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Realizing the Abstraction: Using Today's Law to Reach Tomorrow's Sustainability

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REALIZING THE ABSTRACTION: USING TODAY'S LAW TO REACH TOMORROW'S SUSTAINABILITY

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I. INTRODUCTION

In the southeast corner of my yard, there is a new gardening shed. It is exactly five feet from my neighbor's yard on the side, less than 120 square feet, and under fourteen feet tall. And my subdivision's covenants allow gardening sheds. Although I did not build the shed myself, having learned that lesson previously, I am intimately familiar with its size and location because my local ordinances require that familiarity (and because my neighbor thought our covenants prohibit sheds). I measured our yard, drew a plan, reviewed our subdivision covenants, submitted the plan to the city, and after several weeks, received a permit. I knew what the law was, and I followed it.

But I never asked why. I never wondered why five feet is the magical distance from a neighbor's yard, nor why 120 square feet requires a building permit. And more important, I never questioned the purpose of these rules. Is there some vision of my community that these ordinances are designed to achieve? If so, what is it? I can understand the purpose of each requirement in isolation, but do they work toward any broader end?

It may seem strange to begin an article in a symposium about developing sustainable energy systems with a story about a backyard shed, but the shed is relevant to the bigger story for two reasons. The key to a sustainable energy future lies in achieving a sustainable demand for energy, more than any other factor. A large component of our energy demand is a function of our built environment, which is the product of thousands of individually insignificant land-use

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decisions in any place over time. The land-use ordinances that regulate shed construction are part of that, reflecting an attitude that apparently prefers dispersed development of geographically-separated uses that is highly resource intensive. The shed requirements serve that perhaps unintended end by helping to ensure that commercial or industrial uses are not surreptitiously performed in our backyards.

But this article is interested in another relationship between the backyard shed and sustainable energy systems. In both cases, the thousands of small choices that make up the trajectory of the larger system are often legally unconnected. More important, the thousands of small choices are unconnected to any holistic vision of a sustainable community. There are both horizontal and vertical disconnects, and no mechanisms exist to ensure that local, or issue-specific, or resource-specific decisions work together to promote the larger end—creating a sustainable system. This is the "why?" question that I failed to ask about my shed. What is the broader purpose of the regulation, and how does this specific example get us there? In short, why does this law exist?

At its most broad and abstract, law exists—and can only exist—to promote the public health, safety, and welfare. This authority, known as the police power, is the inherent power of government.[1] But more important, it is the exclusive justification for government—it is both what government can do and why government can do it. As communities, we engage in an ongoing process of creating an imagined future for a place. We then identify and implement the legal structures that will achieve those created imaginings.[2] As the creators of government, we require more than conclusory justifications that a government act promotes those vague police power concepts. To the contrary, we expect law to promote a specific understanding of what the public health, safety, and welfare look like, on the ground, in our communities. If a governmental act does not promote our visions of the public health, safety, and welfare—our visions of our community—we legitimately question the validity of the act.[3]

What is the justification for the rules describing what my shed should look like? What are the justifications for front-yard setbacks or minimum lot sizes? I suggested that these ordinances contribute to sprawling development patterns. But is that their purpose? I do not know the ultimate answer to that question because the purpose of many of these land-use ordinances is no longer apparent in

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1. *See, e.g.*, Joseph L. Sax, *Takings and the Police Power*, 74 YALE L.J. 36, 36 n.6 (1964); *see also* Berman v. Parker, 348 U.S. 26, 32 (1954) ("We deal, in other words, with what traditionally has been known as the police power. An attempt to define its reach or trace its outer limits is fruitless, for each case must turn on its own facts. The definition is essentially the product of legislative determinations addressed to the purposes of government, purposes neither abstractly nor historically capable of complete definition.").

2. *See generally* JOHN R. COMMONS, THE LEGAL FOUNDATIONS OF CAPITALISM 147 (1923); *see also* DANIEL BROMLEY, SUFFICIENT REASON: VOLITIONAL PRAGMATISM AND THE MEANING OF ECONOMIC INSTITUTIONS 67–84 (2006).

3. *See, e.g.*, JOHN LOCKE, THE SECOND TREATISE ON GOVERNMENT §131, at 371 (2d ed. 1970) (1690) ("[T]he power of the Society, or Legislative constituted by them, can never be suppos'd to extend farther than the common good. . . . And all this to be directed to no other end, but the Peace, Safety, and publick good of the People.") (emphasis omitted).

their application. And no legal requirements exist that would make apparent a connection between purpose and on-the-ground effect.

The disconnect between resource- or place-specific laws or ordinances and the broader community visions that justify them is apparent in the articles that comprise this issue. Each of the articles demonstrates a connection to the problems inherent in moving toward a sustainable energy system. But none of the articles, nor the structure of the symposium itself, reveals a durable legal connection between the *purposes* of various components. That is not the fault of the authors, nor the symposium organizers, because no such connection exists. In fact, several of the articles explicitly acknowledge this disconnect in purpose. How do imperiled species protection regimes interact with energy transport? Is a national energy production and supply infrastructure compatible with the vision Nevada (or any other state) creates for its future?

The questions presented—and disconnects identified—in this symposium are crucial because achieving a sustainable tomorrow is much broader than any specific resource or problem. A sustainable *system*—whether an energy production and transport system or a community—must recognize and synthesize those conflicting purposes into a single, coherent, sustainable purpose (or constellation of purposes) that we can achieve.

Although the route toward sustainability faces some obstacles and seems overwhelming, it is not impassable. Like many difficult legal and policy questions, the obstacles are conceptual *and* practical. It is both difficult to imagine a sustainable community and difficult to implement those imaginings in concrete legal regimes. But sustainability faces a third obstacle more formidable than the other two. Even if those conceptual and practical difficulties could be overcome, would we *choose* to do so? The final obstacle is one of choice, and this is simultaneously the simplest and most difficult to overcome. It is the simplest because we only have to choose to do it. But unfortunately, our existing institutional structure prevents us from making—or better said, implementing—that choice.

The article will address each of these three obstacles with the purpose of identifying a realistic and achievable approach to overcome them. Combined, these obstacles create a lack of any coherent, and legally enforceable, vision for a sustainable community—or a sustainable energy system, in the specific context of this symposium—that would allow us to create sustainable places. Although specific legal regimes that might promote a single component of a broader sustainable system do exist, those resource-specific regimes are insufficient. For however defined or envisioned, "sustainability" exists at a scale and level of abstraction that remains unapproachable by traditional institutional regimes; in order to achieve sustainable communities, we must create, and choose, a mechanism to give legal effect to that abstraction.

II. UNDERSTANDING "SUSTAINABILITY"

The first obstacle on our path to achieving sustainable communities lies in the abstract concept "sustainability."[4] We use the word in many different contexts. A search for the words "sustainable" or "sustainability" in the United States Code yields 317 different sections.[5] Those statutory provisions address the "sustainability . . . of local emergency communications[,]"[6] "sustainable agriculture,"[7] sustainable use of naval petroleum reserves,[8] "sustainable homeownership,"[9] sustainable forestry,[10] and "sustainable economic growth and development of sub-Saharan Africa,"[11] among many other diverse topics. In this article, we must consider all of those understandings of sustainability together. Consequently, I use "sustainability" in two ways: first, to refer to the interaction of all of those different notions of sustainability in *one* community. And second, to describe a sustainable *system* that consists of the interaction of all of the different sustainable communities. Because this use of sustainability—and the sustainable communities we must create—represents a paradigm shift from existing institutional regimes, understanding sustainable communities requires the adoption of vision-based, rather than issue-based or jurisdiction-based, approaches.

A common definition of sustainability originated in the United Nations World Commission on Environment and Development (the "Brundtland Commission"). The Brundtland Commission's report—"Our Common Future"—defined sustainable development as "development that meets the needs of the present without compromising the ability of future generations to meet their own needs."[12] This definition and the concepts it represents have since been interpreted to include three components: environment, economy, and equity.[13] Although probably the most widely used,[14] the Brundtland Commission's defini-

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4. I prefer the word "sustainability" over "sustainable development" and will only use "sustainable development" when citing to another source that uses that term or to refer to a component of the broader sustainability concept. It is possible that growth can occur sustainably, but "development" is not necessary to achieve a sustainable system.

5. I performed this search using the "USC" (United States Code unannotated) database on Westlaw. "Sustainable Development" occurs 35 times.

6. 6 U.S.C. § 575 (2006).

7. 7 U.S.C. § 450i (2006). Many other provisions in Title 7 refer to sustainable agriculture or related concepts.

8. 10 U.S.C. § 7420 (2006).

9. 12 U.S.C. § 1715z-23 (2006).

10. 16 U.S.C. § 1674a (2006).

11. 19 U.S.C. § 3701 (2006).

12. U.N. World Comm'n on Env't & Dev., *Report: Our Common Future*, 54, U.N. DOC. A/42/427 (Aug. 4, 1987), *available at* http://daccess-dds-ny.un.org/doc/UNDOC/GEN/N87/184/67/IMG/N8718467.pdf?OpenElement.

13. *See, e.g.*, PRESIDENT'S COUNCIL ON SUSTAINABLE DEVELOPMENT, SUSTAINABLE AMERICA: A NEW CONSENSUS FOR PROSPERITY, OPPORTUNITY, AND A HEALTHY ENVIRONMENT FOR THE FUTURE at We Believe Statement, point 10 (1996), *available at* http://clinton2.nara.gov/PCSD/Publications/TF_Reports/amer-believe.html (This document explicitly adopted the Brundtland Commission's definition of sustainable development).

14. A Westlaw search in the JLR (journals and law reviews) database using this entire phrase yielded 314 articles on Feb. 25, 2010. Using the search term "Bruntland Commission"—the colloquial name for the commission that created the preceding definition—yields 51 documents (many of which

tion is not the only approach to sustainability. They might emphasize different components, but most alternative definitions at least implicitly recognize the need to consider human needs (economy and equity) and ecological needs over time.[15]

The Brundtland Commission's definition appears sufficiently difficult to achieve on its own, but applying it on the ground reveals that it might be, in fact, too *simplistic*. Our understandings of these needs vary across communities, geographic scales, and through time. Professor J. B. Ruhl described a five-dimensional sustainability algorithm for making decisions that requires consideration of economy, equity, and environment across multiple geographic scales over time. He articulated the algorithm's function as follows:

> [A] crude algorithm for sustainable development would (1) find the optimum for all three E's at one location and time, taking into account the effects tinkering with any one will have on the other two; then (2) evaluate the effects of the local solution on all other local, regional, and global solutions; then (3) evaluate the effects of the local solution on all future solutions; and finally (4) repeat the process until the system reaches a stable, sustainable equilibrium.[16]

After recognizing that this algorithm must achieve the goals of environment, ecology, and equity across time and space, while taking into account the "feedback and feedforward loops that exist in their coevolving system," Professor Ruhl noted, "[t]his is a hard combinatorial problem if ever there was one."[17]

Although it is admittedly "crude," this algorithm contains an unrecognized, but fundamental, failing that prevents it from making a real contribution to a useful discussion about attaining sustainability. An algorithm is a useful tool because it begins with what we know and provides clear steps from that known place to some other place we desire to be. While clarity and a logical sequence are necessary components of any algorithm, an algorithm's most important component—its foundation—is the *user*. It must start with what the user *already* knows. Without that, the algorithm is useless.

In Ruhl's algorithm, we cannot get past the first step. This algorithm provides that we first optimize environment, economy, and equity at one location and time. But it does not provide a mechanism to achieve that end. And it is this optimization, and specifically the implementation of the optimization, that will remain the most difficult obstacle on the path to sustainability. But there is a

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overlap with the first search). A similar search on Google Scholar, using the entire definitional phrase reproduced here, yielded 6,250 results (on Feb. 25, 2010).

15. *See, e.g.*, THE SUSTAINABLE URBAN DEVELOPMENT READER 460–61 (Stephen M. Wheeler & Timothy Beatley eds., 2d ed. 2009) (2006) (providing a number of different definitions of sustainability from various perspectives).

16. J.B. Ruhl, *Sustainable Development: A Five-Dimensional Algorithm for Environmental Law*, 18 STAN. ENVTL. L.J. 31, 57 (1999) [hereinafter Ruhl, *A Five-Dimensional Algorithm*]; *see also* J. B. Ruhl, *Law for Sustainable Development: Work Continues on the Rubik's Cube*, 44 TULSA L. REV. 1 (2008).

17. Ruhl, *A Five-Dimensional Algorithm*, *supra* note 16, at 57.

mechanism that allows that optimization and its implementation. That mechanism requires that we understand that one entity is uniquely qualified to optimize a community: the community itself. My purpose in writing this article is not to recommend a dramatic new approach designed to achieve sustainability, nor to rewrite Ruhl's algorithm. Once we identify where to begin— once we recognize that only the community can envision its optimized condition—the algorithm provides a useful approach, and we will envision the path to sustainability.

In getting to that beginning, one continuing problem we must overcome is the assumption that there exists a sustainability that is independent of social choice.[18] A sustainable community is a socio-ecological place in which our choices interact with the functioning of natural systems. Although we cannot perfectly control those natural systems—whether markets or ecosystems—we necessarily influence their functioning. We write the rules that govern markets,[19] and we are also ourselves ecological actors that affect the operations of ecosystems.[20] We make choices about where to live or not to live; what animals to eat, protect, or eradicate; desired foods and building materials. All of these choices necessarily affect related markets and ecosystems. Our *choice* to protect the gray wolf, rather than exterminate it, is not an "immutable characteristic and rule" of the Greater Yellowstone Ecosystem or the tourism market associated with it.[21] It is just a choice that reflects our vision of the world we want to live in. That choice affects markets and ecosystems, and we assess the consequences of our choice and determine which of those consequences are the market and ecosystem conditions we desire.[22]

With this understanding, we see that there exists no inherent optimal condition for the environment, economy, and social equity. There is no a priori "sustainable community" that we must only identify, understand, and allow to be. There is only the condition or set of conditions that we, as a community, decide

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18. *See, e.g.*, Bruce Pardy, *The Hand is Invisible, Nature Knows Best, and Justice is Blind: Markets, Ecosystems, Legal Instrumentalism, and the Natural Law of Systems*, 44 TULSA L. REV. 67, 76 (2008) ("These systems operate according to their own immutable characteristics and rules. They are organic and evolutionary, changing through time, rather than existing in a fixed or static state. They arise spontaneously and are neither created nor destroyed by the actions of individual people or agencies.").

19. A fair amount of confusion persists on this point. A market is nothing more than a human construct that ultimately relies on the rules of the system in which it exists. Consider, as a single example, rights in property. Without an institutional regime that defines (and thus protects) property "rights," there can be no exchange of those rights. The market therefore requires a pre-existing institutional regime, which is obviously a human construct. *See, e.g.*, JOHN R. COMMONS, LEGAL FOUNDATIONS OF CAPITALISM (1924).

20. *See, e.g.*, WILLIAM CRONON, CHANGES IN THE LAND: INDIANS, COLONISTS, AND THE ECOLOGY OF NEW ENGLAND (1983); WILLIAM CRONON, NATURE'S METROPOLIS: CHICAGO AND THE GREAT WEST (1991); RICHARD WHITE, THE ORGANIC MACHINE: THE REMAKING OF THE COLUMBIA RIVER (1995).

21. A recent study suggests that wolf reintroduction into Yellowstone has increased visitor spending in the local economy by approximately $35 million per year. Livestock depredation by wolves has caused a peak estimated economic loss of approximately $69,000 per year. John W. Duffield et al., *Wolf Recovery in Yellowstone: Park Visitor Attitudes, Expenditures, and Economic Impacts*, 25 THE GEORGE WRIGHT FORUM 13, 18 (2008).

22. *See, e.g.*, BROMLEY, *supra* note 2, at 67–84.

that we prefer. The algorithm must therefore begin with those preferences, with the community's vision of how it will look and operate in the future.

At this point it would be useful to explain my meaning when I use the word "community" and the effect of that meaning on our discussion of sustainability. The word often sounds like it represents a single, identifiable construct—usually a geographic location, or more accurately, a set of experiences related to a specific geographic location. But "community" should not be limited to geography. Community represents the particular settings, relationships, and choice sets that concern a resource or set of resources. It is not the geography that makes community but rather the relationships, shared experiences, and shared visions associated with that geography. Thus, in a particular geographic location, there might be a small business community, a cycling community, a parents-of-toddlers community, and—most important—a community of place. The community of place is the meta-community—the community of relationships between and among communities—that we have in mind when we identify a place.[23] I will employ this last use most often. It is this *community of place* that creates the constellation of visions, hopes, and understandings of purpose that give rise to a particular notion of *sustainable place.*

Understanding this definition of community, and understanding the role of the community in describing sustainable place and creating the institutional regime necessary to achieve that place, demonstrates that sustainability is not a simple toolkit or set of discrete goals that can be simply articulated and individually addressed and achieved. To be sure, a *sustainability plan* may include those components. But sustainability is a vision-based concept, not a strictly issue- or resource-based concept. Sustainability necessarily requires that we imagine both a set of conditions that the present community is capable of achieving as well as a similar set of conditions that we desire to provide future generations. Sustainability, of course, does include optimizing environment, economy, and equity across geographic scales and across time, but that optimization is necessarily determined by the community's visions of itself—what it is and what it wants to be. Only sustainable visions can create sustainable places.

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23. By using the word "place" in this fashion, I open a door to a wide literature from multiple academic disciplines regarding the interaction of individuals and their environments. My "place" reflects that literature to some degree, but does not approach the nuance present there. I simply use "place" to describe the entire suite of resources and experiences in a specific geography around which community might form. *See, e.g.*, Edward Relph, *Sense of Place*, *in* 10 GEOGRAPHIC IDEAS THAT CHANGED THE WORLD 205–26 (Susan Hansen ed., 1997); David A. Gruenewald, *Foundations of Place: A Multidisciplinary Framework for Place-Conscious Education*, 40 AM. EDUC. RES. J. 619 (2003); Robert Hay, *Sense of Place in a Developmental Context*, 18 J. ENVTL. PSYCHOL. 5 (1997); David M. Hummon, *Community Attachment: Local Sentiment and Sense of Place*, *in* 12 HUMAN BEHAVIOR AND ENVIRONMENT: ADVANCES IN THEORY AND RESEARCH 253 (Irwin Altman & Joachim F. Wohlwill eds., 1992).

III. PURPOSE ON THE GROUND, SCALE, AND THE DISCONNECT BETWEEN WHERE WE WANT TO GO AND THE TOOLS WE USE TO GET THERE

A. The Disconnect Between Law and Sustainability

The sustainability discussion in the preceding section might appear unnecessarily abstract and incomplete, but that is the essence of our current understanding of sustainability. Sustainability necessarily requires different approaches in different places, and different communities will imagine different conditions or settings that might be equally durable over time. Sustainability is about visions, but the law as applied is not. The law is about how we can resolve specific disputes in specific circumstances. Because sustainability is about creating places and communities, and thus primarily about purpose and implementing visions, specific-resource-focused legal regimes are too narrow—or more appropriately, operate on the wrong scale—to effectuate any comprehensive vision of a sustainable community.

This distinction might initially appear inconsistent with my introductory comments about the purpose of law. At its most fundamental, law is the tool we use to create the set of conditions we select as our preferred future for our place. It is the final blessing we bestow upon our settled deliberations. Law is perhaps the most durable component in a socially constructed framework—a set of institutions—that shape and influence our community relationships and fields of action.[24] These institutional agreements are therefore collective action, often articulated as law or formal rules, that both constrain as well as liberate and expand our individual and community opportunities.[25]

Because these institutional structures define choice sets, order and structure behavior, and outline the universe of acceptable social actions, they can only persist so long as they continue to advance the community goals that explain the particular institutional choices. If in retrospect we determine that our past choices do not advance our goals, or if our goals change, we make new choices. At any given moment, the existing institutions represent a constellation of visions or ideas regarding the purpose of a given place or situation, as those visions have changed or developed up to that moment.[26] The institutions represent the community's previous agreements about the future of that place, as those agreements

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24. *See, e.g.*, BROMLEY, *supra* note 2, at 31–66. Bromley argues that institutions consist of social norms, working rules, and property relations, with property relations being the most durable component of the institutional structure. "Working rules" refers to operational law—the statutes and common law doctrines that generally influence, guide, or expand our day-to-day behavior. Bromley uses "property relations" to refer to the settings and circumstances that the Supreme Court has chosen to protect as property "rights." In this article, I use the word "law" to refer to both the working rules (e.g., statutes) and Constitutional provisions (i.e., property relations) that influence the development and maintenance of place.

25. *See, e.g.*, John. R. Commons, *Institutional Economics*, 21 AM. ECON. REV. 648 (1931). Bromley uses this same characterization to describe "public policy." Daniel W. Bromley, *Reconsidering Environmental Policy: Prescription Consequentialism and Volitional Pragmatism*, 28 ENVTL. & RESOURCE ECON. 73, 79 (2004).

26. *See generally* COMMONS, *supra* note 2, at 147.

have been institutionalized—either formally or informally—and guide behavior at that moment. The community discussion about its future continues, and existing institutions might not appear capable of creating a new future now imagined by the community. As new agreements emerge for the future of a place, or as it becomes apparent that existing institutions cannot resolve conflict—either new conflict or pre-existing conflict that the existing institutions originally "sought" to remedy—the community will develop a new set of institutions, intending to implement the new imagined future.[27]

This discussion of institutional structures and their purpose might be convincing in the abstract, but often there is a difference between our original justifications for law and its ultimate condition on the ground in a specific place. One of this country's founding, and most durable, myths concerns the "rule of law." In this myth,[28] the law exists independent of human preferences, and judges and juries are bound by its principles and guidelines, whatever alternatives they might choose otherwise. The myth is revealed in many comfortable and well-worn phrases describing, or justifying, the American system.[29] The "law is no respecter of persons."[30] "All men are equal before the law."[31] "This is a government of laws not of men."[32] And of course, "We hold these truths to be self-evident, that all men are created equal . . . ."[33] There is both value and truth in this myth, and many of this country's proudest moments have been when we have achieved the ideals the myth embodies: protecting and respecting the individual, irrespective of race, national origin, gender, economic condition, or political power.[34] Some of our most shameful moments have been digressions from the myth.[35]

But as we move away from the natural rights of individuals, we find that the law is nothing more than the formalization of our particular preferences at a particular point in time. We create laws to achieve or maintain particular economic conditions,[36] to manage and allocate risk,[37] to create a specific aesthetic,[38]

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27. BROMLEY, *supra* note 2, at 67–84. This process operates continually, and the creation of an imagined future, development of institutional regimes to implement those imaginings, and the evaluation of those institutional regimes given the previous imaginings, occur simultaneously. We simultaneously imagine, implement, evaluate, and imagine again. *See* G.L.S. SHACKLE, DECISION, ORDER, AND TIME IN HUMAN AFFAIRS (1961).

28. I do not use the word "myth" in any pejorative sense. Myths are the stories we use to explain specific behaviors or choices, and thus are as valuable or serious as we choose to make them. We only use myth as a derogatory term when we are trying to discredit a story we do not find particularly useful.

29. *See, e.g.*, Walter Carrington, *Equality Before the Law*, 8 VA. L. REG. 481 (1922).

30. Trist v. Child, 88 U.S. 441, 453 (1874).

31. Beck v. Washington, 369 U.S. 541, 576 (1962).

32. Joint Anti-Fascist Refugee Committee v. McGrath, 341 U.S. 123, 177 (1951).

33. THE DECLARATION OF INDEPENDENCE para. 2 (U.S. 1776).

34. *See, e.g.*, Brown v. Board of Education, 347 U.S. 483 (1954).

35. *See, e.g.*, Korematsu v. United States, 323 U.S. 214 (1944); Scott v. Sanford, 60 U.S. 393 (1857); Plessy v. Ferguson, 163 U.S. 537 (1896).

36. For example, the Internal Revenue Code provisions allowing the deduction of mortgage interest represent a specific economic choice that "prefers" home ownership over renting. *See* 26 U.S.C. § 163(h)(2)(D), (3) (2006).

or to protect, preserve, or restore particular natural resources that otherwise possess no inherent rights.[39] On this last point, in suggesting that the objects of these particular regulatory regimes "possess no inherent rights," I do not intend to stake out a position on that topic.[40] Rather, my position is that we protect these landscapes, plants, animals, and ecological systems because we *choose* to do so, not because they are granted rights under our "rule of law."

Notwithstanding the role of choice in creating these regulatory regimes, once created, they too fall into the same rule-of-law mindset that works so admirably in the appropriate context. But our preference for the rule of law, and its refusal to appreciate choice or context, moves those regimes away from their original purpose to a condition in which only the language—i.e., the "law"—matters. This approach can yield results inconsistent with the law's original purpose. In motivating and approving the Clean Water Act, did the *American people*[41] anticipate that it would be implemented by referring to, and misquoting (or selectively quoting), a specific 1954 dictionary, particularly where that approach leads to *reduced* protection of the nation's waters?[42] In choosing to pro-

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37. The pollution control statutes all contain some mechanism for determining how risk is allocated between polluting industries and the public. The strictest standard in the Clean Air Act is the "lowest achievable emission rate." With the requirement that it be "achievable" by industry, even this standard recognizes that the public must bear some risk of polluting activities. *See* 42 U.S.C. § 7501(3) (2006).

38. Many local land-use ordinances serve to achieve a specific aesthetic. Minimum lot sizes, or large front-yard setbacks, reflect an understanding of what residential areas "should" look like. Similarly, historic preservation laws protect a specific aesthetic. The U.S. Supreme Court recognized: "The concept of the public welfare is broad and inclusive. The values it represents are spiritual as well as physical, aesthetic as well as monetary. It is within the power of the legislature to determine that the community should be beautiful as well as healthy, spacious as well as clean, well-balanced as well as carefully patrolled." Berman v. Parker, 348 U.S. 26, 33 (1954).

39. *See, e.g.*, The Endangered Species Act, 16 U.S.C. §§ 1531–99 (2006); The Wilderness Act, 16 U.S.C. §§ 1131–36 (2006); The National Park Service Organic Act, 16 U.S.C. §§ 1–4 (2006).

40. For a detailed discussion of this topic, see DONALD VANDEVEER & CHRISTINE PIERCE, THE ENVIRONMENTAL ETHICS & POLICY BOOK: PHILOSOPHY, ECOLOGY, AND ECONOMICS (3d ed. 2003); RODERICK FRAZIER NASH, THE RIGHTS OF NATURE: A HISTORY OF ENVIRONMENTAL ETHICS (1989); PAUL W. TAYLOR, RESPECT FOR NATURE: A THEORY OF ENVIRONMENTAL ETHICS (1986).

41. While it seems impossible to those of us whose political experience is mostly limited to post 1994 hyper-partisanship, the Clean Water Act (CWA) passed overwhelmingly. Congress approved the basic structure of the Act in 1972 by almost immediately overriding a presidential veto. *See* 86 Stat. 816, 903–04 (1972). The CWA's most significant amendments also passed by significant margins: 96 to 0 in the Senate and 346 to 2 in the House (1977 amendments), and 376 to 37 in the House (1990 amendments). The Library of Congress, THOMAS, http://thomas.loc.gov/cgi-bin/bdquery/z?d095:HR03199:@@@ L&summ2=m&#summary (last visited Feb. 26, 2010); The Library of Congress, THOMAS, http://thomas.loc.gov/cgi-bin/bdquery/z?d101:HR04323:@@@L&summ2=m& (last visited Feb. 26, 2010). The CWA is not unique in this regard. The Endangered Species Act of 1973 passed the Senate 92-0 and the House 355-4. The Library of Congress, THOMAS, http://thomas.loc.gov/cgi-bin/bdquery/z?d093:SN01983:@@@L&summ2=m& (last visited Feb. 26, 2010).

42. In his plurality opinion in *Rapanos v. United States*, 547 U.S. 715 (2006), Justice Scalia interpreted the Clean Water Act's jurisdictional limitations by referring to the definition of "waters" in the WEBSTER'S NEW INTERNATIONAL DICTIONARY 2882 (2d ed. 1954). Although he made a point to note that the CWA refers to the plural "waters," the dictionary definition Justice Scalia used was for the singular "water." *Rapanos*, 547 U.S. at 732. Justice Scalia skipped multiple options that would have supported an alternative conclusion before arriving at the definition that he edited to serve his purpose (I am fortunate to have the same dictionary in the hallway about five feet outside my office door). *See id.*

tect endangered species "whatever the cost,"[43] did Congress intend its purpose in enacting the Endangered Species Act (ESA) would be ignored in order to allow standing for claimants seeking to reduce the protections offered imperiled species?[44] Whether these decisions were correct as a matter of law is not the point. Both decisions overlooked the purpose of the statutes to focus on the meaning of specific words considered in isolation. The purpose was not important. Only the myth was important.

A strict formalistic approach to resolving disputes will lead to some injustices. And we might accept those (hopefully) rare injustices in exchange for the benefits provided by the rule of law. This could be a legitimate pragmatic choice, and, in many cases, we make just that choice for pragmatic reasons—i.e., we prefer the consequences of that approach, in that specific circumstance, to the consequences we imagine would result from feasible alternatives. But one of the negative consequences of focusing on language, instead of purpose, is that we forget our purpose. Over time, the purpose no longer matters. The rule of law then operates in isolation.

The examples used in this discussion are relatively narrow. We can understand clean water and protecting imperiled species without much struggle, and we can assess the success and usefulness of the statutory regimes relatively easily. If the water is clean, and we still want clean water, the statute has been a success. If imperiled species recover, and other species no longer go extinct (or go extinct less frequently perhaps), and we still desire to protect those species, the ESA remains useful. But what about a broader purpose? Is there a broader purpose?

In the two examples I provided above, I suggested that the Supreme Court followed a formalistic approach to statutory interpretation that placed little emphasis on the original purposes of the statutes in question. That disconnect between purpose and interpretation demonstrates one liability of our institutions that makes it difficult to achieve sustainable communities. But the cases demonstrate another liability as well. In the Clean Water Act example—*Rapanos v. United States*—the Court considered the limited question of the meaning of "waters of the United States" in the context of that specific Act.[45] This is a simple jurisdictional question—did Congress provide the EPA jurisdiction over Mr. Rapanos's activities?[46] In *Bennett v. Spear*, the Court focused entirely on the

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at 732–39. Is that the "rule of law"? For a discussion of how the plurality's opinion is disconnected from scientific justifications, see Barbara Cosens, *Resolving Conflicts in Non-Ideal, Complex Systems: Solutions for the Law-Science Breakdown in Environmental and Natural Resources Law*, 48 NAT. RESOURCES J. 257 (2008).

43. Tennessee Valley Authority v. Hill, 437 U.S. 153, 184 (1978).

44. Bennett v. Spear, 520 U.S. 154 (1997). This decision was unanimous, and the reasoning convincing, given the framework the Court provided in which to conduct its reasoning. But that reasoning is only legitimate if we accept the Court's assumption—supported by precedent—that in interpreting the specific provisions at issue, the overall purpose of the statute is largely irrelevant.

45. *Rapanos*, 547 U.S. at 723–39.

46. The Court specifically avoided the question of whether the Congress could reach the activity under its Commerce Clause authority. *Id.* at 737–38. It determined that Congress had not granted the EPA its full Commerce Clause authority, so the question was statutory, rather than constitutional. *Id.*

meaning of "best scientific and commercial data available" to determine if that phrase could be interpreted to protect economic interests.[47] Both disputes demonstrate an immutable characteristic of our legal system—an exceedingly narrow focus on specific behavior or specific aspects of social, economic, or physical relationships.

We find examples of this narrow focus throughout the law. Consider, for example, the void-for-vagueness doctrine in criminal law, which Black's defines as "[t]he doctrine—based on the Due Process Clause–requiring that a criminal statute state explicitly and definitely what acts are prohibited, so as to provide fair warning and preclude arbitrary enforcement."[48] Similarly, real property deeds might also be void where they have "such an insufficient property description as to be unenforceable."[49] In the strictest cases, governmental actions must be "narrowly tailored" to achieve a "compelling state interest."[50] Even in the most permissive approach concerning the Constitution's Equal Protection requirements, law must be rationally related to a legitimate state interest.[51] And, even without the equal protection guarantees, law must still articulate an identifiable end: "a regulation that fails to serve any legitimate governmental objective may be so arbitrary or irrational that it runs afoul of the Due Process Clause."[52]

These are not criticisms. Vague rules that are open to interpretation increase conflict and risk arbitrary government action. But narrow rules cannot achieve big things unless they are specifically and enforceably tied to those big things, which courts are reluctant to do. These characteristics of our legal system as applied—the inherent narrow focus of legal rules and the unwillingness of courts to allow purpose to influence interpretation—might preclude the usefulness of existing institutional regimes in a quest for sustainability. We can summarize the problem by identifying four potential disconnects between our current understandings of the role of law and the necessary understanding of sustainability.

The following are not perfect disconnects, and some overlap will exist between and among the concepts, but they serve to demonstrate the differential operations of law and sustainability. In assessing the usefulness of these disconnects, consider the trilogy of substantive first year courses in law school—Property, Torts, and Contracts—and the constitutional provisions that inform each. To what extent do these courses consider the first component of each disconnect? Or are they primarily about the second component? First, sustainability is about creating and protecting communities and community rights; the law focuses on individuals and individual rights. Second, sustainability creates benefits; the law focuses on preventing or remedying harm. Third, sustainability is

47. 520 U.S. at 176–77.

48. BLACK'S LAW DICTIONARY 1585 (8th ed. 2004).

49. *Id.* at 1604.

50. 16A AM. JUR. 2d *Constitutional Law* § 403 (2009); City of Cleburne v. Cleburne Living Center, 473 U.S. 432, 440 (1985) ("[T]hese laws are subjected to strict scrutiny and will be sustained only if they are suitably tailored to serve a compelling state interest.").

51. Romer v. Evans, 517 U.S. 620, 631 (1996) ("[W]e will uphold the legislative classification so long as it bears a rational relation to some legitimate end.").

52. Lingle v. Chevron U.S.A., Inc., 544 U.S. 528, 542 (2005).

aspirational; the law is operational. And finally, sustainability operates in a world defined by community choice sets; the law operates within arbitrary jurisdictional boundaries. We might summarize these disconnects by analogizing to the false dichotomy I alluded to earlier: sustainability is pragmatic; the law is formalistic.[53]

These four disconnects suggest we can best understand the problems inherent in understanding visions of sustainability as problems grounded in scale. This is not a problem of simple geographic scale, although that might be one component of it.[54] Rather, there is a disconnect in the scale of our choice sets. We have a range of options for defining our community, and a range of options for addressing specific resources. Unfortunately, nothing connects the two. To borrow from a common example of the problems of geographic scale, it is as if we articulated a goal of protecting water quality in the Snake River, but failed to use that goal to guide the use or misuse of the Salmon, Payette, or Wood Rivers, or the Henry's Fork.[55] Would we then wonder why the Snake is still dirty?

Sustainability operates on multiple geographic, social, and temporal scales. A geographic or specific problem-based approach cannot address the range of issues, and more important, the range of relationships, necessary to approach sustainability. Attaining a sustainable community at any scale therefore requires a reimagining of jurisdictional understandings to more closely match the community's choice sets. The institutional arena must be reconfigured as a "vision-shed" that incorporates all elements of a specific community's imagined future.

The necessity of the vision-shed approach is best demonstrated by considering the failings of existing legal regimes.[56]

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53. I suggest that this is a false dichotomy because the two approaches are not mutually exclusive, at least when considered as adjudicative approaches. Pragmatic adjudication can be formalistic, if formalism leads to useful outcomes. And formalism is a pragmatic choice to prefer a specific outcome. *See, e.g.*, RICHARD A. POSNER, LAW, PRAGMATISM AND DEMOCRACY 57–96 (2003); *see also* Richard A. Posner, *Pragmatic Adjudication*, *in* THE REVIVAL OF PRAGMATISM: NEW ESSAYS ON SOCIAL THOUGHT, LAW, AND CULTURE 235, 235–53 (Morris Dickstein ed., 1998); Richard A. Posner, *Pragmatism Versus Purposivism in First Amendment Analysis*, 54 STAN. L. REV. 737, 738 (2002) ("Pragmatism doesn't lead in a straight line to a philosophy of adjudication. But it encourages a mindset that is skeptical of any such philosophy that casts the judge in the role of a quester after certainty who employs to that end tools as close to formal logic as possible. It encourages the thought that the object of adjudication should be to help society to cope with its problems, and so the rules that judges create as a by-product of adjudication should be appraised by a 'what works' criterion rather than by the correspondence of those rules to truth, natural law, or some other high-level abstract validating principle.").

54. There is a long tradition of literature addressing this question of appropriate geographic scale for addressing a variety of resource questions, beginning famously (from a western perspective) with John Wesley Powell's *Report on the Lands of the Arid Region of the United States*. JOHN WESLEY POWELL, DEP'T OF INTERIOR, REPORT ON THE LANDS OF THE ARID REGION OF THE UNITED STATES (2d ed., 1879). *See also* Edward J. Taaffe, *Spatial Organization and Interdependence*, *in* 10 GEOGRAPHIC IDEAS THAT CHANGED THE WORLD, *supra* note 23, at 146; *but see* David Delany & Helga Leitner, *The Political Construction of Scale*, 16 POL. GEOGRAPHY 93 (1997).

55. These are all Idaho rivers that feed the Snake.

56. If it is not obvious by this point, the remainder of this article should make clear that my understanding of pragmatism is not Judge Posner's means-focused pragmatism, despite my approving citations above. Rather than viewing it as merely a means to a pre-determined end, pragmatism helps us *create* desirable ends. Pragmatism cares about purpose, because it is only by comparing consequences to purpose that we can assess the value of a particular choice. And through understanding the conse-

B. Visualizing the Disconnects

My annual argument to my students is that Land-use Law is the best class they will take in law school. Although they generally respond with a depressingly long list of other classes they prefer, we usually agree that land-use law is more directly connected to their everyday experiences than any other area of law. The size, cost, and location of the houses or apartments they live in, the length, ease, and aesthetics of their commutes to school or work, the nature of their recreational activities, among many other everyday experiences, are the products of a constellation of land-use decisions over time. Although most of us choose not to spend time envisioning the many complex legal relationships that create the world we experience when we wake up each morning, we do intuitively understand the product of those relationships. Our land-use decisions create the place, the community, and the suite of experiences that we call "home."

Narrowing that suite of experiences a bit to focus on the physical structure that is the epicenter of those experiences demonstrates how legal regimes determine the nature of our physical experience. Most local governments substantially regulate home building, and particularly the building (or planning) of multiple houses on a single parcel of land—i.e., a subdivision. Zoning ordinances might define the acceptable height and volume of the house, its location on its lot, the number of families or individuals that live inside, and the distance to the other elements of a person's life—work, school, leisure, the local doughnut shop. Building codes constrain how the physical structure itself is constructed, including specifications on the spacing of electrical outlets or the size of windows. And where multiple residences will be constructed on what was formerly a single parcel, subdivision ordinances determine or constrain lot sizes, public and private access, availability of public utilities or similar private services, width, location and layout of streets and alleys, landscaping, and even acceptable paint colors.[57]

But notwithstanding this substantial regulation of our "castles," most legal regimes do very little to ensure consistency across these various approaches. In Boise, Idaho, for example, the city's subdivision ordinance includes the requirement that all preliminary plats be shared with eighteen specified agencies, as well as any other appropriate agencies, for review and recommendations.[58] Those agencies have five working days to review the preliminary plat; if there is no response within those five working days, "approval of the Preliminary Plat by

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quences of a specific purpose, pragmatism allows an analysis of that original purpose. Consider Pierce's original argument regarding the fixation of *belief*. He was not concerned with means to achieve preexisting beliefs. Rather, pragmatism was the tool to employ to arrive at the belief that would motivate us to act. A method is not a belief; it is a tool used to attain belief. *See* Charles Sanders Pierce, *The Fixation of Belief*, 12 POPULAR SCI. MONTHLY 1 (1877).

57. *See, e.g.*, BOULDER COUNTY, COLO., LAND USE CODE art. 4-116 (2009) (specifying the paint colors allowed on building in the district), *available at* http://www.bouldercounty.org/lu/lucode/pdf/Boulder_County_Land_Use_Code_Article_4_116.pdf.

58. BOISE, IDAHO, MUN. CODE §9-20-05.C.4 (2009), *available at* http://www.cityofboise.org/Departments/City_Clerk/PDF/CityCode/Title9/0920.pdf.

such agency will be considered to be granted."[59] A similar requirement, and similar limitation on the time allowed for review, exists at the final plat stage of the process.[60]

This might appear to be a legitimate and effective means to approach internal consistency across all the various agencies with potential jurisdiction over the development of a specific parcel of land, but even a cursory review suggests it does not necessarily achieve that end. Although state law requires limited approval by certain agencies before recordation of a final plat, the Boise ordinance's requirements are limited to transmitting the preliminary and final plats to the listed agencies for "review and recommendations." There are no additional requirements addressing how to incorporate those recommendations, if at all. So long as the city follows its other obligations with respect to land-use decisions—including the requirement not to act in an arbitrary and capricious manner—it is apparently free to ignore any offered recommendations.[61]

A more careful consideration of this specific ordinance reveals a significant problem that is not confined to Boise, and would not be remedied by a redrafting of the ordinance to require justifying the failure to incorporate any legitimate recommendation. We will imagine for the moment that any substantial community development requires the input of a variety of public and private agencies. More important, we will further imagine that the primary authorizing or permitting agency must incorporate those recommendations, or justify its failure to do so. As noted, our list of agencies that must review the development includes both public and private entities. In addition to fire department, school district, highway district, the parks and recreation department, and surveyor, among other public agencies, we will consider input from utility companies, cable franchises, and even local interest groups.[62]

But now that we have allowed these various agencies the ability to participate in the approval process, we must ask *how* they will review the proposal (e.g., a subdivision plat). What is the *purpose* of the agency, and what ends does it want the development approval to achieve? If the various agencies have disparate and conflicting purposes, their reviews and recommendations are likely to be similarly conflicting, and even the requirement that the permitting agency incorporate recommendations on the proposal could not ensure any consistency across purposes. Consider a single type of public agency that should review and

59. *Id.*

60. *Id.* §9-20-05.D.4.

61. As noted above, state law does include several specific requirements regarding approval by other agencies. For example, the local highway district, if any, must accept the dedication of any public roads, IDAHO CODE ANN. § 50-1309(2) (West 2009); the applicable health district must approve the sewer and water facilities, IDAHO CODE ANN. §§ 50-1326 to 1329; the county treasurer must certify that there remain no unpaid, but due, property taxes, IDAHO CODE ANN. § 50-1308. Not only are these required approvals limited to a narrow set of agencies, they are limited to a narrow range of issues. Other than the somewhat vague and generic police power purposes, these requirements do not interact to achieve any set of community goals or preferences.

62. The Boise subdivision ordinance, for example, provides that Idaho Power, Qwest, Intermountain Gas, and the applicable cable system franchise have the opportunity to review the plat and provide recommendations. BOISE, IDAHO, MUN. CODE §9-20-05.C.4.

offer recommendations for any proposed subdivision in our system: the local transportation department or highway district. In Boise, this department is the Ada County Highway District ("ACHD"). While not every municipality will have a transportation agency with the ACHD's specific structure, the ACHD's *purpose* is illustrative.

The ACHD is an independent government agency responsible for the entire automobile transportation system in Ada County, Idaho,[63] including all urban streets, rural roadways, and bridges in the County, excluding only state and federal highways.[64] The ACHD's jurisdiction extends across both incorporated municipalities and unincorporated areas.[65] The ACHD describes its mission as: "To provide the best public highway system for the safe and efficient movement of people and goods in Ada County."[66] Like any public entity, the ACHD derives its authority from the police power, and accordingly exists to promote the public health, safety, and welfare.

But the District's stated mission suggests that it takes a very narrow view of its public obligations. To understand the problem with this narrow view, let us assume again that there exists in any community an agreement, which evolves over time, about what the community should look like, what its values are, and how it wants to grow or change in the future. It is this vision of the community that justifies all of the community's regulatory actions; the vision is the purpose for those actions. It is this vision that gives meaning to the abstract notions of public health, public safety, and public welfare that comprise the police power and legitimate government. Given that assumption, we expect all government agencies to act to implement that vision, as possible, within their areas of authority. If a given agency is not so motivated, we might fairly question the validity of its actions.

The stated mission of the Ada County Highway District is not unique to Ada County. A popular traffic engineering textbook contains the following statement on its first page: "Traffic engineering may be defined as *that phase of engineering which deals with the safe and efficient movement of people and goods on streets and highways.*"[67] The similarities between this definition of traffic engineering and the ACHD's mission are not coincidental and suggest that ACHD had the concept "traffic engineering" firmly in mind when crafting

63. Located in southwest Idaho, Ada County is Idaho's most populous county. Ada County QuickFacts from the U.S. Census Bureau, http://quickfacts.census.gov/qfd/states/16/16001.html (last visited Feb. 24, 2010). In addition to Boise, Ada County includes the cities of Eagle, Garden City, Kuna, Meridian, and Star. About Ada County, http://www.adaweb.net/About.aspx (last visited Feb. 24, 2010).

64. The district was created by referendum on May 25, 1971. ADA COUNTY HIGHWAY DISTRICT, POLICY MANUAL §1001 [hereinafter ACHD MANUAL], *available at* http://www.achd.ada.id.us/AboutACHD/PolicyManual.aspx. The Idaho Legislature affirmed the district in 1985. IDAHO CODE ANN. § 40-1301.

65. *See* ACHD MANUAL, *supra*, note 64, at §1001.

66. Ada County Highway District, About Us, http://www.achd.ada.id.us/AboutACHD/Default.aspx (last visited Feb. 24, 2010).

67. WILLIAM R. MCSHANE & ROGER P. ROESS, TRAFFIC ENGINEERING 1 (1990).

its mission.[68] Applying only a small amount of creative license, we can use this definition of traffic engineering to rewrite the ACHD's mission as "to provide the best public highway system for traffic engineering in Ada County."

Whether there is anything problematic about this revised (or the original) statement of purpose depends on how we define "safe and effective movement." That definition can vary from place to place, but exploring how traffic is engineered suggests that "safe and effective movement" does not consider the full constellation of concerns that create a community vision. In fact, traffic engineering is specifically concerned with an extremely narrow subset of those concerns.

Before continuing, I should recognize the unfairness of isolating a single public agency for ridicule and explain that choice. Transportation departments are not alone in failing to consider broader community visions, and thereby contributing to unsustainable places. When I walk out the front door of my home in Moscow, Idaho, it takes me about ten to twelve steps to reach the street. I could do the same at my previous house in Madison, Wisconsin, and in my childhood home in southeastern Idaho. Despite different settlement histories and cultural traditions, each of these towns has selected almost identical front yard setbacks for most residential development. Notwithstanding the tens of thousands of different jurisdictions, with different histories and visions of the future, across this country, zoning districts for single family homes routinely follow the same pattern of substantial front yard setbacks, regardless of local conditions.[69] Perhaps more frightening, both personally and in the context of creating unique and sustainable communities, all three of my aforementioned houses share virtually identical floor plans, despite sitting on lots with very different physical conditions. In short, it is not just our reliance on the automobile that threatens our ability to create unique and sustainable communities. We refuse to create and implement unique visions of community in many areas.

But the automobile plays perhaps a greater role than any other single factor in shaping the physical structure of our lives and communities. For my fourteenth birthday, my father rented a small plane and took my two brothers and me for a ride around southeastern Idaho. Although we flew over the Teton Dam site, near the Tetons, and over much of the national forest where we spent the summers camping, I remember very little about those parts of the flight. Instead, because my brothers had spent the hours before the flight eating their allowances in penny candy, I remember that my father's flying skills were a bit rusty.[70] But

68. Entering the phrase "safe and efficient movement of people and goods" into the Google search engine leads to an enormous variety of traffic-related government websites, including multiple state departments of transportation, local governments, the Federal Highway Administration, and even the government of South Africa. The search also returns a variety of traffic engineering manuals, guides and other documents.

69. *See* DANIEL R. MANDELKER, LAND USE LAW §5.01 (5th ed. 2003).

70. It was not something I considered surprising at the time, but my brothers had consumed their allowances in penny candy (and then lost the penny candy to the plane's little bags) because they were able to walk downtown to the store. When my father decided to rent the plane, we called home to

more significant, I still recall vividly the "epiphany" I experienced flying over my hometown when I realized how much of the physical space was covered by asphalt. By far the most significant feature of the landscape was the road system, which touched every aspect of my physical environment. While Google Earth and readily available aerial photographs likely will prevent my sons from experiencing a similar epiphany, since that awareness will be a more integral part of their lives, the effect of cars on our physical environment has only increased in the two-and-a-half decades since that flight.[71] More than any other public decision, the creation of our transportation system determines our community landscape. Even my complaints about uniform zoning ordinances only make sense in reference to a road.

Unfortunately, notwithstanding the outsized influence of the transportation system on the landscape of our neighborhoods and communities, we pay very little attention to the desires of the community—its vision for itself—in determining the operation of that system. We will discuss the *planning* of the system in more detail below, but consider how we operate the system itself, specifically the speed at which cars travel. Considering this single element of the traffic system best demonstrates the potentially narrow focus of highway districts and their current inability to help develop sustainable places.

Excessive speed is a primary cause of fatalities associated with motor vehicle accidents,[72] and it therefore stands to reason that reducing speed at which vehicles travel would be an effective mechanism to improve the safety of the transportation system. But more to the point of our present discussion, the speed of vehicle traffic also has a dramatic effect on pedestrians, cyclists, and the neighborhoods through which roads pass.[73] As vehicular speed increases, the attractiveness of the neighborhood as a place to *be*—to walk, ride a bike, or just enjoy the view—decreases. But perhaps more striking than the sense that we do not like a place is the feeling that we have been there before, even when visiting a new place. Cars, and traffic engineers, follow the same rules in Boise, Idaho, as

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see if my brothers wanted to join us. My mother drove downtown and found my brothers walking down Main Street. This was a perfectly normal occurrence. They were nine and eleven years old at the time.

71. Between 1982 and 2003, developed land area in the United States increased approximately 48.3%. NATURAL RES. CONSERVATION SERV., NATURAL RESOURCES INVENTORY: 2003 NRI, LAND USE 5 (2007). Total population increased approximately 25% over the same period (between the 1980 and 2000 censuses, population increased 24.2%). U.S. CENSUS BUREAU, STATISTICAL ABSTRACT OF THE UNITED STATES 5 (2000), *available at* http://www.census.gov/prod/2001pubs/statab/sec01.pdf.

72. *See, e.g.*, CEJUN LIU & RAJESH SUBRAMANIAN, NAT'L HIGHWAY TRAFFIC SAFETY ADMIN., REPORT NO. DOT HS 811 232, FACTORS RELATED TO FATAL SINGLE-VEHICLE RUN-OFF-ROAD CRASHES 1–2 (2009), *available at* http://www-nrd.nhtsa.dot.gov/Pubs/811232.PDF; DEBRA ASCONE & TONJA LINDSEY, NAT'L HIGHWAY TRAFFIC SAFETY ADMIN., RESEARCH NOTE NO. DOT HS 811 218, TRAFFIC SAFETY FACTS: FATAL CRASHES INVOLVING YOUNG DRIVERS 4 (2009), *available at* http://www-nrd.nhtsa.dot.gov/Pubs/811218.PDF (discussing contributing factors to fatal crashes involving young drivers).

73. *See, e.g.*, Kirsten Krahnstoever Davison & Catherine T. Lawson, *Do Attributes in the Physical Environment Influence Children's Physical Activity? A Review of the Literature.*, 3 INT'L J. BEHAVIORAL NUTRITION AND PHYSICAL ACTIVITY (2006); Anna Timperio et al., *Perceptions about the Local Neighborhood and Walking and Cycling Among Children*, 38 PREVENTATIVE MED. 39 (2004); Mimi Sheller & John Urry, *The City and the Car*, 24.4 INT'L J. URB. & REGIONAL RES. 737 (2000); JAMES HOWARD KUNSTLER, THE GEOGRAPHY OF NOWHERE: THE RISE AND DECLINE OF AMERICA'S MAN-MADE LANDSCAPE (1994).

they do in Madison, Wisconsin. Despite the different cultural and development histories of the two places, the new roads, new subdivisions, new strip malls feel strikingly similar. To borrow from James Howard Kunstler, our communities are rapidly becoming geographies of nowhere, where a thousand automobile-focused decisions lead to a thousand little no places that combine to create big no places.[74]

Notwithstanding the potential for traffic speed to influence the livability of a community, and for the physical, engineering responses required to facilitate safe travel at speed to dramatically alter a neighborhood's landscape, traffic engineers pay little attention to those factors in setting speed limits. In the *Traffic Engineering Handbook*, the Institute of Transportation Engineers provides that the "[e]stablishment of speed limits should be based on proper engineering and traffic data."[75] The *Handbook* then provides a list of the factors that should be considered in establishing speed limitations. The four factor categories are: prevailing vehicle speeds, physical features of the road itself (e.g., design speed, road surface, slope, curves, etc.), accident experience, and traffic characteristics and control.[76] Only one sub-factor—listed last—concerns anything other than the vehicle or physical roadway: vehicle-pedestrian conflicts.[77] In short, we base our speed limits almost exclusively on the physical characteristics of the road itself—from curb to curb—and the present behavior of traffic on the road. Within these factors, the primary determinant of speed limits is how fast people currently drive on the roadway, independent of how fast we think people *should* drive: "The 85th percentile speed as determined by speed studies is a principle factor to be used in the determination of proper speed limits. It is generally assumed that 85% of drivers operate at speeds that are reasonable and prudent for the conditions present in each situation."[78]

Both the measurement of system performance and the setting of speed limits fail to consider several critical elements of the communities the systems serve. As noted above, the traffic engineer's goal (and the goal of the ACHD) is to promote the "efficient" movement of people and goods. From the traffic engineer's perspective, "efficient" movement apparently means the movement of as many people or goods as quickly as possible without wasting system resources (i.e., roads). Although "efficient" could also include movement without undue risk to the human environment, the additional use of "safe" movement as a different concept suggests that "efficient" focuses primarily on a system that best uses is physical resources to achieve the desired end—the rapid movement of goods and people. The end result, perhaps not unexpected, is a system of wide roads without obstacles that might impede rapid movement. The "obstacles" that

74. KUNSTLER, *supra* note 73.

75. H. Richard Mitchell & Roy A. Parker, *Traffic Regulations*, *in* INSTITUTE OF TRANSPORTATION ENGINEERS, TRAFFIC ENGINEERING HANDBOOK 329, 348 (James L. Pline ed., 4th ed. 1991).

76. *Id.*

77. *Id.*

78. *Id.*

have been eliminated include street trees, public works of art, and the narrow, comfortable residential streets found in older residential districts. But even if these elements of community were not considered obstacles, they are not things the traffic engineering system allows the engineer to consider. This is not to say that traffic engineers do not care about livable, memorable communities, but rather that the traffic engineering *system* does not care. Achieving the goals of that system preclude consideration of the other factors. In other words, when the traffic engineer achieves her goal of "safe and effective" movement of goods and people, the community may be prevented from achieving its goals of creating a memorable place.[79]

Our transportation system, and the subdivision or land-use approach generally, demonstrates how our current legal regimes lack the understanding of vision-sheds, or even communities, that will be necessary to achieve sustainability. But that failure of vision—or more accurate, that failure to connect aspiration to operation—is unnecessary. We have simply chosen that disconnect. Very few regimes make any effort to ensure these multiple regulatory approaches are consistent with any broader vision for the future of a community. Although I noted the pragmatism vs. formalism distinction, it is not *that* choice that perpetuates the disconnects as they exist in Idaho (or many other states). Rather, it is a choice *within* a formalist, rule-of-law system, complicated by an ignorance of purpose, that promotes the disconnect. We can make a different choice.

IV. UNNECESSARY IMPEDIMENTS AND CHOICES WE DO NOT UNDERSTAND

Given the disparate purposes of the various components of any system that contribute to a community, the only mechanism to ensure that each of those components works together to achieve a single end—e.g., the creation and maintenance of a sustainable community—is to create an institutional regime that *requires* each component to achieve that end, whatever its sub-purpose. As communities create shared visions of their future, they identify sets of values, physical conditions, and notions of place within a broader community that justify all other community actions. Too often, regulatory systems emerge and evolve by focusing on the single question of *how* they might achieve a limited end (e.g., the provision of energy) rather than asking the more important question of *why* we care about that end. We provide energy (or build roads, or allow subdivision

79. This is a somewhat limited criticism of our current transportation engineering system, and further critiques must await another discussion. Our transportation system both institutionalizes and reifies social biases that preserve a series of inequalities. "Reify" is rather inadequate, as the transportation system allows the actual physical construction of these biases. The inequalities become an integral part of the durable, built environment. The single-occupant private automobile is the realm of the rich, white, and male. Transportation choices that prefer the automobile to walking, bicycling, or useable public transportation perpetuate gender, race, and class biases and inequalities. *See, e.g.*, Dolores Hayden, *Domesticating Urban Space*, *in* REDESIGNING THE AMERICAN DREAM: THE FUTURE OF HOUSING, WORK, AND FAMILY LIFE 225 (2002 [1984]); Dan Koeppel, *Invisible Riders: For L.A.'s Immigrant Day Laborers, Biking Isn't Exercise or a Hobby. It's a Way to Get to Work—If There's Work To Be Found*, UTNE, July/Aug. 2006, at 50.

development) only because that effort is required to build community. We also accept that achieving our desired end might require certain community sacrifices. So if the primary purpose is to support our community, or to implement a shared vision of the future of our community, why do we not care about the effect on that community as we develop the system? If we are not following a path toward our collective vision of place, what is the point?

We are not without examples of how we might use broad community visions to direct resource- or place-specific decisions or regulatory regimes; but unfortunately, we do not take advantage of even those limited opportunities. Current institutional regimes contain a crucial, and completely unnecessary, impediment to achieving sustainability: the unwillingness to give legal effect to land-use plans. There is no reason for this. Whatever the original reason for this choice, we retain the ability to select a different path. We can make this new choice consistent with the myth that apparently motivated our past choice—the rule of law.

Most American jurisdictions follow a similar approach to the regulation of private lands and the development of local communities. This similarity originates in two model statutes crafted by the Department of Commerce in the 1920s. Like most states, Idaho has adopted language very similar to that originally provided in 1926 in the Standard State Zoning Enabling Act (SZEA).[80] The SZEA's language provides that land-use regulations "shall be made in accordance with a comprehensive plan."[81] Idaho law provides that "zoning districts shall be in accordance with the policies set forth in the adopted comprehensive plan."[82]

Although this language might appear relatively straightforward, confusion about the appropriate use of a "plan" for guiding zoning decisions arose almost immediately.[83] Section 3 of the SZEA, completed in 1926 and adopted almost immediately by over half of the states,[84] contains the following requirement in its entirety:

> Such regulations[85] shall be made in accordance with a comprehensive plan and designed to lessen congestion in the streets; to secure safety from fire, panic, and other dangers; to promote health and the general welfare; to provide adequate light and air; to prevent the overcrowding of land; to avoid undue concentration of population; to facilitate the adequate provision of transportation, water, sewerage, schools, parks, and other public requirements. Such regulations shall be made with rea-

80. IDAHO CODE ANN. §§ 67-6501 to 6538 (West 2006).

81. STANDARD STATE ZONING ENABLING ACT § 3 (1926).

82. IDAHO CODE ANN. § 67-6511.

83. Charles M. Haar, *In Accordance with a Comprehensive Plan*, 68 HARV. L. REV. 1154 (1955).

84. *Id.* at 1156, n. 9.

85. Sections 1 and 2 of the SZEA provide authority to regulate the height and size of buildings, population density, location and use of buildings, and size of lots, among other related activities. STANDARD STATE ZONING ENABLING ACT §§ 1, 2.

> sonable consideration, among other things, to the character of the district and its peculiar suitability for particular uses, and with a view to conserving the value of buildings and encouraging the most appropriate use of land through such municipality.[86]

Given that list of purposes supporting land-use regulation, and the obvious necessity of taking a broad view of a community in order to achieve each purpose, it is unsurprising that the SZEA would include the reference to a comprehensive plan. A note to section 3, titled "with a comprehensive plan," suggests that the requirement that regulation be in accordance with such a plan "will prevent haphazard or piecemeal zoning. No zoning should be done without such a comprehensive study." [87] While this requirement seems reasonable, the SZEA did not define "comprehensive plan" nor provide any guidance as to what the plan might look like.

Two years later, after at least twenty-nine (of forty-eight) states had already adopted the SZEA, the Department of Commerce completed the Standard City Planning Enabling Act (SCPEA). The SCPEA refers to "municipal," "city," and "master" plans, but does not use the term "comprehensive plan."[88] As described by the Planning Act, "[t]he plan shall be made with the general purpose of guiding and accomplishing a coordinated, adjusted, and harmonious development of the municipality and its environs which will, in accordance with present and future needs, best promote health, safety, morals, order, convenience, prosperity, and general welfare . . . ."[89] The Planning Act anticipates that all land-use decisions will be consistent with the provisions of any adopted "master plan," and requires a two-thirds majority on the city council (or, presumably, other local legislative bodies) to overrule a determination of the planning commission that a specific project is inconsistent with the city's plan.[90] A note to section 9 of the SCPEA suggests that the section on the "legal status" of the city plan—ensuring that the plan guides land-use decisions—is "one of the most important" components of the SCPEA.[91]

Although the two standard acts use different language to describe the "plan" at issue, the similar purposes and obvious physical connections between planning and zoning might have led to the simple conclusion that the SZEA's "comprehensive plan" is the same as the "municipal," "city," or "master" plan of the SCPEA. Similarly, "in accordance with" might have led to the reasonable conclusion that a comprehensive plan is legally enforceable on some level, at least in the context of land-use decisions authorized by the SZEA. But from the very beginning, courts struggled with how to implement the "in accordance with" language.[92]

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86. STANDARD STATE ZONING ENABLING ACT § 3.
87. *Id.* § 3 n.22.
88. STANDARD CITY PLANNING ENABLING ACT §§ 2, 16, 10 (1928).
89. *Id.* § 7.
90. *Id.* § 9.
91. *Id.* § 9 n.45.
92. *See* Haar, *supra* note 83.

An early commentary on the "in accordance with" language suggests that, in the first few decades after the SZEA, there was "a judicial tendency to interpret the statutory directive that zoning ordinances shall be 'in accordance with a comprehensive plan' as meaning nothing more than that zoning ordinances shall be comprehensive."[93] Over fifty years ago, Harvard law professor Charles Haar argued in favor of comprehensive planning, already bemoaning its failure:

> With different local agencies concentrating on streets, parks, roads, and schools, and with the increasing tendency to delegate new techniques such as urban renewal or public housing to *ad hoc* authorities, there is danger that diverse legislative activities affecting the physical environment will not be coordinated, and that inefficiencies, inconsistencies, and waste will result.[94]

In 1953, when Professor Haar made this argument, although almost 60% of cities over 10,000 residents had enacted zoning ordinances, only 32% had enacted master plans.[95]

After fifty years of judicial decisions that failed to require a comprehensive plan as a basis for land-use regulation, a few states have made that connection a statutory requirement.[96] But that effect has been limited. An analysis in 2003 suggested that eighteen states continue to view the comprehensive plan as having no independent legal significance, i.e., there does not need to be an independent comprehensive plan.[97] Another twenty-six states give the comprehensive plan some consideration in making land-use decisions, but the nature of that consideration varies and is often limited.[98] According to the 2003 analysis, only six states fit into the "planning mandate" category, where plans are legally enforceable. But given that one state's Supreme Court appears to disagree with that categorization,[99] and another's statutes require consistency with the plan for only a

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93. *Id.* at 1157.

94. *Id.* at 1155.

95. *Id.* at 1157 n.14.

96. *See* DANIEL R. MANDELKER, LAND USE LAW § 3.01 (5th ed. 2003).

97. Edward J. Sullivan & Michael J. Michel, *Ramapo Plus Thirty: The Changing Role of the Plan in Land Use Regulation*, 35 URB. LAW. 75, 86 (2003). This is referred to as the "Unitary Approach" because these states hold that comprehensive plans can be found in the zoning ordinance—it need not be a separate document. *Id.* at 84; *see also* Edward J. Sullivan & Laurence Kressel, *Twenty Years After—Renewed Significance of the Comprehensive Plan Requirement*, 9 URB. L. ANN. 33 (1975); Edward J. Sullivan, *Recent Development in Land Use, Planning and Zoning Law: Comprehensive Planning*, 36 URB. LAW. 541 (2004); Edward J. Sullivan, *Recent Developments in Comprehensive Planning Law*, 41 URB. LAW. 547 (2009) (characterizing the Unitary approach as "long the majority position").

98. Edward J. Sullivan & Michael J. Michel, *Ramapo Plus Thirty: The Changing Role of the Plan in Land Use Regulation*, 35 URB. LAW. 75, 86 (2003). Idaho falls into this category. *Id.* at 90. The discussion below will demonstrate the limited nature of that consideration. *See also* Udell v. Haas, 235 N.E.2d 897, 902–03 (N.Y. 1968) (finding a "plan" in the village's pattern of zoning ordinances, even though New York requires a comprehensive plan).

99. *See* Woods v. Kittias County, 174 P.3d 25, 33 (Wash. 2007) ("Comprehensive plans serve as 'guide[s]' or 'blueprint[s]' to be used in making land use decisions. Thus, a proposed land use decision must only *generally conform*, rather than strictly conform, to the comprehensive plan. A comprehensive plan does not directly regulate site-specific land use decisions." (citations omitted)).

limited set of decisions,[100] the reality on the ground is likely that plans have even less effect than suggested.

These three arbitrary categories represent only some of the diversity that exists across states in applying the original requirements that land-use decisions be "in accordance with" a comprehensive plan. Given that different jurisdictions have taken different approaches to the connection between comprehensive plans and specific land-use decisions, we might assume that there is nothing in the "in accordance with" language (or similar language) that forces a specific outcome.[101] Put another way, assuming that the highest courts of the various states are reasonable, we can conclude that multiple reasonable interpretations of the "in accordance with" language exist. Because the language itself will not provide a definitive conclusion as to the appropriate outcome—i.e., strict legal formalism is not useful—we have to investigate the courts' other explanations for choosing one outcome over another. The Idaho Supreme Court referred to his concept most recently in 2008 when it determined that amendments to the Comprehensive Plan do not "authorize any development" because a comprehensive plan "is not a legally controlling zoning law . . . ."[102] That clear and definitive statement suggests that, at some point, the Court engaged in a careful analysis of the statutory language and fully explained its decision. Given the importance of a plan in guiding development and achieving a community's vision, we—the vision creators—should expect no less before our visions are legally dismissed.

In *Giltner Dairy*—the 2008 decision quoted above—the Court considered the right to appeal a plan amendment; it did not consider the validity of a land-use decision argued to be in conflict with the comprehensive plan. But the case on which *Giltner Dairy* relied in stating that a comprehensive plan is not legally enforceable, *Evans v. Teton County,* did specifically address this issue. In *Evans v. Teton County*, the Idaho Supreme Court considered the largest single development in Teton County's history.[103] In 1999, when Teton County first consi-

100. Sullivan placed Wisconsin in the "planning mandate" category based on a statutory provision allowing denial of a subdivision plat if it is inconsistent with the comprehensive plan. *See* Sullivan & Michel, *supra* note 98, at 107 n.196; *see also* WIS. STAT. § 236.13(1)(c) (2008). This consistency requirement does not appear to apply to any other provisions of Wisconsin land use law (e.g., zoning designations).

101. It appears that the states placing the greatest significance on the comprehensive plan have adopted their own language, e.g., "shall be consistent with," *see, e.g.*, CAL. GOVT. CODE §§ 65302.3(a), 65454 (West 2009) *and* FLA. STAT. § 163.3194(1)(a) (2009), or decisions "shall be conditioned upon compliance with" the plan, WIS. STAT. § 236.13(1)(c) (2008). Delaware has chosen the cleanest approach, providing that comprehensive plans "shall have the force of law." DEL. CODE. ANN. tit. 22, § 702(d) (2010). I do not want to get lost in a discussion of whether "in accordance with" and "shall be consistent with" require necessarily dissimilar legal interpretations. Nor do I care if they are the functional equivalents. I think both phrases allow for multiple reasonable interpretations, no more. The more important question is why a particular court would select a particular interpretation.

102. Giltner Dairy, LLC v. Jerome County, 145 Idaho 630, 632, 181 P.3d 1238, 1240 (2008), (quoting Evans v. Teton County, 139 Idaho 71, 76, 73 P.3d 84, 89 (2003)), *abrogated on other grounds by* Neighbors for Responsible Growth v. Kootenai County, 147 Idaho 173, 207 P.3d 149 (2009).

103. The Teton Springs Resort consists of, among other amenities, a golf course, equestrian facilities, a heliport, a commercial district, and approximately 550 residential units and 150 overnight accommodations on 780 acres. Prior to the development application, the land at issue was zoned R2.5, which allowed one housing unit per 2.5 acres, or 312 total housing units on this specific site, without any other commercial or other uses. *See* Jerrold A. Long, New West or Same West?: Evolving Land-

dered the project, there were approximately 2,500 total housing units on 300 square miles of private land in the entire county.[104] The Teton Springs project—with 550 new units—represented a 20 percent increase in the total number of housing units available in the county.

But the absolute size of the development, and its inconsistency with the existing physical condition of the county,[105] might not be relevant. In fact, for the purposes of our discussion here, whether the project—and the zoning change required to authorize the project—was actually consistent with the comprehensive plan also is not relevant. Rather, our concern is whether the Idaho Supreme Court considered whether that consistency (or lack thereof) might be relevant. In addressing this point, the court wasted little time. Without any introduction or analysis, the court stated:

> A comprehensive plan is not a legally controlling zoning law, it serves as a guide to local government agencies charged with making zoning decisions . . . . The "in accordance with" language of I.C. § 67-6511 does not require zoning decisions to strictly conform to the land use designations of the comprehensive plan.[106]

Having recognized this point, the Court then noted that the comprehensive plan is not without influence, but that the "in accordance with" determination is a factual determination that can only be overturned where it is "clearly erroneous."[107] The clearly erroneous standard provides an enormous amount of deference to local governments, and consequently, in the thirty-five years that the Local Land-use Planning Act[108] and the "in accordance with" language have been part of Idaho land-use law, the Idaho Supreme Court has *never* overturned a zoning ordinance or development decision for violating this standard.[109] Only once, in 1983, did the Idaho Court use the "in accordance with" language to

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Use Institutions in the Rural American West 183–87 (2008) (unpublished Ph.D. dissertation, University of Wisconsin-Madison) (on file with University of Wisconsin-Madison Library). Two subsequent developments that would surpass Teton Springs in size have been approved by the County but have suffered indefinite delays due to the changed real estate market caused by both an over-supply of residential lots in the county and the ongoing recession.

104. 2000 U.S. Census data, Summary File 1, Table H1, H18, Teton County, Idaho, *available at* http://www.census.gov/Press-Release/www/2001/sumfile1.html. Approximately 2,000 of these housing units were "occupied." The other 500 were vacation homes.

105. Teton Springs is immediately adjacent to the town of Victor, Idaho. The 2000 census reports that Victor had 840 residents in 330 housing units. In other words, Teton Springs would almost triple the size of Victor. 2000 U.S. Census data, Summary File 1, Table H1, P1, Victor, Idaho, *available at* http://www.census.gov/Press-Release/www/2001/sumfile1.html.

106. Evans v. Teton County, 139 Idaho 71, 76, 73 P.3d 84, 89 (2003).

107. *Id.*

108. IDAHO CODE ANN. §§ 67-6501 to 6538 (West 2010).

109. The closest the Court has come to overturning a local decision based on this standard was in *Taylor v. Board of County Commissioners*, where the Court noted: "Where the Board's findings do not establish that the zone change applications are completely in accordance with the comprehensive plan, it is difficult for a reviewing court to affirm the Board's decision that the zone change applications are 'in accordance with' the comprehensive plan." 124 Idaho 392, 400, 860 P.2d 8, 16 (1993). However, perhaps suggesting a reticence to follow through on that threat, the Court ultimately avoided the issue and overturned the county's decision on procedural grounds. *Id.* at 19.

overturn a land-use decision.[110] In that case, the County failed to make *any* findings of fact supporting the decision.[111]

Fully understanding any legal rule requires an investigation into why the rule exists. As noted above, Idaho's land-use laws adopt principles that have been in use across the country for decades. Although many states share Idaho's approach, an increasing number do not.[112] Again, given the apparent ambiguity in both the language of the statutory provision (and its origin), and the different interpretations used by various competent courts, we can only conclude that the language does not *require* a specific interpretation. Why then has Idaho chosen the approach described in the *Evans* decision?

Although the Idaho Supreme Court had considered the interaction of the comprehensive plan and subsequent land-use decisions briefly on at least one previous occasion,[113] it did not thoroughly analyze the legal status of the comprehensive plan until *Bone v. City of Lewiston* in 1984.[114] The *Bone* decision appears to be the origin of the statement in *Evans* that comprehensive plans are not legally enforceable. In its discussion of the status of comprehensive plans in *Evans*, the Idaho Supreme Court cited to five different cases, including *Bone*.[115] Each of the other four cases relied on *Bone*, and none of them engaged in an independent analysis of the issue.[116] Two of the cases included the identical statement, both ultimately borrowing from *Bone*: "This Court has held that a comprehensive plan does not operate as legally controlling zoning law, but rather serves to guide and advise the governmental agencies responsible for making zoning decisions."[117] Since all subsequent courts have followed suit, and dutifully cited to *Bone* for the proposition that land-use decisions need not be in strict conformance with the comprehensive plan—including to overturn a county ordinance that would have independently required consistency with a comprehensive plan[118]—we must consider the legitimacy of that initial decision.

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110. Love v. Bd. of County Comm'rs of Bingham County, 150 Idaho 558, 560, 671 P.2d 471, 473 (1983).

111. *Id.* at 560, 671 P.2d at 473. ("The district court's decision reversing the decision of the Commission was appropriate because of the Commission's failure to make written findings in support of its conclusions.").

112. *See, e.g.*, Edward J. Sullivan. *Recent Developments in Comprehensive Planning Law*, 41 URB. LAW. 547 (2009); *see also* MANDELKER, *supra* note 69, at §3.01.

113. *Love*, 671 P.2d 471.

114. Bone v. City of Lewiston, 107 Idaho 844, 693 P.2d 1046 (1984).

115. Evans v. Teton County, 139 Idaho 71, 73 P.3d 84, 89 (2003).

116. Friends of Farm to Market v. Valley County, 137 Idaho 192, 46 P.3d 9 (2002); Urrutia v. Blaine County, 134 Idaho 353, 2 P.3d 738 (2000); Sprenger, Grubb, & Assoc. v. City of Hailey, 127 Idaho 576, 903 P.2d 741 (1995); Ferguson v. Bd. of County Comm'rs of Ada County, 110 Idaho 785, 718 P.2d 1223 (1986).

117. *Urrutia*, 134 Idaho at 357–58, 2 P.3d at 742–43; *Friends of Farm to Market*, 137 Idaho at 200, 46 P.3d at 17 (quoting *Urrutia*, 134 Idaho at 357–58, 2 P.2d at 742–43). The *Urrutia* decision cited to a previous decision to support this statement; that previous decision relied on (and quoted) *Bone*. *See* S. Fork Coalition v. Bd. of Comm'rs of Bonneville County, 117 Idaho 857, 792 P.2d 882, 888 (1990).

118. *See Urrutia*, 134 Idaho 353, 2 P.3d 738. The court determined that the county's requirement that subdivision proposals "shall conform to the Comprehensive Plan" was inappropriate in that it "elevates the plan to the level of legally controlling zoning law." *Id.* at 743. I will discuss this argument below in my discussion of the *Bone* decision, but it is worth noting here that requirement of conformance with the plan was contained in a Blaine County ordinance. In other words, the County created a

John Bone owned a parcel of land zoned for low-density residential use. The City of Lewiston's land-use map, created as part of the City's comprehensive plan, showed Mr. Bone's land as zoned for commercial use. Based on the land-use map, Mr. Bone requested a rezone from residential to limited commercial use. Because it determined that (a) commercial use would be incompatible with the then existing residential uses of the surrounding properties, and (b) that the city had an over abundance of unused commercial properties, Lewiston denied Mr. Bone's request. Mr. Bone sought a writ of mandamus ordering the city to rezone his land, based on the land-use classification of the land-use map, and the requirement that zoning decisions be "in accordance with" the comprehensive plan. The district dourt agreed with Mr. Bone and issued the writ.[119]

Before proceeding to consider the court's analysis, we should note, as the court did,[120] that Mr. Bone based his claim on the land-use classification provided on the *land-use map*. The land-use map is but one component of the broader comprehensive plan. At the time, comprehensive plans contained eleven elements, one of which was "land use."[121] In addition to a discussion of natural land types, identification of existing uses, and a discussion of the suitability of lands for a variety of uses, the law required a map "indicating suitable projected land uses for the jurisdiction."[122] Although the court recognized that the land-use map "is not the comprehensive plan,"[123] and could have used that fact to reach a narrow, case-specific decision, it relegated the point to a footnote and proceeded with a much broader analysis.

On the surface, it might appear that the court's approach to the legal status of comprehensive plans followed both formalistic and pragmatic trajectories. The court identified two reasons for disagreeing with Mr. Bone's contention that "he is entitled to have his property zoned in conformance with the *City's land use map*."[124] The first is an apparently formalistic analysis of the statutory language. The second, while superficially focusing on the purpose of the various components, and thus suggesting the court might also be focusing on whether its decision will promote those purposes, is also narrowly formalistic.

I suggest that the court followed purely formalistic approaches to resolving this dispute not to denigrate that particular tool. As discussed above, there are legitimate reasons to adopt formalism as a means to reaching justifiable legal conclusions. But one inherent problem with a formalist approach is that it argues

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law requiring consideration of a specific factor. The Idaho Court is suggesting that it is inappropriate to allow a law to have the force of law.

119. All facts are taken from *Bone*, 107 Idaho at 845–47, 693 P.2d at 1047-49.

120. *See id.* at 849, 693 P.2d at 1051 n.7.

121. *See* 1975 Idaho Sess. Laws 516. Current law requires comprehensive plans consider fifteen components. Land use remains one of the required components. IDAHO CODE ANN. § 67-6508(a) to (o) (2010).

122. *See Bone*, 107 Idaho at 849, 693 P.2d at 1051 n.7. The current version of the law contains the same language. IDAHO CODE ANN. §67-6508(e) (West 2010).

123. *Bone*, 107 Idaho at 849, 693 P.2d at 1051 n.7.

124. *Id.* at 849, 693 P.2d at 1051 (emphasis added). Again, the Idaho Court recognized that Mr. Bone was relying exclusively on the land use map, not the complete comprehensive plan.

that the ultimate outcome is the *only* legitimate outcome, because that is the outcome that the law requires. Absent the argument that the court's chosen outcome is the *only* legitimate outcome, there would be no justification for formalism as the ultimate arbiter, because there would be no mechanism for selecting between two (or more) potential and equally legitimate outcomes.

The *Bone* court based its holding on two arguments: first, that Mr. Bone's argument would make Idaho Code § 67-6511 internally inconsistent[125], and second, that his argument did not recognize the different purposes of a zoning ordinance, the land-use map, and the comprehensive plan.[126] The court grounded its first argument in Idaho Code § 67-6511(b), which provided, at that time,[127] that if a rezoning request is in accordance with the comprehensive plan, the zoning commission "*may* recommend and the governing board *may* adopt or reject the [zoning] amendment [request]."[128] The court spent very little time on this argument, noting only that the legislature would have used "shall" had it desired strict conformance with the comprehensive plan.[129]

The court's second argument characterizes Mr. Bone's argument as elevating the comprehensive plan to the status of a zoning ordinance, which, the court suggests, "finds no basis in law or reason . . . ."[130] According to the court, the zoning ordinance, land-use map, and comprehensive plan all serve different purposes.[131] The court never identifies the purpose of the comprehensive plan, but does point out that a land-use map is intended to designate suitable *projected* land uses, while the zoning ordinance identifies permissible *present* uses.[132] According to the court, the land-use map is a "goal or forecast" of future development, and that it is "illogical to say that what has been projected as a pattern of projected land use is what a property owner is entitled to have zoned today."[133] Consequently, the *land-use map* cannot require that present zoning match what it explicitly identifies as projected uses.[134] The court then further justifies its logic by identifying support in a "large body of case law," represented by cases from three states.[135]

Before we consider whether the court's reasoning is convincing, we should recognize the court's scarcely concealed efforts to convince us that no other result is possible. For example, as noted, the court argues that the alternative result

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125. *Id.*

126. *Id.* at 849–50, 693 P.2d at 1051–52.

127. As will be discussed below, the Idaho legislature has amended the statute to remove the provision stating that the proposed rezone should be in accordance with the comprehensive plan. Now the requirement is simply that the local governing body must consider the comprehensive plan. This change eliminates the justification for one of the Court's arguments in *Bone*. *See* 1999 Idaho Sess. Laws 1106.

128. *Bone*, 107 Idaho at 849, 693 P.2d at 1051 (emphasis provided by court); *see* 1975 Idaho Sess. Laws 516.

129. *Bone*, 107 Idaho at 849, 693 P.2d at 1051.

130. *Id.* at 850, 693 P.2d at 1052.

131. *Id.*

132. *Id.*

133. *Id.*

134. *Id.*

135. *Id.*

"finds no basis in law or reason."[136] The second part—that the argument has no basis in reason—may ultimately be true, even if it seems too strong, but we should first consider it a bit more carefully before reaching that conclusion. But the first part—that the alternative finds no basis in law—is precisely the question that the court is tasked with answering. We cannot know if the argument has a basis in law until the court determines what the law is. The *Bone* court is basing its determination of what the law should be on an understanding of what the law already is. But this is the case that determines what the law is. It is one thing for a court to rely unquestioningly—as the court has done since *Bone*—on established precedent in determining that a particular argument has "no basis in law"; it is quite another for a court with no legal history to make the same claim. Stripped of its pretenses, this statement is an attempt to use the law's authoritarian character to convince an audience to accept a specific outcome when multiple legitimate outcomes were possible. It is not an explanation. It is certainly not a legal analysis.

While Mr. Bone's *specific argument* ultimately, and appropriately, may have found no basis in law or reason, the court's ultimate holding—which went much farther than the actual controversy before the court—was not so obvious. Again, *Bone* stands for the proposition that land-use decisions do not have to strictly conform to the comprehensive plan, and that the plan is a mere guide. Was that outcome necessary?

The court's first argument faces two potential problems. The first problem calls into question the validity of the court's reasoning in 1984. The second suggests the *Bone* decision is no longer good law. The court based its legal analysis in the use of the word "may" to describe the local government's range of options in considering a request for a rezone—if the request is in accordance with the comprehensive plan, the governing board *may* approve or reject it. In holding that the word "may" determines the outcome of this case, the court made two apparent mistakes:[137] it took an unnecessarily narrow view of the comprehensive plan, and because of that narrow view, it assumed the outcome of the case. The court apparently failed to recognize that a comprehensive plan is an effort to plan for the growth and change of a community. As a community grows, acceptable land uses in a given location will change—agriculture might transition to residential or industrial, residential might transition to commercial, and commercial might transition to residential. It is precisely the role of the comprehensive plan to recognize and plan for those transitions. The plan thus might recognize two or more legitimate uses of a specific parcel of land over time. Both (or all) of those uses would be in accordance with the comprehensive plan. Mr. Bone's land adequately demonstrates this point. The plan recognized that at some point in the following two decades it would transition from residential to commercial. The

136. *Id.*

137. I say "apparent mistakes" because the Court provided almost no explanation for this part of its decision. We have no way of knowing what assumptions it did or did not make, but the assumptions I make about the Court's assumptions seem reasonable.

precise moment of that transition might not be clear, and the plan must anticipate both uses.

If we recognize this point—which is inherent in the concept of a "plan"—it becomes clear that the use of the word "may" in this statutory provision would be consistent with a legal requirement that all land-use decisions, including rezones, be done in strict accordance with the comprehensive plan. I suggested above that the court assumed the outcome of the case. Use of the word "may" is only *inconsistent* with a legally enforceable comprehensive plan if the existing land uses are *not* in accordance with the existing comprehensive plan. That condition could only occur if the comprehensive plan were not legally enforceable, i.e., the existing zoning designations are inconsistent with the comprehensive plan.[138] But if both the existing use and the proposed use are consistent with a comprehensive plan that anticipates the transition from the one use to the other, it is entirely appropriate, and legally consistent, to grant to the local government the discretion to determine when that transition should occur while still requiring strict adherence to the comprehensive plan. Thus it is only by assuming that the plan is not legally enforceable (i.e., does not influence existing conditions) that the court can use the word "may" to determine that the plan is not legally enforceable. Had the Idaho court recognized the simple fact that a plan can (and often must) anticipate multiple legitimate uses of a specific parcel over time, it might not have found use of the word "may" to be inconsistent with a mandate of strict conformance with the comprehensive plan.

Even assuming the court's original reasoning were valid (relying on "may"), it is wholly irrelevant today. In 1999, the Idaho Legislature revised the language at issue.[139] Now, instead of providing that a local governing board "may" accept or reject a proposed amendment that is "in accordance with the plan," the law provides that the board may accept or reject a proposed amendment "[a]fter *considering* the comprehensive plan and other evidence . . . ."[140] This language implicitly recognizes that *both* the existing and proposed uses might be consistent with the comprehensive plan, and appropriately grants the local government the discretion to determine the appropriate approach at any given time. To the extent Idaho courts continue to rely on *Bone* for precedent, that reliance is now misplaced, at least with respect to this particular justification for the *Bone* holding.

The *Bone* court's second argument is similarly problematic. In footnote 7, the court recognizes that Mr. Bone's argument is based on the projected land uses contained in the plan's land-use map, and the court repeatedly refers to this fact. The land-use map is only one component of the comprehensive plan, and can only be understood in connection with the rest of the plan. Despite recognizing that point, the court went on to base its second argument entirely on the different purposes of zoning ordinances and land-use maps. It did not discuss the

138. Again, an existing use might be inconsistent with what the plan anticipates for the future, but this is not inconsistent with the plan itself. The plan would anticipate those transitions.

139. 1999 Idaho Sess. Laws 1106.

140. IDAHO CODE ANN. § 67-6511(b) (West 2010); 1999 Idaho Sess. Laws 1106.

purpose of the comprehensive plan itself, and whether that purpose suggests the need to make the plan legally enforceable. But assuming the court actually did consider the purpose of the comprehensive plan—which it did not—we see again that the court assumed the outcome to justify its decision that a comprehensive plan is not legally enforceable. In introducing its argument, the court suggests Mr. Bone's position would elevate the plan to the status of a zoning ordinance. The court's implicit suggestion is that *only* a zoning ordinance is legally enforceable, and since a comprehensive plan is not a zoning ordinance, it cannot be legally enforceable. But that simply assumes that a comprehensive plan is not legally enforceable, which again is precisely the question before the court. The court's focus on the land use map avoids this question, and again ignores that the plan necessarily includes present and future uses. The fact that the present is not yet the future does not require that the plan for transitioning between the two not be legally enforceable.

It is easy to criticize a decision that is now almost three decades old, but it is not my intent to argue that *Bone* is necessarily incorrect. Rather, I only argue that it is not necessarily correct. There is nothing about the "in accordance with" language that requires a particular outcome, but three decades of Idaho courts have relied unquestioningly on a decision with incomplete and questionable reasoning. More unfortunate, the court that determined that comprehensive plans are not legally enforceable was not even presented with that question. The only argument before it, as it recognized on several occasions, was whether the land-use map should be legally enforceable. That is a separate question. For almost three decades, Idaho courts have relied on dicta to justify a crucial distinction in Idaho land-use law.

My position throughout this article has been that law is only justified when it promotes the purpose of the community that ultimately created the law. The *Bone* decision—or more accurately, the Idaho Supreme Courts' continued reliance on *Bone*—demonstrates an institutionalized tendency to elevate myth over purpose. Failing to connect law to purpose has both philosophical, as well as practical consequences; we lose the justification for law, and we lose the ability to enact vision on the ground. A recent Idaho case demonstrates the potentially significant consequences of an unnecessary elevation of myth over purpose, and shows that the relationship between community visions and place-specific land-use decisions is even more disconnected than the jettisoning of comprehensive plans might suggest.

In 2009, the Idaho Supreme Court considered—or better said, did not consider—a challenge to a local government decision denying a request for a rezone.[141] The parcel of land had been zoned "Transitional Agriculture Two," which allowed a variety of agricultural and residential uses.[142] The purpose of this zone, as articulated in the current version of the county's zoning ordinance,

141. Burns Holding, LLC v. Madison County Bd. of County Comm'rs, 147 Idaho 660, 214 P.3d 646 (2009).

142. *Id.* at 661, 214 P.3d at 647.

is to "provide for and protect residential lands of a single-family residential environment . . . by providing for an area of transition from agricultural uses to residential."[143] The landowner sought a comprehensive plan amendment, and a zoning change to "commercial" and "light industrial," in order to construct a concrete batch plant that would be surrounded by a commercial zone buffer.[144] Although the planning and zoning commission recommended that county commissioners approve the application, the county denied the request for a plan amendment, and simply failed to act on the zone change request.[145] The county approved a very similar request by another concrete company at about the same time.[146]

As a run-of-the-mill land-use controversy, this case might not have warranted much attention. Granted, it does demonstrate hints of political favoritism. And the change from agricultural/residential to light industrial, and ad hoc changes to a duly-adopted comprehensive plan (which the planning and zoning commission recommended in a 6-1 vote),[147] should cause concern for anyone interested in creating sustainable communities or the predictability and equitable treatment that are the foundation of the rule-of-law myth. But political favoritism and ad hoc decision making are elements of any land-use controversy, and whatever their local significance, they are local issues. The Idaho Supreme Court never considered those issues. The court never considered the county's justification for denying the plan amendment, or lack thereof, and did not address the county's complete failure to respond to the request for a small rezone. Even had the court considered these issues, it is unlikely the result would have changed, as local governments receive a substantial amount of deference in legislative determinations of this nature.[148] But by not considering these issues, the Idaho court took a simple, local land-use controversy and created a problem of statewide significance.

While it often seems counter-intuitive to the uninitiated, absent specific and somewhat limited conditions, there is no inherent right to challenge decisions by local governments.[149] This fact should be somewhat more obvious in the zoning

143. MADISON COUNTY, IDAHO, ZONING ORDINANCE § 7.1 (April 8, 1997), *available at* http://www.co.madison.id.us/modules/smartsection/visit.php?fileid=8.

144. *Burns*, 147 Idaho at 661, 214 P.3d at 647.

145. *Id.* at 662, 214 P.3d at 648.

146. *Id.* The other company requested a plan amendment and zone change in order to operate a gravel pit surrounded by a commercial zone buffer. That company, Walters Ready Mix, Inc., has been in business in the area for several decades.

147. *Id.* at 661, 214 P.3d at 647.

148. In reviewing the actions of local governments, courts often distinguish between legislative and quasi-judicial determinations, with this distinction often being outcome determinative. Decisions characterized as "legislative" receive near complete deference from reviewing courts. *See, e.g.*, JULIAN CONRAD JUERGENSMEYER & THOMAS E. ROBERTS, LAND USE PLANNING AND DEVELOPMENT REGULATION LAW 226 (Thomson West 2003) (1998). *See also* Highlands Dev. Corp. v. City of Boise, 145 Idaho 958, 965, 188 P.3d 900, 907 (2008) ("Not every zoning decision, however, is subject to judicial review. This Court has historically drawn a line between decisions that are legislative in nature and those that are quasi-judicial in nature, only allowing review of the latter category.").

149. Certain limitations on government authority are considered self-executing and do not require separate legislative authorization to provide for a right to challenge government action. In the land-use context, the best example is the Fifth Amendment's takings clause, which prohibits the taking of

context, where the authority to zone—and the limitations on the exercise of that authority—originate in state law. Without specific action by the state, no restrictions or limitations on pre-existing land-use authority would exist, and thus the only available appeal rights would be found in broader Constitutional protections.[150] Recognizing this fact, the Idaho Constitution provides that the "*legislature* shall provide a proper system of appeals . . . ."[151]

In the Local Land Use Planning Act (LLUPA), [152] the Idaho Legislature provided the right to appeal land-use decisions by local governments. There are two relevant provisions. The first, titled "Permit granting process" provides: "An applicant denied a permit or aggrieved by a decision may within twenty-eight (28) days after all remedies have been exhausted under local ordinance seek judicial review . . . ."[153] The second, titled "Actions by affected persons," uses slightly more limited language: "An affected person aggrieved by a decision may within twenty-eight (28) days after all remedies have been exhausted under local ordinances seek judicial review . . . ."[154] In both instances, an "affected person" is a person "having an interest in real property which may be adversely affected by the issuance or denial of a permit authorizing the development."[155]

Since both provisions authorizing judicial review of local land-use decisions only grant that right to persons adversely affected by the grant or denial of a "permit," the Court had little trouble determining that it lacked jurisdiction to hear this particular appeal:

> [T]here was no right of judicial review of the Board's action with respect to the rezone application because, as with the application for an amendment to the comprehensive plan, there is no statute authorizing judicial review of a county's action regarding a rezone application. An application for a zoning change, like a request for an amendment to a comprehensive plan, is not an application for a "permit," and thus no review is authorized under the LLUPA. There is no specific grant of authority to review the Board's action with respect to the request for rezone, and we may not assume the role of the legislature and grant that authority to ourselves.[156]

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private property for public use without just compensation. *See* First English Evangelical Lutheran Church of Glendale v. County of Los Angeles, 482 U.S. 304, 314 (1987).

150. In this way, Idaho differs from most other states on one significant point: the inherent authority of counties and municipalities to regulate land. The Idaho Constitution grants police power authority directly to counties and municipalities. IDAHO CONST. art. XII, § 2. With the qualified exception of certain "home rule" communities, counties and municipalities only exist as creatures of the state government, and only possess that authority granted by state governments. *See, e.g.*, Hunter v. City of Pittsburgh, 207 U.S. 161, 178–79 (1907). Consequently, while use of the phrase "pre-existing land-use authority" is appropriate in Idaho, it would not be appropriate in most other circumstances.

151. IDAHO CONST. art. V, § 13 (emphasis added).

152. IDAHO CODE ANN. § 67-6501 to 38 (West 2010).

153. *Id.* § 67-6519(4).

154. *Id.* § 67-6521(1)(d).

155. *Id.* § 67-6521(1)(a).

156. Burns Holdings, LLC v. Madison County Bd. of County Comm'rs, 147 Idaho 660, 663, 214 P.3d 646, 649 (2009).

This is not a problem that had troubled the court in the past. On numerous occasions since the legislature created the LLUPA in 1975, the court had upheld the right of affected persons to challenge decisions to grant or deny re-zoning applications. The Idaho Legislature has never reacted to the court's interpretation of its law, suggesting it was not terribly concerned that the court had authorized review of zoning activities.[157] Even as recently as 2004, in a unanimous decision, the Idaho court exercised jurisdiction to hear a challenge to a re-zoning decision, determining that Idaho Code section 67-6521(d) authorizes review of the denial of a request for a re-zone.[158] That case addressed exclusively the county's denial of a request to re-zone a property in order to allow for a specific development.[159] Chief Justice Eismann authored the 2004 decision allowing judicial review of a re-zoning decision; but the Chief Justice took the opposite position in 2009, joining a 3-2 decision that effectively overturned twenty-five years of case law.[160]

I do not include this brief commentary on the *Burns* decision to suggest that the Idaho Supreme Court made a legal mistake in holding as it did. To the contrary, the decision appears to be "right," at least in a strictly formalistic sense. But even if the decision is correct in that somewhat narrow sense, it is decidedly un-pragmatic. New law students often struggle to understand the difference between the result that their life experiences, personal ethics, or common sense suggest, and the result that the law suggests. This is an appropriate confusion, and should be explored. But it is too often resolved by inculcating a "the rule (or language) always wins" approach, common sense be damned.

Law students are not without some company in this confusion. Judge Richard Posner has recognized two potentially overlapping ways in which a judicial decision might be "right."[161] In the first, a decision is right if it follows precedent or pre-existing formal norms of judicial interpretation, analysis, or logic.[162] This type of decision promotes predictability and supports the authoritarian character of legal regimes.[163] The second type of "right" decision is one which reaches a just or fair result in the specific case at hand.[164] Legal formalism certainly can lead to just results, but the cases that trouble new law students—and should trouble judges—are those cases where the formalist approach seems

157. *See, e.g., id.* at 666, 214 P.3d at 652 (Jones, J., dissenting) ("It is presumed that the Legislature had full knowledge of those judicial interpretations when it amended section 67-6519 in 1993, 2000 and 2003, and when it amended section 67-6521 in 1993 and 1996. Yet, in none of these instances did the Legislature indicate any intent to overturn the long-standing and consistently-followed holdings in *Hill* and *Love.* It must be presumed that the Legislature was content with such holdings.").

158. *See In re* Application for Zoning Change,140 Idaho 512, 513–14, 96 P.3d 613, 614-15 (2004) ("A person aggrieved by a planning and zoning decision may seek judicial review of that decision under the Idaho Administrative Procedure Act.")

159. *Id.* at 513, 96 P.3d at 614.

160. *Burns Holdings, LLC*, 147 Idaho 660, 214 P.3d 646 (2009).

161. *See generally* Richard A. Posner, *Pragmatic Adjudication, in* THE REVIVAL OF PRAGMATISM: NEW ESSAYS ON SOCIAL THOUGHT, LAW, AND CULTURE 235–53 (Morris Dickstein ed., Duke University Press 1998).

162. *Id.* at 237–38.

163. *Id.* at 238.

164. *Id.*

unjust, where judges elevate the sanctity of the rule of law over the people, places, and communities that law was created to serve.

We can extend that reasoning to add a third category of right decisions, a category that can overlap with one or both of the previous categories: a judicial decision can also be right if it serves to promote or sustain a set of conditions or relationships that is consistent with the community's collective vision of its future. Put another way, a judicial decision is right if its helps us create the type of world we want to live in. I would argue that while it satisfies the definition of right in the first category, and potentially the second (the effective affirmation of the denial of the re-zone might have been the most fair or just result in that specific circumstance), the *Burns* decision fails the third category. It does not promote the visions of community that justify legal regimes.[165]

While my critiques of the Idaho Supreme Court, both current and past, might be somewhat overzealous, they are not unjustified. In that, I do not mean that my approach or legal analysis is better.[166] In fact, my critique is not meant to focus on the analysis at all. Rather, the critique is justified because those decisions lead to on-the-ground outcomes that are inconsistent with our understandings of the purposes the law serves—that is to say, my focus is on the consequence. Both *Burns* and *Bone* lead to outcomes that are inconsistent with the community's vision, as the community has chosen to articulate that vision, in that they do not allow the law to consider that vision. In the *Burns* case, the remedy lies appropriately in the Idaho Legislature, which can, and should, address the problem with relative ease. And while the *Bone* misstep could also be remedied by the legislature, that approach is unnecessary.[167] The Idaho Supreme Court is unafraid to overturn decades of precedent, even where the on-the-ground effects could be extremely troubling,[168] where it considers that approach necessary to faithfully follow the guidance of the people's representatives. Should the court not be similarly willing to overturn decades of even more questionable precedent in order to implement the visions of our Idaho communities? Why are the desires of the legislature more crucial than the desires of the people,

165. Formalism can be a pragmatic choice where predictability and adherence to legislative determinations are determined to be preferable to the alternatives. *See id.* But in this case, as noted in the dissent, the legislature had arguably acquiesced to the Court's twenty-five years of consistent holdings.

166. In this statement, I must admit I am being somewhat disingenuous. I would define "better" as that approach or analysis that would yield the outcome that the community would prefer over other alternative outcomes. Given that this article is based on the argument that allowing implementation of the community's vision in legal regimes will yield outcomes that more closely match the community's visions, which are what ultimately justify law, it is obvious that I do think my approach is "better."

167. And given the court's reasoning in *Urrutia*, it might not solve the problem.

168. "For example, a developer wishing to pursue plans for construction of a nuclear power plant may determine that, with a favorably-inclined county commission, it is better to seek a zoning change that would permit such project, rather than a conditional use permit that would provide the same result. If the county commission granted the zoning change, affected citizens would have no right of judicial review. If the developer pursued the conditional use permit avenue, the affected citizens would have the right of judicial review." Burns Holdings, LLC v. Madison County Bd. of County Comm'rs, 147 Idaho 660, 667, 214 P.3d 646, 653 (2009) (Jones, J., dissenting).

particularly where the legislature has demonstrated little concern if the court takes another approach?

Nothing in our myth requires this disconnect. To the contrary, a true "rule of law" would not elevate questionable, unjustified precedent over the desires of the community. The failure to enforce the plans, and the community visions those plans represent, that provide the foundation for legal regimes undercuts the authority of those legal regimes and removes any social justification for the regime. Without the vision, there is no reason for the law; it lacks purpose, and thus should not be enforced.

V. SUSTAINABILITY PLANNING: CONNECTING PURPOSE TO CONSEQUENCE, AND UNDERSTANDING THE IMPORTANCE OF CHOICE IN JUSTIFYING LEGAL REGIMES

The solution to achieving visions of sustainable communities lies not in jettisoning entirely the existing legal regimes that regulate those communities, even if there are specific laws or ordinances that might stand in the way of achieving the community vision. Problem-specific ordinances are a necessary component of any institutional structure, even ordinances that regulate the minutiae of our lives, like the location and number of power outlets in our homes. Existing regimes are problematic not because they contain narrow, issue-specific approaches, but because they contain *only* narrow, issue-specific approaches. There is no legally enforceable mechanism to tie all of those narrow approaches together into the much broader, and more nuanced and intricate, tapestry that is the community. Creating enforceable *sustainability plans* allows implementation of sustainability principles—and thus the visions of the community—in issue-specific legal regimes that must be consistent with, and implement, the sustainability plans.

Our problem is *not* that we do not know how to understand our preferences, articulate visions of a community, or create a physical picture and description of our visions. Almost every community in the country engages in exactly this exercise on a somewhat regular basis. Our problem is that we have yet to connect visions of community to enforceable legal regimes, even though we already have a mechanism for making that connection. Our current comprehensive planning approach will require some adjustment to ensure it can direct us on a path toward sustainability, but it provides a place to start.

Idaho's comprehensive planning laws—and the comprehensive planning regimes of most other states—already provide the tools for creating useful sustainability plans. Idaho law requires that comprehensive plans consider fifteen different areas, including land use, natural resources, transportation, economic development, among other issues related to sustainability.[169] Under the current

169. IDAHO CODE ANN. § 67-6508(d)-(e), (i), (f) (West 2010). The required components are property rights, population, school facilities and transportation, economic development, land use, natural resources, hazardous areas, public services, facility and utilities, transportation, recreation, special areas or sites, housing, community design, implementation, and national interest electric transmission corridors. *Id.* § 67-6508(a) to (o).

regime, there is no specific requirement that the plan consider sustainability per se, but the law does provide that "the plan shall consider previous and existing conditions, trends, desirable goals and objectives, or desirable future situations for each planning component."[170] As currently written, therefore, Idaho's comprehensive planning statute allows Idaho communities to identify their own community visions. The only thing standing in the way of making that vision legally enforceable is *Bone* and its progeny (including *Burns*). Idaho could decide today to allow enforceable sustainability plans.

A complaint about this approach might be that it is unnecessarily restrictive and would not allow a community to respond to changing conditions over time. But plans can evolve. And consider the alternative. The failure to enforce comprehensive plans allows land-use decisions that are inconsistent with the community's stated preferences. This approach allows land-use decisions to vary with the whims of the local government; creating *new* benefits for advantageously-situated private individuals becomes more important than protecting the interests of the community. Quixotically, the Idaho Supreme Court has argued that enforceable comprehensive plans would provide local governments "unbounded discretion" in making land-use decisions, which would be inconsistent with adherence to the rule of law.[171] To borrow from the Idaho court, this argument has no basis in law or reason. It is the *failure* to enforce comprehensive plans that provides unbounded discretion to local governments. Enforceable comprehensive plans promote predictability and provide specific guidelines for how governments should proceed. Under current law, local governments can change zoning districts without being subject to judicial review. And local governments can authorize virtually any land development under the guise that it is "in accordance . . . with the comprehensive plan,"[172] without any Idaho court carefully considering the legitimacy of that determination. That is the definition of unbounded discretion. Enforcing comprehensive plans is a better alternative.

We have two options. One is pragmatic, and thus inherently democratic. The other is autocratic.[173] We can make the simple decision to allow the law to evolve in a manner that is consistent with our visions of community, and thus implement those visions of community. Or we can continue to follow a myth as it travels outside of its realm of usefulness. If we desire to build sustainable communities—and communities worthy of sustaining—we must create a path connecting our visions of community and purpose to the rule of law.

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170. *Id.* § 67-6508.

171. Urrutia v. Blaine County, 134 Idaho 353, 359–60, 2 P.3d 738, 744–45 (2000).

172. IDAHO CODE ANN. § 67-6511 (West 2010).

173. *See* HILARY PUTNAM, RENEWING PHILOSOPHY 188–89 (Harvard University Press 1992) (quoting John Dewey: "A class of experts is inevitably so removed from common interests as to become a class with private interests and private knowledge, which in social matters is no knowledge at all.")