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A Biotechnology "Regulatory Commons" Problem

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Elinor Ostrom's *Governing The Commons* "continues to have a broad appeal in the legal academy" particularly in the areas of property theory, natural resource/environmental law, and intellectual property.[1] This chapter interrogates legal scholar William Buzbee's suggestion that Ostrom neglected a pervasive "regulatory commons" problem: jurisdictional mismatch and overlap in fragmented legal regimes that provide strong incentives for regulatory inaction.[2] The common resources exposed to dysfunction and underutilization in such regimes are *regulatory opportunities* to address social ills at federal, state and local levels.[3]

Focused upon reconciling his regulatory commons inaction theory with prominent over-regulation hypotheses, Buzbee dismisses examples of greater local rather than federal government protection.[4] Although Buzbee concedes that preserving local authority can help avoid regulatory failure in an *ideal* world, his subsequent writings reference Ostrom just once: calling Ostrom the most optimistic counter to his skepticism about achieving intergenerational equity given individual and political economic tendencies.[5] By comparison, other legal scholars explicitly rely upon Ostrom for: more precautionary approaches to natural resources management that incorporate recreational, ecological and spiritually motivated value systems;[6] reduction of barriers prohibiting local governments from sustainably managing natural resources;[7] and, shifting to decentralized, multi-modal, networked forms of

[1] Carol M. Rose, "Ostrom and the Lawyers: The Impact of Governing the Commons on the American Legal Academy," *International Journal of Commons* 5 (2011): 28, 29n1, 32.

[2] William W. Buzbee, "Regulatory Commons: A Theory of Regulatory Gaps," *Iowa Law Review* 89 (2003): 6nn6–7, 17n52 (citing Elinor Ostrom, *Governing the Commons: The Evolution of Institutions for Collective Action* (New York: Cambridge Univ. Press, 1990): 215–16).

[3] Ibid., 5, 22.

[4] Ibid., 4, 37–48; William W. Buzbee, "The Regulatory Fragmentation Continuum, Westway and the Challenges of Regional Growth," *Journal of Law and Policy* 21 (2005): 352n65–66; William W. Buzbee, "Contextual Environmental Federalism," *New York University Environmental Law Journal* 14 (2005): 110–11.

[5] Buzbee, "Regulatory Commons," 64; William W. Buzbee, "Preemption Hard Look Review, Regulatory Interaction, and the Quest for Stewardship and Intergenerational Equity," *George Washington Law Review* 77 (2009): 1533n35.

[6] Robin Kundis Craig, "Trickster Law: Promoting Resilience and Adaptive Governance by Allowing Other Perspectives on Natural Resource Management," *Arizona Journal of Environmental Law & Policy* 9 (2019); ibid., 140n1 (citing Thomas Dietz, Elinor Ostrom and Paul C. Stern, "The Struggle to Govern the Commons," *Science* 302, issue 5652 (2003): 1907–8).

[7] Jonathan Rosenbloom, "Local Governments and Global Commons," *Brigham Young University Law Review* 2014; ibid., 1502n44 (quoting Dietz et al.).

governance.[8] This chapter joins the fray by exploring Hawai'i's ongoing efforts to address a biotechnology regulatory commons problem.

CRITICALLY ANALYZING THE BIOTECHNOLOGY REGULATORY COMMONS

Buzbee's regulatory commons scholarship briefly references bioengineered foods and plant genetic resources.[9] US regulation of genetically engineered ("GE") seed and/or genetically modified organisms ("GMO") is based on assumptions that such crops are "substantially equivalent" to conventional crops; accordingly, restrictions may only be imposed if regulators prove GE/GMO crops are unsafe – even though the regulatory assumptions are scientifically indefensible.[10] Meanwhile, states may review GE/GMO field test permit applications and assert "special need"[11] to protect local interests, but that power is hampered by budgetary constraints and redaction of confidential business information.[12]

Conceding that regulation primarily serves the regulated,[13] Buzbee warns about "rare" but pervasive regulatory underkill risks when more protective local actions (including citizen enforcement) are preempted – or trumped – by higher levels of government.[14] Under "preemption" doctrine, laws passed by higher authorities expressly or implicitly displace conflicting laws passed by lower authorities. *Federal* preemption is rooted in the US Constitution's supremacy clause (Article VI),[15] while *state* preemption limits Tenth Amendment "police powers" (and other reserved authority) otherwise delegable to local governments.[16]

To avoid regulatory underkill, Buzbee stresses: rigorous contextual analysis;[17] avoiding simplistic views about regulatory fragmentation;[18] skepticism about government, while retaining different roles;[19] along with open, transparent and deliberative action by regulators.[20] Accordingly, this chapter applies "contextual legal analysis" to judicial opinions invalidating three distinct Hawai'i ordinances. Contextual legal analysis[21] acknowledges the failure of legal formalism[22] to fully

[8] Tracey M. Roberts,"Innovations in Governance: A Functional Typology of Private Governance Institutions," *Duke Environmental Law & Policy Forum* 22 (2011): 134n299 (citing Elinor Ostrom, "A Diagnostic Approach for Going Beyond Panaceas," *Proceedings of the National Academy of Sciences* 104 (2007): 15,181).

[9] Buzbee, "Regulatory Commons," 9n9; Buzbee, "Contextual Environmental Federalism," 126; Buzbee, "Regulatory Fragmentation," 341n47.

[10] David M. Forman, "Marooned in the Doldrums While Ignoring Indigenous Ecological Knowledge: Attempting to Regulate Pesticide Use in Hawai'i," in *Legal Actions for Future Generations*, eds. Emilie Gaillard & David M. Forman (Brussels: Peter Lang, 2020): 268–73.

[11] Ibid., 274n54.

[12] Ibid., 273–75.

[13] Buzbee, "Contextual Environmental Federalism," 125–27.

[14] Ibid., 126–29.

[15] Stephen A. Gardbaum, "The Nature of Preemption," *Cornell Law Review* 79 (1994): 769.

[16] *See, e.g.*, Hawai'i Revised Statutes ("HRS") § 46-1.5(13).

[17] Buzbee, "Contextual Environmental Federalism," 129.

[18] Buzbee, "Regulatory Fragmentation," 363.

[19] Buzbee, "Asymmetrical Regulation," 169.

[20] Buzbee, "Preemption," 1580.

[21] D. Kapua'ala Sproat, "*Wai* through *Kānāwai*: Water for Hawai'i's Streams and Justice for Hawaiian Communities," *Marquette Law Review* 95 (2011): 154–72; D. Kapua'ala Sproat, "Where Justice Flows Like Water: The Moon Court's Role in Illuminating Hawai'i Water Law," *University of Hawai'i Law Review* 33 (2011): 547nn75–77.

[22] "Legal formalism" contends that non-legal reasoning is irrelevant, because law is rationally determinate, judging is mechanical, and legal reasoning is autonomous — leading to unique outcomes. Sproat, "*Wai* through *Kānāwai*," 134n131, 154.

consider social factors that impede judicial ability to render just decisions and public understanding of how law shapes society, thus hindering restorative justice.[23]

Despite Buzbee's assurances about rare displacement of protective local action, the US Court of Appeals for the Ninth Circuit ("Ninth Circuit") applied preemption doctrine to three local Hawai'i ordinances targeting perceived GE/GMO crop-related harms.[24] These court rulings facilitate a regulatory commons tragedy by enforcing limitations on municipal power rooted in an ideology that prevents local governments from performing functions supposedly better left to market forces or Hobbesian regulation.[25] As a result, private enterprise continues to be privileged by a centralized management scheme full of federal and state gaps.[26]

LEGAL FORMALISM FAVORS PRIVATE INDUSTRY

Syngenta Seeds I briefly summarizes Kaua'i County Ordinance 960, which required commercial farmers to: maintain buffer zones with certain surrounding properties when applying pesticides to crops; provide pre- and post-application notices; and, file annual reports disclosing GE crop cultivation. Citing Hawai'i Revised Statutes ("HRS") § 46–1.5(13)'s prohibition on counties enacting ordinances to protect health, life or property inconsistent with state statutory schemes, the Ninth Circuit concluded that Hawai'i's Pesticides Law (HRS chapter 149A) comprehensively regulates pesticides with implicit intent to preempt local pesticide regulation like Ordinance 960's general crop reporting provisions. Similarly, the unpublished[27] *Syngenta Seeds II* opinion held the ordinance's GMO reporting requirement implicitly preempted by other state laws: HRS chapters 141 (the state Department of Agriculture ("HDOA") enabling act), 150 (Seed Law), 150A (Plant Quarantine Law), 152 (Noxious Weed Control), and 194 (Invasive Species Council).

Another unpublished Ninth Circuit decision, *Hawai'i Papaya Industry*, explains that Hawai'i County Ordinance 13-121 grandfathered existing GE/GMOs from its ban on open air testing and open air cultivation, propagation, or development of such crops/plants. The ordinance sought to prevent GE to non-GE plant pollination and preserve the island's vulnerable ecosystem, while promoting the cultural heritage of indigenous agricultural practices. Noting substantial similarities with *Atay* (below) and the *Syngenta Seeds* cases, the court invalidated Ordinance 13-121 based on express federal and implied state law preemption principles.

In *Atay*, the Ninth Circuit describes a Maui County ordinance as "banning" cultivation and testing of GE plants rather than a "Temporary Moratorium," because amendment or repeal would require: an Environmental and Public Health Impacts Study ("EPHIS"); public hearing; *and* a two-thirds County Council vote establishing significant benefit without significant harm. The ordinance sought to protect vulnerable ecosystems and indigenous cultural heritage (as well as organic and non-GE farmers) from transgenic contamination and pesticides. In addition to

[23] Ibid., 155.

[24] Atay v. County of Maui, 842 F.3d 688 (9th Cir. 2016); Syngenta Seeds, Inc. v. County of [Kaua'i] (*Syngenta Seeds I*), 842 F.3d 669 (9th Cir. 2016); Hawai'i Papaya Indus. Ass'n v. County of [Hawai'i] (*Hawai'i Papaya Industry*), 666 F. App'x 631 (9th Cir. 2016); Syngenta Seeds, Inc. v. County of [Kaua'i] (*Syngenta Seeds II*), 664 F. App'x 669 (9th Cir. 2016).

[25] *Compare* S. Candice Hoke, "Preemption Pathologies and Civic Republican Values," *Boston University Law Review* 71 (1991): 685, 696n43, *with* Blake Hudson and Jonathan Rosenbloom," Uncommon Approaches to Commons Problems: Nested Governance Commons and Climate Change," *Hastings Law Journal* 64 (2013): 1285-86nn19–28.

[26] Forman, "Marooned," 266n20, 268–75; Heather Hosmer, "Outgrowing Agency Oversight: Genetically Modified Crops and the Regulatory Commons Theory," *The Georgetown International Environmental Law Review* 25 (2013).

[27] Unpublished rulings only bind the parties, but may be cited for persuasive value by others.

civil penalties and criminal liability, the ordinance authorized entry onto private property, removal of GE organisms at the violator's expense, and citizen enforcement.

For non-commercialized plants, the Ninth Circuit concluded that strict inspection and reporting requirements under the federal Plant Protection Act expressly preempted the ordinance. A comprehensive state statutory scheme impliedly preempted commercialized plants no longer regulated under federal law. Relying on *Syngenta Seeds I*, the Ninth Circuit upheld the lower court's refusal to: return the case to state court; allow discovery of information concerning the scope of GE regulations; or, ask the Hawai'i Supreme Court to decide the implied state law preemption question.

CONTEXTUAL LEGAL ANALYSIS EXPOSES RESTORATIVE JUSTICE FAILURES

The three county ordinances were not "one-size-fits-all approaches, but rather exercises in independent local governance."[28]

Absent any GE/GMO seed company presence on the island, Hawai'i County's May 2013 bill preceded the Kaua'i (June) and Maui (November) proposals. Following an industry-devastating Papaya Ringspot Virus outbreak: Hawai'i County GE/GMO field trials began in 1992; government-approved plantings commenced in 1998; and GE/GMO papaya eventually covered 75% of commercial papaya plantings. In 2008, the Hawai'i County Council overrode a mayoral veto and prohibited GE/GMO taro and coffee.[29] 2012 protests targeted a dairy farm growing GE/GMO corn for its cows; additional community concerns included county workers' allegedly indiscriminate off-label spraying of restricted use pesticides. During the four-year period before adopting Hawai'i County Ordinance 13-121 in mid-November 2013 (with mayoral support), acres of GE/GMO papaya trees were vandalized three separate times.

Hawai'i County Ordinance 13-121 banned GE/GMO crops and plants with exceptions for (i) existing operations that paid a nominal fee to register their locations, and (ii) emergencies involving non-GE/GMO crops harmed by plant pestilence. Initial legislative findings cite Hawai'i Constitution Article XI, §§ 1 and 9 (discussed below) as authority for protecting public and private property along with surface waters, vulnerable watersheds, and the Island's coastal waters. The ordinance's express purposes included: protecting non-genetically modified crops and plants from cross pollination, promoting the cultural heritage of indigenous agricultural practices, and preventing the transfer or uncontrolled spread of GE organisms.

Enacted over mayoral veto three days before the Hawai'i County ordinance,[30] Kaua'i County Ordinance 960 affected more than half the state's total acreage of GE/GMO seed crops. Proponents relied in part on pesticide use documented from lawsuits filed against Pioneer Hi-Bred ("Pioneer") on behalf of 150 Kaua'i residents, led by *kalo* (taro) farmer John A'ana, and a parallel case involving 17 additional plaintiffs. The company removed the *Aana* [sic]/*Casey* lawsuits from state to federal court under the so-called Class Action Fairness Act.[31] This euphemistically titled legislation employs neutral efficiency language while sharply

[28] James Pollack, "Case Comment: *Atay v. County of Maui*," *Harvard Environmental Law Review* 42 (2018): 314.

[29] Hawai'i County Code §§ 14-90 to -95 (2008).

[30] GaryHooser's Blog, "An almost complete history of Bill No. 2491" (Oct. 24, 2015); Kevin Tongg, "Poisons in Our Communities: Environmental Justice's Role in Regulating Hawai'i's Biotechnology Industry," *University of Hawai'i Law Review* 40 (2018): 169–70nn136–40.

[31] 2012 WL 3542503 (D. Haw. July 24, 2012), *aff'd*, 2013 WL 1817264 (D. Haw. Apr. 26, 2013).

constricting court access and development of legal claims to the detriment of less powerful social groups.[32]

The federal magistrate judge[33] assigned to handle the *Aana/Casey* cases – and all three lawsuits challenging the county ordinances – narrowly interpreted state negligence law in dismissing multiple claims. For example, the magistrate concluded that Hawai'i's Pesticides Law (HRS chapter 149A) and Air Pollution Control Act (HRS chapter 342B) do not provide for citizen enforcement, even though Hawai'i law clearly provides that laws relating to environmental quality define a self-executing[34] constitutional right to a clean and healthful environment.[35]

The magistrate also prohibited evidence or argument regarding health and environmental effects of Pioneer's pesticide use,[36] explaining that such testimony would exponentially increase trial length and complexity while likely causing jury confusion.[37] In September 2013, a broad coalition of supporters organized the largest march in Kaua'i history – dubbed the "Mana March" (*mana* meaning spiritual energy and healing power) – a month after the magistrate's dismissal order.[38] As adopted in mid-November, Ordinance 960's initial legislative finding acknowledged rights of future generations and constitutional public trust obligations. The ordinance neither banned GE/GMO seed operations, nor imposed a temporary moratorium. Instead, it required Mandatory Disclosure of Restricted Use Pesticides ("RUPs") and GMOs, Pesticide Buffer Zones, and an EPHIS (along with penalties for non-compliance) utilizing a community-based Joint Fact[-]Finding Group ("JFFG").

The so-called Maui Ordinance was never formally codified. A late-November 2013 bill proposed buffer zones, mandatory disclosure of pesticide use and GMOs, along with a "Temporary Moratorium." Following the bill's defeat, proponent SHAKA Movement (Sustainable Hawaiian Agriculture for Keiki and ʻĀina – respectively, "child" and "land that feeds") organized a major rally supporting the county's first citizens' initiative. An effort by seed companies to strike the question from the November 2014 ballot failed,[39] and the initiative passed by a margin of 1,007 votes (50% for, 48% against) notwithstanding a record-setting $7.9 million campaign funded primarily by Monsanto (later acquired by Bayer in 2018) against what the company described as a "ban on farming."

[32] Eric K. Yamamoto, "Critical Procedure: ADR and the Justices' 'Second Wave' Constriction of Court Access and Claim Development," *Southern Methodist University Law Review* 70 (2017): 776.

[33] Based on recommendations from a citizens' merit screening committee, magistrates are appointed by majority vote of active district court judges – who are, themselves, nominated by the president then confirmed by the United States Senate.

[34] Constitutional provisions are "self-executing" absent any indication that supplemental legislation was intended to make them operative.

[35] In re Application of Maui Elec. Co., 408 P.3d 1 (Haw. 2017) (citing Haw. Const. art. XI, § 9); County of Hawai'i v. Ala Loop Homeowners, 235 P.3d 1103 (Haw. 2010); Haw. Const. art XVI, § 16 (providing that constitutional provisions "shall be self-executing to the fullest extent that their respective natures permit").

[36] *Aana/Casey*, 2014 WL 4244221 (D. Haw. Aug. 26, 2014), *reconsideration denied*, 2014 WL 5528373 (D. Haw. Oct. 31, 2014). One day earlier, the magistrate barred Kaua'i Ordinance 960 from taking effect citing implied state preemption. *Syngenta Seeds*, 2014 WL 4216022 (D. Haw. Aug. 25, 2014).

[37] Fifteen bellwether plaintiffs eventually obtained a $500,000+ jury verdict against Pioneer. *Aana/Casey*, Doc. No. 1088 (D. Haw. May 8, 2015). Most of the remaining 100-plus plaintiffs settled for a confidential amount. Email from attorney Kyle Smith to author (May 18, 2018).

[38] Le'a Malia Kanehe, "Indigenous Cultural Property," in *Native Hawaiian Law: A Treatise*, Melody MacKenzie, et al., eds. (Honolulu, Kamehameha Publishing, 2015): 1066n483; ibid., 1058–1060 (discussing prior cultural opposition to GE taro).

[39] Transcript of Proceedings, Taal v. Mateo, Civ. No. 14-1-0506(1) (Haw. 2d Cir. Sep. 15, 2014).

Interestingly, the state's first GE/GMO seed nurseries arrived in Moloka'i (Maui County) in 1966.[40] Following cultural protests involving GE/GMO taro in the early 2000's,[41] well-known Native Hawaiian activist Walter Ritte organized another protest lamenting lack of regulatory transparency and community participation. Ritte later verbally attacked the island's largest employer (Monsanto) for its adverse impact on the environment compared with Moloka'i's history of self-sufficiency. Perhaps a millennium ago, the traditional Native Hawaiian *Moku* (District or Region) system of localized biocultural resource management originated on Moloka'i – and recently reemerged.[42] The *Moku* system's sophistication far exceeds both the environmental impact assessment process, and Ostrom's design principles for managing commons resources.[43] Since 2012, a newly formed 'Aha Moku [District Council] Advisory Committee ("AMAC") has proactively collaborated with state, county and federal agencies on public trust resource management.[44] AMAC recognizes itself as a "global leader in the integration of Indigenous resource management models into modern legal and regulatory structures."[45]

This innovative *Moku* approach furthers reconciliation and restorative justice principles enshrined in voter-ratified 1978 Hawai'i constitutional amendments.[46]

RESTORATIVE JUSTICE UNDER THE HAWAI'I CONSTITUTION

In greater detail than my previous publications,[47] this chapter probes a missed opportunity to evaluate biotechnology regulation under the Hawai'i Constitution's normative public trust framework:

> "For the benefit of present and future generations, the State *and its political subdivisions* shall conserve and protect Hawaii's natural beauty and all natural resources, including land, water, air, minerals and energy sources, and shall promote the development and utilization of these resources in a manner consistent with their conservation and in furtherance of the self-sufficiency of the State.
>
> *All public natural resources are held in trust* by the State for the benefit of the people."[48]

Hawai'i Supreme Court rulings sandwiched around this 1978 amendment declared that public trust obligations governing water survived the Hawaiian Kingdom's mid-nineteenth-century establishment of private property interests.[49]

[40] Paul Brewbaker, Ph.D., *Fifty Years of Seed in the Fiftieth State: An Economic Report of the Hawaii Crop Improvement Association* (Aug. 2016): 15, 20.

[41] Le'a Malia Kanehe, "Indigenous Cultural Property," in *Native Hawaiian Law: A Treatise*, Melody MacKenzie, et al., eds. (Honolulu: Kamehameha Publishing, 2015): 1058. The County subsequently enacted an ordinance making it unlawful to test, propagate, cultivate, raise, plant, grow, introduce, or release GE taro. Maui County Code § 20-38-030 (2009).

[42] Kawika M. Winter, et al., "The *Moku* System: Managing Biocultural Resources for Abundance within Socio-Ecological Regions in Hawai'i," *Sustainability* (Oct. 2018); Trevor N. Tamashiro, "Moloka'i: Resurrecting 'Aha Moku on the 'Last Hawaiian Island,'" *Asian-Pacific Law & Policy Journal* 12:1 (2011): 297n18.

[43] David M. Forman, "Applying Indigenous Ecological Knowledge for the Protection of Environmental Commons: Case Studies from Hawai'i for the Benefit of 'Island Earth'," *University of Hawai'i Law Review* 41 (2019): 327–30nn83–91; Wayne H. Tanaka, "*Ho'ohana aku, Ho'ōla aku*: First Steps to Averting the Tragedy of the Commons in Hawai'i's Nearshore Fisheries," *Asian-Pacific Law & Policy Journal* 10:1 (2008):267–89 (applying Elinor Ostrom, "The Rudiments of a Theory of the Origins, Survival, and Performance of Common-Property Institutions," in Daniel W. Bromley ed., *Making the Commons Work* (1992): 304–14).

[44] HRS § 171-4.5(d); Forman, "IEK," 325-27nn79–80.

[45] Forman, "IEK," 330; [AMAC] Rules § 2-1(d) (Oct. 2016).

[46] Sproat, "*Wai* through *Kānāwai*," 131n16 & 147-48nn96–97.

[47] Forman, "Marooned," 261–84; Forman, "IEK," 300–52.

[48] Haw. Const. art. XI, § 1 (1978) (emphases added).

[49] McBryde Sugar Co. v. Robinson, 504 P.2d 1330 (1973); Robinson v. Ariyoshi, 658 P.2d 287 (1982) (describing Hawai'i's public trust doctrine as "much more than a restatement of police powers").

Before sugar barons diverted this common resource for private use, *kānāwai* (early laws that evolved around management/use of fresh water) reflected the vital role *wai* (fresh water) played in traditional *Kānaka ʻŌiwi* (Native Hawaiian, or *Kānaka Maoli*) society.[50] Hawaiians revered water as: literal and figurative life-giver; manifestation of a principal *akua* (god, ancestor); and, resource managed for the community's benefit rather than commodity reducible to physical ownership.[51] The staple crop *kalo* (taro, *colocasia esculenta*) likewise symbolizes Hawaiians' elder brother in a reciprocal relationship that obligates people to care for all cultural and natural resources, including the land that feeds them.[52] Sufficient cool water flow prevented taro diseases, while supporting reproduction of native stream species as alternative food sources. Fertile coastline runoff also created ideal environments for nearly 500 *loko iʻa* (fishponds).[53] However, many streams dried up after sugar plantations constructed massive ditch systems transporting water from wet, windward (mostly Native Hawaiian) communities to arid central and leeward plains – exemplifying "decisions and practices [that] increasingly reflected Western notions of *ownership* as opposed to *management*."[54]

Turn-of-the-century water rights decision *In re Water Use Permit Application* (*Waiāhole*) explained that public trust principles require global, long-term planning and decision-making that compromises public rights pursuant only to decisions made with openness, diligence, and foresight.[55] Public trust principles require application of the precautionary principle, meaning that lack of firm scientific proof should not prevent the government from adopting reasonable measures designed to further the public interest. Enactment of the State Water Code's comprehensive regulatory scheme did not trump these constitutional obligations.

In 2006, *Kelly* v. *1250 Oceanside Partners* likewise rejected arguments that county public trust obligations were trumped by laws vesting land management authority in the state, combined with unexercised legislative power to transfer public lands to counties for public uses or purposes.[56] Elaborating upon the self-executing constitutional provision, HRS § 180C-2 authorized counties to cooperate with state and federal agencies to enact ordinances meeting – or exceeding – minimum standards for controlling soil erosion and sediment. However, the *Kelly* plaintiffs failed to prove governmental breach of trust when they relied solely on a state agency–issued Notice and Finding of Violation regarding construction-related storm water pollution.

In 2014, *Kauai Springs, Inc.* v. *Planning Commission of Kauaʻi* (*Kauai Springs*) reaffirmed the affirmative constitutional "duty and authority of the state *and its political subdivisions* … independent of statutory duties and authorities created by the legislature."[57] Two subsequent rulings also warrant mention: first, the "plain language" of Hawaiʻi's Constitution indisputably applies public trust obligations to *all* public natural resources, including land;[58] second, the fiduciary duty to reasonably protect and preserve trust property includes the obligation to reasonably monitor and inspect property leased to a third party.[59]

[50] Sproat, "*Wai* through *Kānāwai*," 139–42.
[51] Ibid., 127-28n4, 141.
[52] Ibid., 527; Forman, "IEK," 333–34, 350.
[53] Joseph M. Farber, *Ancient Hawaiian Fishponds: Can Restoration Succeed on Molokaʻi?* (California: Neptune House Publications, 1997): 6, 8.
[54] D. Kapuʻala Sproat, "From *Wai* to *Kānāwai*: Water Law in Hawaiʻi," in MacKenzie, *Native Hawaiian Treatise*, 532–34n67.
[55] 9 P.3d 409 (Haw. 2000).
[56] 140 P.3d 985 (Haw. 2006).
[57] 324 P.3d 951 (Haw. 2014).
[58] In re Conservation District Use Application (CDUA) HA-3568 (*Mauna Kea II*), 431 P.3d 752 (Haw. 2018).
[59] Ching v. Case, 449 P.3d 1146 (Haw. 2019).

By ignoring Article XI, § 1, federal judges transformed efforts to implement these constitutional obligations into a public message that reinforces the prevailing regulatory narrative of "substantial equivalence" while rewriting history and silencing indigenous voices.[60]

KAUA'I COUNTY CONTEXT

Although Monsanto (now Bayer) does not operate on Kaua'i, the other four major GE/GMO seed companies sued the county in federal court on January 10, 2014. After correctly rejecting the seed companies' reliance on a constitutional declaration that agriculture is a matter of statewide concern,[61] the magistrate decided that counties (as state creations) may only exercise powers conferred through general laws[62] – failing to acknowledge Article XI, § 1's self-executing nature,[63] and its *express* reference to "political subdivisions" (counties).[64] (Despite the adverse ruling, Kaua'i's mayor and the HDOA chairperson convened a JFFG consistent with collaborative rulemaking authority extended by the ordinance and HRS § 149A-35.[65])

Setting off a domino effect by mischaracterizing county authority in Hawai'i,[66] the magistrate gave no explanation for refusing to seek a Hawai'i Supreme Court ruling on the determinative state law question[67] – despite having rejected the seed companies' federal preemption claims.[68] The magistrate's conclusion that state law preempts Ordinance 960 relies upon an ideology favoring private enterprise,[69] while ignoring centuries of prior local rule: before King Kamehameha unified the Hawaiian Islands (1810); continuing thereafter; as well as during the fifty- plus-year period between Maui County's establishment by the Territory of Hawaii (1905); and, Hawai'i statehood (1959).[70] Oral histories indicate the *Moku* system of localized biocultural resource management flourished in Hawai'i for about a millennium: [71] "Hawaiians often assert that management of resources under the Euro-American paradigm involves formal centralized control of resources and habitats and thus less sensitivity to local biophysical dynamics, less

[60] Troy J.H. Andrade, "(Re)Righting History: Deconstructing the Court's Narrative of Hawai'i's Past," *University of Hawai'i Law Review* 39 (2017): 631–32, 657n166.

[61] Haw. Const. art. XI, § 3 (1978).

[62] *Compare* Jon D. Russell & Aaron Bostrom, "Federalism, Dillon Rule and Home Rule" (American City County Exchange, Jan. 2016): 6 (noting the Hawai'i Constitution provides for *self-executing* Home Rule).

[63] *Compare* Save Sunset Beach Coal. v. City & County of Honolulu, 78 P.3d 1 (Haw. 2003) (concluding the constitution's agricultural lands provisions are *not* self-executing).

[64] Absolute state legislative control over a municipality's governmental functions applies *absent* specific, contrary constitutional limitations. Koike v. Board of Water Supply, 342 P.2d 835 (Haw. 1960); McKenzie v. Wilson, 31 Haw. 216 (1930).

[65] Peter S. Adler, Ph.D., Pesticide Use by Large Agribusinesses on Kauai: Findings and Recommendations of the [JFFG] (May 25, 2016), available at www.accord3.com/crops-and-pesticides-on-kauai/.

[66] Professor David Callies contends that Hawai'i has extremely weak home rule. *See* Jacob Garner & Ian Wesley-Smith, "State Preemption of Local GMO Regulation: An Analysis of Syngenta Seeds, Inc. v. County of Kauai," *Urban Lawyer* 47, no. 2 (2015): 291–92n128. However, this analysis ignores self-executing county public trust obligations recognized in *Waiāhole*, *Kelly* and *Kauai Springs*. *Cf. Mauna Kea II*.

[67] Hawai'i Rules of Appellate Procedure 13(a) authorizes such requests for "certification" absent clear controlling precedent.

[68] *Cf.* Carnegie-Mellon University v. Cohill, 484 U.S. 343 (1988) (observing that "judicial economy, convenience, fairness, and comity … point toward declining to exercise jurisdiction over the remaining state-law claims" when federal law claims are eliminated before trial).

[69] Pollack, "Atay," 317n91.

[70] Ibid., 316–17n88.

[71] Forman, "IEK," 323–30.

appreciation for the needs and interests of the indigenous human populations, and less capacity for enforcing rules and regulations at the local level."[72]

On appeal, a coalition of nonprofits led by *Ka Makani Ho'opono* ("wind that makes right" – representing Kaua'i residents living next to GE/GMO fields) argued courts must be particularly cautious about invalidating ordinances on preemption grounds when constitutional duties to county residents are implicated.[73] Unpersuaded that Hawai'i counties have any inherent (or reserved) constitutional authority, the Ninth Circuit focused instead on two court rulings predating the November 1978 public trust provision – *Hawaii Govt. Employees' Ass'n v. Maui* (*HGEA v. Maui*),[74] and *In re Application of Anamizu*.[75] Calling Article XI, § 1 "irrelevant,"[76] the Ninth Circuit reiterated the magistrate's erroneous conclusion that counties may only exercise powers expressly granted by the State, and upheld his refusal to certify the state law question.[77] Ignoring *Ka Makani Ho'opono*'s citations to *Waiāhole* and *Kelly*,[78] along with Kaua'i County's reliance on *Kauai Springs*,[79] the Ninth Circuit disregarded the self-executing nature of county public trust obligations, which do not lie dormant awaiting express grants of legislative power by the state.

HAWAI'I COUNTY CONTEXT

In March 2014, two papaya farmers obtained a state court order staying the deadline for existing operations to pay an annual $100 registration fee and disclose their locations.[80] Industry groups later challenged Hawai'i County Ordinance 13-121 in federal court.[81] Relying on his earlier *Syngenta Seeds* opinion, the magistrate: found the ordinance preempted[82]; refused certification to the Hawai'i Supreme Court; and, denied the County's request to gather additional information to support its reliance on *Kelly* and *Waiāhole*.[83]

Glossing over obvious contextual distinctions, *Hawai'i Papaya Industry* suggests on appeal that *Atay* involved "substantially similar" facts. Two Ninth Circuit footnotes likewise dismiss fundamental state constitutional questions: first, rejecting the county's certification request because of Hawai'i's purportedly "well-defined" implied state preemption analysis; and, finally, relying on *HGEA* v. *Maui* and *Anamizu* to conclude that Article XI, § 1 does not alter the analysis absent legislation expressly granting counties power to enact relevant ordinances. Once again, these conclusions ignore the constitutional provision's self-executing nature and its pre-existing status as background principle of Hawai'i law (reflecting centuries of localized natural resource management experience).

[72] Ibid., 335n175.
[73] Opening Brief, 2015 WL 8004262 (citing Robinson Township v. Pennsylvania, 83 A.3d 901 (Pa. 2013): "constitutional commands . . . cannot be abrogated by statute"); Reply Brief, 2015 WL 2265299.
[74] 576 P.2d 1029 (Haw. [Mar. 22,] 1978).
[75] 481 P.2d 116 (Haw. 1971)).
[76] *Compare* Forman, "Indigenous Knowledge," 334-46nn107–46 (discussing *nine* post-1978 decisions concerning state or county public trust obligations); ibid., 316n48 (discussing *Robinson Township*).
[77] Hawai'i Rules of Appellate Procedure 13(a) authorizes federal courts to certify determinative questions about Hawai'i law absent clear controlling precedent.
[78] Opening Brief, 2015 WL 8004262; Reply Brief, 2015 WL 2265299.
[79] Reply Brief, 2015 WL 2193643.
[80] John Doe v. County of Hawai'i, Civ. No. 14-1-0094 (Haw. 3rd Cir. Mar. 7, 2014).
[81] Hawai'i Floriculture and Nursery Ass'n v. County of [Hawai'i], 2014 WL 2587282 (D. Haw. filed June 9, 2014).
[82] 2014 WL 6685817 (D. Haw. Nov. 26, 2014).
[83] Defendant-Appellants' Principal Brief, 2015 WL 8004268.

MAUI COUNTY CONTEXT

A week after the November 2014 election, the SHAKA Movement joined councilmember (and indigenous farmer) Alika Atay's state court lawsuit seeking timely implementation of the Maui Ordinance.[84] The next day, an industrial group including two GE/GMO seed companies filed *Robert Ito Farm, Inc.* v. *County of Maui* (*Ito Farm*) asking the federal court to block the ordinance. Four days later, Maui County agreed not to implement the ordinance – after repeatedly declining to defend it.[85] Dow Agrosciences removed *Atay* to federal court; then, the magistrate refused to conduct a hearing before deciding against sending *Atay* back to state court – despite the SHAKA Movement withholding consent to the magistrate's continued involvement.[86]

Ignoring this discrepancy, the succeeding judge affirmed the magistrate's decision to keep *Atay* in federal court based on federal preemption questions. Rejecting the SHAKA Movement's attempt to gather additional documentation undermining the preemption argument, the judge explained that oversight of specific industry operations or their health and environmental impacts is not relevant[87] – i.e., proof of regulatory gaps would not prevent preemption of the Maui Ordinance. Despite the SHAKA Movement's legal citations,[88] *Ito Farm* and *Atay* do not even mention the Hawai'i Constitution's public trust provision when declining to certify the novel implied state preemption question.

The Ninth Circuit's unsupported characterization of the temporary moratorium as a "ban" conflicts with available precedent.[89] In any event, the appellate court turned a blind eye to the SHAKA Movement's reliance on *Kauai Springs*.[90] Consequently,

> *Atay* constrains local power to mitigate risk and places biodiversity and native plants at the whims of . . . the free market, which will determine whether and where GE research is conducted . . . . *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. [91]

Preemption thus "dampens legitimate and responsive local democratic activity, privileges the private corporation over the public corporation, and privatizes control over the lived environment."[92]

NEXT STEPS

The *Atay, Syngenta Seeds, and Hawai'i Papaya Industry* preemption rulings silenced indigenous and other community voices by transforming efforts to implement constitutional public trust

[84] Atay v. County of Maui, No. 14-1-0638 (Haw. 2d Cir. Nov. 12, 2014).
[85] 2014 WL 7148741 (D. Haw. Dec. 15, 2014); 2015 WL 1279422 (D. Haw. Mar. 19, 2015) (extending injunction).
[86] 2015 WL 134070 (D. Haw. Jan. 9, 2015) (discussing 28 U.S.C. § 636(c)'s consent requirement).
[87] 111 F. Supp. 3d 1088 (D. Haw. June 30, 2015).
[88] Objections to the Findings and Recommendation to Deny Plaintiffs' Motion to Remand, Atay v. County of Maui, Civ. No. 14-00582 SOM-BMK (D. Haw. Mar. 7, 2015).
[89] *Compare* Tahoe-Sierra Preservation Council, Inc. v. Tahoe Regional Planning Agency, 216 F.3d 764 (9th Cir. 2000) (distinguishing permanent development bans from temporary moratoria, which expire after meeting certain conditions precedent), *aff'd*, 535 U.S. 302 (2008); Department of Transportation v. Public Citizen, 541 U.S. 752 (2004) (discussing congressional moratorium lifted by the President after *twenty* years).
[90] Appellants' Opening Brief; Appellants' Reply Brief.
[91] Pollack, "Atay," 308.
[92] Ibid., 307, 318.

obligations into a public message that reinforces a narrative of "substantial equivalence" favoring GE/GMO seed companies. Economic development absent precautions for present and future generations facilitates a regulatory commons problem: unnecessary evisceration of local authority producing strong incentives for governmental inaction. By comparison, restorative justice principles enshrined in the Hawai'i Constitution reflect the grassroots approach championed by Nobel Prize–winning economist Elinor Ostrom.[93]

In the wake of these preemption decisions, Ostrom-like networked forms of governance achieved some limited successes through: federal enforcement,[94] state legislation,[95] state administrative action,[96] and private litigation.[97] Legislation specifically authorizing counties to adopt relevant ordinances could, theoretically, address remaining state GE/GMO regulatory gaps. Alternatively, administrative rulemaking petitions could be filed with Hawai'i's agricultural and health departments.[98] For example, proposals to: adopt rules requiring environmental and public health risk assessments; establish standards governing plant-incorporated protectants for National Pollutant Discharge Elimination System general permits; and/or mandate consultation with the 'Aha Moku Advisory Council consistent with the United Nations Declaration on the Rights of Indigenous Peoples.[99] Rulemaking approaches arguably would be more open, transparent and deliberative than other options.

If the agencies exercise the kind of "rational thinking" that perpetuates ongoing regulatory commons problems – i.e., rejecting "irrational" actions that might adversely impact economic development opportunities[100] (by failing to timely act on the petitions, formally declining to institute rulemaking proceedings, or commencing the rulemaking process but failing to adopt necessary provisions) – challenges can be pursued as pure state law matters in state court.[101] If the agencies instead promulgate gap-filling regulations over GE/GMO industry objections, the appropriate forum for legal challenges is also state court.[102] Either way, Hawai'i courts will not be bound by erroneous Ninth Circuit predictions about unique state constitutional provisions.[103]

[93] Dietz, "The Struggle," 1907-08; Ostrom, "A Diagnostic Approach," 15,181; Elinor Ostrom,"Polycentric Systems for Coping with Collective Action and Global Environmental Change," *Global Environmental Change* 20 (2010): 552.

[94] Press Release, U.S. Dept. of Justice, "Monsanto Agrees to Plead Guilty to Illegally Spraying Banned Pesticide at Maui Facility," November 21, 2019 (describing $10.2 million deferred prosecution agreement).

[95] Act 45 (2018) amended chapter 149A by adding: a Pesticide Reporting and Regulation Program; buffer zones around schools; a ban on permits authorizing use/application of pesticides containing active chlorpyrifos after December 31, 2022; and, a required pesticide drift monitoring study.

[96] In June 2019, the Hawai'i Department of Education ("DOE") banned herbicide use on public school grounds. Gary Hooser, "A Twofer – DOE bans herbicides and GMO acreage plummets," *The Garden Island*, July 3, 2019.

[97] "Maui Lawsuit Alleges Birth Defects Caused by Monsanto's 'Reckless Use of Pesticides'," *Maui News*, October 25, 2019; Stewart Yerton, "Monsanto Could Soon Be Facing Dozens of Lawsuits in Hawaii Over Pesticide," *Civil Beat*, Aug. 29, 2019.

[98] *See* HRS §§ 91-3, -6; Haw. Admin. R. §§ 4-1-23, 11-1-51.

[99] AMAC Rules §§ 2-3(c).

[100] Hudson & Rosenbloom, "Uncommon Approaches," 1292-93.

[101] *Cf.* Green Party of Hawai'i v. Nago, 378 P.3d 944 (Haw. 2006) ("if the agency refuses, then the petitioning person would have an action in circuit court").

[102] *Id.* (citing HRS § 91-7).

[103] The United States Constitution acknowledges and preserves state judicial autonomy and independence. Erie Railroad Co. v. Tompkins, 304 U.S. 64 (1938).