
The U.S. Regulatory Takings Debate Through an International Lens

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THE UNITED STATES LEADS THE WORLD in the complexity of its regulatory takings law, the amount of academic writing devoted to the topic, and the intensity of the surrounding public debate. This is one of the (ancillary) findings of a large-scale comparative study of regulatory takings law. A look from the “outside” may shed light on American takings law and the “property rights” debate. An international looking glass can allow both sides in this debate either to find alternative models to support their own position (with appropriate adjustments) or to develop middle-of-the road approaches towards a rapprochement in this long-raging contest.

In every country where land use regulations and development controls operate (the vast majority of countries today), they change the economic value of real property. The question addressed here focuses on the downwards effect—what Americans call “regulatory takings.” Do landowners have a right to claim compensation or some other remedies from the planning authorities? This topic addresses an inherent raw nerve of planning law and practice, bearing deep economic, social and ethical implications. However, not in every country does the issue generate the same intensity of legal and public debate as it does in the United States.

This article draws on the findings of comparative research encompassing thirteen countries around the world.¹ Readers of this Festschrift, who are acquainted with American takings law, will be able to view it from this new perspective. A comparative perspective can help to create a sense of scale and proportionality that conventional domestic legal analysis cannot offer.

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1. The detailed research findings and the detailed citation of legal sources are presented in my recently published book, RACHELLE ALTERMAN ET AL., *TAKINGS INTERNATIONAL: A COMPARATIVE PERSPECTIVE ON LAND USE REGULATIONS AND COMPENSATION RIGHTS* (2010).

I. The Dearth of Systematic Comparative Research on Regulatory Takings

Given the near-universality of the takings issue, one might have thought that the law of regulatory takings would be a prime topic for cross-national research. Surprisingly, an international survey of academic literature reports little comparative research on this topic.² The research project on which this paper is based is, to the best of my knowledge, the first large-scale comparative research that focuses specifically on regulatory takings. Interestingly, most of the other contributions, as well as the present one, were all published in the United States.

The seminal theoretical and comparative contribution that focuses directly on regulatory takings (as well as on the converse—value capture) covers five English-speaking countries with advanced economies (the UK, Canada, Australia, New Zealand, and the United States) and addresses both the upwards and the downwards effects of regulations on land values.³ The introductory chapter provides a now-classic framing of the issue, and the rest of the book analyzes selected instruments designed either to tame the negative impact of planning regulation or to capture the windfalls and redistribute them. A 2006 comparative work presents an in-depth study of constitutional property rights in three countries: the United States, Germany, and South Africa, with some discussion also devoted to Canada.⁴ Kotaka and Callies' edited volume (2002) is a comparative study covering ten Asian-Pacific countries that reports on expropriation (eminent domain) law and, for some of the countries, also on regulatory-takings law.⁵ A 2007 law review article analyzes three English-speaking countries: the United States, Canada, and Australia.⁶ Finally, Kushner's book is a collection of excerpts from previously-published papers on a wide variety of planning-law topics,

2. The survey of literature covers publications in the English language and partially in French as well.

3. WINDFALLS FOR WIPEOUTS: LAND VALUE RECAPTURE AND COMPENSATION (Donald G. Hagman & Dean J. Mischynski ed., 1978).

4. GREGORY S. ALEXANDER, *THE GLOBAL DEBATE OVER CONSTITUTIONAL PROPERTY: LESSONS FOR AMERICAN TAKINGS JURISPRUDENCE* (2006). Alexander's book focuses only on constitutional law, while in most countries regulatory takings law is largely governed by statutory law. This probably explains why Alexander's book does not focus on the law of regulatory takings, except in the discussion of the United States. See also ALTERMAN, *supra* note 1, at 75-89.

5. *TAKING LAND: COMPULSORY PURCHASE AND REGULATION IN ASIAN-PACIFIC COUNTRIES* (Tsuyoshi Kotaka & David L. Callies eds., 2002).

6. Donna R. Christie, *A Tale of Three Takings: Taking Analysis in Land Use Regulation in the United States, Australia, and Canada*, 32 *BROOK. J. INT'L L.* 345 (2007).

among them two brief items on regulatory takings outside the United States—one on Germany, and one comparing U.S. and Swiss law.⁷

Considering Europe's quest for a "single market" and the importance of the free movement of capital—including real estate investments—one would have expected that European scholars would study the similarities and differences in regulatory takings and compensation laws across Europe. Yet, there has been very little comparative research on regulatory takings among European countries.⁸ This is not because European countries have similar laws on regulatory takings (they don't); it is simply because in most European countries the issue is perceived as not very salient.

II. The Jurisdictions Selected and the Research Method

Thirteen countries were selected for comparative analysis. A large and varied sample of countries was necessary in order to avoid a predetermined focus on a particular model or on presumed convergences. In the absence of prior legal or social-science theory about hypothesized similarities and differences in regulatory takings laws, there was no room for any statistically valid random sampling of countries. Instead, a wide spectrum of countries was studied in order to span different approaches to regulatory takings.⁹

The common denominator for all countries chosen is a democratic system of government, a reasonably working and accountable public administration, and an advanced (or fast-emerging) economy.¹⁰ All the countries selected are members of the Organization of Economic Development and Cooperation and the sample represented approximately

7. JAMES A. KUSHNER, *COMPARATIVE URBAN PLANNING LAW* 163-96 (2003). Chapter seven is devoted to regulatory takings, but it is not a systematic, comparative analysis. The countries covered differ widely from topic to topic, according to the availability of published papers. The papers compare some aspect of American takings law with Italian, Swiss, German, or international law.

8. The major comparative project on planning law and institutions commissioned by the European Commission (1997-2000), hardly addresses regulatory takings. EUROPEAN UNION, *THE EU COMPENDIUM OF SPATIAL PLANNING SYSTEMS AND POLICIES* (1997, 2000). Schmidt-Eischstaed's 1995 book is another important comparative analysis of planning laws, but it too does not cover regulatory takings. *See* GERD SCHMIDT-EICHSTAEDT, *LAND USE PLANNING AND BUILDING PERMISSION IN THE EUROPEAN UNION* (1995).

9. My research was also confined to countries where I had located suitable scholars in the planning law field.

10. Developing countries were not included in this study because planning laws in most of those countries are often bypassed due to corruption or widespread noncompliance. Regulatory takings law, if it exists, is likely to be almost dormant (no claims filed). More onerous issues, such as outright condemnation of property, are in the forefront.

40% of all OECD members. The state of Oregon was added, in addition to the federal United States due to its unique story, so in total fourteen jurisdictions were analyzed.

Beyond the predetermined common denominator, a variety of countries were included in the sample based on four variables: (1) representation of both major, Western families of law (common and civil law); (2) global geographic location; (3) sovereignty system (unitary or federal); and (4) cultural-language groups affiliation. To represent the two major legal traditions, the sample includes five common-law countries: the UK, Canada, Australia, the United States, and Israel¹¹ and eight civil-law countries: Netherlands, France, Sweden, Finland, Germany, Austria, Greece, and Poland. Because Europe encompasses the majority of the world's democratic, advanced-economy countries, nine of the thirteen countries are part of Europe. The sample includes both federal countries (the United States, Canada, Germany, Austria, and Australia)¹² and unitary ones (the other eight). There are also several cultural-language groupings (for example, the United States and Canada, or all four English speaking countries; Germany and Austria, Sweden and Finland, and to some extent also the Netherlands, Germany and Sweden). Some countries are culturally stand-alones: France, Greece, Poland and Israel.

Analysis of the laws of thirteen countries is beyond the capacity of a single researcher. There are also language barriers, for example—none of the non-English speaking countries in the sample offers translations into English of court decisions in the planning area and only a few translated their planning legislation into English. Therefore, for each of the candidate countries, leading experts on planning law provided a

11. Israel is regarded by comparative-law scholars as a mixed system, but with strong attributes of the common law tradition. On the one hand, precedence is a major source of the law and common law is still prominent in a few areas; on the other hand, statutory law is dominant in most fields of law today. *See* MARY ANN GLENDON, PAOLO G. CAROZZA & COLIN B. PICKER, *COMPARATIVE LEGAL TRADITIONS: TEXT, MATERIALS, AND CASES ON WESTERN LAW* 948, 976-82 (2007) (discussing mixed jurisdictions in general, and Israel). In the field of planning law, the British influence dates back to the British Mandate on Palestine from 1921 to 1948. The planning law is a direct derivative of legislation enacted during that time.

12. In the United States, Canada, and Germany, the federal level is the most important for regulatory takings law. Therefore, the analysis of these countries focused on the federal level. Austria does not have any overarching federal body of law on regulatory takings and each of the nine states in this small country has its own statutory law which differs from the other states. In Australia, in addition to federal-level constitutional law, state statutes are very important in takings law. We chose the state of New South Wales for analysis.

detailed analysis of their country's laws and practices on regulatory takings. To enable rigorous comparative analysis, a set of detailed guidelines were developed and tested based on a series of scenarios. The challenge of bringing the parallel analysis of all the countries onto a common platform was not easy. The details of the takings law in each country are complex and nuanced, and require in-depth knowledge of each country's law, jurisprudence, and practices. Often, what a particular author assumed to be easily understandable to readers from other countries was in fact quite opaque and at times even of opposite meaning. We worked hard to provide enough contextual information so that readers from other countries would understand the implications of a particular law or institution.

III. The Scope of the Research and the Categories of Regulatory Takings

In this research, one overarching question was asked and then divided into several conceptual sub-categories. The overall research question is:

Under each country's laws, do landowners¹³ have the right to claim compensation (or some other remedy) when a government decision related to planning, zoning or development control causes a reduction in property values? If so, what are the legal and factual conditions that a landowner must meet to claim compensation? And how extensive are such claims in practice?

As this question indicates, this study does not cover all conceivable types of regulations that may injure property values. The study focuses only on land-use related regulations. The law of eminent domain or physical takings also falls outside this study. Topics such as exactions and negotiated agreements are also beyond the scope of this research, and deserve comparative analysis.¹⁴ However, the jittery seam line between regulatory takings and eminent domain is included because it is a legal issue in many countries.

As every land use lawyer knows, regulatory takings are not a monolithic concept and have many variations. The international literature has yet to develop a general conceptual categorization. For the comparative study, regulatory takings were classified into three main types: (1) major takings, (2) partial takings with direct injuries, (3) partial takings with indirect injuries. This last type was further divided into

13. Or holders of lesser property rights; countries differ on this question.

14. See PRIVATE SUPPLY OF PUBLIC SERVICES: EVALUATION OF REAL ESTATE EX-ACTIONS, LINKAGE, AND ALTERNATIVE LAND POLICIES (Rachelle Alterman ed., 1988) (including a comparative analysis of exactions in a few countries).

(a) partial takings with the indirect injuries caused by public development and (b) partial takings with the indirect injuries caused by private development.

A. *Major Takings vs. Partial Takings*

“Major takings” refer to situations where regulation extinguishes all or nearly all of the property’s value. Different countries use different terms for this situation.¹⁵ In U.S. jurisprudence (only), major takings are known as a “categorical” or “*per se*” takings.¹⁶ In Canada, a major taking is sometimes called “constructive expropriation,”¹⁷ while in the UK it is called “planning blight.” In Greece it may be termed “de facto expropriation”; in Poland, “planning expropriation”; in Switzerland “material expropriation.”¹⁸ The term “major takings” was selected because it is intuitively understandable and is distinct from expropriation. “Major takings” was used rather than “full takings” as the natural antonym to “partial takings” because it might be confused with a physical taking or taking of title, whereas in all the jurisdictions studied, including the United States, there is a legal line drawn somewhere between a physical or title taking on the one hand and a regulatory taking on the other. All thirteen countries in this study do provide for some remedy in cases of major takings, but the threshold, contexts, procedures, and remedies vary significantly among the countries.

15. I have translated the non-English terms literally. For detailed analysis see Rachel Alterman, *Comparative Analysis: A Platform for Cross-National Learning*, in TAKINGS INTERNATIONAL: A COMPARATIVE PERSPECTIVE ON LAND USE REGULATIONS AND COMPENSATION RIGHTS 21-74 (2010).

16. See Thomas E. Roberts, *United States*, in TAKINGS INTERNATIONAL: A COMPARATIVE PERSPECTIVE ON LAND USE REGULATIONS AND COMPENSATION RIGHTS 215-28 (2010). For more information, look to any text on takings in an American land use law, for example: DAVID L. CALLIES, ROBERT H. FREILICH, & THOMAS E. ROBERT, CASES AND MATERIAL ON LAND USE 334 (4th ed., 2004). U.S. case law also recognizes a second type of categorical taking—a physical taking—but this is not relevant here. American jurisprudence draws a clear distinction between regulatory and physical takings and different principles apply. See Thomas E. Roberts, *Tahoe-Sierra and Takings Law*, in TAKING SIDES ON TAKINGS ISSUES: THE IMPACT OF TAHOE-SIERRA 5-14 (Thomas E. Roberts ed., 2003).

17. See Raymond E. Young, *Canadian Law of Constructive Expropriation*, 68 SASK. L. REV. 345 (2005). The Canadian Supreme Court too has used the term “de facto expropriation”. *Canadian Pac. Ry. Co. v. City of Vancouver*, [2006] 1 S.C.R. 227, 2006 SCC 5 (Can.), available at <http://scc.lexum.umontreal.ca/en/2006/2006scc5/2006scc5.pdf>.

18. Switzerland is not included in this book. See Enrico Riva, *Regulatory Takings in American Law and “Material Expropriation” in Swiss Law—A Comparison of the Applicable Standards*, in COMPARATIVE URBAN PLANNING LAW, 167-73 (James A. Kushner ed., 2003) (1984).

B. *Direct vs. Indirect Injuries*

The second and third types of takings are both “partial.” They both refer to situations where property values suffer only a small or moderate decline. Where partial takings are concerned, there is much less convergence among the countries. The degree of compensation rights granted for partial injuries is therefore a much better “litmus test” than major takings for ranking the countries along the “scale” of compensation rights, as will be presented below.

The distinction between direct and indirect injuries is much less familiar to American readers. Direct injuries are caused by regulatory decisions that apply to the same plot of land that suffers the depreciation. This is the usual way in which regulatory takings are conceived. Indirect injuries conjure up a very different concept. They refer to regulatory decisions that apply to plots of land *other* than the ones suffering the depreciation. Indirect injuries arise from actual or anticipated negative externalities which cause depreciation in the value of a neighboring property. The legally recognized degree of geographic proximity between the cause and effect differs among countries. Indirect injuries often conjure up issues of distributive justice because their context is inherently unequal: Land plots that have gained more development rights cause the depreciation of other plots.

The concept of indirect injuries naturally brings to mind the law of damages. In a few countries, some types of damages from externalities caused by government regulation are also actionable under nuisance law. However, this study addresses only the realm of public law because it, and not torts law, is at the center of public debate about property rights.

More jurisdictions in the sample recognize the right to compensation for direct injuries than for indirect ones. This does not indicate that indirect injuries are necessarily of lesser economic impact. For landowners, indirect injuries may be substantial. In the few countries where there are broad compensation rights for indirect injuries, such rights are responsible for many claims and a heavy burden on public finances. In determining the rank-order of the countries this study took into account not only the law on direct injuries but also on indirect ones.

C. *Publicly-Caused vs. Privately-Caused Indirect Injuries*

Indirect injuries may be caused either by *developers of public infrastructure* or by *developers of private-type land uses*. Although these categories have a fuzzy conceptual boundary, the laws in some countries do

make this distinction (applying somewhat different definitions). More countries grant compensation rights for indirect injuries stemming from government approval of public infrastructure (such as public roads, railways and airports) than from approval of private-type development. The latter category is fully recognized as compensable in only two countries in the sample, not including the USA. In these two countries, claims for indirect privately caused takings represent a major part of all compensation claims.

IV. A Comparative “Scale” of Compensation Rights

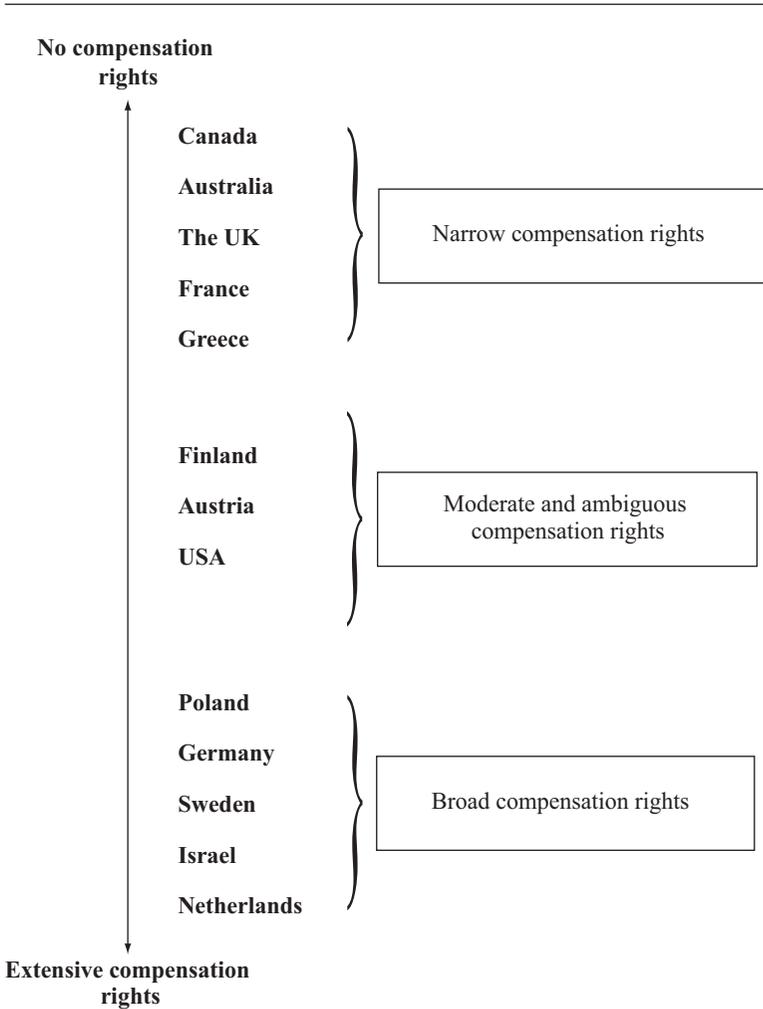
The findings show that there is no universally consensual approach, nor even a dominant approach. The differences are multi-dimensional¹⁹: they fall along each of the categories of regulatory takings defined above. In addition, there are many seemingly minor differences that may have great impact on whether a landowner has grounds for a compensation claim and the chances of winning one. Such differences (not all discussed here) include the eligible types of tenure, the breadth of types of government decision that may trigger a takings claim, time limits of various kinds, and procedural accessibility factors.

The current U.S. property rights debate should be viewed as focusing not on a binary “yes” or “no” but on degree. The debate is about the appropriate balance between unimpeded government policy and unbridled private property rights, but there are great disparities in the balance points deemed appropriate. The laws of the counties studied can be roughly ranked on a scale of compensation rights (see Figure 1). On one extreme edge of the scale there are “no compensation rights” at all. On the other extreme are “extensive compensation rights” for every imaginable type of regulatory injury to real property. In order to place the different countries along the scale, each country’s relative position with respect to the various categories of takings law and the nuanced details and conditions were merged into a single dimension along the scale.

No country in the sample falls at either extreme, but some countries’ laws come close to one of the two edges. The set of countries represents a broad spectrum of compensation rights. Each country’s set of laws and policies differs significantly from every other’s equivalent set. There was no difficulty in grouping the countries into three sets and in placing

19. A detailed analysis of the differences is presented in ALTERMAN, *supra* note 1, at 1-90.

Figure 1.



them on the scale: (1) countries with “narrow compensation rights”; (2) countries with “moderate or ambiguous compensation rights”; and (3) countries with “broad compensation rights.” However, the internal order on the scale within each group is not cast in stone.

The five countries in the group of “narrow compensation rights” recognize only major takings. The internal ordering takes into account the different degrees of compensation rights for major injuries. The most extreme “no compensation” country, Canada, barely recognizes even major takings as compensable, while the other four countries recognize such takings as compensable in different degrees and situations.

The group at the opposite side of the scale, the “extensive compensation rights” group, includes five countries. These offer compensation rights not only for major takings but also for a broad range of partial injuries. The ordering of the countries along the scale is based on the degree of additional constraints placed on partial takings claims, such as the threshold level of injury, the range of compensable government decisions and time limits. The two countries with the most generous compensation rights in the entire set—Israel and the Netherlands—could also be placed in a group of their own because they are the only ones that recognize broad categories of indirect injuries—including those caused by private developers. These two countries also set a very low threshold requirement for compensation and encompass a broad range of government land-use decisions.

The countries in the middle category, which include the United States, are characterized by legal uncertainty or inconsistency. They do offer remedies for major injuries, but regarding partial injuries their laws are unclear or inconsistent.

V. Constitutional Protection of Property Rights and Its Relationship with Regulatory Takings Law

An obvious question is whether property rights are constitutionally protected in each of the countries and how this is expressed in takings law. In all the sample countries except the United States²⁰ there is a statutory law that defines regulatory takings, sets out the types that are compensable, details the procedural rules, etc. Most of the countries in the set do have constitutional protection of property rights, yet statutory laws about regulatory takings have been enacted whether or not property rights are constitutionalized. Statutory laws intermediate between takings law and constitutional law. The question is whether one can discern a relationship between the degree of constitutional protection of property and the contents of statutory law and its interpretation by the courts.

The findings indicate that the differences among the thirteen countries in the law of regulatory takings are only partially attributable to

20. A small minority of U.S. states have enacted statutes that grant statutory causes of action for a limited set of partial takings. These statutes have had a limited effect—excepting Measure 37 in Oregon until it was repealed. See Roberts, *supra* note 16, at 215-28. See generally Joni Armstrong Coffey, *High Hopes, Hollow Harvest: State Remedies for Partial Regulatory Takings*, 39 URB. LAW. 619-32 (2007); Stacey S. White, *State Property Rights Laws: Recent Impacts and Future Implications*, LAND USE L. & ZONING DIG., July 2000.

the specific language of the constitutional protection of property.²¹ Such protection usually allows a wide margin of tolerance not only for differences in the law on regulatory takings, but to some extent even on expropriation (condemnation) law.²²

These findings are not intuitively understandable. The comparative analysis shows that there is only a partial and uni-directional link between the constitutional standing of property and regulatory takings law. Such a link is visible only among the three countries where property is *not* constitutionalized—Canada,²³ the UK²⁴ and Australia.²⁵ The laws of these three countries grant only minimal compensation rights for regulatory injuries. Even this uni-directional relationship has an exception: Israeli law has been granting landowners extensive compensation rights as a result of case law delivered before constitutional protection of property was enacted in 1992.

The reverse relationship, where property rights *are* constitutionalized, is weaker. Ten countries in the set have constitutions that protect property. Yet these countries' regulatory takings law covers almost the full spectrum of degrees of compensation rights (except for the most extreme non-compensable position). Obviously, statutory law and case law have created the differences among these countries' regulatory takings laws over the years. France²⁶ has a famous and old legacy of constitutional protection of property,²⁷ yet offers a very low degree of

21. For country-specific analysis, see ALTERMAN, *supra* note 1, at 24-35.

22. See ALEXANDER, *supra* note 4.

23. See Bryan P. Schwartz & Melanie R. Bueckert, *Canada*, in TAKINGS INTERNATIONAL: A COMPARATIVE PERSPECTIVE ON LAND USE REGULATIONS AND COMPENSATION RIGHTS 93-106 (2010).

24. The UK does not have a written constitution. Like all other European countries, the UK comes under the European Convention on Human Rights—see *infra*. In 1998 the UK enacted the Human Rights Act, which brought into force most of the rights set out in the Convention. However, if a government authority is obliged to act in a certain way according to primary legislation—such as the planning act—this action would not be unlawful under UK law. See Michael Purdue, *United Kingdom*, in TAKINGS INTERNATIONAL: A COMPARATIVE PERSPECTIVE ON LAND USE REGULATIONS AND COMPENSATION RIGHTS 119-37 (2010).

25. Australia's constitutional property protection is indirect and weak in that it only empowers parliament to make laws "with respect to the acquisition of property on just terms." See my comparative constitutional analysis on Cluster 1 countries in ALTERMAN, *supra* note 1, at 27-30; see also John Sheehan, *Australia*, in TAKINGS INTERNATIONAL: A COMPARATIVE PERSPECTIVE ON LAND USE REGULATIONS AND COMPENSATION RIGHTS 107-18 (2010).

26. See Vincent A. Renard, *France*, in TAKINGS INTERNATIONAL: A COMPARATIVE PERSPECTIVE ON LAND USE REGULATIONS AND COMPENSATION RIGHTS 139-48 (2010).

27. For a comparative constitutional analysis on Cluster 1 countries, see ALTERMAN, *supra* note 1, at 27-30.

compensation rights for regulatory injuries, to the extent that French planning legislation says explicitly that compensation *may not be paid* for regulatory injuries. Greece²⁸ grant only minimal compensation rights for regulatory takings, and Finland²⁹ grants only modest and uncertain rights, yet both countries' constitutions do have a protection clause.

At the other end of the spectrum are the five countries with extensive compensation rights, including for partial takings (in ascending order—Poland, Germany, Sweden, Israel and the Netherlands). It is difficult to account for the extensive compensation rights in this cluster or for the differences within the group of countries based on the language of their constitutional property protection.

One of the most interesting findings about the relationship between constitutional law and takings law concerns the nine European countries in the sample. They are all bound by an additional, supra-national constitutional layer—the European Convention on Human Rights and Fundamental Freedoms (ECHR) of 1950. Article 1 of the First Protocol of ECHR provides for property protection, but qualifies it “with the general interest.”³⁰ Yet this shared constitutional canopy has not brought about a significant convergence in the regulatory takings law of these nine countries, except to rule that extreme cases of major takings should be compensated or remedied in other ways.³¹ The “general interest” clause has not visibly affected the domestic takings laws, and four among the nine European countries do grant extensive compensation rights for regulatory takings, including partial takings.

28. See Georgia Giannakourou & Evangelia Balla, *Greece*, in TAKINGS INTERNATIONAL: A COMPARATIVE PERSPECTIVE ON LAND USE REGULATIONS AND COMPENSATION RIGHTS 149-67 (2010).

29. See Katri Nuuja & Kauko Viitanen, *Finland*, in TAKINGS INTERNATIONAL: A COMPARATIVE PERSPECTIVE ON LAND USE REGULATIONS AND COMPENSATION RIGHTS 171-94 (2010).

30. Protocol 1, Article 1 says:

Every natural or legal person is entitled to the peaceful enjoyment of his possessions. No one shall be deprived of his possessions except in the public interest and subject to the conditions provided for by law and by the general principles of international law. The preceding provisions shall not, however, in any way impair the right of a State to enforce such laws as it deems necessary to control the use of property in accordance with the general interest or to secure the payment of taxes or other contributions or penalties.

Protocol to the Convention for the Protection of Human Rights and Fundamental Freedoms as amended by Protocol No. 11, Mar. 20, 1952, Fr., available at <http://conventions.coe.int/treaty/en/Treaties/Html/009.htm>.

31. For a more detailed discussion see ALTERMAN, *supra* note 1, at 26-27, 84.

VI. The Features of U.S. Takings Law from a Comparative Perspective

A comparative analysis highlights several aspects of U.S. law on regulatory takings. These are: the mid-way position along the scale, the absence of statutory law to mediate and the direct application of constitutional law, several unique attributes of U.S. takings law, the intensity of the property rights debate, and the paradox of extensive scholarly analysis.

A. *The Mid-Range Position Along the Scale*

When viewed from a cross-national perspective, the most striking finding about U.S. regulatory takings law is the glaring disparity between the intensity of the “property rights debate” and the factual positioning of U.S. takings law midway along the “scale” of degree of compensation rights for regulatory takings.

U.S. takings law holds a middle seat both on major takings (known as “categorical” in the United States) and on partial takings.³² On major takings, U.S. law is more or less in line with the majority of countries studied. In some ways, U.S. law is tougher on landowners by setting conditions that are difficult to meet. In other ways, U.S. law is more generous. On partial takings, too, U.S. law is mid-scale, joining half of the set of countries where partial injuries are compensable to some extent. But unlike its image, U.S. law places a high quantitative threshold for partial claims as well as various preconditions that make it difficult for American landowners to win challenges for partial takings (except for a few state-law exceptions). The third type of taking—indirect injuries—is not recognized in U.S. law at all, not even for indirect injuries induced by public infrastructure. On many other counts, it is fair to say that U.S. takings law is also highly “ambiguous” and uncertain.

B. *The Unmediated Application of Constitutional Law and the High Level of Uncertainty*

Another key difference between the United States and the other countries studied is the prominent role played by constitutional law. In most other jurisdictions in this study, statutory law (whether on the national or sub-national levels) is a key player in takings law. Only in the United States is takings law decided largely by direct application of

32. For a concise summary of U.S. takings law formatted for comparative analysis see Roberts, *supra* note 16, at 215-27.

the Constitution. In the few states where there are “regulatory takings statutes”—Oregon excepted—these laws add only minor causes of action beyond constitutional law.³³

In interpreting the constitution, the U.S. Supreme Court has refrained from making “bright line” rules, leaving many legal issues to be decided through case-by-case determination.³⁴ The result is that U.S. takings law is characterized by a high degree of uncertainty that both landowners and government agencies face whenever regulatory takings are challenged in the courts.³⁵ After many decades and a large body of jurisprudence, there are even some fundamental questions unresolved.³⁶

In two more countries in the sample—Finland and Austria—a high degree of legal uncertainty still prevails. However, in these two countries, the reason for the uncertainty is that there have been very few claims and hardly any jurisprudence to interpret the language of the statute or its relationship with the constitution. The unique feature of U.S. takings law is that high legal uncertainty persists despite a huge body of jurisprudence extending over almost nine decades. (The number of Supreme Court decisions on regulatory takings, however, is not high in comparative terms).

33. Most of the state statutes only required government agencies to conduct a takings assessment prior to adopting a regulation, or to institute conflict resolution measures. The only exceptions are Florida and Oregon—and the record there too is disappointing for the proponents of property rights. See Stacey S. White, *State Property Rights Laws: Recent Impacts and Future Implications*, LAND USE L. & ZONING DIG., (July 2000); JOHN D. ECHEVERRIA & THEKLA A. HANSEN-YOUNG, THE TRACK RECORD ON TAKINGS LEGISLATION: LESSONS FROM DEMOCRACY’S LABORATORIES (2008), available at <http://www.law.georgetown.edu/gelpi/TrackRecord.pdf>. Regarding Florida, see Joni Armstrong Coffey, *High Hopes, Hollow Harvest: State Remedies for Partial Regulatory Takings*, 39 URB. LAW. 619, 619-32 (2007).

34. See Roberts, *supra* note 16, at 215-27; see also *infra* note 51.

35. Many American authors make a similar point regarding insufficient clarity and inconsistencies. See, e.g., CALLIES ET AL., *supra* note 16, at 380; see also Edward J. Sullivan & Kelly D. Connor, *Making the Continent Safe for Investors—NAFTA and the Takings Clause of the Fifth Amendment of the American Constitution*, in CURRENT TRENDS AND PRACTICAL STRATEGIES IN LAND USE LAW AND ZONING 47-83 (Patricia E. Salkin, ed., American Bar Association, 2004). Sullivan and Connor argue that the degree of certainty and uniformity intended by the Federal Constitution has not been accomplished in the field of takings law. *Id.* at 67.

36. One example is the basic question of whether “the character or extent of the government action”—that is, whether the public purpose or public gain should be weighed against the private loss. One would have thought that after so many decades of jurisprudence a question so fundamental to determine the underlying rationale of regulatory takings would have been settled. *Lingle v. Chevron U.S.A., Inc.*, 544 U.S. 528 (2005) is deemed by many legal analysts to have provided a clear negative answer. See, e.g., Roberts, *supra* note 16, at 215-27. However, even after this Supreme Court decision, some scholars remain dubious. See Michael E. Lewyn, *Character Counts: The “Character of the Government Action” in Regulatory Takings Actions*, 40 SETON HALL L. REV. 597, 597-637 (2010).

C. *Several Other Unique Specifics of U.S. Takings Law*

On several counts, U.S. regulatory takings law is more generous to landowners than the laws of most other countries in the set. While these aspects may expand the causes of action, they do not raise significantly the chances of winning a takings claim.

First, for the most part, takings claims in the other countries can only be made when a government body *changes* an existing land use regulation to a *more restrictive* category.³⁷ Owners of farmland, environmentally regulated open space, or even vacant land that generates no income, cannot demand that the land be rezoned for a more lucrative use. The United States is the only country studied where *refusals to upzone* or to grant a development permit can (theoretically) serve as grounds for a taking challenge.³⁸ Although a challenge on these grounds is very difficult to win, the threat of one lurks in the background when policymakers in the United States decide, for example, to institute an exclusive farmland zone.

Second, in most countries, regulatory takings, especially partial takings, are not an open-ended concept; a statute usually defines a limited set of government decisions which may entail compensation. The historic as well as the current core of compensable decisions in most countries revolves around “classic” land use planning and zoning (not even all types of potentially injurious land-use decisions are necessarily included). For example, some environmental regulations may not be compensable. In the United States, because takings law is largely constitutional law, unmediated by statutory law, a regulatory taking may be ruled against any government decision, at any level and jurisdiction, and on any substantive topic. In the words of Justice Scalia, “[t]he Takings Clause . . . is not addressed to the action of a specific branch or branches. It is concerned simply with the act and not with the

37. The exceptions are Finland and Greece. In both countries, the traditional law that applied to rural areas outside urban zones included, as part of property law, the right to build housing units within some limitations. The exercise of these rights, however, is fast shrinking when it is overridden either by urban zones or by declaration of environmentally protected rural zones. For Finland, see Katri Juuja & Kauko Viitanen, *supra* note 29, at 171-94; for Greece, see Georgia Giannakourou & Evangelia Balla, *supra* note 28, at 146-67.

38. See *Tahoe-Sierra Pres. Council, Inc. v. Tahoe Reg'l Planning Agency*, 535 U.S. 302 (2002).

government actor.³⁹ According to this view, even decisions of the judicial arm itself may constitute a taking.⁴⁰

D. *The Intensity of the Property Rights Debate*

Perhaps the most prominent feature of U.S. takings law is the intensity of the debate surrounding it.⁴¹ An outside observer listening to the fervor of the arguments on both sides would get the impression that U.S. law is extreme (on either side). The arguments of proponents of the “property-rights movement” would lead one to think that U.S. law denies remedies even for major takings, while the arguments of spokespersons for the social-function view of property would lead one to assume that U.S. takings law grants very generous compensation rights in cases of partial and indirect takings with a low threshold level of injury. In no other country in the sample has the issue of regulatory takings occupied a similarly prominent position in public opinion. In no other country has the issue of regulatory takings become a major topic in national (or state) elections. In no other country has public opinion led to a legislative saga such as Oregon’s extremist Measure 37 and then to its quick demise within only three years. Interestingly, in most other countries, the relatively docile status of the takings issue exists regardless of the position occupied by that country’s takings laws on the compensation rights scale: whether on the very restrictive side (Canada, Australia, the UK, France, or Greece); or on the broad-rights side (Poland, Germany, Sweden, the Netherlands, and Israel). The regulatory takings issue simply does not capture the interest of voters, politicians, and scholars as much as it does in the United States.

39. *Stop the Beach Renourishment, Inc. v. Fla. Dep’t of Env’tl. Prot.*, 130 S. Ct. 2592, 2601 (2010).

40. As an outsider I find this analysis surprising. I wonder what other countries’ courts might reach a similar conclusion instead of simply reversing the decision of the lower court.

41. The debate has produced many books and papers on both sides, often with vivid titles. On the property protection side, see LAND RIGHTS: THE 1990S’ PROPERTY RIGHTS REBELLION (1995). On the property protection side, see WILLIAM FISCHER, REGULATORY TAKINGS: LAW ECONOMICS AND POLITICS (1995); E. Donald Elliott, *How Takings Legislation Could Improve Environmental Regulation*, 38 WM. & MARY L. REV. 1177, 1178 (1997). On the liberal, social-view side, see, e.g., LET THE PEOPLE JUDGE: WISE USE AND THE PRIVATE PROPERTY RIGHTS MOVEMENT (John Echeverria & Raymond Booth Eby eds., 1995); HARVEY M. JACOBS, STATE PROPERTY RIGHTS LAWS: THE IMPACTS OF THOSE LAWS ON MY LAND (1999); WHO OWNS AMERICA? SOCIAL CONFLICT OVER PROPERTY RIGHTS (Harvey M. Jacobs ed., 1998). Many other scholars have criticized the legislative initiatives of the property rights movement. See Glenn Sugameli, *Takings Bills Threaten Private Property, People, and the Environment*, 8 FORDHAM ENVTL. L. REV. 521, 567-80 (1997).

E. *The Paradox of Scholarly Research*

The combination of intensive public debate, the dependence of takings law on direct constitutional analysis, and the high level of legal uncertainty have generated what is by far the largest body of scholarly research and publications on regulatory takings anywhere in the world. A Lexis Nexis search using the terms “regulatory takings” together with “land use” yielded a larger number of items than the program was able to report. In total there are probably thousands of scholarly papers and hundreds of books that discuss the “takings issue.” This body of publications is several times larger than all the scholarly writing on the topic in all other countries and languages combined. Every new Supreme Court decision generates scores, sometimes hundreds, of scholarly publications. Beyond quantity, this body of publications, as a whole, is characterized by a high analytical level, cross-disciplinarity, and innovation not encountered in other countries.

The paradox is that this huge body of knowledge has not contributed to the reduction of uncertainty but in some ways, to the contrary. Much of the scholarly analysis takes one or the other side in the debate and is “colored” by it. The result is that the immense body of superb scholarly analysis has not dissipated the persistent uncertainties inherent to U.S. regulatory takings law; the reverse might be true.

F. *Oregon’s Measure 37 from a Comparative Perspective*

The hyperactive rise and demise of Oregon’s Measure 37 deserves special analysis. It is a tale with no counterparts anywhere else in the world. It is indicative of the volatility of the property rights debate in the United States and thus deserves a closer look from a cross-national perspective. This rather strange piece of legislation was enacted in 2004 as a citizen-ballot initiative.⁴² It soon turned out to be so unworkable that it was replaced in 2007 by Measure 49. The latter Measure too has no international counterparts in takings law—neither in the statute’s excessive length nor in its complexity. The assortment of remedies enabled by Measure 49—many of them in kind rather than financial—has no apparent connecting rationale except for the desire to patch the wounds created by Measure 37.

From an international perspective, the unworkable aspects of Measure 37 were not simply the notion that landowners have the right to

42. None of the statutes in the other countries in this research were born of direct citizen ballot initiatives. In most countries there is no such procedure.

compensation for partial takings. As reported above, there are legal regimes where some types of partial takings are compensable. These regimes do seem to “work” reasonably and are sustainable for decades as long as there is a reasonable rationale, appropriate boundaries, and logical sieves. In three of the countries (Germany, the Netherlands, and Israel) there was at one point in their history a need for legislative revision to cool down excessive and burdensome claims, but nowhere does one encounter a dramatic turnabout like that in Oregon.

From its inception, Measure 37 lacked appropriate rationale, boundaries, or sieves. Seven attributes of Measure 37 are out of line with all or most of the other jurisdictions in this study. First, Measure 37 was deeply retroactive, unlike any other legislation in this study. Oregonians had the right to claim compensation for regulations approved all the way back to 1950, as a one-time opportunity which lasted for two years. This meant that more than a half-century-worth of claims would be piled onto a population of “innocent” taxpayers who happened to be residents of Oregon in 2004. One does not need to be a prophet to know that this is neither workable nor just. Second, the statute did not set any threshold for the level of injury that would be compensable. By comparison, even in those countries with the most generous compensation rights, there is either a quantitative threshold or a qualitative threshold to represent “reasonableness,” “social contribution,” or “justice.” Third, legislators went out of their way to remove most legal-administrative burdens and costs for landowners. Thus, even transaction costs—effective in some jurisdictions in cooling down claims fever—were absent in Measure 37. The costs of processing claims were placed largely on the taxpayers. In contrast, the two other countries where the number of claims became burdensome—Israel and the Netherlands—both imposed an administrative fee on claimants. Fourth, the statute defined as compensable any regulatory decision on any land use subject, up to the state level. There is no precedent for this degree of breadth among the sample of countries. Fifth, the statute limited the right to claim compensation to property that has “stayed in the family.” This condition too has no kin among the laws of the other jurisdictions. It was intended to narrow the circle of potential claimants, but left the statute lacking a reliable across-the-board criterion. Instead, each case history had to become clan history and planners and land appraisers had to become amateur genealogists.⁴³ Sixth, Measure 37 did not require that

43. Edward J. Sullivan, *Year Zero: The Aftermath of Measure 37*, 36 ENVTL. L. 131 (2006).

landowners take responsibility to minimize the damage, not even in the form of the “investment-backed expectations” criterion of U.S. constitutional takings jurisprudence. This meant that Oregonians could “sit” on their development rights for decades, but when these rights would be restricted, the landowners could ask the taxpayers to compensate them for their loss. This blank-check policy is out of line even with countries with generous compensation rights such as Germany, Sweden, and the Netherlands. In these jurisdictions, landowners are expected to share the risks (in different ways). Only Israeli law is similar to Oregon’s on this point, and it has proven to be similarly unworkable and is now before parliament for revision. Finally, the fatal difference between Measure 37 and all other countries’ laws was Measure 37’s “about turn” clause. It gave the authorities open-ended powers to grant an exception to those who submitted a claim, instead of paying compensation.⁴⁴ No other country’s statutes provide such an unabashed waiver of the need to justify a retraction from public policy simply because of financial costs. The predictable effect of this clause was that almost no claims were actually paid, while a large number of development proposals that would have previously been rejected or modified were granted development permits. Thus, during Measure 37’s life, Oregon’s famous land use and environmental policies regressed. To an outsider looking at the saga of Measure 37, it is not surprising that this statute did not survive infancy and had to be followed by Measure 49—a strange spare-parts sibling.

VII. The Mutual Images of Americans and Europeans

In academic and professional discussions one sometimes encounters Europeans referring to the “American approach” to property rights, and conversely—Americans who contrast their own approach with the “European Approach.” The comparative research shows that these views are no more than legal stereotypes. The two images parallel the two sides of the philosophical debate on property rights. Many European practitioners and scholars imagine that U.S. law is extremely protective of property, especially real property, rights.⁴⁵ They assume that takings law would offer landowners extensive protection from downzoning

44. See William K. Jaeger, *The Effects of Land-Use Regulations on Property Values*, 36 ENVTL. L. 105 (2006).

45. Thomas Roberts, the author of the U.S. chapter, is well aware of this false image, and points it out. See Roberts, *supra* note 16, at 215-28.

and generous compensation rights. On the American side, one often encounters the assumption that there is a “European approach” to real property law, that this approach is grounded in the social view of property, and that it grants lesser protection of property rights in case of regulatory takings than U.S. law.

The evidence from the thirteen-country study shows that both images are far from accurate (they may or may not hold for other spheres of property law). There is no “European approach” to regulatory takings. This holds despite the fact that all the European countries in this study come under the ECHR’s constitutional canopy and are members of the European Union. The laws and practices of the nine European countries differ so greatly from each other that a “Euro-blind” reader may not have guessed their joint affiliation. As noted above, the canopy of the ECHR constitutional law has shown high tolerance for the variety of interpretations of regulatory takings law. The effect of ECHR jurisprudence so far has been modest: It has pared down only the extremities on the non-compensation side, but has not influenced the countries whose laws fall anywhere on the scale except for the very extreme edge of “no compensation rights.”

The comparative findings also show that there is no unitary “British approach” to contrast with the U.S. approach. The four countries with British law in their background—the UK, Canada, Australia, and Israel—span the two extremes on takings law: Canada on one side (extremely restrictive) and Israel on the other (excessive compensation rights). Today, there are not many similarities among these countries’ laws on takings.

VIII. Possible Models for Cross-Learning

Measure 37 is probably not the last time that proponents of property rights in the United States will propose takings statutes. At the same time, opponents of the property rights movement may wish to consider state-level statutory initiatives of their own with the purpose of helping to reduce the high degree of uncertainty that characterizes American takings jurisprudence as long as constitutional law is unmediated by statutory law. Within the federal structure of the United States there is much more room for “experimentation” among the fifty states than in unitary countries.⁴⁶

46. Although Germany too is federal, planning law is largely a national-level competence.

Both sides in the debate may find useful models among the countries surveyed in this study. The advantage of such models over start-up constructs such as Measure 37 is that the other countries' models operate in "real life"—for better or for worse—and can be studied and evaluated. Of course, transplantations of laws or policies into other legal-administrative and socio-cultural contexts are a risky business. At the same time, the survey of a large variety of legal models presented here may help to stimulate new ideas on both sides of the debate.

A. *Models for the Social View Side*

Proponents of the no-compensation doctrine can find an assortment of approaches among the countries surveyed. The cluster of countries on the no-compensation side of the spectrum includes Canada, Australia, the UK, France, and Greece. Among these, the UK is the most relevant. Greece is unsuitable because its law on regulatory takings lacks internal consistency, and poor administrative practices have made its laws dysfunctional. France is also unsuitable because its planning statute explicitly disallows payment of compensation for any land use regulation and is likely too extreme to withstand U.S. constitutional challenges.

Canada, at the federal level, presents another extreme no-compensation doctrine which is at odds with U.S. constitutional protection of property rights. However, some of the Canadian provinces have enacted more moderate statutes or administrative practices. These may well merit further study. Australia is somewhat less extreme in its no-compensation doctrine. The Australian state statutes are more consistent than their Canadian counterparts in granting compensation rights for major ("categorical") takings. Especially interesting would be to look at the differences among the Australian states and evaluate their legal and public impacts. Since 2007, several Australian states⁴⁷ have begun a reassessment of their regulatory takings laws and the outcomes are worthy of follow-up.

The UK is the most interesting model.⁴⁸ UK law is the most coherent on the narrow-compensation side of the scale. Its pieces fit

47. See LAND REFORM COMM'N OF W. AUSTL., COMPENSATION FOR INJURIOUS AFFECTATION (2007), available at <http://www.lrc.justice.wa.gov.au/2publications/reports/P98-DP.pdf>. The state of Victoria also commenced on a reform track in 2008-09. See Interview with Rebecca Leshinsky, Manager, Planning Legislation Review, in Victoria, Austl. (Nov. 2008).

48. See Daniel R. Mandelker, *Afterword*, in TAKINGS INTERNATIONAL: A COMPARATIVE PERSPECTIVE ON LAND USE REGULATIONS AND COMPENSATION RIGHTS 365-66 (2010).

together into a consistent whole. The UK system is well worth further study by those who seek a legal system where there would be minimal compensation rights, yet where landowners would have a reasonable degree of protection in extreme situations. In the UK this balance is achieved with a greater degree of legal certainty than offered by U.S. law.

UK law is able to strike this balance between private and public interests by bypassing the very notion of development rights. Thus UK law avoids most situations in which land use decisions can cause a partial regulatory taking. A dramatic 1947 reform of the planning law removed all then-existing, unbuilt development rights. A one-time compensation fund was set up to cover claims.⁴⁹ From then on, statutory plans, which had previously functioned like U.S. zoning, would no longer grant development rights. Thus there could no longer be a “downzoning.” The right to develop (called “planning permission”) would be granted on a discretionary case by case basis and would be valid for five years only.⁵⁰ If government decides to withdraw a planning permission before the five years are up, the landowner has the right to full compensation for the depreciation in property value as well as to indemnification for specific out-of-pockets costs. In practice, revocations are made only when there is an overwhelming public consideration for a policy change and number very few nationally. Because, under the UK system, permission to develop is considered and granted very close to the maturity of the development, government can adjust its policies and faces little uncertainty. Decades of practice show that the UK system “works” without overburdening the public purse.

Recognizing that property values might be diminished when land use plans—though advisory—designate land for some types of uses, UK law grants landowners two optional causes of action for inverse condemnation claims. One procedure, called “planning blight” is available when a local plan designates private land for a distinctly public use. The plan does not have to be officially approved and may even be diagrammatic. The property may still retain some beneficial use. The landowner only needs to prove that, if sold, the property would obtain a price significantly below what it would have obtained without the designation for

49. Malcolm Grant, *Compensation and Betterment*, in *BRITISH PLANNING* 62-76 (Barry Collingsworth ed., 1999).

50. PHILIP BOOTH, *PLANNING BY CONSENT: THE ORIGINS AND NATURE OF BRITISH DEVELOPMENT CONTROL* (2003); VICTOR MOORE, *A PRACTICAL APPROACH TO PLANNING LAW* (2005).

public use. The second procedure, called “purchase notice,” is available for any land use designation, not necessarily a public use. The threshold condition, however, is more difficult to prove than for planning blight. The landowner must show that the property has no beneficial use at all and that the owners’ request for planning permission had been refused. Planning authorities try to avoid blighting property, so the number of claims for major takings nationwide is very small.

B. *Models for the Property-Rights Side*

What can proponents of property rights take from this study? They should first heed the lessons, detailed above, from the Measure 37 experience. If new statutes are proposed, they must have a solid rationale and contain adequate internal checks and balances. Proponents of new state statutes have much to learn from the international experience. The survey established that seven countries other than the United States have statutes that grant compensation rights for some types of partial takings, not only major ones (Finland, several of Austria’s states, Poland, Germany, Sweden, Israel, and the Netherlands). American proponents of property rights should, however, note that none of these countries recognize takings claims where there were no prior development rights. The underlying notion of all compensation laws is *reliance* on government decisions, not reliance on private wishful thinking.

Which among the seven countries can serve as useful models? The experiences of Finland and Austria leave too much legal ambiguity to be useful. Among the five remaining countries, the Netherlands and Israel are models that can help to foresee what mistakes to avoid. These countries’ laws—though to a lesser extent than Measure 37—have overburdened the public purse with a disproportionate number of claims. Poland’s law is still embryonic in practice. The most interesting models, in my view, are the remaining two countries—Germany and Sweden.

German and Swedish laws on regulatory takings are of the same vintage, with minor but interesting differences (this pair is the only one showing knowledge transfer). Both laws draw a clear distinction between major and partial takings and provide a high level of certainty on both. When property is designated for a public-type use (one that falls among a long pre-defined list), the landowner has a statutory right to full compensation by means of a “transfer of title” claim that can be made at any time. There are no preconditions.

Under German and Swedish law, in cases of partial takings there are rights to full compensation (beyond a *de minimis* level). However, there is a set of preconditions. Unlike U.S. law on partial takings, where the

precondition of showing “investment-backed expectations” has no preset criteria and is to be determined case by case, the German-Swedish preconditions are predefined and easy to determine. The pivotal concept is a time frame (aptly called “implementation time” in Sweden). Compensation rights last for seven years in Germany and for five to fifteen years in Sweden (usually fifteen). These time frames are counted from the time the development rights were initially granted, not from the date of approval of the injurious amendment (and are additional to the regular statute of termination). The idea behind the implementation time is to create a sharing of risk between landowners and the government body. The Dutch model too is based on the idea of a shared risk, but it has no preset time frame, thereby leaving uncertainty for both sides and more need for litigation.

The concept of reliance on government decisions underlies the regulatory takings laws of most countries, including the United States. Under German and Swedish takings laws, the principle of reliance becomes transparent to both sides. Unlike UK planning law, German and Swedish laws are similar to those in most countries where statutory plans or zoning do grant (or take away) development rights. These two countries’ laws grant full or almost full compensation rights when government changes its mind and downzones. At the same time, the German and Swedish models qualify this right by setting a time frame. It is based on the rationale that the public purse is not a timelessly open-ended insurance policy against a change in public decision. If landowners wish to be ensured that the development rights will not be restricted without compensation, the landowners should apply for a development permit before the preset time frame expires. Note that the development rights do not self-terminate; but if the landowners procrastinate they take the risk of a downzoning without compensation.

The concept of time-limited compensation rights has a potential ancillary benefit as a growth-management tool in high growth areas. “Normal” planning regulations across the world are notoriously bad at controlling the timing of private development decisions and planners everywhere seek ways either to regulate or to incentivize developers. In high-growth areas in the United States the implementation time frame can serve as a growth-management tool to encourage landowners to channel their development decisions into a specified time frame. The public authorities can thus better manage infrastructure investments, school thresholds, housing mix, or versatile employment opportunities. As a growth management instrument, the Swedish model has an advantage over the German model in that the time period is flexible and

is determined at the time of each new plan-approval decision. Interestingly, neither in Germany nor in Sweden is the implementation period perceived as a growth management instrument. However, in Sweden there is a recent and increasing (though still small-scale) use to incentivize commercial developers in urban redevelopment projects.⁵¹

IX. Learning from One Another

The diversity of regulatory takings law around the globe is great: no two countries have the same law on regulatory takings—not even countries with ostensibly similar legal and administrative traditions. The purpose of this comparative research was to enable the readers to learn from other countries' experiences and thus to gain a new perspective on their own country's laws and policies. Not only American lawyers, legal scholars, and planners should be able to learn from other countries—the same holds for each and every country.

This article was written especially for American readers because in the United States the debate over property rights is more intensive than in other countries. Both the proponents of more protected property rights and the supporters of enhanced social obligations by property owners may gain by looking at U.S. takings law from the outside. Both sides can also look to other countries for alternative models to support their own position (with appropriate adjustments). And perhaps both sides could look for middle-of-the-road approaches that may contribute to a rapprochement in this long-raging contest.

51. The limited and relatively new use of this tool (mostly vis-à-vis commercial developers in major urban redevelopment projects) reflects the character of the development process in Sweden, where commercial developers are not yet as important a sector as in many other countries. Imposition of a time limit on private, non-commercial developers is not customary. See Interview with Thomas Kalbro, (Dec. 2008); Thomas Kalbro, *Sweden*, in TAKINGS INTERNATIONAL: A COMPARATIVE PERSPECTIVE ON LAND USE REGULATIONS AND COMPENSATION RIGHTS 293 (2010).

