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# Private Lands, Conflict, and Institutional Evolution in the Post-Public-Lands West

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## ARTICLE

# Private Lands, Conflict, and Institutional Evolution in the Post-Public-Lands West

JERROLD A. LONG\*

### I. INTRODUCTION

*Despite their colorful history, there has hardly been a continuous community life in an Aspen or a Telluride; and when oilfields are superimposed on cattle country in Texas, or subdivisions superimposed on orchards in California, something disruptive has happened in the life of both people and towns.*<sup>1</sup>

A couple of winters ago, as my family traveled south to meet the rest of the clan for Christmas, we ended a long day's drive by crossing over potato and barley fields on a shoulder of the Big Hole Mountains in southeastern Idaho. The conditions were not atypical for mid-December, with low clouds, blowing snow and limited visibility. As we started to enter the Teton Basin, still fifteen miles from the nearest town – and at about the point my two-year-old son reached the limits of his patience – we drove over a hill to see a massive display of Christmas lights covering the fields. Fallow farm fields just the year before, the area was now covered in newly planted trees, fences and a stone gateway, a new pond, a massive 'clubhouse', and a dozen extremely large homes selling for well over \$1 million. By the time we reached town, we had passed more houses on large rural lots than are

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1. WALLACE STEGNER, THE SOUND OF MOUNTAIN WATER: THE CHANGING AMERICAN WEST 191 (1969).

contained in the area's three incorporated municipalities, with as many more on the other side of town. But perhaps more interesting than the scattered houses were the spaces in between. For every house, there remained four empty permitted lots. By building on these empty lots, the community could increase in population by 500% without any opportunity for additional public comment, without concern for ecological resources, aesthetic amenities, or the influence on local culture or social arrangements or organization.

This basic landscape is familiar to anyone who has driven Interstate 25 north or south of Denver, traveled around Phoenix, or visited Las Vegas. But the nascent Broadacre City<sup>2</sup> described here is not the exurbs of the West, which is surprisingly the nation's most urban region.<sup>3</sup> Rather, after traveling through dozens of miles of subdivisions and new development, the central "city" anchoring it all is Driggs, Idaho, home to approximately 1,500 residents.<sup>4</sup> An evolution of the "Geography of Nowhere,"<sup>5</sup> sprawling development patterns in the 1990s and 2000s created thousands of additional "great big noplaces made up of many little noplaces."<sup>6</sup> Although the absolute change in the landscape is greatest in places like Denver or Phoenix, the relative change might be more significant in formerly rural (or formerly *more*

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2. "In the City of Yesterday ground space was reckoned by the square foot. In the City of Tomorrow ground space will be reckoned by the acre: an acre to the family." Frank Lloyd Wright, *The Disappearing City*, in *THE ESSENTIAL FRANK LLOYD WRIGHT: CRITICAL WRITINGS ON ARCHITECTURE* 235, 253 (Bruce Brooks Pfeiffer ed., 2008). When Frank Lloyd Wright proposed his Broadacre City in 1932, he did not perceive it as a negative. It did not voraciously consume wildlife habitat or productive farmland; it did not further solidify our reliance on foreign energy sources; it did not contribute to a rapidly changing global climate and the consequent loss or weakening of many global ecosystems and cultures. Broadacre City instead would save Americans from the negative effects of density and centralization from urbanization.

3. See, e.g., Robert E. Lang, *Open Spaces, Bounded Places: Does the American West's Arid Landscape Yield Dense Metropolitan Growth?* 13 *HOUSING POLY DEBATE* 755 (2003).

4. U.S. CENSUS BUREAU, [www.census.gov](http://www.census.gov) (last visited Mar. 30, 2011) (Search for Driggs, Idaho in "Population Finder.").

5. See generally JAMES HOWARD KUNSTLER, *THE GEOGRAPHY OF NOWHERE: THE RISE AND DECLINE OF AMERICA'S MAN-MADE LANDSCAPE* (1993).

6. *Id.* at 136.

rural) towns and communities where population growth has been sufficient to replace pre-1990 populations several times over.<sup>7</sup>

This emerging western landscape also represents a substantial regional transition.<sup>8</sup> Although scholars of the West argue convincingly that it has always been “new,” i.e., defined more by change and conflict than any other characteristic,<sup>9</sup> the contemporary West does represent a subtle but important shift to a post-public-lands condition, in which development, change, and conflict in the West’s *private* lands now describe, define, and determine the West’s personality more than the public lands<sup>10</sup> that are increasingly foreign to the region’s new residents.

In the past two years, changing conditions in the global economy have affected rural and exurban real estate markets, thus slowing the dramatic growth of the last two decades. But the sprawling – and increasingly unfinished and often empty – subdivisions that remain require us to ask a difficult question: *Why?* It would be easy to identify the excesses of the pre-

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7. For example, the 1990 population of Teton County, Idaho was 3,439; its 2009 population estimate is 9,337. The 1990 population of Nye County, Nevada was 17,781; its 2009 population was 44,234. And Summit County, Colorado increased in population from 12,881 in 1990 to 27,239 in 2009. To compare, Denver County, Colorado increased substantially – from 467,610 to 610,345 – over the same period, but the relative change was obviously less. All population data was obtained from the U.S. Census website. See U.S. CENSUS BUREAU, [www.census.gov](http://www.census.gov) (last visited Mar. 30, 2011) (To find data on these Counties, search for County in “Population Finder.”).

8. Although there is not enough room to fully address the issue in this particular article, this sentence is something of an overstatement. While there are pockets of the Intermountain West that have experienced substantial amenity-driven population growth--and consequent development--over the last two decades, there are also many areas that have not shared in this experience. For example, almost 20% of the counties considered in the empirical component of this article demonstrated *negative* growth rates between 1990 and 2006. Over half of the study counties (53%) experienced population growth below the national average for the same period (20.1% growth). The average growth rate of all of the study counties for the same period was 25.6%, demonstrating that the characteristic “high rates of amenity-driven population growth” that has been applied region-wide only accurately describes a small subset of the region’s non-metropolitan counties.

9. See, e.g., PATRICIA NELSON LIMERICK, *THE LEGACY OF CONQUEST: THE UNBROKEN PAST OF THE AMERICAN WEST* (1987).

10. In this article, I use “public lands” to refer to those lands managed by the federal government, e.g., National Forests, National Parks and Monuments, Bureau of Land Management Lands, etc.

recession economy and atomistic, self-maximizing individual economic actors, but those explanations are partial at best and ultimately unsatisfying. At some point, this community – and similar communities across the country, but particularly in the rural West – made a choice to adopt a specific institutional regime, a specific land-use ideology, that allowed for substantially increased levels of unsustainable development. Given the scenic amenities both residents and nonresidents perceive in this region<sup>11</sup> (and in rural areas generally), and the allegedly growing importance of that aesthetic beauty to the local culture and economy,<sup>12</sup> why choose an approach that directly threatens those local scenic resources?

But as difficult as that question is, it remains somewhat unenlightening. A trajectory of development is the default condition in most communities, making the question posed above – why would a community choose this development pattern? – a bit uninteresting. Or if not uninteresting, at least unlikely to yield an answer that tells us anything about *why* legal regimes change. After all, if growth is the default condition, the community need make no choice to allow growth. For that reason, the more useful question to consider is under what circumstances would a community choose to restrict or better manage growth? What would make a community desire – and then implement – a more sustainable trajectory?

Even though I have adopted the dualism to some extent here, the choice a community faces is not the clear “growth v. anti-growth” often articulated in the media. It is nevertheless a choice

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11. See, e.g., WALLACE STEGNER, *THE SOUND OF MOUNTAIN WATER: THE CHANGING AMERICAN WEST* 38 (1969); John A. Baden, *The True-Mann's West: Endangered or Forsaken?*, in *THE NEXT WEST: PUBLIC LANDS, COMMUNITY, AND ECONOMY IN THE AMERICAN WEST* 107, 116 (John A. Baden & Donald Snow eds., 1997); DANIEL KEMMIS, *THIS SOVEREIGN LAND: A NEW VISION FOR GOVERNING THE WEST* xviii (2001).

12. See, e.g., Ray Rasker, *An Exploration Into the Economic Impact of Industrial Development Versus Conservation on Western Public Lands*, 19 *SOCY & NAT. RESOURCES* 191 (2006); Douglas E. Booth, *Spatial Patterns in the Economic Development of the Mountain West*, 30 *GROWTH AND CHANGE* 384 (1999); Kevin T. Duffy-Deno, *The Effect of State Parks on the County Economies of the West*, 29 *J. LEISURE RES.* 201 (1997); Jerry D. Johnson and Raymond Rasker, *The Role of Economic and Quality of Life Values in Rural Business Location*, 11 *J. RURAL STUD.* 405 (1995).

about how a community should evolve, about what it should look like, about how to define a place. And the choice is substantially more difficult when a community is both growing and changing simultaneously. What happens when the new residents driving growth also arguably bring new ideas about land that differ from those that existed in the community before their arrival? Does the community grow to facilitate the arrival of new residents who will seek to limit growth? Do those new residents in fact bring new land-use ideologies? Is there a point at which the community's culture changes? Why? Do new land-use regimes reflect new socio-ecological conditions? Given that these conflicts arise in places that are rapidly growing while simultaneously trying to protect natural amenities, is it really possible to combine the words "sustainable" and "development" in a single, discrete concept and apply it in a specific place?

This article addresses these questions via two paths: theoretical and empirical. The article identifies the theoretical backgrounds and potential extensions necessary to understand why communities might choose to reassign property relations in a specific way, while at the same time reporting a test of those theoretical understandings in empirical case studies. The plurals "backgrounds" and "understandings" reflect a meta-theoretical approach that borrows from several distinct disciplines in order to construct a useful story about how communities enact purpose on the ground. Together, these approaches allow a more nuanced understanding of the interaction of apparently competing causative forces.

As this article discusses theoretical frameworks useful for understanding the evolution of local legal regimes, it will provide empirical data and experiences that inform and realize those theoretical approaches. Although this article's broader theme is about the evolution of resource-sustaining legal institutions generally, the specific empirical focus will be on the resource-protective regimes enacted by local units of government in the Intermountain West. That focus initially might seem too narrow to yield useful insights applicable to other areas of the law, but as discussed below, local governments provide advantages as experimental laboratories not available in other contexts. And rural areas of the Intermountain West allow a focus on the

response of local governments to rapidly changing demographic, cultural, and political conditions. Much of this empirical work originated in case studies of two rural Idaho counties that, although sharing a common border and very similar settlement and 20th-Century experiences, have diverged substantially over the past two decades. These are not paradigmatic cases by any means, if any such thing could exist, but they are cases that provide useful insights into legal changes occurring in evolving rural areas.

Local land-use institutions provide several advantages that make them particularly attractive as empirical and theoretical case studies. Most significant, despite the obvious ubiquity of land-use regulation generally, each specific occurrence is a relatively confined, discrete entity with relatively knowable boundaries. Even if we cannot control all variables, local land-use regimes do not demonstrate the same public choice problems faced in our conversations about national, or even state-level, resource-protection regimes.<sup>13</sup> Although interest groups exist in all communities, the disparities in influence decrease as transaction costs decrease. Perhaps as important, as Nobel laureate Elinor Ostrom demonstrated, the tendency toward self-interested behavior diminishes, and cooperation increases, as communication improves.<sup>14</sup> Communication should improve as institutional scales decrease in size, suggesting that community-focused behavior might be more common – and thus more easily studied – at the community scale.

Consistent with the foregoing discussion, this article begins with two theoretical assumptions and one empirical assumption. The theoretical assumptions are, first, that community understandings of purpose, and community visions or imaginings of the future of place, emerge – and are continually revised – as communities go about creating a place and reacting to previous decisions regarding that place; and second, that those community agreements are subsequently formalized into local law, including

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13. See generally MANCUR OLSEN, *THE LOGIC OF COLLECTIVE ACTION: PUBLIC GOODS AND THE THEORY OF GROUPS* (1965).

14. See Elinor Ostrom, *Collective Action and the Evolution of Social Norms*, 14 J. ECON. PERSP. 137, 140 (2000); see also ROBERT C. ELLICKSON, *ORDER WITHOUT LAW: HOW NEIGHBORS SETTLE DISPUTES* (1991).

local land-use regimes. The empirical assumption is that rural communities, where public choice problems and transaction costs are minimized, are useful laboratories to witness and understand this process.

The article follows three distinct theoretical paths to where they converge in a specific place. Because this article is about the evolution of legal regimes, the first path articulates an approach – borrowing from the “old” institutional economics<sup>15</sup> and anthropology – describing a general theory of legal evolution. Because that general theory does not specify or describe causative forces, the article continues by following two competing paths – the restructuring thesis<sup>16</sup> and the “growth machine”<sup>17</sup> – as they interact individually and then collectively with a specific place. Connecting these theoretical paths to a specific place requires two different empirical approaches: first, a region-wide quantitative approach that attempts to identify legal change; and second, a focused qualitative study that explores the effect of the growth machine in the midst of restructuring forces.

But after attempting to integrate these theoretical approaches and empirical studies, this article ultimately concludes that it is only upon directly considering the issue of *choice* in a specific place that useful explanations begin to emerge. As a community goes about the process of imagining its future, it can only make sense of the conditions or circumstances before it. It is the on-the-ground effects of its previous choices – whether motivated by the “growth machine” or other emerging understandings of purpose – that provide the entirety of the community’s understanding of the choices, and potential futures, available to it. Allegedly changing culture, values, or ideas about the purpose of land only make sense, only matter, in a specific place with a specific cultural and landscape history – i.e., a history of previous choices. Why do land-use regimes evolve? Why might a community adopt a new approach that alters its

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15. See, e.g., Geoffrey M. Hodgson, *The Approach of Institutional Economics*, 36 J. ECON. LITERATURE 166 (1998).

16. See generally RURAL RESTRUCTURING: GLOBAL PROCESSES AND THEIR RESPONSES (Terry Marsden, Phillip Lowe, & Sarah Whatmore eds., 1990).

17. See generally Harvey L. Molotch, *The City as a Growth Machine: Toward a Political Economy of Place*, 82 AM. J. SOC. 309 (1976).



developmental velocity? Because the community *has already witnessed* the consequences of failing to do so. It is not until the resource or amenity the community might desire to protect is actually significantly harmed that the community is willing and able to enact legislation seeking to protect it. More interesting, if less obvious, the community may not know what amenities it values until those amenities are destroyed.

## II. WHY DO INSTITUTIONS CHANGE? CONSEQUENCE, IMAGINING THE FUTURE, AND CREATING THE TOOLS TO GET THERE

How, in the face of competing understandings of the purpose of land, might a community go about arriving at, and implementing, a collective vision for the future of a place? The following discussions identify two theoretical approaches – the “growth machine” and the restructuring thesis – that reflect competing understandings of evolving purpose – specifically about the appropriate use and regulation of private land. These competing understandings make claims about a specific phenomenon: the formalization of a community’s settled deliberations about the purpose and future of a specific place. Both theoretical approaches make claims about what communities prefer and how they choose to implement those preferences. Both approaches are thus necessarily about the creation and evolution of law.

Given that fact, we must begin with a brief and necessarily abstract (at this point) discussion about the creation and evolution of law. The theoretical approach employed here specifically seeks to explain how formal legal structures – e.g., local land-use codes and policies – evolve in response to changing community expectations for a place. Land-use regimes will change only when the relevant community determines that the existing regimes will not achieve that community’s created imaginings for the future of its place.<sup>18</sup>

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18. The adjective “relevant” in this sentence may seem obvious, unnecessary or somewhat redundant. It is none of those things. Or better said, it is not only those things. What is relevant will vary substantial over time, and with different conflicts, in the same place. Identifying the relevant community, or

All communities operate within an institutional structure comprised of social norms, rules, and property relations.<sup>19</sup> The actions and preferences of apparently self-interested individuals (including government officials) exist within, and contribute to, a socially constructed framework – a set of institutions – that informs the actions of all individuals.<sup>20</sup> These institutions are the outcome or formalization of collective action in control, liberation, and expansion of individual action.<sup>21</sup> Beginning with routine or informal norms or habits, collective understandings become an integral part of local cultures and customs, ultimately forming durable and integrated institutional structures.<sup>22</sup> The study of institutions “brings us into direct contact with the socially constructed norms, working rules, and entitlements that shape and influence individual fields of action.”<sup>23</sup>

These pre-existing and continually evolving structures – including local land-use regimes – define choice sets, order and structure behavior, and outline the universe of acceptable social actions. Because all human actions and interactions occur within this pre-existing framework, individuals cannot act wholly independently outside of the society and culture within which they live.<sup>24</sup> Instead, society or culture informs all individual

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again better said, identifying when a specific community decides to be relevant, is the crux of this article’s broader consideration.

19. See, e.g., Geoffrey M. Hodgson, *John R. Commons and the Foundations of Institutional Economics*, 37 J. ECON. ISSUES 547 (2003); Walton H. Hamilton, *The Institutional Approach to Economic Theory*, 9 AM. ECON. REV. 309 (1919). This article focuses on land-use ordinances and other formal means of regulating private land. The theoretical approach outlined here also considers informal norms and customs that inform social behavior and cultural expectations. I will not address informal institutions in any detail.

20. See, e.g., DANIEL W. BROMLEY, SUFFICIENT REASON: VOLITIONAL PRAGMATISM AND THE MEANING OF ECONOMIC INSTITUTIONS 31-66 (2006).

21. See, e.g., John R. Commons, *Institutional Economics*, 21 AM. ECON. REV. 648, 649 (1931). Bromley uses this same characterization to describe “public policy.” See Daniel W. Bromley, *Reconsidering Environmental Policy: Prescription Consequentialism and Volitional Pragmatism*, 28 ENVTL. & RES. ECON. 73, 79 (2004).

22. Geoffrey M. Hodgson, *The Approach of Institutional Economics*, 36 J. ECON. LITERATURE 166, 180 (1998).

23. DANIEL W. BROMLEY, SUFFICIENT REASON: VOLITIONAL PRAGMATISM AND THE MEANING OF ECONOMIC INSTITUTIONS 31 (2006).

24. *Id.* at 49.

action, even those actions that might be perceived superficially as purely selfish or self-interested. They are only 'selfish' within the framework the culture provides. "By institutions, individuals are not merely constrained and influenced. Jointly with our natural environment and our biotic inheritance, as social beings we are *constituted* by institutions."<sup>25</sup>

This institutional understanding of human systems, relationships, and structures is consistent with understandings of human systems from other disciplines. Focusing on the influence of "culture" on the individual, Anthropologist Clifford Geertz argued:

the image of a constant human nature independent of time, place, and circumstance, of studies and professions, transient fashions and temporary opinions, may be an illusion. . . . [W]hat man is may be so entangled with where he is, who he is, and what he believes that it is inseparable from them. . . . [M]en unmodified by the customs of particular places do not in fact exist, have never existed, and most important, could not in the very nature of the case exist.<sup>26</sup>

Geertz's understanding of "culture" is consistent with this discussion of institutions, and demonstrates the importance of understanding law as an integral component of a broader contributor to individual meaning. "Culture," according to Geertz, is a "historically transmitted pattern of meanings embodied in symbols, a system of inherited conceptions expressed in symbolic forms by means of which men communicate, perpetuate, and develop their knowledge about and attitudes toward life."<sup>27</sup> Symbols are the "tangible formulations of notions, abstractions from experience fixed in perceptible forms, concrete

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25. Geoffrey M. Hodgson, *The Approach of Institutional Economics*, 36 J. ECON. LITERATURE 166, 189 (1998) (emphasis in original).

26. CLIFFORD GEERTZ, *THE INTERPRETATION OF CULTURES* 35 (Basic Books 1973).

27. *Id.* at 89. See Arthur F. McEvoy, *A New Realism for Legal Studies*, 2005 WIS. L. REV. 433, 435 (2005) (defining "culture," in part, as including "both the meanings that people carry in their heads and the meanings that they manifest in their behavior").

embodiments of ideas, attitudes, judgments, longings, or beliefs.”<sup>28</sup>

Law is a symbol, and an integral part of culture, in several ways. For example, law in the abstract – as the “rule of law” – represents our understanding of an individual’s relationship with other citizens and with our government. When we identify this particular symbol, we identify a particular limitation on the role of government and take a specific position on the appropriateness of legal “classes.” The “rule of law,” which we make real as a specific form of legal interpretation and understanding, *prohibits* differential application of the law to different persons, contexts, or outcomes.

But the law can also function as a more narrowly-defined or narrowly-characterized symbol of our ideas, beliefs or notions of purpose. In the context of this article, law also reflects our specific ideas about the future of a specific place. That symbol embodies community notions of the appropriate resolution of conflicts over community versus private “rights,” and the shared vision – as and when it emerges – of the future of a place. We create law as the final blessing to bestow upon our temporarily settled deliberations about place.<sup>29</sup> These legal choices are an integral part of our culture, community and understandings of place, and thus inform new or ongoing deliberations about new or ongoing conflicts over place.

The legal regimes that exist in any one place at any one time represent only a snapshot of that place as it changes over time. Law is a single component of an institutional structure that includes the norms, working rules, and property relations that inform social relationships, culture, and formalized routines or customs.<sup>30</sup> If we understand law as a contributor to culture and

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28. CLIFFORD GEERTZ, *THE INTERPRETATION OF CULTURES* 91 (Basic Books 1973).

29. While I cannot pinpoint the specific origin of this understanding of law – as the final blessing bestowed upon settled deliberations – I believe that I have adopted and/or adapted it from the work of my former professor Daniel Bromley of the University of Wisconsin-Madison, cited throughout this article.

30. See, e.g., John R. Commons, *Institutional Economics*, 21 *AM. ECON. REV.* 648, 648 (1931); Geoffrey M. Hodgson, *The Approach of Institutional Economics*, 36 *J. ECON. LITERATURE* 166, 180 (1998); DANIEL W. BROMLEY, *SUFFICIENT*

social relationships, we must also understand law as informing individual human behavior and choice. But the institutional framework or culture of a community is not itself completely independent of the individual actors that it guides and influences. Even as individuals are formed socially by the institutional structure within which they live, that institutional structure is in turn formed by individual and community needs and desires. So while the institutional structure influences and shapes individual needs, desires, preferences, and actions, that institutional structure is itself a function of the needs, desires, preferences, and actions of the society's individual members. In this fashion, "institutions mold, *and are molded by*, human action."<sup>31</sup>

The foregoing might seem a rather simplistic description of the ultimate origin of legal regimes, but focusing on how a community's needs, desires, preferences, and actions form, and are formed by, an institutional structure allows for a more careful and nuanced discussion of how local land-use regimes, in particular, evolve. Institutional regimes or local cultures are not permanent. Rather, all institutional structures – whether culture, social relationships or norms, or legal regimes – are always in the process of becoming.<sup>32</sup> At any given moment, the existing legal regime represents 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.<sup>33</sup> The current governing regime represents the community's previous agreements about the future of that place, as those agreements have been institutionalized – either formally or informally – and guide behavior at that moment. However, the community's discussion about its future continues, and existing legal structures might not appear capable of creating a new future now imagined by the community. As new agreements emerge for the

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REASON: VOLITIONAL PRAGMATISM AND THE MEANING OF ECONOMIC INSTITUTIONS 31 (2006).

31. Geoffrey M. Hodgson, *The Approach of Institutional Economics*, 36 J. ECON. LITERATURE 166, 181 (1998).

32. See Daniel W. Bromley, *Environmental Regulations and the Problem of Sustainability: Moving Beyond "Market Failure"*, 63 ECOLOGICAL ECON. 676, 677 (2007); see also Thorstein Veblen, *Why is Economics not an Evolutionary Science?*, 12 Q. J. ECON. 373 (1898).

33. See JOHN R. COMMONS, LEGAL FOUNDATIONS OF CAPITALISM 147 (1923).

future of a place, or as it becomes apparent that existing legal tools, guidelines, or constraints cannot resolve conflict – either new conflict or pre-existing conflict that the existing structure originally sought to remedy – the community will develop a new approach, intending to implement the new imagined future.

Although institutional evolution occurs continually in all communities, we can expect particular conflict when the community's ideas of *purpose* appear to be undergoing significant or rapid transformation. As notions of purpose change, so too do assessments of the utility of existing institutional structures, including legal regimes. These changing notions of purpose provide much of the energy that drive changes in institutional structures over time.

This understanding of institutional structures suggests that local legal evolution might follow a three-step process.<sup>34</sup> First, dissatisfaction with the existing institutional setup emerges in the regulated community. The community either recognizes that the existing legal structure has not created the situation desired by the community when the structure arose; or the community faces a new set of circumstances or conflicts that the existing institutions cannot adequately address. In the land-use context, the community might perceive a level or quality of development (or lack of development) that is inconsistent with the visions it created for the community. Existing institutional regimes might allow for too much of a specific type of development, or might seem to impede desired development. As the community addresses the new set of circumstances or conflicts, it creates a new imagined future for the place which might avoid, minimize, or mitigate those conflicts or other defects.<sup>35</sup> New expectations for what the place should “look” like emerge, informed by the effect of previous institutions on the community's built

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34. See DANIEL W. BROMLEY, SUFFICIENT REASON: VOLITIONAL PRAGMATISM AND THE MEANING OF ECONOMIC INSTITUTIONS 67-84 (2006). These ‘steps,’ of course, continually overlap and interact such that it would be difficult or impossible to describe any real condition as exclusively occupying one of the boxes suggested here.

35. See generally G.L.S. SHACKLE, DECISION, ORDER AND TIME IN HUMAN AFFAIRS (1961).

environment.<sup>36</sup> After the community agrees on the new collective vision for the future of its place, it develops a new legal regime which the community believes will achieve that imagined future.

With this understanding we can now consider more directly the factors that influence legal evolution in rural communities. To simplify, there are two competing understandings of purpose at work in contemporary rural places, both of which are related to the commodification of the rural lifestyle and the creation of an amenity-extraction economy. First, as the social structure of rural communities evolves in response to rapid amenity-driven population growth and associated demographic change, a community's collective understanding of land might begin to reflect an understanding that views land as a consumptive resource, rather than an extractive resource – i.e., the land is valuable *as such*, rather than because of what it might provide. In contrast, as the physical structure – the built environment – of rural communities evolves in response to population growth and associated demographic change, the community begins to see the value in taking advantage of those new development opportunities, particularly that subset of the community that participated in the old rural economy, and is consequently land rich but cash poor. In sum, one part of the evolving community wants to protect natural amenities and restrict development while another part of the community wants to take economic advantage of the emerging amenity economy by promoting or facilitating development.<sup>37</sup> The following sections develop these potentially competing sources of purpose.

### III. RESTRUCTURING: CHANGING PURPOSE AND NEW HUMAN-LAND PARADIGMS

Given the West's long history of supporting or promoting, often out of necessity, the development or extraction of natural resources, we might legitimately wonder why, and from where, a desire to protect natural resources – as a community

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36. *See id.* at 272.

37. These descriptions of competing purposes are neither mutually exclusive nor exhaustive, but I present them here as discrete categories to simplify the discussion that follows.

characteristic rather than a neighborhood, individual, or otherwise isolated occurrence – might have arisen in the rural West. Although the desire to protect – rather than extract – natural resources might initially seem like a strange characteristic to define the modern interior West, a wide range of recent work, both in academic articles and traditional media, suggest that this characteristic is now closer to defining the region more than any other.<sup>38</sup> At the heart of this alleged change is the period of rapid population growth that has occurred over the last two decades, and particularly in many previously (and perhaps still) rural locations. In these rural and formerly rural communities, a new demographic is emerging with a less cohesive cultural and experiential history than might have existed previously.<sup>39</sup>

Since about 1990, rural areas – particularly in the American West – have experienced a period of significant population

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38. See e.g., Hannah Gosnell & Jesse Abrams, *Amenity Migration: Diverse Conceptualizations of Drivers, Socioeconomic Dimensions, and Emerging Challenges*, GEOJOURNAL (2009); Richelle Winkler et al., *Social Landscapes in the Intermountain West: A Comparison of 'Old West' and 'New West' Communities*, 72 RURAL SOC. 478 (2007); Soren C. Larsen et al., *Place Perception and Social Interaction on a Exurban Landscape in Central Colorado*, 59 PROF. GEOGRAPHER 421 (2007); Rita Ghose, *Big Sky or Big Sprawl? Rural Gentrification and the Changing Cultural Landscape of Missoula, Montana*, 25 URB. GEOGRAPHER 528 (2004); Gayla Smutny & Lois Takahashi, *Economic Change and Environmental Conflict in the Western Mountain States of the USA*, 31 ENV'T & PLAN. A 979 (1999); Andrew J. Hansen et al., *Ecological Causes and Consequences of Demographic Change in the New West*, 52 BIOSCIENCE 151 (2002); Peter B. Nelson, *Perceptions of Restructuring in the Rural West: Insights from the "Cultural Turn"*, 15 SOC'Y & NAT. RESOURCES 903 (2002); Peter B. Nelson, *Rural Restructuring in the American West: Land Use, Family, and Class Discourses*, 17 J. RUR. STUDIES 395 (2001); J. Matthew Shumway & Samuel M. Otterstrom, *Spatial Patterns of Migration and Income Change in the Mountain West: The Dominance of Service-Based, Amenity-Rich Counties*, 53 PROF. GEOGRAPHER 492 (2001); Debra Ohman, *Restructuring and Well-Being in the Non-Metropolitan Pacific Northwest*, 30 GROWTH & CHANGE 161 (1999).

39. I do not want to overstate the cultural stability or cohesiveness that might have existed before the most recent period of western population growth. I am merely repeating an assumption of the restructuring literature discussed in this section, i.e., that there existed previously something identifiable which is now changing. For an alternative perspective of this issue, see generally PATRICIA NELSON LIMERICK, *THE LEGACY OF CONQUEST: THE UNBROKEN PAST OF THE AMERICAN WEST* (1987).



growth.<sup>40</sup> Although that growth rate likely declined to some extent in the last two years, the previous decade of annual growth rates in the double digits has caused substantial physical, cultural and social transformations in rural and formerly rural communities.<sup>41</sup> These changes are allegedly causing rural communities to experience a period of ‘restructuring’ wherein amenity-driven migration contributes to evolving understandings of the purpose of land, potentially causing a reterritorialization in which both public and private property rights are reimagined and reassigned.<sup>42</sup> This restructuring thesis argues that the new communities emerging in rapidly growing rural areas will cause a transition to a new human-land paradigm, in which restrictive, natural amenity-protective land-use regimes are preferred over a history of pro-development approaches.

These changes are neither unique nor necessarily unexpected. Reaching beyond both the West and the legal academy we find a well-established literature on the effects of

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40. See, e.g., Irene C. Frentz et al., *Public Lands and Population Growth*, 17 SOC’Y & NAT. RESOURCES 57 (2004); Andrew J. Hansen et al., *Ecological Causes and Consequences of Demographic Change in the New West*, 52 BIOSCIENCE 151 (2002); Paul Lorah & Rob Southwick, *Environmental Protection, Population Change, and Economic Development in the Rural Western United States*, 24 POPULATION & ENVT. 255 (2003).

41. See, e.g., Kathleen M. Brennan & Christopher A. Cooper, *Rural Mountain Natives, In-Migrants, and the Cultural Divide*, 45 SOC. SCI. J. 279 (2008); Richelle Winkler, et al., *Social Landscapes in the Intermountain West: A Comparison of ‘Old West’ and ‘New West’ Communities*, 72 RURAL SOC. 478 (2007); Thomas E. Sheridan, *Embattled Ranchers, Endangered Species, and Urban Sprawl: The Political Ecology of the New American West*, 36 ANN. REV. ANTHROPOLOGY 121 (2007); Andrew J. Hansen et al., *Ecological Causes and Consequences of Demographic Change in the New West*, 52 BIOSCIENCE 151 (2002); J. Matthew Shumway & Samuel M. Otterstrom, *Spatial Patterns of Migration and Income Change in the Mountain West: The Dominance of Service-Based, Amenity-Rich Counties*, 53 PROF. GEOGRAPHER 492 (2001).

42. See sources cited in footnote 41.; see also Soren C. Larsen et al., *Place Perception and Social Interaction on a Exurban Landscape in Central Colorado*, 59 PROF. GEOGRAPHER 421 (2007); Rina Ghose, *Big Sky or Big Sprawl?: Rural Gentrification and the Change Cultural Landscape of Missoula, Montana*, 25 URB. GEOGRAPHER 528 (2004); Mette J. Brogden & James B. Greenberg, *The Fight for the West: A Political Ecology of Land Use Conflicts in Arizona*, 62 HUM. ORG. 289 (2003).

modernity on rural places, and rurality itself, worldwide.<sup>43</sup> Consistent with the experiences of other rural communities in other regions and countries,<sup>44</sup> several researchers suggest the rapid demographic changes portend a wide range of economic, social, cultural, political and environmental transformations.<sup>45</sup> These alleged changes lead to multiple claims that rural areas are undergoing (or have already experienced) a period of “restructuring,” wherein amenity-driven migration causes a set of significant changes in the economic, social and cultural makeup of the rural communities.<sup>46</sup> Any specific rural area – e.g., the rural American West – is not alone in its experience with change, and responds to larger trends in global restructuring.

For example, over the past several decades, a literature on changing rural areas has noted the effect of modernity on rural culture and social arrangements.<sup>47</sup> Productivist governmental policies, technological advances, and agricultural specialization, for example, may have changed the relationship of rural peoples

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43. See, e.g., THE GEOGRAPHY OF RURAL CHANGE (Brian Ilbery ed., 1998); RURAL RESTRUCTURING: GLOBAL PROCESSES AND THEIR RESPONSES (Terry Marsden, Phillip Lowe & Sarah Whatmore eds., 1990).

44. Gayla Smutny & Lois Takahashi, *Economic Change and Environmental Conflict in the Western Mountain States of the USA*, 31 ENV'T & PLAN. A 979, 979 (1999).

45. See, e.g., Andrew J. Hansen et al., *Ecological Causes and Consequences of Demographic Change in the New West*, 32 BIOSCIENCE 151 (2002); Matthew J. Shumway & Samuel M. Otterstrom, *Spatial Patterns of Migration and Income Change in the Mountain West: The Dominance of Service-Based, Amenity-Rich Counties*, 53 PROF. GEOGRAPHER 492 (2001).

46. See, e.g., Rita Ghose, *Big Sky or Big Sprawl? Rural Gentrification and the Changing Cultural Landscape of Missoula, Montana*, 25 URB. GEOGRAPHER 528 (2004); Gayla Smutny, *Patterns of Growth and Change: Depicting the Impacts of Restructuring in Idaho*, 54 PROF. GEOGRAPHER 438 (2002); Peter B. Nelson, *Rural Restructuring in the American West: Land Use, Family and Class Discourses*, 17 J. RURAL STUD. 395 (2001); Peter B. Nelson, *Perceptions of Restructuring in the Rural West: Insight from the “Cultural Turn”*, 15 SOC'Y & NAT. RESOURCES 903 (2002); Matthew J. Shumway & Samuel M. Otterstrom, *Spatial Patterns of Migration and Income Change in the Mountain West: The Dominance of Service-Based, Amenity-Rich Counties*, 53 PROF. GEOGRAPHER 492 (2001); Debra Ohman, *Restructuring and Well-Being in the Non-Metropolitan Pacific Northwest*, 30 GROWTH & CHANGE 161 (1999).

47. See, e.g., MICHAEL WOODS, RURAL GEOGRAPHY (2005); THE GEOGRAPHY OF RURAL CHANGE (Brian Ilbery, ed., 1998).

with their environment.<sup>48</sup> One effect of rural modernization has been the apparent decrease in relative importance of occupations that place individuals in direct contact with their environment. As agriculture becomes more specialized, and technological advances decrease the number of workers necessary to farm a given plot of land, fewer people find full-time employment in rural agriculture. Even those individuals who own and operate their own farms and ranches must increasingly seek out ‘off-farm’ income to supplement their farm-related income. Non-agriculture, ‘land-based’ industries face similar reductions in the number of people working in traditional rural occupations.

More recently, the move away from productivist policies toward a “post-productivist” approach to rural lands is further challenging the traditional relationship of rural residents with their environment.<sup>49</sup> Where productivism consisted of a series of governmental programs and subsidies, which – in conjunction with technological advances in food production and farming practices – served to industrialize agriculture and emphasize increasing food quantity, the post-productivist transition de-emphasizes the pursuit of a near-exclusive use of rural lands for industrial agriculture in favor of improving environmental quality, food quality, and the social and cultural amenities of the rural landscape.<sup>50</sup> Where productivism altered traditional rural lifestyles and economies through industrialization (while retaining a general focus on traditional rural land uses, e.g.,

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48. For all of the concepts in this paragraph, see generally MICHAEL WOODS, *RURAL GEOGRAPHY* (2005); *THE GEOGRAPHY OF RURAL CHANGE* (Brian Ilbery, ed., 1998).

49. This productivist/post-productivist dualism does not adequately represent the complexity and variety of rural areas, but this transition – to the extent it does exist – demonstrates some of the changes facing rural residents. See Geoff A. Wilson, *From Productivism to Post-Productivism . . . and Back Again? Exploring the (un)Changed Natural and Mental Landscapes of European Agriculture*, 26 *TRANSACTIONS INST. BRIT. GEOGRAPHERS* 77 (2001); Nick Evans, Carol Morris & Michael Winter, *Conceptualizing Agriculture: A Critique of Post-Productivism as the New Orthodoxy*, 26 *PROGRESS HUM. GEOGRAPHY* 313 (2002).

50. See, e.g., Brian Ilbery & Ian Bowler, *From Agricultural Productivism to Post-Productivism*, in *THE GEOGRAPHY OF RURAL CHANGE* 57 (Brian Ilbery ed., 1998).

agriculture or resource extraction), post-productivism applies a different set of values to rural space.<sup>51</sup>

As a consequence of these changing values, new and uneven demands on rural space – for ‘quality’ food production, public amenity space, positional residential property, areas of environmental protection, and for the experience of rural idyll – have grown increasingly entrenched over the past two decades.<sup>52</sup> Globally, rural economies have undergone an economic shift from being conceived as places of production to places of consumption.<sup>53</sup> This shift is not complete, of course, as many governmental policies and subsidies still promote productivist practices,<sup>54</sup> and even many post-productivist policies still target large farms or traditionally productivist enterprises to the exclusion of non-agricultural or non-extractive land-based interests or issues.<sup>55</sup> But even where productive economies or economic sectors remain, the nature of those local economies has changed in response to the globalization of the broader economy.<sup>56</sup>

As this discussion suggests, many of the factors that influence the future of rural communities – both economic and cultural futures – are outside local control and understanding. The abstract forces that influence the evolution of modern rural communities originate in places far removed from the rural

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51. See *id.* But see, e.g., Geoff A. Wilson, *From Productivism to Post-Productivism. . .and Back Again?: Exploring the (un)Changed Natural and Mental Landscapes of European Agriculture*, 26 TRANSACTIONS INST. BRIT. GEOGRAPHERS 77 (2001); Nick Evans, Carol Morris & Michael Winter, *Conceptualizing Agriculture: A Critique of Post-Productivism as the New Orthodoxy*, 26 PROGRESS HUM. GEOGRAPHY 313 (2002).

52. See Terry Marsden, *Economic Perspectives*, in THE GEOGRAPHY OF RURAL CHANGE 13, 16 (Brian Ilbery ed., 1998).

53. See MICHAEL WOODS, RURAL GEOGRAPHY 172 (2005).

54. See, e.g., Brian Ilbery & Ian Bowler, *From Agricultural Productivism to Post-Productivism*, in THE GEOGRAPHY OF RURAL CHANGE 57 (Brian Ilbery ed., 1998).

55. See, e.g., Terry Marsden, *Economic Perspectives*, in THE GEOGRAPHY OF RURAL CHANGE 13 (Brian Ilbery ed., 1998).

56. See, e.g., Robert Gottlieb, *The Meaning of Place: Reimagining Community in a Changing West*, in REOPENING THE AMERICAN WEST 183 (Hal K. Rothman ed., 1998).

locality.<sup>57</sup> Rural areas grow progressively less self-sufficient, self-contained and locally controlled.<sup>58</sup> The global economy, global food markets, and technological advancements that increase the mobility of capital and individuals, contribute to a diffusion of culture and values from the urban to the rural and across the globe. As a result, rural communities increasingly feel the effect not only of a globalized economy, but also the globalization of culture and values.<sup>59</sup> So while it might be true that a false dichotomy persists between the dynamic, threatening rural present and a static, romanticized rural past, modern rural change appears to proceed at a pace and global uniformity unlike any rural change that might have occurred previously.<sup>60</sup>

In the rural American West, globalizing culture and values have combined with rapid population growth since 1990 to add a new constellation of ideas, cultural histories, and understandings of the purpose of land to the 'traditional' western story.<sup>61</sup> New

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57. See, e.g., Keith Hoggart & Angel Paniagua, *The Restructuring of Rural Spain?*, 17 J. RURAL STUD. 63 (2001); Terry Marsden, *Economic Perspectives*, in THE GEOGRAPHY OF RURAL CHANGE 13 (Brian Ilbery ed., 1998); Gundars Rudzitis, *Migration, Places, and Nonmetropolitan Development*, 10 URB. GEOGRAPHY 396 (1989).

58. Terry Marsden, *Rural Futures: The Consumption Countryside and its Regulation*, 39 SOCIOLOGICA RURALIS 501, 506 (1999).

59. See MICHAEL WOODS, RURAL GEOGRAPHY 38-39 (2005).

60. See *id.* at 30.

61. See e.g., Hannah Gosnell & Jesse Abrams, *Amenity Migration: Diverse Conceptualizations of Drivers, Socioeconomic Dimensions, and Emerging Challenges*, GEOJOURNAL (2009); Richelle Winkler et al., *Social Landscapes in the Intermountain West: A Comparison of 'Old West' and 'New West' Communities*, 72 RURAL SOC. 478 (2007); Soren C. Larsen et al., *Place Perception and Social Interaction on a Exurban Landscape in Central Colorado*, 59 PROF. GEOGRAPHER 421 (2007); Rita Ghose, *Big Sky or Big Sprawl? Rural Gentrification and the Changing Cultural Landscape of Missoula, Montana*, 25 URB. GEOGRAPHER 528 (2004); Gayla Smutny & Lois Takahashi, *Economic Change and Environmental Conflict in the Western Mountain States of the USA*, 31 ENV'T & PLAN. A 979 (1999); Andrew J. Hansen et al., *Ecological Causes and Consequences of Demographic Change in the New West*, 52 BIOSCIENCE 151 (2002); Peter B. Nelson, *Perceptions of Restructuring in the Rural West: Insights from the "Cultural Turn"*, 15 SOC'Y & NAT. RESOURCES 903 (2002); Peter B. Nelson, *Rural Restructuring in the American West: Land Use, Family, and Class Discourses*, 17 J. RUR. STUDIES 395 (2001); J. Matthew Shumway & Samuel M. Otterstrom, *Spatial Patterns of Migration and Income Change in the Mountain West: The Dominance of Service-Based, Amenity-Rich Counties*, 53 PROF.

residents arrive with new ideas about the purpose of land. They do not rely on extractive industries that are perceived as the bedrock of the rural western economy. Instead, they move to the rural West because of the natural and social amenities they presumed were available there. In many rural and formerly rural communities, new collective visions might emerge from the changing culture and customs of the community. These changes are not limited to new migrants, as even “old” residents are experiencing an evolution in their ideas about the purpose of land, as globalizing culture and values present new ideas and opportunities to rural communities.<sup>62</sup>

But if change – a “restructuring” – is occurring in rural areas, what does it look like? Much of the restructuring literature focuses on the economic changes occurring in rural areas.<sup>63</sup> But in the context of this discussion, which focuses on changing ideas about the purpose of land, restructuring must refer to qualitative transformations, changes that are inter-related and multi-dimensional in nature.<sup>64</sup> Viewed from this perspective, restructuring is the ‘end-product,’ the actual change from one social organization to another, or the “fundamental readjustments in a variety of spheres of life, where processes of change are casually linked.”<sup>65</sup> Restructuring must be more than simple demographic change, particularly in the rural West, where

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GEOGRAPHER 492 (2001); Debra Ohman, *Restructuring and Well-Being in the Non-Metropolitan Pacific Northwest*, 30 GROWTH & CHANGE 161 (1999).

62. See e.g., Robert J. Johnston et al., *Rural Amenity Values and Length of Residency*, 85 AMER. J. AGRIC. ECON. 1000 (2003); Rina Ghose, *Big Sky or Big Sprawl?: Rural Gentrification and the Change Cultural Landscape of Missoula, Montana*, 25 URB. GEOGRAPHER 528 (2004); Kathleen M. Brennan & Christopher A. Cooper, *Rural Mountain Natives, In-Migrants, and the Cultural Divide*, 45 SOC. SCI. J. 279 (2008).

63. See e.g., Peter B. Nelson, *Quality of Life, Nontraditional Income, and Economic Growth: New Development Opportunities for the Rural West*, 14 RURAL DEV. PERSP. 32 (1999); Peter B. Nelson & William B. Meyers, *Using Economic Base Models to Explain New Trends in Rural Income*, 29 GROWTH & CHANGE 295 (1998); Angelos Pagoulatos et al., *Interactions Between Economic Growth and Environmental Quality in U.S. Counties*, 35 GROWTH & CHANGE 90 (2004); THOMAS M. POWER & RICHARD N. BARRETT, *POST-COWBOY ECONOMICS: PAY AND PROSPERITY IN THE NEW AMERICAN WEST* (2001).

64. Keith Hoggart & Angel Paniagua, *What Rural Restructuring?*, 17 J. RUR. STUD. 41, 42 (2001).

65. *Id.* at 42.

demographic change is an integral part of its modern experience.<sup>66</sup> And, in this light, simple economic and associated technological change alone do not demonstrate a substantial restructuring of rural life.

In fact, economic and technological change might be considered an integral part of rurality. In the past century, rural areas have seen – among other things – the advent and spread of electricity, telephones, refrigeration, and synthetic fertilizer. Irrigation, commodity transportation, and farm machinery have also made significant advances.<sup>67</sup> Farm sizes have increased,<sup>68</sup> while total cropland has decreased,<sup>69</sup> dramatically altering the economics of the small family farm. And independent of farm size or numbers, farming families decreased significantly in size throughout the twentieth century.<sup>70</sup> Consequently, before concluding that a restructuring is occurring in contemporary rural areas, we should identify more than economic or technological changes. That is to say, changes that represent a

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66. The interior West has experienced multiple periods of rapid population growth, caused by a number of factors—including, among others, the “Rural Renaissance,” the OPEC oil embargo, coal-bed methane development, and most famously, the discovery of valuable minerals in multiple locations at multiple times. See, e.g., PATRICIA NELSON LIMERICK, WILLIAM TRAVIS, & TAMAR SCOGGIN, WORKSHOP REPORT: BOOM AND BUST IN THE AMERICAN WEST: A REPORT FROM THE CENTER OF THE AMERICAN WEST, available at <http://centerwest.org/wp-content/uploads/2010/12/boombust.pdf> (report was compiled from the presentations and comments of workshop participants).

67. See, e.g., Alan L. Olmstead & Paul W. Rhode, *Reshaping the Landscape: The Impact and Diffusion of the Tractor in American Agriculture, 1910-1960*, 16 J. ECON. HIST. 663 (2001); G.F. Sassenrath et al., *Technology, Complexity and Change in Agricultural Production Systems*, 23 RENEWABLE AGRIC. & FOOD SYS. 285 (2008).

68. In 1910, the average farm size was 138 acres. See CENSUS OF AGRICULTURE: HISTORICAL CENSUS PUBLICATIONS, U.S. DEPT. AGRIC., 1920 CENSUS OF AGRICULTURE 24 (1920), available at [http://www.agcensus.usda.gov/Publications/Historical\\_Publications/1920/Farms\\_and\\_Property.pdf](http://www.agcensus.usda.gov/Publications/Historical_Publications/1920/Farms_and_Property.pdf). By 1992, that size had increased to 491 acres. See U.S. DEPT. AGRIC., TABLE 1, 1992 CENSUS OF AGRICULTURE 8 (1992), available at <http://www.agcensus.usda.gov/Publications/1992/v1-tbl01.pdf>.

69. See U.S. DEP’T. AGRIC. NATURAL RES. CONSERVATION SERV., SUMMARY REPORT: 2007 NATURAL RESOURCES INVENTORY 71 (2009), available at [www.nrcs.usda.gov/technical/NRI/2007/2007\\_NRI\\_Summary.pdf](http://www.nrcs.usda.gov/technical/NRI/2007/2007_NRI_Summary.pdf).

70. See Richard A. Easterlin, *Population Change and Farm Settlement in the Northern United States*, 36 J. ECON. HIST. 45, 58 (1976).

true restructuring of rurality must represent more than a continuation of the demographic, technological, and economic changes that have occurred in the rural West (and elsewhere) since European settlement. Rather, restructuring should demonstrate qualitative change from one social organization to another – the *purpose* of land understood by rural communities will shift as the region transitions to a new human-land paradigm. Changing human-land relationships might lead to community preferences for the protection of natural resources rather than their exploitation, requiring an expanded role of local government in regulating that natural environment.<sup>71</sup>

#### A. Testing the Restructuring Thesis: Legal Change on the Ground

The restructuring thesis argues that changing demographics and new dominant economic sectors lead to an evolution in the human-land relationships of rural areas. However, the restructuring thesis does not fully explain the effect of these changing human-land relationships. That is to say, the literature describes changing attitudes and changing opinions about the extent of development that should occur, and the amount and type of land that should be preserved rather than developed, but the literature does not explain how these new attitudes and opinions are implemented on the ground. Are local land-use policies changing? Are property rights being redefined? What change has occurred that would ensure that new ideas, attitudes,

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71. There is, of course, a certain irony in this discussion. The new ideas about preferred uses of land and the natural environment, and the role of local government in carrying out those new preferred uses, arguably would originate in the same new residents that have caused the substantial growth, making necessary new, more restrictive land-use regimes, to counter that growth. It is also the new residents who are dissatisfied with the new suburbia of subdivisions and strip malls that motivate new development in ex-urban or rural locations. See e.g., Adrian X. Esparza & John I. Carruthers, *Land Use Planning and Exurbanization in the Rural Mountain West: Evidence from Arizona*, 20 J. PLAN. EDUC. & RES. 23, 25 (2000). It would be inappropriate, however, to discount the concerns or ideas of those new residents simply because they, in a common colloquialism, desire to shut the door to the valley *after* they've arrived. They are part of the new evolving community, and their ideas about the purpose of place matter as much as any other resident. This article will recognize that irony, therefore, but will take it no further.



opinions, and expectations about the purpose and use of land are institutionalized in a durable fashion?

Most of the restructuring literature is not explicitly interested in land-use law or policy. This characteristic might be inherent in the disciplines from which this literature emerges: rural sociology and rural geography. And to the extent to which planning literature addresses similar issues, it has focused in large part on the existence of conflict rather than on the potential legal resolutions to that conflict.<sup>72</sup> In other words, the planning literature seeks to identify and describe the potential problems that might be faced by planners in carrying out their planning function, but reasonably does not specifically address the jurisprudential ramifications of that conflict.

But if a restructured rurality – including a post-public-lands West – is defined by new expectations for both public and private land that would prefer preservation to development, we should expect to see a change in the legal regimes that regulate land. It is not uncommon for individuals to express opinions or attitudes about land and the environment which they are unwilling to implement in their own lives.<sup>73</sup> That is to say, individuals might profess the desire to protect land, reduce development, or otherwise effectively restrict the use of perceived property rights, but those same individuals often are less than willing to allow legal change that would create a durable restriction on their ability to use their *own* land. Consequently, we might be wise to doubt, to some extent, the sincerity of these expressions about land absent support for new, more restrictive legal regimes regarding land use. But that is not to say that claims of changing understandings of land will not lead to new land-use regimes, as those changing attitudes are the first step toward institutional change.

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72. See, e.g., Robert L. Ryan, *Preserving Rural Character in New England: Local Residents' Perceptions of Alternative Rural Development*, 61 *LANDSCAPE & URB. PLAN.* 19 (2002); Daphne Spain, *Been-Heres Versus Come-Heres: Negotiating Conflicting Community Identities*, 59 *J. AM. PLAN. ASS'N* 156 (1993).

73. See, e.g., Sandro Costarelli & Pasquale Colloca, *The Effects of Attitudinal Ambivalence on Pro-Environmental Behavioural Intentions*, 24 *J. ENVTL. PSYCHOL.* 279 (2004); José A. Corraliza & Jaime Berenguer, *Environmental Values, Beliefs, and Actions: A Situational Approach*, 32 *ENV'T. & BEHAV.* 832 (2000).

Viewed through a legal lens, the restructuring thesis – specifically that an evolving population will lead to new human-land relationships in rural areas – should be relatively easy to test empirically. Accepting that law reflects a community’s settled deliberations for a place, restructured human-land relationships ultimately should express themselves in the local legal regimes that regulate land. New understandings will emerge as new legal regimes that are more protective or restrictive, or at least more sophisticated, than the pre-restructured regimes.

In order to test this restructuring hypothesis on the ground in the rural West, I performed a two-part empirical assessment designed to identify and explain changes that have occurred since 1990 in formal land-use regimes in the rural intermountain West. If the “restructured” West is defined by new expectations for land that would prefer preservation to development, we should see a change in the legal regimes that regulate private rural lands. Law is ultimately the final blessing bestowed on our settled deliberations for a place; it is the tool used to implement visions and the mechanism for achieving a specific community vision. Real changes in human-land relationships should lead to changes in the regulation of land. Without that step, we might legitimately distrust claims of restructuring.

For that reason, the first step in testing a restructuring claim should be an assessment of legal change. The initial component of the macro-scale empirical work for this article was a survey of 173 rural western counties.<sup>74</sup> This initial survey occurred in the spring of 2007, with the goal of identifying the extent to which those rural counties have changed their approach to regulating land since 1990, the period during which the rural intermountain West experienced its most recent period of significant population growth.<sup>75</sup> The counties selected were those classified by the

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74. For a complete explanation of this research, see Jerrold A. Long, *New West or Same West?: Evolving Land-Use Institutions in the Rural American West* (2008) (unpublished Ph.D. dissertation, University of Wisconsin-Madison) (on file with author and on file with the Dissertation Collection, University of Wisconsin-Madison).

75. See, e.g., Irene C. Frentz, et al., *Public Lands and Population Growth*, 17 *SOCY & NAT. RESOURCES* 57 (2004); Andrew J. Hansen et al., *Ecological Causes*

Department of Agriculture's rural-urban continuum codes as non-metropolitan with an urban population less than 20,000 (as of the 2000 census).<sup>76</sup>

Since it is legal *change* in these counties that is most relevant to the restructuring discussion, rather than the nature of the ultimate land-use regime, the survey focused on identifying change. Aspen, Colorado, or Jackson, Wyoming, might have very sophisticated or restrictive land-use regimes that reflect the collective visions of those communities, but those land-use regimes might not represent a restructuring, i.e., a community change that leads toward new human-land relationships. Those land-use regimes instead might reflect the continuation of a pre-existing human-land paradigm grounded in earlier periods of restructuring. The output of this empirical work, therefore, was a "restrictiveness change score," which measured the degree to which a county's land-use regime had grown more restrictive or sophisticated since 1990.

This restrictiveness change score did not reflect the land-use approach of each county at a specific point in time, but rather identified the *change* in each county's approach to land use since 1990. The survey requested that each respondent identify the land-use tools employed in each county, as well as the date of implementation. In addition, the survey requested a subjective assessment of whether the use of several specific tools has changed over time, and whether the entire regulatory regime has grown more restrictive and complicated over time. Consequently, the index contains a score based on the land-use tools implemented during three periods – before 1990, between 1990

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*and Consequences of Demographic Change in the New West*, 52 BIOSCIENCE 151 (2002); Paul Lorah & Rob Southwick, *Environmental Protection, Population Change, and Economic Development in the Rural Western United States*, 24 POPULATION & ENVT. 255 (2003).

76. See *Briefing Room, Measuring Rurality: Rural-Urban Continuum Codes*, ECON. RESEARCH SERV., U.S. DEP'T OF AGRIC., <http://www.ers.usda.gov/briefing/rurality/ruralurbcon/> (last visited Apr. 28, 2004). For the "Intermountain West," I used Riebsame's characterization. See *ATLAS OF THE NEW WEST: PORTRAIT OF A CHANGING REGION 50* (James J. Robb & William E. Riebsame eds., 1997). The survey measured the change in the land-use regimes of counties, rather than municipalities, because in the rural West most of the recent significant development has occurred in unincorporated areas.

and 2000, and after 2000 – as well as a score based on the subjective responses. The restrictiveness change score is the combination of three sub-scores: the *difference* between the number of land-use tools implemented after 1990 and the number implemented before 1990; a subjective measure of the change in use of several specific tools; and the subjective statements of the overall change in how the county approaches land use. Because the primary intent of this research was to identify durable change in land-use institutions, actual change in the land-use ordinances of a county contributed to the restrictiveness change score to a greater extent than did changes perceived by the survey respondents.

As should be expected, given both the complexity of local land-use structures and the significant variability in geography, culture, and history across the rural West, the survey results demonstrated a wide variety in both the current tools used by local governments, and the amount the use of those tools has changed over time. But consistent with the predictions of the restructuring theory, local land-use regimes in the rural West have changed over the past two decades. More important, those changes coincide with changes in the demographic and community characteristics identified as potentially leading to a restructured rurality: high quality natural amenities and associated population growth and economic change.

In attempting to explain the differences among the survey responses, this empirical study compared the changes in land-use regimes to the variables suggested by the restructuring thesis as promoting changing human-relationships.<sup>77</sup> According to the restructuring literature, the new ideas and expectations that arrive with migrants from outside the rural West are an important cause of those changing relationships.<sup>78</sup> However,

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77. All together, I considered sixty different variables, but most either demonstrated no explanatory power – either alone or considered in a model with other variables – or were closely correlated to other variables and thus eliminated.

78. See Terry Marsden, *Economic Perspectives*, in THE GEOGRAPHY OF RURAL CHANGE 13 (Brian Ilbery ed., 1998); Robert Gottlieb, *The Meaning of Place: Reimagining Community in a Changing West*, in REOPENING THE AMERICAN WEST 183 (Hal K. Rothman ed., 1998).

rural western counties differ on a much wider range of variables than simply the level of amenity-driven population growth each county experiences. Population growth alone might be sufficient to cause any given county to revise its approach to managing land. But, more likely, if amenity-driven population growth does affect how a county manages private land, it will do so in concert with one or more additional variables.

The statistical analyses of the survey data and potential causative factors consisted of two parts: a series of tests of a difference in means, and a series of multiple regression analyses.<sup>79</sup> The first approach relied on the assumption – consistent with the restructuring thesis – that counties that demonstrated a change toward more restrictive land-use regimes would differ in some way from those that did not. After determining that the land-use regimes of certain counties are evolving toward a more restrictive approach to regulating private land, while other counties are changing very little (if at all), the most obvious initial question is whether the counties differ with respect to any other variable that is part of this study.

These statistical analyses confirm some of the predictions of the restructuring literature. Dividing the counties into two sets of two populations<sup>80</sup> yielded populations that differed in a statistically significant fashion with respect to two restructuring relevant variables: population growth,<sup>81</sup> and change in median

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79. For a complete description of the statistical methodology used, see Jerrold A. Long, *New West or Same West?: Evolving Land-Use Institutions in the Rural American West* (2008) (unpublished Ph.D. dissertation, University of Wisconsin-Madison) (on file with author and on file with the Dissertation Collection, University of Wisconsin-Madison).

80. I performed this analysis with two different sets of different populations. First, I simply divided the entire set of counties at the mean of the restrictiveness change score. Then I used the counties that were between one and two standard deviations above the mean and compared that group to the counties that were between one and two standard deviations below the mean.

81. Splitting the counties at the mean restrictiveness change score, the high restrictiveness change score counties grew by an average of 35.6% between 1990 and 2006. The low restrictiveness change score counties grew by an average of 13.3% during the same period. The difference between these two means is statistically significant ( $p < 0.0001$ ). Dividing the counties into the “highly restrictive” and “minimally restrictive” categories – one standard deviation above and below the mean – provides average growth rates between 1990 and

household income.<sup>82</sup> On the surface, these initial results support the claims of the restructuring theory as that theory has developed to date. The restructured counties – identified by land-use regimes that have grown more restrictive over time – are more likely to have experienced rapid population growth and increased personal incomes than non-restructured counties.<sup>83</sup> In other words, there is a statistically significant correlation between evolving land-use regimes and population growth and increasing personal income, as the restructuring thesis would predict. But although these results are useful, this approach is a somewhat blunt instrument.

At least two factors recommended augmenting the means comparisons with further statistical analyses. First, the survey results demonstrated – as would be expected – that a substantial range of land-use approaches exists in the rural West. As a result, the responding counties demonstrated a similarly substantial variety in the amount of *change* in land-use regimes

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2006 of 47.2% and 6.8% respectively. Again, the difference between these means is statistically significant ( $p = 0.001$ ).

82. Comparing the change in mean household income – assumed by the restructuring literature to be affected by amenity-driven population growth – in high and low restrictiveness change score counties yields similar results. The counties with an above average restrictiveness change score experienced a \$15,009 increase in mean household income between 1989 and 1999, compared to \$11,999 for low restrictiveness change score counties. The difference between these means is statistically significant ( $p = 0.0002$ ). Comparing the counties one standard deviation above and below the mean also demonstrates that the two groups differ with respect to this variable in a statistically significant fashion. The “highly restrictive” counties saw a \$16,671 increase in mean household income, compared to \$11,139 for the “minimally restrictive” counties. The 1989-1999 data were the latest data available at the time of the analysis, based on the 2000 census. It remains relevant because this change correlates with a period of significant population growth in the Intermountain West and with the period of time measured in the land-use survey. The data also remains relevant for the simple fact that institutional change takes some time, i.e., demographic changes occurring today will only have an effect on institutional regimes (if they do have any effect) after some period of time elapses. This period of time is important because it would allow the demographic change to permanently alter the local politics and understandings of purpose.

83. The changes in average incomes actually say little specifically about the nature of the local economies, but the restructuring theory uses these changes as a proxies for changes in dominant economic sectors. The assumption here is that average incomes could only rise as communities shift away from farming, ranching, or other traditional extractive industries.

that has occurred since 1990. Creating a somewhat arbitrary division of two separate groups potentially added an unnecessary level of researcher bias into the analysis without providing enough additional explanatory power to justify that move. Moreover, any research approach that seeks to explain phenomena that occur *across* units of analysis – by attempting to achieve an explanation adequate for the whole – tends to “smooth out” the differences between the units of analysis.<sup>84</sup> Collapsing the wide range in differing approaches to a simple zero/one binary might have exacerbated that tendency by removing much of the inter-county variability from the analysis.

A multivariate regression analysis – which identifies the correlation between the change in the variable of interest and change in one or more potentially explanatory variables – provided an additional opportunity to determine which factors might explain the apparent change in county-level approaches to private land-use regulation.<sup>85</sup> Consistent with the difference in means analysis, every multi-variate model selection tool employed yielded a statistically significant model that supported the restructuring thesis to some extent.<sup>86</sup> The number of variables in these models varied from three<sup>87</sup> to twenty one.<sup>88</sup>

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84. See, e.g., ROBERT K. YIN, *CASE STUDY RESEARCH: DESIGN AND METHODS* (3d ed. 2003); MATTHEW B. MILES & A. MICHAEL HUBERMAN, *QUALITATIVE DATA ANALYSIS: AN EXPANDED SOURCEBOOK* (2d ed. 1994).

85. The multi-variate regression analyses used models created out of the full suite of sixty original variables, by employing Mallow’s  $C_p$  criterion, see Colin L. Mallows, *Some Comments on  $C_p$* , 15 *TECHNOMETRICS* 661 (1973); the adjusted R-squared metric, see RICHARD G. LOMAX, *AN INTRODUCTION TO STATISTICAL CONCEPTS FOR EDUCATION AND THE BEHAVIORAL SCIENCES* 256 (2001); and “common sense” and a “great deal of personal judgment.” NORMAN R. DRAPER & HARRY SMITH, *APPLIED REGRESSION ANALYSIS* 294, 300 (2d ed. 1981).

86. For both models and variables, I used  $p < 0.01$  as the threshold for significance. Because  $p < 0.05$  is a commonly used threshold, I report variables that satisfied that threshold as “potentially significant.” In the discussion that follows, every mention of statistically significant variables (within a statistically significant model) contains the caveat that the variables are statistically significant only when considered in conjunction with *all* the other variables in the model.

87. In the case of one model, which was provided by the Mallow’s  $C_p$  criterion model selection approach.

88. In the case of another model, which was provided by the adjusted R-squared model selection tool.

The highest degree of correlation— which represents the percentage of the variability in the dependent variable that is explained by the independent variables<sup>89</sup> — was 0.44, provided by a twenty-one variable model<sup>90</sup> with six statistically significant variables.<sup>91</sup> In other words, in this model, 44% of the variation in the restrictiveness change score is explained by variation in the independent variables. Other models yielded different, but consistent, results, albeit using substantially fewer variables.<sup>92</sup>

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89. This value is referred to as the “R-squared” value. See SUSAN WELCH & JOHN COMER, QUANTITATIVE METHODS FOR PUBLIC ADMINISTRATION: TECHNIQUES AND APPLICATIONS 238 (3d ed. 2006).

90. This model was created using the adjusted R-squared approach. There were many models with virtually identical R-squared and adjusted R-squared values that differed slightly in the make-up of variables included. The model mentioned in the text demonstrated the highest R-squared value and equaled the highest adjusted R-squared value.

91. In the 21-variable model, six of the variables are statistically significant when considered with the other variables: the population density in 2000 ( $p = 0.002$ ); the change in population density between from 1990-2000 ( $p = 0.002$ ); the change in population density on non-federal lands from 1990-2006 ( $p = 0.0007$ ); the amount of public assistance income provided in 1999 ( $p = 0.002$ ); whether the county suffers from low employment levels ( $p = 0.01$ ); and the amount mean household income changed between 1989-1999 ( $p = 0.003$ ). Five additional variables would satisfy a less stringent significance threshold ( $p \leq 0.05$ ). Those additional variables are: population growth 1990-2000 ( $p = 0.04$ ), the population density on nonfederal lands in 2000 ( $p = 0.04$ ); the percent of the county made up of high-quality federal lands ( $p = 0.03$ ); whether the county is adjacent to a large metropolitan area ( $p = 0.04$ ); and whether the county is farming-dependent ( $p = 0.03$ ).

92. The two models selected using the Mallows’  $C_p$  criterion contained six (R-squared = 0.30) and three variables (R-squared = 0.25). None of the variables in the six-variable model satisfy a  $p < 0.01$  significance test, although four satisfy the  $p < 0.05$  significance test: percent of the county comprised of high quality federal lands ( $p = 0.049$ ); farming dependence ( $p = 0.015$ ); manufacturing dependence ( $p = 0.025$ ); and the change in mean household income between 1989 and 1999 ( $p = 0.017$ ). For the purposes of this study, “high quality” public lands consisted of the National Parks and Monuments, Wilderness, or National Forests that presumably offer a suite of recreational, ecological, and social amenities that attract new westerners. Several studies have tied population growth to the presence of “high quality” federal lands. See, e.g., Christy Dearien et al., *The Role of Wilderness and Public Land Amenities in Explaining Migration and Rural Development in the American Northwest*, in AMENITIES AND RURAL DEVELOPMENT 113 (Gary P. Green, Steven C. Deller, & David W. Marcoullier eds, 2005); Irene C. Frentz et al., *Public Lands and Population Growth*, 17 SOC’Y & NAT. RESOURCES 57 (2004). “Farming dependence” is an economic classification created by the USDA Economic Research Service. A county is considered farming dependent if 15% of all earnings or 15% of all jobs



The model selection tools all have certain limitations,<sup>93</sup> and many statisticians suggest that the researcher's knowledge and experience are the best model selection tools.<sup>94</sup> Those issues notwithstanding, the multi-variate regression analyses do provide some insight into the factors that influence changing land-use regimes. Considering all of the tests above together, population growth (and change in other variables related to population growth) apparently plays the most important role – *of the variables considered in this component of the research* – in explaining the variation in restrictiveness change scores.

Although the statistical analyses described above indicate that population growth and changing economic conditions explain an important part of the change in restrictiveness change scores, as would be expected by the restructuring thesis, there remains a significant issue we must address in considering the results of the land-use survey. The most 'complete' statistical model – which contains twenty-one independent variables – explains less than 50% of the variation in the restrictiveness change scores. The single-most important variable – i.e., the variable that explains more of the change in the restrictiveness change score than any

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come from agriculture. See *Briefing Room, Measuring Rurality: Rural-Urban Continuum Codes*, ECON. RESEARCH SERV., U.S. DEPA'T OF AGRIC., <http://www.ers.usda.gov/briefing/rurality/ruralurbcon/> (last visited Apr. 28, 2004). "Manufacturing dependence" describes those counties which *do not* satisfy the "farming dependence" criteria, and which experienced 25 percent or more of average annual labor and proprietors' earnings derived from manufacturing. See *id.* All three variables in the three-variable model are significant or potentially significant; two of which are also potentially significant in the six-variable model. The change in nonfederal population density between 1990 and 2006 ( $p = 0.003$ ), and the change in mean household income between 1989 and 1999 ( $p = 0.0001$ ), are statistically significant; manufacturing dependence is potentially significant ( $p = .027$ ).

93. Interestingly, in one case, the sign of the regression coefficient was the opposite of the expected result. In the 21-variable model, the change in population density 1990-2000 was statistically significant, but the regression coefficient was negative, indicating that restrictiveness change scores increase as population density decreases, when considered with the other 20 variables. In the same model, the population density in 2000 was statistically significant and had a positive regression coefficient, as expected. These results further recommend moving beyond the surveys and statistical analyses to the case study approach.

94. See, e.g., NORMAN R. DRAPER & HARRY SMITH, APPLIED REGRESSION ANALYSIS 294, 300 (2d ed. 1981).

other, when considered separately – explains less than 20% of the variation in the restrictiveness change score. Those results are significant, both in the statistical sense and the more pedestrian sense, and I should not diminish their importance. But even assuming that all of the explanatory power of the twenty-one-variable model is real, most of the variation in the restrictiveness change scores remains unexplained. Again, this is not to say that the correlation identified in these analyses is insignificant. To the contrary, given the range of population sizes, geographic conditions, cultural histories, and other widely varying characteristics of rural western counties, the correlation found is surprisingly high.

But while the land-use survey and statistical analyses contain elements that support the claims of the restructuring literature, they also contain elements that suggest some additional consideration is necessary. The counties that have evolved toward more restrictive land-use regimes might do so because the communities have recognized over the past two decades that the institutions that existed previously either would not be able to carry out the communities' expectations for the future – possibly as a result of new pressures that did not exist when the institutions arose – or the previous institutions were not consistent with *changed* expectations for the future of the place. The restructuring literature focuses principally on the second reason, arguing that in the rural West, ideas about land and the environment have changed from the extractive economy ethic that existed for much of the West's post-European colonization history, to an increasingly preservationist attitude.<sup>95</sup> According to the literature, this change in attitudes about land arises primarily as new ideas and attitudes arrive with the new western residents.

But rural counties might adjust land-use regimes in response to population growth for the simple reason that population growth finally made land-use regulation necessary. Following the "rural renaissance" of the 1970s, many rural communities *lost*

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95. See *discussion supra* Section III.

population during the 1980s.<sup>96</sup> During an extended period of declining populations, land-use regulation might seem unnecessary or even counterproductive. The often rapid rural population growth that has occurred since approximately 1990, in contrast, might demand some form of additional land-use regulation, quite independent of allegedly changing human-land relationships. In other words, while population growth would be necessarily correlated with land-use regime change, the causative element would be *landscape change*, rather than demographic change. I will return to this potential explanation in the following sections.

An important additional factor relates to the relatively recent advent of land-use regulation – by counties – in the rural intermountain West. Over half of the study counties implemented their *first* comprehensive plans after 1990.<sup>97</sup> This is related perhaps, in part, to the well-known, if perhaps somewhat anecdotal, relationship of rural residents to private property rights.<sup>98</sup> But it is also a consequence of the late advent of land-use law on the state level. Idaho, for example, did not require land-use regulation until 1975,<sup>99</sup> and many counties waited a significant amount of time before complying with the legislative mandate.<sup>100</sup> Montana and Utah do not require land-use regulation by counties,<sup>101</sup> and even today some rapidly growing counties have not adopted county-wide plans or zoning ordinances.<sup>102</sup>

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96. See, e.g., Stephan J. Goetz & David L. Debertin, *Rural Population Decline in the 1980s: Impacts of Farm Structure and Federal Farm Programs*, 78 AM. J. AGRIC. ECON. 517 (1996).

97. Sixty-five of the 112 counties that reported when a comprehensive plan was first implemented indicated it was after 1990. Thirty-six said it was after 2000. (Survey data on file with author).

98. See, e.g., WHO OWNS AMERICA? SOCIAL CONFLICT OVER PROPERTY RIGHTS (Harvey M. Jacobs ed., 1998).

99. IDAHO CODE ANN. §§ 67-6503-67-6538 (West 2011) (enacted in 1975).

100. Of the twenty-six Idaho counties that responded to the survey, seventeen reported completing their first comprehensive plans after 1992. One county apparently still lacks a comprehensive plan.

101. MONT. CODE ANN. § 76-2-201 (West 2011); UTAH CODE ANN. § 17-27a-102 (West 2011).

102. Ravalli County, just south of Missoula, Montana, authorizes “citizen initiated zoning districts,” but has not adopted a county-wide, universal zoning

But despite the caveats mentioned here, the land-use survey and statistical analyses are valuable. Given the substantial variation in the survey counties, the complexity of the statistical models, issues inherent in any survey approach, and the previously untested restrictiveness change score concept, the results of the statistical analyses are surprising. In fact, in some ways I overstate the significance of the ‘unexplained region’ while minimizing the fact that nearly half of the variation in land-use regimes *is* explained by one component of the restructuring thesis (as described and applied in this research). The data analyzed is necessarily messy, but the R-squared values that resulted are higher than might have been expected. Consistent with the initial difference in means analyses, the regression analyses demonstrate that a real correlation does exist between population growth and land-use regime change.<sup>103</sup>

But we are left with a nagging question, an “irritation of doubt” that suggests the statistical analyses do not tell the entire story.<sup>104</sup> Are the changed legal regimes incorporating changed human-land relationships, to the extent they exist, or do they instead simply represent an understandable trajectory toward complexity in social and cultural relationships? Any community might be expected to adopt more sophisticated or complex legal regimes as populations expand and new conflicts emerge. But are these new regimes *qualitatively* different from previous regimes? Most important, the recognition that population growth is correlated with land-use regime change does not directly address the more interesting question of *why* these land-use regimes are

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ordinance. Ravalli County had a “growth policy,” but the electorate repealed that policy via referendum on Nov. 4, 2008. See Press Release, Ravalli Cnty., Mont., Planning Dep’t, Frequently Asked Questions Regarding the Referendum to Repeal the Ravalli County Growth Policy and Amendments Passed November 4, 2008 (Nov. 17, 2008). Between 1990 and 2009, Ravalli County increased in population by 61%, compared to 22% for the state as a whole.

103. Perhaps as significant, at least in terms of validating the approach used in this research, these results indicate that the land-use survey and restrictiveness change score concept provide useful measures of land-use regime change.

104. Charles Sanders Peirce, *The Fixation of Belief*, 12 POPULAR SCI. MONTHLY 1 (1877).

changing. That is to say, what is it about rapid population growth that influences evolving land-use regimes?

But before addressing that most basic question – why land-use regimes might change – we must address a related and somewhat problematic alternative explanation for the results of the statistical analyses. New legal regimes can facilitate growth or development just as readily as they can restrict that growth. Is it possible that the evolution in legal regimes identified in the land-use survey occurred as local communities attempted to guide and take advantage of that growth? That is to say, do the new laws *promote* growth, rather than restrict it? Does this legal evolution represent a restructuring, or simply a continuation of previous experiences? The empirical approach above measured *change* in legal regimes, but did not necessarily identify a move toward more restrictive or growth-controlling regimes, even if that was its goal. The following section addresses that question directly and explores an alternative explanation for the legal evolution identified above.

#### IV. HOLDING ON TO PURPOSE: THE GROWTH MACHINE AND RESISTANCE TO CHANGE

*On the surface it looked like the ordinances were getting more sophisticated. . . . What the ordinances were in fact doing was opening the door to dumb growth. . . . To a lay person, it looked like a more sophisticated ordinance than the one it replaced.*<sup>105</sup>

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105. Interview with T1, in Driggs, Idaho (Dec. 27, 2007). (This research included a number of interviews with government officials from two Idaho counties. Because of the divisiveness and controversy still evident in these counties, I promised all of the individuals who were willing to talk to me that I would not reveal their identities. Several individuals specifically requested this; others did not seem to care. However, identifying some individuals would make it more obvious who the others might be. Consequently, unless the information was otherwise publicly available (e.g., where an individual repeated something to me that was stated in a public hearing or to the media), I have not identified anyone in this article. In many cases, that requires that I make claims, or repeat specific statements, without specific attribution. Where appropriate, I provide the general source for the information. In all cases where I provide actual quotes, I identify the speaker with an anonymous but consistent “tag” allowing for comparison across comments, quotes or opinions. The tag consists

One element of the restructuring thesis implicit in the “old timer” concept is *opposition* to a specific type of change. The restructuring discussion identifies a potential change in ideas of purpose in rural areas, but – at least as described and discussed here – pays less attention to the consequences of that change – consequences which might look like a new version of the old extractive economy. Even with the recent downturn in the global economy and consequent deflation of real estate prices, land prices in rural areas, and the profits to be made from development, still exceed substantially what might have been available a decade or two ago.<sup>106</sup> Where land values were once driven primarily by the value of the land itself as support for various extractive industries, the primary source of land value in many rural western communities lies in its role in contributing to, and profiting from, a new natural-amenity-driven economy.

I should note here that this article asks the word “change” to do a fair amount of work. In context of the broader discussion, there is demographic change, landscape change, and institutional change – all interrelated. This specific discussion focuses on institutional change, recognizing that demographic and landscape change are largely *fait accompli* in many places. Because law is the final blessing we bestow upon our settled deliberations of place, it is institutional change that signifies a completed restructuring.

But in any community, local institutions ‘resist’ change because for any institutional setup, a group of interests benefits from the continuation of the status quo and seeks to maintain the

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of a letter/number combination (e.g., “T1” for the first identified source from Teton County) and will always refer to the same person.)

106. According to one assessment of real estate trends in southeastern Idaho, sales and construction industry jobs have declined to approximately the same levels as 2000, which were substantially higher than 1990. See Jonathan Schechter, *Teton Valley Continues Bottom Bounce*, JACKSON HOLE NEWS & GUIDE (Aug. 25, 2010), available at [http://www.jhnewsandguide.com/article.php?art\\_id=6384](http://www.jhnewsandguide.com/article.php?art_id=6384). Mr. Schechter’s article does not contain citations to, or explanations of, his sources. In response to my request for his sources, Mr. Schechter indicated he relied on data from: (1) a proprietary MLS-based system designed by a Jackson, Wyoming realtor; (2) reports from and interviews with the Idaho State Tax Commission; (3) local builder permit activity compiled by a Teton County based activist group; (4) employment data from the Idaho Labor Commission.

existing institutions. This is particularly true in the land-use arena. Over thirty years ago, sociologists recognized that a broad array of local interests benefit from urban growth and seek to promote it, creating a “growth machine.”<sup>107</sup> The growth machine is a set of interest groups with common stakes in development that use the institutional setup of a locality, including both the political/legal and cultural aspects, to intensify land use and increase income for land-based interests.<sup>108</sup> Because of this growth machine, “the political and economic essence of virtually any given locality, in the present American context, is *growth*.”<sup>109</sup>

The growth machine often consists of interests that are invested significantly in a particular place. These interests – landowners, capital-intensive firms (e.g., ski resorts or large-scale developments), firms relying on social relationships (e.g., realtors, insurance agents, attorneys), newspapers, local government – share a “local dependence.”<sup>110</sup> Locally dependent actors possess capital that is not easily transferable to another locale, such as land, a physical infrastructure, or locally-dependent social capital. Similarly, many members of the growth machine hold positions of power in local government, or at least enjoy increased access to that power – power that is also not readily transported to a new community.<sup>111</sup> The combination of access to power and narrowly-defined geographies of interest motivates the growth machine to play a large role in defining the future of a place and the institutions that might arise and persist there.

While opposition to growth is often viewed as the selfish behavior of a privileged elite, the pursuit of growth may be so ingrained in local culture that developers’ maneuvers and interests become part of the local baseline of a community, such that development is normal, rather than ‘activism,’ and only the

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107. See generally Harvey L. Molotch, *The City as a Growth Machine: Toward a Political Economy of Place*, 82 AM. J. SOC. 309 (1976).

108. See *id.*; see also Harvey L. Molotch, *The Political Economy of Growth Machines*, 15 J. URB. AFFAIRS 29 (1993).

109. Harvey L. Molotch, *The City as a Growth Machine: Toward a Political Economy of Place*, 82 AM. J. SOC. 309, 309-310 (1976).

110. See Kevin R. Cox & Andrew Mair, *Locality and Community in the Politics of Local Economic Development*, 78 ANNALS ASS’N AM. GEOGRAPHERS 307, 308-310 (1988).

111. *Id.*

preservation or growth-control positions are viewed as disruptive.<sup>112</sup> In this view, the natural socio-political trajectory would be one of increasingly facilitated development and growth, rather than the maintenance of some baseline. In fact, growth and development can become so important to local culture that growth management or regulation might do little to diminish the wider market for growth.<sup>113</sup> Where multiple communities exist in the same region, more restrictive regulations in one community simply shift growth to a nearby community, thereby maintaining a rate of growth sufficient to accommodate demand and the interests of the local growth machine.<sup>114</sup> But even in a region that has implemented restrictive growth management policies successfully – where no opportunity exists to move to a nearby, less-restrictive community (such as an isolated non-metropolitan community) – those policies arguably play little role in either limiting growth or contributing to any reduced growth that might occur.<sup>115</sup> Either there exist multiple mechanisms to avoid the restrictive elements of local regulations, or the policies are implemented *after* demand for growth has subsided. That is to say, the restrictive land-use policies only arise when it is no longer in the interest of the growth machine to oppose them. Consequently, notwithstanding the creation of growth management programs in some locales, the “most durable” aspect of land-use regulation is the “manipulation of government resources to serve the exchange interests of local elites, sometimes at the expense of one another and often at the expense of local citizens.”<sup>116</sup>

The growth machine benefits from another form of institutional inertia - a circular institutional morality. In the context of the current discussion, the circular nature of an institution's morality is readily apparent in how a community considers rights in land, or more to the point, how a community

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112. Harvey L. Molotch, *The Political Economy of Growth Machines*, 15 J. URB. AFFAIRS 29, 32 (1993).

113. See JOHN R. LOGAN & HARVEY L. MOLOTCH, *URBAN FORTUNES: THE POLITICAL ECONOMY OF PLACE* 159-160 (1987).

114. *Id.* at 160-161.

115. *Id.*

116. *Id.* at 178.



initially assigns rights in land. Ronald Coase recognized that the initial assignments of property rights matter, given the often substantial transaction costs associated with upsetting that initial assignment in favor of an arrangement more satisfactory to all parties involved.<sup>117</sup> Extending the notion of transaction “costs” for a moment, we understand that among the most difficult costs associated with reassigning property rights is the cultural change required to accept that the previous assignment of rights is no longer useful. We are products of our institutional and cultural experiences,<sup>118</sup> and those experiences provide a particular pathway for assessing “appropriate” regulation or reassessment of the previously established rights structure. An institutional regime is appropriate if it is consistent with, and protects, those previously assigned rights – rights which are ultimately the product of that institutional regime. A reassignment of rights requires a change in the cultural framework that justified the original assignment of rights.

Although, per Coase, the initial assignment of rights might not necessarily determine the ultimate outcome absent transaction costs, those costs – represented by cultural change – render the initial assignment more or less permanent. The initial assignment of rights remains because the ongoing institutional structure indicates that the original assignment is correct. And that ongoing institutional structure remains because it serves to protect what the community understands as the correct assignment of property rights – an understanding informed by the local institutional structure. The institution is moral because it protects what the community believes is moral; the community believes something is moral because its institutions define and protect that morality.

For at least these reasons – the circularity of institutional morality and the existence of local elites or power brokers that benefit from the status quo – local legal regimes and institutions are inherently self-sustaining, often requiring significant conflict or significantly changed circumstances before a community will

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117. See Ronald H. Coase, *The Problem of Social Cost*, 3 J. LAW & ECON. 1, 8 (1960).

118. See, e.g., CLIFFORD GEERTZ, *THE INTERPRETATION OF CULTURES* 35 (1973).

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recognize that the existing institutions are no longer satisfactory.<sup>119</sup>

### **A. Testing the Growth Machine: Purpose and Resistance to Change**

If we accept the statistical work discussed previously, we should question the validity of the growth machine in areas undergoing substantial cultural change – assuming that the restructuring thesis' arguments about rural growth and qualitative change remain useful. The advent of a period of more restrictive land-use regimes while population growth is ongoing is inconsistent with the growth machine, in particular its assurance that more restrictive land-use regimes only arise after demand for growth has subsided. But as noted above, there are alternative explanations for the creation of new land-use regimes, including the growth machine's use of those new regimes to facilitate development.

The second phase of this empirical work went beyond the initial statistical analyses to conduct a qualitative assessment of legal regimes that have been emerging in the rural West. The motivation for this second phase originated in an apparent disconnect between the results of the quantitative empirical work and the conditions on the ground in the rural West. Population growth necessarily requires land development, and many of the counties that allegedly adopted restructured land-use institutions demonstrated patterns of development that appeared inconsistent with a changed human-land paradigm, as briefly described in this article's introduction.

Although the complete second phase of this research considered the land-use experiences of six western counties,<sup>120</sup> we only need consider the story of one of those counties to demonstrate the role of the growth machine in guiding institutional evolution in allegedly restructuring rural

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119. See, e.g., Malcolm Rutherford, *Institutional Economics: Then and Now*, 15 J. ECON. PERSP. 173, 174 (2001).

120. The six counties were: Alpine County, California; Huerfano County, Colorado; Routt County, Colorado; Fremont County, Idaho; Teton County, Idaho, and Ravalli County, Montana.

communities. Teton County, Idaho is, at once, a paradigmatic case<sup>121</sup> for restructuring – at least in terms of rapid population growth and changing dominant economic sectors – and a paradigmatic case for the growth machine. Its new residents claim to possess new ideas about land’s purpose and the proper role of government regulation, i.e., they claim to be “restructured.”<sup>122</sup> At the same time, between 2000 and 2007,<sup>123</sup> as Teton County’s population increased 40% – from 5,999 to 8,418 residents<sup>124</sup> – the value of new residential construction increased over 500% – from just \$18 million to \$107 million.<sup>125</sup> And since 1990, as the population has increased 145%, the value of new permitted residential construction increased over 125,000% – from just one permit valued at \$85,000 to the aforementioned \$107 million.<sup>126</sup>

This dramatic increase in development was not unintentional. Teton County’s land-use experience is consistent with one aspect of the restructuring thesis: the county *has* revised its land-use regime multiple times since 1990. However, those revisions have not been consistent with the expectations of the restructuring thesis. In fact, since 1993 it appears that each time

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121. See, e.g., Bent Flyvbjerg, *Five Misunderstandings About Case-Study Research*, 12 QUALITATIVE INQUIRY 219, 232-33 (2006).

122. See, e.g., Peter B. Nelson, *Rural Restructuring in the American West: Land Use, Family and Class Discourses*, 17 J. RURAL STUD. 395, 401-403 (2001). But see, e.g., Michael D. Smith & Richard S. Krannich, “Culture Clash” Revisited: *Newcomer and Longer-Term Residents’ Attitudes Toward Land Use, Development, and Environmental Issues in Rural Communities in the Rocky Mountain West*, 65 RURAL SOC. 396 (2000). Both of these articles report on qualitative studies that included Teton County.

123. I have chosen 2007 as a bookend for this comparison because of how dramatically economic conditions changed nationally in 2008. The effect of the global recession on Teton County will be discussed below.

124. *Idaho—County Population Estimates*, U.S. CENSUS BUREAU, [http://factfinder.census.gov/servlet/GCTTable?\\_bm=y&-geo\\_id=04000US16&\\_box\\_head\\_nbr=GCT-T1&-ds\\_name=PEP\\_2009\\_EST&-\\_lang=en&-format=ST-2&-\\_sse=on](http://factfinder.census.gov/servlet/GCTTable?_bm=y&-geo_id=04000US16&_box_head_nbr=GCT-T1&-ds_name=PEP_2009_EST&-_lang=en&-format=ST-2&-_sse=on) (last visited Mar. 30, 2011).

125. These construction data were obtained through the U.S. Census’ Building Permits database. See *Building Permits*, U.S. CENSUS BUREAU, <http://censtats.census.gov/bldg/bldgprmt.shtml> (last visited March 30, 2010)

126. The single permit in 1990 might represent lax enforcement more than the construction of a single residential unit, given the apparent lack of institutional capacity in the county in 1990. By 1992 permitted residential construction had increased to 113 units valued at over \$7.5 million. See *id.*

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Teton County revisited its comprehensive plan and land-use ordinances – at least until late 2008 – the effort resulted in a *less restrictive* approach that facilitated even more development than before – a result consistent with a strong growth machine.<sup>127</sup>

They went through a horrible phase of just letting everybody come in and draw on the map what they wanted. . . basically whatever zoning you want come draw on the map and we're going to adopt it. . . . They prostituted their entire county to 2.5-acre zoning which has then checker-boarded the landscape and created the most scenically atrocious situation they could have ever had.<sup>128</sup>

For example, in 1998 and 1999, the county proposed the elimination of agricultural zones, replacing them with residential zones, and removing protections provided by certain zoning overlays.<sup>129</sup> The revisions also included a vague definition of “subdivision” that would allow certain small developments without any county approval and two new planned unit development (“PUD”) ordinances that would increase allowable development in most of the county.<sup>130</sup> The county had been working with a Boise law firm throughout the revision process.<sup>131</sup> Upon reviewing the proposed revisions, the law firm suggested that the process “had gotten ahead of itself,” and that the new revisions likely did not comply with Idaho law.<sup>132</sup> The county’s planning administrator responded that the law firm was just providing its “subjective opinion;” he immediately recommended

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127. Several Teton County land-use officials agreed with this assessment of the evolution of Teton County’s land-use regime.

128. Interview with F5, in St. Anthony, Idaho (July 24, 2008).

129. Jacki Cooke, *Planners Continue Zoning Ordinance Overhaul*, TETON VALLEY NEWS, Dec. 10, 1998.

130. Interview with T1, in Driggs, Idaho (Dec. 27, 2007).

131. The county’s relationship with the law firm was somewhat complicated, as the county was not the firm’s actual client. Rather, a local smart growth organization paid the firm’s fees and donated the services to the county. Interview with T2, in Driggs, Idaho (Dec. 27, 2007).

132. Jacki Cooke, *Planners Hear Opposition & Confusion*, TETON VALLEY NEWS, Dec. 17, 1998.

that the county terminate its relationship with the Boise law firm, advice the county commissioners immediately followed.<sup>133</sup>

Despite substantial opposition from the public, the county planning & zoning commission forwarded the planning administrator's new ordinances to the county commissioners as originally drafted.<sup>134</sup> A few weeks later, again despite what the local media characterized as a public that was "overwhelmingly opposed" to the changes, the county commissioners adopted the new zoning ordinances.<sup>135</sup> The commissioners did not adopt one proposal, an agricultural PUD ordinance that allowed a 500% increase in density on agricultural lands, but indicated that it should be a priority of the planning and zoning commission to revise and resubmit the proposal.<sup>136</sup> The importance of this Ag PUD, according to the commissioners and planning staff, was that there were no options for subdividing agricultural land that allowed for "sufficient" development potential, except, apparently, for the basic zoning ordinance.<sup>137</sup> In June 1999, after the planning staff *increased* density allowed in the Ag PUD, and *decreased* the minimum parcel size to which the ordinance could apply,<sup>138</sup> the commissioners adopted the Ag PUD revision without changing the planning staff's proposed language.<sup>139</sup>

The new ordinances contributed to a dramatic change in the nature of development in Teton County. Before 1999, the majority of development in the county consisted of small scale,

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133. *Id.* The law firm in question, Givens Pursley LLP of Boise, Idaho is one of the most highly respected law firms in the state. It also has a respected expertise in land-use law, and in 2007 published an excellent overview of land-use law in Idaho. See GARY G. ALLEN ET. AL., *IDAHO LAND USE HANDBOOK: THE LAW OF PLANNING, ZONING AND PROPERTY RIGHTS IN IDAHO* (2007).

134. Jacki Cooke, *Planners Forward Zoning Revisions to Commissioners*, TETON VALLEY NEWS, Jan. 14, 1999.

135. JoAnn Grant, *All But One Pass: Commissioners Approve Planning Revisions, Except for Ag PUD*, TETON VALLEY NEWS, Feb. 4, 1999.

136. *Id.*

137. Jacki Cooke, *Comment Sought on Ag Revisions*, TETON VALLEY NEWS, Mar. 11, 1999.

138. Jacki Cooke, *Planners Negotiate Ag Zone Solution*, TETON VALLEY NEWS, Mar. 25, 1999.

139. Jacki Cooke, *County Approves 'Pen and Ink' Changes -- Controversial Ag PUD Passes as Written*, TETON VALLEY NEWS, June 17, 1999.

2.5-acre-lot subdivisions.<sup>140</sup> But the new ordinances allowed for denser, more intense development, without precise standards to regulate that development or mitigate its effects. In fact, it is the lack of specificity that best characterized the 1999 revisions. When a challenge to the county's first large-scale, resort-style development reached the Idaho Supreme Court, the case turned, in large part, on whether the county commissioners determined appropriately that the development would use land "intelligently," and whether the Board justified densities in excess of those allowed by the zoning ordinance "as not compromising the health, safety and general welfare of the county."<sup>141</sup> The county ordinances provided no guidance on how to interpret these provisions. According to one observer, the vagueness was intentional:

It was just sort of a special deal, because the definitions [in effect at that time] were sort of open-ended. . . . A particular planner came in who wasn't really a planner by background . . . he had enough outside world experience to know that you had to do the dance, and play the game and get ordinances in place in order to make these approvals legal and hard to oppose in court. The way you mollify the people who don't like land-use regulation, who didn't want land-use regulation, is you intentionally made the ordinance as vague and unspecific, with a lot of subjective criteria, so that, by hook or by crook, you could more or less come in and get anything approved.<sup>142</sup>

This pattern continued with the county's next revision of its land-use regime. Before 2004, most of the county's rural areas (~120,000 acres) were zoned A-20, which allowed for one dwelling unit per 20 acres.<sup>143</sup> The 2004 Comprehensive Plan called for a dramatic increase in the level of density allowed in the former A-20 areas: "The rural reserve area is the remainder of the unincorporated area of the county. The target density for

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140. Separate interviews with T1 and T2, in Driggs, Idaho (Nov. 11, 2007). See CLARION ASSOCS., TETON COUNTY PUD AUDIT 5 (2007) (on file with author).

141. *Evans v. Teton County*, 73 P.3d 84, 91 (Idaho 2003).

142. Interview with T2, in Driggs, Idaho (Nov. 11, 2007).

143. See CLARION ASSOCS., TETON COUNTY PUD AUDIT 5 (2007) (on file with author).

development is 50 to 60 units per 100 acres. . . .”<sup>144</sup> This represents a potential twelve-fold increase in the allowed density of development. The Plan also indicates that the planning and zoning commission could authorize even greater densities where justified.<sup>145</sup> Although the 2004 Comprehensive Plan retained the pre-existing A-20 designations, allowing land-owners to choose between the old zoning and the new, density-dependent structure,<sup>146</sup> most developers unsurprisingly have chosen to proceed under the new structure.<sup>147</sup>

This increase in the allowable density in the county’s rural areas is consistent with the growth machine. If the base zoning for the area were the grandfathered A-20 designation (which it is for most of the county), sixty units per 100 acres represents 1200% of the base density. A typical PUD ordinance *might* allow increased density in exchange for public goods that the local government otherwise could not demand. For example, the American Planning Association’s Model Residential Cluster Development Ordinance allows for up to a 25% density bonus if certain conditions are met.<sup>148</sup> The model ordinance provides that

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144. TETON CNTY., TETON COUNTY COMPREHENSIVE PLAN: A GUIDE FOR DEVELOPMENT 2004 TO 2010 32, *available at* [http://www.tetoncountyidaho.gov/pdf/additionalInfo/AmendedCompPlan\\_10-20-08.pdf](http://www.tetoncountyidaho.gov/pdf/additionalInfo/AmendedCompPlan_10-20-08.pdf). (2008). Teton County recently initiated the process for revising its Comprehensive Plan for the next decade. *See* TETON CNTY., TETON COUNTY COMPREHENSIVE PLAN: REQUESTS FOR PROPOSAL (2011), *available at* [http://www.planning.org/uploads/consultants/requests/6601\\_20110127\\_RFP\\_Final.pdf](http://www.planning.org/uploads/consultants/requests/6601_20110127_RFP_Final.pdf).

145. TETON CNTY., TETON COUNTY COMPREHENSIVE PLAN: A GUIDE FOR DEVELOPMENT 2004 TO 2010 32 (2008), *available at* [http://www.tetoncountyidaho.gov/pdf/additionalInfo/AmendedCompPlan\\_10-20-08.pdf](http://www.tetoncountyidaho.gov/pdf/additionalInfo/AmendedCompPlan_10-20-08.pdf).

146. When the comprehensive plan was first approved in 2004, there was a lot of confusion about its effects, causing numerous landowners to seek rezones from A-20 to A-2.5. *See, e.g.*, Emily Morrison, *Rush for County Zone Changes*, TETON VALLEY NEWS, Nov. 25, 2004; Emily Morrison, *Major Rezoning Postponed Until Ordinances Are Aligned*, TETON VALLEY NEWS, Dec. 16, 2004; Jeanette Blossel, *Zoning Changes Puzzling for Most*, TETON VALLEY NEWS, May 26, 2005. These rezones were almost automatic under the previous ordinances, and most were approved. *Id.*

147. *See* CLARION ASSOCS., TETON COUNTY PUD AUDIT (2007) (on file with author).

148. AM. PLAN. ASS’N, SMART CODES: MODEL LAND-DEVELOPMENT REGULATIONS 1 (2006). In this context, “cluster development” and “planned unit development” can be considered to refer to the same type of development.

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the density bonus is only appropriate where the percent of the density bonus is no greater than the percent of the dwelling units dedicated to affordable housing, and/or the percent of the density bonus does not exceed the percent of the gross area of the development dedicated to open space that is accessible to the public.<sup>149</sup>

Unlike the model ordinance, the Teton County ordinance effectively allowed PUD development *by right*, with only minimal substantive requirements that arguably do not make up for the dramatically increased density.

It was like Santa Claus came. . . we had a PUD ordinance that was created which just basically said whatever you want to do, you just need 50% open space, . . . and there were no requirements for mitigation, no contributions for county infrastructure or anything like that.<sup>150</sup>

In creating this 1,200% increase in allowed density, the planning and zoning commission apparently followed the advice of the planning administrator, who stated in a public meeting: “People have a right to develop, and they have certain densities attached to that right. I encouraged the P&Z not to downzone the valley and take property rights away from people.”<sup>151</sup>

Similarly inconsistent with restructuring predictions, the 2004 regime created no protected areas, no sensitive area or important habitat overlays, and no wildlife migration corridors. As noted by one observer:

They didn’t provide any ag protection overlays, or natural resource protection overlays, there’s all these wildlife corridors running through that are now getting chopped up. . . no sensitive area overlays like protecting wetlands. It’s just these huge blanket zones that take nothing else into consideration.<sup>152</sup>

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149. *Id.*

150. Interview with T1, in Driggs, Idaho (Dec. 27, 2007).

151. Hope Strong, *County Wraps Up Present Plan*, TETON VALLEY NEWS, Nov. 25, 2004.

152. Interview with T3, in Driggs, Idaho (March 16, 2006).



That same individual suggested that the county's residents would have supported these more restrictive tools:

We could have a TDR [transfer of development rights] program for some of those sensitive areas, focus development near the towns. [JL: Has there been any interest in TDRs or other approaches?] Not in that office, not in the county office. Outside of the office, sure, everybody would like to see something happen.<sup>153</sup>

As these developments continued, and the local press highlighted the effect of growth on the Teton Valley on numerous occasions,<sup>154</sup> several editorials suggested that the county was not being perfectly clear about development in the valley.<sup>155</sup> This is not necessarily surprising, given that the county officials themselves had little experience with the type and amount of development occurring in the valley and could not have been expected to know immediately how to deal with it.<sup>156</sup> One new local official indicated that most of her time is spent catching up on ten years of work that was not done before, including simple tasks such as ensuring that building permits contained the proper address.<sup>157</sup>

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153. *Id.*

154. On April 9, 2006, the *Idaho Falls Post Register* hosted two 'competing' op-eds on the valley, together titled *It's BOOM time in Teton County*. That same month, the *Rexburg Standard Journal* published a series of articles on agricultural land-use issues on Madison, Fremont and Teton counties. The third article in that series – *Speculating on Speculation* – focused on development of agricultural land in Teton County.

155. See, e.g., Jeanne Anderson, *What Teton County Isn't Telling You*, IDAHO FALLS POST REG., July 23, 2006; Jeanette Boner, *How To Be Irresponsible Late at Night*, TETON VALLEY NEWS, Mar. 16, 2006.

156. Nor did they have experience with land-use regulation. In one interview, while discussing Teton County's original land-use ordinances, a local official said, "Teton County just had a bunch of farmer dudes sit down and write some ordinances, and quite frankly, they're a miracle considering who wrote them.... You look at who wrote those ordinances, and what their capabilities were, it's unreal. They really were sophisticated for the mindset that wrote them.... As many problems as they had, try to imagine the people that wrote them, and knowing what you know about them, you sit down and say, gosh, how did they ever accomplish this." Interview with F5, in St. Anthony, Idaho (July 24, 2008).

157. Interview with T5, in Driggs, Idaho (Nov. 11, 2007).

But it still seems strange, given the expectations of the restructuring theory, that the public apparently participated only minimally in the working group sessions which created Teton County's 2004 comprehensive plan. According to one individual who was active in those sessions as a member of the county's planning and zoning commission, there was no media presence at the meetings. As a result of this lack of public scrutiny, "weird" things<sup>158</sup> happened during those working group sessions, including unannounced increases of up to an "insane" 1200%<sup>159</sup> in the densities allowed in rural areas. Several local newspaper articles noted at this time that very few members of the public attended the public meetings or hearings as the revision progressed. For instance, one article quotes a participant as follows: "Looking around tonight, it's amazing how few of us are here. . . . It's like we've been through a 15-round boxing match and we're the only ones left standing. There's not too many of us. I don't know why that is, but it disturbs me."<sup>160</sup>

Part of the reason for the lack of interest, however, might have been the perception that public participation did not matter: "As far as I can tell, there has not been one comment from the public incorporated into the sixth draft of this comp plan."<sup>161</sup> The local newspaper's former editor, in a letter to the new editor, pleaded with the county's residents to participate in the comprehensive plan revision, arguing that without that participation, the new plan would not incorporate the county's vision.<sup>162</sup> That former editor claimed that the draft comprehensive plan completely ignored the specific input of five sub-committees, choosing to adopt vague, directionless language. Even where significant changes in the draft plan occurred, the media reports that the public showed minimal interest. For example, even though the plan's fifth draft included an

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158. Interview with T1, in Driggs, Idaho (Dec. 27, 2007).

159. *Id.* Note that the individual quoted here participated actively in creating the PUD ordinance.

160. Hope Strong, *County Wraps Up Present Plan*, TETON VALLEY NEWS, Nov. 25, 2004.

161. *Id.*

162. Jeanne Anderson, *Letter to the Editor*, TETON VALLEY NEWS, Nov. 18, 2004.

unannounced doubling of allowed densities in some rural areas, the public expressed little opposition.<sup>163</sup>

Teton County's allegedly post-restructured experience is consistent with the growth machine and a caricature of the old western mentality. The growth machine still possessed the political power in the county, viewing land with a "401(k) mentality,"<sup>164</sup> despite the addition of a large number of new residents. There were reasons for that approach—although it might be characterized as the old timers "selling their souls,"<sup>165</sup> some individuals in opposition understood and refused to condemn it outright:

It was the old timer. . . farmers and ranchers that had all the political power in the county from the time it was founded. . . until about a year ago. So they elected commissioners and those commissioners in turn appointed planning and zoning commissioners whose priority was. . . to just have a no holds barred land-use policy, with the idea being that it would allow you to finally sell the ranch and, after four generations of hard scrabble, finally have something. And of course there's a lot of empathy for that, if you were the fourth generation of eking out an existence in a climate like this, then people, myself included, thought there should be some development opportunity.<sup>166</sup>

That "no holds barred land-use policy" continued much longer than what might have been expected by the restructuring thesis. As indicated in the preceding quote, the power of the old timers endured well into the time in which Teton County should have restructured. By 2006, for example, the county's population had increased 128% since 1990, compared to 45% for the entire state of Idaho, and 20% for the United States as a whole.<sup>167</sup> While the restructuring thesis argues that this significant amenity-driven population growth should have created a new human-land

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163. Hope Strong, *Comp Plan Densities Questioned*, TETON VALLEY NEWS, Oct. 7, 2004.

164. Interview with T4, in Driggs, Idaho (March 15, 2006).

165. *Id.*

166. Interview with T1, in Driggs, Idaho (Dec. 27, 2007)

167. Population data obtained from the U.S. Census website. See U.S. CENSUS BUREAU, [www.census.gov](http://www.census.gov) (last visited Mar. 31, 2011).

paradigm, in this place, it seemed only to strengthen the growth machine. During the March 14, 2006 meeting of the county's Planning and Zoning Commission, which I attended, ten items were on the agenda. Each was allotted ten minutes. The final item on the agenda was the largest development proposal in the county's history. It was midnight before the commission got around to addressing, and approving, that proposal, and most of the public had long since left for home: "That was done on purpose, let's wear everybody out, get all the public out of here, then let's have a hearing on the biggest development to be heard in Teton County's history."<sup>168</sup>

This quote arguably reflects a somewhat uncomfortable aspect of Teton County's experience from 1998 through 2006. The volunteer planning administrator during that time was a former CIA operative, and the planning office's behavior at times seemed to reflect that background. According to several individuals – who specifically requested anonymity – the planning office cared much more about secrecy and getting projects approved *without* public involvement than it cared about public involvement, collaboration, or implementing the community's vision. One anonymous comment provided:

I've heard people say this. People . . . say: [The former planning administrator] single-handedly did more damage to Teton County than any collection of individuals you could put together over the last 100 years . . . There is almost nothing those commissioners could have done to be more destructive to the county than to put that individual in that position. And you know what, I can't argue with that. Because of his perspective; his perspective was not community. There was no collaborative public process. [He] was a CIA agent. There's nothing in that existence that is commensurate and compatible with collaborative public process. It was about dictatorship. And he was their planning administrator? How in the world. . .? There is almost nothing those commissioners could have done to be

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168. Interview with T3, in Driggs, Idaho (Mar. 16, 2006). The day after this hearing, the local newspaper editorialized about this same issue, making the same point that the planning and zoning commission was being "irresponsible late at night." Jeanette Boner, *How To Be Irresponsible Late at Night*, TETON VALLEY NEWS, Mar. 16, 2006.

more destructive to the county than to put that individual in that position . . .

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According to the land-use survey, Teton County had undergone a restructuring prior to 2007. Its restrictiveness change score was in the top 10% of all the study counties. Its population had increased almost 150% since 1990, and its average household income had almost doubled in the 1990s. As important, its new residents professed a desire to protect the natural environment, as did its longer-term residents.<sup>169</sup> But even if honestly expressed, the desire to protect the natural environment ran straight into those newcomers and others that wanted to be like them. More to the point, that desire ran into the growth machine that emerged to facilitate the arrival of these new residents. As explained in *Men's Journal* (noting without irony that “[t]he trick is to catch it while it’s still good”) and *The New York Times*, Teton County was the place to be.<sup>170</sup> And people came.

What this partial telling of the Teton County story suggests is that both the growth machine and some form of restructuring are at play in all rural areas; it would be insufficient and unsatisfactory to select one over the other as the “true” measure of rural change. Teton County is decidedly different today than it was twenty years ago. The population has changed, and its residents expect something different than the community

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169. See, e.g., Peter B. Nelson, *Rural Restructuring in the American West: Land Use, Family and Class Discourses*, 17 J. RURAL STUD. 395 (2001). But see Michael D. Smith & Richard S. Krannich, “Culture Clash” Revisited: Newcomer and Longer-Term Residents’ Attitudes Toward Land Use, Development, and Environmental Issues in Rural Communities in the Rocky Mountain West, 65 RURAL SOC. 396 (2000).

170. *Men's Journal* listed Driggs, Idaho as the “Best All Around” in a March, 2002 article. See Allen Jones, *The 50 Best Places to Live*, MEN'S J. (Mar. 2002). *The New York Times* included the Teton Valley in section titled *Havens*. Matthew Preusch, *With Jackson Priced Out, A Nearby Valley Takes Off*, N.Y. TIMES, Oct. 19, 2007, available at <http://www.nytimes.com/2007/10/19/travel/escapes/19havens.html>. But see Rob Marin, *Leave My Town Out of Your 'Top 10'*, HIGH COUNTRY NEWS, Apr. 29, 2002.

expected previously, while at the same time allowing (or at least not prohibiting) substantial growth.

How do we explain that ambivalence? Recognizing that complexity without attempting to understand how the forces interact is just as insufficient and unsatisfactory as assuming one partial story adequately represents the whole. Although new subdivisions might seem to emerge spontaneously, they are the result of a deliberate, often relatively long and drawn out, process. Any subdivision requires the local government to make several very clear decisions, the most important being the initial creation of the land-use regime that will determine the nature of all subsequent development. And any individual development proposal requires an additional set of decisions. A community's built environment is not a surprise, but rather the predictable outcome of a constellation of land-use decisions over time. At each step in this process, a local government must balance certain interests, including the growth machine and their own potentially restructured or changing communities. Answering the remaining question of why local governments choose the land-use regimes they do is our task for the balance of this article.

#### V. THE PROBLEM IS CHOICE: PRAGMATIC LAND-USE REGIMES AND THE IDENTIFICATION OF PURPOSE

*Consider what effects, that might conceivably have practical bearings, we conceive the object of our conception to have. Then, our conception of these effects is the whole of our conception of the object.*<sup>171</sup>

Understanding the interplay of restructuring with the growth machine requires us to consider what it is that motivates us to act. Enacting more restrictive land-use regimes is a choice to change – in some cases dramatically – a community trajectory. It is a choice inconsistent with a powerful property rights meta-narrative, and it is a choice counter to the interests of the growth machine. It is ultimately, and can only be, a choice that reflects a

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171. Charles S. Peirce, *How to Make Our Ideas Clear*, in PRAGMATISM: A READER 26, 36 (Louis Menand ed., 1997).

changing community *belief* about the purpose of government, the relationship of one landowner to another, and – most important – the relationship of any given landowner to a community.

The use of the word “belief” to describe how communities understand the purpose of land – and particularly the regulation of land – is appropriate. Land-use regimes are not modified readily. Even the over-simplified process of institutional change discussed previously requires a series of community visions, creations, agreements and efforts. Those changes happen because the community’s beliefs have changed. Charles Sanders Peirce explained, “the essence of belief is the establishment of a habit.”<sup>172</sup> In the context of this discussion, that “habit” is our approach to land, our understanding of its purpose, and the proper role of the government in regulating it—more specific, it is how we chose to *act* regarding our understanding of land.<sup>173</sup>

The demographic and cultural changes that accompany rapid population growth in rural areas understandably create conflict. The classic newcomer versus old timer conflicts originate in evolving *community* doubts about land.<sup>174</sup> When faced with this “irritation of doubt”<sup>175</sup> that causes us to hesitate or fail to act, communities, like individuals, engage in a process of imaging various different resolutions to that doubt until, after some period of time, “we find ourselves decided as to how we should act under such circumstances as those which occasioned our hesitation. In other words, we have attained belief.”<sup>176</sup> Thus it is belief that allows us to act.<sup>177</sup> William James suggested, in the alternative, that we choose *not* to believe those ideas or theories that are of no use to us, i.e., that do not motivate action: “As a rule we

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172. *Id.* at 33.

173. *Id.*

174. See, e.g., Edith E. Graber, *Newcomers and Oldtimers: Growth and Change in a Mountain Town*, 39 RURAL SOC. 504-513 (1974).

175. Charles S. Peirce, *How to Make Our Ideas Clear*, in PRAGMATISM: A READER 26, 30 (Louis Menand ed., 1997).

176. *Id.* at 31.

177. Daniel W. Bromley, *Reconsidering Environmental Policy: Prescriptive Consequentialism and Volitional Pragmatism*, 28 ENVTL. & RES. ECON. 73, 79 (2004).

disbelieve all facts and theories for which we have no use.”<sup>178</sup> In the context of this discussion, James might suggest that we would reject those land-use ordinances or assignments of property rights that we do not find useful, i.e., that do not reflect emerging understandings of land (or ongoing understandings in more static conditions). John Dewey characterized beliefs that motivate action as valuable – the type of belief that an individual or community finds useful.<sup>179</sup> Valuable belief is a crucial component of evolving land-use regimes.

But what makes a particular belief valuable? What about belief allows us to “find ourselves decided as to how we should act under such circumstances as those which occasioned our hesitation[?]”<sup>180</sup> Much of the early writings by pragmatists concerned “truth.” Pragmatists agree on at least one fundamental concept: that there is no objective and universal truth that we can understand.<sup>181</sup> Truth is, instead, those ideas, concepts, settings or circumstances that are, at that moment, better to believe.<sup>182</sup> This concept is particularly relevant in the land-use context. Notwithstanding neo-Lockean efforts to demonstrate otherwise,<sup>183</sup> there are no fundamental, universal, or objective rights in property. Property is inherently relational, and it is only through the acquiescence of the community that

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178. WILLIAM JAMES, *THE WILL TO BELIEVE AND OTHER ESSAYS IN POPULAR PHILOSOPHY* 10 (1897).

179. See, e.g., Robert B. Westbrook, *Pragmatism and Democracy: Reconstructing the Logic of John Dewey's Faith*, in *THE REVIVAL OF PRAGMATISM: NEW ESSAYS ON SOCIAL THOUGHT, LAW, AND CULTURE* 128 (Morris Dickstein ed., 1998).

180. Charles S. Peirce, *How to Make Our Ideas Clear*, in *PRAGMATISM: A READER* 26, 31 (Louis Menand ed., 1997).

181. See *id.* at 26-48; see also DANIEL W. BROMLEY, *SUFFICIENT REASON: VOLITIONAL PRAGMATISM AND THE MEANING OF ECONOMIC INSTITUTIONS* 137-39 (2006); RICHARD A. POSNER, *LAW, PRAGMATISM AND DEMOCRACY* 8 (2003); WILLIAM JAMES, *PRAGMATISM: A NEW NAME FOR SOME OLD WAYS OF THINKING* 29-30, 114 (Longmans, Green & Co., 1907); James Dewey, *The Development of American Pragmatism*, in *THE ESSENTIAL DEWEY, VOL. I: PRAGMATISM, EDUCATION, DEMOCRACY* 3, 3-13 (Larry A. Hickman & Thomas M. Alexander eds., 1998). *C.f.* WILLIAM JAMES, *THE MEANING OF TRUTH* 200, 243-47 (1909).

182. WILLIAM JAMES, *PRAGMATISM: A NEW NAME FOR SOME OLD WAYS OF THINKING* 50 (1907).

183. See, e.g., RICHARD EPSTEIN, *TAKINGS: PRIVATE PROPERTY AND THE POWER OF EMINENT DOMAIN* 3-18 (1985).



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any individual might secure rights in land. Similarly, there is no single correct institutional structure for regulating land and mediating between individual and community rights. There is only what the community chooses.

What is “better to believe” at any given moment with respect to land-use regulation? As the quote from Peirce at the beginning of this section argues, we can only understand a concept by looking at the real effects it has on the ground. James referred to this as an idea’s “cash-value”:

Grant an idea or belief to be true . . . . [W]hat concrete difference will its being true make in anyone’s actual life? How will the truth be realized? What experiences will be different from those which would obtain if the belief were false? What, in short, is the truth’s cash-value in experiential terms?<sup>184</sup>

“Cash value” is perhaps an unfortunate description in the context of this particular discussion, which counterposes the value of development with the value of aesthetics or environmental quality as such. But the basic point – that what matters is what actually affects our daily lives in a real way – allows an understanding of the meaning, and importance, of “valuable belief.” At any moment, humans must imagine the future in order to act, presumably choosing to act in a fashion that we believe will achieve our preferred imagined future. A “valuable belief” is that belief – among many potential beliefs – that the belief holder finds most likely to achieve her desired future.<sup>185</sup>

Community understandings of the purpose of land, and consequently the appropriate regulation of that land, emerge as the community experiences the effects of previous decisions (both decisions to act or *not* to act) on the landscape of concern. Our understanding of land-use law is limited to the effects of that law

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184. WILLIAM JAMES, PRAGMATISM: A NEW NAME FOR SOME OLD WAYS OF THINKING 200 (1907).

185. See, e.g., Robert B. Westbrook, *Pragmatism and Democracy: Reconstructing the Logic of John Dewey’s Faith*, in THE REVIVAL OF PRAGMATISM: NEW ESSAYS ON SOCIAL THOUGHT, LAW, AND CULTURE 131 (Morris Dickstein ed., 1998); DANIEL W. BROMLEY, SUFFICIENT REASON: VOLITIONAL PRAGMATISM AND THE MEANING OF ECONOMIC INSTITUTIONS 133-36 (2006).

on the ground before us: “our individual comprehensions of the settings and circumstances within which we are situated are necessarily limited to impressions of the world around us.”<sup>186</sup> Because there is no foundational or *a priori* correct land-use regime, nor any ideal socio-ecological condition for a given community or landscape, the creation of a land-use regime is an ongoing process – it is always in the process of becoming.<sup>187</sup> As important, although communities might find some success in imagining a desired landscape, getting there is a more difficult task, given the complexities of local land-use ecologies and the constellation of factors that affect the journey from law to socio-ecological landscape. Only upon witnessing the on-the-ground effects of our previous decisions can we formulate a belief that allows us to act in the future.

But this point does not necessarily get us closer to identifying how communities balance the competing demands of the growth machine and restructuring. Both forces have “effects” on the community landscape in some fashion. Understanding that communities create land-use regimes based on expected outcomes and then revise land-use regimes according to an assessment of the effect of previous choices requires a more nuanced comparison, and integration, of the growth machine and the restructuring community.

### A. Choice on the Ground: Place-Based Restructuring of the Growth Machine

The growth machine and restructuring forces are at play in any growing community. The primary difficulty in squaring the predictions of the restructuring thesis with the growth machine lies in the complicated web of relationships inherent in any institutional or cultural system (i.e., it is difficult to know how the variables might interact in a specific place at a specific time regarding a specific conflict). Three, admittedly simplified,

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186. DANIEL W. BROMLEY, SUFFICIENT REASON: VOLITIONAL PRAGMATISM AND THE MEANING OF ECONOMIC INSTITUTIONS 133-36 (2006).

187. See Daniel W. Bromley, *Environmental Regulations and the Problem of Sustainability: Moving Beyond “Market Failure”*, 63 ECOLOGICAL ECON. 676, 677 (2007).

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variables contribute to the velocity of institutional evolution in any community: new ideas about the purpose of land associated with population change (i.e., restructuring), the growth machine, and the existing community institutions and culture. Each variable interacts with the other variables individually and collectively, but that is not a complete picture of the interactions. The *relationship* between any two variables interacts with the third variable individually, as well as with the relationship of that variable to the other variables in the system. For example, the expectations of a community respond to population change and the growth machine individually; the expectations of a community also react to and interact with the relationship between population change and the growth machine (i.e., how each is influenced and changed by the other). And most important, that interaction changes the nature of future interactions: “the act of playing the game has a way of changing the rules.”<sup>188</sup>

Complicating the situation further, the interaction of these components is not linear. A locality’s land-use regime does not respond predictably over time to population change as the rate of population change increases. As population change increases, the growth machine sees increased potential for economic benefit. If the existing expectations for land-use *inhibit* the goals of the growth machine, it will seek to loosen those restrictions. Consequently, the initial phases of increased population change might lead to a period of *reduced* land-use regulation as the benefits to, and power of, the growth machine overwhelm any new land-use expectations that might arrive with population change and subsequently influence the local community’s expectations. It should be obvious here that the *rate* of population change influences both the new expectations that might arise, as well as the desire of the growth machine to restructure the existing land-use regime. Faster population growth means greater benefits to the growth machine just as

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188. JAMES GLEICK, CHAOS: MAKING A NEW SCIENCE 24 (1987). See Arthur McEvoy, *A New Realism for Legal Studies*, 2005 WIS. L. REV. 433, 436 (2005) (explaining this idea by referring to the game “Calvinball” from Bill Watterson’s comic “Calvin and Hobbes”).

much as it means the potential for new ideas about land and the natural environment.

But as development continues, the effects of the growth machine become increasingly apparent *on the ground* to local residents, new and old alike. At some point, if changes are sufficiently dramatic and the effects of the growth machine sufficiently harmful to community expectations, including economic expectations, the emerging expectations for land might overcome the power of the growth machine and allow implementation of a new land-use regime that better manages development. In other words, at some point, the community might *choose* to muzzle the growth machine.

This does not end the relationship however, because the new regime might be ineffective, or it might improve amenity protection – or even create new amenities – in a way that increases development pressure again. In this model, therefore, each of the three variables affects the other, but the level *and nature* of that effect depends on multiple dimensions of each variable. Increased population change can both increase *and* decrease the amount of regulation in a county, depending on the rate of that change, the length of time it has occurred, the effect of the growth on local amenities, the pre-existing land-use regime, and the ability of the local growth machine to benefit from that population change. The most important factor, however, is the actual on-the-ground effects of this process.

This complicated, non-linear relationship takes us closer to understanding the importance of effect and consequence in determining the nature of a community's land-use regime. This article's pragmatic thesis is that the effect of previous land-use philosophies is the primary determinant of the content of ongoing land-use philosophies and suggests that place matters more than politics in the creation of communities and the local understandings of property rights and privileges. In describing the relationship of the growth machine and restructuring above, I made a subtle change in nomenclature when referring to the force driving restructuring – from 'population growth' to 'population change.' That revision was intentional and is a crucial, even if minor, component of understanding my argument.

In the restructuring argument, amenity-driven population growth is important in that it brings new ideas about land and the environment to a rural place, which then influence the institutional evolution in that place. But population growth is not the only source of new ideas or expectations. Over time, as rural places become increasingly part of a global culture and economy, the knowledge, understanding and expectations of even old residents might evolve, without any direct influence from new residents. Moreover, new old residents (i.e., the children of old residents) will develop in a world that is much different from that faced by their parents and grandparents. Again, absent any direct influence from newcomers, these “new” old-timers might develop new ideas about land.

This approach eliminates one implicit assumption, and potentially significant mistake, of the restructuring thesis. That assumption, somewhat overstated and oversimplified, suggests that all (or at least most) newcomers in rural communities possess a single land-use ideology that they seek to impose on their new homes. If this were true, it would represent an extremely unlikely sociological and demographic phenomenon, perhaps unlike any other in this nation’s history – all new westerners, for example, prior to moving to the West, possessed the same, arguably ‘progressive,’ left leaning, land-use ideology. All would have supported higher property taxes, increased regulation, ‘diminished’ private property rights, etc., in their non-rural origins. The vast majority would have voted for a single party. Whatever their positions *after* arriving in the West, the restructuring thesis suggests that the new westerners possessed these characteristics *before* arriving.

This is, of course, absurd.<sup>189</sup> Many new rural residents possessed land-use expectations in their old homes that are more consistent with the mythic Old West than they are with an equally mythic ‘New’ West. To the extent that those new westerners seek to change the land-use regimes of their new homes, the motivation for seeking that change likely arose *after* arriving in their new rural homes.

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189. Again, this position is overstated and oversimplified for rhetorical effect.

### **B. Place over Politics?: Teton County and Learning a New Purpose in a New Place**

Returning to Teton County, Idaho, the importance of destination over origins – of new homes over old homes – becomes obvious precisely at the intersection of the growth machine and the restructuring thesis. Several individuals specifically commented on changes that occur in new residents' understandings of the purpose of land after they arrive:

In national politics they're hard right . . . they belong to James Dobson's organization, and on all the national issues they are far right all the way down the line, and they don't vote here, but they send me \$100 in all my campaigns knowing that I'm a Democrat and somewhat left of center.<sup>190</sup>

While the now classic dichotomy between newcomers and old-timers does have some basis in the experience on the ground, it breaks down as those residents begin facing real controversies in real places:

There's definitely a line between the two [old-timers and newcomers]. There's [sic] people that drive Subarus, and people that drive an American made truck . . . But I think there's a lot of old-timers and newcomers that see eye to eye . . . There's also a lot of newcomers that in the national political scene they're very conservative Republicans, but here they're ultra liberal, smart growth advocates that want to protect what they bought into, which is a pristine, wildlife, ag, kind of open space area.<sup>191</sup>

Absent the perception that the value of their new place is changing, those new residents might not ever possess the allegedly 'evolved' expectations for land and the environment to impose on the new community. In other words, it is the *new* place that creates the new human-land relationships; the expectations do not arrive as baggage from the old place. Rather than vague concepts of 'evolving human-land relationships,' or the classic newcomer/old-timer dichotomy, the motivation to fight for new

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190. Interview with T1, in Driggs, Idaho (Dec. 27, 2007).

191. Interview with T3, in Driggs, Idaho (Mar. 16, 2006).

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land-use regimes arises only *after* some significant physical change occurs in the newcomer's 'place' that threatens the things that individual finds valuable:

I believe that it wasn't until people saw the effects of our land-use policy manifesting on the ground that people became alarmed enough to get engaged . . .

[Interviewer: Not to be redundant, but are you saying that it really is a matter of earth being turned next door?]

Yes, that finally gets people out to vote for land-use progressives.<sup>192</sup>

Consistent with the pragmatic notion of truth, it is the *effects* of an idea that determine its usefulness. Rather than population growth, *physical change in the landscape* is the most important element of institutional change in rural communities – the physical change that represents the “cash value” of the community's land-use ideology. When development threatens the natural amenities that make a place 'special' in the minds of the community, the interests of 'anti-growth' advocates and the growth machine begin to overlap. Before institutional change can occur, a community must first recognize that the existing institutions will not achieve the community's vision for a place (whether new or ongoing). Once that recognition occurs, the community must identify and agree on a new institutional framework that will achieve that collective vision. In rural communities, that agreement might only occur when all residents, new and old alike, as well as the growth machine, recognize that the existing regime is destroying what makes a place valuable.

Who is coming here to buy these lots? Well, they tend to be outdoorsy, they're looking for recreational amenities, they're looking for rural atmosphere, they're looking for wild, open spaces, they're looking for some vestige of the Old West, you know all these, you know what makes a person come here and pay \$250k for a lot, you know it's all those things. And typically they're trying to escape suburban sprawl. You have this sort of you can do anything you want to do with your property sort of

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192. Interview with T1, in Driggs, Idaho (Dec. 27, 2007).

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ideology, you know, you can't tell a feller what he can do with his property, that was seriously threatening to undermine the very things that were making the property valuable. . .

Now the average guy driving up and down the highway sees all this explosion of building of activity and they're going, oh, we could lose the values that brought us here.<sup>193</sup>

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On November 14, 2008, the Teton County Board of Commissioners adopted a new planned unit development (PUD) ordinance.<sup>194</sup> The new ordinance reduced the allowable density increase in PUDs from 1200% to 300%, and removed the county's discretion to go above the specified maximum, provided discretion to reduce the allowed density, and consistent with the express ability to reduce density, clarified that the specified density bonus is *not* an entitlement, but rather the ultimate limit on what the county can approve.<sup>195</sup> At the same time, the county created new protected area regulations providing additional restrictions for scenic corridors, floodplains, steep slopes, wildlife habitat, and wetlands and waterways.<sup>196</sup> While the PUD ordinance still exceeds those density bonuses recommended by the model ordinance, it represents a significant reduction in the amount of overall development that would be allowed in the future, as well as a substantial change in the county's approach to the appropriate uses of private lands.

An interview I conducted in the summer of 2008 – before the new ordinances were adopted, but while they were being considered – hinted at the relative change they represented. A

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193. *Id.*

194. See Lisa Nyren, *County Approves PUD Ordinance*, TETON VALLEY NEWS, Nov. 20, 2008, available at [http://www.tetonvalleynews.net/news/article\\_9dd86625-0b90-5924-b097-c0d294d7f70b.html](http://www.tetonvalleynews.net/news/article_9dd86625-0b90-5924-b097-c0d294d7f70b.html).

195. See Teton County, Idaho Subdivision Regulations §§ 9-5-1, 9-5-2 (last revised May 11, 2010).

196. See Teton County, Idaho Zoning Regulations §§ 8-5-1, 8-5-2 (last revised May 26, 2009); see also WILDLIFE OVERLAY MAP, available at [http://www.tetoncountyidaho.gov/pdf/additionalInfo/WildlifeOverlay\\_11142008opt.pdf](http://www.tetoncountyidaho.gov/pdf/additionalInfo/WildlifeOverlay_11142008opt.pdf).



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land-use official from a neighboring county, who worked with many of the developers active in Teton County, stated:

[The new draft ordinances] did go too far. In fact that's why it's not adopted, and probably won't get adopted. If it does get adopted I'd be surprised, because if it does, well, we'll see what happens to the economy . . . . You can't stop development, you can definitely guide whether it's done right or wrong, and that's the thing a lot of those people don't understand right now. They think you can stop development, that it's ok to stop development. The private landowners are going to beg to differ with that stance.<sup>197</sup>

That official's assessment about the likelihood of the new ordinances being adopted, as well as the actual effect of those ordinances (i.e., that they would "stop development"), was somewhat off the mark. But the idea behind his erroneous assessment – that the new ordinances were contrary to the needs of the growth machine – is somewhat more accurate. Or it at least appears somewhat more accurate initially. To this point, the Teton County story suggests that a rural county experiencing rapid population growth, and subsequent significant changes in its built environment, chose to address those changes once they began to harm the amenities that community valued. In sum, the Teton County story suggests that "restructuring" – caused by physical change in the landscape – can overcome the interests of the growth machine.

But there remains in this story a significant, but as yet unacknowledged and unexplained, event. The analysis of any population-growth- or real-estate-development-influenced social, cultural or legal dynamics runs into something of an empirical schism beginning in late 2007. All of the theoretical tools used in this article explicitly rely on change of one sort or another – demographic change, landscape change, economic change, etc. – to explain community behavior. Both the growth machine and restructuring concepts anticipate that population growth will lead to specific, albeit contradictory, vectors of legal evolution. And the "Old Institutionalism" and pragmatism rely on the outcomes

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197. Interview with F5, in St. Anthony, Idaho (July 24, 2008).

of previous decisions to guide future choices. But what if “change” suddenly stops changing?

The global recession that officially began in December 2007<sup>198</sup> affected the Teton County economy, as well as the economies of similarly situated rural counties across the country,<sup>199</sup> in fairly significant ways. For Teton County, the recession decimated the construction industry, resulting in a nearly 75% decline in construction-related employment and payroll.<sup>200</sup> The county’s tax base suffered similar declines, with all real estate in the county declining in value by 17%.<sup>201</sup> The value of undeveloped lots – which outnumber developed lots by approximately five to one – decreased 34%.<sup>202</sup>

The recession arrived as Teton County was undergoing a period of somewhat focused change. In November 2006, Teton County elected two new county commissioners – both registered Democrats, which is significant in this corner of Idaho – that campaigned largely on controlling growth in the county.<sup>203</sup> These two commissioners quickly voted to approve a 180-day moratorium on new development in the county to allow the county planning department to catch up on pending applications, and to revise the zoning and subdivision ordinances to make

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198. NAT’L BUREAU OF ECON. RESEARCH, DETERMINATION OF THE DECEMBER 2007 PEAK IN ECONOMIC ACTIVITY 1 (2008), available at <http://www.nber.org/cycles/dec2008.html>.

199. Including neighboring Fremont County, discussed in more detail below.

200. See, e.g., Jonathan Schechter, *Teton Valley Continues Bottom Bounce*, JACKSON HOLE NEWS & GUIDE (Aug. 25, 2010), available at [http://www.jhnewsandguide.com/article.php?art\\_id=6384](http://www.jhnewsandguide.com/article.php?art_id=6384).

201. Jonathan Schechter, *Jonathan Column*, Charture Inst. (Aug. 25, 2010), <http://charture.org/manager/uploads/25Aug10%20-%20Teton%20ID%20Properties%20and%20Construction.pdf>.

202. *Id.*

203. See, e.g., Marty Trillhaase, *Eastern Idaho’s Blue Island*, IDAHO FALLS POST REG. (Nov. 15 2006); Alice J. Stevenson, *Candidate Statement*, TETON VALLEY NEWS (Nov. 2, 2006); Larry Young, *Candidate Statement*, TETON VALLEY NEWS (Nov. 2, 2006). These two county commissioners were part of a larger move to the left in the county. In statewide elections, Teton County stood alone among eastern Idaho counties in voting Democratic for the governor and attorney general, both of whom lost, as well as to retain a district court judge (who lost) and for a losing proposition that would have increased school funding.

them consistent with the county's comprehensive plan.<sup>204</sup> At the time the commissioners paused development there were 75 subdivision proposals with 4224 lots pending before the county's planning department.<sup>205</sup> After 45 days, an Idaho district court overturned the moratorium,<sup>206</sup> finding that no "imminent peril" existed as required by Idaho law to justify the moratorium.<sup>207</sup> As might be expected, within a few months of the Judge's decision vacating the moratorium, the number of pending development proposals had increased to 86 subdivisions with approximately 7800 lots.<sup>208</sup>

In response to the moratorium, a group of citizens initiated an attempt to recall the two county commissioners that voted for the moratorium.<sup>209</sup> In order to recall an elected official, Idaho law requires that the recall must carry at least one more vote than the official received when first elected.<sup>210</sup> When elected in November 2006, the two county commissioners subject to the recall election received 55% of the votes cast.<sup>211</sup> By any measure, the 2007 recall effort failed spectacularly; more voters voted *against* the recall than had elected the commissioners in the first place. In an off-year, with no other county-wide issue on the ballot, 71% of registered voters in Teton County voted in the

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204. Matthew Evans, *Screeching Halt: Teton County Bans All New Development*, IDAHO FALLS POST REG., (Mar. 28, 2007).

205. Ben Cannon, *A Valley Split*, JH WKLY., Apr. 4, 2007, available at [http://www.planetjh.com/news/A\\_100871.aspx](http://www.planetjh.com/news/A_100871.aspx).

206. *Robinson v. Bd. of Teton Cnty. Comm'rs*, No. CV-07-102 (Idaho 7th Dist., Apr. 30, 2007).

207. IDAHO CODE ANN. § 67-6523 (West 2010).

208. Ben Cannon, *A Rift Remains*, JH WKLY., Aug. 8, 2007, available at [http://www.planetjh.com/news/A\\_101724.aspx](http://www.planetjh.com/news/A_101724.aspx).

209. The county's former planning administrator apparently supported the recall election, or was at least a member of the organization that initiated the recall. According to a one planning and building official, most of the previous planning and zoning staff moved on to for development interests in the county. I could not confirm if that is true, and if so, the extent of that involvement. However, the former planning administrator represented the Teton Valley Alliance – the organization that spearheaded the recall – in working group meetings that created a new PUD ordinance.

210. IDAHO CODE ANN. § 34-1712(3) (West 2010).

211. See *Elections, 2006, 2006 November General Election Results*, <http://gis.co.teton.id.us:81/Weblink8/0/doc/93323/Page1.aspx> (last visited Oct. 15, 2010) (to access website, use public as both username and password).

recall election – a 7% higher turnout than in the 2006 general election.<sup>212</sup> The response, perhaps unsurprisingly, is that the commissioners immediately felt more empowered after the recall election than when first elected, and apparently repeatedly claimed a “mandate” to reform radically the land-use regime in Teton County.<sup>213</sup>

Prior to 2006, the political power in the county remained in the hands of “old-timers” who applied a “no-holds-barred land-use policy.”<sup>214</sup> In 2006, immediately after approval of the county’s largest developments, the approach arguably changed in rapid fashion from a “property rights” regime to a “smart growth” regime.<sup>215</sup> Several factors might have influenced this apparent shift. For one official, it took until 2006 for the newcomers to finally overwhelm the old timers politically – not because the newcomers only recently out-numbered the old timers, but because newcomers do not vote in the same numbers as the old timers. It was not until the land-use changes became evident on the ground that the motivation to vote was sufficient to overcome the “old guard.”<sup>216</sup> Another official made a similar suggestion, arguing that “fear” is the only factor that motivates people to adopt change – they have to witness personally the effect of the “old guard’s” land-use policies on their land and expectations.<sup>217</sup>

But if this is true, if the 2007 recall election truly was “the old guard’s last stand,” and Teton County’s new, more progressive land-use regime (as expected by restructuring theory) represents a durable change, what happened to the growth machine? Was it overwhelmed along with the “old guard” or did the growth machine’s interests change? And if so, what does that mean? Growth machine theorists argue that growth control efforts are only effective when it is no longer in the interest of the growth

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212. See *Elections, 2007, 2007 November General Elections Results*, <http://gis.co.teton.id.us:81/Weblink8/0/doc/112679/Page1.aspx> (last visited Oct. 15, 2010) (to access website, use public as both username and password).

213. Interview with T1, in Driggs, Idaho (Nov. 11, 2007).

214. *Id.*

215. Interview with T2, in Driggs, Idaho (Nov. 11, 2007).

216. Interview with T1, in Driggs, Idaho (Dec. 27, 2007).

217. Interview with T2, in Driggs, Idaho (Nov. 11, 2007).

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machine to oppose them.<sup>218</sup> It would be simple to identify the global economic downturn as eviscerating the local growth machine. There is evidence of that. In 2009, Teton County granted thirty-nine residential building permits, with an estimated construction cost of \$8 million. In 2007, the county granted permits for 550 residential units with an estimated cost of \$107 million.<sup>219</sup>

But is that the only explanation for Teton County's final turn away from the growth machine? In April 2007, on the day after the county's development moratorium was challenged in court, and as the effort to have the two county commissioners recalled was gaining steam, Commissioner Larry Young visited three of the valley's largest developers.<sup>220</sup> The purpose of the visit was to request contributions to help the county pay for a capital improvements plan. The county must create a capital improvements plan before it can implement an impact fees ordinance.<sup>221</sup> Impact fees are additional fees required of developers to help pay for the increased costs of public services that result from development, including public roads, sewer, and affordable housing, among other things.<sup>222</sup> Put simply, an impact fee ordinance increases developers' costs, and potentially reduces the profit margin, of all development.

In that single day, Mr. Young received commitments totaling \$150,000 of private funds from the county's largest developers for that capital improvements plan.<sup>223</sup> According to Mr. Young, the commitments demonstrate two recognitions on the part of developers in the valley. First is that the county cannot afford to

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218. See JOHN R. LOGAN & HARVEY L. MOLOTCH, *URBAN FORTUNES: THE POLITICAL ECONOMY OF PLACE* 159-60 (1987).

219. CenStats Database, U.S. CENSUS BUREAU, <http://censtats.census.gov/bldg/bldgprmt.shtml> (Query select "Annual" button, year "2007", Place/County "county", State "Idaho", and select submit; then select "Teton County" and submit).

220. Interview with Larry Young, Teton Cnty. Comm'n., in Driggs, Idaho, (Dec. 27, 2007).

221. IDAHO CODE ANN. § 67-8208 (West 2010).

222. IDAHO CODE ANN. § 67-8203(9) (West 2010) (definition of "Development impact fee").

223. Interview with Larry Young, Teton Cnty. Comm'n., in Driggs, Idaho, (Dec. 27, 2007).

maintain its existing transportation network. One of the most common winter complaints by newcomers and second-home owners is that the county does not plow the roads adequately.<sup>224</sup> Many county roads are gravel or very poorly paved, and many 'county' roads are not public roads at all, but rather private roads originally shared by adjoining farmers. Without the impact fees ordinance, the developers might be left with multi-million dollar developments, but no secure, year-round access.

But more complicated, and more interesting (if less surprising), is that developers recognized they would benefit from controlling growth by encouraging stricter land-use controls *after* their proposals have been approved. This is something of a developer NIMBY-ist ("not in my backyard") behavior – "enlightened self interest" in the words of one local official,<sup>225</sup> or the "perfect definition of hypocrisy" in the words of another.<sup>226</sup> The largest development in the county (and the development perhaps least consistent with any reasonable planning principles) recently opposed a new subdivision on the grounds that it would 'ruin our view.'<sup>227</sup>

Arguing for, or allowing, a more restrictive land-use regime is obviously a double-edged sword for local developers. But as suggested briefly above, the high-end home market might have become oversaturated by this point. At the end of 2005, there were approximately 4,000 platted lots in the county; by the end of 2007, there were over 8,000 total lots approved, with 8,000 more proposed lots at some stage of the approval process.<sup>228</sup> Nearing the end of 2010, there are now over 12,000 approved building lots in the county with many more in the process of being approved.<sup>229</sup> By way of comparison, the 2000 census recorded 2,632 total housing units in Teton County, with 554 vacant

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224. *Id.*

225. Interview with T1, in Driggs, Idaho (Dec. 27, 2007).

226. Interview with T2, in Driggs, Idaho (Nov. 11, 2007).

227. *Id.*

228. Interview with T1, in Driggs, Idaho (Dec. 27, 2007).

229. See Jonathan Schechter, *Teton Valley Continues Bottom Bounce*, JACKSON HOLE NEWS & GUIDE (Aug. 25, 2010).

(including 355 designated vacation homes).<sup>230</sup> In the words of one concerned Teton County resident, this is an approach that “cheapens land by increasing its supply.”<sup>231</sup> One potential effect of the large number of platted lots and approved subdivisions is a decrease in the value of both existing and potential homes and lots – a self-inflicted decrease in the power and influence of the growth machine.

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Teton County’s story both challenges *and* supports the growth machine and restructuring theories. The cultural and political changes that led to the November 2008 revisions to the county’s land-use ordinances were evident as early as November 2006. But those final changes – that final blessing in the form of formal legal change – did not occur until *after* a global recession had substantially reduced local demand for growth. While it appeared likely in early 2007 (immediately following the recall election) that some revisions in the county’s land-use ordinances were inevitable, we cannot know what they would have looked like had a strong growth machine persisted. So even if it appears justified to argue that amenity-driven population growth does play a role in influencing the evolution of land-use regimes in rural communities, we must recognize that it is not a simple linear relationship. Changed human-land relationships, to the extent they exist, are not necessarily the result of new ideas and new expectations for land arriving with the new residents. Rather, it is the effect of growth on the landscape, relative to the community’s evolving vision of its future, that changes human-land relationships. Whether those changed human-land

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230. *Census 2000, Detailed Tables*, U.S. CENSUS BUREAU, [http://factfinder.census.gov/servlet/DTable?\\_bm=y&-context=dt&-ds\\_name=DEC\\_2000\\_SF1\\_U&-mt\\_name=DEC\\_2000\\_SF1\\_U\\_H001&-mt\\_name=DEC\\_2000\\_SF1\\_U\\_H003&-mt\\_name=DEC\\_2000\\_SF1\\_U\\_H005&-CONTEXT=dt&-tree\\_id=4001&-redoLog=true&-all\\_geo\\_types=N&-geo\\_id=05000US16081&-search\\_results=01000US&-format=&-\\_lang=en&-SubjectID=17497016](http://factfinder.census.gov/servlet/DTable?_bm=y&-context=dt&-ds_name=DEC_2000_SF1_U&-mt_name=DEC_2000_SF1_U_H001&-mt_name=DEC_2000_SF1_U_H003&-mt_name=DEC_2000_SF1_U_H005&-CONTEXT=dt&-tree_id=4001&-redoLog=true&-all_geo_types=N&-geo_id=05000US16081&-search_results=01000US&-format=&-_lang=en&-SubjectID=17497016) (last visited Mar. 31, 2011) (Tables H1, H3 and H5).

231. Hope Strong, *County Wraps Up Present Plan*, TETON VALLEY NEWS (Nov. 25, 2004).

relationships can be realized as a formal institutional regime, however, likely still relies – at least to some extent – on the remaining power and influence of the growth machine.

But these conclusions beg a difficult question: if the motivation to protect locally important natural amenities only emerges in response to negative effects on the landscape, is it possible to enact resource-protective land-use regimes *before* the resources of interest are damaged or destroyed? Can a community formulate a new belief about land, about the proper regulation of land, without directly witnessing the consequences of that choice, or the consequences of alternative approaches? The qualitative data informing this discussion originated in a county that has experienced population growth, substantial landscape change, and ultimately institutional change. Would that institutional change have been possible *without* the landscape change associated with rapid amenity-driven development?

### **C. Imagining a Different Future?: Fremont County and Learning (or Failing to Learn) from your Neighbors**

*People I've known my whole life come up to me and say, commissioner, you're holding up a \$30 million sale for me.*<sup>232</sup>

Fortuitously, just to the north of Teton County is another set of communities that has shared Teton County's settlement, cultural, and economic histories, at least until 1990. Both Fremont and Teton counties were part of a period of significant settlement that began in the early 1880s and continued for several decades. Settled almost simultaneously in the 1880s and 1890s, the counties both grew rapidly due to relocation of Mormon settlers moving north from Salt Lake City and the Cache Valley in Utah.<sup>233</sup> But after the initial rapid population growth,

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232. Telephone interview with F3 (Feb. 29, 2008).

233. Information regarding the late 19<sup>th</sup>-Century and early 20<sup>th</sup>-Century histories of these two counties was compiled from a variety of sources, including: M.D. BEAL, *A HISTORY OF SOUTHEASTERN IDAHO* (1942); BENJAMIN W. DRIGGS, *HISTORY OF TETON VALLEY* (1926); Ashton Chamber of Commerce, *A History of Fremont County*, 6 *SNAKE RIVER ECHOES* 44 (1977); Arminda Briggs, *Teton City:*



both counties experienced more difficult times. By 1920, when the Teton Valley had become its own county, 3921 residents called it home.<sup>234</sup> The county's population would then decline and not reach this number again for another seven decades. In 1920, Fremont County was home to 10,380.<sup>235</sup> Its population also declined to 8679 in 1960, before beginning to grow again in the 1970s.<sup>236</sup>

But the experience of the two counties diverged substantially beginning in about 1990. Fremont County enjoyed none of the population growth experienced by neighboring Teton County. Between 1990 and 2009, Teton County grew by 171%;<sup>237</sup> Fremont County grew by 16%.<sup>238</sup> But somewhat ironically, in the early 1990s, even absent the substantial population growth experienced by Teton County – and the potential restructuring it might bring about – Fremont County adopted and maintained a rather sophisticated and progressive land-use regime.

To be sure, that Fremont County might adopt a sophisticated land-use regime, even in its first effort, is not completely surprising. Fremont County contains a varied geography, with productive farmland, National Forests, state parks, several high quality trout streams, and portions of Yellowstone National Park.<sup>239</sup> The northern two-thirds of the county – collectively, if

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1883-1983, 12 SNAKE RIVER ECHOES 138 (1983); Phillip Hibbert, *A History of Ashton*, 6 SNAKE RIVER ECHOES 18 (1977).

234. IDAHO, *Population of Counties by Decennial Census: 1900 to 1990*, 3/27/95, U.S. BUREAU OF THE CENSUS, <http://www.census.gov/population/cencounts/id190090.txt> (last visited Mar. 31, 2011).

235. *See id.*

236. *See id.*

237. From 3,349 residents in 1990 to an estimated 9,337 residents as of July 1, 2009 (the date of the latest census estimate). Population data obtained from the U.S. Census website. *See* U.S. CENSUS BUREAU, [www.census.gov](http://www.census.gov) (last visited Mar. 31, 2011).

238. *Id.* The population in Fremont County increased from 10,937 residents in 1990 to 12,691 residents in 2009. U.S. CENSUS BUREAU, [www.census.gov](http://www.census.gov) (last visited Mar. 30, 2011) (Search for Fremont County, Idaho in "Population Finder.").

239. In many ways, Fremont County contains far more of the high quality natural amenities crucial to the New West than does Teton County. Fremont County has more and more easily accessible National Forest lands, more rivers and lakes, world-famous fly-fishing, picturesque waterfalls, two state parks, a back-country access to Yellowstone National Park, and easier access to the more

not entirely accurately, referred to as “Island Park” – contains a wide array of natural amenities and recreational opportunities.<sup>240</sup> It is the experience with those amenities – more specifically, the experience *protecting* those amenities – that might explain the county’s initial choices regarding land use. Tourism has been a part of this area for over a century,<sup>241</sup> and that tourism has both contributed to the area’s economy and demonstrated its potential negative aspects.

In the early 1900s, the Oregon Short Line Railroad, operated by the Union Pacific, built a rail line through Fremont County to provide access to the newly created Yellowstone National Park.<sup>242</sup> During the planning for the Yellowstone line, the Union Pacific’s president, E.H. Harriman, experienced the Island Park area and subsequently purchased a 10,000-acre cattle ranch there in approximately 1902.<sup>243</sup> Although the land remains a working cattle ranch to this day – as part of Harriman State Park of Idaho – the primary purpose of the ranch was to serve as a hunting and fishing retreat for the Harriman and Guggenheim families.<sup>244</sup>

But the Harrimans and Guggenheims were not the first to make use of the county’s Island Park region for recreation and

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famous parts of Yellowstone. Teton County has the ski area, proximity to Jackson Hole, and the propaganda machine associated with those two things.

240. See, e.g., Russell Leavitt, *In Idaho: The Hatch of the Green Drake*, TIME MAG., Aug. 15, 1983; KEITH PETERSON & MARY E. REED, HARRIMAN STATE PARK OF IDAHO AND THE RAILROAD RANCH (1984); MARY E. REED & KEITH C. PETERSON, HARRIMAN: FROM RAILROAD RANCH TO STATE PARK (1991).

241. See e.g. JAMES L. ALLISON & DEAN H. GREEN, IDAHO’S GATEWAY TO YELLOWSTONE: THE ISLAND PARK STORY (1974); Margaret H. Lindsley, *Fremont County born in March, 1893*, FREMONT CNTY CHRON. NEWS, CENTENNIAL-HIST. EDITION, Aug. 8, 1963; Russell Leavitt, *In Idaho: The Hatch of the Green Drake*, TIME MAG., Aug. 15, 1983.

242. See JAMES L. ALLISON & DEAN H. GREEN, IDAHO’S GATEWAY TO YELLOWSTONE: THE ISLAND PARK STORY 169-170 (1974).

243. JAMES L. ALLISON & DEAN H. GREEN, IDAHO’S GATEWAY TO YELLOWSTONE: THE ISLAND PARK STORY 37 (1974); MARY E. REED & KEITH C. PETERSON, HARRIMAN: FROM RAILROAD RANCH TO STATE PARK 3 (1991). Edward H. Harriman and Solomon Guggenheim both purchased interests in the Island Park Land and Cattle Company, which was known as the Railroad Ranch and spent the first decade of the 1900s purchasing neighboring cattle ranches to increase the total size of their operation.

244. See MARY E. REED & KEITH C. PETERSON, HARRIMAN: FROM RAILROAD RANCH TO STATE PARK 3 (1991).

second home development, as summer homes were already a part of Island Park when Idaho became a state in 1890.<sup>245</sup> Theodore Roosevelt hunted buffalo in Island Park in the late 1880s, and after becoming President created the Targhee Forest Reserve in the Island Park area in 1909.<sup>246</sup> The first hunting and fishing club in the area started in 1902, followed by several others over the next decades.<sup>247</sup> The first club – the Utaida Rod and Gun Club – provided hunting and fishing opportunities for men who lived in Pocatello, Idaho, and Salt Lake City, Utah.<sup>248</sup> One year later in 1903, “Utah and California sportsmen” founded the Flat Rock Club, which prohibited any person under the age of 18.<sup>249</sup>

The creation of public inns and lodges followed shortly thereafter. The Big Springs Inn began in 1906, and “Doc” William H. Mack took advantage of a new rail line to Yellowstone to establish a resort at Trude Siding in Island Park.<sup>250</sup> Additional lodges (several of which remain in some form today) were established later, including Pond’s Lodge in 1923, and the Island Park Lodge and associated subdivision in 1947.<sup>251</sup> In 1909, future Idaho governor and Fremont County realtor C.C. Moore, published a short propaganda piece entitled: *Many men are making money in Fremont County, Idaho. Why not you?*<sup>252</sup> Moore bragged that:

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245. See, e.g., Margaret H. Lindsley, *Fremont County born in March, 1893*, FREMONT CNTY CHRON. NEWS, CENTENNIAL-HIST. EDITION, Aug. 8, 1963; KEITH PETERSON & MARY E. REED, HARRIMAN STATE PARK OF IDAHO AND THE RAILROAD RANCH (1984). I should note that much of this initial tourism development occurred at a time when southeastern Idaho was largely unsettled, and before Idaho became a state. Without desiring to engage in the substantial academic debate that exists regarding this topic, we might consider that this corner of Idaho was still very much a “frontier.” See, e.g., FREDERICK JACKSON TURNER, THE SIGNIFICANCE OF THE FRONTIER IN AMERICAN HISTORY (1893).

246. MARY E. REED & KEITH C. PETERSON, HARRIMAN: FROM RAILROAD RANCH TO STATE PARK 3 (1991).

247. JAMES L. ALLISON & DEAN H. GREEN, IDAHO’S GATEWAY TO YELLOWSTONE: THE ISLAND PARK STORY (1974).

248. See *id.*

249. See *id.*

250. See *id.* He later moved his resort to the automobile road after Yellowstone was opened to automobiles in 1916.

251. See *id.*

252. C. C. MOORE, MANY MEN ARE MAKING MONEY IN FREMONT COUNTY, IDAHO. HOW ABOUT YOU?, (1909).

Some of the most famous trout streams of the West are in Fremont County. The trout are numerous, large and gamey, and conditions are such that lovers of the sport can enjoy it to the utmost. Numerous resorts and clubs are maintained in the famous Island Park, through which trains run every day. Elk, deer, bear, mountain lion, mountain sheep and other game may be killed during the open season. Wild geese, ducks, grouse, sage hens, etc. are still plentiful.<sup>253</sup>

By the 1970s, Fremont County was a relatively well established tourism destination, for this region, even landing in Time Magazine in the early 1980s.<sup>254</sup> Although it did not lead to a level of population growth like that experienced across the West in the 1990s, this popularity had its consequences. One interesting component of Fremont County's original comprehensive plan is the recognition of land-use decisions or efforts that took place *before* the county decided to address land-use regulation on a county-wide scale. In a subdivision inventory completed in January 2008 as part of the ongoing planning process, Fremont County identified 7,066 known lots (both platted and known unplatted), occupying 9,659 acres in the Island Park planning area and representing 83% of the total subdivision lots in the county.<sup>255</sup> Only 44% of the lots had been developed in some fashion.<sup>256</sup> Most of these lots were created in the 1960s and 1970s<sup>257</sup> during a period of "rural renaissance" that provided a period of amenity-driven migration (and land

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253. *Id.* at 9-10.

254. See Russell Leavitt, *In Idaho: The Hatch of the Green Drake*, TIME MAG., Aug. 15, 1983.

255. FREMONT CNTY., ISLAND PARK PLANNING AREA SUBDIVISION INVENTORY, MAP 2.4A (2008), available at [http://www.co.fremont.id.us/departments/planning\\_building/Comp\\_Plan/IP\\_PlanArea\\_SubInventory\\_Map2.4a.pdf](http://www.co.fremont.id.us/departments/planning_building/Comp_Plan/IP_PlanArea_SubInventory_Map2.4a.pdf); FREMONT CNTY., COMPREHENSIVE PLAN 65 (2008), available at [http://www.co.fremont.id.us/departments/planning\\_building/Comp\\_Plan/Fremont\\_Comp\\_Plan\\_09.pdf](http://www.co.fremont.id.us/departments/planning_building/Comp_Plan/Fremont_Comp_Plan_09.pdf).

256. See FREMONT CNTY. COMPREHENSIVE PLAN 65 (2008), available at [http://www.co.fremont.id.us/departments/planning\\_building/Comp\\_Plan/Fremont\\_Comp\\_Plan\\_09.pdf](http://www.co.fremont.id.us/departments/planning_building/Comp_Plan/Fremont_Comp_Plan_09.pdf).

257. FREMONT CNTY., 1997 COMPREHENSIVE PLAN 17 (1997) (on file with author).

speculation) similar to what has occurred since 1990.<sup>258</sup> The effect of that land speculation remains today. The 2000 census reported that the Island Park census area had only 1,097 residents.<sup>259</sup> In other words, there were (and remain) over 3.5 times more permitted but undeveloped lots in the Island Park area than permanent residents. These lots could be developed without any public input.

Perhaps because of this earlier experience with a natural-amenity based economy, the first land-use regime that emerged in Fremont County contained elements that might have been considered perhaps *too* progressive in Teton County fifteen years later:

It was good work, it was revolutionary. It was 40 years ahead of its time. It really was 40 years ahead of his time. And he<sup>260</sup> had the vision and he could market it and sell it. And you know what? No one argued with him. Because they couldn't. Their ideas were rock solid. So when it came right down to it, as a facilitator, he was able to do the song and dance here in Fremont County. The old guys, 'I don't know what the hell he's even talkin' about, I'm out of here.' Literally, that was what happened. I've talked to a bunch of people up here, the people who were really engaged, totally were sold on it, there was no question that they could do it. And he created this performance-based zoning that was only done in a few areas of the country.<sup>261</sup>

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258. See, e.g., William H. Frey, *Migration and Depopulation of the Metropolis: Regional Restructuring or Rural Renaissance?*, 52 AM. SOC. REV. 240 (1987); J. Matthew Shumway & James A. Davis, *Nonmetropolitan Population Change in the Mountain West: 1970-1995*, 61 RURAL SOC. 513 (1996). Between 1970 and 1980, Fremont County's population increased by 24%. Since 1980, its population has increased 17.4%. Between 1920 (when the county's current borders were finalized) and 1970, the county's population *decreased* 16%. See IDAHO, *Population of Counties by Decennial Census: 1900 to 1990*, 3/27/95, U.S. BUREAU OF THE CENSUS, <http://www.census.gov/population/cencounts/id190090.txt> (last visited Mar. 31, 2011).

259. U.S. CENSUS BUREAU, [www.census.gov](http://www.census.gov) (last visited Mar. 30, 2011) (Population data obtained using the "Factfinder" page. The Island Park area is census tract 9701).

260. "He" in this statement refers to Lee Nellis, the consultant hired by the county to create its first land-use regime.

261. Interview with F5, in St. Anthony, Idaho (July 24, 2008).

A subsequent, but similar, version of the county's comprehensive plan recognized the importance of the county's natural amenities,<sup>262</sup> and the original land-use ordinances consequently treated its amenity-rich areas differently.<sup>263</sup> A former member of the county's planning and zoning commission argued that Fremont County's land-use regime "stood out among the western states" when originally created, was the result of some "early wisdom and foresight," and has served the county well.<sup>264</sup> That individual did recognize that there is some dissatisfaction with how the system is implemented – mostly among developers, but also among citizens. But rather than criticizing the system itself, he blamed most of the conflict on a board of county commissioners that refused to cooperate, or even communicate, with the planning and zoning commission.<sup>265</sup>

This experience – the enactment of a sophisticated land-use regime after a period of harmful amenity-driven development, or threatened amenity-driven development – is consistent with the story that appeared to be emerging in Teton County at the end of 2007. As the value of natural amenities becomes more apparent, and the effect of development-promoting land-use regimes (or the lack of any land-use regime, in the case of Fremont County in the 1960s and 1970s) becomes obvious on the ground, more restrictive or sophisticated land-use regimes are more likely to emerge. But Fremont County's experience does not include the additional element of population growth, and the alleged restructuring that might be associated with that growth. When Fremont County adopted its original comprehensive plan and zoning ordinance in

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262. For example, the 2002 Comprehensive Plan contained policies to "maintain the natural assets upon which the resort economy and recreational amenities of the Island Park Area are based," to prohibit industrial development in the area, to direct development away from visually sensitive areas, and to provide "abundant" open space. See *FREMONT CNTY., 2002 COMPREHENSIVE PLAN* 18 (2002) (on file with author).

263. *FREMONT CNTY., IDAHO, DEV. CODE, Ch. VIII* (2003), available at [http://www.co.fremont.id.us/departments/planning\\_building/pdf/Dev\\_Code\\_New.pdf](http://www.co.fremont.id.us/departments/planning_building/pdf/Dev_Code_New.pdf). Because Island Park has no productive cropland, the development code actually allows for more dense development in that area (e.g., the least dense base density is one unit per 20 acres, rather than one unit per 40 acres in agricultural areas).

264. Telephone interview with F2 (Feb. 27, 2008).

265. *Id.*

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January 1991, it did so “with little fanfare and no public opposition.”<sup>266</sup> It also happened after a decade in which Fremont County increased in population by just 1%, adding only 124 residents between 1980 and 1990.<sup>267</sup> Population growth and associated cultural change was not the primary driver of this relatively progressive and protective land-use regime.

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In some ways, Fremont County is in the same position Teton County faced a decade ago. Beginning in about 2007, Fremont County started experiencing more significant development pressure. Increased second-home development, overflow from more expensive Teton County, and demand from the rapidly growing and urbanizing Madison County to the south dramatically increased both the number of development applications in the county and the expectations of landowners regarding the value of their farmland. Much of this pressure focused on the seasonal home market, leading to a “development spike.”<sup>268</sup> According to one official, only 5% of the homes in recent development proposals are targeted at year-round residents.<sup>269</sup> Another local official suggested that this “spike” leaves many landowners – and thus potential developers – upset “because they don’t know what their densities will be until they apply.”<sup>270</sup>

Prior to the 2008 election, fearing that some political change might occur, the county commissioners expressed the intent to “do something” about the “density “restrictions” before the end of the year.<sup>271</sup> While this might seem like pro-development, growth machine supporting behavior, the commissioners did not view it in that fashion. In a personal interview, one commissioner

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266. *Fremont Board Adopts Land Plan, Zoning Law*, FREMONT COUNTY HERALD CHRON., Jan. 30, 1992.

267. See *IDAHO, Population of Counties by Decennial Census: 1900 to 1990*, 3/27/95, U.S. BUREAU OF THE CENSUS, <http://www.census.gov/population/cencounts/id190090.txt> (last visited Mar. 31, 2011).

268. Telephone interview with F2 (Feb. 27, 2008).

269. *Id.*

270. Telephone interview with F1 (Mar. 6, 2008).

271. Telephone interview with F3 (Feb. 29, 2008).

constantly returned to the difficulties of farming, the increasing costs of production, and the persistent drought. In his opinion, for many farmers, development is their only option other than bankruptcy. But “what’s killing them is the density restriction.”<sup>272</sup> For this particular commissioner, the efforts to relax development restrictions was not about promoting development, but was instead about protecting farmers and “allowing more property rights.”<sup>273</sup>

That was a common refrain, and the commissioners regularly – and in my opinion honestly – insisted that they do not support development for its own sake. At a public meeting in July 2007, in response to a demonstration of ‘power’ by the Smart Growth Coalition,<sup>274</sup> Commissioner Skip Hurt said:

I put more store into people who are directly affected. I am pro property rights. I am not pro development. . . . I do have respect for where you are coming from. We need to be fair and we need to meet in the middle ground. . . . We want to do what is right. . . . We are not always approving developments because we want to. We are not on the take.”<sup>275</sup>

Commissioner Don Trupp, who at 80 years of age chose not run for reelection in 2008, similarly argued “[w]e work for the people of this county. I am a firm believer you have a right to your property but you cannot infringe on your neighbor. The county is swinging from agriculture to development. It is not our wish, but facts are facts.”<sup>276</sup>

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<sup>272.</sup> *Id.*

<sup>273.</sup> *Id.*

<sup>274.</sup> Over fifty members of the Coalition crowded the commissioners’ meeting room, attempting to demonstrate that they represented a large group of county residents that the county was not listening to. See Elizabeth Laden, *Smart Growth Coalition Packs Commission’s Rooms*, ISLAND PARK NEWS, July 13, 2007, available at [http://www.islandparknews.com/atf.php?sid=2638&current\\_edition=2007-07-13](http://www.islandparknews.com/atf.php?sid=2638&current_edition=2007-07-13).

<sup>275.</sup> *Id.*

<sup>276.</sup> *Id.* The official minutes of this meeting also reflect this discussion. See FREMONT COUNTY COMMISSIONERS’ MEETING MINUTES (July 9, 2007), available at [http://www.co.fremont.id.us/departments/commission/minutes/monthly/7\\_9\\_2007.pdf](http://www.co.fremont.id.us/departments/commission/minutes/monthly/7_9_2007.pdf).



This increased development pressure coincided with an effort to update the county's land-use regime. The proposed new regime eliminated the performance-based aspects of the original regime, including a complicated agricultural lands protection system. One of the justifications for the new land-use regime, expressed by several officials during my interviews, was the desire to create objective standards to replace the difficult and inconsistent subjectivity of the county's performance-based regime. County officials, developers, *and* the 'green' community in Fremont County apparently agreed that certainty – even if it does not allow for a given interest group's preferred level of development – works better than uncertainty.<sup>277</sup> In one interview, a local official continually referred to a pamphlet prepared by the Fremont County Smart Growth Coalition in which the Coalition identified that it desired development that was “predictable, fair, and cost effective.”<sup>278</sup> Developers apparently desired the same thing, which allowed relative agreement on a new draft zoning regime which might allow more development than before, but which would preserve substantial open space values. The new cluster development ordinance being developed for the county's rural areas will require protection of 70% of the development as open space for the majority of the county.<sup>279</sup> Developers are satisfied with knowing, with certainty, how they can develop. The green community is “ecstatic” that each development must preserve a significant portion open space.<sup>280</sup>

But the desire for certainty is not the only force driving development of the new land-use regime. Throughout the interviews in Fremont County, every individual expressed the desire to protect the county's natural, scenic and agricultural resources. One individual expressed that desire in a way that was impressively relevant to this analysis:

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277. Telephone interview with F3 (Feb. 29, 2008).

278. *Id.*

279. See FREMONT CNTY. PLANNING AND BLDG. DEP'T, DRAFT FREMONT COUNTY. DEVELOPMENT CODE § 5.58.040 (Working draft August 25, 2010), *available at* [http://www.co.fremont.id.us/departments/planning\\_building/devcode/draft.pdf](http://www.co.fremont.id.us/departments/planning_building/devcode/draft.pdf). When the ordinance was originally drafted, it required that 75% be reserved as open space. See Telephone interview with F3 (Feb. 27, 2008).

280. Interview with F5, in St. Anthony, Idaho (July 24, 2008).

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The watch cry over here is ‘don’t do what Teton County did.’ And it’s pretty easy to figure out what happened, it really is, it’s pretty easy to see it. Don’t do what Teton County did, and that was just checker-board your whole stinkin’ county. . . . They’ve just been pimpin’ their land over there. It’s not about design, it’s not about community, it’s not about environment, it’s about pimpin’ your land. How much money can you get for that piece of dirt, that 2.5-acre square.<sup>281</sup>

In explaining the new cluster ordinance and how it balances the expectations of the county’s varied interests, a local official again referred to the county’s neighbor to the south:

It’s about balancing the density with the open space with the design of the subdivision . . . . You have to do this. . . . Teton County is still allowing checkerboard subdivisions; we’re not. We’re not going to allow it anymore. It’s not going to happen, it’s not going to get approved.<sup>282</sup>

But as of March 2011, Fremont County has not adopted its new development code, so it remains unclear how that code will look and whether it will trend more pro-development or more restrictive. The first public hearing on the new code, scheduled for August 18th was postponed indefinitely when the county fired its planning administrator because, “despite repeated counseling and weekly meetings,” the planning administrator’s “work performance did not meet expectations or the demands and challenges of the position[.]”<sup>283</sup> In his place, the county commissioners appointed an interim planning administrator who has worked as a developer and consultant in the county and was the author of a controversial ordinance that temporarily eliminated the system that protected productive farmland.<sup>284</sup>

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281. *Id.*

282. *Id.*

283. Joyce Edlefsen, *Fremont County Commission Fires P&Z Director*, REXBURG STANDARD J., Aug. 6, 2010, available at [http://www.rexburgstandardjournal.com/news/article\\_38c931c0-a1e3-11df-8559-001cc4c002e0.html](http://www.rexburgstandardjournal.com/news/article_38c931c0-a1e3-11df-8559-001cc4c002e0.html).

284. Joyce Edlefsen, *Loosli Named as Fremont County’s Interim P&B Chief*, REXBURG STANDARD J., Aug. 9, 2010, available at [http://www.uvsj.com/news/loosli-named-as-fremont-county-s-interim-p-b-chief/article\\_865896fc-a43a-11df-9025-001cc4c03286.html](http://www.uvsj.com/news/loosli-named-as-fremont-county-s-interim-p-b-chief/article_865896fc-a43a-11df-9025-001cc4c03286.html). The county subsequently hired Mr. Loosli

While that temporary repeal of the ag-land protection system was effective, thirteen developments were proposed with 2,700 lots on 7,800 acres, all of which arguably would have been prohibited but for the amendment.<sup>285</sup> The new interim planning administrator was associated as a consultant with approximately 85% of that proposed development.<sup>286</sup> In other words, the current interim planning administrator is a member of the growth machine.

What has prevented Fremont County from adopting the new land-use ordinances? And what would cause it to fire an experienced planning administrator and replace him with a developer with a history of attempting to remove impediments to increased residential development? Without the ongoing economic downturn, the answer might seem relatively simple. As the county experiences increased second-home development and land values rise, and the relative advantages of farming and ranching decrease, the growth machine might seek to facilitate development. The short-lived amendment to the agricultural land evaluation system, a move to “ensure more property rights” for farmers and ranchers,<sup>287</sup> and the admission that the county commissioners “have felt enough pressure that we have to do something before the next election”<sup>288</sup> demonstrated the success of the growth machine in softening a long-standing land-use regime that “has served well to date”<sup>289</sup> but which does not promote development.

But even as it largely eviscerates the real estate market, the global recession might still increase the power and influence of the growth machine. Fremont County is revising its land-use regime during a period when its residents are experiencing some

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permanently, after he wrote the job description for the position. Only one other person applied for the position, and he was not interviewed. See Joyce Edlefsen, *Loosli Hired as P&B Administrator*, REXBURG STANDARD J., Dec. 20, 2010, available at [http://www.uvsj.com/news/loosli-hired-as-p-b-administrator/article\\_46fd1f68-0cbe-11e0-8539-001cc4c03286.html](http://www.uvsj.com/news/loosli-hired-as-p-b-administrator/article_46fd1f68-0cbe-11e0-8539-001cc4c03286.html).

285. Joyce Edlefsen, *Smart Growth Lawsuit*, REXBURG STANDARD J., Feb. 19, 2008, available at [http://www.uvsj.com/news/article\\_d2183111-af3d-5004-8763-398b1cbf9bc0.html](http://www.uvsj.com/news/article_d2183111-af3d-5004-8763-398b1cbf9bc0.html).

286. *Id.*

287. Telephone interview with F3 (Feb. 27, 2008).

288. *Id.*

289. *Id.*

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economic hardship. Compared to the second quarter of 2007, total sales in all commercial sectors in Fremont County were down almost 40% by the second quarter of 2009, and still down almost 20% by the second quarter of 2010.<sup>290</sup> Similarly, compared to 2007, the sales of vacant residential land in Fremont County – including both platted lots and unplatted parcels – decreased 47% in number, 41% in total value, and 14% in average value by 2009.<sup>291</sup> But this decline in the *economic* strength of the growth machine might actually improve its *political* strength. As the relevant land-use constituencies suffer economically, they might be less likely to accept land-use regulation that could be perceived as decreasing the value of place-bound capital, specifically vacant but developable land.

As noted above, Fremont County recently fired its planning administrator, replacing him with an interim administrator that previously worked as a developer and authored a controversial land-use amendment that temporarily repealed protections for productive agricultural lands.<sup>292</sup> That action alone might demonstrate the continuing power of the growth machine. The most recent draft (as of this writing) of the new regime – dated February 11, 2011 – demonstrates both the continuing power of the growth machine as well as the desire to protect the natural resources valued by the community. The latest draft still contains a wide variety of resource protective ordinances. There remain substantial setbacks from waters and riparian plant communities, design guidelines that include recommended color palettes based on local ecological communities, requirements for wildlife plans designed to protect habitat and migration corridors,

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290. See *Reports and Statistics Search*, IDAHO STATE TAX COMM'N, <http://tax.idaho.gov/searchentry.cfm?stype=report> (last visited Mar. 17, 2010) (under report title field, choose "Sales/Use Tax By County" and search by year).

291. See *Ratio Studies*, IDAHO STATE TAX COMM'N, <http://tax.idaho.gov/i-1054.cfm> (last visited Mar. 17, 2010) (Click on the "Ratio Study" button at the bottom of the page and then compare by year). Interestingly, the sales of *improved* lots (i.e., existing houses) increased substantially during the same period, both in terms of total numbers (up 79%) and average and total value (up 13% and 102%, respectively).

292. See, Joyce Edlefsen, *Loosli Named as Fremont County's Interim P&B Chief*, REXBURG STANDARD J., Aug. 9, 2010, available at [http://www.uvsj.com/news/article\\_865896fc-a43a-11df-9025-001cc4c03286.html](http://www.uvsj.com/news/article_865896fc-a43a-11df-9025-001cc4c03286.html).

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the required use of native plants in landscaping and revegetation, among many other amenity- and resource-protective requirements.<sup>293</sup> These provisions arguably demonstrate that the county remembers the value of natural amenities, and has learned from the experience of nearby and clearly visible counties – put most simply: “I don’t want to see our county splattered.”<sup>294</sup> But the ordinance also demonstrates the ongoing influence of the growth machine. Despite repeated references to open-space requirements, and even as it incorporates substantial design standards and guidelines for open space, the most recent draft version of the code has eliminated specific requirements for open space that were included in previous drafts.<sup>295</sup>

## VI. WHERE THE PATHS CONVERGE: PREDICTING – OR MOTIVATING – INSTITUTIONAL CHANGE

As we consider the experiences in these two counties with the intent of determining *why* legal regimes change, patterns begin to emerge. Today, Fremont County is in a position similar to Teton County ten or fifteen years ago. As demand for development increases, *in part* because of population growth, pressure to facilitate that development increases. Those pressures might be in conflict with the county’s pre-existing understandings of land, or might be in conflict with the new ideas and understandings that population growth (or globalizing culture and values) bring to a place. But if the demands for development are sufficient, those demands can overwhelm the community’s evolving understandings of purpose. That interaction is not always peaceful, and can lead to both community and internal conflict, as

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293. See generally FREMONT CNTY. PLANNING AND BLDG. DEP’T, DRAFT FREMONT COUNTY. DEVELOPMENT CODE (February 11, 2011 working draft), available at [http://www.co.fremont.id.us/departments/planning\\_building/pdf/DRAFT\\_FC%20Dev%20Code%20-%202011%20Edition.pdf](http://www.co.fremont.id.us/departments/planning_building/pdf/DRAFT_FC%20Dev%20Code%20-%202011%20Edition.pdf).

294. Telephone interview with F3 (Feb. 27, 2008).

295. The September 24, 2010 draft of the ordinance required 70% dedicated open space in all developments throughout most of the county. See FREMONT CNTY. PLANNING AND BLDG. DEP’T, DRAFT FREMONT COUNTY. DEVELOPMENT CODE, §5.59.040 (Working draft Sept. 24, 2010), available at [http://www.co.fremont.id.us/departments/planning\\_building/pdf/DRAFT\\_FC\\_Dev\\_Code\\_2010\\_PH\\_Draft.pdf](http://www.co.fremont.id.us/departments/planning_building/pdf/DRAFT_FC_Dev_Code_2010_PH_Draft.pdf). Those requirements have been eliminated in more recent drafts of the ordinance.

new and old residents alike attempt to reconcile their expectations for a place (including the fear of losing a place they love) with the need to honor and respect property rights and the expectations and hopes of a community's long-term residents.

According to this understanding, and consistent with the experiences of the study counties, the first response to *significant* population growth and subsequent development pressure is a movement *away* from restrictive land-use regimes. The severity and duration of that move depends on a variety of factors, including potential benefits to the growth machine and the power of evolving expectations for land, but it seems to be a necessary component – at least in rapidly growing counties – of what could be a long-term pattern of movement toward more sophisticated, more 'evolved' or simply more restrictive land-use regimes. Fremont County's subtle move in a pro-development direction might not have been very deep, or very long, but there are hints that it responded in this fashion. But because demand for development was not as significant as that experienced in other parts of the West, the county's pre-existing expectations for land, the 'new' ideas of new residents, and the experience of witnessing the rampant development in Teton County appear able to balance the demands of the growth machine to some extent. Increased development pressure, or more substantial experiences with changes in the county's natural amenities, might shift that balance in one direction or the other.

Teton County, a decade or so 'ahead' of Fremont County, already passed through a period with a less restrictive, pro-development land-use regime, and now – after having experienced directly the consequences of that move – is looking toward a future that approaches land in a different fashion. Teton County's move in the pro-development direction was much deeper than what Fremont County has experienced or likely will experience. Both Teton County's pre-existing institutional regime (including its lack of previous experience with a natural-amenity economy) and the dramatic levels of population growth and second home development created fertile ground for an active growth machine that overwhelmed the input of the changing population. The restructured understandings of land did exist, but they could not compete with the power and influence of the

growth machine. Only as the consequences of the rampant development became apparent to residents and the growth machine alike did the growth machine's influence diminish, and the involvement and power of the restructured community increased, to the point that a new land-use regime might emerge.

This understanding – that the growth machine's influence only diminishes after a community experiences its negative effects – allows reconsideration of the statistical analyses considered in the first empirical component. The restructuring approach assumes that the variables considered together all combine to influence the dependent variable in the same fashion. That is to say, population growth, increased average income, increasing population density, etc., all should lead to land-use regimes that grow more sophisticated, more restrictive. But that approach can only consider input flowing in a single direction – from population growth, 'et al.', to land-use regimes. It does not consider the reciprocal effect, the influences of factors in other dimensions, nor more important, the ability of the relationship between the two variables to affect each variable individually. Variations in a single variable can affect other variables in unpredictable fashions – population growth might generally support less (or more) restrictive land-use regimes until, at some threshold, the influence changes. Considered through this lens, the statistical analyses are unsurprising; in fact, they demonstrate what this more nuanced model might have predicted. Population growth explains some of the variation in the counties' approaches to land use, but it cannot approach anywhere near a complete explanation. Given the complex interactions between the variables, and the statistical model's inability to consider directly the effect of the growth machine, the level of relationship between population growth and the restrictiveness change score might even be considered surprisingly high.

To review, this revised approach distills the factors that influence evolving land-use regimes in rural areas into three complex variables: (1) population change, including evolving expectations for land and the environment, in new and old residents alike, driven both by the arrival of new residents as well as globalizing culture and values; (2) the growth machine;

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and (3) the community's existing institutional regime, which consists of, among many other things, its land-use history, previously settled understandings of land, and its evolving vision for the future. Each variable contains the imprint of, and evolves with, the other variables. It is impossible to completely isolate the variables from each other, or even to define them in the absence of the other variables.

Most important, this approach recognizes that population change – and accompanying social and cultural change, including legal change – is a function more of the *new* place (for both new and long-term residents), rather than the old place. To be sure, a new resident's past experiences in a different place influence her understandings of land, just as a community's past experiences influence its understandings, but those understandings do not fully ripen until they interact with, and are molded by, a new place. A new resident to a rural area does not decide that existing land-use regimes need changing until it becomes obvious that the existing regimes are defective, that is, they do not protect the things that the new resident values about the place. Only when a community, or an individual, loses part of what it values is it motivated to evolve to protect that value.

#### VII. CONCLUSION: CLOSING THE DOOR AFTER THE VIEW DISAPPEARS

*It took this more fundamental shift in the way people look at land use policy, it took demographic change, and it took people seeing how land-use policy plays out on the ground and what it means to their lives for people to wake up and go, it matters, it's very important for me to go vote a certain way in a county commissioner election because it'll affect what happens next door to me.<sup>296</sup>*

This article's title contains a reference to a "post-public-lands West" that has emerged over the past two decades. From a simple cartographic perspective, the West remains distinguishable from the rest of the country based on the substantial amounts of federal lands found there – National

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296. Interview with T1, in Driggs, Idaho (Dec. 27, 2007).



Forests, National Parks, National Monuments, and 'left over' lands managed by the Bureau of Land Management.<sup>297</sup> But the era has ended in which the West was primarily defined – culturally, socially, *and* cartographically – by the presence of those public lands. The West is now much more similar to the rest of the country, where the primary land-related concern for most residents is the use and regulation of private lands. Local cultures and economies, and social conflicts, in this post-public-lands West originate in the same private lands uses and disputes that arise anywhere in the United States, and increasingly, anywhere in the world. The primary landscape in which western human-land relationships are realized is now more likely to be a private landscape than a public – i.e., federal – one.

This changing regional identity might complicate our efforts to understand emerging cultural expressions. While the presence of the public lands, and associated natural amenities (or the perception that there are associated natural amenities), influence population growth, those public lands are not the source of the conflict that emerges in response to that population growth, as might have been the case in previous decades.<sup>298</sup> Understanding social conflict in this context requires a more direct and specific look at how we understand private lands, specifically how we interpret the effects of our decisions on those private lands.

The task is not a simple one. Exploring our understandings of the purpose of land, and the way in which we effectuate that purpose in formal legal regimes, particularly in a place that is undergoing a period of cultural transformation, requires moving beyond the traditional ken of legal scholarship. As important, an exploration of how we enact purpose on the ground requires that we actually visit the ground where that purpose is enacted. The

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297. Most of the lands managed by the Bureau of Land Management are lands that were not reserved earlier out of the public domain – for example, National Parks and forest reserves (National Forests). The Taylor Grazing Act of 1934 effectively closed the public domain, creating the modern public lands – i.e., BLM – regime. See 43 U.S.C. §§ 315-316o (2006).

298. See, e.g., John D. Leshy, *Unraveling the Sagebrush Rebellion: Law, Politics and Federal Lands*, 14 U.C. DAVIS L. REV. 317 (1980); Bruce Babbitt, *Federalism and the Environment: An Intergovernmental Perspective on the Sagebrush Rebellion*, 12 ENVTL. L. 847 (1982); CHARLES F. WILKINSON, *CROSSING THE NEXT MERIDIAN: LAND, WATER, AND THE FUTURE OF THE WEST* (1992).

result is a messy, and necessarily incomplete (because it is ongoing) story of how conflicting and complementary theoretical approaches might make sense of specific events in specific places.

But the lesson that appears to emerge from that story is surprisingly simple: we can only make sense of something when we see its effects on the ground before us.

The restructuring thesis focuses on the change new residents effect in their new homes. What this article suggests instead is that the origin of these new residents is less important than their destination in determining what effect population change will have on local land-use regimes. That is to say, it is the physical effect of population change on a specific place – on its geography and culture – in the context of that place's history and the understandings of its residents, that plays the greatest role in influencing the response to growth; the ideas about land the new residents might take with them to a new place are much less important. A county with a long history of population growth will respond differently than a county in which rapid population growth is a new phenomenon, even if the same type and number of new residents arrive in each. Similarly, a county with a relatively stable rural economy (e.g., agriculture) might take a different approach to protecting the culture that accompanies that economy than a county without a similar stability. And new rural residents likely will react differently to a new place that promotes development than one which *already* seeks to protect natural amenities.

What this approach also suggests, however, is that population growth *does* ultimately contribute to evolving land-use regimes that might effectuate restructured understandings for a place. But the path the developing rurality takes to become "new" is not the path expected by the restructuring thesis. This article suggests the following simple explanation for the modern rural experience: new land-use regimes effectuating new *community* expectations for land (i.e., durable institutional change) arise only when the defects in the existing institutional regime become sufficiently obvious, and perhaps painful, on the ground – for both old and new residents alike – that the new understandings for a place can overcome institutional inertia and

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the interests of the growth machine. Population growth, as *one* source of new ideas and expectations for a place, contributes to this experience, but that contribution varies dramatically depending on the rate and nature of the population growth, as well as the place the new population arrives.

Community land-use regimes are pragmatic, reflecting the alternative with the highest “cash value” to the community, as determined by that community’s interpretation of the various alternatives’ actual effects on the ground. Because a community can only understand the value of a particular choice by experiencing its effects, a legal evolution toward resource-protective, or resource-sustaining, land-use regimes only occurs after the valued resources are harmed – a result we might like to avoid. For that reason, the crux on the path toward sustainability is to accurately imagine – *before* directly witnessing – the consequences of the alternatives available to us. It is this failure of visualization that most impedes attaining sustainability.