Planning, Law, and Property Rights: A U.S.-European Cross-National Contemplation*

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Abstract

Globalization today encompasses multi-national dialogues on the appropriate role for planning in mediating relationships between individual and community, state and citizen, government and market, and people and property. Yet confusion persists as speakers from one country attempt to convey concepts different from what listeners from another country hear. This paper provides a cross-national contemplation on the sources of that confusion, comparing the U.S. to Western Continental Europe, primarily Germany. Americans and Europeans engage fundamentally different worldviews in promoting progress while reconciling harms, stemming from different philosophical traditions that can be broadly characterized as a Millian versus a Hegelian liberalism, respectively.

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1 Introduction

Globalization today speaks not only to an array of multi-national economic activities but also multi-national dialogues on the appropriate relationships between the individual and the community, the state and its citizens, the government and the market, and people and property. These dialogues speak in turn to debates on the appropriate role for planning to play in mediating all of these relationships, especially with regard to the inherent tensions

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between planning, law, and private property rights. This globalization of thinking and practice has also prompted new scholarship providing comparative assessments of planning goals and methods, particularly as they involve the translation and application of concepts from one national setting into another (e.g. Alterman, 2011; Hirt, 2007, 2012; Jacobs, 2008, 2009; Joch, 2014).

As we engage in these comparative dialogues, we have come to perceive a persistent but latent confusion. That confusion manifests itself when it becomes clear that the core concept a speaker from one country is attempting to convey is subtly but importantly different from what the listener from the other country hears. We believe that this confusion stems, at least in part, from subtle but important differences in the philosophical traditions underlying the American and European experiences. It is abetted by the similarities within those same traditions, which provide just enough verisimilitude to mask disconnects, along with the use of a common language – English – that allows for rich variation in meaning through use of the same terms and phrases. The purpose of this paper is to provide a cross-national contemplation on these different philosophical traditions and the confusion wrought when we think about and discuss planning, law, and property rights from within our own tradition alone.

Because the precise relationships between planning, law, and property rights in the U.S. are largely determined at the state level, those relationships are not strictly homogenous within the U.S. Nonetheless, the broad similarities in philosophical traditions underlying them across the states allow us to generalize for the purpose of making cross-national comparisons. Similarly, recognizing that Europe is not homogenous culturally, politically, or legally, but wanting to keep our task manageable for purposes here, we focus our comparison on Western Continental European countries that enjoy democratic and federalist governments and capitalist economies. We look primarily to Germany, along with selected reference to other Germanic countries, Austria and Switzerland in particular, to represent that collective Western European tradition.

With that caveat, we frame this contemplation by first considering a primary purpose of the planning endeavor-aiding societal efforts to promote progress while avoiding harms-in order to posit our thesis. We then explicate and justify that thesis by, first, framing our contemplation in terms of policy argumentation and focusing our assessment accordingly; second, discussing the philosophical traditions underlying the American and Germanic traditions; and third, considering corresponding cross-national differences in meaning across selected key concepts, including community, democracy, property rights, federalism, and the judicial review of legislative and administrative governmental functions.

2 Framing planning, law, and property rights

2.1 Promoting progress while avoiding harms through planning

A fundamental goal advanced through the interaction of modern self-governments and modern market economies is to promote individual and social prosperity and quality of life through the use of land, on the one hand, while tempering and avoiding the corresponding individual and social economic costs and environmental harms that those land uses can yield, on the other. Despite the singular vision of this overarching goal, there are a variety of institutional designs that might be used to strike that balance.

The countries we compare – primarily the U.S. and Germany – are quite similar in funda-

mental ways. Both structure their institutions to enhance and reconcile economic prosperity, environmental quality, and public welfare through the use of land-promoting progress while avoiding harms. In doing so, they both attempt to balance the tensions between desires for individual autonomy on the one hand, with community and governmental obligations on the other. They both recognize private property as a key institutional component in their efforts to do so; they both engage all of the governmental entities available to them (i.e., legislative/parliamentary, administrative, and judicial) as they intertwine governmental activities with market activities in various ways toward those ends; and they both engage representative forms of self-government that are federalist (i.e., distinct across national, state, and local levels). Finally, both enjoy market systems that are fundamentally capitalist in that they rely on emergent producer-consumer decisions-rather than engaging central planning governmental authorities-to allocate natural and social resources for the production of material resources and wealth.

Despite these fundamental similarities, however, there are paradoxes and dissimilarities as well. Most notably, at least since the latter half of the 20th Century both the U.S. and Western Continental European countries have focused more on promoting economic development than on safeguarding environmental protection, public safety, or social welfare, but that outcome has arguably been more tilted toward economic concerns and the individual in the U.S. while being more favorable to environmental and public welfare concerns in Europe (Newman and Thornley, 1996). In corresponding terms of landscape form, sprawl is a growing concern in Germany, but it has not occurred to the extent and in the form that is typical across much of the U.S. (Schmidt and Buehler, 2007).

Likewise, in a private property rights context, the U.S. is generally taken to be much more focused on safeguarding private property rights as against community imperatives than is Europe. Even so, as detailed by Alterman (2011) and her colleagues, U.S. compensation rights in response to regulations constraining private property, on paper at least, are moderate while German compensation rights are strong. Yet in practice, U.S. property rights are weak in that American courts almost always uphold governmental regulations without requiring compensation when those regulations are challenged, but simultaneously strong in that governments are reticent to regulate in the first place because of private property rights concerns. Conversely, German property rights are strong in that German courts vindicate the more extensive constitutional and statutory protections afforded, but simultaneously weak in that those protections apply in more limited circumstances than in the U.S., and especially in that German property owners are much less likely to litigate regulations on their property than are Americans in the first place. What explains these paradoxical observations?

2.2 Thesis

Scholars have begun attending to these questions through cross-national comparison, including recent work by Jacobs (2006, 2008, 2009); Jacobs and Bassett (2010), Alterman (2011) and her colleagues, and Davy (2012), all collectively evaluating legal systems and expectations in the context of private property rights and notions of regulatory takings, along with work by Hirt (2007, 2012) comparing the regulatory systems of American and selected European countries, and work by Schmidt and Buehler (2007) and others comparing planning systems across America and selected European countries.

Our analysis picks up especially on Alterman's question about why land use regulatory regimes differ across the thirteen countries she compares. She poses and dismisses several factors that could explain these differences but do not, including legal systems (civil vs. com-

mon law), governance structures (federalist vs. unitary), and geography. We agree that none of these factors seem to explain the differences she explores. We posit that much of the phenotypical variation observed – at least between the U.S. and Germanic Western Continental Europe – can be explained instead by the genotypical philosophical traditions of those countries, traditions that we generalize and label here as Millian liberalism versus Hegelian liberalism. We posit further that a real challenge in evaluating similarities and dissimilarities in planning, law, and property rights cross-nationally stems from the conceptual and linguistic similarities of these traditions, which serve to mask the real differences separating them. Our analysis here is admittedly abstract and to that extent overly simplified, but we believe the influence of these differing philosophical traditions is important enough to merit contemplation, even if only in broad-brush terms.

2.3 Framing empirical and policy arguments on land and society

We take "land" to include the land itself along with its attendant physical, mineral, natural, and cultural/symbolic resources. Asking how society might better reconcile its use of land to promote progress while avoiding harms, and correspondingly understanding the dialogues about how to do so in a cross-national comparison, requires first articulating important interrelated empirical and policy arguments. Among these are arguments on how society-nature dynamics change over time or under specific conditions. We frame our contemplation in the context of several key debates as they have evolved over time.

Enlightenment-era political and economic thinking restructured human institutional arrangements by diminishing substantially the role played by the church (or religious institutions more broadly) in shaping human-to-human and human-to-nature interactions (see generally DesJardins, 1999; Platt, 2004; Linklater, 2013). This shift also focused attention, first, to debates over the relationships between the individual as a member of society, society collectively, and the state, along with the role that states and markets play in mediating relationships between individual and society; and second, to the conceptualization of land as property (Germino, 1972; Ryan, 1984).

All contemporary debates on land and society, at least in modern self-governed, capitalist systems, recognize a common welfare that must be served by some combination of governmental and economic institutions in several distinct ways: through the efficient production of private consumer goods; through the production of "public goods" – things that individuals acting through market exchange cannot or are not likely to produce; and through the protection of both individual and public interests via the amelioration of individual and public harms generated by economic production processes. All similarly accept the need for the state, especially, to provide public goods and ensure individual and public protections. Even in the U.S., therefore, the real debates are not over the need to justify the community or the state. Rather, they implicate the appropriate balance to be struck between individual and community imperatives; whether the "community" is merely an aggregation of individuals or an emergent whole; and whether the state exists as a third party to serve merely individual interests and vindicate individual rights (e.g., by facilitating the individual production of wealth and preventing individual harms) or as the embodiment of the individual-as-member-of-society to serve more expansively and simultaneously both individual and community interests (we illustrate these distinctions more thoroughly through cross-national comparisons below).

Within these debates, land is viewed today primarily as an asset for the production of material goods and as a source of wealth and power (Caldwell and Shrader-Frechette, 1993;

Harris, 2002; Steinemann, Apgar, and Brown, 2005). Thus the central challenge of reconciling land and society today is to somehow balance the interests of the individual vis-á-vis society with regard to the appropriation, manipulation, consumption, conservation, and even preservation of land as property. In both the American and the European experience, all of the policy debates engaged here revolve around competing notions of private property, its role in serving the individual, its role in serving the community, and the mediating role of the state generally-and planning particularly-in between. All involve acceptance of the proposition that it is necessary to safeguard an individual's control over land-as-resources (i.e., real property), at the very least to ensure the subsistence of the individual and his/her family. Beyond that initial proposition, however, further justifications for the existence and reach of private property rights are contentious, resting on different formulations of arguments grounded in tradition and pedigree, common-sense everyday experience, and the public or general welfare (cf. Epstein, 1985; Freyfogle, 2003, 2007).

Having noted the Enlightenment-era changes in thinking that have framed contemporary institutional arrangements, we have also thus focused the debate on the normative elements of the policy arguments that speak to land and society-that is, justifying the claims we make about why institutional arrangements ought to be structured in certain ways or why they need to be changed. These normative elements implicate in turn moral claims about the kinds of societies we want given our individual and social values. That is, they speak to the stuff of moral and political philosophy. Particularly in the U.S. and Western Continental Europe, the normative elements of contemporary policy debates draw heavily from the moral philosophizing of Enlightenment-era thinkers.

3 The philosophical origins of property and the state

Despite their shared intellectual origins in the ideals of the Enlightenment, important nuances exists between the American and the Western Continental European perspective with regard the philosophical justification of property, its institutional governance and-perhaps most visibly-the legal framework within which land and property are constituted. 'Property' here is understood in the sense of a legal claim on a tangible asset (i.e., ger. "Eigentum" as opposed to "Besitz"), not merely as real estate, but we discuss it specifically in the context of real property; thus "land" is a specific type of 'property' (i.e., real property) and "property" is a particular human institutionalization of "land" (i.e., the attributes of land-as-nature that make it useful to us).

Most trans-Atlantic comparisons focus on property either in terms of a description of the different families of legal systems (common law vs. civil law, e.g. Morag-Levine, 2007) or, focusing more specifically on land-use regulation, in terms of a comparison of different land-use planning traditions that juxtaposes the U.S. tradition to the British, Napoleonic, Germanic, Scandinavian and Eastern European traditions (e.g. Newman and Thornley, 1996). Here we emphasize the importance and explanatory power of historical context in this regard, and we characterize the U.S. tradition as "Millian liberalism," in contrast to the "Hegelian liberalism" informing the Germanic tradition. Although not strictly chronological, the arguments of Enlightenment-era philosophers informing the Hegelian liberal tradition represent a critique and response to the Millian liberal tradition. Similarly, the Post-World War II German government incorporated and synthesized key elements of the U.S. system of representative self-government and the British parliamentarian system (Kommers, 1997), but in doing so adapted that system – we would argue – in light of Germany's Hegelian liberal tradition.

Thus we present our analysis by first characterizing the U.S. system and then by counterposing the German system in response.

3.1 The U.S. tradition – Millian liberalism

The institutional structure that frames debates and actions to promote progress and address harms in the U.S. today were set in place at the end of the 18th century with the publication of the Declaration of Independence in 1776 and the U.S. Constitution in 1787 (Nedelsky, 1990; Nowak and Rotunda, 1995; Ely, 1996, 1998). The founders of the new republic were clearly informed in their reasoning by Enlightenment-era philosophers, especially Hobbes, Smith, Locke, and Montesquieu, and they were clearly aiming to rearrange contemporary political, legal, and economic institutions with an eye toward promoting new visions of political and economic progress.

The conventional wisdom is that the Founders were especially motivated by the desire to safeguard private property rights against the harmful abuse of those rights by the newly enabled government of the people; that is, to safeguard property in the form of land held by the extensively propertied minority from the minimally propertied majority (Nedelsky, 1990; Ely, 1998). This concern was warranted to the extent that the Founders witnessed the willingness of newly empowered majorities, operating through state legislatures bound together only by the Articles of Confederation, to disinvest propertied minorities through acts like debtor relief laws (Glendon, 1991).

Nonetheless, the American ethos is neither homogeneous nor philosophically pure (Germino, 1972; Ryan, 1984; McCloskey and Zaller, 1984). Notably, American notions of individual private property rights and the purpose of the state vis-á-vis those rights are bifurcated and in some ways irreconcilable, incorporating both natural rights and utilitarian/quasi-social contract theories (see, e.g. Sandel, 1982, 1996). On the one hand, it is clear that the philosophical reasoning of Locke (1698 [1963]) played a significant role in shaping the thinking of the Founders, leading them to find as self-evident the existence of natural law rights to life, liberty, and some notion of property as a justification for separating themselves from the British monarchy (Shrader-Frechette, 1993; Kuklin and Stempel, 1994; Presser and Zainaldin, 1995). With regard to property, Locke's reasoning was that humans own a sacred right in their person and by extension their labor, such that when one mixes one's labor with the unclaimed earth, one also takes a sacred ownership of that land. This strong natural rights notion of private property found fertile ground in the New World, where the boundless frontier of available land over which to take ownership seemed limitless (Udall, 1963), and the distribution of landownership was already wider and more even than for any European country at the time, at least until the French Revolution (Glendon, 1991).

On the other hand, American notions of private property rights are both driven and justified by the moral philosophizing of Adam Smith, especially simplifications of his arguments that today underlie neoclassical economics, and the utilitarian theory of Jeremy Bentham, further developed through notions of liberty expounded by John Stuart Mill writing subsequently (e.g. Beckerman, 1996; Harris, 2002; Steinemann, Apgar, and Brown, 2005).[1] This utilitarian/quasi-social contract underpinning can be characterized as favoring Bentham's and Smith's individualistic and undifferentiated notion of utility (i.e., garnering pleasure and avoiding pain, both measured strictly in the eye of the individual), maximized through government-enabled, policed, and moderated free-market exchange. It also rejects: a natural

[1] See also Armstrong and Botzler (1993); DesJardins (1999); VanDeVeer and Pierce (2003).

rights theory of private property (i.e., property ownership is valuable strictly for its utility, not as a self-evident natural right); a pure social contract theory of society (i.e., members of society enjoy the benefits of society and so should reciprocate, but the notion of a social contract is a myth); and a holistic notion of community (i.e., the unit of measure is individual utility and the goal is the maximization of aggregated utility, but "community" is nothing more than the aggregation of autonomous and independent individuals) (Germino, 1972; Ryan, 1984; DesJardins, 1999). Thus especially at a policy-making level and especially with regard to economic policy relating to the use of land, the U.S. tends to favor policy decisions that serve the greatest good for the greatest number as measured by aggregated market economic efficiency, while giving thought only secondarily to inequitable distributions of benefits and harms across individuals, often in uneasy tension with principled concern for safeguarding the "natural" rights of individuals who have established claims to private (real) property.

The Americanization of Bentham's utilitarian philosophy was more fully developed by John Stuart Mill writing in the mid 19th Century. Most importantly, Mill further developed the concept of individual liberty that today represents an axiom of the American ethos. Largely through his essay, *On Liberty* (1859), he expounds a sense of liberty that is rooted in individual autonomous freedom in tension with responsible harm prevention, elevating liberty (and liberalism) as a means to: enable community by ensuring individual economic and political autonomy; promote responsibility in the form of self-reliance; and foster creative excellence and human flourishing by rejecting the dulling pull toward social conformance (Germino, 1972; Ryan, 1984). Individuals and society will be better off if competent consenting adults are allowed to act as they please, so long as their actions are un-coerced and do not yield harms to their neighbors or the larger community. While Mill never explicitly connected this libertarian argument to private property ownership – and indeed like Bentham rejected a natural rights justification for private property – he acknowledged that safeguarding property ownership creates the incentive and reward structure necessary to promote the individual investment, creativity and innovation that in turn allows individuals and by extension human society to flourish (Ryan, 1984).

Rounding out the American ethos is a strong inclination to distrust government given the potential for abuse that comes with absolute governmental authority, a distrust born by the country's experience at its inception as a colony subjected to the abusive overreaching of the remote British monarchy, combined with a strong sense of the Protestant work ethic and its emphasis on enjoying the (God-given) rewards from self-initiative and hard work (McCloskey and Zaller, 1984; Kuklin and Stempel, 1994; Presser and Zainaldin, 1995). These characteristics again resonated with the largely rural and necessarily self-reliant population that characterized most of the U.S. well into the late 19th century (and indeed that still characterizes the largely rural and so-called "red" states of the U.S. today). The result was and continues to be an abiding concern that government needs to be both tempered and limited; that is, controlled through checks and balances such as the separation of powers doctrine and the strong judicial review of constitutionally safeguarded individual rights, as well as focused more on enabling individuals to self-reliantly pursue their own ambitions rather than on ensuring all have the capacity to succeed through the equitable distribution of resources (Kuklin and Stempel, 1994; Nowak and Rotunda, 1995). Mill did not necessarily explicate or accept all of these various aspects of the American ethos, but to the extent that he articulated its core elements – individual liberty, tempered and limited self-government, self-reliance – it can be characterized as Millian liberalism.

Finally, specifically in a planning, law, and property rights context, it is this Millian liberalism that largely explains the minimalist American approach to promoting community through comprehensive land use (or social/community) planning in favor of vindicating individualism and private property rights through the law (see, e.g., Beatley, 1994; Merriam and Frank, 1999; Mandelker, 2005; Juergensmeyer and Roberts, 2007). Because of the preference for securing individual political autonomy through control of one's property, for more local (and hence more accountable) government (Briffault, 1990), and for limited national government, there is not and never has been a coherent national land use planning mandate. Because of the non-communitarian, individualistic notion of community, there is less sentiment for allegiance to the notion of community planning. Because of the prominence of utilitarian market-oriented notions of the good, there is a strong preference for allowing and promoting individuals to productively use their land through market development and exchange rather than conserving or preserving land in its natural condition (i.e., promoting the 'highest and best' or most economically remunerative use).

Yet in contrast, because of constitutionalized notions of property rights combined with a preference for tempered government (i.e., stopping only nuisance-like harms rather than promoting public welfare), the U.S. experience is a paradoxical combination of at once too little law and too much law. The default is to allow private property owners to develop their lands unless the government specifically prohibits doing so. But when government does regulate, it applies overly prescriptive rules separating uses, buffering uses, and so on (see the comparative analyses by Hirt (2007, 2012). Similarly, because of limited acceptance of the idea of planning for the communal land management as an appropriate governmental function, especially in favor of vindicating a property owner's rights either to develop his own land or be protected from the neighbor developing hers, the U.S. experience is an increased emphasis on the legal resolution of policy choices after the fact, litigating local zoning decisions piecemeal, rather than the resolution and acceptance of collective planning and policy choices before. Finally, because of Americans' generally antagonistic distrust of government, government has become to many a third party in land use planning and policy decision-making – the "them" in between me, you, and us – rather than the embodiment of us and our communal welfare.

3.2 The Western Continental European tradition – Hegelian liberalism

To the extent that notions of property and the state in the U.S. tradition are anchored by the writings of Hobbes, Locke, and Mills, the philosophical traditions of Kant and Hegel ground German/Western Continental concepts of property and much of the organizational principles of political and legal institutions. Thus from a Continental European perspective, the Millian liberal interpretations of the origins of property, especially that strand emanating from the Lockean notions of natural rights to private property, are detached from the question how the individual is related to society at large in that it posits that property can be merely the product of a single individual's activity without requiring the entering of a social contract per se. In contrast, Kant sees property – and legal claims on property – as inextricably linked to the concept of a totalizing social contract that has its governance locus in the state (Ryan, 1984).[2]

[2]There is an inherent challenge here in labeling philosophical propositions according to philosopher, first because the philosophers discussed here were so prolific and their philosophizing so nuanced (and sometimes seemingly self-contradictory), and second because subsequent scholarly characterizations of their work situate their propositions

This important divergence between the Lockean and Kantian notions of property has substantive consequences for the practice of managing progress and avoiding societal harm, and it directly maps into differences of liberalism between the Millian tradition and the Hegelian tradition. Here, the role of individualism that is implicit within Millian liberalism is the most central aspect of Hegel's critique of liberalism, an argument that relies on the conceptual observation that atomistic individualism and liberty of the individual are theoretically distinct. Indeed, Hegel's criticism of liberal individualism focuses on two key aspects.

First, Hegel challenges the individualistic purpose that Millian (and Lockean) liberalism attributes to the state, namely the assertion that the state is solely justified by the mandate to secure the liberty and property of the individual (see generally Knox, 1967; Germino, 1972; Ryan, 1984; Franco, 2007). Hegel's idea of rational freedom – rooted in Kant's idea of rational autonomy – is the capacity to realize one's self, while recognizing that the individual is ultimately always a product of his or her social and cultural environment. As such, Hegel views freedom as being synonymous with the individual's identification with the duties and responsibilities that come with being a member of the state. In the sense of two concepts of freedom, negative and positive, Hegel's idea of rational freedom is consistent with the "positive" concept for freedom as self-direction, as opposed to "negative" freedom as the absence of a coercion that "implies the deliberate interference of other human beings within the area in which I could otherwise act" (Berlin, 1969, p. 121). The Hegelian notion of an individual's liberty thus implies "total self-identification" with a specific principle or ideal – such as the need for state-mandated planning – in order to attain a given societal end, such as promoting progress and avoiding societal harm. In contrast to the U.S. intellectual tradition, Hegelian liberalism therefore does not necessarily conceptualize individual property rights and the interests of the state as linear opposites, but rather theorizes them as two sides of the same societal contract.

Hegel's second critique of liberal individualism is more subtle and also gives rise to the most common misreading of Hegel as an apologist for the repressive restoration of Prussian absolutism or even as a proto-fascist (Germino, 1972). In addition to the individualistic purpose that liberalism assigns to the state, Hegel – firmly rooted in Kant's tradition of social contract theory – disagrees with the Montesquieuian or Humeian traditional notion that the state and government must rest on an individualistic or consensual basis. In contrast to Hegel's first critique of liberalism, the issue here is not economic or civil freedom, but political liberty in that Hegel demands that the ideal state should correspond to the rational (communal) will and not the atomizing will of the individual. In other words, Hegel recognizes that no state can fulfill the demand that every act of government be "the direct and conscious deed of each." The rational state will always involve a certain amount of social differentiation and political representation.

Thus Hegel's first criticism of liberal individualism focuses on freedom within the state and, as such, it is not immediately inconsistent with a laissez faire notion of a liberal state. His second criticism, however, has immediate consequences for the role of the state in that – consistent with the rational social contract – the Hegelian state forms the institutional locus for the communal will, which rightfully privileges the communal good over that of the individual (Franco, 2007). In sum, the first strand of Hegel's critique of (Millian) liberalism is

in different ways (cf. Germino, 1972; Sandel, 1982; Ryan, 1984). Nonetheless, acknowledging that variation in interpretation and meaning across scholarship, we believe the apt way to characterize the American liberal tradition particularly in juxtaposition to the Germanic "Hegelian" liberal tradition, and particularly in the context of planning, law, and property rights, is as "Millian liberalism."

that individual identity does not come from individual autonomy but rather through membership in society; his second critique is that there is a role for the state to play in representing the holistic social will.

Viewed from these different philosophical vantage points, the organic Lockean and Kantian traditions imply a fundamentally different notion of how the individual's relationship to the state is mediated through property. Indeed, the very definition of property differs between our case countries. German law codifies the "social obligations of ownership," whereas in the U.S. both the Constitution and philosophical tradition emphasize more individualistic notions of property ownership, particularly in contemporary arguments. Compared to an array of other countries studied by Alterman (2011) and colleagues, for example, the U.S. is unique in that property owners today generally assume the right to use their land as they see fit (including, ironically, urban dwellers heavily regulated by zoning).

Indeed, beyond often demanding compensation if their property is downzoned, American landowners sometimes even sue the local government if it refuses to upzone to allow a more intensive use (Merriam and Frank, 1999; Juergensmeyer and Roberts, 2007; Alterman, 2011). Moreover, and perhaps more importantly, in the U.S. the government is viewed as essentially an independent third party (i.e., standing between the individual and the collective welfare), as noted above, whereas in Western Continental Europe the government is seen as an emanation and manifestation of the common will – the government is "us," not a "them" charged with representing "us" (see, e.g. Kommers, 1997). Thus in Germany, for example, property owners are not entitled and generally do not expect to receive compensation (or litigate) when their properties are located outside of public service areas, but at the same time the German government is expected to accept a reasonable offer to build infrastructure to facilitate new development (Alterman, 2011, p. x).

4 Institutions and terminology

Our purpose here is to reveal the ways in which historical contexts and philosophical traditions shaped attitudes and institutions regarding the promotion of progress and the avoidance of societal harm. Having described the ways in which major thinkers in political, legal, and economic philosophy shaped attitudes toward property and the state, we focus now on relevant governance practices in the United States and Continental Europe. Given that the U.S. and Germany (along with other Western Continental European countries like Switzerland and Austria) all operate within the constraints of a tiered system of federalism, such divergence in governance practice frequently has not received attention. Indeed, most comparative work either tends to emphasize the shared legacy of the "Hamiltonian curse" of needing to reconcile both a strong federal government while favoring limited government (Rodden, 2006), or it accentuates common trends, particularly toward the perceived liberalization of individual property rights in Europe (Jacobs, 2008).

Here, we draw from, synthesize, and reorganize the material presented above to more fully explicate our cross-national contemplation particularly in terms of cross-national confusion created by terminology. We do so by discussing the different meanings that key terms have to U.S. and European audiences, given the different traditions of liberalism from which they come.[3] Those key terms include community and democracy, property and rights, federalism, and the judicial review of legislative and administrative governmental functions. In

[3] In this section we do not repeat citations to source materials provided above, but we do cite to additional sources as appropriate.

reviewing all of these terms, it is important to acknowledge again that the discussion here represents broad-brush caricatures of the U.S. and European systems, necessarily overly simplistic and – more importantly – not inevitable.

4.1 Community and democracy

The primary distinction to be understood when using the terms "community" and "democracy" (or self-government) through cross-national comparison is this: In the U.S., community is realized almost secondarily through the voluntary interaction of flourishing autonomous individuals, while in Europe the individual is enabled to flourish through the support provided by the community (embodied by the government) and the social contract. Ontologically, the individual comes first in America; the community comes first in Europe.

For many Americans, depending on how the question is asked, community in the U.S. is nothing more than the aggregation of individuals. Community exists to protect the individual, and the individual requires political and economic autonomy to be a fully functioning member of the community. Freedom is "negative," taking form primarily as the lack of governmental restraint. In this context, self-government (democracy) focuses elected legislatures on addressing the concerns of their individual and independent constituencies rather than cultivating leadership for promoting a social welfare. Even the government function itself is in a sense individualized, separated into constituent parts for the sake of checking its potential for abuse, with a studied lack of coordination across its different levels (i.e., national, state, and federal-see discussion of federalism below) and lack of coordination if not outright antagonism between its several branches (i.e., legislative, executive, and judicial – especially compared to a parliamentarian system where the executive is formed out of the legislative and the judiciary does not exercise strong judicial review as in the U.S. – see again below). To the extent Americans experience a more holistic sense of community – and, make no mistake, they do – it comes more through the neighborhood groups, service clubs, and other private associations they engage rather than through formal government (Bellah, Madsen, Sullivan, Swidler, and Tipton, 1986).

At the extreme, democratic "self-government" in the U.S. is perceived as government of me, by me, and for me, and "the government" is perceived as a third party standing in between me and us (the community). Given that stance, the preferred venues for addressing notions of social progress while ameliorating harms are the market, which allows individuals to pursue their own interests through independent trade, and the law, engaging the courts to check nuisance-like harms while vindicating the rights of individuals as against the abusive overreaching of the government. It is not the community in the form of governmental public planning, which requires both a prominence and degree of coordination at odds with the American vision of limited and tempered government (Tarlock, 2014).

The notion of community in Europe, in contrast, is more holistic and social. Community exists to enable and promote the will of the community and, through the social contract, to enable the flourishing of the individual. Freedom is 'positive,' taking form as the ability to flourish through the identity and support provided by the community. In this context, self-government is focused on the communal function and government is perceived as the embodiment of "us," not as a third party standing in between me and us. The preferred venue is much more focused on planning, or the future-oriented communal function. The courts still play an important role in vindicating rights, but one much reduced relative to the U.S. context (Light, 1999).

4.2 Property and rights

The primary distinction to be understood when using the terms "property" and "rights" through cross-national comparison is this: In the U.S., unfettered ownership of private property – especially real property – is the condition that allows the individual to be politically and economically autonomous and thus able to engage in community through the government, such that the right to property ownership is a claim against governmental constraint on the use of one's property. In Europe, in contrast, ownership of private property is conferred by the community (government) through the social contract, such that the right to property is the ability to use one's land for political and economic engagement within that social arrangement. Ontologically, the right to private property in the U.S. places a constraint on community (government), while the social contract of community (government) in Europe places a constraint (social obligation) on the right to private property.

Property protection under the U.S. Constitution, especially as popularized in contemporary interpretation, emphasizes individual freedom above all else; beyond Millian nuisance – like duties to do no harm, neither the U.S. Constitution nor U.S. culture more broadly explicitly recognize an affirmative social obligation of property use. At the same time, courts have not considered property a fundamental right and are reluctant to use a language of natural rights to describe ownership relations (Lubens, 2007). Still, the very fact that American municipalities fear lawsuits if they refuse to upzone a property indicates a fundamentally individualistic notion of property rights in the U.S. – an individual's right to use land for economic benefit is considered paramount.

In contrast, reflecting the differences in Lockean and Kantian notions of property, the role of property differs fundamentally in the Western Continental European tradition (Kushner, 2003). In the context of our discussion here, this difference finds its most salient expression in the notion of the "social obligation of property" as a key legal and socio-philosophical principle in continental European constitutional law, which – in Germany, Austria and Switzerland – is commonly referred to as *Sozialpflichtigkeit des Eigentums* (also *Sozialbindung des Eigentums*, transl. as "social bond of property"). Indeed, German law explicitly considers the individual's place in and relationship to the social order in defining ownership rights. The property clause in the German *Grundgesetz* (The Basic Law, the German constitution) contains an affirmative social obligation alongside its positive guarantee of ownership rights (Kommers, 1997). Against the background of a fundamental recognition of the institution of private property and an appropriate discretion with regard to its use, this principle requires that the use of property must not run counter to the public interest or must be in its direct benefit. For example, the *German Constitution of Weimar* in 1919 states that

> "[…] Property entails obligations. Its use shall simultaneously be for the Common Best Purpose" ("Eigentum verpflichtet. Sein Gebrauch soll zugleich Dienst sein für das Gemeine Beste"; WRV, 1919, Art. 153, sec. 3)

While the codification of the social-obligation norm of property might be considered a distinguishing feature of the continental legal tradition, Alexander (2009) argues that American property law also includes a social-obligation norm, but that this norm has never been explicitly recognized as such nor systemically developed.

4.3 Federalism

The primary distinction to be understood when using the term "federalism" through cross-national comparison is this: In the U.S., federalism is best described as disjointed, adversarial, and middle-out government that exists within the context of independently enabled levels of governmental authority and serves as a check on the potential for governmental abuse. In contrast, in Europe federalism is best described as coordinated, cooperative, and top-down government that exists through coordinated and overlapping grants of authority and serves to holistically and rationally advance the communal welfare through governmental action. Ontologically, federalist government in the U.S. means checking government in favor of safeguarding individual liberty (the individual comes first), while federalist government in Europe means coordinating government for the sake of realizing the social function and-through society-the flourishing of the individual (the community comes first).

Technically, the literature on fiscal federalism broadly distinguishes between two models of federalism, "dual federalism" and "cooperative federalism" (e.g. Shah, 2007). Under dual federalism, the responsibilities of the federal and state governments are separate and distinct, and there is either a hierarchical type of relationship among the various orders of government or-in the so-called "coordinate-authority" model of dual federalism-states enjoy significant autonomy from the federal government and local governments have little or no constitutional status. In this terminology, the U.S. operates under a system of dual federalism.[4]

The model of cooperative federalism, on the other hand, usually takes three forms, where an increasing level of interdependency between federal, state, and local governments characterizes each form. In its most interdependent variety, as practiced in Germany, Austria, and Switzerland, the federal government determines policy and the state and local governments act as implementation agents for federally determined policies.

Thus U.S. federalism starts with the states, which ceded some of their sovereign authorities to create the national government but strictly constrained the national government's powers (at least theoretically) in doing so. Moreover, as a legal matter, local governments in the U.S. are "creatures of the state," enabled by the state and unequivocally subject to state control in virtually all respects. While "Dillon's Rule" and "home rule" are terms often used to denote limited and expansive local government autonomy in the U.S. context, any authority that a local government possesses must come from grants by the state and as such is not directly anchored to the U.S. Constitution beyond the Constitution's supremacy clause (Richardson, 2011). Nonetheless, as a political matter, local governments are perceived as politically autonomous (and indeed often perceived as legally autonomous by popular misconception), such that states are often reticent to either constrain local autonomy or require local consistency with state policy. This is especially true with regard to the public management of private land use given the history of planning and land use management in the U.S. (DiMento, 1980; Porter, 2008; Jacobs and Paulsen, 2009; Norton, 2011).

In contrast, while European federalism historically also began with states ceding sovereign authorities to a national government, the roles of federal, state and local government have become much more closely interlinked. Most importantly, key legislation in Germany, Austria, and Switzerland gives the federal government direct organic enabling jurisdiction over

[4]Formally, the U.S. dual federalism emerges from the Tenth Amendment to the U.S. Constitution, whereby the national government is supreme only to the point where reserved state power is invaded. The Tenth Amendment thus arguably constitutes a judicially enforceable limitation on the Supremacy Clause (Fellman, 1948), giving rise to active tension between federal authority and states' rights that are as unthinkable in a European context as they are relevant for U.S. federalism debates today (e.g., in the medical marijuana laws or national health care legislation).

municipalities as well as the state (Bieri, 1979). At the same time, this higher degree of federal jurisdiction over localities is also reflected in higher levels of revenue sharing.

Indeed, European municipalities typically do not face the same fiscal liabilities as U.S. cities. Local governments in Germany derive less than one-third of their income from local revenues, with higher levels of government transferring the rest (Nivola, 1999). By contrast, and largely as a consequence of the New Federalism that came into effect under the Reagan administration, U.S. urban governments must largely support themselves, collecting three quarters of their revenues from local sources (Rueben and Rosenberg, 2008). This higher reliance on local own revenues also explains why U.S. property tax rates are relatively high compared to Germany. Furthermore, fundamental differences in the mechanics and the enabling legislation for property taxation highlight important institutional differences between federalism in the U.S. and Germany (discussed in more detail in the context of land-use regulation below). While property taxation in the U.S. is a matter for state constitutions alone, the German *Grundsteuergesetz* (Federal Property Tax Laws) defines a federal uniform rate for local property taxes, while giving municipalities the autonomy to set their own tax rates relative to the federal benchmark, but only within a predefined range.

These differences between the U.S. system of dual federalism and the Continental European tradition of cooperative federalism is perhaps most directly visible in the approach to land-use regulation and planning, where the roles and competencies of both the German and Swiss federal government, state or cantonal government, and municipalities are clearly defined and codified. In both countries, integrative spatial planning efforts rely on this division of labor in fundamental ways. The German and Swiss approach to land-use planning involves 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 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 (Light, 1999). Specifically, the German federal legislation for spatial planning (*Raumordungsgesetz*), for example, defines a comprehensive national framework for land-use regulation and regional economic development. At the same time, municipal building law (*St'adtebaurecht*) that forms the legal basis for all land- and real estate-related activities at the municipal level is governed by the federal government, including the legal basis for all municipal zoning regulation via the *Baunutzungsverordnung*. Such an integrated top-down federal legal foundation to the planning process – with all its detailed provision for the competencies of different levels of government – is completely foreign to the American system.

It is not that the U.S. federal government abstains from land use planning altogether. The U.S. Army Corps of Engineers and the Federal Bureau of Reclamation, for example, in their efforts to control and divert the nation's flood waters, along with the federal government's involvement in inter-state transportation planning, continues to play leading roles in shaping large-scale land use patterns (Babbitt, 2005). But in contrast to the federal tradition in Europe, the closest equivalent of hierarchically integrated planning can be only be found at the level of state-wide land use planning programs in Oregon or Maryland, at least to the extent that these states represent more the willingness of the state to take back authorities previously delegated to localities – something any state in the U.S. could do if it had the political will – rather than a tiered, top-down, national-state-local federalist system (Burby and May, 1997).

Indeed, without the European top-down notion of government, more clear definitions of hierarchical competencies and enabling legislation, and more limited judicial review, the very

promise of European spatial integration and territorial cohesion and the European model of society would not be possible (Faludi and Waterhout, 2006; Faludi, 2007; Kalliomäki, 2012). In the context of spatial planning effort in the European Union, the subsidiarity principle (i.e. the notion that a matter ought to be handled by the smallest, lowest, or least centralized authority capable of addressing that matter effectively) and the proportionality principle are key principles of European Union Law (Dühr, Colomb, and Nadin, 2010). However, viewed in the context of a tradition of (dual) federalism in the United States, subsidiarity does not have the same notion of a strong top-town policy that is executed locally, but is regularly interpreted as more freedom for states or municipalities vis-á-vis the federal government. Thus in the U.S., subsidiarity allows for local policy discretion, whereas in Europe it simply allows for local implementation of centrally determined policies.

To be clear, our characterization of cooperative federalism as "top-down" by no means implies that there is a lack of local autonomy with regard to policy, as perhaps top-down suggests in the context of unitary forms of government. In the context of the continental tradition of federalism, top-down policy directives and local implementation are the very hallmarks of this variety of federalism. As mentioned above, this implies that – from property taxation to land-use regulation – the federal government sets the parameters and the broad planning framework whereas the actual implementation occurs at the state or municipal level. In the case of the German spatial planning legislation as defined in the federal *Raumordnungsgesetz*, this top-down structure goes hand in hand with the legal obligation for each lower-level of government to actively participate in the creation of higher-level plans (this is the so-called, *Gegenstromprinzip* [lit. against-the-current principle]). By contrast, the marginal status of plans in U.S. zoning law creates the legal ability of local governments to ignore the regional impacts of their decisions.

Thus as a result of these different varieties of federalism, many European planning and sustainability processes have an integrated programmatic dimension with consequences for transportation planning, infrastructure planning (including energy planning) and environmental planning that is absent in the U.S. In Germany, for example, the notion of *Raumordnungsplanung* (literally, planning of the spatial order) rests on two interdependent pillars, a physical pillar and a socio-economic pillar. These pillars form an integrated policy framework with a highly coordinated division of labor between different levels of government. Spatial initiatives in transportation planning (e.g. the *Bundesverkehrswegplan*) or national infrastructure planning, for example, epitomize in detail how the complex interconnectedness between the social and economic is mirrored in physical planning efforts. Similar to spatial planning initiatives in Germany, Switzerland's new spatial planning program importantly relies on a clear division of labor between the federal government, states, and municipalities as well. Nonetheless, the degree of intergovernmental coordination found in all of these countries – not to mention the degree of sophistication with which it is both designed and analyzed – is lacking in the U.S., given the latter's use of federalism to check governmental power through separation rather than to improve governmental action through integration.

4.4 Judicial review

Finally, the primary distinction to be understood when using the term "judicial review" through cross-national comparison is this: In the U.S., the courts serve as the (self-appointed) guardians of individual rights guaranteed by the federal and state constitutions, particularly through the independent review of the substantive fairness of legislative and executive governmental actions (Ely, 1998).

In contrast, in Europe the courts serve to reconcile individual and community rights and obligations-including social obligations, primarily through the procedural review of legislative and administrative governmental actions (Tushnet, 2004). Ontologically, in the U.S. the courts can claim the final word on the substantive fairness of governmental action (as the guardians of individual liberties), while in Europe the courts yield to governmental (community) determinations on how best to reconcile individual and community rights and obligations, beyond ensuring procedural safeguards.

Not only is the U.S. system less coordinated and standardized in a hierarchical sense, there is also the fundamental question of legal uncertainty that emerges from the case law setting. Compared to a qualitatively different role of the European courts in a civil law setting, the regulatory powers and competencies of the government in the U.S. are always and everywhere subject to more extensive legal interpretation under the Anglo-American doctrine of judicial review and its common law traditions (e.g. in the recent resurgence of questions in the landmark takings verdict of *Kelo v. New London*) than in Germany (Alexander, 2003).

5 Conclusions

Americans and Europeans engage fundamentally different worldviews in approaching the task of promoting progress while reconciling harms, worldviews we trace to the different philosophical traditions underlying the American and European experiences, which we characterize as a Millian liberalism versus a Hegelian liberalism, respectively. These distinct worldviews persists in meaningful ways, despite recent assertions that a convergence is occurring in the conceptualization and practice of planning between the U.S. and Europe, fears characterized as the "socialization" of the U.S. and the "Americanization" of Europe in their respective approaches to planning, government, property rights, and so on.

Yet paradoxically, despite the perpetuation of a meaningful distinction in worldviews, and simultaneously despite significant *de jure* differences in the ways the U.S. and Western Continental Europe strike the balance between promoting progress and avoiding harms (particularly in the context of private property rights), the *de facto* differences may not be so great. Both countries, for example, significantly limit private property rights for the purpose of promoting some notion of the public good but both provide strong protections of property rights were property owners' reasonable development expectations have been unfairly frustrated.

Thus, when a German asserts that German notions of private property are strong, for example, she means "strong" within the circumscribing context of the recognized and accepted social obligations of property. Once a landowner has established reasonable expectations to use her land within that circumscribing context, she can expect that her rights will be protected by the state from being unreasonably frustrated. When a U.S. property owner asserts that property rights are strong, in contrast, it means that she presumes the ability to use her land unfettered by government unless there is some valid governmental purpose to regulate. Nonetheless, both legislatures and courts in the U.S. recognize a myriad of valid public purposes to regulate. Thus private property rights are "weak" in the U.S. to the extent that regulation happens while "strong" to the extent that the courts will safeguard those rights (only) when reasonable development expectations are frustrated.

In the end, the lesson to be learned is this: Beware of using the same (English) terms to describe the U.S. and Western Continental European experience. There exists a great deal of nuanced and subtle difference, such that understanding between the speaker and listener

(especially a speaker and listener approaching the conversation from two national cultures) is fraught with the potential for easily missed confusion born of only partial conveyance of meaning.

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