

# Note

## Different Ideas of the City: Origins of Metropolitan Land-Use Regimes in the United States, Germany, and Switzerland

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### I. INTRODUCTION

This Note argues that national regimes of land-use regulation—the whole body of a country’s institutions, laws, and jurisprudence that regulates building and development—can be understood only in the context of distinct political and legal regimes. National land-use regimes do not arise in response to universal laws of the market that exert the same influence at any location on the planet. Rather, land-use regimes differ from country to country. They are embedded in a complex, historically developing framework of ideology, law, and culture. If land-use controls regulate the physical shape of the communities we live in, then it is history itself that regulates what kind of

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community we view as wholesome, normal, and desirable—our ideas of what “the city” and “the good city” mean.

Much thinking about land-use topics in the United States seems to be predicated on the unspoken assumption that metropolitan development can only follow the pattern it has taken in the United States since World War II, namely that of business and residential expansion on the urban periphery, “dispersed in a pattern that can only be served by the single occupant auto.”<sup>1</sup> In fact, however, other countries have selected, and continue to pursue, radically different land-use regimes. By examining such alternatives to American policies, we are forced to confront the fact that much of what we take for granted about the American metropolitan scene can be traced to concrete political choices. Ultimately, the comparative approach helps demonstrate that Americans, like other peoples, have a particular idea of the good city; that our idea arises out of our history, culture, and legal doctrine; and that this idea can be recognized in many aspects of a country’s regime of land-use regulation.

What follows is a comparative study of the land-use regimes of the United States, Germany, and Switzerland. The two European cases were selected primarily because they represent an idea of the good city that diverges dramatically from the American one. This German-Swiss idea, as instantiated in land-use policies, has imposed radically different urban forms than those that prevail on this shore of the Atlantic. One may well question the differences between American and German-Swiss urban forms. Why do American cities sometimes merge with each other along lines of roads and highways, while Swiss towns are separated from each other by expanses of fields or woodland? Why do even affluent Germans tolerate small, expensive living quarters, while American suburbanites spread out in ever larger houses and lots? And why have German and Swiss cities largely succeeded in preserving a monopoly over retail establishments, even as American downtowns have emptied out in the face of competition from out-of-town shopping centers?

The short answer to these questions is that the legal regime governing land use in the United States does not share certain common features of the analogous regimes in the two European countries. The German and Swiss land-use regimes concentrate on the goal of preserving traditional, compact urban areas defined by legally established growth perimeters and ringed by countryside untouched by urbanization. American land-use controls, by contrast, do not attempt to preserve this traditional urban form, which has been eroding in the United States with particular rapidity since the beginning of the post-World War II economic boom. Rather, it will be argued in this Note, American land-use controls are essentially oriented toward promoting single-family homes and protecting their occupants.

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1. Paul J. Pezzotta II, *Emerging Evidence of the Erosion of Economic Competitiveness Caused by Development Patterns Based on the Single Occupant Auto*, 30 URB. LAW. 507, 511 (1998).

This Note analyzes how and why these two European states have adopted measures to preserve the traditional shape of their cities and towns, and why Americans have chosen not to do so. This difference between the land-use regimes stems from fundamentally different ideas of the city. Germans and Swiss understand the city as a historically unfolding entity with its own corporate personality, its own social structure, and its own indispensable function in the political system. The city plays an essential role in shaping and preserving the regional and national social order. Finally, the German and Swiss city is conceptually and administratively integrated within its agricultural hinterland, a tended municipal realm with its own special function in public life. Americans have lost, or perhaps rejected, this concept of the city as an essential mediator in social life. The American city, it will be argued, has come to be defined in public law as a neutral space in which can be realized the competing ambitions both of subsidiary actors—households—and of superior ones—higher levels of government.

Why these three countries? Arguably, most European land-use regulatory systems outside Great Britain share a similar legal and administrative framework.<sup>2</sup> Germany and Switzerland may not even qualify as the most systematically planned land-use systems on the continent.<sup>3</sup> Nonetheless, they do stand out in some respects. First, Germany and its neighbor Switzerland both represent a history of urban autonomy and prestige within national political systems, a legacy differing radically from the path taken in the United States.<sup>4</sup> In addition, as will be explained below, Germany developed the modern urban planning profession.<sup>5</sup> To this day, as a result, German and Swiss legislation and scholarly writing on land-use planning convey with particular clarity the underlying ideological construction of the city that drives the whole system.<sup>6</sup> Thus, a contrast of Germany and Switzerland against the United States illustrates how differing ideologies of the city produce distinct outcomes in the regulation of urban form.

Despite these strengths of the comparison, it should be frankly acknowledged at the outset that this Note is only the beginning of what would need to be a more comprehensive examination of land-use regulatory systems across the developed (and possibly also the developing) world. Only such a comparison, involving numerous countries and taking into account many variables, could really produce a robust theory of the relation between national political cultures and land-use regimes. Nevertheless, it is hoped that this Note, by presenting what is necessarily a highly stylized claim based on a few examples, will serve to instigate further research to test the hypothesis that the

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2. See PETER NEWMAN & ANDY THORNLEY, *URBAN PLANNING IN EUROPE: INTERNATIONAL COMPETITION, NATIONAL SYSTEMS, AND PLANNING PROJECTS* 71 (1996) (noting a broad similarity among Continental land-use regulation systems as contrasted with the more centralized, adversarial, and ad hoc procedures in England and Wales).

3. See *id.* at 49–50 (calling the Netherlands the “most planned” country in Europe).

4. See *infra* Section III.A.

5. See *infra* note 156 and accompanying text.

6. See, e.g., *infra* text accompanying notes 87, 97, & 98 (describing influences of city ideals on land-use policies and debates).

regulation of urban form is powerfully influenced by the ideological and legal construction of the city.

The remainder of this Note is organized as follows. Part II offers a brief comparison of the land-use regimes of the United States, Germany, and Switzerland, in the course of which each regime's techniques and goals are analyzed. This primarily descriptive Part is followed in Part III by an attempt to explain these outcomes in terms of the differing historical development of cities within the social and political systems of the three countries. Finally, Part IV argues that America's national land-use regime on the one hand, and Switzerland's and Germany's on the other, reflect differing responses to modernity. America's land-use system reflects, at least in part, a radical rejection of European social norms; the German and Swiss systems reflect a conservative unease with industrial society that tries to conserve important aspects of the preindustrial community.

## II. BASIC ELEMENTS OF LAND-USE REGIMES IN THE UNITED STATES, GERMANY, AND SWITZERLAND

In this Part it is argued that while American land-use policies aim at the safeguarding of private life, German and Swiss policies aim at the shaping of public space. American policies feature fragmented decision-making, concentrated in municipalities, and focus on the protection of single-family residences. German and Swiss laws, by contrast, involve all levels of government in concert and are devoted to preserving a certain urban form: the compact city.

### A. *The United States: A Fragmented and Relatively Unplanned Land-Use Regime*

American land-use controls are marked by a few particularly noteworthy characteristics: the comparative weakness of overt involvement by state and federal government in local land-use controls; the corresponding delegation of land-use regulatory power to municipalities; the reliance on zoning as the preeminent method of local land-use controls and the relatively weak links between zoning and comprehensive land-use planning; and the ubiquitous use of zoning to effect the separation of "incompatible" residential and non-residential uses—and particularly the protection of single-family homes from "lower" uses.

#### 1. *The U.S. Regime: Basic Structure*

One of the most noteworthy facts about land-use controls in the United States is the extreme localization (and consequently, fragmentation) of their implementation. Apart from some relatively recent environmental legislation, to be discussed shortly, the federal government plays a fairly limited overt

role in the land-use controls governing privately owned land.<sup>7</sup> The states ostensibly have the right to regulate land use as part of the police power.<sup>8</sup> Significantly, however, most states have chosen to delegate most of their land-use regulatory powers to local governments.<sup>9</sup> Moreover, states have been slow to allow the growth of land-use controls and planning by units of government larger than a municipality.<sup>10</sup> The largest political subdivisions commonly permitted to impose land-use controls or to prepare and adopt comprehensive plans for community development are counties, and these usually are restricted to regulating lands that are outside the incorporated areas contained within their borders.<sup>11</sup> In other words, land-use controls are implemented largely by cities and towns acting in isolation:

Admittedly, some erosion of the pattern of exclusively local regulation became visible with the rise of the environmental movement in the 1960s. In an era dubbed "The Quiet Revolution" after the 1971 book by Fred Bosselman and David Callies,<sup>12</sup> it briefly seemed that local government control of land use would be extensively supplanted by state and federal regulation. Bosselman and Callies identified a number of innovative programs regulating land-use decisions on a statewide, or at least a regional, level.<sup>13</sup>

Among these experiments, Hawaii's statewide land-use law stands out as the first and still among the most strict and comprehensive in the United States.<sup>14</sup> Adopted in 1961, soon after Hawaiian statehood, the law essentially broke with the typical pattern of local control and created a state agency to administer the policy, which called for division of the state's land area into land-use "districts" of three different kinds, only one of which could contain urban development.<sup>15</sup> A few other states, such as Maine and Vermont, also

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7. The federal government has played an important role in land-use management in the vast lands owned by the United States, principally in the western states. As recently as 1975, this federally owned land comprised one-third of the entire surface area of the United States; in 1993 the proportion was still 28.6 percent. See BUREAU OF THE CENSUS, U.S. DEP'T OF COMMERCE, STATISTICAL ABSTRACT OF THE UNITED STATES 1996, 228 tbl.364 (1996).

8. The police power is the general regulatory power of the state to promote "order, safety, health, morals, and the general welfare of society, within constitutional limits" and without compensation to those affected by the regulation. 16A C.J.S. *Constitutional Law* § 432 (1984); see also *Village of Euclid v. Ambler Realty Co.*, 272 U.S. 365, 389-90 (1926) (holding the exclusion of industrial development from residential areas, even when such exclusion is to the detriment of industry itself, to be a valid exercise of the police power).

9. See 1 ANDERSON'S AMERICAN LAW OF ZONING § 2.01 (Kenneth H. Young ed., 4th ed. 1996) [hereinafter ANDERSON'S].

10. See 4 *id.* § 24.01.

11. See *id.*

12. FRED BOSSELMAN & DAVID CALLIES, *THE QUIET REVOLUTION IN LAND USE CONTROL* (1971).

13. Bosselman and Callies examine several state policies and regional land-use entities not discussed in this Note, including the San Francisco Bay Conservation and Development Commission and the Twin Cities (Minneapolis-St. Paul) Metropolitan Commission. See *id.* at 108-35, 136-63.

14. See Act of July 11, 1961, act 187, 1961 Haw. Sess. Laws 299 (codified as amended at HAW. REV. STAT. § 205 (1997)); see also BOSSELMAN & CALLIES, *supra* note 12, at 5 ("The quiet revolution in land use control saw its first legislative success with the Hawaiian Legislature's passage of the Land Use Law in 1961.")

15. See Act of July 11, 1961, act 187, 1961 Haw. Sess. Laws at 300 (classifying all land as either urban, agricultural, or rural); see also BOSSELMAN & CALLIES, *supra* note 12, at 7-8 (explaining

took significant steps toward state regulation of the location of future development.<sup>16</sup>

Still other states have taken similar steps since the publication of Bosselman and Callies's compilation, creating a "second generation" of the Quiet Revolution. For instance, since 1972 Florida has extensively regulated large developments deemed to have regional, as opposed to merely local, impact.<sup>17</sup> New York exercises substantial direct control and other forms of supervision over the many private lands in its Adirondack State Park, an area the size of Vermont.<sup>18</sup> Finally, upon the adoption of its 1973 Land Use Act, Oregon assumed land-use powers even more sweeping than those of the state government of Hawaii.<sup>19</sup>

Such state policies marked a significant shift away from states' prior noninvolvement in land-use regulation. They also raise legitimate and substantial questions about a heretofore unspoken premise of this Note: that it is reasonable to compare land-use regimes at the national, rather than the local, level. If Oregon and Hawaii can formulate comprehensive state laws to regulate urban development in accordance with a restrictive model of compact urban development, and if Vermont can make serious efforts to preserve its

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how the Hawaiian land-use law works).

16. The Maine Land Use Regulation Commission directly administers the controls over land use in unincorporated areas. *See* ME. REV. STAT. ANN. tit. 12, § 683 (West 1994). Even incorporated communities must adhere to statewide "standards," broad policy guidelines prepared by the Commission. *See id.* §§ 685-A(3), -A(4). Vermont, proud of its rural beauty and small-town traditions and mindful of their value in attracting tourism, attempts to channel growth into existing town centers designated as "growth areas" in order to protect mixed-use, compact-settlement urban patterns. *See* Vermont Planning and Development Act, VT. STAT. ANN. tit. 24, §§ 4301-4348 (1992). The state has made the availability of certain state funds to municipalities contingent upon the designation of such growth centers. *See id.* § 4306. For a mixed assessment of the success of the "growth center" policy in maintaining traditional compact village form in Vermont in the face of the pressures of rapid economic development, see Jessica E. Jay, Note, *The "Malling" of Vermont: Can the "Growth Center" Designation Save the Traditional Village from Suburban Sprawl?*, 21 VT. L. REV. 929, 961-63 (1997) (demonstrating that even a state as rural as Vermont can be dramatically affected by the land-use trends of the more metropolitan parts of the country, such as the tendency to develop new commercial establishments along highways rather than in traditional town centers).

17. *See* Florida Environmental Land and Water Management Act of 1972, FLA. STAT. ANN. § 380.06 (West 1987); *see also* FRANK J. POPPER, *THE POLITICS OF LAND-USE REFORM* 78 (1981) (explaining the provisions of the Florida Environmental Land and Water Management Act).

18. *See* Adirondack Park Agency Act, 27 N.Y. EXEC. LAW §§ 800-820 (Consol. 1995); *see also* POPPER, *supra* note 17, at 81 (explaining the provisions of the Adirondack Park Agency Act).

19. By this act Oregon became the first state to require all municipal governments to prepare comprehensive plans of development *and* to submit these plans to a state agency for approval ("acknowledgment"). *See* Oregon Land Use Act, ch. 80, 1973 Or. Laws 127 (codified as amended at OR. REV. STAT. § 197 (1997)); *see also* GERRIT KNAAP & ARTHUR C. NELSON, *THE REGULATED LANDSCAPE: LESSONS ON STATE LAND USE PLANNING FROM OREGON* 22-23 (1992) (summarizing the main provisions of the Oregon Land Use Act). As a result, by 1985 Oregon could claim that, uniquely among American jurisdictions, "every acre of Oregon land is zoned, every zone is planned, and every plan is state-approved." KNAAP & NELSON, *supra*, at 1. Moreover, Oregon consciously set out to constrain the physical extension of its metropolitan areas, principally Portland, through the regulatory device of "urban growth boundaries" beyond which most development would not be permitted. *See id.* at 51-53. While Oregon's comprehensive state law finds no parallel in the United States, it resembles German and Swiss policies discussed in Section II.B.

landscape of small nucleated villages from the encroachment of Wal-Mart stores and suburban-style subdivisions, then how meaningful is it to discuss “national” land-use regimes and (as I shall do below) “national” ideologies? There are a number of answers to this question.

First, while some degree of state regulation of land use has become entrenched since the Quiet Revolution, the more ambitious programs of Hawaii, Vermont, and Oregon are still highly exceptional, as is the commitment to a more regimented ordering of the built environment that the policies presumably reveal.<sup>20</sup> Accordingly, while the more far-reaching Quiet Revolution projects certainly need to be noted—and deserve scholarly attention as interesting examples of dissent from prevailing national norms—they do not disprove certain generalizations about land-use controls at the national level. The role of state land-use laws remains relatively minor as compared to local regulation (particularly, as will be argued below, in contrast with Germany and Switzerland<sup>21</sup>).

A further reason why comparisons at the national level are valuable is that land-use regulation in the United States has an explicitly federal component, which by definition is uniform across the states. Contemporaneous with the Quiet Revolution at the state level, the blossoming of the environmental movement in the 1960s and 1970s witnessed the passage of federal legislation with ramifications for land-use regulation.<sup>22</sup> Such federal laws show that Congress has at least recognized the environmental significance of land-use decisions. In the optimistic view of the early 1970s, these acts gave hope that Congress would ultimately articulate a national

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20. “[T]he legislation of most states continues to reflect an underlying assumption that the control of land use is basically a local problem.” 4 ANDERSON’S, *supra* note 9, § 24.01.

21. See *infra* Section II.B.

22. Following the passage of the federal Coastal Zone Management Act of 1972, Pub. L. No. 92-583, 86 Stat. 1280 (codified as amended at 16 U.S.C. §§ 1451–1464 (1994)), many states (most notably California) have also resorted to statewide regulation to protect their coastlines from unorganized, unattractive, or simply excessive development. See POPPER, *supra* note 17, at 84 (analyzing various state approaches to land-use planning). In addition, the National Environmental Policy Act of 1969 (NEPA), Pub. L. No. 91-190, 83 Stat. 852 (codified as amended at 42 U.S.C. §§ 4321–4347 (1994)), required federal agencies to conform to environmental standards. Specifically, NEPA required federal agencies to prepare “environmental impact statements” concerning the likely consequences of proposed federal activity. Other federal legislation relevant to land-use concerns includes the Clean Air Act, Pub. L. No. 88-206, § 7, 77 Stat. 392 (1963) (codified as amended at 42 U.S.C. § 7401 (1994)), and its 1970 amendments, which directed the Environmental Protection Agency to review the environmental impact of much federal activity. See Pub. L. No. 91-604, § 12a, 84 Stat. 1709 (1970) (codified at 42 U.S.C. § 7609 (1994)). Similarly, the Water Pollution Control Act, Pub. L. No. 80-845, 62 Stat. 1155 (1948) (codified as amended at 33 U.S.C. §§ 1251–1376 (1994)), created national standards for certain kinds of industrial emissions and provides for federal enforcement. As a result of various revisions and augmentations over the years, this law also involved the federal government extensively in the funding, location, and sizing of new sewer lines and sewage treatment plants, decisions that powerfully influence the location of new development. See David L. Callies, *The Quiet Revolution Revisited*, 46 J. AM. PLAN. ASS’N 135, 140 (1980). In addition, the 1970 Federal-Aid Highway Act, Pub. L. No. 91-605, 84 Stat. 1734 (codified as amended at 23 U.S.C. § 109(j) (1994)), along with other federal laws, required submission of transportation plans considering environmental effects when communities build new roads. Finally, the Endangered Species Act, Pub. L. No. 93-205, 87 Stat. 884 (1973) (codified as amended at 16 U.S.C. § 1531 (1994)), restricted development potentially threatening the habitat of a protected species.

policy on land-use regulation addressing some of the problems associated with disorganized and chaotic development.<sup>23</sup>

Ultimately, however, the Quiet Revolution failed to achieve an explicit national policy against the uncoordinated development of land that characterized, and continues to characterize, the United States.<sup>24</sup> Indeed, after the mid-1970s, the movement for increased state and federal regulation of land use floundered as it began to encounter conservative political opposition.<sup>25</sup> To be sure, there has been no return to the days before environmental concerns pushed their way to the top of the national agenda and galvanized the federal and state governments into action.<sup>26</sup> Indeed, there even have been some new additions to the ranks of the "revolutionary" states that have added a layer of state coordination to their land-use regimes.<sup>27</sup> Nevertheless, despite the creation of new layers of federal and state regulation, there has been no adoption of a national policy and, with the few exceptions already named, no state legislation against uncoordinated sprawl or in favor of the compact city development that, I will argue, characterizes Germany and Switzerland.<sup>28</sup>

The other key feature of the American regime that distinguishes it from its German and Swiss counterparts—and that justifies a national-level comparison—is America's reliance on municipal zoning as the preeminent tool of metropolitan land-use regulation. Western European observers are frequently perplexed by the fact that zoning appears to exist in the absence of highly developed national (or even state) policies on land-use *planning*.<sup>29</sup> To be sure, planning is not absent from the American scene. Indeed, the Standard State Zoning Enabling Act<sup>30</sup>—the product of a commission appointed by then-

23. See Russell E. Train, *Foreword* to BOSSELMAN & CALLIES, *supra* note 12, at ii (calling land use "the most important environmental issue remaining substantially unaddressed as a matter of national policy"). Train was the chairman of President Richard Nixon's Council on Environmental Quality, so his support for such a national policy suggests that political receptiveness to it in the early 1970s was not limited to liberals.

24. Federal legislation that would have established a national policy in favor of statewide land-use planning of major infrastructural development, supported by federal grants, was repeatedly introduced into Congress during the 1970s but never became law. For details of this story, see POPPER, *supra* note 17, at 60.

25. See *id.* at 209.

26. See Callies, *supra* note 22, at 140. Popper suggests that single-issue regulation, such as protection of coastal areas, has retained more state legislative support than general statewide regulation of all building. See POPPER, *supra* note 17, at 229.

27. See David L. Callies, *The Quiet Revolution Revisited: A Quarter Century of Progress*, 26 URB. LAW. 197, 205-11 (1994) (mentioning Georgia, New Jersey, Washington, Rhode Island, and Maryland).

28. See Reid Ewing, *Is Los Angeles-Style Sprawl Desirable?*, 63 J. AM. PLAN. ASS'N 107, 118 (1997) (calling for "active planning of the type practiced almost everywhere except the United States (and beginning to appear here out of necessity)").

29. Thus, a British scholar writes that "the lack of any substantial relationship between the legal machinery and a clear concept of city planning is the firmest impression left by the origin and later course of land-use control in America." JOHN DELAFONS, *LAND-USE CONTROLS IN THE UNITED STATES* 24 (1969).

30. ADVISORY COMM. ON ZONING, U.S. DEP'T OF COMMERCE, *A STANDARD STATE ZONING*



Secretary of Commerce Herbert Hoover, and still the basic source of zoning power in most states—calls for zoning regulations to be “made in accordance with a comprehensive plan.”<sup>31</sup>

Yet the early and continuing tendency among American courts has been to hold that this requirement is met merely by demonstrating the existence of a zoning law itself, as the putative end product of a planning process. In most jurisdictions, no separate plan for the town’s development has usually been required to uphold a zoning law.<sup>32</sup> In addition, such land-use planning remains largely restricted to the local municipal, or at most the regional metropolitan, level.<sup>33</sup> State enabling acts typically provide for weak regional planning boards; frequently, municipalities can simply refuse to participate in these boards.<sup>34</sup> Moreover, the enabling acts usually specify that the plans drawn up by these boards are to be advisory rather than legally binding.<sup>35</sup> In short, American land-use planning is weak and usually optional.

## 2. *The U.S. Regime: Goals*

American land-use law’s reliance on zoning and the weakness of statutory urban planning can be understood relatively easily by reference to goals made explicit within zoning jurisprudence itself. Zoning in the United States has focused on one central objective: the separation of residential uses from others, and, within the broader category of residential uses, the separation of single-family homes from other kinds of living accommodations. Zoning accomplishes this goal admirably even without extensive city planning. As will be argued, American zoning law represents a rejection of urbanity and of the city in favor of a certain vision of private domestic life.

Zoning developed as a statutory tool intended to protect favored uses and households from disfavored ones.<sup>36</sup> This phenomenon can be traced back

ENABLING ACT (rev. ed. 1926).

31. *Id.* § 3.

32. *See Dawson Enters., Inc. v. Blaine County*, 567 P.2d 1257 (Idaho 1977); *Kozesnik v. Township of Montgomery*, 131 A.2d 1 (N.J. 1957); *Bell v. City of Elkhorn*, 364 N.W.2d 144 (Wis. 1985). Even in California, a relatively aggressive Quiet Revolution state that does require comprehensive planning, the state government possesses “no enforcement mechanism to compel localities to comply with their own plans. For jurisdictions grossly out of compliance, the state must rely on individuals to sue the locality in court in order to force the adoption of a legally-adequate general plan for development.” John A. Hird et al., *Housing in San Francisco: Shelter in the Market Economy*, in *HOUSING MARKETS AND HOUSING INSTITUTIONS: AN INTERNATIONAL COMPARISON* 157, 197 (Bjorn Harsman & John M. Quigley eds., 1991). On the other hand, where municipalities do have comprehensive plans in effect, a growing number of jurisdictions are inclined to treat such plans either as useful statements of public policy or even as binding laws that necessarily constrain all zoning ordinances enacted by the municipality. *See Edward J. Sullivan, The Plan as Law*, 26 *URB. LAW.* 753 (1994) (reviewing the extent to which various states give legal force to municipal plans).

33. *See PETER HALL, URBAN AND REGIONAL PLANNING* 205 (3d ed. 1992) (calling U.S. planning “excessively local and small-scale”).

34. *See* 4 *ANDERSON’S*, *supra* note 9, § 24.04.

35. *See id.* § 24.12.

36. Indeed, zoning developed as a statutory substitute for the common law doctrine of nuisance, which was the universal remedy against noxious uses of land in the United States until early in this century. *See 1 id.* § 3.02–.03. New York City’s 1916 zoning ordinance was the first of its kind in the country. *See id.* § 3.07.

as far as the foundational *Euclid*<sup>37</sup> case, in which the Supreme Court gave its imprimatur to zoning by holding that the practice falls within the state's "police power."<sup>38</sup> In its decision, the *Euclid* Court describes as the "crux" of zoning legislation "the creation and maintenance of residential districts, from which business and trade of every sort, *including hotels and apartment houses*, are excluded."<sup>39</sup> To this day, American zoning is still based on a model of a "hierarchy" of uses, with single-family residences as the highest use, followed by multiple-family residences, commerce, light industry, and so forth.<sup>40</sup> And "single-family dwellings were, and they continue to be, regarded as meriting the most stringent protection."<sup>41</sup>

This zealous protection of single-family residences from lower uses is captured by a Supreme Court decision from twenty-five years ago, *Village of Belle Terre v. Boraas*,<sup>42</sup> which makes clear that what American courts since *Euclid* have sought to protect through zoning is a certain kind of neighborhood:

A quiet place where yards are wide, people few, and motor vehicles restricted are legitimate guidelines in a land-use project addressed to family needs. . . . The police power is not confined to elimination of filth, stench, and unhealthy places. It is ample to lay out zones where family values, youth values, and the blessings of quiet seclusion and clean air make the area a sanctuary for people.<sup>43</sup>

The *Belle Terre* decision expresses a conception of the good community whose central feature is *private domesticity* and in which other uses figure as threats. What accounts for this insistence on domesticity and the relative absence of federal and state land-use policies? It will turn out in Part III that the answer to this question is closely linked to the radical attack on the prestige and autonomy of American cities in U.S. public law. But first we turn to a brief exploration of the land-use regimes to which that of the United States is being compared.

### B. *Land-Use Regimes in Germany and Switzerland*

German and Swiss land-use regimes diverge from the American model along every dimension that was explored above. Fundamentally, they stem not from a glorification of private life, as in the United States, but rather from a subordination of private life and private property to a certain model of the normatively desirable community. The German and Swiss regimes give government full control over the location and extent of future development.

37. *Village of Euclid v. Ambler Realty Co.*, 272 U.S. 365 (1926).

38. *Id.* at 389-90.

39. *Id.* at 390 (emphasis added).

40. See 2 ANDERSON'S, *supra* note 9, § 9.14.

41. *Id.*

42. 416 U.S. 1 (1974) (upholding the constitutionality of a village zoning ordinance prohibiting occupancy of a dwelling by more than two unrelated persons).

43. *Id.* at 9.

And government employs this power so as to preserve the hegemony of important towns over their surrounding smaller towns, villages, and countryside.

In addition, the German and Swiss systems share a common structure involving all levels of administration: a federal government that frames the broad outlines of land-use policy and identifies the objectives of land-use controls; German states (*Länder*; singular, *Land*) and Swiss cantons that provide relatively detailed plans for the use of the territory under their jurisdiction; and, finally, regional and local administration of these plans, including zoning and direct control over individual land parcels. In both countries the basic system of land-use controls is laid out in a federal law.

### 1. *The Land-Use Regime of Germany*

Thus, in Germany, the federal *Bundesraumordnungsgesetz* (Federal Land-Use Law, hereinafter BROG)<sup>44</sup> sets out the goals of land-use regulation and the means of their implementation in a general and nonhierarchical manner. The BROG requires each German *Land* to formulate a program and comprehensive plans for its own territory.<sup>45</sup> This state-level planning (*Landesplanung*) is intended to produce a development program (*Landesentwicklungsprogramm*) with a lifespan of about fifteen years. This program divides the territory of the state into regions; for example, the relatively large German *Land* of Bavaria is divided into eighteen planning regions.<sup>46</sup> Within each of these regions the government assigns a particular status to the various cities, towns, and villages within the state, based on their size and importance.<sup>47</sup>

These designations do not simply *describe* a particular settlement; rather they *prescribe* a particular status for it. The designations reflect the so-called "central cities" approach prescribed by the BROG, which is derived from the work of German planners in the 1930s.<sup>48</sup> These planners believed that "a community is interwoven with the surrounding area for which the community provides the source of services and facilities."<sup>49</sup> Under the influence of this principle, the *Länder*, as part of their activities under the BROG, have usually chosen to categorize all settlements as main, middle, or subordinate centers, or as non-centers.<sup>50</sup>

44. Bundesraumordnungsgesetz (BROG), v. 8.4.1965 (BGBl. I S.306), amended by Law of May 6, 1993, v. 6.5.1993 (BGBl. I S.630).

45. See *id.* § 3(2).

46. See Thomas J. Schoenbaum, *Planning and Land Development Law in the Federal Republic of Germany*, 54 TUL. L. REV. 624, 627-28 (1980) (citing Landesentwicklungsprogramm Bayern, Teil A, 31 (1976)).

47. See, e.g., Schoenbaum, *supra* note 46, at 628 (citing Bayerisches Landesplanungsgesetz, art. 13, v. 6.2.1970 (GVBl. Bayern S.65), amended by Law of July 24, 1970, v. 24.7.1974. (GVBl. Bayern S.354)).

48. See Clifford Larsen, *What Should Be the Leading Principles of Land Use Planning? A German Perspective*, 29 VAND. J. TRANSNAT'L L. 967, 1006 (1996).

49. *Id.*

50. See *id.* at 1006-08.

What turns on this distinction is the right to future development of the center (or non-center):

[Main centers] are intended to offer a full range of educational and cultural opportunities, health care, housing, shopping, and economic opportunity. Other categories of centers will only be allowed to offer jobs and services to accommodate the needs of the surrounding population. Communities that are not designated as centers will typically receive only minimal public investment funds and *will not be allowed to grow* beyond replacement of existing housing stock.<sup>51</sup>

In other words, the location of development is ultimately determined by the *Land*, in conformity with national policy.

In addition, restrictions on development cannot be evaded by moving out of town altogether, as they can be in the United States. To begin, in contrast to the United States, nearly all German land lies within the territory of a municipality.<sup>52</sup> This means that it is not possible, as it is in the United States, for a developer to evade the zoning plan of a municipality by relocating her building activities a mile or two beyond the city limit. More fundamentally, the use of nonurban (i.e., primarily agricultural) land, which has received the legal designation of *Aussenbereich*, or "outside area," is regulated with great strictness in Germany. Under German law, building on such land is essentially limited to construction ancillary to agricultural activities.<sup>53</sup> In short, in Germany there is no escape from regional land-use regulation and national land-use policy.

Finally, in further contrast to the United States, the power of the federal government and *Länder* also extends to the control of land-use regulation enacted by local government. Under the German Federal Building Code, each municipality is required to draw up zoning plans (*Flächennutzungspläne*) and, at the most detailed level, building plans (*Bebauungspläne*), that regulate individual subdivisions.<sup>54</sup> These plans are subject to higher-level review. For example, the *Land* of Schleswig-Holstein reviews "[local] development plans, which are drafted for a period of five years, and may disapprove the plans if they do not meet federal and state planning goals."<sup>55</sup> Thus, Germany's land-use regime is both more hierarchical and more comprehensive than America's. Do Germans tolerate these restraints on the use of private property because they are more left-wing than Americans, as evidenced by Germany's

51. Schoenbaum, *supra* note 46, at 628 (emphasis added) (footnote omitted).

52. See ARTHUR B. GUNLICKS, *LOCAL GOVERNMENT IN THE GERMAN FEDERAL SYSTEM* 40-41 (1986).

53. See Baugesetzbuch [Federal Building Code], v. 12.12.1986 (BGBl. I S.2253) [hereinafter German Federal Building Code]; see also Terence J. Centner, *Preserving Rural-Urban Fringe Areas and Enhancing the Rural Environment: Looking at Selected German Institutional Responses*, 11 ARIZ. J. INT'L & COMP. L. 27, 31 (1994) (citing German Federal Building Code).

54. See German Federal Building Code § 1(3); see also Larsen, *supra* note 48, at 979 (citing German Federal Building Code).

55. Larsen, *supra* note 48, at 1005 (citing Gesetz über die Landesplanung (Landesplanungsgesetz), art. 13, para. 4, v. 10.6.1992 (GVBl. Schleswig-Holstein S.342) and subsequent amendments).

strong labor unions and historically Marxist left? No. Rather, German land-use controls represent a consensus on what constitutes the model of the good urban life.<sup>56</sup> This model is embraced not just by the concededly rather social democratic Germans, but by their decidedly free-market neighbors, the Swiss.<sup>57</sup>

## 2. *The Land-Use Regime of Switzerland*

The Swiss Federation's power to implement a national land-use policy is derived from a constitutional amendment adopted only as recently as 1967.<sup>58</sup> By this amendment the Swiss federal government was empowered to enact legislation to establish basic principles with respect to the development and settlement of the nation and the use of land, and in particular the creation of zoning regulations by the cantons.<sup>59</sup> Under the constitution, the federation is also authorized to promote and coordinate the land-use regulation activities of the cantons.<sup>60</sup> As can be readily observed, this range of powers corresponds closely to that exercised by the federal government of Germany.

On the strength of this new constitutional provision, the Swiss government later enacted land-use legislation, known as the *Bundesgesetz über die Raumplanung* (RPG) of 1979.<sup>61</sup> Like the German BROG, the RPG establishes general rules to which all levels of government must adhere. In addition, the RPG allocates responsibilities among different levels of government. Thus, the federation's duties include consultation with the cantons, regular reporting on the current land-use situation, and (more substantially) the elaboration of certain *Sachpläne*, plans over specific policy areas.<sup>62</sup>

As to the cantons, the RPG directs them to produce development programs (*Richtpläne*), similar to those of the German *Länder*, in which the cantons are to report on the current condition and development of population, traffic, and so forth.<sup>63</sup> The cantons must specify the time framework for the implementation of their program,<sup>64</sup> and the *Richtpläne* are also to be reexamined and, if necessary, reworked every ten years.<sup>65</sup> The cantons must

56. *See infra* Section III.A.

57. On Switzerland's strong commitment to capitalist economic institutions, see generally PETER J. KATZENSTEIN, *CORPORATISM AND CHANGE: AUSTRIA, SWITZERLAND, AND THE POLITICS OF INDUSTRY* (1984). Katzenstein describes "Switzerland's traditional preference that the government should play a minor role in the economy," *id.* at 107, and the country's small federal bureaucracy compared to other OECD countries, *see id.* at 116.

58. *See* BUNDESVERFASSUNG [Constitution] [BV] arts. 22-ter, 22-quater (Switz.), *amended by* Law of Sept. 1, 1967 (BB1 1967 II 133). Significantly, this development was approximately contemporaneous with the adoption of the German BROG. As will be argued in Part III, both represented a response to the effects of post-World War II prosperity.

59. *See id.* art. 22-quater.

60. *See id.*

61. Bundesgesetz über die Raumplanung [RPG], AS 1979 1573 (1979).

62. *See id.* art. 13.

63. *See id.* arts. 6, 8a.

64. *See id.* art. 8b.

65. *See id.* art. 9, para. 3.

also designate which areas are most suitable for agriculture or are deserving of protection because of their beauty, cultural significance, or susceptibility to environmental problems.<sup>66</sup> In addition, the cantons are directed to produce more specific use plans, or *Nutzungspläne*, which actually carve up their territory into several different use zones; these plans are normally drawn up by the communes (i.e., municipalities) on the orders of the cantonal governments. The main use zones are the building zones (*Bauzonen*), the agricultural zones (*Landwirtschaftszonen*), and the conservation zones (*Schutzzonen*).<sup>67</sup>

Because it prohibits urbanization of agricultural zones, the RPG ensures that agricultural land is protected, while land available for development is contained and monopolized by existing centers. In addition, the RPG specifies that building zones can encompass only land that is already developed or whose necessary development is foreseeable within a span of fifteen years.<sup>68</sup> Thus, it becomes clear that it is *new development* that the RPG views as the proper object of restraint and suspicion.

As for the cantons, they use their land-use powers in accordance with the same broad goals as those underlying the RPG. For example, the 1985 *Baugesetz* (Building and Planning Code)<sup>69</sup> of the canton of Bern provides a useful illustration of the actual implementation of the national policy on the cantonal level.

Within the canton of Bern, planning and zoning responsibilities are meticulously divided and coordinated among different levels of government. Thus, the cantonal administration itself is responsible for the publication of reports on land use,<sup>70</sup> for the delineation of agricultural land,<sup>71</sup> for the establishment of cantonal development plans when the communes or the regions fail to safeguard interests broader than their own,<sup>72</sup> and for the development plans required by the RPG.<sup>73</sup>

Below the cantonal level, the regions and communes of the canton of Bern also play an important role in land-use regulation. These "regions" are groups of communes agglomerated for the purposes of land-use control. As Zaugg explains, "The region in the sense of land-use planning law is a space that is characterized and limited by geographic features . . . and by economic relationships and interdependence."<sup>74</sup> The regions are responsible for land-use regulation tasks that require coordination among the member communes.<sup>75</sup>

66. *See id.* art. 6, para. 2.

67. *See id.* arts. 15–17.

68. *See id.* art. 15b.

69. *Baugesetz des Kantons Bern (BauG Bern)*, v. 9.6.1985, reprinted in ALDO ZAUGG, KOMMENTAR ZUM BAUGESETZ DES KANTONS BERN VOM 9. JUNI 1985 (1995).

70. *See BauG Bern*, art. 100, para. 4, reprinted in ZAUGG, *supra* note 69, at 539.

71. *See BauG Bern*, art. 101, para. 2, reprinted in ZAUGG, *supra* note 69, at 540.

72. *See BauG Bern*, art. 102, para. 2, reprinted in ZAUGG, *supra* note 69, at 544.

73. *See BauG Bern*, art. 103, para. 1, reprinted in ZAUGG, *supra* note 69, at 546.

74. ZAUGG, *supra* note 69, at 528 (author's translation).

75. *See BauG Bern*, art. 98, para. 1, reprinted in ZAUGG, *supra* note 69, at 529.

They also serve as an intermediate level and liaison between the cantonal government and the communes.

Finally, at the most local level, the municipalities are bound by the federal constitution and legislation and by cantonal legislation.<sup>76</sup> However, it is also the communes that actually zone their own territory and regulate subdivision development and actual buildings. In addition, they are responsible for supplying authorized developments with public utilities and roads and for the consolidation of building areas.<sup>77</sup> Thus, the example of Bern demonstrates how Swiss and German land-use law integrates all governmental bodies into an effort to pursue a national policy. But to what end?

### 3. *The German and Swiss Regimes: Goals*

The German and Swiss land-use laws share a number of objectives. Broadly speaking, the laws are formulated to prevent destabilizing social change. Swiss and German policies evince a refusal to treat land-use regulation in the American manner, as essentially a matter of regulating private property rights; in contrast, Swiss and German laws assume that land-use regulation is an important way of maintaining the social order.

This broad goal of maintaining social stability is instantiated in more specific policy objectives. These include the stabilization of small cities' populations by preventing large-scale migration for economic reasons; the prevention of sprawl and the preservation of the appearance of both cities and countryside; and the promotion of commercial agriculture and especially family farmers. Let us consider these concerns in turn, using examples drawn from both Germany and Switzerland.

First, by closing off the overwhelming mass of agricultural land to development through the legal categories of *Aussenbereich* in Germany<sup>78</sup> and *Landwirtschaftszone* in Switzerland,<sup>79</sup> existing cities in effect receive a monopoly of most nonagricultural economic activity, and population growth is directed to existing centers. The designation of towns as "centers" of different ranks, or as non-centers, also serves this goal. That is, by restricting development in minor centers and non-centers, German policy discourages people from moving to areas where, by definition, housing, jobs, and services will not be provided. Like the strict controls on building in the *Aussenbereich* and in the *Landwirtschaftszonen*, the policy of "center" designation thus appears to stem from a desire to limit internal migration and keep people where they already are.

Some support for this characterization of the goals of German land-use policy can be found in recent German history. The policy of using land-use controls to contain internal movement was born as a result of a substantial increase in migration during the early post-World War II years, when areas of

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76. See ZAUGG, *supra* note 69, at 399.

77. See BauG Bern, art. 64, reprinted in ZAUGG, *supra* note 69, at 400-01.

78. See *supra* note 53 and accompanying text.

79. See *supra* note 67 and accompanying text.

the Federal Republic near the inter-German border began to suffer economic decline after being cut off from their traditional markets that were now located in the German Democratic Republic.<sup>80</sup> In consequence, land-use controls, in conjunction with various forms of federal aid to depressed areas, have come to be viewed as an important means of preventing "massive population movements causing the under-utilization and decay of older infrastructure and a concomitant increase in demand for new infrastructure."<sup>81</sup>

Second, Swiss and German concern is not just with migration of persons between cities; it is also with migration of persons, and businesses, from towns into the hinterland. An important principle of the BROG requires the territory of Germany to be developed so as to construct "a balanced relationship between populated areas and rural space."<sup>82</sup> Stripped of the pleasing rhetoric, this policy means that existing downtowns receive a monopoly of most economic functions in order to prevent development from spilling out into the countryside. Again, the goal can be described at its highest level of generality as preservation of the traditional compact city.

Swiss law also uses national policy to preserve urban cores. For example, Bernese law discourages the development of large shopping centers outside existing downtowns by requiring municipal authorization and supervision of any such projects.<sup>83</sup> This prohibition is unapologetically intended, in part, *to protect such downtowns from competition*.<sup>84</sup> The Bernese model of city development calls for "decentralization of settlement and economy," in other words, the preservation of numerous viable population centers.<sup>85</sup> It is worth noting in this context that U.S. courts have frequently been confronted with the anti-competitive implications of comprehensive plans designed to protect downtown merchants.<sup>86</sup> While such plans have generally withstood litigation, the fact that the issue is raised at all indicates how controversial and sometimes offensive downtown-protection can seem in an American legal context.

80. See Larsen, *supra* note 48, at 977.

81. *Id.* at 972.

82. Bundesraumordnungsgesetz (BROG) § 2(1)(1), v. 8.4.1965 (BGBl. I S.306), amended by Law of May 6, 1993, v. 6.5.1993 (BGBl. I S.630).

83. See Baugesetz des Kantons Bern (BauG Bern), arts. 19–20, v. 9.6.1985, reprinted in ZAUGG, *supra* note 69, at 180–82.

84. See ZAUGG, *supra* note 69, at 191, 358 (noting that Bernese legislation is intended to prevent shopping centers from sapping the vitality of existing downtowns and neighborhood shopping areas (*Orts- und Quartierzentren*) and interfering with the ability of less mobile people to take care of their shopping needs conveniently); see also *id.* at 358 ("The restraints on shopping centers in peripheral locations . . . are to prevent the existing supply network (*Versorgungsnetz*) from being endangered by the formation of a new center (*Zentrumsbildung*) on the edge of town." (author's translation)).

85. *Id.* at 359.

86. See, e.g., Sprenger, Grubb & Assocs., Inc. v. City of Hailey, 903 P.2d 741, 749 (Idaho 1995) (holding that "preserving aesthetic values and the economic viability of a community's downtown business core can be a proper zoning purpose" even where the result is to protect downtown merchants from competition).



In Switzerland, it appears, the legal community takes a different view of this issue. Zaugg writes that “[R]estrictions on trade and commerce are permissible when based on regulatory grounds (*polizeilichen Gründen*), on considerations of social policy, and on measures undertaken by the cantons in the immediate context of land-use planning.”<sup>87</sup> Thus, the goal of providing the cheapest prices to consumers at the point of purchase is implicitly subordinated to the goals of land-use planning.

The Swiss also use numerous other policies to favor high-density settlements. To begin, development is supposed to take into account the need for providing public transport. Bernese law thus requires the provision of public transit to small towns, so that people who do not live within walking distance of a train station will have access to a bus line.<sup>88</sup> In addition, Swiss towns are intended to remain attractive and accessible to pedestrians. The law requires that towns be provided with bicycle and pedestrian paths,<sup>89</sup> trees, and green spaces.<sup>90</sup> Such provisions aim to make the dense settlement pattern called for by Swiss law seem desirable rather than burdensome.

The corollary of this policy of entrenching towns is draconian restrictions on the development of the countryside. Accordingly, Bernese law contains guidelines that preserve land for agricultural use and try to maintain the attractiveness of the landscape. Small building zones are avoided, as they tend to lead to destruction of the countryside.<sup>91</sup> In addition, remarkably, all building zones are to be separated by “green” zones (which cannot be developed) so as to prevent the “excessive agglomeration of built-up areas” (*die übermässige Zusammenballung überbauter Gebiete*).<sup>92</sup> This ensures that Swiss towns and villages maintain their separate physical identity. Clearly, regulating the appearance of the landscape is an important goal of Swiss and German policy.

This goal of preserving a pristine countryside is linked with a strong policy of favoring peasant agriculture. In Germany, according to the BROG, agriculture is to remain a “peasant-structured and efficient sector” (*“bäuerlich strukturierter, leistungsfähiger Wirtschaftszweig”*).<sup>93</sup> The vision of agriculture in the BROG is thus one of family farms that primarily grow crops and raise small numbers of livestock.<sup>94</sup> Such farms are also favored with generous tax provisions, including subsidies that “may be responsible for nearly one-half of a farm’s profit and income potential.”<sup>95</sup> To be sure, farmers’ political

87. ZAUGG, *supra* note 69, at 38 (author’s translation).

88. See BauG Bern, art. 74, para. 1, *reprinted in* ZAUGG, *supra* note 69, at 438; ZAUGG, *supra* note 69, at 442; see also Bundesgesetz über die Raumplanung [RPG], art. 3, para. 3(a), AS 1979 1573 (1979) (requiring that residences and workplaces be situated so as to be easily accessible to each other by public transit).

89. See RPG, art. 3, para. 3(c).

90. See RPG, art. 3, para. 3(e).

91. See ZAUGG, *supra* note 69, at 443.

92. BauG Bern, art. 79, para. 1, *reprinted in* ZAUGG, *supra* note 69, at 462.

93. Bundesraumordnungsgesetz (BROG) § 2(7), v. 8.4.1965 (BGBl. I S.306), *amended by* Law of May 6, 1993, v. 6.5.1993 (BGBl. I S.630).

94. See Centner, *supra* note 53, at 32.

95. *Id.*

influence should not be discounted as an important part of the explanation for these subsidies. What is important for this Note, however, is the relation between the policy of restricting development of agricultural areas and the policy of subsidizing family farms. Arguably, both can be seen as means to the same broad objective: preserving the rural landscape and traditional social structure. Under such a reading of these policies, family farms are important to European governments as custodians of regional landscapes, and it is at least in part this social role that gives farmers the moral authority to demand subsidization.<sup>96</sup>

Finally, it should not be forgotten that the protection of the countryside and the protection of downtowns are necessarily linked. Thus, in Switzerland, the decline of the family farm has provoked increased pressure on the Swiss government to permit more placement of residences and businesses in agricultural areas.<sup>97</sup> Martin Lendi, a prominent planner, has vehemently rejected these proposals, asserting that such liberalization would "pull the ground out from under" ("*den Boden unter den Füßen wegziehen*") businesses and housing already located in the cities.<sup>98</sup>

In summary, it may be helpful to ask what goals are not featured in German and Swiss land-use regimes that do figure in U.S. land-use regulation. Clearly absent from German and Swiss regulation is the American goal of segregating single-family homes from other uses. The most restrictive German zones call for duplexes and convenience shops alongside single-family homes, and German law does not require segregation of many services and clean (nonindustrial) workplaces from residential areas.<sup>99</sup> On the contrary, the emphasis placed in both Germany and Switzerland on provision to all populated areas of public transport and pedestrian and bicycle paths, together with the insistence on nucleated settlements centering on comprehensive retail

96. Thus, to the chagrin of the United States, the 15 European Union countries have spent approximately \$2 billion to subsidize the practice of "agrotourism," in which otherwise unviable farms stay in business by accepting paying holiday guests who wish to spend time in a rural setting. "A populated countryside . . . [European officials say] protects picturesque landscapes that attract tourists and produces distinctive products, like wines and cheeses, that swell European food exports." John Tagliabue, *Preserving a Heritage via Bed and Barns: European Governments Subsidize Agrotourism*, N.Y. TIMES, Aug. 13, 1998, at D1. For a European perspective on the role of the peasant farmer in the preservation of the rural landscape, see Georges Thomson, *La Communauté européenne et le paysage* [*The European Community and the Landscape*], 4 REVUE JURIDIQUE DE L'ENVIRONNEMENT 541, 563 (1993) (arguing that the very idea of a "landscape" ("*paysage*") denotes "a humanized nature, that is one that is mastered, controlled by work, and in which the traces of human activity are visible" (author's translation)). The same author suggests that the peasantry is the "ideal workforce" for the maintenance of many elements of the landscape associated with traditional agriculture. *See id.* at 564.

97. See Ulrich Zimmerli, *Bauen ausserhalb von Bauzonen: Anmerkungen zur Revision des Raumplanungsgesetzes* [*Building Outside the Building Zones: Notes on the Revision of the RPG*], 4 BEIBLATT BAURECHT/DROIT DE LA CONSTRUCTION 107, 108 (1997) (noting that the number of Swiss farms dropped from approximately 120,000 to approximately 80,000 between 1985 and 1997).

98. Martin Lendi, *Langfristige Verantwortung wider kurzfristige Bedürfnisse: Vom Sinn und Zweck der Raumplanung* [*Long-Term Responsibility Versus Short-Term Needs: On the Meaning and Goal of Land-Use Planning*], NEUE ZÜRCHER ZEITUNG, Mar. 14-15, 1998, at 83.

99. See Thomas H. Logan, *The Americanization of German Zoning*, 42 J. AM. INST. PLANNERS 377, 383-84 (1976).

districts, suggests the opposite: the desire to *force* people to live relatively near work and shopping, and to encourage citizens to use public transportation to reach these destinations.

How effective have German and Swiss land-use policies been in achieving their ends? On the one hand, German and Swiss policies appear to have had some success in meeting their stated objectives of preserving the compact city. The beauty of the German landscape, free of clutter and scattered residential development, is one prize of the country's land-use policies.<sup>100</sup> Another achievement is the preservation of vibrant urban cores, producing a country of livable and prosperous medium-sized cities.<sup>101</sup> As a result, German land-use policies have drawn approbation elsewhere in Europe.<sup>102</sup>

On the other hand, Swiss and German policies should not be romanticized: They entail serious costs that Americans would probably find intolerable. As one might expect, because of the scarcity of available land, "Germany ranks last among western European countries in the percentage of the population that own their own home."<sup>103</sup> Germany also pays for its successes with "a high degree of bureaucratic control, loss of local government control over land-use policy, and severe restrictions on individual private property rights."<sup>104</sup> In addition, the insistence on extremely detailed public supervision of development has had to be modestly revised in the former German Democratic Republic in order to deal with urgent housing and infrastructure problems there.<sup>105</sup>

Finally, the argument that Germans and Swiss (and more broadly, Europeans) are committed to containing metropolitan growth does not mean that there are no large—and sprawling!—metropolises in Europe. Indeed, there is much evidence that trends in Europe and elsewhere in the developing world to some extent mirror those in the United States toward greater

100. See Centner, *supra* note 53, at 38.

101. See Larsen, *supra* note 48, at 1011.

102. For example, Jean-Louis Guigou, a French planning official, in response to a study reporting on the continuing growth of metropolitan Paris, has urged the French to follow the German model of a cluster of medium-sized cities. "They have rejected the city of 10 million inhabitants in favor of about 10 cities with less than a million people, each one having its specialty." *Jean-Louis Guigou défend le centre-ville: Le responsable de la Datar dénonce le modèle américain* [*Jean-Louis Guigou Defends Downtown: Official in Charge of Datar Denounces the American Model*], *LE FIGARO* (Paris), Aug. 20, 1998, at 7 (author's translation). Datar is the French government agency for regional planning and development.

103. Larsen, *supra* note 48, at 1018. Americans, perhaps not coincidentally, are quite well-housed by international standards. A recent international study notes that the U.S. housing stock compares favorably with European countries on some dimensions of housing well-being, such as degree of crowding, supply of central heating, and presence of complete plumbing. See Bjorn Harsman & John M. Quigley, *Housing Markets and Housing Institutions in a Comparative Context*, in *HOUSING MARKETS AND HOUSING INSTITUTIONS: AN INTERNATIONAL COMPARISON*, *supra* note 32, at 1, 20–21.

104. Schoenbaum, *supra* note 46, at 656.

105. For instance, under a procedure known as a *Vorhaben-und-Erschliessungsplan* (Project and Development Plan), development before the adoption of a *Bebauungsplan* may proceed if the developer "guarantees to prepare a local plan [for the project] and finance and implement the servicing of the development." NEWMAN & THORNLEY, *supra* note 2, at 61–62; see also *id.* at 103 (describing the use of the *Vorhaben-und-Erschliessungsplan* to accelerate the planning process).

suburbanization of metropolitan populations and greater reliance on the automobile.<sup>106</sup> But what is important to observe, and what this Note has tried to demonstrate, is that public policy in Europe has not endorsed these trends, and has had some success in containing them.

In conclusion, to restate national objectives at the highest level of generality, the American policy of *separating* putatively incompatible uses can be contrasted with the German and Swiss policy of *combining* uses that are understood to complement each other. Such a policy might be called one of urban compression. In Part III, historical analysis of the development of the public law concept of the city is used to explain these fundamental differences between the American and the German-Swiss approaches to land-use regulation.

### III. PUBLIC LAW CONCEPTIONS OF THE CITY AND THE DEVELOPMENT OF LAND-USE REGIMES

This Part will argue that the development of national land-use regimes cannot be separated from the development of national public law conceptions of the city. In German and Swiss legal thought the city has been formulated as a restrictive and regulatory community that shapes and monitors its residents. Moreover, German and Swiss cities are also understood as corporate political entities that serve as building blocks of national society and the national political order. However, this paradigm of the city, which pervades and determines German and Swiss land-use controls, is profoundly foreign to contemporary American law. The public law history of American cities is one of hostility to the corporate identity and political and social autonomy of the city.

#### A. *Germany and Switzerland: The City as a Building Block of Society*

Land-use regimes in Germany and Switzerland are bound up with the two countries' historical inheritance of independent, powerful cities dominating their immediate hinterlands. Today, in both countries, the broader polity remains committed to the preservation of this paradigm of cities' municipal identity and social function.

German and Swiss cities bear the mark of the centuries when Central Europe was a region of fragmented sovereignty.<sup>107</sup> Until the Prussian monarchy managed to unify Germany under its leadership in the nineteenth century, the region had never known the dominion of a large centralized state.

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106. In the last 30 years large European metropolitan areas such as Paris have experienced a substantial departure of residents from the central city for the suburbs. See IVAN LIGHT, *CITIES IN WORLD PERSPECTIVE* 224 (1983). In addition, until the 1970s' oil crunch forced a reevaluation of energy policy, western European countries were building highways more rapidly than was the United States. See *id.* at 229.

107. See Charles Tilly, *Entanglements of European Cities and States*, in *CITIES AND THE RISE OF STATES IN EUROPE, A.D. 1000 TO 1800*, at 1, 23 (Charles Tilly & Wim P. Blockmans eds., 1994).

The Holy Roman Empire, the loose constitutional entity that more or less defined Germany between 800 and 1806, "did not develop a central region with a great residential capital."<sup>108</sup> Instead, without a single dominant state or strong central government, much of late medieval and early modern Germany remained enmeshed in the nexus of the symbiotic but tense relationships between local princes and a multiplicity of strong, highly autonomous towns dominating their surrounding countryside as well as smaller towns.<sup>109</sup> Swiss towns also appear to have fit this pattern of small autonomous settlements with dominated hinterlands.<sup>110</sup>

Walker has described how the powerful cities of southern Germany were locked into perpetual conflict with the other would-be powers in the early modern period. These autonomous towns, often surrounded by defensive walls, had both to defend themselves from self-aggrandizing princes and to impose themselves on restive peasants under their domination.<sup>111</sup> Relations with the peasants were fundamental to the identity of the central European autonomous city. Braudel argues that a dominated agricultural hinterland is fundamental to the identity of any city:

The town only exists as a town in relation to a form of life lower than its own. . . . There is no town, no townlet without its villages, its scrap of rural life attached; no town that does not impose upon its hinterland the amenities of its market, the use of its shops, its weights and measures, its moneylenders, its lawyers, even its distractions. *It has to dominate an empire, however tiny, in order to exist.*<sup>112</sup>

This claim seems to reflect the reality, at least in Germany and Switzerland, that the economic importance of the towns was dependent on their political power. Because the town was dependent on the surrounding countryside for its food supply, peasants were forced to sell their produce in town markets. And because guilds wanted a captive market for their goods, peasants were forbidden to practice crafts and were required to come to town to shop.<sup>113</sup> Market transactions were thus a controlled prerogative of city power.

German cities' regulatory activity also extended to the detailed supervision of social mores. Within the towns, guilds formed an elite class, exerting a ubiquitous influence over their members and mediating between them and the city government.<sup>114</sup> Even such intimate matters as a guild member's choice of spouse fell within the scope of regulations designed to

108. Peter Moraw, *Cities and Citizenry as Factors of State Formation in the Roman-German Empire of the Late Middle Ages*, in *CITIES AND THE RISE OF STATES IN EUROPE, A.D. 1000 TO 1800*, *supra* note 107, at 100, 103.

109. *See id.* at 116–22 (describing a variety of strategies employed by cities in Germany to preserve their power vis-à-vis local princes).

110. *See id.* at 107 (citing examples of Bern and Zürich and the cantons surrounding them).

111. *See* MACK WALKER, *GERMAN HOME TOWNS: COMMUNITY, STATE, AND GENERAL ESTATE, 1648–1871*, at 113–19 (1971).

112. FERNAND BRAUDEL, *THE STRUCTURES OF ORDINARY LIFE: THE LIMITS OF THE POSSIBLE 481–82* (Siân Reynolds trans., Univ. of Cal. Press 1992) (1979).

113. *See* WALKER, *supra* note 111, at 113–14.

114. *See id.* at 76 (noting guilds' influence on economic regulation, political organization and representation, and guardianship of social or domestic standards).

control the membership of the community.<sup>115</sup> In addition, it is worth noting that construction—which is both the use one makes of one's real property and the shaping of the community's physical space—was also extensively regulated by city ordinances, which in some cases had been developing since the medieval period.<sup>116</sup>

Thus, the German and Swiss town was not just a geographical expression. The town and its ordinances represented an essential framework for social regulation, and the townsman was an "integrated personality"<sup>117</sup> situated within his political community. It is this phenomenon of politically repressive cities struggling to preserve their charter rights against external opponents and internal subordinate groups that leads Moraw to argue that urban freedom was the freedom of feudal privileges, not that of liberal universality.<sup>118</sup> Urban citizenship represented membership in a privileged corporate body within an essentially feudal political framework.<sup>119</sup>

The model of the autonomous town represents an important part of the historical explanation for the development of the distinctive German and Swiss approach to land-use regulation. Although Germany developed a stronger central government than did Switzerland, political elites in both countries have consistently shared the vision of the city as a constitutive community and a building block of the larger nation.

In Switzerland, towns and cantons have remained strong and have never undergone extreme centralization. Indeed, Moraw claims that the founding impulse of the Swiss Confederation was the Swiss refusal during the fifteenth century to give up a privileged position of autonomy and accept more centralized rule by the Holy Roman Empire.<sup>120</sup> As a consequence, the phenomenon of guild-dominated towns ruling over a subject countryside was particularly prominent in early Switzerland.<sup>121</sup> Even when a federal state finally began to emerge in the mid-nineteenth century, it remained non-centralized, with the cantons retaining an extensive ability to block the acquisition of new powers by the federation.<sup>122</sup> In addition, by long-standing albeit informal tradition, Swiss municipalities have come to be understood as the third tier of Swiss federalism, and hold extensive powers of internal self-government and taxation.<sup>123</sup>

The story of modern Swiss cities and the regulation of land use reflects

115. *See id.* at 103.

116. *See Logan, supra* note 99, at 379.

117. WALKER, *supra* note 111, at 106 (describing the guilds' extensive control over community morals).

118. *See Moraw, supra* note 108, at 123.

119. *See id.* ("Freedom of particular cities and the citizenry in Germany were movements within the whole of the 'feudal' world, which in its turn was modified by them.")

120. *See id.* at 113-14.

121. *See id.* at 107 (citing Bern and Zürich as imperial cities ruling over extensive hinterlands).

122. *See WOLF LINDER, SWISS DEMOCRACY* 42-43 (1994) (noting constitutional restraints on the power of the federal government).

123. *See id.* at 50-52.

this long-standing political tradition of localism. It appears that urban growth in the nineteenth century, although disruptive, did not produce the huge explosion in urban population and urban problems that was characteristic of German industrialization.<sup>124</sup> Rather, post-World War II prosperity, with its growth in demand for cars and houses, seems to have provided the impetus for contemporary Swiss cantonal and federal land-use regulation.<sup>125</sup> Some Swiss cantons had already adopted land-use policies before federal regulation began.<sup>126</sup> Specifically, postwar economic expansion led to a speculative real estate boom cited in the Swiss federal council's official explanation of the need for a constitutional amendment to permit federal regulation of land use.<sup>127</sup> Finally, by insisting on the maintenance of existing population centers, Swiss land-use policy complements other official policies of subsidizing economic development in small communities that would otherwise suffer population decline.<sup>128</sup> Thus, as in the case of Germany,<sup>129</sup> contemporary Swiss land-use regulation may be tied to official hostility to internal migration.

If in Switzerland the development of modern land-use controls should be understood as part of a relatively smooth and unproblematic tradition of city government, in Germany the history of urban autonomy within the development of the modern German state is more complex. First, it should be noted that, even during the later middle ages and the early modern period, the phenomenon of autonomous cities was more prominent in southwestern Germany than in other parts of the Holy Roman Empire.<sup>130</sup> Even in the southwest, the cities gradually lost power to the territorial principalities around them as a result of the Thirty Years' War in the seventeenth century.<sup>131</sup> At the beginning of the nineteenth century, as the Kingdom of Prussia began its rise to the preeminence that would ultimately make it the engine of German unification, its absolutist administrative model actually featured a high degree of centralized control and extremely weak cities.<sup>132</sup>

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124. Cf. Georges Andrey, *La quête d'un Etat national: 1798-1848* [*The Quest for a National State: 1798-1848*], in *NOUVELLE HISTOIRE DE LA SUISSE ET DES SUISSES* [NEW HISTORY OF SWITZERLAND AND THE SWISS PEOPLE] 497, 530-31 (Jean-Claude Favaz ed., 2d ed. 1986) [hereinafter NEW HISTORY] (describing changes in construction of Swiss cities over the course of the 19th century).

125. See Peter Gilg & Peter Hablützel, *Une course accélérée vers l'avenir: 1945- . . .* [*An Accelerated Course Toward the Future: 1945- . . .*], in NEW HISTORY, *supra* note 124, at 771, 800 (describing how the construction of plants, offices, residences, roads, and the like reduces the area usable for agriculture and denatures formerly intact landscapes).

126. See *id.* at 801.

127. See Botschaft des Bundesrates an die Bundesversammlung über die Ergänzung der Bundesverfassung durch die Artikel 22-ter und 22-quater (Verfassungsrechtliche Ordnung des Bodenrechts) [Report of the Federal Council to the Federal Assembly on the Amendment of the Federal Constitution by Articles 22-ter and 22-quater (Constitutional Regulation of Real Property)] (Aug. 15, 1967) (BBl 1967 II 133, 134). It is interesting to note that the concept of "speculation" in this document seems to involve buying agricultural land for development for nonagricultural purposes—in other words, non-agricultural use of such land is a *misuse*.

128. See LINDER, *supra* note 122, at 61-62.

129. See *supra* text accompanying note 81.

130. See Moraw, *supra* note 108, at 115.

131. See *id.* at 116.

132. See WOLFGANG R. KRABBE, *DIE DEUTSCHE STADT IM 19. UND 20. JAHRHUNDERT* [THE GERMAN CITY IN THE NINETEENTH AND TWENTIETH CENTURIES] 12-13 (1989) (contrasting the Prussian model with the survival of relatively autonomous cities in Württemberg, a region in southwestern

Ultimately, even the triumphant Prussian state would come to see the utility of cultivating strong city governments. As early as 1808, the Prussian official Baron vom Stein reinvigorated municipal governments with his City Charter Law.<sup>133</sup> This reform transformed cities into “relatively autonomous, self-governing units in an otherwise hierarchically governed, absolutist monarchy.”<sup>134</sup> Stein’s program featured representative city governments chosen by a restricted electorate of property owners. Stein saw the city as a political entity, possessing its own legitimacy, historically prior to (and constitutive of) the state.<sup>135</sup> Accordingly, he believed that strong city government would channel this legitimacy to the benefit of the state, converting city-dwellers from passive subjects to active supporters of the regime.<sup>136</sup> The older model of the autonomous and controlling city thus became the template for urban policy in modern Germany.

Germany’s relatively late but intense Industrial Revolution undermined existing land-use patterns dramatically as Germany’s cities grew enormously over the course of the nineteenth century and the country’s population became ever more urbanized.<sup>137</sup> In addition, large urban agglomerations began to appear for the first time.<sup>138</sup> Prussian and Imperial governments, and apparently even the bourgeois elite, had at least two closely linked reasons to view this phenomenon with alarm.

First, the development of a modern industrial economy posed a threat to traditional culture as embodied in the landscape and its tillers, the peasants. Germany has a long-standing tradition, going back to the Renaissance, of seeing nature as a unified whole encompassing fields, woodland, and towns—a kind of nature-as-garden.<sup>139</sup> Thus, the German landscape includes and is constituted by human cultivation.<sup>140</sup> This gives the peasant cultivator an important role as bearer of national identity. It is in this context that one should see the German elite’s nineteenth-century reaction against “*Unkultur*,” the dehumanizing and deracinating effects of industrialization. German conservative bourgeois constructed “an idealized vision of the preindustrial . . . period, the good old days when the German peasant tilled his German soil,

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Germany).

133. See GUNLICKS, *supra* note 52, at 2.

134. *Id.* at 9.

135. See KRABBE, *supra* note 132, at 16.

136. See *id.* at 11.

137. Between 1871 and 1919, the percentage of the German population living in cities of more than 100,000 rose from 4.8 to 21.3; the percentage in cities of 10,000 to 100,000 rose from 7.7 to 13.4. See KRABBE, *supra* note 132, at 71.

138. Examples are Berlin and the Rhine-Ruhr industrial belt between Dortmund and Duisburg. See *id.* at 74–75, 84–85.

139. See SIMON SCHAMA, *LANDSCAPE AND MEMORY* 95–100 (1996) (citing Renaissance German artwork and natural history treatises that portray German forests as wholesome and economically productive).

140. It is arguable that this approach to nature as a human-tended garden infuses the broader European, and not just the German, view of the agricultural landscape. See Thomson, *supra* note 96, at 563–64 (describing the EU view of the peasant population as guardian of the landscape).



the age of the 'fully rounded German personality.'"<sup>141</sup> With the departure of the peasants for the cities, this view of nature as a kind of garden became annexed to a certain despairing conservatism. A Romantic view of the German medieval past as a heroic era was conjoined with a critique of "industrial capitalism and metropolitan life, seeing both as corrosive of the moral solidarity . . . inherent in traditional work and community."<sup>142</sup> Thus, the German landscape came to be seen not just as a link with the past, but as a *threatened* link with a *more desirable* past. Perhaps this phenomenon in part explains why in Germany the modern large city was seen as an illegitimate institution from its very inception.<sup>143</sup>

Second, and even more importantly, the Prussian and later Imperial governments saw the rise of the modern mass city as a direct political threat.<sup>144</sup> The growth of an urban proletariat created a new kind of population of doubtful political allegiance and even more doubtful morals.<sup>145</sup> This necessitated an urban policy that would neutralize the revolutionary potential of large cities. The German government's long-term response was an attempt to foster the class of small shopkeepers and artisans, known as the *Mittelstand*, that was seen as a bulwark of tradition.<sup>146</sup> In any case, German urban policy was dominated by an official desire to replace the modern city with something "less threatening."<sup>147</sup> It is therefore tempting to suppose that the subsequent development of German land-use regulation should be interpreted in light of a continuing attempt to reinforce existing hierarchical social relationships within established communities.<sup>148</sup> This policy has had important ramifications for land-use controls.

During the Imperial period, the German government wished to encourage strong city governments that could provide local reinforcement for the conservative monarchy. Accordingly, the central government favored a practice known as *Eingemeindung*, annexation by existing cities of their

141. Franziska Bollery & Kristiana Hartmann, *A Patriarchal Utopia: The Garden City and Housing Reform in Germany at the Turn of the Century*, in *THE RISE OF MODERN URBAN PLANNING 1800-1914*, at 135, 147 (Anthony Sutcliffe ed., 1980).

142. SCHAMA, *supra* note 139, at 113.

143. Unified Germany's first chancellor, Otto von Bismarck, once claimed that "the true Prussian people" did not reside in cities. BRIAN LADD, *URBAN PLANNING AND CIVIC ORDER IN GERMANY, 1860-1914*, at 15 (1990).

144. An important aspect of the threat that lies outside the scope of this Note is that peasants' flight from the land challenged the hegemony of the landed Prussian ruling class, which relied on their labor. Perhaps the most famous social scientific treatment of this issue is BARRINGTON MOORE, JR., *SOCIAL ORIGINS OF DICTATORSHIP AND DEMOCRACY: LORD AND PEASANT IN THE MAKING OF THE MODERN WORLD* (1966).

145. See ANTHONY SUTCLIFFE, *TOWARDS THE PLANNED CITY: GERMANY, BRITAIN, THE UNITED STATES AND FRANCE 1780-1914*, at 28 (1981).

146. See GEOFFREY CROSSICK & HEINZ-GERHARD HAUPT, *THE PETITE BOURGEOISIE IN EUROPE 1780-1914: ENTERPRISE, FAMILY, AND INDEPENDENCE* 144 (1995).

147. LADD, *supra* note 143, at 244.

148. More research is needed to investigate whether contemporary German land-use policies still reflect this solicitude for the small-town petite bourgeoisie. Should German restraints on commercial development outside downtowns be seen simply as an attempt to encourage small, family-run retail establishments? Or was (and is) the goal broader: to use the neighborhood structure, with its pattern of residence interspersed with small shops, to uphold good morals and social continuity?

growing working-class suburbs.<sup>149</sup> Between 1885 and 1918, more than two thirds of all cities with more than 50,000 inhabitants absorbed some neighboring towns.<sup>150</sup> Since World War I, every subsequent German regime has endorsed this annexation policy.<sup>151</sup> The policy was intended to preempt the formation of revolutionary municipalities by subjecting them to conservative town elites.<sup>152</sup> But even more importantly, these annexations were supposed to facilitate coordinated land-use planning by making the administrative entity of the city coextensive with the city as an economic space.<sup>153</sup>

This policy of annexation and consolidation coincided with the development of another important principle: that the *Länder* (and, later, municipalities) had a right and a duty to supervise the extension of the built-up area along major thoroughfares leading out of town. So-called *Fluchtliniengesetze* (roughly, laws on lines of extension) were first introduced into the German state of Baden in 1868 and into Prussia in 1875.<sup>154</sup> Both these policies, annexation and supervision of city-extension, stand for the principle that city growth is a matter to be determined by public policy, not by the untrammled will of developers. As was suggested above, this principle is strongly present in contemporary German land-use regulation.<sup>155</sup> It reflects the continuing German view of the city as the political expression of a geographically circumscribed community that calls for coordinated land-use decisions. Finally, Imperial Germany also developed the modern theory and practice of professional urban planning as official policy.<sup>156</sup> The goal of this planning activity in Imperial Germany was to entrench ideas of decent city life derived from the ideal of the small autonomous city of the country's past.

149. See KRABBE, *supra* note 132, at 95–98.

150. See *id.* at 95.

151. An administratively unified "Greater Berlin" was created by an act of the Prussian legislature (*Landtag*) in 1920 under the Weimar Republic. See KRABBE, *supra* note 132, at 96–97. The Nazis created a similar administrative entity for the Hamburg metropolitan area in 1937. See *id.* at 97. Finally, the annexation policy has continued under the contemporary Federal Republic: In 1975, the *Land* of Baden-Württemberg carried out a forced consolidation of its municipalities that reduced their total number from 3379 to 1110. See *id.* at 98.

152. See LADD, *supra* note 143, at 223. Krabbe also suggests that the policy of *Eingemeindung* was adopted in part to prevent wealthy people from leaving the jurisdiction of the central city for wealthy suburban enclaves, thus impairing the tax base of the city they left behind. Such a consideration seems to indicate a determination by the German government to force a leading political role onto an urban bourgeoisie that might have preferred to escape from large cities altogether. See KRABBE, *supra* note 132, at 95.

153. See KRABBE, *supra* note 132, at 96–98.

154. See *id.* at 79; see also SUTCLIFFE, *supra* note 145, at 19, 26 (emphasizing the role of the *Fluchtliniengesetze* in strengthening the powers of municipalities in urban planning and creating a sense that they had a duty to be a part of urban policy).

155. See *supra* Section II.B.

156. Krabbe argues that Germany was in fact the first European country to produce either a recognized profession and science of urban planning or a coherent policy of official support for it. See KRABBE, *supra* note 132, at 79.

Under German planning doctrines, new cities, like older towns, were not permitted to capitulate to modern anonymity.<sup>157</sup>

The aggressive German intervention in cities' shape has been matched by a policy of municipal intervention in the actual market for urban land. The prevention of a housing crisis, with its implications of working-class misery and possible revolt, was one of the goals behind the Imperial government's policy of encouraging decent housing conditions for workers.<sup>158</sup> This in turn led to the rise of a practice known as *Umlegung* (reparceling), under which a city had the power to expropriate small plots of privately owned land so that they could be consolidated and developed in accordance with a municipal plan.<sup>159</sup> Cities such as Frankfurt am Main managed to gain ownership of as much as half their surface area, giving them substantial power over their own development.<sup>160</sup>

German land-use policy since the end of the Empire in 1918 shows a continuation, at least by democratic regimes, of the earlier goal of softening the modern city.<sup>161</sup> This policy, moreover, has been pursued at ever higher levels of government. Under the Weimar Republic (1918–33), a highly successful planning authority for the Ruhr coal-mining area known as the *Siedlungsverband Rukhrkohlenbezirk* was inaugurated in 1920 to create order in a chaotically developed industrial region. This experiment attracted such extensive imitation that by 1931 thirty percent of the surface area of Germany, which contained fifty-eight percent of the population, fell within the jurisdiction of such planning commissions.<sup>162</sup>

This also confirmed a policy shift away from the pre-World War I Imperial government's emphasis on giving cities administrative tools to promote land-use policy, in favor of coordinated action by higher levels of government.<sup>163</sup> Over the years, the scope of land-use planning has been broadened in post-World War II Germany so that the scope of contemporary social change can be fully taken into account.<sup>164</sup> By the post-World War II period, Germany had been thoroughly prepared for the national policy embodied in the BROG.<sup>165</sup>

157. See LADD, *supra* note 143, at 136.

158. See Logan, *supra* note 99, at 382.

159. See LADD, *supra* note 143, at 200–01.

160. See KRABBE, *supra* note 132, at 82–83.

161. Interestingly, the National Socialist regime of 1933–45 inherited previous German governments' interest in city planning as an important aspect of national policy. Indeed, the Nazis may be credited with the first instance of coordinated national land-use planning in Germany under the supervision of the Reich Planning Office (*Reichsstelle für Raumordnung*). See Larsen, *supra* note 48, at 976. However, the Nazis seemed to have replaced the more conventional goal of making cities attractive and livable with the goal of making them monuments to the regime's power. A number of cities were singled out as "*Führerstädte*" ("Führer cities"), to be extensively redesigned and filled with massive pharaonic buildings. World War II, of course, scotched most of these plans. See KRABBE, *supra* note 132, at 87–88.

162. See Larsen, *supra* note 48, at 976.

163. See KRABBE, *supra* note 132, at 98.

164. See *id.* at 82.

165. See *supra* notes 44–50 and accompanying text.

Finally, it may seem paradoxical to argue that the assumption of land-use regulatory power by ever higher levels of government in both Germany and Switzerland testifies to the power of the ideal of the autonomous city community. But this paradox is illusory, because the distinction between the power of the federal government and the *Land* or canton on the one hand and that of the municipality on the other obscures the real issue: Whose interest do these policies serve?

In answer, it has already been argued that many features of Swiss and German policy can be thought of as measures to defend existing cities. If we compare the tightness of German and Swiss land-use policies with the opportunities for evasion of municipal laws in the United States, we have to ask: Is it really accurate to regard American municipal governments as possessing strong land-use powers when they have very little power over land use within adjacent municipalities or in unincorporated land? Such "strength" seems to have a very perverse meaning for the municipalities involved! Arguably, giving power to *Länder* and cantons rather than to cities can be understood as a way of preventing the fragmentation of land-use control that undermines existing cities in the United States. In short, by preventing towns from competing with each other, the state protects them from destabilizing competition and secures their monopoly position as centers of higher-level cultural, economic, and political functions. Thus, it is the state that serves the cities, and not the other way around.<sup>166</sup>

In conclusion, then, whatever the administrative arrangements involved, at the most fundamental level German and Swiss policy constitutes a concerted effort to preserve the profusion of thriving small- and medium-sized cities bequeathed by the two countries' histories. In turn, this concern with the viability of cities stems from a historically determined understanding of the social and political function of the city.

#### B. *The City in U.S. Public Law: The Attack on Urban Autonomy*

If German and Swiss land-use policies can be traced to a history of strong cities, American policies can be traced to cities that were weak—weak both in their legal status and in their political and cultural prestige. As will become clear, American ideas of the good community, and consequently of land-use controls, have been driven by a desire to create wholesome private spaces for the individual and the family, not to shore up the city as a central pillar of public order. Escape from urbanity, not the regulation of urbanity, has been the goal of American land-use controls.

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166. Indeed, Germany, like Switzerland, has a long-standing constitutional tradition upholding the principle of urban autonomy against both the federal and *Land* governments. For a brief discussion of German constitutional law on the status of cities and the relevant post-World War II jurisprudence, see DAVID P. CURRIE, *THE CONSTITUTION OF THE FEDERAL REPUBLIC OF GERMANY* 81–84 (1994). German land-use policy is thus only one of the ways in which German political institutions reflect the idea that the cities are a foundational part of the polity, and not simply administrative agents of the state.

The weakness of American cities can be traced as far back as the colonial period. Monkkonen has argued that from their inception colonial American cities differed from their Old World predecessors.<sup>167</sup> Arising after the establishment of the nation-state, American cities never had the experience of political power that European ones did.<sup>168</sup> Moreover, they did not enjoy the control over local trade that we observed in the German hometowns, and there was no constellation of independent cities like that of central Europe.<sup>169</sup> Even more importantly, American cities lacked the trappings of sovereignty and separateness: charters, guilds, and prestige.<sup>170</sup>

If early American cities were not the political overlords of subjugated peripheries, what then was their function? It appears that from a very early date American cities typically functioned as regional nodes of a national trading economy.<sup>171</sup> Such a situation clearly contrasts with the model of the autonomous city presiding over its little kingdom that prevailed in early modern Germany and Switzerland and that later was adopted by Prussian officialdom. In consequence, American towns were unable to enforce restrictions on building within their borders, as the affected property owner could always escape into an unregulated hinterland.<sup>172</sup>

Intellectual trends after American independence accentuated the weakness of American cities. Frug claims that American cities have been enfeebled by legislation and court decisions of the nineteenth century that were motivated by a conscious liberal hostility to cities.<sup>173</sup> City government, formerly seen as the privilege of a group of citizens as against outsiders, came to be seen as a subsidiary instance of state government. Municipal corporations, Chancellor Kent wrote, "are invested with subordinate legislative powers to be exercised for local purposes connected with the public good, and such powers are subject to the control of the legislature of the state."<sup>174</sup> Most notably, it was in this period that "Dillon's Rule," still the predominant American doctrine of urban public law, was developed in John F. Dillon's *Treatise on the Law of Municipal Corporations*.<sup>175</sup> Under Dillon's Rule, cities are mere "creatures of the state," not separate bearers of

167. See ERIC H. MONKKONEN, *AMERICA BECOMES URBAN: THE DEVELOPMENT OF U.S. CITIES AND TOWNS, 1780-1980*, at 66 (1988).

168. See *id.* at 64.

169. See *id.* at 42-43.

170. See *id.* at 51.

171. For example, in a study of early 19th-century Syracuse, New York, and its hinterland in Onondaga County, Miller has argued that, unlike European cities, American towns did not originate as the center of a local polity based on an economy of peasant agriculture. Rather, from its first settlement by white Americans, regional development in urban America was driven by and occurred within the framework of an existing national economy. See ROBERTA BALSTAD MILLER, *CITY AND HINTERLAND: A CASE STUDY OF URBAN GROWTH AND REGIONAL DEVELOPMENT* 156 (1979).

172. See MONKKONEN, *supra* note 167, at 57-59.

173. See Gerald E. Frug, *The City as a Legal Concept*, 93 HARV. L. REV. 1059 (1980).

174. *Id.* at 1104 (quoting 2 JAMES KENT, *COMMENTARIES ON AMERICAN LAW* 275 (3d ed. 1836)).

175. See Frug, *supra* note 173, at 1109, 1112 (citing JOHN F. DILLON, *TREATISE ON THE LAW OF MUNICIPAL CORPORATIONS* (Chicago, James Cookcroft & Co. 1st ed. 1872)).

democratic legitimacy, and any powers delegated to them are to be narrowly construed by the courts.<sup>176</sup>

Frug argues that this attack on the power and prestige of cities took place because nineteenth-century liberals saw cities as vestiges of pre-modern corporate privilege standing between the "Sovereignty of the State and the Sovereignty of the Individual."<sup>177</sup> Cities, for American liberals, were instruments of pure repression, a medieval edifice of power that had to be torn down to make all citizens equal under the law.<sup>178</sup> Turn-of-the-century Progressives, heirs to this tradition, did their best to depoliticize municipal government.

By the steps they took to reinforce the public/private distinction, the reformers reinforced the powerlessness of cities. Their efforts to transform the cities helped to erode further the sense of the city as a center of political autonomy or of direct democracy. Today, almost half of American cities have "non-partisan" elections, commission governments, or city managers. In the place of democracy are the ideas of expertise, objective decisionmaking, and government by rational rules.<sup>179</sup>

One obvious contrast that emerges from Frug's observations resides in the different uses to which nineteenth-century America and nineteenth-century Germany put their cities. As we have seen, German rulers and officials such as Stein accepted the time-honored model of the city as a building block of the state.<sup>180</sup> They sought both to nurture the city and to shape it for their own purposes. In contrast, American politicians appear to have sought to tear down the political structures of the urban community altogether. Hartog describes how the New York Corporation, originally in possession of an ill-defined mix of public and private powers derived from a royal charter, was transformed into an administrative arm of New York State charged with "using a public bureaucracy to provide public goods for public consumption."<sup>181</sup> Rather than shore up the city to strengthen the state, American politicians instead subordinated the city as a political entity. As was pointed out even at the time, the arguable result of this subordination of the city was a loss of interest in city government on the part of the voting public.<sup>182</sup> Similarly, the attack on

176. See Frug, *supra* note 173, at 1059, 1112.

177. *Id.* at 1088 (quoting O. GIERKE, *POLITICAL THEORIES OF THE MIDDLE AGES* 87 (1958)).

178. See Frug, *supra* note 173, at 1106 ("[R]ecognizing the rights of the city as an exercise of the freedom of association would frustrate both the interests of the state and the individual and would defy the liberal attempt to dissolve the power of groups in favor of the state and the individual.").

179. *Id.* at 1119 (footnote omitted).

180. See *supra* notes 133-136 and accompanying text.

181. HENDRIK HARTOG, *PUBLIC PROPERTY AND PRIVATE POWER: THE CORPORATION OF THE CITY OF NEW YORK IN AMERICAN LAW, 1730-1870*, at 8 (1983).

182. See Frank J. Goodnow, *The Historical Development of the City's Position* (1904), reprinted in *URBAN GOVERNMENT: A READER IN ADMINISTRATION AND POLITICS* 67, 81 (Edward C. Banfield ed., 1969) ("In those states where . . . central interference [with the city government] has been most marked the people of the cities have very largely lost interest in the municipal governments . . .").

municipal city government led to a loss of the sense that purely local interests have their own legitimacy as against the interest of the state and nation.<sup>183</sup>

Taken together, Frug's argument and Hartog's story of New York City capture certain distinctive features of American liberalism, specifically, its hostility to constraints on the individual's freedom to engage in economic transactions and its suspicion of ancient institutions claiming the right to subordinate the individual. In the eyes of proponents of American liberalism, the city, with its enforced togetherness and its powerful institutions, needed to be dissolved into a conceptually neutral administrative agglomeration of private residences. Warner, in a study of Philadelphia, writes that in the American tradition "the goal of a city is to be a community of private money makers."<sup>184</sup> Indeed, Warner attributes Philadelphia's failure to make adequate provision for middle- and working-class housing to this tradition of "privatism."<sup>185</sup>

Unwilling to entrust the city with control over development, the middle classes and wealthy decided to forego urban residence altogether. Warner has also documented how the middle class gradually abandoned central Boston for outlying "streetcar suburbs" as early as the nineteenth century.<sup>186</sup> In turn, this trend made the formation of metropolitan governments through German-style annexation impossible, as suburban residents used municipal boundaries to insulate themselves from urban problems. As Jackson writes, "Resistance to annexation is symptomatic of the view that metropolitan problems are unsolvable and that the only sensible solution is isolation."<sup>187</sup>

Moreover, the American view of the city as an unhealthy agglomeration of individuals that should be avoided rather than a little polity needing to be managed seems to be matched with an American view of nature that is different from its German counterpart. Instead of a cultivated garden tended by the people of a city and the surrounding subordinated hinterland, nature was idealized as a wilderness that was also identified with untrammelled political freedom. Thus, Schama describes the role of forest imagery in the art and literature of the independent United States. He cites a poetic depiction of

183. *See id.* at 82 ("[I]t is practically impossible to secure a solution of any one of our municipal problems uninfluenced by the consideration of the effect which the solution proposed may have on questions of state and national politics.").

184. SAM BASS WARNER, JR., *THE PRIVATE CITY: PHILADELPHIA IN THREE PERIODS OF ITS GROWTH*, at x (1968).

185. *See id.* at 205–14. Specifically, Warner argues that, in the early 20th century, Philadelphia business and civic elites poured money into downtown public works projects, *see id.* at 205–08, while neglecting to supply existing residential neighborhoods with the public amenities such as schools, parks, and adequate shopping areas that might have made such neighborhoods more acceptable to an increasingly affluent population, *see id.* at 208. Finally, Warner criticizes the same civic elites for permitting development on the city's periphery to take place in a haphazard and substandard manner, a process he thinks might have been avoided had Philadelphia imitated contemporary European cities by setting up its own, municipally owned, land development and housing institutions. *See id.* at 213. For a discussion of aggressive government intervention in municipal land development in Germany, *see supra* text accompanying notes 158–160.

186. *See* SAM BASS WARNER, JR., *STREETCAR SUBURBS 162–63* (1978) (chronicling the gradual bifurcation of Boston housing between middle-class suburbs and a poor, largely immigrant, central city).

187. KENNETH T. JACKSON, *THE CRABGRASS FRONTIER* 155 (1985).

forests as cathedrals that proclaims: "The groves were God's first temples."<sup>188</sup>

On the other hand, such a view of nature as something sacred that is unspoiled by civilization also implies that the landscape is a kind of social *tabula rasa*. There appears to be no American equivalent to the German and Swiss view of the countryside as a part of national culture that must be safeguarded by the polity. Rose has argued with insight that in order to be effective, land-use controls must be based on a certain desired "end-state" goal for the regulated area—simply put, one has to know what one wants before one can figure out how to get it.<sup>189</sup> In the United States, the countryside has no obvious "end-state." The landscape is separate from the city and therefore a desirable place of refuge from it, yet the countryside is not seen as harboring any particular cultural significance. It seems fair to say that in contrast to the European tradition of landscape regulation, in the United States the preservation of agricultural landscapes is treated primarily as the proper subject of private charitable activities rather than state or federal regulation. As a result, current public policy in the United States does not seem to set as an explicit goal the preservation of the appearance and way of life of the countryside and rural towns in the path of metropolitan expansion.<sup>190</sup>

Thus, America combines a depoliticized urban space with a rural space that, while it may be a haven from urban problems, has not been formulated as worthy of preservation. The combination has created a glorification of private rusticity that imbues American culture. For example, explaining Frank Lloyd Wright's influence on postwar architecture, Hall comments, "Wright based his thinking on a social premise: that it was desirable to preserve the sort of independent rural life of the homesteaders he knew in Wisconsin around the 1890s."<sup>191</sup> In short, the attack on urbanity leaves private, rustic life as the normative form of the American community.

With this background in mind, it becomes possible to tell a coherent story about why there has been so little political support in the United States for more aggressive measures to protect the traditional compact city and

188. SCHAMA, *supra* note 139, at 200 (quoting *A Forest Hymn* by William Cullen Bryant). Compare the following observation made by Henry David Thoreau after a visit to a Roman Catholic church in Montreal, Quebec: "In Concord, to be sure, we do not need such. Our forests are such a church, far grander and more sacred." HENRY DAVID THOREAU, *A YANKEE IN CANADA* (1853), reprinted in *THE PORTABLE THOREAU* 243, 253 (Carl Bode ed., Viking Press rev. ed. 1964).

189. Carol Rose, *Planning and Dealing: Piecemeal Land Controls as a Problem of Local Legitimacy*, 71 CAL. L. REV. 837, 878 (1983) (contrasting coastal areas and historic districts, where the desired end-state is retention of the status quo, with "developing areas, where—in the absence of concrete proposals—we seldom have a clear vision of the end-state we desire, or even what the intermediate states along the way will look like").

190. For example, the transformation of the Pennsylvania Amish country into bland exurbia proceeds apace, despite the efforts of private charitable organizations to save it. See Herbert Muschamp, *Trying to Save an Old Way of Life From Progress*, N.Y. TIMES, July 26, 1998, at AR35. An interesting exception must be made for Vermont, which, as we have seen, has an official policy of preserving its towns and landscapes. See *supra* note 16 and accompanying text.

191. HALL, *supra* note 33, at 53.



agricultural countryside. Without the idea of the city as a necessary part of the social order, no consensus could possibly form around any program to entrench any particular model of the city, let alone one as stylized as the German-Swiss model. Moreover, the legal and cultural weakness of the city (and to a lesser extent that of the tended countryside) has left the United States without a dignified conception of metropolitan public space. Instead, town life in the United States, and hence land-use controls, has been organized around a kind of flight: a flight into privacy and independence captured by the detached suburban house. This flight into domesticity is probably linked to the distinct hostility to cities commented on by Frug.<sup>192</sup> Domesticity and nature are linked: The appeal of the suburb has been that its green, rustic setting symbolizes separation from a denigrated public space.

These observations also permit us to revisit the issue of America's extreme reliance on zoning to the exclusion of planning. Logan argues that at the heart of American zoning lies the desire to remove low-status segments of the population from the proximity of more favored citizens. Comparing America with Germany—the country from which the idea of zoning was first imported into the United States<sup>193</sup>—he finds that

[w]hat distinguished the German from the American zoning idea was primarily the size of the job to be done by this one tool. The separation of uses was not a central objective for zoning in Germany. . . . In the United States the desire to separate out undesirable population classes [primarily immigrants and racial minorities] through the zoning of places of business with which those classes were associated was a central motivation for early ordinances.<sup>194</sup>

The point is not that well-to-do Americans were more hostile to the poor than were German elites. Rather, it is that whereas the German state sought to contain its workers in cities dominated by an established elite, in the United States the elite sought security by escape from the city itself, and indeed from the idea of the city.

This history also explains the postwar course of federal and state intervention in land-use regulation. The federal and state governments could intervene to protect individuals from “spillover effects” and “externalities.” They could pass environmental laws to protect public health. But they could not transform an implicitly private construct—relations between property owners—into an explicitly public one—the regulation of public space. As a result, while Germany and Switzerland put the finishing touches on their national land-use regimes in the postwar decades, the United States could only move to ameliorate the worst consequences of undisciplined development through patchwork state and federal reform of land-use and environmental laws.

In many respects, postwar federal policy seems to show that the American city has come to be understood as a kind of neutral physical space

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192. See *supra* notes 173–179 and accompanying text.

193. See Logan, *supra* note 99, at 377 (noting that early American planners openly borrowed the idea of zoning ordinances from Germany).

194. *Id.* at 383.

within which a wide variety of policy experiments can be implemented without much regard to the extremely disruptive effects they are likely to have on existing land-use patterns. To take only a few examples, the federal government largely paid the bill for an enormous system of interstate highways that encouraged diffuse settlement patterns, all the while starving public transit of funds.<sup>195</sup> Federal tax policy also subsidized home ownership by making mortgage payments tax-deductible, thereby promoting construction of detached houses and, arguably, suburban construction and middle-class flight.<sup>196</sup> Indeed, one observer has suggested that the cities of Canada benefited from their own federal government's weakness, which prevented it from embarking on such programs.<sup>197</sup>

In summary, then, American land-use controls reflect the intellectual history of the American town. Cities without the prestige of their European counterparts have no claim on the official support represented by the German and Swiss land-use regimes. Rather, they have fallen victim to the consequences of public hostility to urban living.

#### IV. CONCLUSION: LAND-USE REGIMES AS RESPONSES TO MODERNITY

The differences between American and German-Swiss attitudes to land-use are so profound that they lie embedded and hidden in the foundations of public life, rather than visible in the political structures.

Thus, in post-World War II Germany and Switzerland, governments recognized the threat to the traditional urban form inherent in an affluent society characterized by a widespread desire for upward economic mobility that was expressed in the aspiration for home and car ownership. Officials resolved to manage economic growth to preserve the land-use status quo. In short, land-use regulation for the Swiss and the Germans is a way of restraining the modern economy to protect a traditional way of life. It enforces a prescriptive model of the good city and of the good countryside, and requires the market to operate within that model.

Indeed, German and Swiss views of land-use have evolved to the point where a national land-use regime is seen as an essential part of the construction of the polity. As one Swiss land-use expert has put it, land-use planning is part of the state's ongoing responsibility to guarantee "the

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195. Under the Interstate Highway Act of 1956, Congress paid 90 percent of the expenses of highway construction. See Federal-Aid Highway Act, ch. 462, sec. 108(e), 70 Stat. 374, 379 (1956) (current version at 23 U.S.C. § 109(j) (1994)); see also JACKSON, *supra* note 187, at 249 (discussing the Interstate Highway Act). In addition, "75 percent of government expenditures for transportation in the United States in the postwar generation went for highways as opposed to 1 percent for urban mass transit." *Id.* at 250 (citing Sen. Gaylord Nelson).

196. See JACKSON, *supra* note 187, at 294.

197. See Graham Hallett, *Conclusion*, in LAND AND HOUSING POLICIES IN EUROPE AND THE USA: A COMPARATIVE ANALYSIS 182, 194 (Graham Hallett ed., 1988) (citing M.A. Goldberg, *Housing and Land Prices in Canada and the US*, in PUBLIC PROPERTY? THE HABITAT DEBATE CONTINUED 207, 235-37 (Lawrence B. Smith & Michael Walker eds., 1977)).

preconditions of life" (*"Lebensvoraussetzungen"*).<sup>198</sup> He writes of Switzerland's national land-use planning: "Its object—briefly summarized—is living space (*Lebensraum*), that is, the space in which life is to be preserved and in which individual and social life develops."<sup>199</sup>

Contemporary America, on the other hand, is so remote from the German and Swiss idea of the town that there is no intellectual basis for duplicating land-use controls which derive from that idea. We cannot simply scrap the ideological background that gave us the metropolitan form we do have. The American public law hostility to the city has left a heavy ideological mortgage.

There is, in fact, some reason to think that the American approach to building cities reveals a rejection of ideas about traditional city form that may be more extreme than in any other country. In other words, German and Swiss attitudes toward the city may be more typical of attitudes in most Western countries. Two English-speaking countries with close cultural links to the United States furnish support for this claim. Our northern neighbor Canada, despite its cultural and historical closeness to the United States, has adopted an urban policy emphasizing "gradual expansion of the urban envelope . . . seeded by higher-density 'nodes' where office, retail, and residential land uses occur in healthy mixes."<sup>200</sup> Likewise, the United Kingdom has had a succession of national land-use policies since the 1940s. These have emphasized maintaining the existing distribution of regional populations and surrounding central London with a greenbelt of non-urbanizable land.<sup>201</sup> Notably, the first of these policies was enacted by the post-World War II Labour Party government in an atmosphere of "informed agreement among rational men of good will" and was seen as being relatively uncontroversial.<sup>202</sup> The policies of these two countries, otherwise so similar to the United States, seem to suggest that there is something unusual and radical in the U.S. willingness to forego similar policies.

Thus, an important conclusion of this Note is that our land-use regime must be seen in the context of broader American attitudes toward the relation between individual and community. If German and Swiss land-use regulations place the individual in the center of a managed landscape and a restrictive community, American land-use regulation seems to reject this idea of a socially situated self. If German and Swiss land-use policies reflect a dogged determination to control the modern town and make it conform to an inherited idea of the well-made community, American land-use controls represent a willingness to experiment with unprecedented forms of urban life.

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198. Lendi, *supra* note 98, at 83.

199. *Id.* (author's translation).

200. Tamim Raad & Jeff Kenworthy, *The US and Us*, ALTERNATIVES J., Winter 1998, at 14,

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201. See LIGHT, *supra* note 106, at 261.

202. *Id.* at 264.

