

*ATAY V. COUNTY OF MAUI**James Pollack**

“Of all the types of freedom, that of the townships, established with so much difficulty, is the most susceptible to the onslaughts of power.”¹

INTRODUCTION

Decentralized authority is a hallmark of our Republic.² While the Federal Constitution and laws remain the “supreme Law of the Land,”³ there is a long line of legal and political reasoning treating each state as a “laboratory”⁴ for experimentation. Beyond the state, the remaining powers are “reserved . . . to the people.”⁵ This constitutional framework implements classical liberal theory, the dominant philosophical framework at the time the U.S. Constitution was written, as well as today. The Constitution sets up the dualism of the coercive, sovereign state authority that must be checked through individual rights and the individuals who are free to exercise their slightly limited liberties.⁶ But what of other forms of legal and political organization, such as the public and private corporation? The public municipal corporation—the city—does not fall naturally into either classical liberal category, but rather sits at an intermediate stage: it may be an expression of coercive state authority, or of individual freedom of association and self-determination.⁷

* J.D. Candidate, Harvard Law School, Class of 2020. M.P.P. Candidate, Harvard Kennedy School, Class of 2020. The author would like to thank the *Harvard Environmental Law Review* staff for their fantastic assistance with this piece.

1. ALEXIS DE TOCQUEVILLE, *DEMOCRACY IN AMERICA* 73 (Gerald E. Bevan trans., Penguin Books 2003) (1835–1840).
2. This article draws from a variety of sources and methodologies, including MORTON J. HORWITZ, *THE TRANSFORMATION OF AMERICAN LAW, 1780–1860* (1977); Gerald E. Frug, *The City as a Legal Concept*, 93 *HARV. L. REV.* 1057 (1980); Duncan Kennedy, *Form and Substance in Private Law Adjudication*, 89 *HARV. L. REV.* 1685 (1976).
3. U.S. CONST. art. VI, § 2.
4. *New State Ice Co. v. Liebmann*, 285 U.S. 262, 311 (1932) (Brandeis, J., dissenting) (presenting what became known as the argument for “laboratories of democracy”).
5. U.S. CONST. amend. X.
6. By classical liberalism I mean the set of political philosophies that have come to define our modern era, defined by an emphasis on individual autonomy and characterized by a world understood through a series of opposing dualities such as individual and state. *See, e.g.*, JOHN LOCKE, *TWO TREATISES OF GOVERNMENT* (1690).
7. *See* Frug, *supra* note 2, at 1076 (“[C]ities could be understood as vehicles useful for the exercise of the coercive power of the state, but, on the other hand, they could also be understood, like voluntary associations, as groups of individuals that sought to control their own lives free of state domination.”).

R

While the Constitution does not mention cities, our daily lives often revolve around them.⁸ Cities aren't alone in their absence from the Constitution. In fact, there is a long list of jurisdictions not contemplated by the dualism of our Constitution and the classical liberal framework. As the farmer toils at her field, she draws water from a pump dug with a state permit or water sourced directly from the county or independent water district system, watches as her children return from the city-run school, waves at the county sheriff who passes by on the state highway, and pays state sales tax on her federally regulated fertilizer. This is only to name a few authorities that our farmer lives under that fall in the middle of what John Stuart Mill would call the "struggle between Liberty and Authority."⁹

Are these intermediate authorities an expression of freedom and voluntary cooperation, or a coercive state force to be restrained? In the classical liberal framework, and functionally in our Constitution, entities must fall into one of these two categories: individual or state. It is not obvious where intermediate authorities should land, and what priority we should assign to their conflicting demands and authority once categorized. For example, when does local authority supersede state authority, and vice versa? While it is not clear from our constitutional framework how we should answer these questions, our courts, constrained by the liberal dualism of individual and state, must answer these questions nonetheless. On the whole, courts have developed a series of legal doctrines in municipal and legislative jurisprudence that tip the scales against local governments. These legal doctrines include preemption doctrine, an elaborate set of rules that empower and promote state or federal law to invalidate local law entirely in cases of real, potential, or imagined conflict.¹⁰ Courts have constrained cities through the historical development and layering of these doctrines, such that cities and local governments can no longer play an active role in regulating daily life.¹¹ The city is now powerless against the state, the federal government, and the person in its many forms, including the human and cor-

-
8. See, e.g., J. DILLON, COMMENTARIES ON THE LAW OF MUNICIPAL CORPORATIONS §§ 11–16 (5th ed., 1911) (describing the legal status and development of early English and American cities, with Dillon using language describing the town, hamlet, city, and county as both an expression of freedom and coercion).
 9. JOHN STUART MILL, *On Liberty*, in ON LIBERTY AND OTHER ESSAYS 5, 5 (John Gray ed., Oxford Univ. Press paperback reissue, 2008) (1859).
 10. See generally Caleb Nelson, *Preemption*, 86 VA. L. REV. 225 (2000).
 11. This treatment of legal doctrine as its own artifact of history worthy of study emulates the methodology of "legal archaeology" from the critical legal studies movement, by which scholars make sense of legal concepts and cases by studying the surrounding political, historical, economic, and social context to examine the "unexamined assumptions and unacknowledged biases" of opinions and doctrine. Debora L. Threedy, *Unearthing Subversion with Legal Archaeology*, 13 TEX. J. WOMEN & L. 133, 135 (2003) (describing legal archaeology). For an example of this methodology in practice, see, for example, HORWITZ, *supra* note 2.

2018]

Atay v. County of Maui

307

porate forms. This Comment will call this judicial trend the “powerless city paradigm.”¹²

Recently, in *Atay v. County of Maui*,¹³ the Ninth Circuit struck down an attempt by Maui County to ban the cultivation of genetically engineered (“GE”) plants within county lines.¹⁴ This case shows the modern powerless city paradigm at work: The court deployed legal doctrine to disempower the local government.¹⁵ Hawai’i is ideally situated for testing and developing GE crops due to its climate and yearlong growing season.¹⁶ In fact, Hawai’i has hosted more GE crop experimentation than any other state in the U.S.¹⁷ The people of Maui County passed the ordinance at issue in *Atay* by ballot initiative in 2014 in order to mitigate the risks that come with GE plants, including potential contamination of non-GE plants and overuse of experimental pesticides.¹⁸ The U.S. District Court for the District of Hawai’i struck down the ordinance the following year as expressly and impliedly preempted by federal law.¹⁹ On appeal, the Ninth Circuit disagreed with the lower court’s use of implied federal preemption, but still struck down the local law under implied state law preemption.²⁰ The Ninth Circuit’s reliance on implied preemption in this case is especially telling—even a silent state holds more authority than an active and powerless city. The city cannot rely on explicit notice of potential preemption from state law, but instead seems to face a presumption of preemption.

Atay follows a long line of cases grappling with the legal and philosophical status of the city. This Comment applies Frug’s analysis of the historical origins of city powerlessness to *Atay*.²¹ The Ninth Circuit’s opinion in *Atay* sides with the prevailing “powerless city” paradigm identified by Frug. Functionally, the opinion labels Maui County as a coercive agent that must be reined in by court

12. This concept is meant to encapsulate Professor Gerald E. Frug’s description of the various laws and legal doctrines governing cities that establish the “current powerlessness of American cities.” See Frug, *supra* note 2, at 1060; see also GERALD E. FRUG & DAVID J. BARRON, CITY BOUND: HOW STATES STIFLE URBAN INNOVATION (2008).

13. 842 F.3d 688 (9th Cir. 2016).

14. *Id.* at 710.

15. Throughout this case comment I refer to “city” or “municipal” authorities to simplify my terminology. By city I mean not only legal entities chartered or otherwise established as a city proper, but any localized form of government or public organization smaller than the state, including Maui County. In fact, on Maui island the county is the smallest unit of local government established by the state legislature. This case comment is focused on empowerment of localized government in all its forms.

16. *Atay*, 842 F.3d at 692.

17. See Robynne Boyd, *Genetically Modified Hawaii*, SCI. AM. (Dec. 8, 2008), <https://perma.cc/UB6X-7J9M>.

18. See *Atay*, 842 F.3d at 693–94.

19. See *Robert Ito Farm, Inc. v. Cty. of Maui*, 111 F. Supp. 3d 1088, 1114 (D. Haw. 2015).

20. See *Atay*, 842 F.3d at 692.

21. See Frug, *supra* note 2, at 1060.

R

R

authority to ensure it remains subservient to state authority. In this way, *Atay* constrains local power to mitigate risk and places biodiversity and native plants at the whims of two other mechanisms: the free market, which will determine whether and where GE research is conducted, and random natural processes of pollination, which will determine whether and where genes spread. *Atay* allows corporations that may have sway over state and federal authorities to dictate the risk experienced by Maui County residents, all on an island scarred by a history of environmental damage.

Courts should reexamine the implied preemption doctrine that subjugates municipal power to state and federal law without explicit notice, and should reconsider the status of the city as a locus of legitimate governance and even dissent. People in modern society have limited control over their own lives due to centralization in the political and economic spheres. Votes count for less as the population grows, bureaucracies hold regulatory powers, and large corporations hold significant sway over our patterns of work, travel, and even sustenance. Cities have the potential to counter political apathy and empower local communities in a way that bureaucracies and far away legislatures cannot. Local government can provide authority to communities that are not represented at larger levels of government, and these decentralized governments may be less susceptible to capture by special interests. Perhaps most important of all, cities can provide individuals with greater ability to make a meaningful impact on their daily lives through political action, embodying a type of freedom through collective organization that is otherwise largely absent in modern life. Through community organization individuals can push for real change at the local level, from crop regulation to marriage equality, affordable housing to anti-discrimination legislation, and marijuana legalization to fracking bans. Cities provide an avenue for the expression of local desires unlike any other. Cities can and must have a greater role to play as an expression of human freedom, and the courts play a part in supporting this role.

I. CASE BACKGROUND

U.S. courts are no strangers to GE crops, and have long acknowledged the benefits and risks presented by genetic experimentation on crops. Cited benefits include resistance to diseases, pests, and pesticides, improved or enhanced nutritional value or shelf life, increased crop yields, and even the production of biofuels or pharmaceuticals.²² Cited risks include cross-contamination of non-GE crops through the spread of pollen, impact on crop prices with cross-con-

22. See, e.g., *Atay*, 842 F.3d at 692–93; *Ctr. for Food Safety v. Johanns*, 451 F. Supp. 2d 1165, 1170, 1183, 1186 (D. Haw. 2006).

2018]

Atay v. County of Maui

309

tamination, alteration of the natural ecosystem, and overuse of dangerous pesticides.²³

Hawai'i has a unique environment that makes it an "attractive location for field tests of a variety of biotech crops."²⁴ Companies can harvest a crop like corn three to four times per year in Hawai'i compared to once a year on the mainland United States due to the state's temperate tropical climate.²⁵ These conditions allow companies to quickly test a wide variety of genetically modified crops and to cultivate seeds at a rate far exceeding that of most mainland farms.²⁶ In fact, according to recent data, Hawai'i has hosted more than 3,600 field tests for new GE crops, making it the top state for GE crop experimentation.²⁷ These tests include not only corn, but also produce such as papayas, soybeans, cotton, potatoes, wheat, alfalfa, beets, and rice.²⁸

In response to the large-scale cultivation and experimentation of GE crops on the islands, Maui, Hawai'i, and Kauai Counties each passed ordinances to regulate or ban GE crop cultivation altogether. Contentious litigation followed the passage of each ordinance, culminating in *five decisions* issued by the Ninth Circuit on November 18, 2016.²⁹ Ultimately, the Ninth Circuit struck down all three laws on preemption grounds.³⁰ *Atay* most clearly articulates the Ninth Circuit's preemption analysis, and is cited in the other cases to provide legal reasoning,³¹ so it is an appropriate starting point for exploration of the powerless city paradigm in these cases.

This section analyzes the history and decision in *Atay*, which deals with the Maui ordinance as well as the related GE crop ordinances and litigation in Hawai'i. The next section presents the "powerless city paradigm," a new lens for understanding this litigation as an expression of a jurisprudential pattern

23. See, e.g., *Monsanto Co. v. Geertson Seed Farms*, 561 U.S. 139, 154–55 (2010); *Ctr. for Food Safety v. Vilsack*, 718 F.3d 829, 832, 841 (9th Cir. 2013); *In re Genetically Modified Rice Litig.*, 2007 WL 3027580, *1 (E.D. Mo. Oct. 15, 2007); *Geerston Seed Farms v. Johanns*, 2007 WL 518624, at *4–5 (N.D. Cal. Feb. 13, 2007).

24. U.S. DEPT OF AGRIC., BRS FACTSHEET 1 (Feb. 2006), <https://perma.cc/82ZH-XTXW>.

25. See Boyd, *supra* note 17.

26. *Id.*

27. See Hawai'i Genetically Engineered Crop Data, U.S. DEPT OF AGRIC., https://www.aphis.usda.gov/aphis/ourfocus/biotechnology/permits-notifications-petitions/sa_permits/status-update/release-permits (filter using "By State" for "Hawaii" to view all active and requested permits for release in Hawai'i, or download all states to compare rates).

28. See Boyd, *supra* note 17.

29. *Atay v. Cty. of Maui*, 842 F.3d 688 (9th Cir. 2016); *Robert Ito Farm, Inc. v. Cty. of Maui*, 842 F.3d 681 (9th Cir. 2016); *Syngenta Seeds, Inc. v. Cty. of Kauai*, 842 F.3d 669 (9th Cir. 2016); *Syngenta Seeds, Inc. v. Cty. of Kauai*, 664 F. App'x 669 (9th Cir. 2016); *Hawai'i Papaya Indus. Ass'n v. Cty. of Hawai'i*, 666 F. App'x 631 (9th Cir. 2016).

30. See *Atay*, 842 F.3d at 692; *Syngenta Seeds*, 842 F.3d at 672; *Syngenta Seeds*, 664 F. App'x at 671; *Hawai'i Papaya Indus. Ass'n*, 666 F. App'x at 632.

31. See, e.g., *Syngenta Seeds*, 842 F.3d at 672; *Syngenta Seeds*, 664 F. App'x at 671; *Hawai'i Papaya Indus. Ass'n*, 666 F. App'x at 632–33.

that minimizes local governmental power and elevates the power of the state and private corporations within the locality.

A. *Atay v. County of Maui*

On November 4, 2014, the voters of Maui County passed “A Bill Placing a Moratorium on the Cultivation of Genetically Engineered Organisms”³² (“the Ordinance”) by ballot initiative.³³ The contentious initiative passed by little more than a thousand votes.³⁴ Eight days after the vote, supporters of the initiative filed suit in Hawai‘i state court, seeking declaratory relief to clarify the legality of the Ordinance.³⁵ The next day, opponents of the initiative filed suit in federal district court seeking to invalidate the Ordinance.³⁶ The state action was removed to federal court, and Chief Judge Susan Oki Mollway heard the consolidated cases.³⁷ With these two legal challenges in play, the County and the challengers stipulated that the County would refrain from “publishing or certifying the ordinance” while its legality was still in question.³⁸

Opponents of the Ordinance argued that a series of federal and state laws relating to crop and plant regulation preempted the Ordinance.³⁹ Courts have read the Supremacy Clause to provide for three general taxonomies of preemption: express preemption, implied field preemption, and implied conflict preemption.⁴⁰ Express preemption occurs when a federal statute has language explicitly withholding powers from the delegated (state or local) authority.⁴¹ Implied field preemption can occur in the absence of express preemption lan-

32. See Public Notice, Proposed Amendments to the Revised Charter of the County of Maui (1983), as Amended 2–11 (Sept. 4, 2014), <https://perma.cc/TE2S-DHCF> (providing the text of the voter initiative).

33. *Atay*, 842 F.3d at 693–94.

34. GENERAL ELECTION 2014 – STATE OF HAWAII – COUNTY OF MAUI: FINAL SUMMARY REPORT (Nov. 5, 2014), <https://perma.cc/853W-6K6F>; Wendy Osher, *Maui votes “YES” on GMO Moratorium*, MAUI NOW (Nov. 4, 2014), <https://perma.cc/7HBU-GPH4>.

35. See *Atay*, 842 F.3d at 694. Plaintiffs included Alikea Atay, a local political activist, and the SHAKA Movement, a local advocacy group, as well as others, represented in part by Earthjustice. *Id.* at 688, 691, 694.

36. See *Robert Ito Farm, Inc. v. Cty. of Maui*, 111 F. Supp. 3d 1088, 1093–94 (D. Haw. 2015); see also *Atay*, 842 F.3d at 694. Opponents included Robert Ito Farm, Inc., Hawaii Farm Bureau Federation, Maui County, Molokai Chamber of Commerce, as well as large corporations such as Agrigenetics, Inc., Monsanto Company, and others. *Ito Farm*, 111 F. Supp. 3d at 1093–94.

37. *Atay*, 842 F.3d at 695.

38. *Id.* at 694 (quoting Stipulation Regarding County of Maui Ordinance and Order, at 4, *Ito Farm*, 111 F. Supp. 3d (No. 14-cv-00511)).

39. See *id.* at 698–99, 705–06.

40. Nelson, *supra* note 10, at 226; see *id.* at 231.

41. See, e.g., *Pac. Gas & Elec. Co. v. State Energy Res. Conservation & Dev. Comm’n*, 461 U.S. 190, 203 (1983) (“Congress may pre-empt state authority by so stating in express terms.”).

2018]

Atay v. County of Maui

311

guage, when the relevant federal law is “so pervasive” that it implies “that Congress left no room” for supplementary authority.⁴² Finally, implied conflict preemption can occur when there is similarly no express preemption language in a statute, but the state law conflicts with the federal law by creating either a “physical impossibility” where both state law and federal law could not be simultaneously implemented or an obstacle where state law obstructs Congress’s objectives in the federal law.⁴³ Under the Supremacy Clause the constitutionality of local ordinances is analyzed in the same way as the constitutionality of state laws.⁴⁴

The District Court struck down the Ordinance as expressly preempted under the federal Plant Protection Act⁴⁵ (“PPA”); impliedly preempted under the same federal law; preempted by state law; and as an action outside of the county’s authority.⁴⁶ The court noted in its opinion that the value or danger of GE crops was not a question for the court, nor was the “value of voter initiatives” to adopt regulations like the Ordinance.⁴⁷ The court further noted that it could not address the “political, medical, economic, or other social concerns” involved in the case—this was a simple legal question about preemption.⁴⁸ With that framing, the court analyzed the scope of the PPA with regard to its regulation of “plant pests,” and determined that the PPA preempted the Ordinance under both express and implied conflict preemption.⁴⁹ The court went on to determine that state laws regulating crop and agricultural research activities⁵⁰ also invalidated the Ordinance under implied field preemption.⁵¹ Finally, the court held the Ordinance penalty provision fell outside of Maui County’s authority, as provided by the Maui County Charter.⁵²

The Ninth Circuit, in a three-judge panel opinion by Judge Consuelo M. Callahan, affirmed the district court’s ruling on slightly different grounds.⁵³ The circuit struck down the Maui Ordinance as only partially expressly preempted

42. *English v. Gen. Elec. Co.*, 496 U.S. 72, 79 (1990); *see also*, *Int’l Paper Co. v. Ouellette*, 479 U.S. 481, 491 (1987); *Rice v. Santa Fe Elevator Corp.*, 331 U.S. 218, 230 (1947).

43. *English*, 496 U.S. at 79 (quoting *Hines v. Davidowitz*, 312 U.S. 52, 67 (1941)); *see also* *Boggs v. Boggs*, 520 U.S. 833, 844 (1997); *Gade v. Nat’l Solid Wastes Mgmt. Ass’n*, 505 U.S. 88, 98 (1992).

44. *Hillsborough Cty., Fla. v. Automated Med. Labs. Inc.*, 471 U.S. 707, 713 (1985).

45. 7 U.S.C. §§ 7701–86 (2017).

46. *Robert Ito Farm, Inc. v. Cty. of Maui*, 111 F. Supp. 3d 1088, 1093 (D. Haw. 2015) (ruling the Ordinance “invalid and unenforceable.”).

47. *Id.*

48. *Id.*

49. *See Ito Farm*, 111 F. Supp. 3d at 1100, 1106.

50. *See* HAW. REV. STAT. § 141–42.

51. *See Ito Farm*, 111 F. Supp. 3d at 1109–10.

52. *See id.* at 1113.

53. *See Atay v. Cty. of Maui*, 842 F.3d 688, 692 (9th Cir. 2016).

by federal law, and as otherwise impliedly preempted by state law.⁵⁴ The opinion began with a history of GE crop cultivation on Maui and an acknowledgment of the broad use and potential risks posed by GE crops.⁵⁵ This focus on context seems to show the circuit was more willing than the district court to grapple with and acknowledge the high-stakes context of this litigation in Hawai'i, but the circuit court's consideration of context still gave way to a similar preemption analysis.

The Ninth Circuit held that the PPA expressly preempts the Maui Ordinance due to an express preemption clause,⁵⁶ but only to the "extent that it seeks to ban GE plants" already regulated by the Animal and Plant Health Inspection Service ("APHIS") under the PPA as "plant pests."⁵⁷ This would encompass most new experimental crops, as APHIS "deems nearly all GE plants to be plant pests because nearly all GE plants are created using *Agrobacterium*, which is a listed plant pest."⁵⁸ However, once APHIS has delisted a plant, as it has with many commercial GE crops that include *Agrobacterium*, local regulation of that plant is no longer expressly preempted by the PPA.⁵⁹ The Ninth Circuit went on to disagree with the district court's assertion that the PPA otherwise impliedly preempted the Maui Ordinance—instead, the circuit struck down the Ordinance on implied state law preemption grounds.⁶⁰ The Ninth Circuit applied what it deemed to be the Hawai'ian state law implied preemption test.⁶¹ Under this test, the circuit determined that the "legislature intended to create an exclusive, uniform, and comprehensive state statutory scheme" through five chapters of state law targeting the regulation of potentially harmful plants, seeds, and agricultural research, thus preempting the Maui Ordinance through implied field preemption.⁶²

Interestingly, neither court certified the question of state law preemption to the Supreme Court of Hawai'i. A basic assumption of preemption doctrine is

54. *See id.*

55. *See id.* at 692–95.

56. 7 U.S.C. § 7756(b)(1) ("no State or political subdivision of a State may regulate the movement in interstate commerce of any . . . plant, . . . plant pest, noxious weed, or plant product in order to control . . . , eradicate . . . , or prevent the introduction or dissemination of a . . . plant pest, or noxious weed within the United States.").

57. *See Atay*, 842 F.3d at 702.

58. *Id.*

59. *See id.* ("[A]t APHIS's urging, we held in *Vilsack* that APHIS 'no longer had jurisdiction to continue regulating' a GE plant once APHIS decided to deregulate it.") (quoting *Ctr. for Food Safety v. Vilsack*, 718 F.3d 829, 832 (9th Cir. 2013)).

60. *See id.* at 703–11.

61. *See id.* at 706 ("[U]nder this test a local law is preempted if 'it covers the same subject matter embraced within a comprehensive state statutory scheme disclosing an express or implied intent to be exclusive and uniform throughout the state.'") (quoting *Richardson v. City & Cty. Of Honolulu*, 868 P.2d 1193, 1209 (Haw. 1994)).

62. *Id.* at 710.

2018]

Atay v. County of Maui

313

that the superseding authority holds the power to preempt a lesser authority. In this case, the Hawai'iian state legislature chose how much power over agriculture to provide to its cities. As the preempting authority in question, the Hawai'i Supreme Court is best situated to deal with state law preemption questions. Considering that supporters of the Ordinance initially filed in state court and argued for certification,⁶³ the state court would probably have been more sympathetic to the Ordinance or at least to local concerns. The district court addressed its choice not to certify the state law question by arguing that its decision did not rely on the state law question—under the court's reasoning the Maui Ordinance was completely preempted by federal law.⁶⁴ However, this argument does not hold for the Ninth Circuit decision, which relied on state law preemption to strike down the Maui Ordinance.⁶⁵ The Ninth Circuit used a single sentence to declare “the district court did not err in denying . . . [certification of] the state law questions presented.”⁶⁶ Otherwise, potential certification went completely unaddressed.

B. *Maui Was Not Alone*

While the Ninth Circuit provided its most detailed preemption analysis in *Atay*, Maui's Ordinance was not the only local GMO regulation at issue before the panel. In fact, there were three separate local Hawai'iian GMO ordinances challenged before the panel across five different Ninth Circuit arguments and decisions. This broad action to regulate GMOs at the local level not only highlights Hawai'i's status as a tightly concentrated hotbed for GE crop cultivation, but also indicates the widespread local concern for the risks associated with so much GE crop research.

The three ordinances, passed in Maui County,⁶⁷ Hawai'i County,⁶⁸ and Kauai County⁶⁹ regulated GE crop cultivation in different ways. Part of this

63. *See* Robert Ito Farm, Inc. v. Cty. of Maui, 111 F. Supp. 3d at 1088, 1093, 1107 (D. Haw. 2015).

64. *See id.* at 1107.

65. *See Atay*, 842 F.3d at 705.

66. *Id.* at 710.

67. The Ordinance, entitled “A Bill Placing a Moratorium on the Cultivation of Genetically Engineered Organisms,” imposed a moratorium for study, public hearings, potential reevaluation of GE crop cultivation, to be enforced through a series of criminal and civil penalties and a private right of action. *See id.* at 693–94; MAUI, HAW., ORDINANCE ch. 20.39, §§ 5–9 (2014).

68. Hawaii County Ordinance 13-121 banned “open air testing of genetically engineered organisms of any kind” and “open air cultivation, propagation, development, or testing of genetically engineered crops or plants.” HAW. CTY. CODE §§ 14–130, 14–131 (2014).

69. Kauai County Ordinance 960 required commercial farmers to establish “buffer zones” around crops applied with certain kinds of pesticides, and provide notice to the County and surrounding properties about the use of such pesticides and the cultivation of GE crops. *See*

variance in regulatory architecture reflected their different experiences with GE crops. For example, Hawai'i County's ordinance grandfathered GE papaya cultivation. After a devastating ringspot virus outbreak among papaya farms, the GE ringspot virus-resistant Rainbow papaya revived the industry and now makes up about three-quarters of the 30 million pounds harvested annually in the state.⁷⁰ Hawai'i County's exemption for GE papaya may therefore have been a reaction to this experience and an effort to tailor the regulation to local desires surrounding GE crops. Each of these ordinances represents an effort by the local government and populace to take control of their lived environment and a perceived set of risks in accordance with their own experiences with GE crops. These were not one-size-fits-all approaches, but rather exercises in independent local governance.

In spite of these local and individualized design processes, the Ninth Circuit struck down all three ordinances, pointing to *Atay* as providing the "legal basis" for its preemption analyses.⁷¹ The district court declared that those opposed to GE activities should "seek means other than" the Ordinance to achieve their goals.⁷² But how *should* local populations—especially those underrepresented at state and federal levels—pursue change? The historical, philosophical, and structural choices that undergird preemption doctrine may provide an answer. The next section will present and analyze a potentially helpful lens to study preemption doctrine in these cases: the "powerless city" paradigm.

II. THE "POWERLESS CITY" PARADIGM

With the U.S. Constitution silent on the matter, courts were forced to develop legal doctrine to categorize and deal with city authority. The courts ultimately developed a set of doctrines informed by the liberal dualism of the individual and the state that disempowered local government. In *The City as Legal Concept*, Gerald Frug explores the origins of the powerlessness of the American city.⁷³ He argues that this legal status cannot be understood through deduction from neutral principles, rather it must be understood as a political choice originating from classical liberal political theory.⁷⁴ Liberalism is the

KAUAI CTY. CODE § 22 (2014). This ordinance targeted pesticides co-developed with GE crops.

70. Amy Harmon, *A Lonely Quest for Facts on Genetically Modified Crops*, N.Y. TIMES (January 4, 2014), <https://perma.cc/GXT5-5LT8>. Even with the exemption, the Hawai'i Papaya Industry Association still challenged the ordinance. See *Hawai'i Papaya Indus. Ass'n v. Cty. of Hawaii*, 666 F. App'x 631, 632 (9th Cir. 2016).

71. *Haw. Papaya Indus. Ass'n* at 632; see also *Syngenta Seeds, Inc. v. Cty. of Kauai*, 842 F.3d 669, 671–72, 680 (9th Cir. 2016).

72. *Ito Farm*, 111 F. Supp. 3d at 1093.

73. Frug, *supra* note 2.

74. See Frug, *supra* note 2, at 1060–61.

2018]

Atay v. County of Maui

315

dominant world view in American political life. It is a broad term that encompasses the fundamental structure of our political system. Originating with Hobbes, Locke, Bentham, Rousseau, John Stuart Mill, and Adam Smith, liberalism is a way of thinking that pervades every aspect of our shared and individual life.⁷⁵ This included the Framers, the fundamental structure of our government and its treatment of individual rights, and as a result, the courts to this day. While difficult to define, it can perhaps be best described as a way of viewing the world based on a series of dualities: reason and desire, fact and subjective value, public and private, individual and state.⁷⁶

It is within this final duality that we find the core tension of municipal power. On one side, the private individual in the form of the person, family, partnership, or private corporation is an entity who exercises freedom and liberty. This individual's actions are an expression of this freedom, and so must be protected. On the other side, the state is a coercive authority that plays a specialized role in society and must be restrained through delineated powers and individual rights. Historically, cities posed a puzzle to liberal theorists as they "seemed entities intermediate between the state and the individual."⁷⁷ This intermediate status is encapsulated by the term *municipal corporations*, an amalgam of conflicting public and private terminology. Cities seem to defy categorization. Are they an expression of individual freedom and organization, or of the coercive state?

This tension is more than theoretical or academic. In *City of Lafayette v. Louisiana Power & Light Co.*,⁷⁸ for example, the Supreme Court considered whether cities should be bound by antitrust laws, like individuals and private corporations, or exempt from antitrust laws, like states. With four Justices on each side, the deciding Justice, Chief Justice Burger, suggested that the city could act as either individual or state depending on the circumstance and activity.⁷⁹ *City of Lafayette* shows that cities occasionally continue to defy categorization, and depending on context, can occupy the space of either a public or a private entity. But while the status of the city can still raise legal uncertainty, close cases like *City of Lafayette* are outliers.

While the exact contours of the status of cities may not have been entirely defined, the strong weight of legal doctrine has categorized cities as creatures of the state subservient to higher state powers. In perhaps the clearest statement of

75. See, e.g., THOMAS HOBBS, LEVIATHAN (1651); JOHN LOCKE, TWO TREATISES OF GOVERNMENT (1690); JEREMY BENTHAM, AN INTRODUCTION TO THE PRINCIPLES OF MORALS AND LEGISLATION (1789); JEAN-JACQUES ROUSSEAU, THE SOCIAL CONTRACT (1762); JOHN STUART MILL, UTILITARIANISM (1861); ADAM SMITH, THE THEORY OF MORAL SENTIMENTS (1759); ADAM SMITH, AN INQUIRY INTO THE NATURE AND CAUSES OF THE WEALTH OF NATIONS (1776).

76. See Frug, *supra* note 2, at 1075; see also KARL MANNHEIM, IDEOLOGY AND UTOPIA 192–204 (L. Wirth & E. Shils trans., 1936).

77. Frug, *supra* note 2, at 1076.

78. 435 U.S. 389 (1978).

79. See *id.* at 418–26 (Burger, C.J., concurring in part and in the judgment).

R

R

this doctrine, John Dillon in 1872 wrote the first and “most important American treatise”⁸⁰ on municipal corporations.⁸¹ Dillon proclaimed that local government may only have limited powers: “First those granted in express words; second, those necessarily or fairly implied in or incident to the powers expressly granted; third, those essential to the accomplishment of the declared objects and purposes of the corporation.”⁸²

This is the core of the “powerless city” paradigm: To constrain city authority, Dillon argued for “state control of cities” and “judicial supervision of that control.”⁸³ City functions must be limited to those powers given by the state, and any functions that fall in the private realm must be relinquished to the individual and private corporation.⁸⁴ Put differently, cities are creatures of the state, and ultimately “the [s]tate is supreme.”⁸⁵ The relationship of authority between the state and municipality is to be regulated and maintained by the courts. In many ways, Dillon’s treatise breathed this “powerless city” paradigm into life.

One example of this trend in legal doctrine is in the development of preemption doctrine jurisprudence. While the Supremacy Clause clarifies that the Constitution and laws of the federal government remain the “supreme Law of the Land,”⁸⁶ it does not provide a sophisticated framework like preemption doctrine. While express or conflict preemption in a federal context may follow neatly from the Supremacy Clause, the need for implied field preemption is less clear. Supremacy does not necessarily entail implied preemption in cases where state and federal laws can coexist.⁸⁷ Even the concept of conflict is itself open to interpretation. Does a state law that imposes greater restrictions on activities than a federal law necessarily conflict with the federal law? This confusion is further compounded by the balance of power between the city and state.

Decisions by courts to reign in cities—via implied preemption, for example—withstanding their historical status as independently chartered and operated municipal corporations, are political choices, not inevitabilities. In many cases, our cities have long preexisted our states. Nowhere is this truer than in

80. Frug, *supra* note 2, at 1109.

81. 1 J. DILLON, COMMENTARIES ON THE LAW OF MUNICIPAL CORPORATIONS (1st ed., 1872).

82. 1 J. DILLON, COMMENTARIES ON THE LAW OF MUNICIPAL CORPORATIONS, § 237, at 449 (5th ed., 1911).

83. Frug, *supra* note 2, at 1111.

84. As Dillon would put it, a city retaining any sort of private identity would be “difficult exactly to define . . . [because the State] breathed into it the breath of life.” DILLON, COMMENTARIES § 110, at 183–84 (5th ed., 1911). As often framed in contemporary doctrine, cities are mere “creatures of the state.” Frug, *supra* note 2, at 1063.

85. *Hunter v. City of Pittsburgh*, 207 U.S. 161, 178 (1907).

86. U.S. CONST. art. VI, § 2.

87. Nelson, *supra* note 10, at 231.

R

R

R

R

2018]

Atay v. County of Maui

317

Hawai'i, our fiftieth and newest state.⁸⁸ Despite their histories, cities have been repeatedly constrained by a legal fiction that labels them creations of the state and subjects them to constraints like implied preemption doctrine.⁸⁹ This trend follows Dillon's famous treatise, which argued that local government may only have limited powers: those expressly granted by the state, impliedly granted alongside express powers, and those powers essential to declared municipal objectives.⁹⁰ But cities do not have to be subordinate to the state. The ordering of these authorities is a historically derived political choice.⁹¹

The Ninth Circuit continued this trend of disempowering local governments in *Atay*. This case was particularly perilous because it relied on unclear state law. Although the Ninth Circuit was bound by *stare decisis* to consider preemption arguments, its preemption analysis here was questionable because the state law at issue was not clear about the potential for local GE crop regulation. Rather than grappling with this political question or certifying the state law question, the circuit relied on implied field preemption to strike down the Ordinance on its own. A state court could have ruled otherwise, but it did not have the opportunity to do so. *Atay* has real impact on the ground, regardless of court assurances that it ruled on pure legal grounds without regard to social, political, economic, or other concerns.⁹² The following section will explore the implications of the "powerless city" paradigm in *Atay*, and its impact on the Maui County's political, economic, social, and environmental community.

III. POWERLESS MAUI

The Ninth Circuit, and our courts more broadly, should reconsider implied preemption jurisprudence and the status of the city. It is not at all clear that Maui County should be powerless in this case. To render the County powerless through implied state preemption when the state legislature has not been explicit in how much power over agricultural regulation it has delegated to cit-

88. For example, Maui County was formed in 1905 shortly after U.S. annexation of Hawai'i, *see* COUNTY OF MAUI HAWAII, POLICE DEP'T, Police History, <https://perma.cc/XLL6-BPV9>, while Hawai'i was admitted as a State to the United States in 1959. This provides for a more than fifty-year preexistence of Maui County before the State of Hawai'i, and this even ignores centuries of prior local rule of the Kingdom of Maui before the unification of the Kingdom of Hawai'i under King Kamehameha. *See* TOM COFFMAN, NATION WITHIN: THE HISTORY OF THE AMERICAN OCCUPATION OF HAWAII, 20–22, 28–31 (2d ed. 2009).

89. *See* Nelson, *supra* note 10, at 228.

90. JOHN DILLON, MUNICIPAL CORPORATIONS, Vol. 1, § 237 (5th ed. 1911).

91. The order of federal, state, and city status may feel natural, but we have been acculturated in the powerless city paradigm. We may feel city powerlessness is necessary or desirable. *See* Frug, *supra* note 2, at 1066–67. But this is actually a product of iterative historical development based on the political interests or ideology of individuals like Dillon who felt limited municipal government would keep cities from performing functions "better left to private enterprise." *Id.* at 1109–12 (quoting DILLON, *supra* note 81, at § 9, at 22).

92. Robert Ito Farm, Inc. v. Cty. of Maui, 111 F. Supp. 3d 1088, 1093 (D. Haw. 2015).

R

R

ies is an unyielding perpetuation of the powerless city paradigm. The Federal District Court of Hawai'i and the Ninth Circuit Court of Appeals approached their decisions regarding the Maui Ordinance through what they considered non-political frameworks. But the history of preemption doctrine reveals that there is more to this question than the application of precedent. In this case, the powerless city paradigm has three distinct effects: it dampens legitimate and responsive local democratic activity, privileges the private corporation over the public corporation, and privatizes control over the lived environment.

Rather than mechanically applying doctrines which perpetuate the powerless city paradigm, courts should reevaluate the premises underlying the current status of local power. The District Court decision in this case directly cited the Dillon treatise to support the proposition of the powerless city.⁹³ In part, the decision cited "Dillon's Rule . . . the notion that a municipal corporation has only the power conferred on it by the state."⁹⁴ As this Comment argues above, there is nothing natural about the status of the city below the state, and it is certainly not explicitly grounded in our constitutional framework. Instead, the powerless city paradigm is rooted in this centuries-old treatise, which provides greater legal purchase for the court than the vote counts from Maui County. Even though the Ninth Circuit does not directly cite "Dillon's Rule," its decision is another deployment and reinforcement of the powerless city paradigm.

This argument can be taken in three directions: a strong, moderate, and weak formulation. In the strong formulation, the city should be empowered in all cases as a natural locus for democratic expression, perhaps even in cases of potential conflict with state laws. Not all readers will agree with this formulation, because there may be good justifications for state power.⁹⁵ In the moderate formulation, city laws should not be struck down by implied preemption, or in cases where the state law can coexist with a local law. In the weak formulation, federal courts should certify questions about implied state law preemption to the relevant state court. If municipalities are creatures of the state, then the state itself should balance these coexisting authorities when state laws are used to strike down local action.

93. *See Ito Farm*, 111 F. Supp. 3d at 1108.

94. *Ito Farm*, 111 F. Supp. 3d at 1108 (citation omitted).

95. Such justifications include setting a baseline of uniform standards for environmental protection, non-discrimination, and other priorities. One could respond that this lowest common denominator approach is ineffective, and that state action often threatens those subject to discrimination. For example, after Charlotte, North Carolina passed antidiscrimination laws to protect LGBT people, the North Carolina state legislature passed a law preempting these local protections. *See* Camila Domonoske, *North Carolina Passes Law Blocking Measures To Protect LGBT People*, NPR (March 24, 2016), <https://perma.cc/YT7Z-64M2>. At that point, the discussion becomes one about the correct locus of legitimate democratic action, which is outside the bounds of this case comment, but is the subject of broad recent debate by progressive "national federalist" scholars such as Heather K. Gerken, Jessica Bulman-Pozen, Abbe R. Gluck, Cristina M. Rodríguez, Alison L. LaCroix and others. *See, e.g.*, Heather K. Gerken, *Federalism as the New Nationalism: An Overview*, 123 *YALE L.J.* 1889 (2014).

2018]

Atay v. County of Maui

319

Atay could have provided an opportunity to put these new legal directions into action because the relevant state laws do not clearly preempt the Ordinance. The Hawai'i State Constitution was initially drafted in 1949, a time when the powerless city doctrine was already well in effect. As a consequence, it includes a clause elaborating that its counties (the smallest local government unit in Hawai'i) "shall have and exercise such powers as shall be conferred under general laws."⁹⁶ But the state constitution also obligates counties to "conserve and protect Hawai'i's natural beauty and all natural resources."⁹⁷ To further complicate the legal landscape, the state legislature has enacted a complicated set of laws regulating "restricted" or "noxious" plants that includes no express preemption language.⁹⁸ Both sides of the case presented credible arguments about whether the regulations were truly comprehensive and exclusionary.⁹⁹ The district court relied on unpublished opinions and amicus curiae to resolve the matter,¹⁰⁰ while the Circuit Court relied on its own reading of the state laws and a 1991 case involving regulation of utility pole height.¹⁰¹ This kind of legal reasoning shows how legally tenuous the decision to find implied preemption really was. No matter which formulation of the above arguments the reader chooses, courts had an opportunity to reconsider city authority in *Atay* by allowing the Ordinance to stand as not necessarily conflicting with state law or by at least certifying the state law question. Instead, the courts followed the powerless city paradigm, a choice that has real impact on the ground in Maui.

First, *Atay* dampens legitimate local democratic activity that most accurately reflects the needs and desires of the local community. While federal and state laws in some ways regulate agricultural production, *three of four* Hawai'i counties¹⁰² enacted new regulatory frameworks on GE crop cultivation,¹⁰³ showing dissatisfaction with the status-quo. There was no such successful activity at the state level. This seems to suggest different dynamics at play at the state and local levels that allow a concerned—and perhaps under-resourced and under-

96. HAW. CONST. art. VIII, § 1.

97. See *Kelly v. 1250 Oceanside Partner*, 140 P.3d 985, at 1004–05 (Haw. 2006) (quoting HAW. CONST. art. XI, § 1).

98. HAW. REV. STAT. §§ 150, 152 (2016).

99. See *Ito Farm*, 111 F. Supp. 3d at 1109.

100. See *id.* at 1109–12.

101. See *Atay v. Cty. of Maui*, 842 F.3d 688, 706–710 (9th Cir. 2016).

102. While Hawai'i officially has five counties, Kalawao County has no elected government and operates as a judicial district of Maui County due to its small population size of ninety according to the last census. See HAW. REV. STAT. § 326-34 (2013); US Census 2010 Profile of General Population for Kalawao County, Hawaii, <https://factfinder.census.gov/> (search for "Kalawao County, Hawaii" in the Community Facts search bar, select "General Population and Housing Characteristics" under the 2010 Census).

103. See *Atay v. Cty. of Maui*, 842 F.3d 688 (9th Cir. 2016); *Haw. Papaya Indus. Ass'n. v. Cty. of Haw.*, 666 F. App'x 631 (9th Cir. 2016); *Syngenta Seeds, Inc. v. Cty. of Kauai*, 842 F.3d 669 (9th Cir. 2016).

represented—community to more effectively mobilize support of elected officials and the voting public at the local level.

When Maui County residents voted to regulate GE crops, they embodied what Hannah Arendt called “public freedom,” the ability to actively participate in public decision-making and the exercise of shared public power.¹⁰⁴ Such public freedom plays a self-affirming role as people see their immediate surroundings and daily lives begin to reflect their actions in the public political sphere. This kind of political action is more possible at the local level; communities that are underrepresented in higher tiers of government can make up the majority at the local level and moneyed interests may also have less influence. Recent “national federalist” scholars describe this activity as “dissenting by deciding,” a way of expressing dissent and affirmative participation in the larger polity by enacting potentially conflicting public policy at the local level.¹⁰⁵ This is a way for minorities of all kinds to exercise legitimate and self-affirming power in arenas where they are in fact the majority. Through *Atay* and its related cases, the Ninth Circuit dismissed this affirming activity with the stroke of an *implied* pen. Through its liberal application of implied field preemption doctrine, the Ninth Circuit contributed to the ongoing powerlessness of the local government as a potential locus for self-affirming democratic activity.

Second, *Atay* renders Maui County powerless against private companies named and unnamed in this litigation, including Monsanto Company, Syngenta, Agrigenetics, and Dow Agrosiences. Local control can seem like a far-fetched idea in a globalized world. The corporations may here invoke the image of the job creator trying desperately to operate, but constrained by a complicated network of parochial rules—surely local laws must yield or they may never be able to operate in such a confusing patchwork of local laws.¹⁰⁶ This Comment counters with the image of a local community facing the behemoth corporation that has slowly grown to cover the physical landscape, changing what was once home into a living laboratory. The community tries to act through the state, but the state government yields to corporate interests. The majority of Hawai’ian counties found current GE crop regulations unsatisfactory, and sought to regulate GE activities. Residents of these counties were trying to exercise freedom to control their own lived environment by curbing corporate activity. The Ninth Circuit’s use of implied preemption in this case gives agency to the private corporation as an entity exercising freedom to experiment, while it disempowers the municipal government, a democratic entity that expresses the will and political freedom of the local community.

104. HANNAH ARENDT, *ON REVOLUTION*, Ch. 3 (1962).

105. See Heather K. Gerken, *Dissenting by Deciding*, 57 STAN. L. REV. 1745, 1748 (2005) (“*Dissenting by deciding* occurs when would-be dissenters—individuals who hold a minority view within the polity as a whole—enjoy a local majority on a decision-making body and can thus dictate the outcome.”) (emphasis in original).

106. See Frug, *supra* note 2, at 1067 (“Far from seeming a political choice, the rejection of local power seems implied by the needs of modern large-scale organizations.”).

2018]

Atay v. County of Maui

321

Third, as the local government cannot reign in corporate agricultural practices, *Atay* functionally privatizes control over much of the natural and lived environment. The three counties that sought to regulate GE crop production were not just regulating an industry, they were working to shape the future of life on the islands. As the proponents of the GE crop regulation argued in *Hawai'i Papaya*, “Hawai'i County's residents did not want to go the way of Kaua'i, Maui, Moloka'i, and O'ahu, all of which have extensive acreage . . . devoted to experiments and production of seed.”¹⁰⁷ The Ninth Circuit noted in its decision that Hawai'i has a history with the introduction of new species to the islands that cannot be ignored. In 1883, “[s]ugarcane farmers imported mongooses to control invasive rats It turned out that rats are nocturnal and mongooses are diurnal, and thus the mongooses mostly hunted other prey, ravaging native bird populations and becoming a widespread problem that, like the rats, persists today.”¹⁰⁸ This anecdote is certainly not the only of its kind in Hawai'i, an isolated island chain filled with endemic species that is considered an endangered species capital of the world.¹⁰⁹ Article XI, §1 of the Hawai'i Constitution obligates its counties to “conserve and protect Hawai'i's natural beauty and all natural resources, including land, water, [and] air,” for the benefit of its people.¹¹⁰ The local communities in three counties tried to fulfill this obligation by regulating GE crops and pesticides. Instead, *Atay* placed biodiversity at the whims of two non-democratic mechanisms within the broader regulatory status quo: the free market, which will determine what GE research is conducted, and random natural processes of pollination, which will determine whether genes spread. *Atay* functionally privatized control over the risks posed by GE crops to the environment.

These are the results of *Atay* that necessitate another look at implied federal law preemption, implied state law preemption, and the balance of state and local power. The Ninth Circuit may not want to reexamine such broad and far-reaching issues as the entire structure of state and municipal power, at least not in a single case. But the Circuit and other courts should begin that daunting task. Perhaps “Dillon's Rule”¹¹¹ has run its course, and we should no longer take

107. Haw. Papaya Indus., Filing for Plaintiffs-Appellees, Nos. 14-17538, 15-15020 (May 4, 2015), at 3–4.

108. *Atay*, 842 F.3d at 706.

109. See, e.g., U.S. FISH & WILDLIFE SERV., PACIFIC ISLANDS FISH AND WILDLIFE OFFICE, ENDANGERED SPECIES IN THE PACIFIC ISLANDS (2014) <https://perma.cc/93UB-Z84A>; *Hawaii Is 'The Endangered Species Capital Of The World'* HUFFINGTON POST, (Sept. 18, 2013), <https://perma.cc/Y7WA-CZRJ>.

110. HAW. CONST. art. XI, § 1; see also *Kelly v. 1250 Oceanside Partners*, 140 P.3d 985, 1004–05 (Haw. 2006) (“[T]he plain language of article XI, section 1 mandates that the County does have an obligation to conserve and protect the [S]tate's natural resources.”) (emphasis added).

111. See *Robert Ito Farm, Inc. v. Cty. of Maui*, 111 F. Supp. 3d 1088, 1108 (D. Haw. 2015) (explaining that “Dillon's Rule expresses the notion that a municipal corporation has only the power conferred on it by the state.”).

this Rule as assumed simply because it has been followed for so long. In the meantime, the federal courts should at least begin to certify state law questions on the balance of state and municipal power to the state supreme court with jurisdiction. This should especially be the case when the federal court relies on state law to strike down a municipal law, as in *Atay*. After all, state law and even federal law preemption is not a natural construct. It is a political and jurisprudential choice.

CONCLUSION

While *Atay* may at first appear to be a simple case of preemption, it takes on much broader implications below the surface. In striking down the Maui Ordinance that banned the cultivation of GE crops within county lines, the Ninth Circuit perpetuated city powerlessness. This decision had distinct effects in Maui County and across Hawai'i: it dampened legitimate local democratic activity, empowered the private corporation over the public corporation, and privatized control over the lived environment. As this case shows, courts continue to constrain cities through antiquated and unnecessary views of limited municipal power.

The balance of power between individuals, cities, states, and even the federal government is not set in stone. It is a set of political and jurisprudential choices that alter the way we each live, work, and find value in the world. Much of modern life is characterized by a lack of control. Votes count for very little at the federal level, far-away and non-responsive bureaucracies hold regulatory powers, and large corporations hold significant sway over the ways we live. Our courts have an essential role to play in changing this reality, and their work begins with a hard look at doctrines like implied preemption. Courts are ideally placed to rebalance the vertical scales of power in our federalist system by giving cities the authority they need to act—authority they arguably should have had in the first place.

Cities should be more than a place to live. They should reflect the values, desires, and collective imaginations of those who make that place home. This may strike the reader as foolish, perhaps a “nostalgic memory of an era gone forever or a dream of romantics who fail to understand the world as it really is.”¹¹² But this is no callback to a bygone era. It is a call to reimagine the role of local government in how we live and express our democratic values, as a legitimate locus of dissent by decision.¹¹³ The people of Maui should have a say in what their environment looks like and the kinds of risks they are willing to endure within the legitimate limits of our federalist system. Put differently,

112. Frug, *supra* note 2, at 1067.

113. See Gerken, *supra* note 105, at 1805.

2018]

Atay v. County of Maui

323

courts should respect their legitimate expression of “public freedom.”¹¹⁴ The city is a democratically legitimate site for communities to shape their own day-to-day lives, comparable to the state and federal government. We should trust our cities to play a more active role in our lives. Our courts can lead the way.

114. See ARENDT, *supra* note 104, at 115.

R

