichotomizing” ignores the existence of other minority groups that also suffer environmental injustice. This problem is magnified in Hawai‘i, since a majority of the state’s population is comprised of minorities. This imprecise focus on race is flawed for two reasons. First, advocates for environmental justice have recognized that environmental injustice is not exclusively based on race; it also includes the disproportionate distribution of waste facilities based on social economic status. Second, this mentality is unacceptable in light of the fact that the country is moving towards a more diverse body of citizens. Consequently, Hawai‘i is an ideal place to advance environmental justice principles. In Hawai‘i, the goals of environmental justice can still be acknowledged and realized for the benefit of the State’s residents, particularly in the overburdened communities of the Wai‘ānae Coast.

III. ENVIRONMENTAL INJUSTICE ON THE WAI‘ĀNAE COAST

Environmental justice issues in Hawai‘i are most apparent when applied to the Wai‘ānae Coast of the island of O‘ahu. The Coast is home to many ethnic populations, including Native Hawaiians, other Pacific islanders, and Asians. The Coast is also home to eleven of eighteen sewage treatment plants, active landfills, and power plants on the island of O‘ahu. These statistics offer verification of the unequal distribution of general societal burdens on this particular area of the island. While this injustice includes other facilities and actions that impact the environment

98 Id.

99 See OMPO, supra note 96, at 48. “In racially diverse areas like Honolulu...where there is no clear majority and where one of the [Federally defined minority] groups (Asian) is numerically significant, such a simplistic approach would result in close to half of O‘ahu being identified as environmental justice areas.” Id.


and health of these communities, for purposes of this comment, the focus will be on two existent landfills. This part of the comment presents the racial and social-economic make up of the Waiʻānae Coast. It also examines the general concept of environmental justice, with particular focus on the existence of environmental injustice, using relevant framework structured by Law Professor Eric K. Yamamoto.

A. Ethnic & Social-Economic Make-up of the Waiʻānae Coast

The Waiʻānae Coast of Oʻahu is composed of multiple ethnic groups that fit in the federal definition of environmental justice minority populations. These groups include, but are not limited to, Native Hawaiians, Samoans, Tongans, Filipinos, Chinese, and Koreans. The residents of the Coast, in addition to being comprised of ethnic minorities, are also predominantly poor. Moreover, the Coast satisfies the description of low-income as defined by the Federal Government. Census Bureau of Statistics data found the “percentage of residents [on the Coast] living below the poverty level, [at] 21.9 percent; [this is] more than double the percentage of Oʻahu residents as a whole (9.9 percent below the poverty level).” The residential composition of the Waiʻānae Coast, when correlated with the distribution of waste facilities on Oʻahu, raises

104 Environmental problems are not exclusive to these facilities. There is also a military live fire training area that uses a 4500-acre valley that “the Army uses for training, despite protests from Native Hawaiians who regard the valley as a sacred cultural and historical spot.” Brian Duus, Reconciliation between the United States and Native Hawaiians: The Duty of the United States to Recognize a Native Hawai'i an Nation and Settle Ceded Lands Dispute, 4 ASIAN-PAC. L. & POL'Y J. 393, 436 (2003). Another environmental problem concerns military actions in the past where military munitions were dumped off the Waiʻānae Coast “including lewisite, mustard, cyanogens chloride and cyanide.” William Cole, Army Taking Closer look at Ordnance Dumps off Oʻahu, HONOLULU ADVERTISER, Oct. 29, 2008, http://hummaproject.com/html/hnl_advertiser_10292008.htm (last visited Mar. 2, 2009). Waiʻānae residents have voiced concerns over finding numerous remnants of past grenades and bombs in Waiʻānae beaches, one area in particular, named “ordnance reef” due to ordnance fragments continually discovered there. Id. These raise immediate issues not just over the environmental treatment, but also about the safety of Waiʻānae residents. Id.

105 Eric K. Yamamoto is an internationally recognized law professor who teaches at the University of Hawaiʻi William S. Richardson School of Law.

106 OMPO, supra note 96, at 1.

107 Id. at 48-55.

108 Id. at 56-62.

109 Id. at 1. “Low-Income – a person whose income (or in case of a community or group, whose median household income) is at or below the U.S. Department of Health and Human Services poverty guidelines.” Id.

110 Waiʻānae Ecological Characterization, supra note 102.
suspicions between the over-representation of low-income ethnic groups and the number of waste facilities in this area. This correlation becomes abundantly clear, and increasingly troubling, when the applicable framework for environmental justice is applied to the current conditions of the Waiʻanae Coast.

**B. Framework for Environmental Justice**

In his article entitled “Racializing Environmental Justice,” Professor Yamamoto highlights four main characteristics that collectively make up the concept of environmental justice. These general characteristics are: “an emphasis on traditional environmental hazards . . . ; a remedial focus on relocation of facilities and clearing of polluted ones; an embrace of the norm of equal representation in the administration of environmental laws and policies; and a belief in community activism.”

All four characteristics, when examined in regards to the Waiʻanae Coast, validate the existence of environmental racial injustice.

1. **Disproportionate Distribution**

The first characteristic of the framework of environmental justice, and arguably the basis of this concept, concentrates on the “disproportionate distribution of hazardous facilities.” This component focuses on the location of waste facilities in comparison to populace situations and physical proximity from other such facilities. As mentioned above, eleven of the eighteen waste facilities and power plants on the island of Oʻahu are located on the Waiʻanae Coast. Of the three active landfills in existence, two operate on the Waiʻanae Coast within three miles from each other, and the third is on a Military base.

The privately run PVT landfill, located in Nānākuli, was first opened in 1985. PVT accepts industrial waste, such as construction and demolition materials, including asbestos-containing material and petroleum-contaminated soil. The private landfill is the depository for:

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111 See Yamamoto, supra note 3, at 320.
112 Id.
113 Id. at 317.
114 Id.
117 Id.
the six hundred thousand tons of industrial waste that O‘ahu generates each year.\footnote{2006 Haw. Sess. Laws, H.R. No. 58, at 666 [hereinafter H.R. No. 58].} Community concerns include PVT becoming the last resort for the island’s waste problems, leading to an expansion of the current PVT site, and a permit to receive municipal solid waste on top of the industrial waste already being dumped there.\footnote{Donald, Nānākuli, Hawai‘i PVT Landfill Meeting 3/6/08, Part 2 of 2, MySpace Video, http://vids.myspace.com/index.cfm?fuseaction=vids.individual&VideoID=32183455 (last visited Mar. 05, 2009). Community concerns were directed not only at health issues, but also concerns over “noise pollution” and the heavy traffic that frequents the area. Id. Community members expressed also the lack of favorable results despite the numerous meetings that have occurred. Id. Community members were aware of possible civil rights violations and one resident even mentioned the possible existence of “environmental racism.” Id. Another concern was over the possibility that PVT was violating its permit by accepting materials that it was not authorized to take. Id.}

The Waimānalo Gulch Sanitary Landfill (“WGSL”), in existence since 1986,\footnote{STATE OF HAWAI‘I DEPARTMENT OF HEALTH SOLID WASTE SECTION, LANDFILL DATABASE – O‘AHU WEBPAGE, http://209.85.173.132/search?q=cache:9A9KOGHu6kJ:Hawaii.gov/health/environmental/waste/sw/pdf/Oahulandfills.pdf+Oahu+active+landfill+database&hl=en&ct=clnk&cd=1&gl=us&client=firefox-a (last visited Apr. 09, 2009).} is a municipal dump owned by the City & County of Honolulu (“City”) and operated by a private company. WGSL receives over fourteen hundred tons of waste a day,\footnote{H.R. No. 58, supra note 118.} including nearly four hundred tons of ash from H-POWER. H-POWER generators are located only 5 miles away from the landfill, still within the Wai‘ānae Coast.\footnote{H-POWER is a project of the City’s waste-to-energy system. See H-Power http://www.honoluluhpower.com/About.asp (last visited Apr. 22, 2009). The facility takes in certain solid wastes and through a “refused derived fuel combustion” process, creates energy to power turbines that make electricity. Id. The byproducts are tons of ash that are sent to the WGSL daily. Id.} The history of WGSL is rife with misuse and broken promises, including the “consideration” of five alternative sites, four of which were still located on the Wai‘ānae Coast.\footnote{Diana Leone, The Search For O‘ahu’s Next Landfill, HONOLULU STARBULLETIN, http://archives.starbulletin.com/2004/11/14/news/index2.html (last visited Apr. 21, 2009). The five alternative sites were located in Maili, Nānākuli (across the street from the PVT landfill), the Maka‘iwa Gulch (adjacent to the WGSL), an expansion of WGSL, and the Ameron Quarry (the only alternative not located on the Wai‘ānae Coast). Id.} This history includes litigation involving the State Department of Health alleging eighteen violations in the operation of this particular landfill.\footnote{State of Haw. Dep’t of Health Solid and Hazardous Waste Branch Hazard Evaluation and Emergency Response Office, Report to Twenty-fourth Legislature State of Haw. 2007 Litigation against Waste Management and City & County &}
Honolulu has applied to the State Land Use Commission for a special use permit to allow a 92-acre expansion of the existing landfill and a 15-year extension of operations at WGSL. This fact highlights the urgency of this issue and the continued disregard for the disproportionate distribution of waste facilities on the island of O‘ahu.

2. Environmental Hazard

The second characteristic of this framework requires an examination of traditional hazards to the environment, such as pollution from waste facilities, and the resulting impact on local residents. Some have suggested that this component addresses the right that all Americans, regardless of race and socio-economic status, have “to live and work in healthy environments.” Related writings on this issue have focused on the relationship between an increase in negative health effects and the pollution caused by hazardous waste facilities. This “quality-of-life” issue is apparent on the Wai‘ānae Coast regarding both the Waimānalo Gulch and PVT landfills. Residents who live near the Waimānalo Gulch landfill raise concerns that the waste facility, particularly the tons of black ash brought into the dump daily, has attributed to increased health problems among families living in close proximity to the landfill. The landfill is located near residential homes, areas of work, and recreational areas.

125 Peter Boylan, Some state lawmakers try to stop Honolulu’s landfill extension plan, HONOLULU ADVERTISER, http://www.honoluluadvertiser.com/article/20090304/NEWS01/903040421 (last visited Mar. 5, 2009). State lawmakers representing the affected area also introduced a measure in the State legislature that would place a moratorium on any new waste landfill and the expansion of any private landfill on the Wai‘ānae Coast. Id. This measure, however, “would not block the city’s expansion plan.” Id. Thus, this measure, does little to alleviate the immediate concerns of residents over the current landfills on the Wai‘ānae Coast.

126 See Yamamoto, supra note 3, at 316.

127 Id.

128 Id.

129 Nānākuli-Maili Neighborhood Board No. 36, Draft Minutes of Regular Meeting, 4 (Mar. 2009), available at http://www.honolulu.gov/NCO/nb36/09/36200901min.pdf. The meeting also included testimony from “[m]any residents who live near the landfill [and] are complaining of health issues (e.g., dust in their homes, dirt tracked on the roadway by the trucks leaving the landfill).” Id.

Across the highway from the location of the landfill, “approximately 200 feet from the corner of the landfill boundary” are the Brookefield Homes residential developments, which include “270 multifamily units.” The landfill is also located adjacent to a Hawaiian Electric Company Power Plant and across from the Ko Olina resort. Both companies employ numerous individuals, some of which reside on the Wai‘anae Coast. The landfill also sits across the Kahe Point Beach Park, numerous public lagoons in the Ko Olina resort, and the Ko Olina golf course. Opponents to the landfill, and those opposed specifically to attempts by the County to expand the landfill, have identified several “adverse affects on adjacent residential communities.” These include concerns of “excessive accumulation of leachate at the base of the landfill,” and the potential for instability that could lead to landslides. Other concerns highlight the “presence of asbestos in the current landfill due to inadequate monitoring of waste accepted,” and the possibility of mercury contamination from older cars that are included in the “automobile shredder residue sent to the landfill by the City & County’s auto recycling contractor.”

Similarly, residents who reside near the PVT landfill have raised comparable concerns regarding respiratory conditions and other general health problems. Indeed, the opening narrative of this very comment authenticates the existence of these health issues. This component of


133 Id.

134 See EIS Preparation Notice, supra note 131, at 4-27.

135 Office of Planning Position Statement, supra note 132, at 5.


137 Office of Planning Position Statement, supra note 132, at 5.

138 Id.


140 There have been additional reports of dust from the PVT landfill that have
the framework, with its focus on “reducing the threat of health hazards,” is particularly relevant for Wai‘anae Coast residents.

3. Community Representation

The third characteristic of the environmental justice framework recognizes that ethnic minority and low-income communities “lack . . . real political power.”141 As such, this element focuses on “equal representation in the administration of environmental laws and policies.”142 Vulnerable communities lack representation, particularly “in the areas of substantive environmental law.”143 This deficiency leads to a lack of political power, and an inability to voice opinions and oppositions in “legislative, regulatory, and enforcement arenas.”144 This component of the environmental justice framework seeks to improve this area by increasing access of these communities to “legislative, administrative, and judicial fora.”145

Numerous community members have expressed a frustration in their attempts at finding relief by appealing to elected public servants.146 These community members are frustrated by the failure of proposed measures in the state legislature that would grant relief to their communities.147 Recently, a private company attempted to establish another landfill on the Wai‘anae Coast by circumventing required procedural rules.148 Environmental justice, through this component of the

141 Mahoney, supra note 100, at 368.
142 Yamamoto, supra note 3, at 318.
143 Hernandez, supra note 26, at 207.
144 Yamamoto, supra note 3, at 318.
145 Id. at 319.
148 Interview with Maile Shimabukuro, Hawai‘i State House Representative of District 45, in Honolulu Haw. (Feb. 2, 2009). Rep. Shimabukuro explained how Pacific Aggregate, a private company, nearly succeeded in acquiring a permit to open a landfill on the Wai‘anae Coast by taking advantage of a procedural mistake by the Land Use Commission (“LUC”). Id. Pacific Aggregate had been denied an application by the LUC due to certain issues that the LUC thought could be rectified by simply sending the application back to the Planning Commission. Id. The problem with this action is that under state law, the LUC only has power to “approve, approve with modifications, or deny.” Id. The LUC does not have power to remand it back to the Planning Commission. Id. Because the application was not approved, it should have been thrown out
framework, seeks to “level the playing field” by giving a greater voice to affected communities.\textsuperscript{149}

The City and County of Honolulu recently sought to expand the WGSL for another fifteen years, which reflects a lack of concern for the communities of the Waiʻānae Coast.\textsuperscript{150} In order to achieve this expansion, the City applied for both a “district boundary amendment” and a “special permit.”\textsuperscript{151} This “unprecedented nature of a reclassification request” is the City’s attempt to guarantee this expansion regardless of community opposition.\textsuperscript{152} The City also stands to benefit from a district amendment.

Special permits are required to be reviewed and renewed every five years, but “a district boundary amendment [would] eliminate any future reviews and reduce the pressures [on the City] to improve.”\textsuperscript{153} This would allow the landfill to continue without a review by the appropriate body of decision-makers and deprive the community of any input into this process. Additionally, a district amendment would allow the City to bypass a condition that has been a part of its rezoning agreement with the Makaʻiwa Hills, LLC, who are the owners of residential property located near the WGSL.\textsuperscript{154} The condition “require[s] disclosure of all of the potential noise, odor, dust, and adverse effect[s] from the [landfill].”\textsuperscript{155} Should a district amendment be granted, however, the “[r]eclassification…would eliminate the opportunity for adjacent residents to testify concerning the impact of these adverse effects to both the Planning Commission and the

\textsuperscript{149} Yamamoto, supra note 3, at 318.
\textsuperscript{150} See Office of Planning Position Statement, supra note 132.
\textsuperscript{151} Id. at 3. This unusual requirement “may be the first and only case in which a district boundary amendment is being requested to allow for a temporary landfill.” Id. at 9. This goes against the “uniform and long-held practice of allowing landfills by special permit.” Id.
\textsuperscript{152} Id. at 10.
\textsuperscript{153} Office of Planning Position Statement, supra note 132, at 8.
\textsuperscript{154} Id. at 6.
\textsuperscript{155} Id.
Land Use Commission.”\footnote{\textit{Id.}} The City’s actions seem to exhibit an unfortunate disinterest in recognizing community resistance and a lack of concern in allowing for community input in its ruthless efforts to expand an already controversial landfill.

4. Community Involvement

The final aspect of the environmental justice framework concentrates on community activism.\footnote{Id.} Though not an element that adds to any injustice, this factor examines community involvement and efforts to build “people power” to place “pressure on the person[s] or agenc[ies] with decision-making authority.”\footnote{Id.} Waiʻanae Coast residents have demonstrated numerous efforts to find relief through organizing within the community.\footnote{Id.} One of the various groups that work towards achieving environmental justice goals for the Waiʻanae Coast is KAHEA, Inc.\footnote{Id.} This community-based organization seeks on numerous fronts to preserve the ‘āina\footnote{Translated from Hawaiian, “āina” refers to “the land.”} and cultural rights of Native Hawaiians. KAHEA, along with other groups including Concerned Elders for Waiʻanae,\footnote{Concerned Elders for Waiʻanae: Protect Our Coast page, http://Waianaewatch.org/Landfills.html (last visited Apr. 21, 2009).} have recently organized to create a Waiʻanae Environmental Justice working group to address this specific issue of environmental injustice on the Waiʻanae Coast. Community leaders have voiced their commitment to do everything possible to prevent the placement of any additional landfills on the Waiʻanae Coast.\footnote{See \textit{Cash to Fight Trash}, supra note 2.} This common sentiment even led to the creation of a communal fund for the sole cause of taking legal action against “anyone who as much as attempts to stick a landfill anywhere else on the Waiʻanae Coast.”\footnote{Id.} Communities on the Waiʻanae Coast have acted and organized for the purpose of earning relief for the entire Coast. Despite these worthy endeavors and the existence of communal support, environmental injustice still persists.

\footnote{156 Id.}
\footnote{157 Yamamoto, \textit{supra} note 3, at 319.}
\footnote{158 Id.}
\footnote{159 Waiʻanae Ecological Characterization, \textit{supra} note 110. Waiʻanae’s “ability to organize as a community is unmatched on the island.” \textit{Id.}}
\footnote{160 Translated from Hawaiian, “kahea” is “the call.”}
\footnote{161 Translated from Hawaiian, “aina” refers to “the land.”}
\footnote{162 Concerned Elders for Waiʻanae: Protect Our Coast page, http://Waianaewatch.org/Landfills.html (last visited Apr. 21, 2009).}
\footnote{163 See \textit{Cash to Fight Trash}, supra note 2.}
\footnote{164 Id. This announcement was made at a town meeting where a Waiʻanae resident, William Aila, stood up and announced the creation of this fund. He also announced that he would create the fund with his own $1,000. \textit{Id.} Aila further stated that the money would be used to fund a lawsuit if needed or to bail people out of jail who were arrested for acts of civil disobedience. \textit{Id.}}
C. The Cultural Factor

In addition to the above-mentioned elements of the framework, there is also another aspect unique to Hawai‘i that further discourages the siting of these landfills. Native Hawaiian culture places a significant importance on the spiritual relationship between the Native Hawaiian people and the land. Ancient Hawaiian philosophy endorses the unity of people and nature in many common expressions such as “aloha ‘āina a me mālama ‘āina,” which translates to “love, care for, and protect the land.” Indeed, the Hawai‘i State motto is “Ua mau ke ea o ka ‘āina i ka pono,” which means “the life of the land is perpetuated in righteousness.” Thus, the act of filling the land with waste completely contradicts the beliefs of ancient and modern Native Hawaiians, and disgraces the value that they place in the land.

Archaeological studies and cultural impact assessments conducted in the area where the City seeks to expand the WGSL “discovered important archaeological [finds] within the petition area.” Specifically, archaeologists found three upright monoliths within the proposed expansion area, and “[c]ultural consultants agreed that the stones have cultural significance and should be left in place if possible.” These cultural and historic resources should be recognized and preserved in respect of ancient Native Hawaiians and their descendants who reside near these cultural areas.

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166 *Id.*

167 *HAW. CONST.* art XV, § 05 (2008).

168 There were also findings in the Environment Impact Statement Preparation Notice, prepared for the proposed expansion of Waimānalo Gulch Landfill, that the landfill area “may well have been significant for the people of western Honouliuli.” EIS Preparation Notice, *supra* note 131, at 4-27. This may have been due to the fact that the gulch provided a source of potable water (*wai* translates to water, and *manalo* to potable), and also because there were legends of supernatural beings that inhabited the area. *Id.*


170 *Id.*

171 See *Wai‘ānae Ecological Characterization*, *supra* note 110. The Wai‘ānae Coast is also the area with the highest concentration of Native Hawaiians on O‘ahu. *Id.* Of Wai‘ānae “residents reporting only one race, about 22.9 percent are Native Hawai‘i, compared to only 5.6 percent of the population for O‘ahu, and 6.6 percent for the State of Hawai‘i.” *Id.* This is due in part to the fact that it contains the highest concentration of Hawaiian Homelands in the State. *Id.*
IV. THE EXTENT OF ENVIRONMENTAL JUSTICE IN HAWAI’I

The environmental injustice that exists in Hawai’i should not detract from the fact that there have been efforts of attaining the goals of environmental justice in this state. This section of the comment will examine past attempts at establishing this concept, and also explore the slight environmental justice gains realized in Hawai’i.

A. O‘ahu Metropolitan Planning Organization

After President Clinton’s famed EO, few agencies took actions to implement the concepts specified in the decree. The results were less than satisfying. But the efforts of one agency, in particular, had far reaching effects that influenced the policy decisions of one specific agency in Hawai’i.

The United States Department of Transportation (“DOT”), in light of the EO, distributed a memorandum “to all federally funded transportation agencies, including state DOTs and metropolitan planning organizations,. . . requir[ing] such agencies to comply with Title VI and environmental justice.” This led to actions by the Federal Highway Administration (“FHWA”) to increase its efforts in furthering the environmental justice movement. The FHWA defined Environmental justice “persons” as anyone belonging to the Black, Hispanic, Asian, American Indian & Alaskan Native, Native Hawaiian or other Pacific Islander, and Low-Income categories. Although the FHWA allowed state DOTs and Metropolitan Planning Organizations flexibility within their discretion of these issues, the O‘ahu Metropolitan Planning Organization (“OMPO”) was quick to adopt the principles of environmental justice.

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172 See Bullard, supra note 21, at 382.
173 OMPO, supra note 96.
174 Id. The FHWA provided training on Title VI and environmental justice to state DOTs and MPOs. Id. at 1.
175 Id. FHWA recognized three environmental justice principles: “(1) to avoid, minimize, or mitigate disproportionately high and adverse human health and environmental effects, including social and economic effects, on minority populations and low-income populations; (2) to ensure the full and fair participation by all potentially affected communities in the transportation decision-making process; (3) to prevent the denial of, reduction in, or significant delay in the receipt of benefits by minority and low-income populations.” Id. (listing minority and low income groups defined as “Environmental Justice persons”).
176 Id. State departments retain flexibility over the identification of environmental justice populations, the criteria that would be used to evaluate compliance, and the effectiveness of measures to be taken to protect them. Id. at 2.
1. Report on Environmental Justice on O‘ahu

These events led OMPO, in 2000, to “evaluate its regional transportation plan and transportation improvement program” and create a report in which OMPO utilized the 1990 and 2000 Census bureau data to identify specific environmental justice populations within the island of O‘ahu.\(^{177}\) The most fascinating aspect of OMPO’s report was its attempt to accurately depict environmental justice populations within the unique make-up of Hawai‘i’s diverse population.\(^{178}\)

The report recognized the difficulty of “relying on arbitrarily-set thresholds as the basis of identifying environmental justice populations,” when considering Hawai‘i’s remarkable diversity.\(^{179}\) This recognition led OMPO to create two completely new measurable elements that would compensate for this uniqueness. While still applying FHWA guidelines, OMPO factored in underlying “settlement characteristics”\(^{180}\) of the minority races on O‘ahu, and “local knowledge”\(^{181}\) of areas that were “truly disadvantaged.”\(^{182}\) OMPO was determined to follow the “intent of the law” (i.e., EO 12898) by bending the “letter of the law” to fit the ethnic diversity found in the islands.\(^{183}\)

Utilizing the FHWA guidelines alone, OMPO identified four hundred and thirty-five “block groups” that could be classified as

\(^{177}\) Id.

\(^{178}\) Id. at 4.

\(^{179}\) Id.

\(^{180}\) The first element created to compensate for Hawai‘i’s uniqueness was an analysis of “the underlying settlement characteristics of each of the minority races on O‘ahu. . . . This yields an understanding of the normal variation of each race among the block groups . . . allow[ing for] the truly disproportional concentration of the races to be found.” \(^{181}\) Id.

\(^{181}\) The second element took advantage of the “wealth of information [known] locally, as to the location of truly disadvantaged areas.” \(^{182}\) Id.

\(^{182}\) Id. OMPO realized the difficulty in utilizing the general definitions of minorities in the United States and created a framework of analysis that would better suit the diverse makeup of O‘ahu. Interview with Gordun Lum, Executive Director for OMPO, in Honolulu Haw. (Feb. 19, 2009). Executive Director Lum commented on this analysis as the organization’s effort in fulfilling the “intent of the law [executive order 12898]” but at the same time not following the “letter of the law.” \(^{183}\) Id. Lum also commented on the use of “local knowledge” and called this the “common sense test” that utilized the “wealth of [local] information” and knowledge of the areas that were truly disadvantaged. \(^{184}\) Id. This component begged the question, “who really is disadvantaged?” \(^{185}\) Id. Lum also described the use of Asian Americans in its report. \(^{183}\) Id. Asian Americans in Hawai‘i were given a “high threshold” to meet due to the fact that Asian Americans in Hawai‘i made up a large portion of the population and were generally more prosperous then as defined under the federal guidelines. \(^{186}\) Id.

\(^{183}\) Id.
environmental justice populations.\textsuperscript{184} After factoring in the two unique components (local knowledge & settlement characteristics), the number of environmental justice block groups fell to seventy-eight,\textsuperscript{185} (including ethnic minority groups & low-income groups) and these became the vulnerable populations identified in this report. Out of the seventy-eight identified environmental justice populations, the report identified nine block groups that met both ethnic minorities and low-income population definitions. Four of the nine high-risk areas were located on the Waiʻānae Coast, including a large area that could easily encompass the combined areas of the remaining five.\textsuperscript{186}

The process developed by OMPO, defining environmental justice groups in ethnically diverse areas, provides a solution to a problem that once seemed a hindrance to realizing environmental justice for Hawaiʻi's communities. This approach is also valuable to other similarly situated communities in light of increased probability that this country’s population will soon resemble the diversity enjoyed in Hawaiʻi.\textsuperscript{187} In addition to posing a better perspective at analyzing the existence of environmental injustice in ethnically diverse areas, OMPO’s report also confirms the reality that the Waiʻānae Coast is highly susceptible to this injustice. Aside from all the promising developments that OMPO offers, however, the organization is limited only to developments involving transportation planning and improvement.\textsuperscript{188} Thus, the landfills on the Waiʻānae Coast are beyond the reach of OMPO regulations and thus remain among the majority of projects that fail to consider environmental justice factors.

B. Legislative Efforts at Realizing Environmental Justice

Environmental justice attempts in Hawaiʻi have not been limited to the OMPO example. There have been other efforts to pass legislative measures to advance the environmental justice movement.


In the 2003 Hawaiʻi State Legislative session, Senator Hanabusa, the elected State Senator from the Waiʻānae Coast, introduced Senate Bill 1593 (SB1593).\textsuperscript{189} This measure encompassed high hopes of infusing the

\textsuperscript{184} A significant amount that would not be accurate when correlated to the actual communities that were a part of that majority. \textit{Id.}

\textsuperscript{185} The reduction resulted in \textup{18\%} of the Oʻahu block groups being considered environmental justice areas. \textit{Id.}

\textsuperscript{186} See OMPO, supra note 96, at 63.


\textsuperscript{188} See OMPO, supra note 96, at 2. OMPO is an agency of the State DOT.

\textsuperscript{189} See S.B. 1593, supra note 147.
principles of environmental justice into every State and County agency within the State of Hawai‘i. In particular, the measure sought to amend CH 343 of the Hawai‘i Revised Statutes (HRS), which deals with Environmental Impact Statements (“EIS”). HRS 343 requires an EIS for numerous state and local government actions. SB1593 would have required agencies to evaluate, as a component of the EIS, the impact of a proposed project on “native Hawaiian and low-income communities” with the purpose of “minimizing the likelihood that [these communities would] bear a disproportionate share of the adverse environmental consequences.” The measure would have also created an interagency working group that would “assist government agencies in discharging their environmental justice responsibilities.” In the end, despite the strong language and promising potential, this Bill failed to pass the State Legislature in both the 2003 and 2004 sessions.

2. Senate Resolution 78 (2005)

The following legislative session, Senate Resolution 78 (“SR78”) was introduced and ultimately adopted by the entire legislature as a Concurrent Resolution. The resolution requested the Department of Health to develop a “guidance document” that would assist in environmental reviews by suggesting that the environmental justice principles be utilized in the consideration of future environmental developments. The resolution, although seemingly beneficial, lacks the strength of enacted law obligating the use of environmental justice values

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190 See S.B. 1593, supra note 147, at § 4. The measure would have “require[d] state and county agencies that control the siting and disposing of hazardous materials… to give fair treatment to native Hawai‘ian and low-income populations.” Id.

191 Id.

192 Haw. Rev. Stat. § 343-5 (2008). This measure requires an EIS for projects that involve, amongst other things, “Waste-to-energy facilit[ies] . . . Landfill[s] . . . or Power-generating facilit[ies].” Id. In 2000, the Legislature enacted one of the more significant amendments to chapter 343. This amendment was directed at the definition of “environmental impact statement” to include impacts on the “cultural practices of the community and the State.” See 2000-ALS. 50. HAW. REV. STAT. ANN. Adv. Legis. Serv. 1. (LexisNexis 2000).

193 See S.B. 1593, supra note 147.

194 Id.


197 Id.
by governmental entities in decisions regarding developments that could impact the health and environment of proximate communities.198

3. ACT 294

Despite the failure of SB1593 and the only passing measure being a mere resolution, the State Legislature in 2006 passed Senate Bill 2145 (“S.B. 2145”), signed into law as Act 294.199 Act 294 recognizes the concept of environmental justice as “requir[ing] 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.”200 This measure, although more substantive and favorable than SR78, is a watered down version of its predecessor, S.B. 1593. Act 294 appropriated funds used for the purpose of conducting a “comprehensive and scholarly review of the state environmental impact statement process.”201 This measure merely finances a study analyzing the EIS process and evaluating the potential need of including environmental justice principles into the process.202 It significantly lacks the strength of S.B. 1593 and fails to require any consideration of unequal burdens in relevant government actions. The existence of environmental injustice has been evaluated and confirmed in OMPO’s 2004 report regarding this very issue. More studies on already completed reports only delay the realization of environmental justice by those communities who sorely need it. Although significant in demonstrating support of environmental justice issues within the State Legislature, Act 294 does not provide the solid base upon which the residents of the Wai‘anae Coast can depend to receive much needed relief.

V. FAVORABLE LEGAL ENVIRONMENT FOR ENVIRONMENTAL JUSTICE

The injustice of overburdening the Wai‘anae Coast with general societal burdens persists in Hawai‘i. This fact demonstrates that the slight progress made in recognizing environmental justice principles in the islands have been ineffective for the needs of Wai‘anae Coast communities. Despite these bleak circumstances, however, there is hope.


201 Id.

202 Id.
This section of the comment will discuss the favorable legal environment in Hawai‘i, with its origins in the 1978 Constitutional Convention.

A. The 1978 Constitutional Convention

In 1978, the State of Hawai‘i, pursuant to the State Constitution, elected to have a Constitutional Convention (‘‘Con Con’’) whereby elected citizens would analyze the State’s governing document and recommend amendments to be considered by the electorate. Going into the Con Con, which involved a hundred and two delegates from various backgrounds, there existed a “genuine feeling that the Hawaiian culture and people were the host people of this state . . . and as such should be protected above and beyond others.” The delegates to the Con Con made substantial efforts to make “constitutional level” protections that would ensure an individual’s “inviolable right.”

B. Article XI § 9 and its Potential

One of the products of the Con Con was an amendment to Article XI of the State Constitution. This provision is the basis for the legal environment favoring environmental justice. Article XI § 9 (Article XI) guarantees every person the:

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\text{right to a clean and healthful environment, as defined by laws relating to environmental quality, including control of pollution and conservation, protection and enhancement of natural resources. Any person may enforce this right against any party, public or private, through appropriate legal proceedings, subject to reasonable limitations and regulations as provided by law.}
\]

Proposed by the delegates and approved by the electorate, this provision was similar to provisions that were included in the constitutions of several other States.

In 1968 and 1970, during what has been termed by some as the “environmental Seventies,” there were attempts to amend the Federal Constitution to include a provision that would “declar[e] an individual right to a clean environment.” These campaigns, while ultimately

\[\text{203 HAW. CONST. art. XVII, § 2. This provision requires the State to certify the question of having a constitutional convention every ten years. Id.}\]

\[\text{204 Id.}\]


\[\text{206 Id.}\]

\[\text{207 HAW. CONST. art. XI, § 9 (emphasis added).}\]

\[\text{208 Robert Meltz, Congressional Research Service Report RS20088, Right to a}\]
unsuccessful, led to similar efforts in amending the state constitutions of Illinois,\textsuperscript{209} Massachusetts,\textsuperscript{210} Montana,\textsuperscript{211} Pennsylvania,\textsuperscript{212} and Hawai‘i. Some have argued that these types of provisions are better served in individual state constitutions in lieu of an amendment to the U.S. Constitution.\textsuperscript{213} Though not expressly asserting recognition of environmental justice values, some suggest these provisions “offer a promising strategy for contributing to the fight against environmental racism.”\textsuperscript{214}

1. Judicial Interpretation of Art XI, § 9

The interpretation of this Hawai‘i State Constitutional provision has been limited to procedural issues (i.e., standing to bring legal action)\textsuperscript{215}


\textsuperscript{209} ILL. CONST. art. XI, § 2. “Each person has the right to a healthful environment. Each person may enforce this right against any party, governmental or private, through appropriate legal proceedings subject to reasonable limitation and regulation as the General Assembly may provide by law.” \textit{Id.}

\textsuperscript{210} MASS. CONST. art. XLIX. “The people shall have the right to clean air and water, freedom from excessive and unnecessary noise, and the natural, scenic, historic, and esthetic qualities of their environment.” \textit{Id.} (Effective Nov. 7 1972).

\textsuperscript{211} MONT. CONST. art. II, § 3. “All persons are born free and have certain inalienable rights. They include the right to a healthful environment.” \textit{Id.}

\textsuperscript{212} PA. CONST. art. I, § 27. “The people have a right to clean air, pure water, and to the preservation of the natural, scenic, historic and esthetic values of the environment.” \textit{Id.}

\textsuperscript{213} Mary Ellen Cusack, \textit{Judicial Interpretation of State Constitutional Rights to a Healthful Rights to a Healthful Environment}, 20 B.C. ENVTL. AFF. L. REV. 173, 175 (1993). The author argues that States were more appropriate because “States are more familiar with their regional environment and are therefore better suited to adjudicate related issues.” \textit{Id.}


\textsuperscript{215} \textit{Id.} The doctrine of standing “requires complaining parties to show that they have a sufficient interest in the subject matter of the action before proceeding with litigation.” \textit{Id.} at 364. This is important because absent language that provided for direct citizen enforcement, suits brought under this provision would run into “a formidable legal obstacle to achieving environmental justice.” \textit{Id.} Luckily, “the environmental provisions of the Hawai‘i and Illinois constitutions explicitly grant standing to private individuals.” \textit{Id.} at 365 (emphasis added). Another example of a favorable interpretation of the standing issue under this provision was seen in \textit{Life of the Land v. Land Use Comm’n}, 623 P.2d 431, 441 (Haw. 1981). In this case, the court granted standing to the “Life of the Land” environmental organization because they simply had “a stake in the outcome of the alleged controversy,” even though they, including their members, were not owners of the land in question, “nor adjoining owners of land.” \textit{Id.}
and the existence of a private right of action). The court in *Fiedler v. Clark*\(^{216}\) recognized the standing issue and granted it in its interpretation. The court acknowledged, in examining the provision’s legislative history, the delegate’s clear intent to “remov[e] barriers to sue based on standing.”\(^{217}\) The court also considered the issue of a private right of action. However, the outcome was not as favorable as expected.

Inspecting the language of the provision provides a “preliminary indication of the parties whom the legislature intended to be the advocates for the rights that the provision grants.”\(^{218}\) Although the language of the “Hawai‘i constitutional provision] specifically recognize[s] suits by and against private parties[,]”\(^{219}\) the courts have interpreted this provision as not including a private right of action.\(^{220}\) This interpretation severely limits attempts of bringing claims under this article, including environmental justice claims, and has been characterized by some as a “dubious result” in light of [the plain language of the constitutional provision that] “[a]ny person may enforce this right.”\(^{221}\)

The interpretation of this Hawai‘i constitutional article and similar provisions in other states, however, have generally been unfavorable to environmental justice advocates. Some still maintain, however, that these provisions have promising potential.\(^{222}\) Judicial construction of these articles has centered only on procedural issues, whereas substantive interpretations “remain largely undefined.”\(^{223}\) This absence has led some to explore the possibility that “environmental justice cases could provide valuable opportunities to develop the law” in favor of communities that suffer this injustice.\(^{224}\)

\(^{216}\) *Fiedler v. Clark*, 714 F. 2d 77 (9th Cir. 1983).

\(^{217}\) *Id.*

\(^{218}\) Cusack, *supra* note 213, at 186.

\(^{219}\) *Id.* at 186.

\(^{220}\) *Stop H-3 Ass’n v. Lewis*, 538 F. Supp. 149, 176 (D. Haw. 1982). The court recognized that although the language of the constitutional provision provided language concerning a private right of action, it also stated that this right would be “subject to reasonable limitations and regulations as provided by law.” *Id.* (quoting HAW. CONST. art. 11, § 9). As such, the court ruled that an enforcement provision from HAW. REV. STAT., Chapter 195D precluded the existence of a private right of action under this constitutional provision. *Id.*

\(^{221}\) Meltz, *supra* note 208.

\(^{222}\) See Popovic, *supra* note 214, at 356.

\(^{223}\) *Id.* at 347.

\(^{224}\) *Id.*
2. The Potential of Favorable Judicial Interpretation

This argument suggests using “the environmental rights provisions of . . . state constitutions [to] facilitate the realization of environmental justice in the United States, particularly if courts interpret those provisions in light of emerging international human rights norms.”

Proponents of this view indicate that “[s]tate courts can reasonably turn to international principles to flesh out state constitutional text, especially where the [constitutional] language parallels that used in international human rights instruments.” This view operates on the narrow possibility that state courts will implicate international law in their decisions.

There have been rare moments when state courts have sought the wisdom of external sources. In Hawai‘i, State v. Marley was one of these rare instances. This was a criminal trespass case where the court cited to the “Geneva Convention Relative to the Protection of Civilian Persons in Time of War.” These rare instances prove that legal advocates will seldom raise a claim that “is not the most obvious legal strategy.”

This also shows that courts are not likely to assent to “rather exotic and convoluted [legal] elements.”

Proponents recognize these potential difficulties and caution that many “courts [will] resist acknowledging that legally international law is binding in the United States.” Proponents also recognize that there is a sense of “uncertainty” surrounding this strategy, especially when it is heavily dependent on the “philosophy of the judge with respect to the role of international law.”

Despite these obstacles, the author of this article supports these attempts because they will, at the very least, “exert pressure on the justice systems of the several states to develop the content of environmental rights and to deal with environmental racism.”

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225 Id. at 341.
226 Id. at 373.
227 Id. The argument is that because the constitutional provisions indicate a human right, courts will feel inclined to seek the knowledge and relevance of international human rights principles. Id. The author admits that only in “exceptional cases can an individual invoke international law as a directly binding source of authority in state courts,” but appropriately presented, courts may find that these external sources “provide[d] valuable insight into the meaning of sometimes unexplored, or inadequately explored, constitutional passages.” Id. at 368.
228 Id. at 370.
230 Id. at 1105.
231 Popovic, supra 214, at 367.
232 Id.
233 Id.
234 Id. at 374. Despite these obstacles, the author of this article supports these attempts because they will, at the very least, “exert pressure on the justice systems of the several states to develop the content of environmental rights and to deal with environmental racism.” Id.
legal strategy and the adverse interpretation of the procedural guarantees of the Hawai‘i constitutional provision severely limit the potential of Article XI for environmental justice advocates.

These obstacles confirm the shortcomings of Article XI as written. This deficiency demonstrates that more is required of this constitutional article and an appropriate amendment to the written Article XI is needed to rectify the flaws of this current version. Any future amendment would need to articulate the concept of environmental justice so as to bestow an inviolate right upon the citizens of Hawai‘i.

To understand the strength that an amended constitutional article would have for the environmental justice movement in Hawai‘i, it is important to understand the path of another provision of the state constitution, and the accomplishments that have resulted from its enactment.

C. Article XII § 7, and its Path to Heightened Enforcement

Article XII § 7 of the Hawai‘i State Constitution was another major product of the 1978 Con Con. This provision of the Constitution, relating to the traditional and customary rights of Native Hawaiians, reads:

The State reaffirms and shall protect all rights, customarily and traditionally exercised for subsistence, cultural and religious purposes and possessed by ahupua‘a tenants who are descendants of native Hawaiians who inhabited the Hawaiian Islands prior to 1778, subject to the right of the State to regulate such rights.235

In subsequent judicial decisions interpreting this provision and legislative acts that have built on it, the courts have given much freedom to Native Hawaiians in the practice of their traditional gathering rights.236

The first case to utilize this provision of the State Constitution was Kalipi v. Hawaiian Trust Company.237 In Kalipi, the appellant was a Hawaiian who owned land on the island of Moloka‘i. Appellant Kalipi lived within the ahupua‘a238 of Ohia, but occasionally traveled into other ahupua‘a for the purpose of gathering “indigenous agricultural products for use in accordance with traditional Hawaiian practices.”239 The private

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235 HAW. CONST. art. XII, § 7.
236 Sproat, supra note 205, at 336.
238 An ahupua‘a is a term that describes a particular section of land that runs from the mountains to the sea. The concept of the ahupua‘a was that it’s residents would be able to benefit from resources found in the mountains and those from the sea.
239 Kalipi, 656 P.2d at 747.
owners of the lands in which Kalipi had crossed into brought legal action against Kalipi. Although the Hawai‘i Supreme Court held for the private landowners, the opinion itself acknowledged the existence of Native Hawaiian gathering rights and was an “affirmation of the HAW. CONST. art. XII, § 7.” In fact, the Hawai‘i Supreme Court’s analysis in Kalipi started “by first reiterating the importance of the newly added article XII, section 7 [of] the Hawai‘i Constitution,” and stated that “this expression of policy . . . must guide our determinations.” The cases following Kalipi further defined and expanded gathering rights of native Hawai‘ians and, in many ways, also defined and expanded the scope of Article XII.

After Kalipi, the courts expanded the gathering rights per Article XII in the Pele Defense Fund case, and in Public Access Shoreline Hawai‘i v. Hawai‘i County Planning Comm’n (“PASH”). In these cases, the court “strengthened the court’s position on HAW. CONST. art. XII, § 7,” and in fact, “went beyond Kalipi’s basic holding” by expanding gathering access to lands that were not within an individual’s ahupua‘a. The court also concluded that the “western concept of exclusivity is not universally applicable in Hawai‘i,” meaning that general property law concepts concerning an owner’s “right to exclude” are not applicable in this state. The court backed this controversial statement in an “attempt to quell the perceived backlash from exclusionary rights advocates” by holding that “the State retains the ability to reconcile competing interests under article XII, section 7.”

Further still, the courts demonstrated in Ka Pa’akai v. State of Hawai‘i, Land Use Commission, its continued commitment to principles

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240 Id.


242 Id.

243 Kalipi, 656 P.2d at 748.


246 Dettweiler, supra note 241, at 208.

247 Id. at 209.

248 PASH, 79 Haw. at 447.

249 Dettweiler, supra note 241, at 210.

250 PASH, 79 Haw. at 447.

251 Ka Pa’akai o ka’aina v. State of Hawai‘i Land Use Commission, 7 P.3d 1068 (Haw. 2002).
of native Hawaiian rights. In *Ka Pa‘akai*, the court, in referring to Article XII, stated that the “provision place[d] an *affirmative duty* on the State and its agencies to preserve and protect traditional and customary native Hawaiian rights.”\(^{252}\) The court explained that the delegates to the 1978 Con Con, through this provision, provided “a legal means by constitutional amendment to recognize and reaffirm native Hawaiian rights.”\(^{253}\) In defining this affirmative duty, the court provided an analytical framework that the State and its agencies were obligated to consider in approving development:

(1) the identity and scope of ‘valued cultural, historical, or natural resources’ in the petition area, including the extent to which traditional and customary native Hawaiian rights are exercised in the petition area; (2) the extent to which those resources, including traditional and customary native Hawaiian rights, will be affected or impaired by the proposed action; and (3) the feasible action, if any, to be taken by the [Land Use Commission] to reasonably protect native Hawaiian rights if they are found to exist.\(^{254}\)

The Court’s willingness to increase the scope of native Hawaiian rights and define the obligations of the State of Hawai‘i is based on the court’s reliance on this guiding constitutional provision. Similar potential for bringing environmental justice to the residents of the Wai‘anae Coast can be achieved should Article XI be appropriately amended.

VI. AN AMENDMENT TO ARTICLE XI OF THE STATE CONSTITUTION

The accomplishments and extent to which Article XII has been established, demonstrates the potential that can be expected should Article XI be amended to include the concept of environmental justice. The expansion of native Hawaiian rights is founded on the language within Article XII. This part of the comment proposes specific language to be used in an amendment to Article XI of the Hawai‘i State Constitution, in light of the accomplishments of Article XII, and in an effort to achieve environmental justice for the residents of Hawai‘i and particularly those of the Wai‘anae Coast on O‘ahu.

The evident difference between Article XII and Article XI is the intent of the delegates who framed the individual provisions. Article XII was intended to “preserve the small remaining vestiges of a quickly disappearing culture.”\(^{255}\) The legislative history shows a recognition of

\(^{252}\) *Id.* at 42, (emphasis added).

\(^{253}\) *Id.* at 43.

\(^{254}\) *Id.* at 49.

the importance of “provid[ing] the State with power to protect these rights and to prevent any interference” with them. \(256\) Article XI was intended only to “remove[] the standing to sue barriers[].” \(257\) This difference, highlights the need for significant restructuring and an expansion of Article XI.

\(\text{A. The Proposed Amendment Language}\)

In order to bring Article XI to the degree of enforcement and effect that has been conferred on Article XII, it is essential that an amendment be made articulating the concept of environmental justice. The preferred language would include: (1) a recognition of an individual’s right to a healthy environment; (2) a requirement that government be vigilant when permitting certain developments (e.g., landfills) for the possibility that such developments will unfairly impact environmental justice communities; and (3) a provision giving communities the ability to bring successful legal challenges through the judicial system.

In light of the above, this comment offers the following language as a possible amendment to the Hawai‘i Constitution article 11 § 9 regarding “Environmental Rights:”

Each person has the right to a clean and healthful environment based on a mutual respect and justice for all peoples, free from any form of subconscious or institutional discrimination. The state reaffirms and strengthens its commitment to environmental justice and giving fair treatment to native Hawaiian, ethnic minority, and low-income populations that may be disproportionately impacted from proposed actions on the health and environment of these communities. Any person may enforce this right against any party, public or private, through appropriate legal proceedings.

This proposed language expands on the article’s existing language and specifically mentions the state’s commitment to environmental justice. The proposed amendment, composed of three sentences, combines the concept of environmental justice with specific language inserted to combat the deficiencies identified with the original provision.

\(\text{1. Dealing with the Intentional Discrimination Standard}\)

The first proposed sentence reiterates the language found in the original article concerning an individual’s right to a “clean and healthful

\(\text{256 Id. at 639.}\)

environment.” It also adds an additional phrase that this right is “based on a mutual respect and justice for all peoples, free from any form of subconscious or institutional discrimination.” The additional language is specifically aimed at countering the legal obstacles that undermine environmental justice claims being brought under the Equal Protection Clause of the U.S. Constitution, whereby plaintiffs are required to prove the discriminatory intent of policy makers.

The proposed language acknowledges the difficulty of the “[d]iscriminatory intent standard” and considers the existence of subconscious or institutional discrimination that cannot be ascertained by the standards set forth in the Washington v. Davis, and Arlington Heights decisions. As such, the proposed amendment avoids the pitfalls commonly associated with traditional interpretations of the Equal Protection Clause and Title VI claims.

2. Introducing “Environmental Justice” to the State Constitution

The second sentence of the proposed amendment is not based on any language from the original provision. This sentence begins by reaffirming the State’s interest in environmental justice as apparent in the passage of relevant resolutions and Act 294. But, in recognizing the deficiencies of those measures, the sentence goes further to “strengthen [the state’s] commitment.” This sentence then goes on to portray the factual foundation of the environmental justice concept: the uncomfortable pattern of waste facilities being sited in ethnical minority and low-income communities. This sentence also identifies Native Hawaiians specifically because of their “unique status as the indigenous people of

258 The first factor in Yamamoto’s “Framework of Analysis,” discussed supra note 3, concerned the “traditional hazards to the environment . . . and the resulting pollution.” Id. This language, bestowing a right to a clean and healthful environment, can be interpreted to satisfy this first factor.

259 The First National People of Color Environmental Leadership Summit, discussed supra in Part II.B, established seventeen “Principles of Environmental Justice.” See EJNET, http://www.ejnet.org/ef/principles.html (last visited Apr. 12, 2008). The second principle was a recognition that “Environmental Justice demand[ed] that public policy be based on mutual respect and justice for all people, free from any form of discrimination or bias.” Id. This principle was the basis of the additional language in the first sentence of the proposed amendment.


261 The second factor in Yamamoto’s “Framework of Analysis,” discussed supra note 3, concerned the disproportionate distribution of waste facilities. Id. This specific language in the proposed amendment describing the adverse impacts to vulnerable communities would satisfy the second factor in this framework of analysis.
Hawai‘i, long standing stewards, and holders of legally recognized rights in Hawai‘i.”

This second sentence is extremely important because of the way that it explicitly identifies vulnerable communities. Communities that fall within these categories, (1) native Hawaiian; (2) ethnic minority; or (3) low-income, will find it much easier to bring environmental justice claims under this proposed amendment. This sentence would be especially beneficial to communities, such as those on the Wai‘anae Coast, that can satisfy all three classifications. It also mentions “fair treatment” of these vulnerable communities, which can be interpreted to provide for more involvement of these communities in the decision making process.

3. Procedural Guarantees

The third sentence of the proposed amendment is taken from the original provision and concerns procedural issues of standing and rights of action. As discussed above, standing has generally been granted under this article. Unfortunately, however, courts have refused to grant a private right of action under the current interpretation of the provision. This complication is diminished by excluding the latter part of the original language that held the provision “subject to reasonable limitations and regulation as provided by law.” Without this latter part, the proposed amendment will recognize standing and a private cause of action despite statutory law, thus reducing the procedural obstacles that can seriously impede environmental justice claims.

B. The Potential Impact of the Proposed Amendment

The passage of the proposed amendment would bring environmental justice to the State of Hawai‘i, and in particular, the residents of the Wai‘anae Coast. The State Legislature would then have a foundation to expand its newly recognized commitment. The Legislature could identify specific areas, possibly using OMPO’s report and analysis, where vulnerable communities exist. Laws could be enacted to establish procedures that would ensure the consideration of native Hawaiian, ethnic minority, or low-income factors surrounding planned developments. The


263 The third factor in Professor Yamamoto’s “Framework of Analysis,” discussed concerned the lack of representation in the decision making process from these vulnerable communities. Id. The language guaranteeing “fair treatment” can be interpreted to rectify problems with this factor in the “Framework of Analysis.”

264 HAW. CONST. art. XI, § 9.
courts could utilize this amendment to guide their decisions in environmental justice cases and recognize an affirmative duty on the part of the State to ensure that proper considerations be examined in all relevant government actions.\textsuperscript{265} Individuals, communities, organizations, and even agencies would have a legitimate process by which they could bring environmental justice claims and invoke their constitutional right to a clean and healthful environment. This is the potential that exists should an amendment, like the one proposed above, be enacted in regards to the Hawai‘i State Constitution.

VII. CONCLUSION

Although it may be true that no one is safe from pollution and environmental degradation while it continues to exist, it is also true that “we are not all endangered equally.”\textsuperscript{266} The residents of the Wai‘anae Coast recognize this reality and continually speak out against the injustice that is so apparent in their communities. The Coast is home to ethnic minority and low-income populations that carry a disproportionate level of general societal burdens. This injustice is not limited to the siting of existent and future landfills, but other environmentally damaging facilities and areas that exist on the Coast.

These injustices will persist unchallenged under Article XI as currently written, and continue to compound as more destructive facilities become approved. The current law’s inability to prevent this unfair treatment leaves Wai‘anae Coast residents without a course of action to challenge these placements and to protect their communities from this injustice. The above cases reveal how affected communities, who were burdened with numerous landfills, severe environmental threats, and obvious patterns of mistreatment, could still be denied legal recourse in the courts. These lessons should instruct our actions and cause us to recognize the urgent necessity in providing a constitutional-level shield that will prevent continued unfair treatment and serve as a defense from further injustice.

An amendment guided by the principles of environmental justice will provide much needed guidance and a foundation that will reinforce and sustain equal protection from environmental injustice. The potential for equitable treatment and evenhanded distribution of societal burdens is possible with an appropriate amendment. The potential for further mistreatment and the approval of additional waste facilities without legal means to challenge or prevent it, regardless of communal funds and fervently voiced opposition, is also possible and will be allowed to occur under the current provision. The importance of empowering these

\textsuperscript{265} Similar to the level of enforcement given to Article XII, § 7, in the Ka Pa‘akai case, discussed supra note 251.

\textsuperscript{266} Popovic, supra note 95, at 339.
residents with an inviolate right cannot be overlooked. The power of these residents to fight for the health and safety of their environment must be recognized, defined, and granted so that environmental justice can be realized for the communities of the Wai‘ānae Coast and for the greater State of Hawai‘i.