

The Public's Right of Participation: Attaining Environmental Justice in Hawai'i Through Deliberative Decisionmaking*

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INTRODUCTION

What are the most effective means for attaining environmental justice? Environmental justice scholars such as Craig Anthony Arnold, Eileen Gauna, Luke Cole, and Sheila Foster have long advocated for a proactive strategy that emphasizes public participation in land use planning and regulation, rather than a reactive, post-hoc legal strategy.¹ As the environmental justice movement evolved, and proposed remedies failed, awareness grew that low-income communities of color systemically host a disproportionately high distribution of locally unwanted land uses

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1. See Craig Anthony Arnold, *Planning Milagros: Environmental Justice and Land Use Regulation*, 76 DENV. U. L. REV. 1, 3 (1998) (“[E]mpirical evidence shows that environmental justice advocates are beginning to move from reactive strategies—essentially an ‘opposition’ model of environmental justice—to proactive planning and participation in policymaking.”); Eileen Gauna, *The Environmental Justice Misfit: Public Participation and the Paradigm Paradox*, 17 STAN. ENVTL. L. J. 3, 4 (1998) (arguing for an “‘environmental justice style’ public participation model as a more promising approach because it calls for a recasting of the role of community participation in environmental decisionmaking—a recasting which transcends traditional, modern, and proposed decisionmaking paradigms.”); Sheila Foster, *Justice From the Ground Up: Distributive Inequities, Grassroots Resistance, and the Transformative Policies of the Environmental Justice Movement*, 86 CAL. L. REV. 775, 819 (1998) (“While legal action brings much-needed attention to environmental justice struggles, legal strategies rarely address what is, in essence, a larger political and structural problem.”); see also Luke W. Cole, *The Theory and Reality of Community-based Environmental Decisionmaking: The Failure of California’s Tanner Act and its Implications for Environmental Justice*, 25 ECOLOGY L.Q. 733, 734 (1998); LUKE W. COLE & SHEILA R. FOSTER, FROM THE GROUND UP 129 (2001).

(LULUs).² Luke Cole and Sheila Foster criticized the “prevailing pluralistic structure” of decisionmaking.³ They argued that such decisionmaking structures gave the appearance of allowing the public access to environmental planning processes without ensuring meaningful participation.⁴ In practice, communities of color lack access to crucial information and knowledge and face severe barriers to full participation in a pluralistic decisionmaking process.⁵

This Article builds upon this influential environmental justice scholarship by advocating for a civic republican model of participation, rather than a pluralistic model. “Pluralism” refers to a “notice and comment” participation system that provides an open opportunity for individuals to comment on pending environmental permit applications.⁶ Once the comment period closes, the agency decisionmaker tallies the comments and weighs the costs and benefits of the competing interests.⁷ By contrast, “civic republicanism” refers to a participation model that looks beyond merely tallying individual preferences and relies on the use of collective deliberation in democratic decisionmaking.⁸ In the environmental decisionmaking context, a civic republican form of participation may involve small, county-created local advisory committees that deliberate on the pending environmental issue, educate themselves with the technicalities of the environmental decision, identify any shared values at stake, and advise environmental decisionmakers on the local impacts of the decision.⁹

This Article presents the Hawaiian island of O‘ahu’s Waimānalo Gulch Landfill controversy as a case study of participation models and

2. Craig Anthony Arnold, *supra* note 1, at 1 (outlining the emergence of the environmental justice movement). For a recent report on environmental equity, *see also* United Church of Christ, *Toxic Wastes and Race at Twenty: 1987–2007* (2007), available at <http://www.ucc.org/assets/pdfs/toxic20.pdf> (“Host neighborhoods of commercial hazardous waste facilities are 56% people of color whereas non-host areas are 30% people of color.”).

3. COLE & FOSTER, *supra* note 1, at 109.

4. *Id.*

5. *Id.*

6. *See id.* at 107 (“Legal pluralism is the model that best describes the idea behind participatory decisionmaking processes in much of environmental law. . . . In the environmental context, basic notice and comment rules exemplify the pluralistic model of decisionmaking.”).

7. *See id.* (“In a well-functioning pluralistic process, the decisionmaker would aggregate the preferences of all interest groups. The decisionmaking outcome would reflect, on balance, a mix of predominating preferences.”). *See also* Gauna, *supra* note 1, at 65 (describing notice and comment proceedings as a “crude preference tally.”).

8. *See* Gauna, *supra* note 1, at 28-29 (defining civic republicanism values as a “deliberative process” that “requires participants to exercise civic virtue by putting aside their self-interested preferences to focus upon the greater, common good.”); *see also* CASS SUNSTEIN, *THE PARTIAL CONSTITUTION* 20, 22 (1st ed. 1993) (noting “[i]n their aspirations for deliberative government, the framers modernized the classical republican belief in civic virtue . . . [t]he commitment to these ideas explains many of the founding institutions . . . [such as] the mystery of the Electoral College, which was . . . to be a deliberative body . . .”).

9. *See* COLE & FOSTER, *supra* note 1, at 112-113.

examines how Hawai'i environmental law acts to exclude many low-income people of color from environmental decisionmaking. Such an analysis is especially appropriate now because state lawmakers are currently poised to transform Hawai'i's environmental laws. In 2006, Governor Linda Lingle signed Senate Bill 2145 "A Bill for an Act Relating to the Environment" into law as Act 294.¹⁰ This legislation pronounced "environmental justice" as a state concern and acknowledged the need to "ensure that principles of environmental justice are systematically included in all phases of the environmental review process and that each agency fulfills its duty to identify and address at the earliest possible time any disproportionately adverse . . . cultural effects on . . . native Hawaiians."¹¹ In 2008, pursuant to Act 294, the State of Hawai'i Environmental Council published a draft environmental justice guidance document which sought to define "environmental justice" for Hawai'i, and identified Native Hawaiians as a group particularly vulnerable to environmental justice concerns.¹² The guidance document proposed revising the public participation model of the environmental decisionmaking process to utilize local advisory committees, in an attempt to better ensure an understanding of how environmental decisions might adversely impact diverse populations.¹³ The state continues to study the issue, but has yet to implement any of the proposed changes.

The shift to acknowledging environmental justice as a systemic concern is, however, promising. In this Article, I analyze the pluralistic public participation model currently codified in Hawai'i's environmental impact statement (EIS) law and compare it to an alternative civic republican model.¹⁴ I focus on the local Waimānalo Gulch Landfill expansion controversy to assess the effectiveness of the current pluralistic model against a proposed civic republican model. I argue that a civic republican model has the potential to effectuate more meaningful public involvement in the environmental decisionmaking process. Lastly, I recommend that the state should revise its EIS law to create a local advisory committee (LAC) that can advise on potential adverse affects of a

10. S.B. 2145, 23rd Leg. Reg. Sess. (Haw. 2006); see also HAWAI'I ENVIRONMENTAL COUNCIL, ANNUAL REPORT (2007), available at http://oeqc.doh.hawaii.gov/Shared%20Documents/Environmental_Council/Annual_Reports/Annual-Report-2007.pdf (noting that one aspect of Act 294 requires the "development of an environmental justice guidance document to ensure that principles of environmental justice are systematically included in all phases of the environmental review process.").

11. *Id.*

12. See Leslic Kahihikolo, *Hawai'i Environmental Justice Initiative Report*, 4-3, 5-2 (2008), available at <http://oeqc.doh.hawaii.gov> (select "Misc. Documents" then "2008_Hawaii_Environmental_Justice_Report.").

13. *Id.* at 6-9 (recommending that "the agency or applicant should consider forming a local assessment committee (LAC)," consisting of "a representative sampling of minority, low-income, and other members of the impacted community.").

14. HAW. REV. STAT. § 343-3 (2009) (outlining notice and comment structure for environmental assessments and environmental impact statements).

proposed project.

Part I gives a general overview of the environmental justice movement. Part II describes the environmental contexts of Hawai‘i. It then focuses on the Waimānalo Gulch Landfill case study, describing existing distributional inequities and the current environmental justice struggle against expanding the landfill on O‘ahu’s Wai‘anae Coast. Part III analyzes the Waimānalo Gulch Landfill expansion permitting process and presents it as an illustration of the serious flaws prevalent in the pluralistic public participation model. Next, Part IV acknowledges the difficulties in implementing a more deliberative civic republican model, as revealed in the landfill expansion permitting process. Finally, Part V outlines specific recommendations for implementing a civic republican model of public participation in environmental decisionmaking.

I. THE EVOLVING ENVIRONMENTAL JUSTICE MOVEMENT

The environmental justice movement emerged from a growing awareness of distributional inequities: low-income people of color host a disproportionately high number of environmental hazards and LULUs in their neighborhoods.¹⁵ This Part traces the development of the movement, suggesting that as it evolved, it shifted from focusing on distributional inequities and legal remedies to a broader focus on process-oriented harms such as the lack of full participation in the environmental decisionmaking process.

The environmental justice movement arguably originated from the toxic waste landfill siting controversy of Warren County, North Carolina.¹⁶ In 1982, hundreds of Warren County residents—largely poor and African American—mobilized to protest the hazardous waste site.¹⁷ Police aggressively arrested five hundred non-violent protesters, prompting the community to create the evocative term “environmental racism” to depict the harms they suffered.¹⁸ Largely in response to the activism of Warren County, the General Accounting Office conducted a 1983 investigation and discovered actual correlations between the siting of hazardous waste landfills and race.¹⁹ Three out of the four major waste facilities in the region studied were located in predominantly African American communities.²⁰ Four years later in 1987, the United Church of Christ’s

15. Arnold, *supra* note 1, at 5.

16. See, e.g., Joshua Glasgow, *Not In Anybody’s Backyard? The Non-Distributive Problem with Environmental Justice*, 13 BUFF. ENV’T L. L.J. 70, 72 (2005) (“The beginning of the environmental justice movement is usually attributed to the controversy surrounding the siting of a PCB landfill in the heavily poor and minority Warren County, North Carolina in 1982.”).

17. CLIFFORD RECHTSCHAFFEN & EILEEN GAUNA, ENVIRONMENTAL JUSTICE: LAW, POLICY & REGULATION 56 (2d ed. 2003).

18. *Id.*; Glasgow, *supra* note 16, at 72-73.

19. RECHTSCHAFFEN & GAUNA, *supra* note 17, at 56 (2003).

20. *Id.*

Commission for Racial Justice published a study finding that three out of every five African Americans and Hispanic Americans nationwide lived in close proximity to uncontrolled toxic waste sites.²¹ The study concluded that race was the most significant variable in the distribution of commercial hazardous waste facilities—more than home ownership rates, income, and property values.²²

In 1994, President Clinton acknowledged this troubling empirical data with Executive Order No. 12,898.²³ This Order expressly directed federal agencies to “make achieving environmental justice part of its mission” and assess the effects of their programs on “minority populations and low income populations.”²⁴ President Clinton also urged:

In accordance with Title VI of the Civil Rights Act of 1964, each Federal agency shall ensure that all programs . . . that affect human health or the environment do not . . . discriminate on the basis of race, color, or national origin.

Each federal agency shall analyze the environmental effects . . . on minority communities and low-income communities, when such analysis is required by the National Environmental Policy Act of 1969 (NEPA)

Each federal agency shall provide opportunities for community input in the NEPA process

Each Federal agency shall ensure that the public, including minority communities and low-income communities, has adequate access to public information relating to human health or environmental planning, regulations, and enforcement²⁵

As a result of Clinton’s express directives, environmental racism gained unprecedented recognition.²⁶ In response, the President’s Council for Environmental Quality (CEQ) issued a guidance document in 1997, elaborating upon the elements of environmental justice compliance.²⁷ CEQ directed agencies to consult with “affected environmental justice groups” in the EIS process required by the National Environmental Policy Act

21. United Church of Christ, Commission for Racial Justice, *Toxic Wastes and Race in the United States* xiv (1987), available at <http://www.ucc.org/about-us/archives/pdfs/toxwracc87.pdf>.

22. *Id.* at xiii, xv.

23. Exec. Order No. 12,898, 59 Fed. Reg. 7,629 (Feb. 16, 1994).

24. *Id.*

25. Memorandum on Environmental Justice, 1 PUB. PAPERS 241 (Feb. 11, 1994), available at: <http://frwebgate5.access.gpo.gov/cgiin/TEXTgate.cgi?WALSdocID=275181169924+0+1+0&WALSaction=retrieve>; see also RECHTSCHAFFEN & GAUNA, *supra* note 17 at 396 (discussing President Clinton’s Memorandum).

26. COLE & FOSTER, *supra* note 1, at 10.

27. Council on Environmental Quality, *Environmental Justice Guidance Under the National Environmental Policy Act* (1997), <http://ceq.hss.doe.gov/nepa/regs/cj/justice.pdf>.

(NEPA).²⁸

Although these national directives expressed good intentions, environmental justice advocates observed little progress on the ground. Obtaining legal judgments acknowledging environmental racism seemed tenuous. Civil rights suits that targeted racial or cultural discrimination had dismal results. No environmental justice plaintiff has ever prevailed in a constitutional equal protection suit against governmental actors siting LULUs in areas heavily populated by minorities.²⁹ None of these plaintiffs was able to meet the Supreme Court's strict discriminatory intent requirement.³⁰ For example in *East-Bibb Twiggs Neighborhood Association v. Macon-Bibb County Planning & Zoning Commission*,³¹ plaintiffs filed an equal protection claim against the County when it sited a landfill in a housing tract composed of predominantly black residents.³² In its opinion the court admitted that the landfill would affect minority residents to a larger degree, but concluded that this finding did not suggest a governmental intent to discriminate.³³ *East-Bibb Twiggs* indicates the extent to which proof of disparate impact, absent rare proof of discriminatory intent, is inadequate to support an equal protection suit. Cases such as this suggest that obtaining environmental justice on constitutional grounds seems nearly futile.

Federal statutory claims under Title VI of the Civil Rights Act of 1964 seemed more promising, because Title VI has no intent requirement.³⁴ Unfortunately, claims based on this statute also have little hope for success. The Supreme Court limited the force of Title VI in *Alexander v. Sandoval*, holding that Title VI does not create a private right of action.³⁵ This judicial limitation makes it extremely difficult for plaintiffs to target any systemic discrimination that might result in decisions to site waste facilities in poor or minority neighborhoods.

Environmental justice plaintiffs found the most success with challenges based on procedural claims, rather than racial discrimination claims. For example, the residents of Kettleman City in California successfully sued the Planning Commission for failures in its hazardous

28. *Id.*; National Environmental Policy Act, 42 U.S.C. § 4321 (1970).

29. Arnold, *supra* note 1, at 51 ("Virtually no plaintiff in any of the many different environmental justice civil rights cases nationwide has prevailed on an equal protection claim; no one has been able to meet the Supreme Court's intent requirement."). See also *Washington v. Davis*, 426 U.S. 229 (1976) (establishing intent requirement for equal protection claims).

30. *Id.*

31. 888 F.2d 1573, 1576 (11th Cir. 1989).

32. *Id.* at 1574.

33. *Id.* See also *Personnel Adm'r of Mass. v. Fecney*, 442 U.S. 256, 278 (1979) (holding that a neutral law does not violate the Equal Protection Clause solely because it results in a racially disproportionate impact. The disproportionate impact must be traced to a desire to harm, rather than the harm itself).

34. 42 U.S.C. § 2000(d) (1964).

35. 532 U.S. 275, 286 (2001).

waste facility permitting process.³⁶ Kettleman is a tiny San Joaquin farming community of only 1,100 people—and home to the largest toxic waste dump west of Alabama.³⁷ Ninety-five percent of the residents were Latino, seventy percent were bilingual Spanish and English speakers, and forty percent were monolingual Spanish speakers.³⁸ In 1988, the community learned that the operator of the toxic waste dump proposed to build a toxic waste incinerator on the site.³⁹ Residents sent 120 letters requesting translations of the Environmental Impact Reports that assessed the proposed project, but the County Planning Commission denied these requests.⁴⁰ When the Commission approved the incinerator permit application, the community petitioned for a writ of mandate, passionately arguing that the failure to provide translations of crucial documents effectively excluded Spanish-speaking residents from participating in the decisionmaking process.⁴¹ The court ultimately decided in favor of the Kettleman plaintiffs, concluding that the County did in fact exclude the residents from meaningfully participating in the permitting process.⁴² This tremendous victory won by the Kettleman residents suggests that procedural claims can halt inequitable environmental decisionmaking and remedy its disparate impact on vulnerable communities.

Although the Kettleman City example powerfully illustrates that litigation can result in effective change, some environmental justice advocates emphasize that such discrete legal victories fail to transform the underlying political and economic relationships that actually create the distributive disparities.⁴³ The practice of bringing a lawsuit risks disempowering environmental justice litigants by forcing them to voice their concerns through lawyers and rely on these agents to speak for an entire community.⁴⁴ Sheila Foster writes, for example, “[w]hile legal action brings much-needed attention to environmental justice struggles, legal strategies rarely address what is, in essence, a larger political and structural

36. Luke W. Cole, *The Struggle of Kettleman City: Lessons for the Movement*, 5 MD. J. CONTEMP. LEGAL ISSUES 67, 77 (1994); COLE & FOSTER, *supra* note 1, at 1-9 (describing the facts of the Kettleman case and its significance in the environmental justice movement).

37. COLE & FOSTER, *supra* note 1, at 2.

38. *Id.* at 1; Peter Reich, *Greening the Ghetto: A Theory of Environmental Race Discrimination*, 41 KAN. L. REV. 272, 308 (1992).

39. COLE & FOSTER, *supra* note 1, at 2.

40. *Id.* at 6-7.

41. Reich, *supra* note 38, at 309-10.

42. *Id.* at 310.

43. See Arnold, *supra* note 1, at 39 (“What is unclear . . . is whether environmental justice groups are using litigation for empowerment or merely as a legal answer to a political problem. Luke Cole, one of the nation’s leading public interest environmental justice lawyers . . . argues that a victory in a lawsuit will not change the political and economic relationships that created the environmental injustice, and therefore a legal response to environmental injustice may be inappropriate for a political problem.”).

44. See COLE & FOSTER, *supra* note 1, at 129.

problem.”⁴⁵ Luke Cole similarly cautioned that the legal victory at Kettleman City should not detract from the months of coalition-building and grassroots efforts led by the community in conjunction with the trial.⁴⁶ He writes that the successful lawsuit should not obscure the true “moral” of the Kettleman story: “environmental justice struggles are *political* problems, not *legal* problems . . . [O]ne of the great myths of white Americana is the myth that ‘we need a lawyer.’”⁴⁷ He continues, “[a]lthough we won the lawsuit, it is important to point out that legal approaches are the least favored approaches to solving environmental problems. They are disempowering to community residents because they take the struggle out of the community and put it into the hands of a lawyer.”⁴⁸

Cognizant of these concerns, environmental justice activists focus on the importance of casting environmental justice as a structural political problem rather than as a legal problem.⁴⁹ A legal victory won on inadequate procedure requires only that the court send the environmental impact report back to the local decisionmaker to vote on it following correct protocol.⁵⁰ If low-income people of color still play inadequate roles in developing the policies that govern pollution standards, neighborhood land use patterns, and the siting of locally unwanted land uses, then the unequal distribution of environmental burdens will persist.⁵¹

In recent years, environmental justice advocates successfully lobbied local legislators to transform the pluralistic public participation processes outlined by NEPA and employed by many states.⁵² Sheila Foster and Luke Cole argued that although NEPA theoretically provides an open opportunity for all residents to comment equally on pending permit applications, in actuality groups with significant political or financial resources can dominate the process by more forcefully broadcasting their interests.⁵³ They advocated instead for a deliberative approach where community stakeholders would gather together, discuss their personal interests and concerns, identify shared values, and set aside their self-

45. Foster, *supra* note 1, at 819.

46. See Cole, *The Struggle of Kettleman City*, *supra* note 36, at 68.

47. *Id.*

48. *Id.* at 77.

49. See, e.g., COLE & FOSTER, *supra* note 1, at 131 (“Because environmental justice struggles are at heart political and economic struggles, a legal response is often inappropriate or unavailable.”).

50. Cole, *The Struggle of Kettleman City*, *supra* note 36, at 78.

51. Arnold, *supra* note 1, at 44 (“. . . [E]nvironmental injustice is a political problem in part because people of color and low-income people have not played a role in developing the general policies that govern the siting of LULUs, pollution standards, community participation, and neighborhood land use patterns.”).

52. Cole, *The Struggle of Kettleman City*, *supra* note 36, at 78. See also Gauna, *supra* note 1, at 25 (“Undue reliance upon the ideals associated with pluralism is . . . problematic.”).

53. COLE & FOSTER, *supra* note 1, at 110.

interests to implement those values.⁵⁴ More and more states have revised their NEPA-like statutes, but environmental justice scholars even now continue to analyze the dynamics of deliberation and strategies of implementation.⁵⁵

II. ENVIRONMENTAL JUSTICE IN HAWAI'I

A. *Environmental Law in Hawai'i*

The state of Hawai'i is dramatically poised to transform its environmental permit process from one that employs a pluralistic public participation model to one that employs a more deliberative civic republican model. In 2007, the Hawai'i legislature passed Act 294, which formally identifies the need to revise the environmental decisionmaking process so that it takes into account environmental justice concerns.⁵⁶ The revised environmental decisionmaking process should include "appropriate consideration of the effects of a proposed action on the cultural practices of the State and community."⁵⁷ The Act provided funding for the creation of an "environmental justice guidance document," which would "ensure that principles of environmental justice are systematically included in all phases of the environmental review process."⁵⁸

Currently, Hawai'i's State Environmental Policy Act (SEPA) models the pluralistic "notice and comment" structure of NEPA almost exactly.⁵⁹ NEPA requires agencies to assess the extent to which a proposed project will have "cumulative environmental effects" on "historic, scientific, or cultural resources" of the surrounding area.⁶⁰ If the agency determines that the project will have a potentially significant effect on the environment, the agency should prepare an EIS.⁶¹ First, the agency should hold a public meeting to determine the breadth of the environmental impacts.⁶² The agency then must prepare a draft EIS detailing the potential effects of the project, post notice of the draft, and then circulate it for public comment to anyone who requests it.⁶³ Next, the agency must prepare a response to the public comments, holding public hearings on the EIS.⁶⁴ Finally, the agency

54. *Id.*

55. *See id.* at 112, 115. *See also* Cole, *The Theory and Reality of Community-Based Environmental Decisionmaking*, *supra* note 1 (discussing the difficulties California has had with the Tanner Act, which mandated a civic republican model of public participation that utilized LACs).

56. HAW. REV. STAT. § 343 (2009).

57. *Id.*

58. *Id.*

59. *See id.*; *cf.* 42 U.S.C. §§ 4321-4370 (1994).

60. HAW. REV. STAT. § 343 (2009).

61. *Id.*

62. *Id.*

63. *Id.*

64. *Id.*

decides whether to permit the project.⁶⁵

Hawai'i's SEPA similarly requires that when a public or private entity applies for an environmental permit, the reviewing agency—usually the State Department of Health (DOH)—must first assess the project.⁶⁶ If the DOH determines that the project will “significantly” impact the environment, it will commence the EIS process.⁶⁷ In this review, the decisionmakers must document the effects that the proposed project will have on the “economic welfare, social welfare, and cultural practices of the community.”⁶⁸ To assess the extent of these effects, the state requires formal public participation at several stages of the permitting process: at the “scoping” stage when the agency determines the scope of the EIS, upon submission of the draft EIS, and upon submission of the final EIS (FEIS).⁶⁹

Hawai'i's environmental decisionmaking statute acknowledges that “public participation during the review process benefits all parties involved and society as a whole” and that “cooperation and coordination are encouraged.”⁷⁰ Yet in 2008, the Hawai'i Environmental Council recognized the inadequacies of the current participation model, stating that “[a] concerted effort needs to be made by the agency or applicant to identify and reach out to those living in under-represented communities.”⁷¹ It presented a draft of the environmental justice guidance document that proposed revising the NEPA-like pluralism currently embodied in Hawai'i Revised Statute § 343, to a public participation model based on civic republican ideals of shared deliberative values.⁷² In particular, it proposed that the DOH form a “local assessment committee” (LAC) of residents from neighborhoods potentially affected by the proposed environmental project.⁷³ This committee would deliberate with environmental decisionmakers, share their interests and values, and serve as representatives for their community.⁷⁴

Hawai'i lawmakers are now evaluating the public participation model proposed by the draft guidance document. To analyze the flaws of the current pluralistic model and the potential problems of codifying the proposed civic republican model, the next section examines the dynamics of participation in a current environmental controversy.

65. *See id.*; cf. 42 U.S.C. §§ 4321-4370 (1994).

66. HAW. REV. STAT. § 343-2 (2009).

67. *Id.*

68. *See* H.B. 2895, Act 50, 20th Leg., Reg. Sess., H. Doc. No. 1 § 1 (Haw. 2000) (amending HAW. REV. STAT. § 343).

69. HAW. REV. STAT. § 343-5 (2009).

70. HAW. REV. STAT. § 343-1 (2009).

71. Leslie Kahihikolo, *Hawai'i Environmental Justice Initiative Report*, 6-7 (2008), available at <http://oeqc.doh.hawaii.gov> (select “Misc. Documents” then “2008_Hawaii_Environmental_Justice_Report.”).

72. *Id.*

73. *Id.*

74. *Id.*

*B. Environmental Injustice in Hawai'i:
The Wai'anae Coast on the Island of O'ahu*

The state of Hawai'i has long struggled to balance competing environmental, economic, social, and political concerns: preserving its fragile marine ecosystem, providing for economic growth and urban development, and upholding the traditional cultural practices of indigenous Native Hawaiian communities. Racially and culturally, Hawai'i differs markedly from the United States as a whole. Asian Americans are the largest racial group in the state at nearly forty percent (39.9%), Caucasians are the second at about twenty-six percent (26.3%),⁷⁵ and Native Hawaiians and other Pacific Islanders make up only nine percent of the population (9.4%).⁷⁶ Geographically, the vast majority of the state's population density is focused in the island of O'ahu (70%), which is entirely encompassed by the City and County of Honolulu.⁷⁷ The Honolulu city center, located on the south side of the island, is the state's only major financial district and is the site of most commercial activity.⁷⁸ By contrast, the leeward (western) Wai'anae Coast, which stretches from Mākaha to Kapolei and includes the towns of Wai'anae and Nānākuli, largely remains rural. Although the Wai'anae area has experienced modest economic growth over the last twenty years (3.4%), the average per capita income of a Wai'anae Coast resident (\$13,348) is half that of a Honolulu city resident (\$24,191).⁷⁹ Furthermore, the number of people living below the poverty level (19.8%) is nearly double the state average (11.8%).⁸⁰ Sixty percent of the population that lives on the Wai'anae Coast is Native Hawaiian.⁸¹

In 2004, the O'ahu Metropolitan Planning Organization (OMPO) published a study entitled "Defining Environmental Justice Populations."⁸² The study concluded that "Native Hawaiian and other Pacific Islanders" are the most vulnerable ethnic or racial group in Hawai'i.⁸³ Of the seventy-

75. U.S. CENSUS BUREAU, AMERICAN FACTFINDER: 2006 AMERICAN COMMUNITY SURVEY, available at <http://www.census.gov/acs/www>.

76. U.S. CENSUS BUREAU, PROFILES OF GENERAL DEMOGRAPHIC CHARACTERISTICS: 2000 (May 2001) [hereinafter 2000 CENSUS REPORT], available at www.census.gov/prod/www/abs/ProfilesTD.pdf.

77. *Id.* See also Official Web Site for the City and County of Honolulu, <http://www.honolulu.gov/cchnl.htm#city> (last visited Mar. 15, 2010).

78. Official Web Site for the City and County of Honolulu, *supra* note 77.

79. 2000 CENSUS REPORT, *supra* note 76.

80. *Id.* See also City-Data.com, Wai'anae, Hawai'i (HI) Poverty Rate Data-Information about Poor and Low Income Residents, <http://www.city-data.com/city/Waianae-Hawaii.html> (last visited March 15, 2010).

81. HAWAII COASTAL ZONE MANAGEMENT, WAI'ANAE ECOLOGICAL CHARACTERIZATION, SOCIOECONOMIC TRENDS, <http://www.state.hi.us/dbedt/czm/initiative/wec/html/people/socio/sociotrends.htm> (last visited Mar. 15, 2010).

82. See generally O'AHU METROPOLITAN PLANNING ORGANIZATION, ENVIRONMENTAL JUSTICE IN THE OMPO PLANNING PROCESS: DEFINING ENVIRONMENTAL JUSTICE POPULATIONS (Mar. 2004), available at www.oahumpo.org/reports-docs/2004Update.pdf.

83. *Id.* at 63.

eight census block groups OMPO identified as environmental justice populations, nine were “Native Hawaiian and other Pacific Islander” dominated.⁸⁴ Census Bureau statistics reveal that the average per capita income of a Native Hawaiian person in Hawai‘i (\$14,375) is nearly half that of the state average (\$21,525).⁸⁵ Native Hawaiians also comprise thirty-seven percent of O‘ahu’s homeless.⁸⁶ Integrating these findings, the study identified Native Hawaiian populations as a target for environmental justice efforts in Hawai‘i.⁸⁷ The 2004 study also identified the Wai‘anae Coast as the most vulnerable geographic area in O‘ahu of the regions surveyed.⁸⁸ Four of the nine target areas were located along the Wai‘anae Coast which has “disproportionate concentrations” of Native Hawaiian residents and low-income populations.⁸⁹

OMPO’s findings are supported by the inequitable distribution of environmental harms on O‘ahu. An astounding eleven of the eighteen LULUs on O‘ahu—sewage treatment plants, active landfills, and power plants—are located on the Wai‘anae Coast.⁹⁰ Residents perceive the LULUs located on the Leeward side as affecting not only their quality of life but also their health. For example, the Nānākuli community vehemently calls for the closure of a PVT Land Company landfill located in their town, which accepts hazardous materials such as asbestos and petroleum-contaminated soil.⁹¹ Residents blame this landfill for the high incidents of asthma suffered by the children who live closest to it.⁹² Nānākuli residents also call for the DOH to shut down an illegal four-acre dump site located on the abandoned Lualualei Naval road that has been used to dispose of demolition materials and hazardous petroleum waste.⁹³

The distributional inequities apparent on O‘ahu illustrate the compelling environmental justice challenges that the state of Hawai‘i faces in the future. The state acknowledged the importance of remedying disparities in its environmental justice guidance document and emphasized the “right of every person in Hawai‘i to live in a clean and healthy

84. *Id.*

85. 2000 CENSUS REPORT, *supra* note 76.

86. Hawai‘i Homeless Outreach & Medical Education Project, <http://www.hawaiihomeproject.org/homelesshawaii.html> (last visited Mar. 15, 2010).

87. O‘AHU METROPOLITAN PLANNING ORGANIZATION, *supra* note 82, at 63.

88. *Id.*

89. *Id.*

90. *In the Matter of the Application of Hawaiian Electric Company, Inc.: Hearings Before the Public Utilities Commission*, PUC DN. 05-0145 (2002) at 27 (testimony of Kechaulani Watson) [hereinafter Watson Testimony], available at <http://www.lifcofthelandhawaii.org/Proposed-2009-plant/index.html> (follow “Life of the Land’s Direct Testimony (August 17, 2006);” then follow “Kechaulani Watson Testimony re Environmental Justice” hyperlink.).

91. Danielle Choate, *Views on Landfill Pour In*, HONOLULU STAR BULLETIN, Oct. 22, 2007, available at <http://archives.starbulletin.com/2007/10/22/features/story03.html>.

92. Stephen Florino, *Leeward O‘ahu Residents Say PVT Landfill Causes Sickness*, HAWAII NEWS NOW, June 18, 2004, available at <http://www.hawaiincwsnow.com/Global/story.asp?S=8500885>.

93. *Dust Generates Complaints, But No Fines*, ENV’T HAWAII, Vol. 11 No. 3, September 2000.

environment, to be treated fairly, and to have meaningful involvement in decisions that affect their environment and health.”⁹⁴ The state’s recognition that environmental injustice persists is promising, but as of yet, no legislation has been implemented that will effectuate change.

C. Case Study of the Waimānalo Gulch Landfill

The state of Hawai‘i has not offered any promising concrete new legislation to ensure that “every person” will have “meaningful involvement in decisions.”⁹⁵ Thus, this Article examines the possibilities of attaining environmental justice by empowering communities in the environmental decisionmaking process. It focuses on O‘ahu’s Waimānalo Gulch Landfill permitting controversy as a case study that illustrates the efficacy of differing public participation models.

The 200-acre Waimānalo Gulch Municipal Solid Waste Landfill became the only municipal landfill on the island in 1990, and it is located in the town of Kapolei off of the Wai‘anae Coast.⁹⁶ It was built as a “temporary” replacement for the major municipal landfill located in the eastern town of Kailua, which reached capacity and closed in 1992.⁹⁷ Owned by the City and County of Honolulu and operated by the private Waste Management Corporation, the landfill accepts 300,000 tons of municipal solid waste per year.⁹⁸ It also processes 95,000 tons of waste at an H-POWER facility, which incinerates the waste and converts it to power.⁹⁹ The landfill lies within the state Agricultural District, requiring a special use permit from the state Land Use Commission (LUC) in addition to a DOH solid waste permit.¹⁰⁰

Operation of the landfill has had a long and contentious past. In December 2002, the City completed an EIS for a 14.9-acre expansion, which would allow the landfill to operate for five more years.¹⁰¹ More than a year later, LUC approved the special use permit on the condition that the landfill cease accepting municipal solid waste.¹⁰² LUC further required that

94. LESLIE KAHIIKOLO, STATE OF HAWAI‘I ENVIRONMENTAL COUNCIL, *Hawai‘i Environmental Justice Initiative Report ES-1* (2008), available at <http://ocqc.doh.hawaii.gov> (select “Misc. Documents” then “2008_Hawaii_Environmental_Justice_Report.”).

95. *Id.*

96. *Resolution of Waimanalo Gulch Violation Case Pushes Limits of DOH Rules, Permit Deadlines*, ENV‘T HAWAI‘I, Vol. 18, No. 1, July 2007.

97. Trisha Kehaulani Watson, *The Changing Face of Environmental Racism: Why the Current Legal Model of Environmental Justice Fails* 26 (Dec. 2002) (unpublished Masters thesis, Washington State University) [hereinafter *Watson Dissertation*] (on file with the Washington State University Library).

98. *Resolution of Waimanalo Gulch Violation Case Pushes Limits of DOH Rules, Permit Deadlines*, *supra* note 96.

99. *Id.*

100. *Id.*

101. *Id.*

102. *Id.*

the City find alternative sites for the landfill and close Waimānalo Gulch by May 1, 2008.¹⁰³ A few months after LUC's approval, DOH renewed the permit.¹⁰⁴ In 2005, the County Council passed a bill calling for assurances that the landfill would close by May 2008, which new Mayor Mufi Hannemann vetoed.¹⁰⁵ In 2006, as the landfill reached full capacity, DOH cited Waste Management of Hawai'i and the City and County of Honolulu for eighteen permit violations committed over two years.¹⁰⁶ DOH imposed a \$2.769 million penalty.¹⁰⁷ While in settlement negotiations for the permit violations, the City announced its intention to seek approval of an additional expansion.¹⁰⁸ By 2008, the City still claimed that there were no other immediate alternatives to dispose of O'ahu's waste.¹⁰⁹ It proposed to expand the 107.5-acre landfill by 92.5 acres, a project that would take ten years to complete at a cost of \$86 million.¹¹⁰ In October 2008, a final EIS (FEIS) found no environmental hazard in expanding the landfill and keeping it open for another fifteen years.¹¹¹

As the EIS process for the landfill expansion drew to a close, and it appeared that DOH would approve the permit, residents became outraged at the failures of the public participation process. For years, they complained that the landfill's emission of ash and dust caused a rise in debilitating and chronic asthma suffered by the children in surrounding communities.¹¹² Although they struggled for their voices to be heard in public comment for the EIS and FEIS, their efforts seemed futile. The Waimānalo Gulch Landfill expansion permitting process aptly illustrates the failures of a poorly functioning public participation model.

III. CRITIQUE OF HAWAI'I'S PLURALISTIC ENVIRONMENTAL DECISIONMAKING MODEL

A. Legal Pluralism and Hawai'i's EIS Process

Hawai'i's EIS process is modeled on the pluralistic notice and comment model set forth by NEPA. Ideally in such a process, the decisionmaking outcome would reflect a mix of predominating

103. *Id.*

104. *Resolution of Waimanalo Gulch Violation, supra* note 96.

105. *Id.*

106. Press Release, State of Hawai'i Department of Health, Waimanalo Gulch Landfill Permit Violations (Feb. 2, 2006), available at hawaii.gov/health/about/pr/pressdir.html.

107. *Id.*

108. Lauric Au, *Landfill Passes Environmental Impact Test*, HONOLULU STAR BULLETIN, May 28, 2008.

109. *Id.*

110. *Id.*

111. CITY AND COUNTY OF HONOLULU DEP'T OF ENVTL SERVICES, FINAL ENVIRONMENTAL IMPACT STATEMENT (FEIS): WAIMĀNALO GULCH SANITARY LANDFILL LATERAL EXPANSION xvii (2008) [hereinafter FEIS], available at <http://luc.state.hi.us>.

112. James Gonsler, *Asthma Cases Blamed on Landfill*, HONOLULU ADVERTISER, Oct. 7, 2001.

preferences.¹¹³ The agency would issue notice of the proposed project and solicit comments on the project's anticipated environmental impacts from interested and affected parties. A wide range of interests would be represented throughout, no single interest would predominate, and the identities of the participants would not determine the outcome.¹¹⁴ The agency would clearly grasp the preferences of all interest groups and mediate among those preferences.¹¹⁵ At the conclusion of the comment period, the neutral agency would weigh the cost-benefits of the interests represented and attempt to capture and preserve the most utilitarian underpinnings of the community's aggregated preferences, rather than the preferences of any special interest group. In practice, however, interested parties often compete to influence agency decisions. The pluralistic participation model becomes defined by the relative power of self-interested subjects.¹¹⁶

An analysis of the dissent surrounding the Waimānalo Gulch Landfill expansion permitting process will illustrate three potential drawbacks of the pluralistic participation model employed by the state of Hawai'i. First, the formal opportunity for public comment under a pluralistic model often arises years after most of the informal decisionmaking has actually occurred.¹¹⁷ Second, groups with political power and material resources often find that the informal participation opportunities offered by pluralistic models allow them to broadcast their interests more powerfully, dominating groups with fewer resources.¹¹⁸ Finally, the pluralistic model, at its core, does not account for social justice values. Instead, the decisionmaker weighs the cost-benefits of the interests represented and attempts to capture the most utilitarian of the community's aggregated preferences.¹¹⁹

1. Pluralism Serves As An Inadequate Model For Participatory Decisionmaking Because Formal Opportunity for Comment Can Often Arise Years After Informal Decisionmaking Has Occurred

Although almost all pluralistic participation models require an agency to solicit public comment on a proposed project, often the opportunity to

113. COLE & FOSTER, *supra* note 1, at 107.

114. *Id.*

115. Gauna, *supra* note 1, at 25.

116. Jody Freeman, *Collaborative Governance in the Administrative State*, in ENVIRONMENTAL JUSTICE: LAW, POLICY & REGULATION 118 (Clifford Rechtschaffen & Eileen Gauna eds., 2003).

117. COLE & FOSTER, *supra* note 1, at 110.

118. See, e.g., Luke W. Cole, *Macho Law Brains, Public Citizens, and Grassroots Activists: Three Models of Environmental Advocacy*, 14 VA. ENVTL. L.J. 687, 701 (1995) (discussing how participating in the permitting process is often futile for low-income communities and communities of color who can not "muster the political power within the system to compete with well-connected and financed companies.")

119. Gauna, *supra* note 1, at 40.

write remarks or speak at a public hearing arises long after the agency has already engaged in considerable informal decisionmaking.¹²⁰ Well before the agency solicits public comment on a proposed project, it has often already expended considerable energy, resources, and expertise on the permit application.¹²¹ The agency will likely have evaluated the project for its potential effect on the environment, and then spent hundreds of hours preparing its EIS.¹²² The agency, as a consequence, will often only reluctantly amend or change its judgments to reflect public concerns.¹²³

The Waimānalo Gulch landfill controversy vividly illustrates the extent to opportunity for public comment can arise after much of the informal decisionmaking has already been completed. The Waimānalo Gulch landfill siting was originally sold to the community as a “temporary” site that would not remain in operation past 2002.¹²⁴ Yet in 1999, three years before the first landfill operation permit expired, former Mayor Jeremy Harris initiated informal discussions about retaining the existing location. He began quiet negotiations with Waste Management Corporation to renew its contract at the landfill for an additional fifteen years.¹²⁵ The City did not publicly confirm its intention to expand the landfill until 2001, when it acknowledged that it no longer planned to explore alternative sites on the island. It announced that it favored either expanding the existing site or building a new Wai‘anae Coast site.¹²⁶ This announcement elicited angry responses from some members of the Wai‘anae Neighborhood Board, who had believed official promises that the landfill would close in 2002. Board Chairwoman Cynthia Rezentes stated to the press, “the community was against [the landfill expansion] from the beginning. . . there’s a sense of

120. COLE & FOSTER, *supra* note 1, at 110.

121. *Id.*

122. *Id.* at 108.

123. *Id.* at 111.

124. Watson Dissertation, *supra* note 97, at 26.

125. See *Resolution of Waimanalo Gulch Violation Case Pushes Limits of DOH Rules, Permit Deadlines*, *supra* note 96 (“In 1999, then-Major Jeremy Harris signed an agreement with Waste Management to continue operations for another 15 years, despite the fact that the city and Waste Management’s DOH permit to operate the landfill was set to expire in 2002.”); Johnny Brannon, *Honolulu’s Trash Faces Long Regulatory Haul*, HONOLULU ADVERTISER, Nov. 11, 2007 (“May 1999: City seeks to nearly double landfill’s capacity . . . City signs new contract with Waste Management of Hawai‘i to continue operating landfill for 15 more years.”); Press Release, Office of Mayor Hannemann, Mayor Vetoes Bill 37 on Waimanalo Gulch Landfill (Feb. 28, 2006) (“[F]ormer [Mayor] Jeremy Harris publicly promised he would shut the landfill down by 2008 but never took the steps to do so because he also signed a 15-year contractor extension with Waste Management of Hawai‘i to operate the landfill.”).

126. Watson Testimony, *supra* note 90 (“At a community meeting held to address public concern, the city confirmed that despite the fact that forty-two sites were originally considered for housing a new landfill, only three siting options remained: expand the existing site, or build a new site [in one of two remaining locations]. . . Both alternate locations were located in the Ewa District on the Leeward Coast.”). See also Wai‘anae Coast Neighborhood Board No. 24 Minutes of Regular Meeting (Mar. 6, 2001) (“At this time, the City & County of Honolulu has recognized three locations for new landfills: Maili (old quarry), Makaiwa Gulch (next to Waiamanalo Gulch) and expanding Waimanalo Gulch.”).

betrayal.”¹²⁷ Wai‘anae community members became even more incensed when they were given little opportunity to express their opinions in a formal public forum—the City scheduled its “open house” on the landfill during working hours. A spokesperson for a local Leeward group observed, “scheduling this meeting in the middle of the work day . . . will only guarantee that many concerned citizens of the Leeward Coast will not be able to attend.”¹²⁸ DOH approved the landfill expansion in 2002, without giving the community adequate occasion to voice their pressing concerns.¹²⁹

Similarly, during the 2008 landfill expansion conflict, decisionmakers seemed to reach their conclusions long before the public comment period officially closed. For example, at an August 2007 Town Hall Meeting, residents of the nearby town of Nānākuli appeared in full force to protest the proposed expansion:

More than an hour before the mayor arrived at Nanaikapono Elementary School cafeteria to host a town meeting on the Waimānalo Gulch landfill near the Ko Olina Resort, dozens of protesters lined Farrington Highway fronting the school with placards saying “No More Landfills!” and “Enough is Enough!”¹³⁰

Current Mayor Mufi Hannemann not only appeared reluctant to engage with community concerns, he actually appeared to subvert opposition to the expansion. He warned that Nānākuli residents should support the Waimānalo Gulch landfill expansion, or risk the promotion of Nānākuli as the alternative site.¹³¹ “Of the sites that have been evaluated . . . the studies have shown that it is going to come closer to this Nānākuli community, and I don’t want that to happen,” Hannemann said.¹³² One month after the Mayor made this ominous statement, the Nānākuli representatives on the Wai‘anae Neighborhood Board changed their positions and actually voted to support a temporary landfill expansion.¹³³ One Nānākuli resident asked, “My question is, if Waimānalo is closed, where’s the garbage going to go? The only other place is in Nānākuli. What’s going to happen to us?”¹³⁴ Within the next few months, the

127. Rosemarie Bernardo, *Wai‘anae Says No to Larger Landfill*, STAR BULLETIN, July 5, 2001, available at <http://archives.starbulletin.com/2001/07/05/news/story8.html>.

128. Lisa Asato, *Group Angry Landfill Talk Is Scheduled On Work Day*, STAR BULLETIN, July 15, 2001, available at <http://archives.starbulletin.com/2001/07/15/news/story7.html>.

129. *Id.*

130. *Mayor: Landfill a ‘Terrible Problem,’* HONOLULU ADVERTISER, Aug. 29, 2007.

131. Telephone Interview with Lucy Gay, Member, Wai‘anae Neighborhood Board (Nov. 11, 2008) (notes on file with author).

132. Danielle Choate, *Views on Landfill Pour In*, HONOLULU STAR BULLETIN, Oct 22, 2007, available at <http://archives.starbulletin.com/2007/10/22/features/story03.html>.

133. Wai‘anae Coast Neighborhood Board, Special Meeting Minutes (Sept. 27, 2007) [hereinafter Special Meeting Minutes], <http://www.honolulu.gov/NCO/nb24/24spagandmin.htm>.

134. *Id.*

Nānākuli representatives on the Wai‘anae Board left to form their own Neighborhood Board.¹³⁵ Coalition building between Wai‘anae Coast towns degenerated. In effect, the Mayor’s remarks diffused public opposition to the landfill expansion. Rather than act as an objective mediator, the Mayor actually coopted the public participation process.

Wai‘anae Board representatives felt that tensions with Nānākuli prevented the Leeward Coast from presenting a united front to decisionmakers. They felt that this factionalism eventually weakened the community’s message to the DOH against landfill expansion.¹³⁶ Indeed, the City later blandly reported the Board meetings in the “public comment” section of the October 2008 FEIS. The FEIS observed that the Neighborhood Boards were “interested” in the closure of the landfill, but failed to capture the vehemence, divisiveness, confusion, and outrage that the Boards expressed when the Mayor announced plans for further landfill expansion.¹³⁷ Such a recasting—downplaying—of the political tensions between the Neighborhood Boards exemplifies the extent to which complex public sentiments may become neutralized in official representations.

This example illustrates how environmental decisionmakers might respond defensively to public criticism, especially after devoting time and expense to developing a particular project. Environmental officials might treat a public meeting as an “announce and defend” affair, instead of a forum where they may listen to a community’s honest concerns.¹³⁸ As a result, the public opinion expressed in such meetings can become distorted.

2. *Pluralism Allows Powerful Interest Groups to Dominate Groups with Fewer Resources*

The structure of the pluralistic notice and comment model also allows groups with political power and significant resources to powerfully broadcast their interests and dominate groups with fewer resources.¹³⁹ This can result in an appropriation of the decisionmaking process.¹⁴⁰ The Waimānalo Gulch expansions in 2002 and 2008 illustrate how business representatives with power and money may have been able to “capture” the

135. Will Hoover, *Nānākuli-Ma‘ili Election Dates Set*, HONOLULU ADVERTISER, Feb 27, 2008, available at <http://the.honoluluadvertiser.com/article/2008/Feb/27/n/Hawai'i802270389.html> (“Two dozen certified candidates have applied for the newly created Nānākuli-Ma‘ili Neighborhood Board No. 36—including some who were formerly members of the Wai‘anae Coast Neighborhood Board No. 24 . . .”).

136. Telephone Interview with Lucy Gay, *supra* note 131.

137. FEIS, *supra* note 111, at § 7-13.

138. COLE & FOSTER, *supra* note 1, at 111.

139. See, e.g., Cole, *supra* note 118, at 701.

140. *Id.* (Cole goes even further, arguing that the mini-NEPA pluralistic process is actually designed to “manage, diffuse, and ultimately co-opt community opposition to projects.”).

attention of the decisionmaker in the pluralistic process.¹⁴¹ In this instance, the dominant corporate interest that arguably captured the attention of the landfill expansion decisionmakers was H-POWER, operator of the Waimānalo Gulch waste-to-power incinerator. In 1989, the City commissioned H-POWER to convert solid waste into electricity.¹⁴² When the Waimānalo Gulch landfill began to operate in full force in 1990, it processed H-POWER ash and residue and also served as an emergency alternative for solid waste disposal during H-POWER maintenance and repair.¹⁴³

Conflicts surrounding the Waimānalo Gulch expansion often seemed to focus on the City's unwillingness to minimize landfill-dependence by reducing solid waste and expanding recycling capabilities.¹⁴⁴ At the landfill's inception in 1990, Wai'anae Coast leaders accepted the Waimānalo Gulch landfill in their community as long as the City promised that its placement would be "temporary" while they searched for other waste disposal alternatives.¹⁴⁵ In response to concerns about solid waste generation, the City did concurrently launch a pilot curbside recycling program in 1990, but the City canceled the program after only a year.¹⁴⁶ In 2002, when the City approved the first landfill expansion application, it again sincerely pledged to bring new waste disposal methods to the state and reduce the amount of trash deposited at Waimānalo Gulch.¹⁴⁷ In 2003, after the first landfill expansion commenced, the City Environment Services Department promised that the City would use its five-year solid waste permit extension to significantly reduce its reliance on sanitary landfill disposal, advertise for proposals for alternative technology to increase recycling, and establish a blue ribbon committee to propose a site for a contingency landfill.¹⁴⁸ Again, these efforts were unsuccessful, culminating in the second landfill expansion application in 2006.¹⁴⁹

Some Wai'anae residents began to question the legitimacy of the City's decisionmaking process as it struggled to implement solid waste

141. COLE & FOSTER, *supra* note 1, at 110.

142. Trevor Atkins, *Leeward Landfill Saga Continues*, THE VOICE OF KALEO, Nov. 14 2007, available at <http://media.www.kaleo.org/media/storage/paper872/news/2007/11/14/News/TheLeeward.Landfill.Saga.Continues-3100111.shtml>.

143. *Id.*

144. See, e.g., *City Trashes Experiment in Windward Curbside Recycling*, ENV'T HAWAII, Vol. 3, No. 1, July 1992.

145. Watson Dissertation, *supra* note 97, at 26; Atkins, *supra* note 142.

146. *City Trashes Experiment in Windward Curbside Recycling*, *supra* note 144.

147. Scott Ishikawa, *City Officials Looking Into Alternative Waste Solutions*, HONOLULU ADVERTISER, Mar. 25, 2002 ("With Honolulu expected to run out of room to dispose of its trash this year, and plans to expand a Leeward O'ahu landfill strongly opposed by area residents . . . officials have taken the first concrete steps toward bringing new waste-disposal methods to O'ahu.").

148. Wai'anae Coast Neighborhood Board, Regular Meeting Minutes (Feb. 4, 2003), available at <http://www.honolulu.gov/refs/nco/nb24/03/24febmin.htm>.

149. Atkins, *supra* note 142.

reduction programs—such as curbside recycling—that other states had followed for several years. One Wai‘anae Neighborhood Board member queried, “[T]here must be somebody benefiting. Why are the requests of recycling and shipping falling on deaf ears? What is the hidden picture? Why are we not closing the landfill?”¹⁵⁰ Advocates similarly observed that, fifteen years after the landfill’s opening, solid waste had actually tripled while the population had grown by only seven percent.¹⁵¹

A few local environmental activists argued that the City’s seeming unwillingness to broaden its recycling plan was due in part to the City’s 1990 contract with H-POWER, which gave H-POWER sole control over recyclables.¹⁵² These activists also pointed to a 1991 report from the Division of Refuse on its pilot recycling program that admitted that “recycling has a relationship to H-POWER.”¹⁵³ The report stated:

[T]he department does not see it as an adversarial one. There is enough refuse generated on O‘ahu to satisfy contractual obligations at H-POWER and provide recycling with all the material it can handle. H-POWER may be viewed as the dominant partner for now . . . [but] recycling can become an equal or dominant partner in this relationship over the next 10 to 20 years.¹⁵⁴

This mention of the “dominance” of H-POWER led environmental advocates to speculate that the City’s obligations to H-POWER gave it a greater interest in maintaining and expanding the preexisting landfill.¹⁵⁵ The continued stalling of a state-wide recycling program lends some teeth to this perspective. As of 2010, the City and County of Honolulu has not yet implemented a comprehensive recycling program, although it hopes to eventually expand curbside recycling state-wide, despite budgets cuts that threatened to halt these plans.¹⁵⁶

From the perspective of local environmental advocates, then, the City’s contractual obligations to H-POWER to continue its waste-to-power incinerator program made it less inclined to listen to public concerns about reducing solid waste and limiting the landfill.¹⁵⁷ “It’s painfully obvious that the city is trying to push incineration over recycling,” said Isaac Moriwake, Sierra Club Honolulu chapter chair, in 2007.¹⁵⁸ He continued:

150. Special Meeting Minutes, *supra* note 133.

151. Atkins, *supra* note 142.

152. *City Trashes Experiment in Windward Curbside Recycling*, *supra* note 144.

153. *Id.*

154. *Id.*

155. *Id.*

156. Zahid Arab, *Resident, Councilmembers Irate Over Suspension of Curbside Recycling*, HAWAII NEWS NOW, May 20, 2009, available at <http://www.hawaiinewsnow.com/Global/story.asp?S=10393091>.

157. *Counties Pay Consultants to Push Incineration Over Recycling*, ENV’T HAWAII, Vol. 18 No. 1, July 2007.

158. *Id.*

Not only is that an affront to environmental sustainability, it's an affront to the will of O'ahu voters, who last November overwhelmingly approved an amendment to the City Charter requiring comprehensive curbside recycling. So far, the administration of Mayor Mufi Hannemann has proposed a small curbside pickup program, but at the meetings,¹⁵⁹ city officials said no plans are on the table for expanding it islandwide.

Such appearances undermine the integrity of the decisionmaking process to public participants, leading these Wai'anae residents to feel as if their interests can not compete with H-POWER.

If these allegations are true, then H-POWER's role in the Waimānalo Gulch expansion illustrates how the pluralistic decisionmaking model might become undermined, despite the appearance of equal participation by competing interest groups. Corporate interests can dominate the agency from the beginning of the decisionmaking process. Community concerns, even when voiced loudly and angrily, can fail to result in meaningful agency deliberation. The interest groups that can provide the most valuable commodities to elected officials will ultimately be more successful in the policy-making marketplace.¹⁶⁰

3. *Pluralism Focuses on Individually Held Preferences Rather than Developing a Shared Baseline of Understanding*

Finally, the pluralistic model, at its core, fails to look past individually held preferences to find commonly shared social values. Under the notice and comment participation structure, the agency solicits individual comments, weighs the costs and benefits of the interests represented, and then attempts to capture the most utilitarian of the community's aggregated preferences.¹⁶¹ This sort of line-up-and-tally model does not encourage deliberation over larger equitable concerns, nor does this structure require that the agency weigh alternative normative values over pure economic optimization.¹⁶² As Eileen Gauna queries, "What is the utility of environmental justice, and how do we measure its value in economic terms?"¹⁶³ The question Gauna posits sharpens the divide between environmental decisionmaking as a cost-benefit analysis and environmental decisionmaking as a social justice analysis. Indeed, it is more economically efficient to place environmental risk-generating activities in areas where the land is cheaper and where politically disenfranchised residents are less likely to successfully oppose the siting.¹⁶⁴ Yet from a normative

159. *Id.*

160. Matthew Parlow, *Civic Republicanism, Public Choice Theory, and Neighborhood Councils: A New Model for Civic Engagement*, 79 U. COL. L. REV. 137, 150 (2008).

161. Gauna, *supra* note 1, at 40-44.

162. *Id.*

163. *Id.* at 39.

164. *Id.* at 40.

perspective, the public might balk at systematically burdening low-income people of color with environmental harms.

NEPA's pluralistic model does not impose any substantive obligations on environmental agencies to decide based on equitable concerns.¹⁶⁵ It mandates only that agencies remain transparent regarding the environmental impacts of proposed projects and disclose their responses to public comments.¹⁶⁶ Agencies need only conform to procedural requirements, but are not obligated to choose less environmentally harmful alternatives or adopt mitigation measures to reduce the impacts of a project on a disparately harmed community.¹⁶⁷ The language of the statute prohibits "uninformed" agency action, but it does not prohibit "unwise" agency action."¹⁶⁸ Under this pluralistic model, if the aggregation of interest group preferences indicates that racially disproportionate environmental inequity is most economically efficient, then the decisionmaker could put those preferences into effect.¹⁶⁹

The Waimānalo Gulch expansion illustrates the extent to which environmental justice concerns add a level of complexity to the simple cost-benefit analyses conducted in pluralistic decisionmaking processes.¹⁷⁰ Hawai'i's current EIS process includes no mechanism for weighing social justice and environmental equity alongside economic efficiency, unlike the processes employed by states such as California.¹⁷¹

The inadequacies of Hawai'i's pluralistic model are evident when reviewing the City's decision to maintain the landfill at Waimānalo Gulch or move it to an alternate location. In 2003, former Mayor Harris formed a fifteen member committee to recommend a new landfill site to the City Council.¹⁷² After six months of study, the committee concluded that keeping the landfill at Waimānalo Gulch would be the least expensive and most fiscally responsible option.¹⁷³ When the City prepared its 2006 EIS, it relied on similar economic efficiency reasoning, stating that the "city already owns the property and the infrastructure is already in place, making the site the most economical and least expensive to develop and maintain as a landfill."¹⁷⁴ The 2008 FEIS pushed the reasoning further, framing the

165. RECHTSCHAFFEN & GAUNA, *supra* note 17, at 311.

166. *Id.*

167. *Id.*

168. *Id.* (quoting *Robertson v. Methow Valley*, 490 U.S. 332, 351 (1989)).

169. *See id.* at 276.

170. COLE & FOSTER, *supra* note 1, at 109.

171. *Compare* HAW. REV. STAT. §343-3 (2009) (outlining notice and comment structure for environmental assessments and environmental impact statements) with CAL. HEALTH & SAFETY CODE § 25199 (requiring LACs for environmental decisionmaking processes).

172. Mayor's Blue Ribbon Advisory Committee, Final Report, (Dec 1, 2003), available at http://cnvhonolulu.org/pdfs/solid_waste/landfill_sitting/Committee_Recommendations.pdf.

173. *Id.*

174. CITY AND COUNTY OF HONOLULU DEP'T OF ENVTL SERVICES, ENVIRONMENTAL IMPACT STATEMENT: WAIMĀNALO GULCH SANITARY LANDFILL LATERAL EXPANSION 1-6 (2006), available at

continued burdening of Wai‘anae community as a “positive social impact” because retaining the Waimānalo Gulch Landfill “reduce[s] the impact on other O‘ahu communities.”¹⁷⁵ It continued: “[mo]ving the current landfill operation to another O‘ahu location would only shift the potential for adverse impacts to another community, still requiring that the issues of litter, traffic, odors, and visual pollution be addressed and managed.”¹⁷⁶ After reviewing the reasoning set forth in the FEIS, LUC dismissed alternative sites in favor of allowing a three year permit extension of the existing Waimānalo Gulch site.¹⁷⁷ The decision reflected an emphasis on economic efficiency over social equity, placing environmental risk-generating activities in areas where land was least expensive and residents lacked political influence.

B. The Waimānalo Gulch Example Illustrates That Hawai‘i’s Pluralistic EIS Process Is Flawed

The Waimānalo Gulch landfill expansion permitting process illustrates that a NEPA-like pluralistic participation model often fails to resolve highly contentious public issues in a way that lends legitimacy to the ultimate decision.¹⁷⁸ “It becomes frustrating when you feel like your voice really doesn’t matter,” said Shad Kane, a Kapolei resident and former Kapolei Neighborhood Board member.¹⁷⁹ “It gets to a point where you feel the community meetings don’t matter.”¹⁸⁰ Wai‘anae community members participated in public forums yet felt as if their voices were not heard and promises were not kept. The EIS process ensured that agencies publicly disclosed information after the permitting application had officially been filed, but provided little opportunity for meaningful dialogue regarding the substance of the EIS.¹⁸¹

Under the NEPA-like system employed in Hawai‘i, individual preferences are elicited, but the system does nothing to encourage deliberation of the normative or equitable concerns underlying those preferences.¹⁸² The environmental decisionmaking statute requires that an FEIS include a response section that addresses public comments, but the agency must issue its final decision only thirty days after publishing the

<http://gen.doh.hawaii.gov> (follow “EA_and_EIS_Online_Library” hyperlink; then follow “O‘ahu” hyperlink; then follow “2006-11-23-OC-EISPN-Waimanalo-Gulch-Sanitary-Landfill-Expansion” hyperlink).

175. FEIS, *supra* note 111.

176. *Id.*

177. B.J. Reyes, *Landfill to Stay Open Until 2012*, HONOLULU STAR BULLETIN, Sept. 25, 2009.

178. See COLE & FOSTER, *supra* note 1, at 111.

179. Laurie Au, *Landfill Passes Environmental Impact Test*, STAR BULLETIN, May 28, 2008, available at <http://archives.starbulletin.com/2008/05/28/news/story02.html>.

180. *Id.*

181. Jonathan Poisner, *A Civic Republican Perspective on the National Environmental Policy Act’s Process for Citizen Participation*, 26 ENVTL. L. 53, 75, 86 (1996).

182. Poisner, *supra* note 181, at 87.

FEIS.¹⁸³ These time constraints prevent the agency decisionmaker from thoroughly analyzing all of the concerns of the public. The agency retains broad discretion in setting goals and weighing the cost-benefits of competing interests. These limitations suggest that the pluralistic model employed in Hawai'i fails to encourage critical reflection of the underlying values at stake in the proposed action.¹⁸⁴

IV. CRITIQUE OF HAWAI'I'S CURRENT CIVIC REPUBLICANISM MODEL: LOCAL ADVISORY COMMITTEES

Part III argues that pluralism is flawed because it requires agencies to conduct a public preference tally without guarding against interest-group capture or preference distortion.¹⁸⁵ Under this model, decisionmakers need not weigh equitable concerns over pure economic optimization. Instead, as the Waimānalo Gulch Landfill example suggests, they often become swayed by the most powerfully broadcast opinions.¹⁸⁶ Part IV argues that a model grounded in civic republican principles creates a deliberative process that can remedy the distortions of pluralism.

A. Civic Republicanism Creates a Deliberative Process, Where Community Stakeholders Participate Early in Environmental Decisionmaking to Discuss the Equitable Values at Stake

Civic republicanism relies on Jeffersonian ideals of shared knowledge, collective decisionmaking, and equal discourse among participants.¹⁸⁷ Classic civic republicanism envisioned local government as a deliberative democracy where community stakeholders engaged with one another to identify the needs of the community.¹⁸⁸ The modern conception of civic republicanism, articulated by prominent scholars such as Cass Sunstein, casts public participation as “an extended process of deliberation and discussion, in which new information and new perspectives are brought to bear [through] widespread participation by the citizenry.”¹⁸⁹

From the civic republican perspective, “community” is not a mere collection of individuals. It is a set of relationships that gives rise to goals incapable of being expressed in individual terms.¹⁹⁰ Advocates of this model believe that the pluralistic aggregation of preferences cannot entirely capture the range of goals appropriately pursued by a democratic

183. HAW. REV. STAT. § 343-5(c)(3). See also Poisner, *supra* note 181, at 74.

184. See Poisner, *supra* note 181, at 89.

185. See Gauna, *supra* note 1, at 45.

186. *Id.* at 40.

187. Foster, *supra* note 1, at 834; Gauna, *supra* note 1, at 30.

188. Parlow, *supra* note 160, at 152.

189. SUNSTEIN, *supra* note 8, at 134-35.

190. *Id.*

society.¹⁹¹ Rather, civic republican scholars believe that citizens can work together to discover commonly held equitable values and goals if given the opportunity to confront one another and engage in normative disputes.¹⁹² A more deliberative process fosters the disclosure and discussion of information, instead of encouraging secrecy and indirect communication.¹⁹³ This allows those most affected by the decision to access available information and properly educate themselves about the proposed action.¹⁹⁴ Ideally, direct engagement between knowledgeable parties who would never otherwise share information or devise solutions together would produce novel and unanticipated solutions for regulatory problems.¹⁹⁵

Increasingly, state environmental decisionmaking processes are moving away from the pluralist model of public participation and seeking to involve more meaningful dialogue and consultation.¹⁹⁶ A common model is the formation of local advisory committees (LACs).¹⁹⁷ For example, at least a dozen states now mandate the creation of LACs in the permitting process for waste facilities, based upon the belief that these local groups can engage in open discussion and can reach agreement upon a common good.¹⁹⁸ State-appointed LACs such as these are usually active only for the period when a specific permit is under consideration.¹⁹⁹ The committees are generally appointed upon announcement of a notice of intent to file an application.²⁰⁰ This allows for public involvement much earlier than in a pluralistic notice and comment model, where the agency solicits public comment only after the application has been filed.²⁰¹

Although in theory LACs might transform the participatory process into something more meaningful and deliberative, in practice the success of such committees depends on the people appointed, when they are included in the decisionmaking process, and their relationship to the communities that they are meant to represent.²⁰² In their analysis of civic republican models, Luke Cole and Sheila Foster present two LACs as case studies, but only one succeeded in influencing the agency decisionmaker.²⁰³ In the successful case of Martinez, CA, the agency appointed committee members

191. Poisner, *supra* note 181, at 58.

192. *Id.*

193. Jody Freeman, *Collaborative Governance in the Administrative State*, 45 U.C.L.A. L. REV. 1, 23 (1997-1998).

194. Foster, *supra* note 1, at 835.

195. See Freeman, *supra* note 193, at 22.

196. See generally COLE & FOSTER, *supra* note 1, at 112 ("A recent move away from the pluralist model of public participation is evident in many state permitting processes.").

197. *Id.*

198. *Id.*

199. *Id.*

200. *Id.*

201. *Id.*

202. *Id.* at 115.

203. *Id.* at 119.

from wide-ranging groups that both supported and criticized the proposed landfill.²⁰⁴ In the unsuccessful case of Buttonwillow, CA, the agency decisionmaker actually excluded individuals opposing the additional waste facilities from the deliberative process.²⁰⁵ There were no representatives from the town of Buttonwillow on the committee, although the meetings were held in the town.²⁰⁶ Local residents complained that the Buttonwillow committee did not adequately represent their community's interests, which led to tension and distrust between the public and the LAC.²⁰⁷ Further, the committee found itself battling the agency for access to information and resources, leaving participants frustrated by their lack of formal power or influence.²⁰⁸ Hindered by these problems, the LAC eventually failed to reach any consensus.²⁰⁹ Cole and Foster concluded that the success of these two LACs turned upon whether the committees adequately represented the divergent interests of the community and whether the agency legitimately committed to including the committee in its decisionmaking process.²¹⁰

These examples illustrate that the formation of LACs might not always lead to a more qualitatively deliberative process. However, when structured with care, such committees can create an opportunity for lay people and experts to work together, share knowledge and information, and reach consensus.²¹¹ The core goals of increased dialogue and consensus are at the heart of this move toward deliberative democratic principles as an alternative to interest-group pluralism.²¹²

*B. LACs Employed in the Waimānalo Gulch Landfill Expansion
Controversy Exemplify Potential Pitfalls of the Civic
Republican Model*

Creating LACs and giving local community representatives a greater measure of autonomy in advising environmental decisionmaking may be especially appropriate for the state of Hawai'i, given both its diverse demographics and the unique political status of the Native Hawaiian community on the Wai'anae Coast. As lawmakers in Hawai'i ponder transitioning to a civic republican model that utilizes LACs, they should closely examine the efficacy of the LACs employed by Mayor Hannemann in the Waimānalo Gulch landfill expansion controversy. The Mayor appointed two LACs in 2006 as the City tried to encourage public support

204. *Id.* at 119.

205. *Id.* at 119.

206. *Id.* at 116.

207. *Id.* at 117, 120.

208. *Id.* at 117.

209. *Id.* at 117.

210. *Id.* at 119.

211. *Id.* at 113.

212. *Id.*

for the second landfill expansion.²¹³ One LAC was meant to provide “oversight” for “landfill operations” and the other was to provide “oversight” of a “community benefits package” meant to compensate residents for hosting the landfill.²¹⁴ Mayor Hannemann announced the newly appointed committees in a 2006 press release:

It's important to point out that the benefits program will be community-driven. This won't be a matter of the City telling residents what they should be doing. Rather, we fully expect residents to take an active leadership role in defining their goals and charting the course they want to take in achieving them, and those will be the responsibilities of two advisory groups we're forming to provide direction and oversight.²¹⁵

Despite these optimistic words and earnest intentions, the Mayor's LACs have struggled without any published guidelines to govern the selection of committee members or structure their role in the process.

The example of these LACs further reveal the pitfalls of appointing committees that inadequately capture the divergent interests of the community they are meant to represent. First, LAC members' appointed status undermined the legitimacy of the LAC to many community members, who viewed them as primarily loyal to the Mayor rather than to the community. Second, many Wai'anae residents felt that the LAC, as an unrepresentative body, failed to capture the community's values or interests in negotiating a “community benefits package” as compensation for housing the landfill. In these respects, the LACs created by the Mayor more closely resemble the unsuccessful LACs in the Cole and Foster case study of Buttonwillow rather than the successful LACs in Martinez.

1. The Appointed Status of LAC Members Undercut Their Legitimacy To Many Wai'anae Residents

Many Wai'anae residents protested that the appointed Waimānalo Gulch LAC members failed to adequately represent the community's interests. Although the Mayor's stated purpose for the LACs was to provide residents with the opportunity to meaningfully participate in the decisionmaking process, many residents became skeptical about whether the LAC would honestly promote the community's interests and withstand external political pressures. “The appointments undermine legitimacy from the community's point of view . . . DOH selects people based on relationships and politics,” observed Kyle Kajihiro, director of Hawai'i's

213. Press Release, Office of the Mayor, Mayor Hannemann Unveils Leeward Coast Benefits (June 26, 2006), available at <http://www.honolulu.gov/refs/csd/publiccom/honnews06/mayorhannemannunveilsleewardcoastbenefits.htm>.

214. *Id.*

215. *Id.*

American Friends Service Committee.²¹⁶ Kajihiro observed that the appointed LAC members did not include “organic leaders,” those designated by their communities to give strong voice to their concerns, who could have offered a true diversity of perspective to the deliberative process.²¹⁷ Just as the Buttonwillow LAC members did not actually reside in Buttonwillow, other Wai‘anae residents criticized the Mayor for failing to include individuals who lived in the neighborhoods daily affected by the landfill. “Those decisions should not be controlled by people who don’t have to live with the problem,” commented one resident on the role of the community benefits committee.²¹⁸ Perceptions of the LACs’ illegitimacy seemed to hinder direct and deliberative dialogue rather than facilitate it. Mr. Kajihiro stated, for example, that he saw the LACs as just another commission “set up to serve as insulation between the community and decisionmakers.”²¹⁹ These comments suggest that, although the Mayor intended for the appointed LACs to serve as community representatives in a deliberative process, local residents generally agreed that the members actually failed to represent the community as a whole.

2. *The LACs’ Lack of Formal Power or Influence Led To Community Skepticism About “Community Benefits Package” Negotiations*

The sense that the LACs inadequately represented the Wai‘anae community led to greater tensions when the committee negotiated a “community benefits package” with City officials. In 2006, the City agreed to provide \$2 million to \$2.5 million per year in community grants to the Wai‘anae Coast to “offset the impact of the City’s Waimānalo Gulch landfill.”²²⁰ Although LAC members insisted that the money was not a “payoff” for hosting the landfill, some residents expressed outrage that the committee had agreed to monetary benefits on behalf of the community.²²¹ One resident observed that the benefits package seemed to excuse the City for keeping the landfill in Wai‘anae and “not dealing with the city’s garbage problems.”²²² Other members of the community felt that the benefits package failed to address the community’s deeper concerns regarding the landfill and its continued presence in Wai‘anae.²²³ “We want him to get that landfill the heck out of our community,” said Maeda

216. Interview with Kyle Kajihiro, Director, American Friends Service Committee in Hawai‘i (Nov. 15, 2008).

217. *Id.*

218. FEIS, *supra* note 111, at § 7-19 (public comments on the community benefits package).

219. Interview with Kajihiro, *supra* note 216.

220. Ronna Bolante, *How Is the Mayor Doing?*, HONOLULU MAGAZINE, Jan. 2007; Press Release, Office of the Mayor of Honolulu, *supra* note 213.

221. Johnny Brannon, *Ulehawa Park Homeless To Be Ousted*, HONOLULU ADVERTISER, Dec. 27, 2007, available at <http://the.honoluluadvertiser.com/article/2007/Dec/27/ln/Hawai'i12270363.html>.

222. *Id.*

223. *Id.*

Timson, chairwoman of the Makakilo-Kapolei-Honokai Hale Neighborhood Board, emphasizing that the money should not distract residents from the fact that the community still lived with a disproportionate share of environmental burdens.²²⁴ For these residents, it seemed as if the LAC's negotiations with the City failed to result in a deliberative discussion based upon shared equitable concerns or social values.

The residents' distrust of the negotiated benefits package arose not only from a sense that the LACs inadequately represented the community, but also from suspicions that the committee had a mere "advisory" role with no formal power or influence. For example, Kyle Kajihiro pointedly expressed this sentiment, observing that "communities are always advising; they can testify all they want, but nothing happens."²²⁵ Other community members wondered how much of the LAC's negotiations with the City resulted in mere lip service. They felt that the City labeled necessary spending as a "community benefits package" in their discussions with the LAC when really "the Leeward Coast needs to have that kind of attention and benefits whether or not we have a landfill."²²⁶ Another resident agreed that the purported benefits package had "elements that merely replace funds that should have been spent in the community anyway," such as park maintenance, and denounced it as "a farce."²²⁷ And, even if residents accepted the spending as compensation for hosting the landfill, the amount accepted by the LAC seemed merely placatory rather than genuine. One resident protested, "[a] \$2 million benefits package is like pennies—you can't even build a community center with that."²²⁸ Community members also worried that the LAC's acceptance of the token compensation weakened their negotiating power for the future. One resident commented, "as soon as we start 'negotiating' a community package, we will surely have to keep the landfill. We'll get bought off. There's too much money being made by the City at the landfill."²²⁹ These vocal concerns from the Wai'anae community suggest that LAC members did not actually adequately represent the community's interests in its negotiations. Any deliberative process that the LAC engaged in did not uncover shared equitable values between the community and the decisionmakers.

The community's sense that the LAC inadequately represented its interests arose not only at the negotiation of the community benefits package itself, but also in the administration of its funds. There appeared to be general agreement that, despite the LAC's participation, there was

224. *Id.*

225. Interview with Kajihiro, *supra* note 216.

226. Brannon, *supra* note 221.

227. *Id.*

228. *Id.*

229. FEIS, *supra* note 111, § 7-19.

“insufficient community involvement in questions surrounding ‘who should benefit?’, ‘what impacts are being addressed?’ and ‘what services are appropriate?’”²³⁰ Some residents balked at the services that the appointed committee and the City decided would benefit the community. Perhaps the most troubling aspect of the package was the “benefit” of a “cleanup and facelift for beach parks in Mā’ili, Nānākuli, and Kea’au.”²³¹ The purported “major overhaul” actually resulted in the ouster of the homeless beach dwellers who camped on the beaches of the Leeward Coast.²³² Hundreds of families, many of Native Hawaiian descent, lived in tents and makeshift structures set-up in these beach parks.²³³ One Nānākuli resident observed, “It seems like there’s more homeless people here just getting pushed around . . . I have family here, living on the beach, and a lot of people here need help.”²³⁴ Statements such as these indicate that empaneling an unrepresentative deliberative body might have resulted in excluding the very Leeward Coast residents most vulnerable to the environmental risks posed by the landfill expansion from the decisionmaking process. The civic republicanism process, as carried out through these advisory groups, actually served to suppress some views of the “public good” held by community members most affected by the environmental decisions.

In conclusion, these examples illustrate the potential problems of a civic republican model. If the deliberating committees do not adequately represent the communities that they purport to speak for, then the conceptions of the “common good” that emerge might differ significantly from beliefs that the community actually holds. Meanwhile, power disparities and unfair private benefits can remain unexamined and more sustainable alternatives are ignored.²³⁵ Improper implementation can severely hamper the ideal of deliberation represented by LACs.²³⁶ Even if problems of representation and material resources can be attended to by tightening regulatory requirements, attention to the dynamics of deliberation is needed—an attention to whose perspective dominates and whose perspective is suppressed—and the ways in which those dynamics are consequential for the justice of the decisionmaking outcomes of even the most ideal deliberative process.²³⁷

230. *Id.*

231. Press Release, Office of the Mayor of Honolulu, Mayor Vetoes Bill 37 on Waimanalo Gulch Landfill (Feb. 28, 2006), available at <http://www.honolulu.gov/refscsd/publiccom/honnews06>.

232. Brannon, *supra* note 221.

233. Janis Magin, *For 1,000 or More Homeless in Hawaii, Beaches Are the Best Option*, N.Y. TIMES, Dec. 5, 2006, available at <http://www.nytimes.com/2006/12/05/us/05hawaii.html>.

234. *Id.*

235. Gauna, *supra* note 1, at 50.

236. COLE & FOSTER, *supra* note 1, at 115.

237. *Id.* at 115-16.

V. LOCAL ADVISORY COMMITTEES REVISED

Environmental justice advocates recognize that, despite even the best-intended public participation model reforms, preexisting power disparities will continue to operate upon the system of decisionmaking.²³⁸ Merely instituting a civic republican model of environmental decisionmaking will fail to shift distributional inequities.²³⁹ The extent to which vulnerable communities might attain environmental self-determination ultimately depends upon their access to power.²⁴⁰ As activist Luke Cole observes: “[s]elf-determination is a crucial aspect of improving the quality of life in many communities of color.”²⁴¹ He writes, “taking part in the permitting process is often futile for residents of low-income communities and communities of color who can not muster the political power within the system to compete with well-connected and financed companies.”²⁴² Thus, it is important to look not only at abstract theories of civic republicanism, but also at the social and historical contexts that reinforce structural inequalities within the system itself.

The state of Hawai‘i acknowledges that many residents of Native Hawaiian descent continue to suffer from historical racial and cultural subordination, colonization, and dispossession.²⁴³ In fact, in 1978 the state convened a Constitutional Convention in part to discuss amending the Constitution to increase the rights of Native Hawaiian people.²⁴⁴ The state legislature eventually amended Hawai‘i’s Constitution to reflect a primary state goal to provide for “[t]he betterment of conditions of Native Hawaiians.”²⁴⁵ State administrative agencies such as the Office of Hawaiian Affairs and the Department of Hawaiian Home Lands instituted remedial programs to retroactively confer former Hawaiian crown lands back to the Native Hawaiian community.²⁴⁶ These state programs recognize that the Native Hawaiian people consider autonomous land ownership and land management essential to maintaining their culture and way of life.²⁴⁷ The state seeks to rectify the history of colonialism by protecting property

238. Foster, *supra* note 1, at 811.

239. Cole, *Community-based Environmental Decisionmaking*, *supra* note 1, at 735.

240. COLE & FOSTER, *supra* note 1, at 131.

241. Cole, *Macho Law Brains*, *supra* note 118, at 707 (quoting Peggy Shepard, a founder of West Harlem Environmental Action).

242. *Id.* at 701.

243. Chris K. Iijima, *Race Over Rice: Binary Analytical Boxes and a Twenty-First Century Endorsement of Nineteenth Century Imperialism in Rice v. Cayetano*, 53 RUTGERS L. REV. 91, 97 (2000).

244. STANDING COMM. REPORT NO. 57, *reprinted in* 1 PROCEEDINGS OF THE CONSTITUTIONAL CONVENTION OF 1978, at 640 (1980).

245. See *Rice v. Cayetano*, 528 U.S. 495, 508 (2000); HAW. CONST., art. XII, § 5 (2009).

246. Rose Cuison Villazor, *Blood Quantum Land Laws and the Race Versus Political Identity Dilemma*, 96 CAL. L. REV. 801, 835 (2008).

247. Gavin Clarkson, *Not Because They Are Brown, But Because of Ea: Why the Good Guys Lost in Rice v. Cayetano, And Why They Didn't Have to Lose*, 7 MICH. J. RACE & L. 317, 352 (2001).

rights, recognizing Native Hawaiian sovereign indigeneity, and promoting efforts towards Native Hawaiian self-determination.²⁴⁸

Despite these efforts, the United States Supreme Court's 2000 opinion in *Rice v. Cayetano* undermined the move towards granting Native Hawaiians increased measures of sovereignty. The Court concluded that Native Hawaiians should be recognized as a racial group, and not as a sovereign indigenous people with an autonomous political identity.²⁴⁹ With this ruling, the Court challenged the constitutionality of the state Hawaiian Home Lands program and quashed the hopes of Native Hawaiians for eventually gaining independent political status.²⁵⁰ The state continues to administer the land grants, but the conflict between state and federal political designations makes the political position of Native Hawaiians especially uncertain and vulnerable.

In advocating for a participation process that acknowledges these power differentials, I argue that principles of civic republicanism provide a structure within which Native Hawaiian communities may build power and meaningfully participate in environmental decisionmaking. The state of Hawai'i should modify its participation model to facilitate knowledge-sharing, collective decisionmaking, and open discourse in the environmental decisionmaking process.²⁵¹ Under ideal conditions, the creation of local advisory committees would allow culturally knowledgeable community members and technically knowledgeable environmental agencies to directly engage, share information, and collaborate in creative problem-solving.²⁵² Candid dialogue and collective decisionmaking would produce novel and unanticipated solutions for regulatory problems.²⁵³ However, in practice, as the Waimānalo Gulch LAC example described above illustrates, agencies can create commissions to serve as insulation between the community and the decisionmakers. The public views such committees as having very little legitimacy.²⁵⁴ Granted no decisionmaking power, these LACs exert no power of accountability over the agency itself.²⁵⁵ Further, due to the LAC members' status as appointed rather than organic leaders, residents perceive the relationship between the LAC and decisionmakers as a political one, undermining the LAC's authenticity.²⁵⁶

With these concerns in mind, I suggest that Hawai'i implement a civic republican model of public participation for its environmental

248. Villazor, *supra* note 246, at 820.

249. *Rice*, 528 U.S. at 508; Clarkson, *supra* note 247.

250. *Rice*, 528 U.S. at 508; Clarkson, *supra* note 247.

251. Foster, *supra* note 1, at 834.

252. Freeman, *supra* note 193, at 22.

253. *Id.*

254. *See, e.g.*, Interview with Kajihiro, *supra* note 216.

255. COLE & FOSTER, *supra* note 1, at 120.

256. *Id.*

decisionmaking process, but caution that the state should consider instituting three revisions from the advisory committee model currently employed by the Mayor. First, lawmakers should create an election process for committee members instead of an appointment process, to ensure a more representative body. Second, they should create a formal structured reporting process for the advisory committee's deliberations to ensure that committees can access agencies and higher-level officials. Third, state agencies should provide early information to the committees when entities apply for a permit, rather than after the draft permit is being prepared.²⁵⁷

To explain further, first, lawmakers should create an election process for committee members to ensure a more representative body. Wai'anae community members heavily criticized the mayor's LAC because of its appointed membership, and they viewed the committee as unrepresentative of the community as a whole. Selecting members for a neighborhood council by political appointment undercuts the legitimacy of a local independent body intended to truly represent the community.²⁵⁸ Appointed members might face tension in their participation between an obligation to the lawmaker who appointed them, and not freely advocating on behalf of their communities.²⁵⁹ Further, there is the risk that these appointed members might represent a narrower spectrum of perspectives, reinforcing a distorted but strongly held consensus.²⁶⁰ These concerns could be lessened by elected, rather than appointed, membership to the committees.

Elections of local advisory committees are, however, constrained by a few potential legal barriers. The Supreme Court's decision in *Avery v. Midland County* extended voting apportionment rules for state legislatures to local governments.²⁶¹ The Court held that the Fourteenth Amendment forbids the election of local government officials from districts of disparately sized populations.²⁶² The Voting Rights Act would also allow only registered voters to participate in the elections and prohibit the imposition of any "voting qualification or prerequisite to voting, or

257. *Id.*

258. Parlow, *supra* note 160, at 171 ("a policy of elected officials appointing members to neighborhood councils runs counter to the notion of a local independent body that is truly representative of its community and that is more organically formed . . . appointed members to these councils may feel loyalty and ties to the elected officials appointing them, thus preventing them from unfettered advocacy and representation of their neighborhoods."). See COLE & FOSTER, *supra* note 1, at 120-1 ("advisory committee members are not chosen by the populace but are instead appointed by local officials, who normally support incoming waste facilities touting economic benefits. As a result, community groups likely to oppose additional waste facilities may easily be left out of the deliberative process."). See also discussion of Cole and Foster's Buttonwillow and Martinez examples, *infra* Part IV, where representational concerns significantly affected the perceived legitimacy of the Local Advisory Committees.

259. Poisner, *supra* note 181, at 64, 68.

260. *Id.* (quoting Paul Brest, *Constitutional Citizenship*, 34 CLEV. ST. L. REV. 175, 194 (1986)).

261. *Avery v. Midland County*, 390 U.S. 474 (1968); Parlow, *supra* note 160, at 172.

262. *Avery*, 390 U.S. at 478-79.

standard, practice, or procedure.”²⁶³ This, taken with *Avery*, might actually limit a community’s ability to self-select boundaries for local advisory committee member elections.²⁶⁴ Under these requirements, a higher-income adjacent community with less of a stake in the elections could participate in voting for LACs, limiting the true representative nature of these committees.²⁶⁵ Other major cities have, however, authorized nongovernmental neighborhood-based organizations with elected membership. For example, the District of Columbia Code provides for Neighborhood Planning Councils.²⁶⁶ The District of Columbia Code authorized the creation of Advisory Neighborhood Commissions after receiving a petition signed by five percent of its registered voters, and the Board of Elections and Ethics Commission administers the nonpartisan election.²⁶⁷ Neighborhoods vote on two representatives per election ward, with jurisdictional boundaries drawn by the mayor after each decennial census to be approximately equal in population.²⁶⁸ Electing the committee members fits the community-centered model of neighborhood councils desired by the District of Columbia, making them more authentic and representative of the broad cross-section community stakeholders.²⁶⁹ Thus, although there are legal constraints to elected LACs, some jurisdictions have managed to implement them.²⁷⁰

A second issue with the LACs in Hawai‘i was that the committees’ merely “advisory” role endowed the LACs with little formal power or influence.²⁷¹ Citizens assumed that the City ignored the committees’ analysis in its final decision.²⁷² For example, the mayor failed to develop a structured advisory process, or explain how the LACs would provide “oversight.”²⁷³ Participation by the LAC seemed highly informal and disorganized, which likely undermined the LAC’s effectiveness.²⁷⁴ Sheila Foster and Luke Cole observe that such informality actually increases power differentials, partly because of the greater discretion the decisionmaker wields.²⁷⁵ Giving LACs a formal role in the decisionmaking

263. 42 U.S.C.A. § 1973(a).

264. Parlow, *supra* note 160, at 172.

265. *Id.*

266. Peter W. Salsich, *Grassroots Consensus Building and Collaborative Planning*, WASH. U. J. L. & POL’Y 709, 719 (2000).

267. *Id.*

268. *Id.*

269. *Id.*

270. *But see* Parlow, *supra* note 160, at 172 (noting that cities might incur significant costs in running these elections and complying with the Voting Rights Act requirements).

271. Interview with Kajihiro, *supra* note 216.

272. *Id.*

273. Press Release, Office of the Mayor of Honolulu, *supra* note 213.

274. Salsich, *supra* note 266, at 715 (observing that oftentimes participation by neighborhood organizations is “highly informal and disorganized.”).

275. COLE & FOSTER, *supra* note 1, at 120-21.

process would make it more difficult for decisionmakers to avoid substantively committing to the LACs' recommendations. By creating a formal role for the LACs and integrating them into the decisionmaking process, its legitimacy would also increase in the eyes of both the community and the decisionmakers.

To be fair, it is certainly difficult to delegate formal decisionmaking power to advisory committees. The city might fear substantial legal liability for the actions of decisionmaking committees.²⁷⁶ Or, endowing the committees with decisionmaking authority might increase the city's costs related to the permitting process.²⁷⁷ Neighborhood councils with land use authority may reject many development proposals, creating a "Not In My Backyard" problem that would impede city government action.²⁷⁸ Still, even if Hawai'i chose to preserve the advisory role of LACs and rejected conferring decisionmaking authority upon them, lawmakers could improve the current reporting structure to enable committee members to engage more meaningfully in the decisionmaking process. In Oregon, for example, the state legislature created an advisory Environmental Justice Task Force in 2008.²⁷⁹ This Task Force includes members from designated communities, including low-income communities and communities of color.²⁸⁰ Members identify pressing environmental justice concerns and conduct formal investigations.²⁸¹ They then report directly to the Governor on the progress of natural resource agencies as they strive to resolve these concerns and achieve environmental justice goals.²⁸² As a formal entity working within a transparent reporting structure, the Task Force can monitor the effectiveness of local government actions.²⁸³ The Task Force has so far "shown great promise" and has "increased the potential for public involvement, active agency involvement and state agency leadership."²⁸⁴ Hawai'i could similarly consider implementing an advisory committee with a more formal investigative and reporting role.

Third, the state should revise its participation process so that LACs are involved in decisionmaking early on, ensuring greater collaboration and deliberation.²⁸⁵ The goal of a LAC is to create an open yet structured forum for lay people and technical experts to engage in direct communication,

276. Parlow, *supra* note 160 at 172.

277. *Id.*

278. *Id.*

279. Robert W. Collin, *Environmental Justice in Oregon: It's the Law*, 38 ENVTL. L. 413, 449 (2008).

280. *Id.*

281. *Id.*

282. *Id.*

283. *Id.*

284. Parlow, *supra* note 160, at 177.

285. Mclissa Lor, *Effectiveness of Citizens Advisory Boards in Addressing Fairness in Environmental Public Disputes*, 6 PEPP. DISP. RESOL. L.J.JOURNAL 177, 185 (2006).

collaborating to reach decisions.²⁸⁶ Yet, as the Waimānalo Gulch example illustrates, citizens often become aware of a draft EIS only when the agency has already devised a solution and merely requests public comment.²⁸⁷ This forces citizens to take a reactive posture, rather than one of collaborative problem-solving.²⁸⁸ Early notification of the Waimānalo Gulch expansion could have allowed community members to learn more about the viability of alternative landfill sites, and about the extent of environmental impacts possibly caused by the proposed expansion. Access to technical experts, from the beginning, would also have aided residents affected by the landfill expansion in understanding the science behind landfill siting and in demystifying the extent of the environmental impacts. States such as Texas, Illinois, and Wisconsin have enacted laws that require earlier public notification in permit cases.²⁸⁹ Texas, for example, requires the public to be notified of air pollution permit applications as soon as an application is complete, rather than when a draft permit has been prepared by the decisionmaking agency.²⁹⁰ In the future, as it is possible that additional landfills might be sited in Waiʻanae, the state of Hawaiʻi should consider revising its permitting process to include an early notification provision.

Amending environmental decisionmaking in Hawaiʻi to include a more deliberative process would confer an important measure of environmental self-determination upon vulnerable Native Hawaiian groups on the Waiʻanae Coast. This would reinforce broader state efforts to facilitate increased Native Hawaiian self-governance.

CONCLUSION

This Article presents the Waimānalo Gulch Landfill expansion controversy as a case study to illustrate the problems inherent in a pluralistic environmental decisionmaking public participation model. The pluralistic participation model currently employed in Hawaiʻi environmental law has proven ineffective, as exemplified by the local Waimānalo Gulch Landfill expansion controversy.²⁹¹ I argue that a civic republican model has the potential to effectuate more meaningful public involvement in the environmental decisionmaking process.

The state of Hawaiʻi should revise its environmental impact statement law to incorporate LACs, which can advise on potential adverse affects of the proposed project. The formation of such committees would create an

286. *Id.*

287. Poisner, *supra* note 181, at 89.

288. *Id.*

289. Lcroy Paddock, *Environmental Accountability and Public Involvement*, 21 PACE ENVTL. L. REV. 243, 261.

290. *Id.*

291. Gauna, *supra* note 1, at 45.

opportunity for lay and technical people to work together, have a dialogue, and reach consensus on the “common good.”

As the Waimānalo Gulch landfill expansion illustrates, however, deliberating decisionmakers must not ignore the historical and sociological contexts that the community operates within. Lawmakers should create a formal process for these committees and should consider instituting three revisions from the community-based advisory committee model currently employed: 1) LAC members should be elected rather than appointed, to ensure that the body represents the surrounding community; 2) LACs should advise environmental decisionmakers through a structured reporting process, to ensure that the committees gain access to agencies and higher-level officials; and 3) environmental decisionmakers should ensure that LACs are created at an early stage in the environmental decisionmaking process.

Amending environmental decisionmaking in Hawai'i to include a more deliberative process would allow underrepresented groups an increased measure of environmental self-determination. Implementing civic republican ideals, keeping these three reforms in mind, would reinforce broader state efforts to attain environmental justice.

