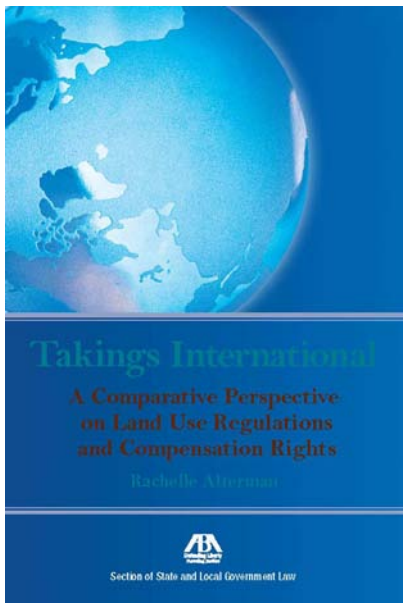

Takings International

A Comparative Perspective on Land Use Regulations and Compensation Rights

Rachelle Alterman et al

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Part I – the comparative analysis (chapters 1 - 3)

Pre-Publication Version

Summary of Contents

Preface and Acknowledgments

Few issues in land use planning are as universal as the bipolar relationship between regulation and property values. Although this topic should be a prime target for cross-national research, very little has been published. In this book my mission is to provide a broad platform for international discussion and exchange of knowledge.

Years of cross-national research into various other aspects of land use law, planning institutions, and property rights have taught me the unrivaled power of systematic comparative analysis. Time and again I have witnessed how misleading are my own and others' tendencies to extrapolate from our own country's laws and practices or to assume that we can deduce about a specific legal arrangement based on our general knowledge about some foreign country. I have been surprised by the variety of ways that different jurisdictions cope with regulatory takings, in some cases adopting directly opposite approaches. Many of the counterintuitive findings presented in this book challenge my own and others' assumptions.

The difficulties of comparative analysis in this research project have been among the toughest I have faced, not least because of the potentially volatile nature of the issues raised by regulatory takings. I hope that the observations offered here will reaffirm the maxim that "the more you know, the more you see." Seeing cross-nationally is indeed important for understanding nationally.

The most valuable resources behind this book are my partners from 13 jurisdictions located in various parts of the globe, all of whom bore countless queries from me and many rounds of editing. I am greatly indebted to this superb group of scholars. Many of them hold influential positions in their own countries, and I hope they will find the book's comparative findings useful on their home ground.

There is good reason why this book is published in the United States, even though most of the countries covered are located on other continents. Nowhere else is the property rights debate as intensive and high profiled, and nowhere else does the issue so thoroughly engage the legal profession and the courts. My choice of the American Bar Association as publisher reflects the hope that the book will reach not only my academic colleagues but also a broad range of legal and planning practitioners, judges, elected officials, civil society organizations, and real estate developers worldwide. ABA's editorial staff managed the daunting task of contending with the laws, citation modes, and confusing terminology used

in 14 jurisdictions (and with authors from nine countries for whom English is a foreign language). I owe personal thanks to Richard G. Paszkiet, deputy director of ABA Book Publishing and Leslie Keros, associate editor. Their consistent support and patience saw this rather unique project reach completion.

I much appreciate the help of those who kindly read through the draft chapters of my comparative analysis and provided important comments: Dan Tarlock of the Chicago Kent Law School; Ed Sullivan of Garvey Schubert Barer in Portland, Oregon; Russell Brown and Eran Kaplinsky of the University of Alberta Law School; and Emily Silverman of my own university, Technion–Israel Institute of Technology. Two of my doctoral students, Nir Mualam and Iris Frankel-Cohen, provided crucial help in proofreading and managing the references. Nir's additional advice has been invaluable in the final stages of the manuscript.

Thanks are also due to the *Washington University Global Studies Law Review*, which published earlier versions of 11 of the 14 jurisdiction chapters. Those chapters (included in part 2) were updated and, in most cases, extensively revised for this book. The comparative analysis in part 1 (chapters 1–3) and three additional chapters in part 2 (Australia, the United States, and the state of Oregon) appear only in this book.

And finally, I would like to express special appreciation to Professor Daniel Mandelker—widely acknowledged as one of America's most eminent scholars on planning law—for his ongoing support for this project. Dan's thoughtful afterword appropriately closes this volume.

Rachelle Alterman
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Part I

Takings International: A Cross-National Perspective

CHAPTER 1

Regulatory Takings and the Role of Comparative Research

Rachelle Alterman

No land use law in the world can evade the need to address the relationship between land use regulation and property values. The issue is universal, yet the solutions have been insular. In the absence of comparative research, each country has had to develop its own legal and public policy approach. Despite the importance of this subject for cross-national knowledge exchange, it has not drawn much attention from researchers. Legislators, judges, and legal professionals in each country have been denied the opportunity to learn from each other's experiences. The purpose of this book is to provide a platform of basic comparative knowledge on regulatory takings to enable cross-national learning.

Land Use Regulation and Property Values

The vast majority of countries across the globe today have laws for regulating land use (though not all countries apply and enforce these laws). These laws vary greatly, but they do share one universal dilemma: How to deal with the shifts in land values inevitably caused by land use regulation? At times, the effects are upward, leading to increases in property values; at other times, the effects are downward, causing reductions in current or future values. Understandably, the upward effect usually is less controversial than the downward effect. The latter is one of the "raw nerves" of planning law and practice. This issue can have

extensive economic and social-justice implications and is at times a major impediment to the implementation of land use planning and environmental policies. Yet, despite its universality, there has been surprisingly little cross-national knowledge exchange on how laws and policies in different countries come to grips with the value-reduction issue. This book seeks to fill some of this gap.

Government regulation applies to many areas of life, so why do the negative impacts on land values often draw special attention? Probably because real property usually holds high economic and social value and represents most households' major investments. This holds not only in advanced-economy countries and in the postsocialist states, but increasingly also in developing countries.[1] Individuals and firms base important decisions on the value of real property. Any significant decline in property values is likely to be seen as a major threat to individuals or groups in society.

Britain led the way in the world discussion of the land-value nexus of planning regulations. The terms that the British coined for the issue, *betterment and compensation* or *betterment and worsement*,[2] date back to the nineteenth century.[3] Because capturing the upward side of the property-values effect has not been a mainstream focus of American law or policy, American English does not have a similar established terminology for the two-directional effect. The closest term is *windfalls and wipeouts*. Originally intended by its authors[4] as a teaser, this phrase has caught on as a quasi-professional term.[5] Another less-established term sometimes used in the United States as a takeoff on takings is *givings and takings*.[6]

Many readers will assume that windfalls and wipeouts are a closely knit couple. Logically, it would seem that if there are compensation rights for takings, then there also should be a mechanism for capturing givings. However, in fact, the windfalls and wipeouts equation is more of a theoretical construct than a reality. A thorough explanation is beyond the scope of this book, but it deserves a few remarks on how the betterment and compensation concepts became decoupled in their motherland, Britain.

Unlike the United States, Britain has had a long tradition of legislative responses to both sides of the property-value effects. In the early 1930s, Britain enacted laws that established both compensation rights and taxation of the betterment value (though both sides never worked satisfactorily).[7] These ideas also were exported to many of the colonies.[8] However, the ostensible match between betterment and compensation did not last for long.

Since World War II, the betterment and compensation sides have been decoupled in Britain. During the height of the war, the British government appointed the Expert Committee on Compensation and Betterment to guide the government in the laws and policies it should adopt for postwar reconstruction. The famous *Uthwatt Committee Report*,[9] named after the committee's chairperson, introduced two important concepts: "shifting value" and "floating value." These concepts influenced much of the subsequent discussions on the relationship between land use regulation and property values. The concept of shifting value is based on the idea that the demand for any given type of land use in a particular region is finite; land use restrictions in one municipality may cause downward value changes there, but at the same time may increase the value of land in another municipality where the regulations do permit development. Floating value refers to the speculative nature of potential land values. Landowners assume that if only planning regulations did not stand in the way, a particular lucrative land use would "land" on their own plot of land. However, that may remain a wishful thought.[10] These concepts challenged the rationale for the traditional notion that plans should grant development rights. The underpinnings of the idea of entitlement to compensation for reduction in development rights thus were shaken. After the war, the entire planning-law system in the UK was reformed and compensation rights subsequently abolished, except for special circumstances (see chapter 6).[11] However, the betterment tax was not abolished at that time. For several decades to follow, the betterment side oscillated with changes of governing party—abolished and reinstituted in various forms several times.[12] Since the late 1980s, a betterment capture tax has not been resumed.

The absence of a strong linkage between the two sides of the property-values effect holds not only for Britain. Among most of the countries in this book, there is no correlation between compensation rights for wipeouts and mechanisms to capture windfalls. Each side deserves its own in-depth focus, as does the degree of linkage among them. This book focuses only on the downward effects of regulation on land values and on the laws and policies adopted in each country to deal with this effect.

The Property Rights Debate in the United States

Unlike most other countries, in the United States, the "takings issue" (more precisely, "regulatory takings" or "partial takings") is a contentious, hotly debated topic, and is the heart of what has been called the "property rights debate." The takings issue has produced several decades of jurisprudence, hundreds[13] of

scholarly papers, and scores of books. Regulatory takings in the United States are probably the most-analyzed topic in land use law anywhere in the world. Yet the line separating takings and noncompensable regulations remains elusive and highly contentious.[14]

The interest of American legal scholars in regulatory takings is not new. Important scholarly work was published by American scholars with opposing views, such as Richard Epstein and Daniel Bromley, before the property rights movement gained popularity.[15] Once the regulatory takings issue became a major target for the conservative property rights movement in the early 1990s,[16] the debate over the takings issue received a strong boost both among civil society organizations and scholars. The intensity of the debate is reflected in the poignant titles of some of the publications: on the conservative side, *Land Rights: The 1990s' Property Rights Rebellion*, and on the progovernment side, *Let the People Judge: Wise Use and the Private Property Rights Movement, Who Owns America? Social Conflict over Property Rights,* and *State Property Rights Laws: The Impacts of Those Laws on My Land*.[17]

Propelled by the property rights movement, many states enacted property rights laws. The advocates hoped that such statutes would grant compensation rights even for minor decreases in the value of property caused by regulation. However, the outcomes did not fulfill the movement's objectives. 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.[18] Florida did adopt legislation in the 1990s that obliged government to compensate landowners for partial takings, but the preconditions are such that few claims have been successful[19]. Thus, the state legislative initiatives did not satisfy either side in the property rights debate and did not contribute much towards a resolution.

Another surge in public attention on the takings issue came in 2004 with the enactment of Oregon's controversial citizen initiative, Measure 37.[20] This was a rather extreme initiative on compensation rights that drew highly polarized views.[21] It generated claims amounting to $14 billion.[22] Significantly, this initiative arose in the state of Oregon, which was regarded as America's flagship of strong planning controls and enviably good "growth management."[23] It was precisely this success that created the dramatic backlash that culminated in the adoption of Measure 37.[24] However, in November of 2007, Measure 49[25] was enacted, partially reversing Measure 37, and tempering many of the grounds for claiming compensation.

Perhaps the strongest boost towards making the takings issue a broad public topic came in the aftermath of the Supreme Court decision in *Kelo*.[26] This decision pertains to eminent domain and not to regulatory takings, but it kindled the

interest of the general public in property issues. Following *Kelo* came a new wave of initiatives for state property rights statutes, some of which also contained proposals for granting compensation for partial takings, but most were not passed.[27] The takings issue is likely to continue to engage American legislators, civil society actors, planners, and lawyers.

Compared to the high-flame controversy in the United States, in most other countries the takings issue is quite tame. Although "downzoning" decisions obviously are not popular anywhere, and disputes and controversies do arise at the local level, in no other country covered in this book has the takings issue become such a major public issue at the national level. This fact does not detract from the importance of cross-national learning; on the contrary, countries where their laws on regulatory takings (regardless of their stands) do not draw much public controversy may harbor lessons for other countries.

The Current State of Comparative Research on Property Rights

One might have thought that the law of regulatory takings would be a prime topic for cross-national research. Yet there has been little comparative research on this topic and few opportunities for knowledge exchange. This research project is, to the best of our knowledge,[28] the first large-scale comparative research devoted entirely to regulatory takings.

This research project, however, is by no means alone in taking a comparative view on topics concerning property. The seminal theoretical and comparative contribution that focuses directly on regulatory takings is Donald Hagman and Dean Misczynski's 1978 book, *Windfalls for Wipeouts*[29] (this book also should be credited with introducing this term into American English). The book covers five English-speaking countries with advanced economies (the UK, Canada, Australia, New Zealand, and the United States) and addresses both the upward and the downward effects of regulations on land values. 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 more recent important comparative work is Gregory Alexander's 2006 book,[30] which 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.[31] Another important comparative study is Tsuyoshi Kotaka and David L. Callies's edited volume,[32] which covers 10 Asian-Pacific countries. This book reports on expropriation (eminent-domain) law and, in some of the countries, also on regulatory takings law. Another contribution to comparative regulatory takings

is a law review article by Donna Christie, which analyzes three English-speaking countries: the United States, Canada, and Australia.[33] James Kushner's book[34] is a collection of excerpts from previously published papers on a wide variety of planning-law topics, among them two brief items on regulatory takings outside the United States—one on Germany and one comparing U.S. and Swiss law.[35] Finally, two comparative books on property law devote a few pages to regulatory takings.[36]

Most of these contributions were published in the United States. 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, as surprising as this may seem, there has been very little comparative research on regulatory takings in Europe.[37] The major comparative project on planning law and institutions commissioned by the European Commission (1997–2000) does not cover regulatory takings law in any depth.[38]

A Note on Terminology

In carrying out comparative analysis, one should be aware of differences in terminology. Because this book is written with American readers in mind and because of the vast dominance of American-based scholarly writing, I have mainly used American terms in this chapter and in chapters 2 and 3, where the comparative analysis and its conclusions are presented. However, most of the authors of the succeeding chapters used their own legal terminology, as translated into English.[39]

There are many differences in terms; only a few will be noted here (some more are discussed in the comparative analysis in chapter 2). The term *regulatory takings* is based on the language of U.S. constitutional law and is not used outside the United States. There is no internationally agreed-on term.[40] Likely, the most widely used term in English outside the United States is *planning compensation rights*.[41] The American terms *eminent domain, condemnation,* or *physical taking* also are unknown outside the United States; the internationally used terms are *expropriation* or (in British-influenced countries) *compulsory purchase*.

Terminology also can be misleading, unless one understands the broader legal context. The most striking example is use of the term *compensation,* as translated into English by practitioners and scholars from countries with Germanic languages. They often use compensation in almost the opposite sense from its use in the context of regulatory takings: They refer to what *landowners* are obliged to

give to the municipality (such as dedication of roads or allocation of open space for environmental mitigation), rather than what the municipality is required to grant to the landowners.[42]

Another important difference in terminology reflects deeper-lying differences in land use regulatory instruments. In most countries included in this book (and worldwide), zoning bylaws are not the regulatory tools for controlling land use. Instead, land use regulation is carried out primarily by means of legally binding plans and building permits authorized by a national (or, in some federal countries, subnational) statute.[43] Unlike American comprehensive or master plans, but like zoning, statutory plans have the force of law. In addition, planning statutes usually also establish various "bypass" or flexibility instruments similar to variances and exceptions in the United States. The national statutes usually differentiate between levels of plans, based on area scope or degree of detail. *Detailed plans* (or equivalent names) usually are the ones that allow issuing of development permits. Similarly to zoning, detailed plans set the permitted land uses and densities and they may be either less or more detailed than is zoning. In addition, statutory plans often contain rules that in the United States are included under other regulatory instruments such as subdivision regulations, design guidelines, or planned unit development.[44] Statutory plans do not necessarily cover the entire municipality or region; like zoning, they often are amended piecemeal, for a particular area within a city or region, or even at a "spot zoning" scale. A rezoning would be called a *plan amendment* or *change in land use designation* or *redesignation*. In most countries, the major type of regulatory decision recognized as compensable are injurious amendments to statutory detailed plans. These may apply to any geographic scale. Amendments to plans basically have the same legal status as the original plan. The laws of a few countries also recognize other types of decisions as compensable—either more specific decisions (such as exceptions) or more general decisions (such as amendments to strategic plans).

The Purpose of the Book

American legal and planning scholars continue to be divided on the regulatory takings issue. In some other countries as well, scholars and decision makers are interested in this issue, even though it usually carries a less-obtrusive public profile. In the absence of an overriding normative theory or consensual solution, legislators, judges, and researchers everywhere are immersed in their own countries' laws and policies and lack an external vantage point from which to take a fresh look at their own countries' law and policies.[45]

The purpose of this book is to tap the universality of the regulatory takings

issue and reduce some of the insularity and compartmentalization that has characterized the issue so far. The book offers readers from various parts of the world an initial systematic cross-national vantage point from which to view the debate in their own country. Such a perspective may be able to provide a sense of scale not available when one is imbued in a single country's laws, policies, and debates. Because nine of the 13 countries covered in this research are members of the European Union, an ancillary objective is to stimulate broader cross-national debate within the EU.

It is also important to note what this book does not aim to do. It is not a manual of laws from which to pick and choose and transplant from one country to another. Transplantation of laws is, of course, neither possible nor desirable. Laws are grounded in legal systems and institutions and reflect public policies. The latter are grounded in sociopolitical and cultural milieus that cannot—and should not—be replicated.[46]

Scope of the Research

I asked each contributing author to address the following main questions: Under your country's laws, do landowners have the right to claim compensation 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?

Injuries to property values caused by land use regulations may fall along a continuum—from no injury at all to a reduction of all or most of the property's value. This entire range is within the scope of this research. However, this book does not encompass every possible topic related to regulatory takings. The focus is on regulations related to land use planning, not on all types of regulations that may affect property values. The limitation accords with the core subject of regulatory takings law as historically viewed in most countries. Thus, some types of environmental regulations that are not part of land use planning are not systematically covered.

It is important to distinguish the right to compensation for injurious land use regulations from the right to compensation for land taken through eminent domain (expropriation or compulsory purchase). In such cases, the ownership rights are compulsorily transferred to an authorized body. Eminent domain does not fall within the direct scope of this research project. However, because expropriation law and regulatory takings law are related to some extent in many countries, the authors of most of the country chapters present a brief introduction to

expropriation law to link into regulatory takings law.[47]

Another topic not covered in this book is exactions of land or other amenities through regulation. The reason is that unlike in the United States, in some of the countries in this book, this topic may not be regarded as part of regulatory takings law. It may be the subject of special regulations on topics such as compulsory dedications of land for roads, public buildings, public passage, and—increasingly—environmental mitigation. This topic, too, undoubtedly merits comparative research.[48]

The Jurisdictions Selected for Study

Thirteen countries were chosen for comparative analysis. This is a large number and makes the analysis quite challenging. At this stage of knowledge buildup, a large sample of countries was necessary to dispel assumptions that there is a single dominant approach outside the United States or that there is a "European approach" versus an "American approach" (more on this in the conclusions in chapter 3). My objective also was to open the cross-national discussion to participants in many countries around the world.

In selecting the set of countries, I did not have the privilege of relying on prior theory from which to derive a typology of regulatory takings laws. The countries chosen, of course, should not be regarded as a random sample that represents all the world's countries. Recognizing the pioneering character of this research, I sought to span a wide spectrum of countries based on several variables that could reasonably be hypothesized as related to differences in approaches to regulatory takings.[49] The set of countries chosen for analysis, therefore, includes jurisdictions from the two major Western legal traditions (common law and civil law[50]), both unitary and federal jurisdictions, and a broad geographic spread. In view of the important legal and ideological changes occurring in the postsocialist countries, I wanted to include at least one such jurisdiction in the sample. The common denominator is that all countries chosen share a democratic system of government and have an advanced (or fast-emerging) economy. In most countries that do not meet these two criteria, planning laws often are irrelevant (because of corruption or widespread noncompliance), and regulatory takings law is either dormant (no claims filed) or nonexistent. Because Europe encompasses a large portion of the world's democratic, advanced-economy countries, the sample selected includes many European countries. My guess is that the set of countries chosen does represent the majority of legal approaches among the world's democratic countries with advanced economies.

The 13 countries chosen for research are (from west to east and south): the

United States, Canada, the UK, France, the Netherlands, Sweden, Finland, Germany, Austria, Poland, Greece, Israel, and Australia. These countries are located on four continents. Nine are members of the European Union. The set includes five federal countries—the United States, Canada, Germany, Austria, and Australia. There are variations among the federal jurisdictions in the degree of importance of the subfederal law on regulatory takings. In the United States, Canada, and Germany, the federal level is the most important for regulatory takings law. Therefore, the focus of the chapters on the United States, Canada, and Germany is on the federal level. In the case of the United States, the state of Oregon is awarded an additional chapter—the 14th jurisdiction— because the Oregon story is unique and encapsulates the volatility of the property rights debate in the United States. Austria does not have any overarching federal law on regulatory takings—neither a significant body of constitutional case law nor statutory law. Because each of the nine states in this small country has its own statutory law and they differ significantly from each other, after reporting on the shared constitutional framework, the Austrian chapter reports on each of the states and compares among them. Finally, in Australia, in addition to federal constitutional law, state statutes are very important in takings law. The Australian chapter therefore reports on both the federal law and on one or two states selected by the author as generally representative.

The set of countries chosen represent the two major legal "families." Five share the common law tradition: the UK, Canada, Australia, the United States, and Israel.[51] The remaining eight countries—all located on the European continent—are civil-law countries. My assumption was that in the field of planning law, the two families of countries have enough in common to enable comparative analysis. The findings corroborate this assumption (see chapters 2 and 3) and show that the differences within these families of laws are not lesser than between the two groups.

The Challenge of Comparative Research

There is no single, agreed-on approach for conducting comparative legal research. The authors of a leading textbook on comparative law note that comparative research encompasses "a variety of methods for looking at law":

> The range and eclecticism of its methods is matched by the wide variety of its aims and uses. Cross-national studies have yielded important contributions to the understanding, practice, and reform of law in the last century. . . . In a world where national and cultural "difference" is often

> seen as posing a formidable challenge, comparatists hold up a view of diversity as neither an impenetrable barrier to comparison nor an aberration to be ignored or reduced, but instead as an invitation, an opportunity, and a crucible of creativity and dynamism.[52]

Much comparative research to date has been devoted to private law.[53] The state of research and method building on public law related to property is especially rudimentary. The present study has a modest goal: to create a fundamental layer of knowledge that describes the various laws on regulatory takings and points out some similarities and differences. This basic level of comparative analysis has been called a juxtaposition, where the different countries are placed side by side. This level is suited to the present state of knowledge. No causal explanations will be sought as to why specific countries have adopted a particular approach to regulatory takings when others have adopted other approaches. While such conjectures are tempting, they must await the time when more factual and theoretical knowledge will be built up. I will share some thoughts on the issue of explanation in the conclusions in chapter 3.

This book espouses a descriptive-analytical approach and does not promote a particular normative point of what *should be* the law about regulatory takings. This approach contrasts with the position taken by many scholarly contributions to the property rights debate in the United States. A normative approach is appropriate, even desirable, for critical analysis of the law of a specific country. However, when conducting comparative research—certainly at the current state of knowledge—a normative stand may be more problematic, as some legal scholars have noted.[54] Therefore, this book does not argue for an ideological position either in favor of extensive compensation rights for regulatory takings or against any such rights.[55]

The Research Method

Analysis of the laws of 13 countries in many languages is beyond the capacity of a single researcher. To carry out this research project, it was necessary to build a team. For each of the candidate countries, I sought out a leading expert (or experts) on planning law who are well versed in English. All 17 contributing authors are highly regarded scholars in their countries. The contributing authors were asked to provide in-depth analyses in English of their countries' laws and practices on regulatory takings according to a set of guidelines that I developed

(described below).

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 laws, jurisprudence, and practices. Often, what a particular author assumed to be similar in other countries and therefore easily understandable to readers from other countries was, in fact, quite opaque. I worked with the authors to provide enough contextual information so that readers from other countries would understand the implications of a particular law or institution. There were also language barriers: In every country in the set, court decisions on land use law are delivered only in the local language. No non-English-speaking country in our sample offers translations into English of court decisions in the planning area. In some countries, even the statutes have not been translated.

To enable comparative analysis, I developed a common framework and a set of guidelines for the entire team (see this chapter's appendix). Prior to developing the guidelines, I read the literature available (in English) on land use law and practice in each of the countries. Next, I conducted a set of preliminary interviews with each of the prospective authors. To ensure that each of the participating authors would understand the guidelines in a similar way, I prepared a preliminary set of scenarios composed of types of regulations, types of potential injuries to property values, and types of contextual conditions. Through a rolling strategy, I expanded or refined the scenarios and guidelines until we were satisfied that these would encompass all the laws and practices in the sample countries. The effort of coordinating and editing the set of papers, nevertheless, proved to be a major challenge. In most cases, the papers underwent several rounds of editing by me and rewriting by the authors, supplemented by clarifications through personal meetings, phone, or e-mail communication.

The comparative analysis was carried out in consultation with the contributing authors. To compare all 13 reports, I first traced them back to the topics of the guidelines, appropriately revised to reflect the findings and supplemented by new "variables" that emerged from the analysis. From among these, I selected four major topics to serve as the main anchors for the comparative analysis. These are constitutional law, major ("categorical") takings, direct partial takings, and indirect partial takings. These topics are explained in chapter 2. These four headings were selected because they could capture the main similarities and differences, but they by no means cover all aspects of regulatory takings law. There are many minor topics that remain for the readers to review in each country chapter. Once the comparative analysis was finished, I sent each contributing author the relevant parts for his or her comments.

A Preview of the Comparative Findings

The findings show that there is no universally consensual approach, nor even a dominant approach. Different countries at different times have adopted varying approaches to dealing with the property-values dilemmas. The diversity is great: No two countries have the same law on regulatory takings—not even countries with ostensibly similar legal and administrative traditions. The differences among the countries are significant and often unpredictable on the basis of other attributes known about these countries.

If one imagines a hypothetical scale of degrees of compensation rights, the countries in the sample seem to represent as full a spectrum of compensation rights as one can conceive (of course, there may be more variations among other countries not represented here). At one extreme are two countries whose laws and practices have said a clear "Yes" to compensation rights for a broad range of downzoning situations, in many ways rivaling Oregon's Measure 37. At the other extreme are a few countries whose legal doctrine does not grant compensation rights for any types of regulatory takings (except in some extreme situations). In between are several countries whose laws grant compensation rights for regulatory takings, but these are limited in time or in subject. The matrix of specific grounds and conditions is rather complex. On the whole, each country's set of laws and policies differs significantly from every other's equivalent set. There are striking differences even among the nine countries that are members of the EU, despite the fact that they all also fall under the jurisprudence of the European Court of Human Rights (analyzed in chapter 2).

Perhaps the most interesting finding—one that is difficult to accept—is that any attempt to guess a given country's position on regulatory takings law based on some other attributes that characterize it is likely to fail. Careful reading of the full set of papers shows that presumptions or hypotheses based on variables such as legal "family," legal-institutional structure, geographic proximity, shared language and cultural backgrounds, or planning needs (such as density, size, or resources scarcity) do not hold in the face of the comparative findings. (More on this counterintuitive conclusion in chapter 3.)

It is our hope that the wide variety of laws and practices identified in this team project on comparative research will enable the readers to learn from other countries' experiences and thus to gain a new perspective on their own countries' laws and policies.

The Book Structure

The 17 chapters in this book are divided into four parts: In the first part, I present

the framework, the comparative analysis, and the conclusions. The other three parts, written by the contributing authors, are devoted to various jurisdictions. The grouping of these chapters in three parts is based on the findings of the comparative analysis. These showed that the countries in the set could be placed along a rough scale representing the breadth of compensation rights that each country's laws grant in cases where regulatory decisions cause a decline in property values. The countries fall into three clusters along this scale, and these constitute the three parts of the book. The order of the jurisdictions within each cluster (part) roughly reflects their rank order.

The heart of the comparative analysis is presented in chapter 2. There, I introduce each of the four major topics for comparison. For each topic, I analyze the laws of all 14 jurisdictions in the three clusters and point out both the shared aspects and the differences. chapter 2 is longer than usual because it seeks to fulfill its mission of presenting a platform of knowledge that is not overly schematic and provides enough detail to be useful for mutual learning. chapter 3 draws some conclusions from the comparative research, with a special focus on what may be informative for American readers engaged in the property rights debate.

The book ends with an afterword by Professor Daniel Mandelker, whose ongoing support for this project has been so important.

Notes

1. Awareness of the important role of property ownership in developing countries was reinforced by De Soto's seminal book. Although his thesis is controversial, it has influenced the work of the World Bank and similar development agencies. *See* HERNANDO DE SOTO, THE MYSTERY OF CAPITAL: WHY CAPITALISM TRIUMPHS IN THE WEST AND FAILS EVERYWHERE ELSE (2000). For an excellent analysis of the evidence on the degree of usefulness of property rights as a development tool, see Klaus Deininger & Gershon Feder, *Land Registration, Economic Development, and Poverty Reduction, in* PROPERTY RIGHTS AND LAND POLICIES 257–91 (Gregory K. Ingram & Yu-Hung Hong eds., 2009).

2. Instead of "worsement," some say "worsenment." Both usages are frequently found. *See, e.g.*, ANDREW COX, ADVERSARY POLITICS AND LAND: THE CONFLICT OVER LAND AND PROPERTY POLICY IN POST-WAR BRITAIN 28 (2002); PAUL LOWENBERG, WINDFALLSFOR WIPEOUTS? AN ANNOTATED BIBLIOGRAPHY ON BETTERMENT RECAPTURE AND WORSENMENT AVOIDANCE TECHNIQUES IN THE UNITED STATES, AUSTRALIA, CANADA, ENGLAND, AND NEW ZEALAND 618–20 (1974); and BARRIE NEEDHAM, DUTCH LAND USE PLANNING: PLANNING AND MANAGING LAND USE IN THE NETHERLANDS, THE PRINCIPLES AND THE PRACTICE 175 (2007).

3. ARTHUR A. BAUMANN, BETTERMENT, WORSEMENT AND RECOUPMENT (1894).

4. WINDFALLS FOR WIPEOUTS: LAND VALUE RECAPTURE AND COMPENSATION (Donald G. Hagman &

Dean J. Misczynski eds., 1978).

5. *See, e.g.*, WIPEOUTS AND THEIR MITIGATION: THE CHANGING CONTEXT FOR LAND USE AND ENVIRONMENTAL LAW (Joseph DiMentro ed., 1990).

6. *See, e.g.*, RICK PRUETZ, BEYOND TAKINGS AND GIVINGS: SAVING NATURAL AREAS, FARMLAND AND HISTORIC LANDMARKS WITH TRANSFER OF DEVELOPMENT RIGHTS AND DENSITY TRANSFER CHARGES (2003). For an interesting analysis of the relationship between "taking" and "giving," see Abraham Bell, *Should Decreases in Property Value Caused by Regulation Be Compensated?" in* PROPERTY RIGHTS AND LAND POLICIES, *supra* note 1, at 232–50.

7. Malcolm Grant, *Compensation and Betterment, in* BRITISH PLANNING 62–76 (Barry Cullingworth ed., 1999).

8. *See, e.g.*, PATRICK MCAUSLAN, BRINGING THE LAW BACK IN: ESSAYS IN LAND, LAW AND DEVELOPMENT 155–58, 188 (2003); ROBERT HOME, OF PLANTING AND PLANNING: THE MAKING OF BRITISH COLONIAL CITIES (1997).

9. THE EXPERT COMMITTEE ON COMPENSATION AND BETTERMENT, FINAL REPORT, 1942, Cmd. 6386. The report's significance in shaping British recovery is recognized not only by planners and lawyers but also by scholars of British history. *See, e.g.*, Michael Tichelar, *The Conflict over Property Rights during the Second World War*, 14 TWENTIETH CENTURY BRIT. HIST. 165 (2003).

10. *See* VICTOR MOORE, A PRACTICAL APPROACH TO PLANNING LAW 3 (2005).
11. For more on the reform and its implications for the very concept of development rights and compensation, see chapter 2.
12. Grant, *supra* note 7; RACHELLE ALTERMAN, LAND VALUE RECAPTURE: DESIGN AND EVALUATION OF ALTERNATIVE POLICIES (Occasional Paper No. 26, Center for Human Settlements, University of British Columbia, 1982); JOHN RATCLIFFE, MICHAEL STUBBS & MILES KEEPING, URBAN PLANNING AND REAL ESTATE DEVELOPMENT 166–67 (3d ed. 2009).
13. A less conservative estimate is thousands of scholarly papers. A Lexis-Nexis search using the terms "regulatory takings" and "land use" yields over a thousand items—beyond the engine's tolerance.
14. JULIAN C. JUERGENSMEYER & THOMAS E. ROBERTS, LAND USE PLANNING AND DEVELOPMENT REGULATION LAW ch. 10 (2d ed. 2007).
15. Epstein's seminal book is regarded as an important intellectual foundation of the property rights movement. Epstein takes the extreme position that all land use regulation is a taking. RICHARD EPSTEIN, TAKINGS: PRIVATE PROPERTY AND THE POWER OF EMINENT DOMAIN (1985). An important contribution on the pro-government side is DANIEL J. BROMLEY, ENVIRONMENT AND ECONOMY: PROPERTY RIGHTS AND PUBLIC POLICY (1991).
16. JEROLD S. KAYDEN, *Charting the Constitutional Course of Private Property: Learning from the 20th Century, in* PRIVATE PROPERTY IN THE 21ST CENTURY 31–49 (Harvey M. Jacobs ed., 2004); Hannah Jacobs, *Searching for Balance in the Aftermath of the 2006 Takings Initiatives*, 116 YALE L.J. 1518 (2007).
17. LAND RIGHTS: THE 1990S' PROPERTY RIGHTS REBELLION (Bruce Yandle ed.,1995); JOHN D. ECHEVERRIA & RAYMOND B. EBY, LET THE PEOPLE JUDGE: WISE USE AND THE PRIVATE PROPERTY RIGHTS MOVEMENT (1995); WHO OWNS AMERICA? SOCIAL CONFLICT OVER PROPERTY RIGHTS (Harvey M. Jacobs ed., 1998); HARVEY M. JACOBS, STATE PROPERTY RIGHTS LAWS: THE IMPACT

OF THOSE LAWS ON MY LAND (Lincoln Institute of Land Policy, Policy Focus Report, 1999). On the property protection side, see also WILLIAM FISCHEL, REGULATORY TAKINGS: LAW, ECONOMICS, AND POLITICS (1995); and E. Donald Elliott, *How Takings Legislation Could Improve Environmental Regulation*, 38 WM. & MARY L. REV. 1177, 1178 (1997). Many scholars have criticized the legislative initiatives of the property rights movement. *See, e.g.*, Glenn Sugameli, *Takings Bills Threaten Private Property, People, and the Environment*, 8 FORDHAM ENVTL. L.J. 521, 567–80 (1997).

18. Stacey S. White, *State Property Rights Laws: Recent Impacts and Future Implications*, 52(7) LAND USE L. & ZONING DIGEST 3 (2000); Hannah Jacobs, *supra* note 16; JOHN D. ECHEVERRIA & THEKLA HANSEN-YOUNG, THE TRACK RECORD ON TAKINGS LEGISLATION: LESSONS FROM DEMOCRACY'S LABORATORIES 1–2 (Georgetown Public Law Research Paper No. 1138017, 2008), *available at* http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1138017.
19. Joni Armstrong Coffey, *High Hopes, Hollow Harvest: State Remedies for Partial Regulatory Takings*, 39 URB. LAW. 619 (2007).
20. Ballot Measure 37, *codified at* OR. REV. STAT. § 197.352 (2005).
21. Measure 37 triggered a vivid debate among legal scholars and many academic publications. On the anti–Measure 37 side, see Rebekah, R. Cook, *Incomprehensible, Uncompensable, Unconstitutional: The Fatal Flaws of Measure 37*, 20 J. ENVTL. L. & LITIG. 245, 256–60 (2005); Edward J. Sullivan, *Year Zero: The Aftermath of Measure 37*, 38 URB. LAW. 237 (2006). On the pro–Measure 37 side, see Sara C. Galvan, *Gone Too Far: Oregon's Measure 37 and the Perils of Over-regulating Land Use*, 23 YALE L. & POL'Y REV. 587 (2005).
22. *See* chapter 12 *infra*. For an analysis of the claims, see Sheila A. Martin, Meg Merrick, Erik Rundell & Katie Shriver, *What Is Driving Measure 37 Claims in Oregon?* (Institute of Portland Metropolitan Studies, 2007).
23. On some of Oregon's pacesetting policies, see CONNIE OZAWA, THE PORTLAND EDGE: CHALLENGES AND SUCCESSES IN GROWING COMMUNITIES (2004).
24. *See, e.g.*, Galvan, *supra* note 21.
25. 2007 OR. LAWS ch. 424, § 4, *codified at* OR. REV. STAT. § 195.305 (2007).
26. Kelo v. City of New London, 545 U.S. 469 (2005).
27. ECHEVERRIA & HANSEN-YOUNG, *supra* note 18.
28. The survey of literature covers publications in the English language and partially in French as well.
29. *See supra* note 4.
30. GREGORY S. ALEXANDER, THE GLOBAL DEBATE OVER CONSTITUTIONAL PROPERTY: LESSONS FOR AMERICAN TAKINGS JURISPRUDENCE (2006).
31. 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 does not focus on the law of regulatory takings, except in his discussion of the United States. See also chapter 2 *infra*.
32. TAKING LAND: COMPULSORY PURCHASE AND REGULATION IN ASIAN-PACIFIC COUNTRIES (Tsuyoshi Kotaka & David L. Callies eds., 2002).
33. 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).
34. JAMES A. KUSHNER, COMPARATIVE URBAN PLANNING LAW (2003). The countries covered differ

widely from topic to topic.

35. *Id.* Chapter 7 is devoted to regulatory takings, but like other chapters it does not provide a systematic comparative analysis. The papers compare some aspect of American takings law with Italian, Swiss, German, or international law.
36. JOHN SPARKLING, RAYMOND COLETTA & M. C. MIROW, GLOBAL ISSUES IN PROPERTY LAW 145–53 (2006); LAND LAW IN COMPARATIVE PERSPECTIVE(María Elena Sánchez Jordán & Antonio Gambaro eds., 2002) (indirect reference to regulatory takings in various parts of the book).
37. This assessment is supported by the 13 European authors participating in this project, who work in a variety of languages. The French author, Vincent Renard, brought my attention to a French-language edited collection of short papers on "servitudes d'urbanisme," which, in French, also refers to regulatory takings. See the special issue (no. 48, 1999) of *Droit et ville*, titled "L'indemnisation des servitudes d'urbanisme en Europe."
38. European Union, European Commission, THE EU COMPENDIUM OF SPATIAL PLANNING SYSTEMS AND POLICIES (1997, 2000). Schmidt-Eichstaedt's book is another important comparative analysis of planning laws, but it too does not cover regulatory takings. See GERD SCHMIDTEICHSTAEDT, LAND USE PLANNING AND BUILDING PERMISSION IN THE EUROPEAN UNION (1995) (in English and German).
39. A few authors who are acquainted with American legal literature have used American terms on occasion.
40. In French the term is "indemnisation des servitudes d'urbanisme" (servitudes in this context has a different connotation than in English). See supra note
41. Any book on "land policy" outside the United States will likely use these terms. See, e.g., JOHN RATCLIFF, LAND POLICY: AN EXPLORATION OF THE NATURE OF LAND IN SOCIETY 17–22 (1976); GRAHAM HALLETT, LAND AND HOUSING POLICIES IN EUROPE AND THE USA: A COMPARATIVE ANALYSIS 13 (1988); NATHANIEL LICHFIELD & HAIM DARIN-DRABKIN, LAND POLICY IN PLANNING (1980); Grant, supra note 7.
42. See, e.g., Kristina Rundcrantz & Erik Skärbäck, Environmental Compensation in Planning: A Review of Five Different Countries with Major Emphasis on the German System,13(4) EUR. ENV'T 204 (2003).
43. For a comparative analysis of national planning statutes and institutions in ten countries, see RACHELLE ALTERMAN, NATIONAL-LEVEL PLANNING IN DEMOCRATIC COUNTRIES: AN INTERNATIONAL COMPARISON OF CITY AND REGIONAL POLICY-MAKING (2001).
44. See also Rachelle Alterman, A View from the Outside: The Role of Cross-National Learning, in PLANNING REFORM IN THE NEW CENTURY (Daniel R. Mandelker ed., 2006).
45. For an example of an outsider's view of U.S. law, see id.
46. See V. Mamadouh, M. de Jong & K. Lalenis, An Introduction to Institutional Trans-plantation, in LESSONS IN INSTITUTIONAL TRANSPLANTATION: HOW ADOPTION OF FOREIGN POLICY INSTITUTIONS ACTUALLY WORKS 1–19 (Ì. de Jong, K. Lalenis & V. Mamadouh eds., 2002).
47. In many countries represented here, including the United States, the distinction between regulation and de facto expropriation is not always a bright line. Situations of "near-

expropriation" do occur. Called by various terms in various countries, including "inverse condemnation" and "planning blight," these types of takings are included in the scope of this project. See my analysis in chapter 2.

48. For a comparative analysis of exactions, see my book PRIVATE SUPPLY OF PUBLIC SERVICES: EVALUATION OF REAL ESTATE EXACTIONS, LINKAGE, AND ALTERNATIVE LAND POLICIES (Rachelle Alterman ed., 1988).
49. I of course limited my search to countries where I had located suitable scholars in the planning law field. See "Research Method" below.
50. For a general discussion of legal tradition in comparative research, see MARY ANN GLENDON, PAOLO G. CAROZZA & COLIN B. PICKER, COMPARATIVE LEGAL TRADITIONS: TEXT, MATERIALS AND CASES OF WESTERN LAW 23–49 (2007).
51. Israel is regarded by comparative-law scholars as a mixed system, but with strong attributes of the common law tradition. On 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 id. at 948 (about mixed jurisdictions in general) and 976–82 (about 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.
52. Id. at 13.
53. ALEXANDER, supra note 30, at 17, also makes this point.
54. Dagan notes the limitations of comparative research for drawing normative conclusions. Hanoch Dagan, The Social Responsibility of Ownership, 92 CORNELL L. REV. 1255 (2007).
55. In Israel, my own country, compensation rights for regulatory takings are very broad, so I have relied on the factual findings of the comparative research in arguing that the law in Israel has gone to an extreme—from a cross-national perspective—and that compensation rights should be significantly tapered down. The findings of this research serve as the knowledge base for a government bill to be submitted to parliament in 2009. On the other hand, I do not have an ideological position that totally negates compensation rights and have not proposed to eliminate them entirely (such a proposal would probably not be regarded as constitutional in any case).

Appendix Guidelines for Contributing Authors

1 Constitutional law: Is there constitutional protection of property rights (or its absence) in each of the countries' constitutional law? For the European countries, how has the property-rights clause (or related clauses) of the European Convention of Human Rights and ECHR jurisprudence impacted on their laws and practices?

2 Statutory law: How do statutory planning or related laws relate to the right to compensation for injury?

3 Types of government land-use decisions that may give grounds to compensation claims.

4 Who is eligible to submit a compensation claim? (Type of property right, time relative to injury, etc.)

5 Who is liable for a compensation claim? (What government bodies, other agencies, or private entities)

6 Types of injuries that may give grounds to compensation claims.

I. Direct injuries due to a regulatory decision that applies directly to a plot of land

a. Situations of "no economic value left" or "near expropriation"

b. Situations that eliminate or greatly reduce the chance for any *future* development rights

c. Situation of partial decline in value of the property due to rezoning to a less valuable type of use or reduced intensity of permitted development

d. Situations of partial decline in value due to loss of otherwise expected *income* from the property

e. Situations of temporary freeze or interim conditions

II. Indirect injuries due to a regulatory decision that applies to other land in the vicinity

a. Designation for expropriation (or actual expropriation) of *part* of a plot causes reduction in value of the *remaining* part of the plot ("severance" or "injurious affection")

b. Reduction in property value caused by the designation of land in the vicinity for *a public utility or service* (sometimes also called "injurious affection")

c. Reduction in property value caused by the designation of land in the vicinity for any use (including private use)

7. How is a compensable injury determined? (Preconditions, are there minimum or maximum levels, conditions regarding period of time vacant, must the claimant prove concrete loss (investments), is injury relative to the surrounding development? Are distributive-justice criteria relevant?)
8. Procedures (administrative and judicial): Key differences in time limits, administrative or judicial recourse, degree of "friendliness" to claimants.
9. Practice: Extent of claims in practice, degree of use of mitigating tools such as negotiations, effect on land-use planning policy and implementation

Evaluation: Is there public or scholarly criticism of current law and practice? Are future directions discernable? How fair, efficient, or just is the law in your opinion?

CHAPTER 2

Comparative Analysis: A Platform for Cross-National Learning

Rachelle Alterman

The laws and practices related to regulatory takings vary greatly around the world. The platform of comparative knowledge presented in this chapter will, I hope, enable cross-national sharing and learning about how various countries come to grips with one of the tough questions endemic to land use regulation everywhere: How should the negative economic consequences of regulation on property values be shared?[1] The comparative lenses provide a sense of scale and proportionality and allow the readers to come to their own conclusions.[2]

A preview conclusion for American readers is that on a comparative scale of compensation rights, U.S. takings law generally occupies a middle position. At the same time, the volatility of the property-rights debate on regulatory takings in the United States has no parallel in the other countries.

Both sides of the property-rights debate in the United States may be able to glean new concepts and ideas to support their positions from the wide assortment of legal structures and doctrines found among the 13 countries. The reports from the different countries indicate that a variety of approaches from both sides of the scale seem to work in practice. Those who seek a rapprochement, too, can identify middle-of-the road approaches that may have created a balance between property rights and the public interest without causing an unbearable financial burden on government and without retarding good planning and regulation policies. My

hope is that the comparative analysis will stimulate new thinking and be able to quell some of the fire on both sides of the debate.

Analytic Approach

The purpose of the comparative analysis is to present a coherent picture of the many differences in regulatory-takings laws among democratic countries, as represented by the 13 countries in this book.

Comparative Approach

As noted in chapter 1, in this study, I am not guided by a normative doctrine; nor do I seek to make normative recommendations. This chapter's purpose is to systematically report about similarities and differences in current laws and practices in a large sample of countries. Hopefully, this pioneering research will provide the foundation for further comparative analysis and for a more informed debate on regulatory takings within and across countries. Perhaps a cross-national normative doctrine will emerge sometime in the future.

Comparative analysis of regulatory takings must contend with complex differences that often do not fall elegantly into coherent categories and show internal inconsistencies. Some of the findings also may seem, from a cross-national perspective, out of sync with other attributes one knows about a particular country. These are the facts. The current state of comparative knowledge is very far from being able to provide explanatory variables. In any case, my assessment is that whatever explanatory factors are to be found in the future, they will likely be anchored more in the realm of political science than in the realm of law. I shall return to this point in chapter 3.

This comparison is written largely with American readers in mind, and so uses terminology that Americans are accustomed to. Given the vast numbers of scholarly papers and books on the takings issue published in the United States, I, as a non-American, do not purport to contribute anything new to the analysis of U.S. law. For non-American readers, I asked a leading American scholar to write a brief introduction to U.S. takings law.

For the information on the law of the 13 jurisdictions, I have relied on the legal reporting and analyses provided by the authors of the country chapters.[3] In some cases, I supplemented these with additional literature or with my own prior

research on related topics. In this comparative chapter, I have tried to strike a balance between the need to discuss specific details to avoid "flattening out" the differences and the need to draw a coherent and comparable picture. Not all the details of each country's laws are analyzed; only major topics were selected for comparison. The analysis in this chapter is, therefore, not a substitute for legal authority for each country. And in order not to overload this chapter with the legal sources from all 13 countries, I have not repeated all the sources here, except for direct citations. For the sources and detailed analysis, see the relevant country chapter.

Comparative analysis needs structure. Wanting to avoid an a priori normative structure, I relied on an inductive approach to identify useful dimensions for comparison. The most important dimension to emerge from the 13 country chapters is the broadness of compensation rights that the laws of each country grant for three major types of regulatory takings (defined below). I was able to create a rough rank order of the countries (the same order that guided the order of the country chapters).

The 14 jurisdictions (13 countries plus Oregon) were grouped into three clusters, representing three ordinal degrees of compensation rights. Within each cluster, the countries are analyzed according to a rough rank order:

- Cluster 1: Minimal compensation rights—Canada, the UK, Australia, France, and Greece
- Cluster 2: Moderate or ambiguous compensation rights—Finland, Austria, and the United States including the special case of Oregon
- Cluster 3: Extensive compensation rights—Poland, Germany, Sweden, Israel, and the Netherlands

Three Main Types of Regulatory Takings

The reports from the 13 countries indicated that a useful way to organize the comparative analysis would be according to three main types of regulatory takings. I call these:

- Major takings
- Partial takings due to direct injuries
- Partial takings due to indirect injuries

The first two types are well known to American readers, the third is less known. Major taking refers to situations where regulation extinguishes all or nearly all of the property's value. The laws of all the countries in this book address this type of taking in some way. In U.S. jurisprudence, this is known as a

"categorical" or "per se" taking[4] (U.S. case law also recognizes a second type of categorical taking—a physical taking—but this is not relevant to this book[5]). Other countries employ different terms to denote a drastic decline in property value due to regulation. In Canada, a major taking sometimes is called *constructive expropriation*[6] or *de facto taking*[7]; in Greece, it has been called *de facto expropriation* (as literally translated into English); in Poland, it is *planning expropriation*; and in Switzerland, it is called *material expropriation*.[8] For the comparative analysis, I will use a neutral term, a *major taking* (or a *major injury*) as distinguished from a *partial taking* (or a *partial injury*). (I have avoided the term *full taking* in order to avoid confusion with a *physical taking*).

Because the laws of several countries including the United States draw a clear distinction between major (categorical) and partial takings, I have kept this distinction both in the guidelines to the contributing authors and in this comparative chapter. Understanding the law on major takings is important for understanding the other two, more contentious, types of takings.

The second and third types of takings are both partial, referring to laws that entitle landowners to compensation when property values suffer only a small or moderate decline. Several countries in this book (not including the United States) recognize takings caused not only by direct injuries but also by indirect ones. There is much less convergence among the countries where partial injuries occur. The degree of compensation rights granted for partial injuries is, therefore, the litmus test for the rank order of countries along the scale of compensation rights.

Direct injuries are caused by regulatory decisions that apply to the same plot of land that suffers the depreciation. This is the usual conception of a regulatory taking. Indirect injuries may be caused by regulatory decisions that apply to *other* plots of land in the vicinity (the precise geographic definition varies). Indirect injuries may arise from anticipated or actual negative externalities that cause depreciation in value (this type of injury usually is partial). Some types of damages from externalities also may be actionable under the general nuisance law in each country. In this book, we are interested only in laws that create special causes of action for indirect land use injuries beyond the general private law of damages.

More countries grant compensation rights for direct injuries than for indirect ones, but this does not indicate that indirect injuries are necessarily a less important issue. For landowners, indirect injuries may be substantial. They also may raise questions of distributive justice. For government agencies, extensive compensation rights for indirect injuries can lead to unbearable burdens of claims. In determining the rank order of the countries, I, therefore, took into account not only the law on direct injuries but also the law on indirect ones.

Before delving into the comparative analysis of each of the three types of takings, it is appropriate to begin with a brief review of the constitutional framework in each of the countries. This chapter thus will be divided into four major sections, representing four topics for comparison: constitutional protection of property, major takings (where all or most economic value is extinguished), partial direct takings, and partial indirect takings.

Under each of the four topics, I first present a comparative overview and then discuss the laws of each country according to the order of clusters. Readers who are not interested in the discussion of each of the countries under each topic can select the four comparative overviews. The overall conclusions are presented in chapter 3, with a special view to Americans engaged in the property-rights debate.

Constitutional/Human Rights Protection of Property Rights

The first step in the comparative analysis is to ask whether property rights are constitutionally protected in each of the countries. In all the countries except the United States,[9] there is also statutory law that regulates takings and compensation, whether or not property rights are constitutionalized. The question here 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 brief survey that follows does not purport to be an in-depth comparative analysis of constitutional property law. Others have done so, most notably Gregory S. Alexander in a comprehensive 2006 book devoted to four countries (the United States, South Africa, Germany, and, to a lesser extent, Canada).[10]

Comparative Overview

A few comparative observations are followed by a closer look at the language of the national constitutions of each country. This section focuses on domestic constitutional law and not on international law.[11] However, because of the large number of European countries in this volume—nine out of 13—and the growing importance of the European Convention on Human Rights and Fundamental Freedoms (ECHR), I have asked each of the European authors to discuss its impact on domestic law. A brief introduction to the ECHR protection of property is presented below.

The comparative analysis shows that the large differences in the laws of regulatory takings among the 13 countries can be only partially attributed to different degrees of constitutional protection of property. The constitutional protection of property apparently allows a wide margin of tolerance not only for differences in the law on regulatory takings, but even on expropriation (condemnation) law, as Alexander has shown.[12]

Among the countries where there is a clear link between the constitutional standing of property and regulatory-takings law are the three countries where property is not constitutionalized. These countries are Canada, the UK (until 1998), and Australia (the latter's constitutional property protection is indirect and weak). The laws of these three countries also grant minimal compensation rights for regulatory injuries. The reverse link, however, does not hold: France does have a legacy of constitutional protection of property, but its laws offer a very low degree of compensation rights for regulatory injuries. On the opposite side of the spectrum is Israel, which grants landowners the highest or second-highest degree of compensation rights. The major case law that created the broad compensation rights was delivered before constitutional protection of property was enacted in 1992.

The constitutions of 10 of the countries in the set currently protect property, but there is little similarity in their laws on regulatory takings. These cover the full spectrum of degrees of compensation rights. France, Greece, and Finland grant only minimal or very moderate compensation rights for regulatory takings, yet the constitutions of these countries do protect property. At the other end of the spectrum are the five countries with extensive compensation rights (Poland, Germany, Sweden, Israel, and the Netherlands). One would not be able to predict this based on differences in the language of their constitutional protection of property.

The following sections present a closer look at the constitutional provisions of the countries in each of the three clusters. But first is a brief introduction to the ECHR, which provides an additional constitutional layer to nine of the 13 countries.

The Protection of Property under the European Convention

The European Convention for the Protection of Human Rights and Fundamental Freedoms (ECHR) was prepared by the Council of Europe and signed in Rome in 1950.[13] Also established was the European Court of Human Rights (also abbreviated ECHR). All 47 members of the Council have by now ratified the Convention. The contracting states are bound to secure to everyone within their jurisdictions the rights and freedoms protected by the Convention. The Convention gives individuals as well as states the right to petition the Court. Its judgment in any particular case is binding on the states that are parties to the dispute.[14] The national authorities are expected to provide effective remedies to anyone whose rights are violated.[15]

The protection of property is clearly established under Article 1 of the First

Protocol to the ECHR:

> 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, 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.[16]

Other articles of the ECHR also have been applied in deciding takings cases, especially Article 8 (protecting private life, family life, and the home). A detailed analysis of ECHR jurisprudence is beyond the scope of this book,[17] except to note that several decisions that applied Article 1 did relate, directly or indirectly, to regulatory takings. Indeed, the first case in which the ECHR found a violation of the First Protocol was a regulatory-taking case against Sweden, decided in 1982.[18] This decision was reflected in the enactment of a new Swedish planning act in 1987, which entrenched compensation rights for both major and partial takings.

Several of the countries in this book (Sweden, Greece, Poland, and Finland) have been held in violation for regulatory-takings cases, either directly by the ECHR or indirectly by domestic courts that cited the ECHR (UK, France). Most of these cases relate to major takings or to overly long temporary freezes. On the basis of ECHR jurisprudence, a few countries, including Sweden and Finland, introduced changes in their statutory law, and in some countries, including France and the UK, case law has been influenced, as reported by the authors. By contrast, the authors of the Greek, Polish, and Austrian chapters comment that their countries' courts have not placed great weight on the ECHR decisions.

The comparative analysis shows that the impact of ECHR is sometimes in the *perception* of what its jurisprudence implies. The authors of all the European countries chapters except Poland and Greece report that the perception in their countries is that their takings law is in compliance with the ECHR— regardless of whether that law grants broad or narrow compensation rights. On the one extreme is France, with an explicit statutory clause denying compensation even for major regulatory takings, and several of Austria's nine states where all that a landowner may receive even where a major taking occurs is indemnification of some expenditure on services. On the other extreme are Germany, post-1987 Sweden, and the Netherlands. In these countries, the laws grant compensation rights even for partial takings of small magnitudes and are not in violation of the ECHR.

Yet, paradoxically, in the Netherlands—the country with the broader compensation rights—there is an exaggerated perception of what ECHR jurisprudence implies. In 2007–2008, when the Dutch government proposed to revise the law to introduce a very modest threshold for partial injuries, the Parliament decided to apply the threshold only to indirect injuries. The reason was that legislators were concerned that if such a threshold were applied to direct injuries, this might be in breach of the property-protection clause of the ECHR.

There are two conclusions about the impact of the ECHR on the laws of the nine European countries. The first conclusion is that the ECHR's interpretation of the property-protection clause has shown a high degree of tolerance for national variations in regulatory-takings law. So, after decades of ECHR jurisprudence, the differences in approaches to regulatory takings among the European countries have remained almost as great as they were in the past. The second conclusion is that ECHR decisions increasingly do place some limits on the more extreme expressions of the no-compensation side of the scale. France, Greece, several Austrian states, and perhaps also Finland may in the future have to revise some of their statutory or case law on *major* takings.

Let's take a closer look at the constitutional protection of property in each of the countries, moving from those with minimal compensation rights to those with maximal rights.

Constitutional Property Protection: Cluster 1 Countries

The law on regulatory takings in the countries in this cluster—Canada, Australia, the UK, France, and Greece—grants only minimal or no compensation rights. There are, however, significant differences among these countries in the language of the constitutional protection of property.

The first three countries in this cluster are members of the Commonwealth. Two non-Commonwealth countries—France and Greece—are also in this cluster. The five countries have very different approaches to the constitutional protection of property.

Canada. Among the 13 countries, Canada ranks as offering the lowest degree of compensation rights. As Bryan P. Schwartz and Melanie R. Bueckert note in chapter 4, Canadian scholarly writing and jurisprudence frequently contrasts Canadian law from the American regulatory-takings doctrine.[19] Unlike most other countries in this book, in Canada there is no constitutional protection of property. The Canadian Bill of Rights of 1960, which applies only to federal government actions, says that measures infringing on property rights must only satisfy rules of procedural, not substantive, fairness. The drafters of the 1982 Canadian Charter of Rights and Freedoms intentionally refrained from recognizing property rights, in

many cases for reasons specific to their own provincial economic interests, but also because many of the drafters feared that Canadian courts would use such rights to block social welfare legislation.[20] Most provinces have statutory law that pertains to regulatory takings in some way. Despite the absence of a constitutional protection, some of these statutes grant somewhat more generous protection for regulatory takings than do the constitutional rights. Generally, however, in the absence of an explicit or implied right to compensation in the legislation, private owners are not protected from government takings.

The ideological position that underpins the absence of constitutional protection for property in Canada is well mirrored in Canadian law regarding regulatory takings. As the chapters' authors and others[21] have noted, the only impetus toward somewhat greater compensation rights has come from Canada's external obligations.

Australia. The second Commonwealth country is Australia. Its constitution does refer to property but provides very minimal protection. Section 51 of the Australian Constitution of 1900 says:

> The Parliament shall, subject to this Constitution, have power to make laws for the peace, order, and good government of the Commonwealth with respect to: . . . (xxxi) The acquisition of property on just terms from any state or person for any purpose in respect of which the Parliament has power to make laws.[22]

As explained by John Sheehan, the author of chapter 5, and by others,[23] the language of the constitution provides very weak protection of property. Sheehan explains that even where compulsory acquisition is concerned, the states in the Australian federation are not constitutionally bound to provide compensation on just terms (or indeed any compensation).[24] The weak protection of property is consistent with both constitutional and statutory law on regulatory takings, which grants no compensation rights except in some types of major injuries.

United Kingdom. The United Kingdom is very different from Canada and Australia (and the United States), both constitutionally and in its statutory law on regulatory takings. Until 1998, the UK did not have a law expressly protecting human rights. In 1998, the UK enacted the Human Rights Act, which broadly incorporates into UK law the rights under the European Convention. This act, therefore, provides explicit protection of property, but its adoption did not bring any change in the legislation, and it has had only minor impact on case law regarding regulatory takings.

Despite the absence of constitutional protection of property, since 1909, the UK has had what is probably the world's longest legislative history on planning in

general and on compensation rights in particular.[25] In the early years of the 20th century, the UK first enacted compensation rights for regulatory takings. At the same time, the UK parliament also set rules regarding the capture of windfalls (called *betterment*). In 1947, development rights were abolished, and subsequently compensation rights as well, yet windfall capture continued for a few more years and was repeated, in various forms, several more times in subsequent years.[26] However, even without compensation rights, UK law ensures that property values are rarely injured by land use regulation. The secret lies in the special way in which development is regulated.

UK law on regulatory takings is among the few in this book with a clear doctrinal underpinning, in which the pieces do fit together into a coherent and consistent whole. A major 1947 reform of the British planning law removed all prospective development rights. A onetime compensation fund was set up to pay compensation to cover claims of all unbuilt development rights.[27] From then on, statutory plans no longer would grant development rights. Requests for development permission would be approved case by case. Thus, in the absence of a concept of development rights, the notion of compensation rights for regulatory takings became largely superfluous. However, in cases of major takings, there are compensation rights, as will be explained in the next section.

France. Among the countries on the European continent, France is the most restrictive in the rights it grants landowners for regulatory injuries. Although the French Constitution of 1958 does not contain a property protection clause, the preamble to this document cites the 1789 Declaration of Human Rights. The Declaration famously states in Article 2:

> The aim of all political association is the preservation of the natural and imprescriptible rights of man. These rights are liberty, property, security, and resistance to oppression.[28]

The highest court of France—the Conseil d'État—has ruled that this preamble brings the Declaration into the Constitution[29] and empowers the court to strike down legislation that contradicts the Declaration. Unlike the U.S. Constitution, the language of the French constitutional property protection does not restrict itself to situations of takings.

However, as explained in chapter 7, the Conseil d'État (unlike the U.S. Supreme Court) has ruled that most types of land use regulations are outside the scope of the constitutional protection of property.[30] Furthermore, France is the only country in the set where the planning statute says explicitly that "no compensation will be paid for zoning restrictions introduced by the [law], in

particular . . . restrictions to land use, development rights, heights of buildings, etc."[31] The absence of compensation rights for land use regulations is an entrenched doctrine in France. However, in a 1998 decision, the Conseil d'État referred to the ECHR and decided that in very extreme cases, compensation may be granted. In addition, there are a few exceptions where statutory law grants modest compensation rights even for partial takings. So French takings law may have somewhat softened its entrenched no-compensation doctrine.

Greece. Article 17 of the Greek Constitution states that:

> Property is under the protection of the State; rights deriving therefrom, however, may not be exercised contrary to the public interest." The constitution further states that "no one shall be deprived of his property except for public benefit which must be fully proven . . . and always following full compensation . . .[32]

Greek case law has interpreted the language of the constitution as not applicable to most types of restrictions that land use planning may impose on property. Statutory law in Greece for the most part reflects this constitutional approach. At the same time, Greek law does grant compensation rights for special types of partial injuries. The ECHR has held that denial by Greece of compensation in some cases (mostly major takings) is in violation of the European Convention.

It may be that under the influence of ECHR jurisprudence, both French and Greek law on regulatory takings will evolve a somewhat more moderate approach.

Constitutional Property Protection: Cluster 2 Countries

Next on the scale are the second cluster of countries—Finland, Austria, and the United States—whose laws grant somewhat broader compensation rights than the laws of countries in the first cluster but leave considerable ambiguity. While all three countries offer constitutional protection of property laws, their contents vary significantly.

Finland. The property clause of the Finnish Constitution states:

> Property of everyone is protected . . . [p]rovisions on the expropria tion of property, for public needs and against full compensation, are laid down by an Act.[33]

The language of the first phrase allows for a wide range of interpretations.

However, as Katri Nuuja and Kauko Viitanen explain, the constitution is rarely applied by the courts in regulatory-takings cases and there is very little case law on the issue.[34] The prevailing legal assumption is that landowners must bear restriction on property unless there is an explicit statutory provision for compensation rights.

Although the Finnish Constitution does not refer explicitly to the doctrine of the "social obligation of ownership,"[35] the Finnish authors emphasize the importance of this philosophy in law and practice. However, the expression of this doctrine in the law on regulatory takings is inconsistent. On the one hand, Finnish law recognizes a taking only when there is a major injury. On the other hand, Finnish law grants compensation rights for some types of partial injuries. In the absence of significant jurisprudence on the topic, the linkages with the language of the constitution are not clear.

Austria. Austria is included in the middle cluster because among the nine states in this federal jurisdiction, one finds a wide variety of degrees and formats of compensation rights, with no overarching law.

The Austrian Basic Law on the General Rights of Nationals of 1867, which is equivalent to a Bill of Rights, states that "property is inviolable." Karin Hiltgartner explains that despite the potentially broad scope of this language, the Austrian Constitutional Court has interpreted it narrowly, as not even ensuring the right to full compensation for eminent domain. (That right was finally recognized by the court in 1972, but on the basis of the equality clause rather than on the property clause.) In the case of eminent domain, some of the state constitutions provide a somewhat wider scope of property protection.

Unlike in the United States, in the absence of jurisprudence on regulatory takings, one can hardly discern the influence of the Austrian constitutional canopy on state laws. The planning statutes of the nine states contain a wide array of approaches to regulatory takings. In some states, compensation rights are extremely restrictive, but in other states they are broader.

United States. The Fifth Amendment to the U.S. Constitution, so well known to American readers, states, "nor shall private property be taken for public use without just compensation." Most state constitutions have similar clauses.[36]

Much of the heated debate about the takings issue raging among scholars and civil society groups in the United States still revolves around the correct interpretation of the takings clause. This debate is conducted along a clear ideological demarcation line: Those pro-government seek to interpret the takings clause as referring only or mostly to physical takings, while those who are pro–property rights would like to read into the takings clause a right to compensation not only for major depreciation in property values but for minor

ones as well.[37]

Although U.S. law about regulatory takings differs in some ways from its counterparts in other countries, the language of the U.S. Constitution is not the main reason. The takings clause is not too dissimilar from the language of several other constitutions.[38] The main difference is in the role played by constitutional law—by far the strongest among the countries in this book. Unlike that of most countries, American takings law still is decided largely by direct application of the U.S. Constitution, usually unmediated by statutory law. A few states have enacted "regulatory-takings statutes"; these mostly do not cover the range of situations of potential regulatory takings but add only a few special causes of action beyond constitutional takings law.[39] The absence of statutory law, of course, should not be attributed to the federal constitutional structure. In Canada and Australia, two other federal countries (that also happen to share the common-law legal tradition with the United States), statutory law on the state (provincial) level plays a more important role (perhaps more so in Australia than in Canada). Thus, in the absence of statutory law in the United States, after many decades of jurisprudence, there is still a high degree of uncertainty.[40] The Supreme Court has not created many bright-line rules, preferring to leave decisions to a case-by-case analysis.

Constitutional Property Protection: Cluster 3 Countries

In this cluster of five countries, the legislators or the courts have established broad compensation rights for regulatory takings, including partial takings. What do the constitutions of these jurisdictions say about property?

Poland. The first in this cluster is a postcommunist state. The gross infringements of property rights in the past have led to a clear framing of such rights in the 1997 Constitution. Article 64 states:

> . . . Everyone shall have the right to ownership, other property rights and the right of succession. [And] everyone, on an equal basis, shall receive legal protection regarding ownership, other property rights and the right of succession.

Another clause in the Polish Constitution is similar to the U.S. Constitution's Fifth Amendment, saying that "expropriation may be allowed solely for public purposes and for just compensation."[41]

Soon after the demise of communism, in 1990, the Constitutional Court interpreted this clause as covering all forms of takings, not only eminent domain. On a doctrinal level, constitutional property rights in Poland are qualified by

social considerations. As the Constitutional Court has put it in a 2005 decision: " . . . the social aspect of ownership is now unanimously recognized." However, as noted by Miroslaw Gdesz, there is no jurisprudence as yet to interpret "social obligations" and the notion remains largely theoretical. The social aspect of ownership is not easily visible because Polish statutory law on regulatory takings is, in general, highly protective of property rights. This is indicated by the existence of a right to compensation not only for cases where no economic value is left but also for partial regulatory takings. The reason Poland is ranked somewhat lower than the other four countries in this cluster is that the statute sets several conditions that make it somewhat more difficult for Polish landowners to win compensation claims compared with their counterparts in the other four countries in this cluster.

Germany. The case of Germany is of special interest because alongside broad protection of property, the German Constitution famously sets out the obligations that property entails.[42] Article 14 of the 1949 Basic Law states:

> (1) Property and the right of inheritance shall be guaranteed. Their content and limits shall be defined by the laws. (2) Property entails obligations. Its use shall also serve the public good. (3) Expropriation shall only be permissible for the public good. It may only be ordered by or pursuant to a law that determines the nature and extent of compensation. Such compensation shall be determined by establishing an equitable balance between the public interest and the interest of those affected.[43]

In view of the language about social obligation, one may have expected that German law on regulatory takings would grant only minimal compensation rights. The wording of the German Constitution does not even call for full compensation in cases of expropriation. Yet the statutory rights for compensation for regulatory injuries are rather broad, covering even minuscule partial takings. The doctrine of the "social responsibility of ownership" is perhaps expressed in the special type of time limit that is central to the German approach to regulatory takings.

Sweden. Swedish law on regulatory takings bears great similarity to German law, but this is less apparent in the language of its constitutional protection of property. The property clause of the Swedish Constitution of 1974 is among the broadest in the set of countries. Section 18 speaks of "restrictions by the public administration" so it can be interpreted as directly applying not only to eminent domain but also to land use regulation:[44]

> The property of every citizen is protected in such a way that no one may

be compelled, by means of compulsory purchase or any other such disposition, to surrender his property . . . or to tolerate restriction by the public administration of the use of land or buildings, other than when necessary to satisfy urgent public interests.

Any person who is compelled to surrender property . . . shall be guaranteed compensation for his loss. Such compensation shall also be guaranteed to any person whose use of land or buildings is restricted by the public administration in such a way that ongoing land use in the affected part of the property is substantially impaired or injury results which is significant in relation to the value of that part of the property concerned. Compensation shall be determined ac
cording to principles laid down in law.

In the Swedish case, the statutory law on regulatory takings well reflects the language of the constitutional property protection, and is indeed among the broadest in this book. Similar to German law, in Sweden, too, the balance with social or other considerations is struck through a special type of time limit.

The two last countries in the set—Israel and the Netherlands—have extremely broad compensation rights for regulatory takings. Despite the similarities in their laws, they are totally unrelated in legal history, culture, or geography.

Israel. Israel's law about regulatory takings is ranked as somewhat less extreme than the Netherlands', but one also could argue the reverse. Israel's Basic Law: Human Dignity and Liberty, enacted in 1992, seems to correlate well with the broad statutory compensation rights.[45] Section 3 states, "There shall be no violation of the property of a person."[46] Section 8 permits incursions onto protected rights if the incursion "(1) [was] enacted in a law, (2) befits the values of the State of Israel, (3) is for a proper purpose, (4) is of an extent no greater than necessary."

The High Court of Justice and the Supreme Court have interpreted this protection as covering not only eminent domain, but also regulation of land use. Old statutes were grandfathered in. New laws concerning property, including amendments to planning law, must pass the four-pronged test to survive constitutional challenge.

However, the linkage over time between the broad language of the constitution and the extremely generous compensation rights is, in part, a legal mirage. The statute that grants compensation rights predates the Basic Law by 46 years. The main court decisions that interpreted the language of the statute so broadly—including the decision to recognize indirect partial takings and low levels of injury as compensable—also predate the Basic Law. In fact, in recent years, the courts

have taken a few modest steps in the reverse direction, despite the constitutional protection of property. Today, the broad constitutional protection of property has become a potential stumbling block before the necessary reform of regulatory-takings law to rein in some types of run-wild claims.

The Netherlands. Finally, the Netherlands grants its landowners the most generous compensation rights in this book. The language of its constitutional protection of property is indeed quite broad. The 2002 Dutch Constitution says:

> In the cases laid down by or pursuant to Act of Parliament there shall be a right to full or partial compensation if in the public interest the competent authority destroys property or renders it unusable or restricts the exercise of the owner's rights to it.[47]

This text clearly protects property beyond a physical taking, but its language does not necessarily mandate compensation rights for partial takings to the extreme offered by Dutch law. The protection of property in the Dutch Constitution and especially the exaggerated perception by the Dutch Parliament of the protection mandated by the ECHR have placed limits on the extent of the 2008 legislative initiative for a (rather modest) revision of the law on regulatory takings.

Compensation Rights for Major Takings

The second topic for comparative analysis focuses on situations where regulation eliminates all or nearly all of a property's value. As noted, this type of taking is discussed separately from partial takings because in the United States and several other countries, there is a legal distinction between major and partial takings. There is a much greater consensus among the set of countries regarding major takings, discussed in this section, than on partial takings (direct or indirect) discussed in the following two sections.

Comparative Overview

The laws of most—but not all—countries in this book recognize a taking in cases of extreme regulatory injuries.[48] But a closer look at those countries reveals many differences. These are not always so dramatic as the differences in partial-takings law (see the next section), but they do provide opportunities for cross-national learning about underlying rationales and remedies.

The regulatory-takings laws of many countries distinguish between two types of major takings based on the permitted land use after the rezoning. Will it be a private-type or a public-type use? There are different public and planning

rationale for these two types of takings.

Where the rezoning is to a public use but the public authority has no intention of exercising its eminent domain powers or procrastinates, this is enough to cause a plunge in property values. The problem is that in the twilight zone between land use designation and eminent domain, the landowners may find themselves holding title to a greatly devalued property (and perhaps having to pay taxes). They do not know if and when the public authority will take title and pay compensation. In many countries around the world,[49] including some in this book, this is a major problem (or was so in the past) and is often the subject of litigation on regulatory takings. This problem also has engaged the ECHR and, as already noted, was the basis of its first major decision on property.[50]

There are various reasons why this type of major takings occurs on a large scale. One reason is the built-in uncertainty entailed by long-range planning, where a public authority is not certain what the specific location of some public service will be in the future, but wishes to prevent private development and thus not close options. Another reason is government's financial constraints or lethargy in exercising eminent domain. In countries where local authorities are more affluent and well administered, the extent of this type of taking has declined over time.

The definitions of what constitutes public use differ among the countries, as will be analyzed in greater detail below. Some countries include only roads and similar infrastructure; other countries also include more amenities and public buildings. An issue of growing importance in many countries is whether a designation of private land for open space should be viewed as a public use, or whether open space still can be regarded as a private use.

Another question is what manner of zoning for a future public use would provide grounds for a compensation claim: Must the designation also carry an authorization of government to exercise eminent domain? Must the designation be by a legally binding plan or is a policy plan enough? Must the designation be detailed in scale so that particular parcels can be identified or can the "shadow" of a designation in a smaller-scale map also serve as grounds? Distinctions such as these are discussed in the country chapters.

There are also differences in the remedies. Where the property is designated for some public use, does the landowner have the right to oblige government to take the title to the property or the right to claim compensation while keeping title until (and if) the authority decides to take the property? The first type of remedy is well established as a routine action in some countries, but is not available in others. In the United States, this type of remedy is sometimes called *inverse condemnation,* but this term also is used in the broader sense of denoting a

monetary compensation claim for a regulatory taking.[51] In the UK, the take-title type of claim is also known as *planning blight* or *reverse compulsory acquisition*. In one of Austria's states, it is known as *redemption.* The clearest term—translated from German—is *transfer of title* claim. I shall adopt it for the comparative review.

The second type of major taking leaves private land in private use. The growing environmental awareness in recent decades has led the governments of all the countries in this book to designate extensive areas of private land for open space, agriculture only, or other conservation goals. When such a designation does not take away any preexisting development rights, in most countries—with a few exceptions—this would not be regarded as a regulatory taking. But when existing development rights are downzoned, the issue of whether there is a taking comes up in most countries. The legal answers differ somewhat among the countries.

In the following survey of the 13 countries, I discuss some of the differences and similarities regarding major takings of both the public and private types.

Major Takings: Cluster 1 Countries

The five countries in this cluster—Canada, Australia, the UK, France, and Greece—grant landowners only minimal compensation rights even for major regulatory takings, but there are differences in degree. Two Commonwealth countries, Canada and Australia, compete for the title of "most restrictive laws on regulatory takings." Their legal "mother," the UK, is somewhat less restrictive. France and Greece also share a restrictive doctrine, but their laws offer significant exceptions where compensation is to be granted.

Canada. Under Canadian law, to qualify for compensation, a landowner generally must show that there has been a removal of all reasonable uses of the property; case law has not recognized anything less. As Bryan P. Schwartz and Melanie R. Bueckert explain, to win a "constructive acquisition" claim, landowners additionally must show that the government has gained a *direct* benefit. Some Canadian authors, such as Raymond E. Young,[52] are critical of this tough test, but it was reiterated in a 2006 Supreme Court decision.[53] Had Canada been in Europe, some aspects of its law on major takings may not have survived ECHR scrutiny.

There are some differences among the various provincial statutes, some of which provide somewhat greater protection against major takings than others. In British Columbia, planning decisions generally are not compensable[54] but a bylaw that zones private land for public uses does trigger the right to compensation.[55] In Alberta, legislation requires that land wiped out by zoning be acquired by the

municipality.[56] In Ontario, there is no statutory protection, but it is the long-standing policy of the Ontario Municipal Board that if lands in private ownership are to be zoned for conservation or recreational purposes for the benefit of the public as a whole, then the appropriate authority must be prepared to acquire the lands within a reasonable time otherwise the zoning will not be approved.[57]

Australia. In Australia, the right to "inverse compulsory acquisition" is as narrow as in Canada. As noted in John Sheehan's chapter, the generally applicable test for a successful claim (though there are some differences among the states) is that the land be reserved exclusively for a public purpose and that private usage be totally denied.[58] Sheehan criticizes this restrictive test and discusses its implications for the practice of extensive zoning for open space without leaving even minimal economic value. He also criticizes the widespread practice by which governments reserve land for a public purpose many years in advance of an intention to acquire the land. In some of Australia's states, there are further restrictions, such as the need to prove special hardship to qualify for an inverse compulsory purchase claim.

United Kingdom. Current UK law is more generous to landowners than the laws of Canada and Australia, the UK's former colonies. It also presents a well-thought-out rationale. Although in the UK, a major reform in 1947 established a system where there would be no development rights (see the previous section), the law recognizes diminution in value caused even by a land use designation in a nonbinding plan.

UK law gives landowners two optional courses of action for making claims in situations of major takings. As explained by Michael Purdue, in both types of claims, the landowner has the right to demand that the government acquire the land, but the grounds are different. The first procedure, called *planning blight*, is available only when a local plan designates private land for a public use. The plan does not have to be officially approved, may even be diagrammatic, and still give cause for a compensation claim. In this type of claim, the property still may have some beneficial use, but the landowner needs to prove that if sold, the property would obtain a price significantly below what it would have obtained without the designation for public use. In addition, the public use must be government operated.

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; it is not enough to prove that the property has no economically beneficial use. In addition, the landowner's request for

"planning permission" first must be refused or a valid permit revoked. Purdue criticizes the threshold requirements for the purchase notice action, arguing that the landowner should only be required to prove that the property no longer has any *economic* value, as in planning blight. He attributes the very low number of claims to the overly exacting conditions.

Overall, UK law grants compensation rights for major takings of both the public and private types of land uses. Michael Purdue reasonably concludes that UK law on regulatory takings is in compliance with the ECHR.

France. French law was until recent years narrower in compensation rights than even that of Canada or Australia, recognizing major takings only where a transfer of title claim would hold. A slight expansion of the definition of a major taking was introduced by a 1998 ruling of the Conseil d'État. The court based its decision not on French law but on the ECHR, ruling that if a zoning decision can be considered "abnormal and extraordinary" in reducing property value, the injury may be compensable. However, Vincent Renard argues that this decision has not led to many claims because of its highly restrictive language.[59] At the same time, transfer of title claims are widely used in practice, whether as direct remedies or as deterrents to government's misuse of powers. Once a local plan designates land for a public use, the owner can demand that government acquire the land. This also holds when an entire area is declared for redevelopment, even though this may not necessarily lead to development by the public sector.

An additional type of compensation right in French law applies to private land included in a national park. If the landowner has lost more than 50 percent of the income, he or she can oblige the government to purchase the land. Perimeters surrounding water catchment areas also are compensable.[60]

The 1998 decision mentioned previously has raised the likelihood that French takings law would survive a challenge before the ECHR. However, that depends on how widely French courts will interpret the slight degree of recognition of (major) regulatory takings.

Greece. Unlike the laws of the UK, France, Australia, and several other countries in this volume, Greek law does not grant landowners the right to initiate action to oblige government to take the title of private property in cases of extreme injury. Georgia Giannakourou and Evangelia Balla report that the Greek Supreme Court has never endorsed the notion of "de facto expropriation" (as they call it), which could engender a constitutional right to force expropriation or compensation. For example, the court denied the existence of a major taking in a case where an out-of-plan site could not be developed for 25 years because of archeological findings. Greek public administration has been notoriously inefficient in taking title to land designated for public services, leaving many

landowners in limbo. It is no surprise that Greek takings law has been found to be in violation of the ECHR several times.

On the other hand, Greek law does grant compensation rights in cases where properties, included within areas covered by plans, are zoned for public uses. In such cases, the law draws a distinction between land designated for roads and public open spaces and land designated for public buildings. In the former case, the very designation for public use includes the power to take the land. So where land is designated for roads or open spaces, landowners can expect to obtain compensation once the title is taken. However, in practice, the procedures in Greece may take decades, and landowners have no redress in the meantime. Case law of the Council of State ruled that after eight years, the landowner may petition the authorities to lift the public designation.

Where land is designated for public buildings (rather than roads or open space), landowners may encounter even tougher hurdles because the designation for a public use does not grant government an automatic right to take the land. Furthermore, it is not known in advance which public body will finally be responsible for carrying out eminent domain. There is no statutory time limit, but the eight-year ruling of the Council of State holds here, too. But even if a landowner has succeeded in lifting the designation for public use, he or she cannot be assured of regaining development rights, and there is no compensation for the interim period.

In areas not covered by plans—usually meaning outside urban areas— there is an additional legal complication unique to Greece.[61] In many Greek out-of-town areas, there is a special property right (which I shall call "traditional") by which any parcel of private land has "inherent" development rights for single-family homes as long as the parcel is of a minimal size and has road connection. With growing environmental protection, there are increasing conflicts with landowners' expectations. The courts have not recognized these expectations when rural areas are designated for nature conservation. The courts also ruled that land outside urban areas always should be assumed to retain reasonable economic value in agricultural use. An appeal to the ECHR was successful. The court ruled that a blank assumption about reasonable value is unacceptable and instructed that each rural property should be evaluated individually.

Understandably, the authors of chapter 8 are very critical of Greek law on major takings. Their hope is that the decisions by the ECHR will have more influence on domestic law than they have had in the past to fortify compensation rights for major takings.

Major Takings: Cluster 2 Countries

The three countries in this cluster—Finland, Austria, and the United States—generally grant somewhat broader compensation rights than the countries in the first cluster, especially on major takings. But unlike the countries in the third cluster, the laws of these three countries leave much ambiguity or uncertainty.

Finland. In Finland, there is a disparity between the ostensibly broad language of the planning statute regarding compensation rights and the lack of claims in practice. The takings issue is not a controversial one, it is rarely litigated, and there is not much jurisprudence to interpret the statute.

Finnish legislation grants compensation rights for major takings if the landowners no longer can use the land "in a manner generating reasonable return" or if the restriction causes "significant inconvenience."[62] These criteria could be interpreted as granting either wide or narrow compensation rights, but in the absence of significant case law, the interpretation in practice is dominant.

In areas of the country where there aren't as yet valid detailed plans but only higher-level plans (not the major part of the country today), the principle of "money or permit" applies. This means that a building permit must be granted if its denial would cause "substantial harm" to the applicant. Alternatively, the authority must provide compensation or take the land. If the property is designated for a purpose other than private development, the authorities are expected to take the land or pay compensation.

Although in Finland landowners do not have a statutory "transfer-oftitle" right, there are hardly any challenges in the courts. Are Finnish landowners simply complacent or are there other explanatory factors? A full answer is beyond this book's objective, but I will offer a few conjectures for further research. Finland is regarded as having one of the most trusted and accountable governments in the world,[63] so possibly, where necessary, Finnish public officials take timely action to take title and pay compensation. The authors of chapter 9 add that planning officials are careful to avoid situations where land use controls reduce land values below an acceptable threshold (vague though it may be). Finnish planners also have a long history of relying on negotiated solutions. Planning authorities also are careful to treat landowners equally; in Finland, the equal treatment criterion of due process is an important consideration in the determination of whether the injury of land use restrictions goes too far. And perhaps Finnish landowners are simply less litigious than their American counterparts. Other factors also may help to understand the Finnish picture. Most of the land outside urban centers is used for forestry or agriculture, and these uses

often do, in fact, supply a "reasonable return." Together, these factors may account for the low level of litigation.

Although the Finnish authors assess that Finnish law is generally in compliance with the ECHR, they raise the possibility that Finland may have to broaden its compensations rights somewhat to avoid successful challenges.

Austria. Second in this cluster is Austria, a small federal country with nine member states. Although Austrian regulatory-takings law is very different from that of Finland, the two countries share the low levels of public attention to regulatory takings and of litigation. These characteristics persevere even though in recent years Austrian cities have been "shrinking" and planners have had to roll back many vacant areas zoned for development.

The absence of case law in Austria is especially striking because there are major differences among the nine states—some granting moderate compensation rights, other granting almost none. Austria's nine states are thus a good laboratory, presenting a wide set of rationales, some unique to Austria alone. Unlike in the other federal countries in this book (the United States, Canada, Australia, and Germany), in Austria, one cannot point to many shared principles on regulatory takings among the nine states. Although Austria's Constitutional Court has not recognized even major restrictions as meriting compensation, the planning statute of each of the nine states does grant some compensation rights, but these differ from state to state. Viewed from a comparative perspective, these present a rather erratic assortment of rules.

Austrian state planning laws do not draw a general distinction between major and partial takings. Instead, five of the nine statutes grant compensation for major takings only (Burgenland, Carinthia, Upper Austria, Salzburg, and Vienna), while the other four potentially recognize less drastic restrictions as well (the Tyrol, Vorarlberg, Lower Austria, and Styria). In the absence of case law, the import of these distinctions is not clear. Another difference among the Austrian states is in the type of injurious land use. In Carinthia, it is not enough that the rezoning removed all development rights; the reclassification must be to open space. In Salzburg, rezoning to either open space or transportation qualifies. In the other states, no land use is specified. Vienna is the only state where the statute gives a quantitative threshold for a taking—83 percent diminution. Alongside the many differences, the states share one precondition: In Austria, as in several other countries in this book, to qualify for any remedy, the property must be fit for development (lot size, road access). Planning decisions that reduce the value of speculative agricultural land, for example, do not qualify for compensation in any form.

The most interesting grounds for compensation—ones not encountered

anywhere else in this book—are found in Upper Austria and Styria.[64] Their planning statutes grant compensation rights in a specific situation where there is a *comparative,* not absolute, injury: If a plan amendment singles out one plot to *remain* classified as green, while all or most of the plots surrounding it are rezoned from "green" to development, the landowner has a right to compensation. The condition is that the value of the property has declined because of the rezoning of the surrounding plots. The landowner is entitled to the difference in the plot's value before and after the revision of the plan.

The rationale is obviously grounded in distributive justice. The author of chapter 10 does not offer any economic rationale for this type of taking. My guess is that, in addition to "special sacrifice," the economic rationale pertains to the *expected* development rights. So long as contiguous private plots are all classified as green, landowners can entertain hopes that at some point the properties will be rezoned for development. But once a new plan reclassifies the surrounding plots but singles out one to remain green, the market expectations are frustrated and the property's value may plunge.

The differences among the nine states in the remedies available to landowners also are polarized. The only shared remedy (except for the state of Vienna) is the right to indemnification for expenditures on water, road, and similar infrastructure that landowners incurred while relying on the previous plan. This notion recalls the "investment-backed expectations" criterion in U.S. jurisprudence.[65] But unlike in the United States, in Austria, the expenditures that may be covered are well defined by the statutes and case law so both sides know the rules in advance.[66] Beyond this shared remedy, there are extreme differences among the states.

The states of Burgenland and the Tyrol grant the lower level of compensation rights in Austria and arguably in this entire book. Landowners may only be indemnified for the previously mentioned costs and not for decline in property value. In Burgenland, to qualify for this remedy, the landowner also must suffer undue hardship. All other states except Vienna grant an additional—and all-important—type of right: compensation for the decrease in the value of the property because of the plan revision. There are differences in time frames among the states. In Carinthia, to qualify, the land must have been purchased within the *past* 25 years,[67] while in Salzburg, the amending plan must have been approved within 10 years of the *original* plan. In Vorarlberg, Lower Austria, Upper Austria, and Styria, there are no time limits. Vienna is unique because the only remedy available is a transfer of title claim (called *redemption*).

If one takes into account the differences in grounds for claims and in remedies, then Austrian states could be ranked in the following order, indicating

increasing degrees of "generosity" to landowners: Burgenland, the Tyrol, Upper Austria and Styria, Carinthia and Salzburg, Vorarlberg, and Lower Austria. Vienna is in a category of its own, where landowners can receive monetary compensation only if they transfer titles.

An outsider wonders how Austrian landowners and developers tolerate such erratic differences among states in a country where the distances are no more than between two adjacent towns. This reality contrasts with the United States where there is a basic similarity in regulatory-takings law among most of the states.[68] Yet, unlike in the United States, the takings issue in Austria draws little public attention, few claims, and not very much litigation. If the laws of some of the more restrictive states were appealed to the ECHR, Austrian laws may not survive the challenge. Yet so far, as Karin Hiltgarten notes, Austrian courts rarely refer to the ECHR. The Austrian author provides a partial explanation for the Austrian mystery. Austrian planning authorities, like their Finnish counterparts (and those of other countries to follow), rely widely on negotiations before they impose regulations. There may be other sociocultural and economic factors that may help to understand the Austrian mystery, but these are beyond the scope of this analysis.

United States. Unlike Austria, but similar to the other federal jurisdictions, the United States does have an overarching law of regulatory takings, based on the interpretation of the U.S. Constitution. There are only a few states with special takings statutes, but these do not replace the overarching law; they only grant additional compensation rights in some circumstances, as explained by Thomas E. Roberts in chapter 11.

The shared law on takings in the United States is the most complex in this book. Despite having by far the largest body of jurisprudence and learned analysis, American law still leaves many questions open and considerable uncertainty, as indicated by the high degree of litigation and the prominence of the takings issue in American land use law. The questions left to case-by-case assessment are not lesser in major takings than in partial takings (discussed in the following section).

In the United States, the law on major regulatory takings does not draw a distinction similar to the UK's "planning blight" (designation for a public-type use only) and "purchase notice" (designation for any use). The U.S. Supreme Court has made a somewhat different distinction. Where a regulation deprives a landowner of all economically viable use, this would be regarded as a "categorical" taking (also known as per se taking[69]), as distinct from partial takings (discussed in the following section). The Court added a qualification: If the regulation goes no further than would be allowed by "background principles" of

property law or private nuisance law, the regulation would not be regarded as a categorical taking despite its economic severity. (These exceptions have few parallels in other countries in this book). As Roberts notes, even where categorical takings are concerned, there are several unresolved questions, including whether the property must have lost *all* its value before the case can be considered a categorical taking.

At first sight, the key rules in American law on categorical takings seem similar to those of most other countries in this book. There is, however, an important difference that is not easily visible. In most other countries in the set, there is no legal right to compensation unless there has been a change in regulation that diminishes development rights. Landownership in and of itself does not encompass a right to develop. By contrast, in the United States, refusal to rezone or grant a development permit can be challenged as a taking if the property has no "economically viable use," even if the loss of value was not the result of any change in regulation. For example, refusal to zone or grant a development permit for a property zoned as "exclusively agriculture" or with no zoning could perhaps be challenged as taking in the United States if the current use is no longer economically viable.

This is not a marginal difference. It stems from diverging conceptions of property rights and development rights. In the era of environmental policy where many countries around the world are increasing the regulatory protection of open spaces and agricultural uses, this difference in doctrine has direct implications on feasibly achieving this goal.

Major Takings: Cluster 3 Countries

Countries in this group grant the broadest compensation rights for regulatory takings, especially on partial takings. For the most part, their laws on major takings also grant broad compensation rights. However, there are some inconsistencies and interesting differences in rationales or specifics.

Poland. Poland is first in this cluster because, although its law generally grants broad compensation rights, the laws also set a few limitations that render them somewhat more restrictive than the laws of the other four countries.

Poland's postcommunism law reflects strong ideological protection of property rights. This can be seen both in the law on partial takings (discussed in the following section) and in the law on major takings. The 2003 Polish planning law defines what it calls "planning expropriation" thus: "If the use of a property . . . has become impossible or is limited in an essential manner . . ."[70] because of a revised land use plan or building regulations, the landowner may demand

compensation. The statute makes a clear separation between major and partial takings by regulating these in two different clauses. A clear distinction between major and partial takings may be important to landowners because the law makes it easier to claim compensation for a major taking than for a partial one, but to date (2009), there is no significant case law to interpret "impossible or limited in an essential manner." Miroslaw Gdesz proposes a 50 percent demarcation line. In his opinion, any greater diminution should be regarded as "planning expropriation."

As in many other countries, Polish law offers a special remedy for situations where land is designated for public use but is not taken within a reasonable time frame. Such cases are rampant in Poland, especially because of the transition from the communist regime. A 1994 statute grants landowners the right to a transfer-of-title claim. However, interim regulations exempted the authorities from paying compensation for designations made in plans approved before 1995. Four such cases reached the ECHR. In these cases, plots of land were designated for public purposes for 10 to 24 years but were neither expropriated nor compensated. The ECHR found Poland in violation of the property-protection clause of the Convention.

We move now to Germany and Sweden, whose takings laws are similar to each other and dissimilar to all others in this book. Both can serve as interesting models.

Germany. German law on major takings is perhaps the clearest and most internally consistent among the countries in the set, as is well reflected in Gerd Schmidt-Eichstaedt's analysis. German law leaves few loose ends on any topic. There is little uncertainty either for the landowners or for the public authorities. Because statutory compensation rights refer to any degree of diminution in property values because of land use planning decisions (beyond an "insignificant," meaning de minimis, level), major takings are, of course, also covered.

Similar to that of many other countries, German law draws a distinction between designations for private and for public land use. Where the land use category is among 14 specific public uses and the municipality does not act quickly to acquire the property, the landowner can initiate a "transfer-of-title" claim. However, if the authorities can show that it is "economically reasonable" for the landowner to continue holding the property until the municipality wishes to take the title (for example, if there is income from rent), the authorities may deny the claim and postpone eminent domain. Because a regulatory taking is regarded as illegal, the landowner's right to submit a transfer of title claim and receive compensation has no time limit. This contrasts with downzoning from one

private land use to another where there is a special type of time limit, to be discussed under the partial takings section.

Sweden. Swedish planning law regarding major takings is very similar to Germany's. Its origin, however, is very different. While German law was internally generated, Swedish law was a response to an external prod. In 1982, the ECHR's landmark decision on major takings held Sweden in violation of the European Convention. In *Sporrong and Lönnroth v. Sweden*,[71] two plots of land in Stockholm had been under an expropriation order for 23 and 10 years, respectively, yet titles were not taken and compensation not paid. Pursuant to this decision, all relevant legislation was changed to ensure that such cases would not recur. In 1987, Sweden introduced a new planning law and used that opportunity to introduce compensation rights for partial takings, well beyond what the *Sporrong* decision required.

The Swedish planning statute, like German law, distinguishes between private and public land uses[72]. Where property is redesignated for a public land use, the landowner can submit a transfer-of-title claim, regardless of the time that has passed since the approval of the original plan. As explained by Thomas Kalbro, this right applies to a broadly defined set of public services, including some (such as schools) that may be operated by a private body. But, as in Germany, where the rezoning is to a private use, there is a special type of time limit. This concept is discussed in greater detail under the partial takings section.

Israel and the Netherlands. The last two countries, Israel and the Netherlands, also share many aspects of the laws on regulatory takings (see chapters 16 and 17, respectively). But unlike the Germany-Sweden pair, Israel and the Netherlands do not share any constitutional or political traditions. The laws in both countries grant landowners very broad compensation rights both for major and for partial takings—the most extensive among the set of countries.

Unlike the laws of some other countries discussed previously, Dutch and Israeli laws do not distinguish between public and private land uses.[73] In both cases, once a property is designated for a use that causes depreciation in value, it is up to the landowner to initiate a compensation claim. Neither country recognizes a separate transfer-of-title claim that a landowner must initiate.

Despite the similarity in the laws of these two countries, there is an importance difference in practice. In the Netherlands, local governments have a long tradition of purchasing private land for public use and large-scale land banking. They have the financial sources.[74] In Israel, by contrast, municipalities have few financial resources of their own yet need land for public services.[75] Municipalities, therefore, often find it necessary to postpone eminent domain to postpone payment of compensation. The incidence of major takings thus is probably higher

in Israel than in the Netherlands (proportional to country size).

Thus, in both countries, where a plot of land is designated for a public use in advance of eminent domain, the landowner may take separate action to receive compensation for the decline in value attributable to the plan amendment—often meaning the major part. Once the title, too, is taken, the authority should compensate for the remaining value.

This "two-stage" compensation rule (as it is known in Israel) holds both good news and bad news for landowners. The good news is that unlike several other countries in this book and many more around the world, in Israel, injured landowners do not have to wait until the property title is taken. They may claim compensation immediately after an injurious plan is approved, to cover that portion of the decline in value—usually a substantial part—which resulted from the plan revision. The bad news for landowners is that it's the landowners' responsibility to submit a compensation claim for the first-stage diminution in value. The landowners will have to face the administrative and legal procedures again once the title is taken. In both Israel and the Netherlands, landowners are responsible for finding out that the plan has been amended. The authorities are obliged to serve a personal notice only at the eminent-domain stage. At this point, the laws of the two countries diverge in their implications for landowners. In Israel, if the landowner did not submit the stage-one compensation claim in time, he or she may forfeit the entire portion of the first-stage depreciation. By the time expropriation is undertaken, the property value usually will have plummeted. In contrast, Dutch landowners may wait patiently for the latter stage, when they will be eligible for the full compensation value. Thus, in Israel, the absence of a personal notice is not just an administrative matter; it can cause landowners major losses.[76]

Compensation Rights for Direct Partial Takings

Compensation rights for partial takings are potentially less consensual than for major takings. Comparative analysis of these laws, therefore, may highlight underlying ideologies more clearly than the laws on major takings. In the United States, much of the property-rights debate focuses on partial takings (of the direct type; indirect takings are not a public issue in the United States). The variety of legal regimes presented here can enrich the debate in the United States and other countries. Both sides can find supporting arguments as well as some middle roads.

Comparative Overview

One would think that countries with minimal compensation rights even for major takings would not recognize partial takings as compensable. Yet in three among the first cluster—the UK, France, and Greece—there are some minor exceptions. More significant compensation rights for partial takings are granted by countries in the second cluster (Finland, Austria, and the United States), but the threshold may be high or the criteria replete with uncertainty. In the third cluster (Poland, Germany, Sweden, Israel, and the Netherlands), compensation rights for partial takings are an integral part of an overall compensation doctrine and their legal boundaries are relatively clear in statutory law. These countries recognize even small injuries as compensable.

The most striking finding is the wide differences among the laws on partial takings. They vary in how they define partial takings, in whether there is a compensation threshold, in the time frame, and in whether there are preconditions for exercising compensation rights. The countries also differ in the incidence of claims and the degree to which these create a financial burden on local governments. Of the five countries with extensive compensation rights for partial takings, only in two—Israel and the Netherlands—has the extent of claims become a problem that requires legislative change. In two other countries—Germany and Sweden—the law on partial takings seems to have struck a balance between protection of property rights and capacity to pursue the public interest. Poland is a country in transition and, I would conjecture, its law is in transition.

One would think that partial injuries are less likely to raise constitutional questions about property rights than major injuries would. Indeed, none of the ECHR decisions about the nine European countries in this book concern partial takings. Yet in the United States, Israel, and the Netherlands, partial takings have given rise to constitutional questions similar to major taking.

Direct Partial Takings: Cluster 1 Countries

Canada and Australia are consistent in their noncompensation doctrine and do not recognize partial takings. But three among the countries in this cluster— the UK, France, and Greece—have a few exceptions where the law does grants a modest form of compensation rights for partial takings.

United Kingdom. On its face, UK planning law does not recognize partial takings. There cannot be a situation equivalent to an area-wide downzoning

because the right to develop is granted on a case-by case-basis for five years only.[77] But if "planning permission" is revoked or modified before its five-year term expires, this can be viewed as a type of partial taking (because, in theory, another request for planning permission can be submitted in the future). As Michael Purdue explains, landowners then are entitled not only to compensation for expenditures and losses attributable to the revocation, but also for depreciation in land value and loss of anticipated profits. However, in practice, revocations are very rare and made only when there is an overwhelming public consideration for a policy change. Each revocation decision must be confirmed by the national minister. The low number of revocations reflects the high degree of certainty at the stage they are issued on a discretionary basis.

France. Although the French noncompensation doctrine is well entrenched, there are some exceptions. As explained by Vincent Renard, a statute that regulates forestland grants in-kind compensation rights when private land is designated as "listed wood area." The landowner may request that up to 10 percent of the area be declassified (or be given municipal land instead). In exchange, the landowner must grant the rest of the property to the municipality free of charge. The value of the declassified area must not exceed the value of the land granted. This instrument has helped to mitigate landowners' resistance to the designation of protected forestland. Another example relates to property under high power lines or adjacent to them. A contractual arrangement by the relevant national bodies, rather than a statute, grants landowners compensation rights for partial takings. Chasing such potential claims is a vibrant business for lawyers.

Other types of in-kind compensation in France have emerged in practice. Renard analyzes various instruments that planning bodies use to meet land-owners' demand to distribute the regulatory burdens more equitably. These instruments include attempts to use "transfer of development rights" for open space preservation as a growth-management instrument (an idea exported from the United States to an increasing number of countries[78]). Renard also notes the wide reliance on negotiated practices and ad hoc plan amendments and exceptions.

So far, French jurisprudence has not recognized partial takings beyond these exceptions. But the wording of the landmark 1998 decision by the French court mentioned in the previous section ("abnormal and extraordinary" injury) holds the possibility of extension to partial takings.

Greece. Greek law is almost as resolute as French law in saying "No" to compensation rights for partial diminutions in property values, but there are two important exceptions—nature conservation and historic preservation. A special statute for nature conservation zones grants compensation rights for land

"substantially affected" by regulation. Georgia Giannakourou and Evangelia Balla interpret this phrase as granting compensation rights also for partial takings of significant levels. However, the Greek government has not enacted the regulations so the statute is dormant. In view of the increasing area being zoned for nature conservation under EU impetus, this statute is likely to become a legal and policy issue.

Interestingly, Greek law also singles out archeological and historic preservation and grants compensation for some forms of partial takings. In view of the importance of historic preservation for Greek history and tourism, perhaps this attention reflects the parliament's desire to facilitate implementation. A national statute grants compensation rights for "restrictions in the use of the property." However, no threshold criteria have as yet emerged, either from case law or in practice. A more important national statute authorizes the government to use a compensatory in-kind mechanism for historic preservation and open-space conservation. The mechanism is similar to the U.S.-born "transfer of development rights," but unlike in the United States, the Greek mechanism is anchored in a national statute. The Greek Constitution's property-protection clause was revised specifically to permit alternatives to monetary compensation.

Direct Partial Takings: Cluster 2 Countries

The laws of the three countries in this cluster—Finland, Austria, and the United States—recognize partial takings to some degree. However, winning a compensation claim is highly uncertain.

Finland. Although in Finland, as in the first-cluster countries, the general doctrine implies that there are no compensation rights for partial injuries, there are significant exceptions. The first exception relates to traditional property rights. Similar to Greece, in Finland too rural property rights were traditionally viewed as encompassing permission to develop a limited amount of housing and related uses. These rights still prevail in some parts of Finland. If land is zoned for exclusive agriculture or forest use, for example, landowners may have the right to compensation amounting to the value of the unused traditional development rights, beyond the value of agricultural or forestry use (which also leave a "reasonable return" in most parts of Finland).

The second exception is similar to Greek law regarding historic preservation. As explained by Katri Nuuja and Kauko Viitanen in chapter 9, statutory law in Finland provides that if an owner cannot use a protected building in an ordinary manner or produce a reasonable return, the owner is entitled to full compensation from the state or local government, provided that the damage is not minor. In addition, special expenses to maintain the cultural value of buildings also are

indemnified.

In view of the Finnish constitutional property protection, Nuuja and Viitanen raise the possibility that in the future the courts may interpret compensation rights for partial takings more broadly or may do so in view of ECHR jurisprudence.

Austria. Now, a second look at Austria's nine states and their varied regulatory-takings law, this time on partial takings. In four of the nine states, the language of the planning statutes indicates that partial injuries, too, may be compensable. In the Tyrol, the statute says that injuries that "reduce development rights" are to be compensated; in Vorarlberg, the criterion is "restrict development rights"; in Lower Austria, the criterion is "rule out or considerably limit development rights"; and in Styria, "decrease the value of the plot." This type of language clearly differs from language such as "abolish" or "prohibit" development rights, as used in the remaining states. In chapter 10, Karin Hiltgartner explains that there is no case law to give substance to these differences.

In view of the rarity of compensation claims and the small number of litigated cases even on major takings, the many questions one can ask about Austrian law on partial takings probably will have to wait many years for answers. As noted in the previous section, the nonissue status of the takings issue is partially due to the considerable reliance on negotiated solutions.

United States. The United States is last in the middle cluster. On partial takings, too, U.S. law is in a middle-of-the-road position. Unlike the laws of the countries discussed so far, but like the laws of the countries in the third cluster, U.S. law does recognize a general concept of partial takings. However, contrary to the image that U.S. takings law carries outside, it is much harder to win partial-takings challenges in the United States than in the third-cluster countries.

On partial takings, as on major takings, U.S. law is dissimilar to the laws of most other countries. In other countries, constitutional law is not applied directly to adjudicating regulatory takings challenges. National statutory law[79] determines whether compensation is due for partial injuries, the approximate threshold, the types of compensable government decisions, or other conditions. U.S. law on partial takings is arguably even more complex than on categorical takings because partial takings potentially cover a wider variety of factual situations than do major takings and because of the open-ended tests provided by the Supreme Court.

As reported by Thomas E. Roberts in chapter 11, a landmark 1978 U.S. Supreme Court decision established a three-factor test to determine whether compensation rights are due for partial decline in value. This test still is applied by U.S. courts today. If a court determines that the case at hand does not meet the criteria for a categorical taking, then the three-factor test is applied ad hoc.

The first factor asks about the extent of economic impact on the claimant. Case law has established that the diminution in value must be substantial. There is no set figure. Case law has suggested 60 percent, 70 percent, 85 percent, or even higher.[80] These thresholds are very much higher than the thresholds set by the laws of the five countries in the third cluster.

The second factor determines the extent to which the regulatory decision interfered with the landowner's "investment-backed expectations." These express the Court's view that property owners should not receive compensation from the public purse unless they can show that they have relied on the development rights in a concrete way. The reliance rationale also underlies the regulatory-takings laws of most other countries in this book, but usually the definition of investment-backed expectations would be clearer. In the United States, case law remains paramount and complex, leaving considerable uncertainty for all sides.

Roberts explains that the third factor, the "character of the government decision," was interpreted in the past as the need to investigate the balance between the public interest and the injury to the landowner, but a 2005 U.S. Supreme Court decision clarified that this test addresses the question of whether the alleged taking involved a physical invasion. A balancing test belongs to what Americans call "substantive due process" rather than takings law.[81]

Among the few states that have enacted regulatory-takings statutes, Oregon is of special interest because its vicissitudes are indicative of the intensity of the debate in the United States and the instability it has generated. Oregon's Measure 37 adopted in 2004 was not only the most extreme in the United States, it is also among the most extreme in this 13-country book. Measure 37 was replaced in 2007 by Measure 49. The latter can be classified as belonging to the "moderate" cluster.

Measure 37 granted landowners full compensation rights for any type of land-use-related regulatory decisions—not only planning and zoning-related decisions, but also environmental decisions. The statute also granted compensation rights for decisions by any government body, up to the state level. Measure 37 did not provide tests for "investment-backed expectations," nor a quantitative threshold. As may be expected, Measure 37 drew much criticism. The comparative analysis presented here enhances the critical perspective.

One of the most problematic aspects of Measure 37 was the statute's retroactive rule. Compensation rights extended to any restriction imposed since the property in question was acquired by the current owner or by a close family member, going as far back as 1950. Instead of adopting an objective, across-the-board time rule that would be applicable to all properties, as most countries have done, Measure 37 adopted a subjective rule. The right to receive

compensation depended on the regulatory history of each plot and of each family history. As Edward J. Sullivan[82] notes, this rule required officials to become genealogy experts (and archaeologists as well). The retroactive rule was to last only two years. This meant that the taxpayers who happened to be in Oregon in 2004 were expected to pay compensation for the benefits enjoyed by three previous generations. This type of time pile is unlikely to work anywhere.

The outcome is recounted by Bianca Putters in chapter 12. An avalanche of claims ensued in a short time because landowners wanted to use the two-year window allowed for the retroactive claims. The cumulative size of the claims was so overwhelming that in many cases the various levels of governments were obliged to waive the regulatory decisions they had taken for the public good. This type of paralyzing impact is unprecedented in any other country.

Measure 37 was largely replaced by Measure 49 in 2007, significantly reducing the previous excesses. Measure 49 is based to a large degree on the desire to provide interim remedies for current claims and to rein in future claims. It is difficult to identify any clear rationale in this exceedingly long and complex text with a variety of specific in-kind remedies, tailor-made to solve very specific types of circumstances.

Direct Partial Takings: Cluster 3 Countries

The discussion has reached the group of countries with the broadest compensation rights for injuries of the least magnitude. The planning laws of the five countries in this cluster recognize even small degrees of injuries as compensable. The order of the countries is once again—Poland, Germany, Sweden, Israel, and the Netherlands.

Poland. In principle, Polish planning law grants compensation rights "from the first zloty" of depreciation in property value. There is no minimum threshold (though a rational claimant will likely take transaction costs into consideration). The main statutory planning decisions that may adversely affect property values—plan amendments and issuance of development permission—are both compensable. Development permits are very important because the majority of Poland, including the main cities, is not yet covered by statutory plans.[83] The statute of limitations is five years from the time the amended plan or development decision came into force—among the longest in the set of countries.

However, Polish law places a tempering precondition that claimants must meet, which is not required in the case of major takings. Claimants must be able to demonstrate that they have transferred the property and that its sale price was less than it would have obtained under the former plan or permit.

The level of compensation is based on appraisal. The Polish Supreme Admin-

istrative Court has ruled that "transfer" excludes gifting to close relatives.

Interestingly, this condition in Polish law is, in a way, the converse of the condition in Oregon's Measures 37 and 49 where the claimant must show that the property has *remained* in the family. The Polish rationale is probably to ensure that the diminution in the property's value reflects a real economic loss for the owner. A secondary intention may have been to sieve out potential claimants who may not want to transfer their property to receive compensation.

So far, not many partial-takings claims have been made in Poland. The main reason, according to Miroslaw Gdesz, is not the transfer requirement (which can easily be bypassed by means of a creative contract), but the reason is the insufficient information available to landowners. Gdesz postulates that the number of claims will rise, for Poland is a transition state experiencing a rapid pace of change on the socioeconomic, political, and legal levels. It would be interesting to follow the Polish story. As real estate prices and private wealth increase and social and legal norms change, will compensation claims become a financial burden on local government, as happened in Israel and the Netherlands (discussed below), or does Polish law contain the kind of checks and balances that will make it a workable formula, as in Germany and Sweden?

Germany. Unlike Poland, German law on partial takings has been on the books and in practice for many decades and after some fine-tuning seems to have found a balanced formula. Germany also has one of the world's longest histories of planning regulations in general.[84] The German approach differs in rationale from all other countries in this book, except for Sweden.

In Germany, the federal planning statute that regulates land use planning makes a clear distinction between major takings and partial takings. As noted in the previous section, major takings that involve designation of land for a public use do not have a time restriction.[85] In partial takings, by contrast, a time restriction of seven years is a key factor and part of the underlying balancing rationale. This special type of time period is counted from the date of approval of the *original* plan that granted the development rights,[86] not from the date of approval of the injurious decision. This special time limit was introduced by a 1976 amendment to the statute as a way of creating a better balance between protection of property rights and leeway for planning public use. Prior to the amendment, compensation rights had no time limit.

The implications of the seven-year limit—called "plan liability period"— is that if a plan is amended or revoked during that period, landowners have the right to receive full compensation for the decline in the property's value (so long as the level of injury is beyond a de minimis threshold[87]). But once the seven-year period expires, and if the plot is not yet built up,[88] the municipality may reduce or take

away the development rights with no compensation at all. This seven-year limit should not be confused with a "sunset" period. Under German law, the plan and the development rights continue to be valid beyond the seven years. The implementation period is also different from a standard statute of termination. In the German statute, this is set at an additional three years from the date of approval of the revised (injurious) plan.

Understanding the rationale for the seven-year limitation is key to appreciating German (and Swedish) law on partial takings. This rationale goes well beyond the rationale for statutes of limitations—to enable governments to estimate expenditures. The purpose of the plan liability period is to establish new rules of the game between public-planning authorities and landowners. I prefer the Swedish term for a similar rule—*plan implementation period*— because it better captures the underlying rationale. The plan implementation period places both landowners and the municipality on a platform of mutual expectations. The landowners have some incentive to ask for building permission within that period; otherwise, they are taking the risk that the development rights might later be reduced without compensation. The municipality, on the other hand, is signaling that it does not foresee the need to revise the plan downward within the next seven years. However, to revise a plan at any time, the municipality must have material conditions and thus is not authorized to use the implementation period simply as a growth-management instrument. The implementation period does not represent a contractual commitment and the rights are not formally vested. Both sides simply gain greater certainty than is offered in the usual land use regulation arena, while retaining freedom of decision.

The statute sets another limitation on compensation rights. As in Austria, Finland, and Poland discussed previously and Sweden to follow, the right to compensation applies only to detailed statutory plans and not to more general or higher-order plans. Detailed plans usually specify land use and permitted development, and sometimes also include subdivision or urban-design rules.

There are three exemptions to the seven-year rule, where the authorities are obliged to extend the period of implementation. First, if the *existing* use (actually on the ground) is of higher value than the development rights under the downzoning plan, the landowner always has the right to compensation for the difference and cannot be required to phase out "nonconforming" uses.[89] Second, if the landowner was unable to obtain a permit for objective reasons, such as a development moratorium. Third, if a building permit valid beyond the seven years is revoked before it expires.

The statute also specifies three situations in which landowners may be denied compensation even within the period of liability. Importantly—as in Austria but

unlike in the United States—compensation rights apply only to serviced land. The conception is that the public purse should not become tantamount to an insurance policy for an investor who buys up unsubdivided and unserviced land or a farmer who holds such land. Nor can landowners oblige the municipality to supply the infrastructure at a particular time.[90] But if a landowner makes a reasonable offer to build the required infrastructure, the municipality is obliged to accept it. A second, interesting situation where municipalities are exempt from paying compensation is where many landowners in an area consistently underutilize the development rights. The municipality then may regard this level of development as reflecting the dominant demand and may downzone without liability to pay compensation. A third situation where municipalities are exempt was added by a 2004 amendment to the planning statute. It authorizes the planning authorities to approve plans with temporary land uses scheduled to self-terminate. If the use is not withdrawn prior to the date set, the authorities are exempt from compensation in case the plan is amended.

In addition to compensation for reduction in property values, German landowners have the right to indemnification for specific types of expenditures incurred while relying on the plan. This right does not elapse even after the end of the seven years. Compensable expenditures are fees for architects and engineers and levies paid. The right for indemnification holds even if the property is not developable and infrastructure is not yet installed. German law also grants landowners full compensation rights for any development moratoria beyond four years.

German law is a model of great internal consistency and predictability. Unlike American regulatory-takings law,[91] German law does not leave much uncertainty about the eligibility for compensation. The success of the German approach to compensation for partial takings is indicated by the low number of claims submitted. The rules of the game apparently work: Municipalities do their best to avoid injurious amendments to statutory plans during the implementation period, and landowners who intend to develop try to avoid procrastination. German law is unlikely to be challenged by an appeal to the ECHR.

Sweden. Sweden follows Germany. Swedish law on partial takings bears a strong resemblance to Germany's post-1979 law and one may assume that cross-national learning did take place, especially because the laws of these two countries differ from all others in this book. Sweden's planning statute where compensation rights for regulatory takings are anchored is of more recent vintage than is Germany's. Interestingly, even though the ECHR decision noted previously (which held Sweden in breach of the property-protection clause of the European Convention on Human Rights) concerned a major, not a partial taking,

the Swedish Parliament decided to adopt the German model and extend compensation rights to partial takings as well. Swedish law is even more generous to landowners than is German law. When the depreciation is caused by approval of a plan amendment, Swedish law does not set any minimum threshold—even de minimis injuries are compensable. However, Swedish law regarding partial takings shows somewhat less internal consistency than does German law. As noted by Thomas Kalbro, some of the internal inconsistencies are difficult to explain.

As in all five countries in this cluster, the major type of decision that can trigger a compensation claim is an amendment to a legally binding plan. In Sweden, as in Germany, Poland, Austria, and Finland, such plans must be local detailed plans; higher-order or nonstatutory plan decisions are not compensable.

Similar to German law, the Swedish statute also makes the right to receive compensation contingent upon the time that has passed since the approval of the plan that had originally granted the development rights. The two regimes diverge on whether the time period is preset (Germany) or discretionary (Sweden). In Sweden, each plan must set its own time frame, ranging between five and 15 years (if no time is set, the default is 15 years). Appropriately called the "implementation period," the flexible time period can fulfill the timing-control rationale even better than its German counterpart can. Presumably, when Swedish planning bodies are called on to set an implementation period, they can fine-tune it according to the specific economic and physical contexts surrounding the particular plan.

In Sweden, as in Germany, if a plan is amended before the implementation period lapses, landowners are entitled to full compensation for depreciation in property values. Unlike their counterparts in Poland (but like those in other countries), Swedish landowners need not prove that they have suffered an out-of-pocket financial loss (for example, because the property was sold for a lower value than its purchase price). But the right to compensation does not cover the loss of "expectation value" based on wished-for future development rights.

A further similarity to Germany is that in Sweden, too, the implementation period does not affect the validity of the plan itself. Kalbro notes that in practice, the majority of plans remain in force after the termination of the implementation period. And, as in Germany, the implementation period should not be confused with the termination period, which in Sweden is two years, counted from the date of approval of the injurious plan. Once the implementation period expires, if the landowner has not applied for permission to utilize the development rights, the unused rights can be removed without compensation. However, like in Germany, existing, built-up use cannot be rendered "nonconforming" unless the

municipality takes the title. In addition, if a landowner has encountered direct expenditures while relying on the original plan and the property is later taken, these expenditures must be indemnified.

Swedish planning law grants several special causes of action for partial takings. It is interesting that Sweden, like Greece and Finland, and to a latter extent also Germany,[92] has a special compensatory regime for historic preservation. If a detailed plan designates a valuable building for protection, and the *current* land use is impaired, the landowner has the right to compensation. The law says that the injury must be "substantial" to be compensable, but Kalbro explains that this term is interpreted to refer to a rather low level that the owner must tolerate. The threshold level is not to be deducted from the compensation paid. Swedish law grants an additional type of compensation rights for historically valuable buildings. If the authorities impose a demolition prohibition and the injury is "significant" (interpreted to be in the order of 15 percent), landowners have the right to compensation. In this case, the threshold level is to be deducted from the sum of compensation.

In addition to injuries caused by plans, Swedish law recognizes some limited types of refusals to grant building permits as also compensable, for example, refusal to grant a permit to replace a demolished building or to carry out site improvement. Once the grounds for such claims are established, Swedish law either sets no threshold or sets a low threshold of 10 percent to 15 percent.[93]

Beyond planning law, Sweden, like Finland and Poland, has enacted a statute that sets up a specialized law of damages for land use. This law provides causes of action both against government bodies and private entities. Where land is designated as parks, nature reserves, and "cultural reserves," landowners may claim compensation for a decline in property values if they can show that they have incurred "significant difficulties."

To conclude about Swedish law on compensable partial takings: It is apparently well integrated into practice and publicly accepted. An indicator is the relatively small number of appeals that reach the higher courts. The only criticism that Thomas Kalbro makes is about the uneven threshold levels. He cites the unheeded recommendation for a uniform threshold of 10 percent made by the Legislative Commission that preceded the 1987 law. For those who see the German model as attractive, Sweden presents a somewhat more flexible (though less-consistent) alternative.

Israel and the Netherlands. Now to the extreme edge of the compensation-rights scale. It is difficult to decide which of the two—Israel or the Netherlands—should get the title for having the most extreme protection of property interests. In some ways, the Netherlands is the most extreme; in other ways, Israel

deserves this title.

As counterintuitive as this may seem, the compensation laws for partial takings in Israel and the Netherlands bear greater similarities to each other than to any other country in this book, and are set apart from all the rest. Yet the facts are that these countries do not share a common legal or cultural history and there is no evidence of any cross-transplantation. Both countries grant full compensation rights for partial takings, with either no minimal threshold or a very low one and, as discussed in the following section, only these two countries also grant general compensation rights for *indirect* takings.

Even the histories of how these two laws evolved bear striking, but coincidental, similarities. In both countries, the dramatic expansion in the legal bases for compensation rights was not based on a statutory revision but on case law that gradually assigned new interpretations to a long-existing statute, and on a general administrative change in the mid-1990s that, as an unintended consequence, made it much easier for landowners to make and win claims. There are, however, a few differences between the two countries. These differences mostly revolve around fine points not on principle. Yet, some of these seemingly minor points have made the difference between a still-manageable compensation system (the Netherlands) and one that has recently gone out of control and requires urgent legislative revision (Israel).

Israel. Israel is discussed first because in its underlying legal principles (but not in practice), it grants somewhat less-extensive compensation rights than does Dutch law. The foundations of the current Israeli legislation on regulatory takings date back to 1936.[94] The language of the current statute (regarding direct injuries) is almost identical to the old statute. In 1995, it was amended to extend the termination period to three years. At the same time, six quasi-judicial committees were established nationally and were authorized to hear a variety of planning appeals against local governments, including rejections of compensation claims. This change had an unintended consequence of opening the gates to a flood of claims, now coming much faster and with more accessibility.

However, the major impetus for expansion of compensation rights did not come from these minor statutory revisions but from Supreme Court jurisprudence. As noted in the section on constitutional law, many of the major interpretative decisions that expanded compensation rights were delivered before constitutional protection of property was enacted in 1992. A planning or legal practitioner of the 1960s or 1970s would hardly recognize current law and practice. Here are some of the most important ways in which case law expanded compensation rights in Israel.

The first example of expansive interpretation is the question: What levels of

statutory plans are compensable? The statute grants landowners the right to claim compensation whenever approval of a "statutory plan" (or revision) adversely affects the property.[95] (Israeli law does not grant compensation rights for any types of land use decisions other than approval of a new or amended statutory plan.[96]) Unlike the courts in most other countries (but similar to the courts in the Netherlands), Israeli courts have interpreted the term *plans* beyond what the original legislators intended, to include not only local plans but also district and national plans. Recent higher-level plans that seek to protect open spaces have drawn huge numbers of claims. Furthermore, the plans do not have to be detailed and show the exact plots to which the injurious provisions apply; it is enough to show an appraisal that a rough indication in a small-scale map—by which specific plots cannot be identified—might affect property values. This holds even if a future detailed plan may not, in fact, locate the injurious land use on the claimant's plot.

A second example of expansive interpretation refers to the all-important qualifying clause, the "safety valve," also on the books since 1936. The evolution of case law on this clause has led, in my view, to another divergence from the likely intention of the original legislators. The clause says that if the type of injurious provision falls among a long list of provisions (the list encompasses most of the usual rules set by plans), there would be no right to compensation, unless the restrictions go "beyond what is reasonable under the circumstances" and unless "justice" considerations require that compensation be paid. These criteria are Israel's equivalent of the "goes too far" standard of a landmark U.S. Supreme Court decision.[97] As the discussion of other countries has shown, threshold terms such as *reasonable* are interpreted very differently from country to country. In Israel, until the 1980s, there were very few claims for partial takings, so there was little jurisprudence on this point.[98] As more cases came before the Supreme Court, the term *reasonable* gained substance. Case law gave it mainly[99] a quantities interpretation. The threshold level declined gradually, lately reaching about 10 percent. The threshold sum is not to be deducted from the full compensation. Compared with the U.S. "goes too far" standard, Israeli case law today provides much clearer guidelines.

The justice criterion has received very little case law and still is open to interpretation. Nor is there guidance on the relative weight of justice and reason. An injury that is above the quantitative threshold is unlikely to be denied on the basis of the justice criterion alone, but the reverse may hold. In interpreting "reasonable" and "just" for partial takings, Israeli jurisprudence has not developed any doctrine similar to "investment-backed expectations" so cardinal in U.S. law on partial takings, nor any rules that expect landowners to utilize the development

rights within a reasonable time frame, as required by German, Swedish, and Dutch law. So, all in all, the safety valve that the original legislators had inserted into Israeli law has been interpreted as exceedingly wide-open to claims. Even development moratoria pending approval of another plan are not exempt from compensation claims.

The points discussed so far, despite their broad interpretation, still would have permitted the authorities to cope with the number and amount of claims. What has thrown the Israeli compensatory regime out of balance is an interpretative question of little legal importance but great financial implications. The question is whether compensation rights extend beyond the lost value of the current development rights to also cover "expected" development rights that the downzoning decision has ostensibly thwarted. This is a major issue because recent national and district plans have designated extensive tracts of land currently classified as agriculture as zoned for "protected open space" or the like. In a high-density and high-growth country, this would mean that the property values in the growth regions of the country would decline because the market "expectation" for rezoning at some future time would be disappointed. Such claims account for a significant portion of the total value of claims. The courts lean to this interpretation, and this has made current Israeli compensation law unmanageable.

Since the mid-1990s, the number of claims has risen sharply and amounts to millions of dollars of claims still undecided.[100] Many lawyers and land appraisers solicit potential claimants. The financial burden on local governments—and, thus, potentially on the national budget—is huge. Israeli planning practice tries, within reason, to avoid planning decisions that might trigger compensation claims, but without jeopardizing planning goals. Israel law, unlike its Oregon counterpart, does not usually authorize planning bodies to turn back whenever they encounter a compensation claim. Nevertheless, compared with the excesses of Oregon's Measure 37, Israeli compensation law has proved to be more workable.

The Israeli government proposes to revise the statute to clarify that "expectation values" are not compensable and that only precise identification of the injured parcel on a detailed plan, not a higher-level plan, would be grounds for a compensation claim. A draft bill probably will be submitted in 2010. A major issue during Knesset scrutiny will likely be whether the revision is in accordance with the constitutional protection of property and will survive court challenges. If the legislative revisions are approved, the size of claims for direct partial takings will likely be reined in.

The Netherlands. Finally, we turn to the Netherlands, which is at the very edge of the scale. In some ways, it offers even more extensive compensation rights than does Israeli law or Oregon's Measure 37. The breadth of compensation

rights under Dutch law is expressed in several ways.

To be eligible for compensation, Dutch landowners need only suffer a tiny decline in property values—lower even than Israel's. Similar to that of Israel, the low threshold would not be apparent from the criterion stipulated in the Dutch planning statute—"insofar as the loss cannot reasonably be expected to be borne by the applicant."[101] Initially, as Fred Hobma explains, case law interpreted this criterion as indicating a presumption against compensation rights except for major takings. Very few claims were submitted. A 1993 book on Dutch land policy states: "This sort of compensation is a 'non-issue.' Compensation is rarely paid . . . ."[102] However (and with striking similarity to the Israeli story), since the later 1980s, case law gradually created a change in doctrine, recognizing compensation rights even for low levels of partial injuries. The number of claims rose sharply. A change in the administrative court structure in the mid-1990s gave this process an additional boost.[103]

Of all the laws of the countries in this book (except for the laws of the United States[104]), Dutch law defines the broadest range of planning decisions as qualifying for compensation for partial takings. All types of local plan-related decisions are compensable, as well as several provincial planning decisions and several national planning decisions. This definition is even broader than in Israeli law because the latter does not grant compensation rights for anything that is not called a "plan." Unlike Israel's statute (or even Oregon's Measure 37), the Dutch statute explicitly recognizes landowners' right to receive compensation even for loss of business income.[105] Dutch case law also grants compensation rights—including loss of income—even for temporary restrictions as brief as one-year construction-related nuisances. The procedural rules also are exceptionally friendly to landowners. They need only argue that there has been an injurious decision and are not obliged to supply proof of a causal relationship or an expert appraisal. These burdens rest on the authorities. Furthermore, until 2005, the right to submit compensation claims had no time limitation. Since 2008, it is set at a generous five years.

However, Dutch law has a qualifier that tempers the breadth of compensation rights. Landowners are expected to take reasonable action to minimize the damage to local governments and should not take for granted that current development rights will continue indefinitely. It is the landowners' responsibility to apply for a building permit within a reasonable time. Neither in Israel nor in Poland (nor in Oregon's Measure 37) does the law impose similar duties on landowners. The rationale for the Dutch qualifier is reminiscent of the German and Swedish "implementation time" concepts, but while the German and Swedish laws set a specific time period, known to both sides, Dutch law assigns the determination of what is reasonable to a case-by-case review, leaving much

uncertainty. There are also no compensation rights for what the Dutch aptly call "planning shadow damages." This refers to a decline in property value or income that occurred prior to the actual planning decision.

To quell the claims wave somewhat, a 2005 revision of the statute introduced a modest administrative fee. Although this measure probably does help to sieve out small claims, it does not deter the flourishing business where (as in Israel) lawyers or other professionals seek out potential claimants and offer their services without up-front charges.

The continuing wave of claims led the Dutch government to initiate a 2006 statutory amendment (in force since July of 2008). The amendment added a qualifier: "Losses falling within standard social risk shall be borne by the applicant."[106] However, as noted by Hobma, it is too soon to know how the courts will interpret this additional criterion. I would conjecture that the courts might interpret this phrase narrowly, based on a comparison of direct and indirect takings. For direct partial takings, the Parliament decided not to include any quantitative guideline; while for indirect takings (discussed in the following section), the Parliament introduced a quantitative threshold of at least 2 percent (only). The courts, therefore, might regard the 2 percent figure as a broad-brush benchmark by which to interpret "normal social risk" for direct takings as well, especially because direct injuries are regarded as more worthy of protection than are indirect injuries.

Even before these small statutory amendments, the damage-minimization duty in Dutch law probably is responsible for making the number and size of claims much more tolerable than under Israeli law or Oregon's Measure 37. In late 2008, Dutch officials expressed optimism that the changes introduced by the 2008 law, though small, will succeed in creating a better balance between property rights and planning needs.

Compensation Rights for Indirect Partial Injuries

The final type of regulatory takings is the least known or discussed. The underlying normative question is whether a landowner should have the right to compensation by a government body for a reduction in property value caused by a planning decision that applies to an *adjacent* property. Two examples: First, designation of a highway route leads to depreciation of the value of adjacent properties, especially those on an access-restricted highway or those zoned for housing. Second, zoning for a high-rise building may block the view for adjacent properties or may increase traffic and noise, thus reducing the neighbors' property values.

This book addresses only the realm of public law, not the general law of

damages. Of course, some such cases may be actionable under nuisance laws. But where public law recognizes indirect takings as compensable, a government body would be the one to pay the compensation, even if the rezoning that caused the negative externalities was requested by a private developer. In such cases, the basic rationale behind the right to compensation becomes shaky. Nevertheless, compensation rights for indirect takings do exist in a few countries and in a variety of formats.

Comparative Overview

Initial comparative analysis indicated that it would be useful to classify compensation rights for indirect injuries into three types:

- Injuries when only part of a parcel is taken by eminent domain ("severance") and the remainder suffers diminution in value from externalities stemming from the use of the portion taken ("injurious affection"[107]).
- Injuries that stem from planned public infrastructure nearby. Often, such situations also involve physical taking of a neighbor's land for the infrastructure, in whole or in part. In that case, that landowner is compensated. I will call this a "public-to-private" injury.
- Injuries stemming from rezoning of a nearby parcel for a more intensive private use. I will call these "private-to-private" injuries.

The comparative findings show that these three categories can be tentatively ranked according to incidence: Most of the countries in our set do grant the first type of compensation right; about two-thirds grant the second type of right; and only a few countries grant the third type of right. The first type of indirect injuries is not covered in this chapter because the rules governing it usually are part of eminent-domain law, a topic outside the scope of this book.[108] Left for discussion are the two remaining categories, "public-to-private" and "private-to-private" injuries.

The question posed here, for each country, is whether direct and indirect injuries are part and parcel of the same legal doctrine or whether they, in fact, are governed by separate laws and legal concepts. In only two countries— Israel and the Netherlands—direct and indirect takings are part of the same legal doctrine, distinguished only by relative geographic location. And only in the Netherlands, indirect takings are explicitly part of the original planning statute; in Israel, indirect takings are a product of case law, subsequently inserted into the legislation. In all the other countries, the laws treat direct and indirect injuries (whether or not the latter are recognized) as separate fields of law. In some

countries, the laws on the two types of injuries are not only distinct; they also are logically inconsistent with direct takings. The reason may be that the law on indirect takings may have been an "add on" rather than an integral part of the regulatory-takings law. In Finland, for example, compensation rights for direct partial takings are quite limited, while for indirect injuries these rights are relatively generous.

Indirect Takings: Cluster 1 Countries

Canada, France, Australia, and Greece. Given the narrow compensation rights even for direct partial injuries in this cluster, it is not surprising that in four of the five countries—Canada, France, Australia, and Greece—there are no compensation rights at all for indirect injuries. This is true (with a few exceptions) even for injuries due to public infrastructure. The Australian and Greek authors are very critical of the lack of compensation rights for such injuries. The other authors are implicitly critical.

United Kingdom. UK law is an exception. Despite the narrow compensation right for direct partial injures, UK law does grant compensation rights for some types of injuries from public infrastructure. Compensation for indirect injuries from public infrastructure is payable only if there is statutory immunity from actions in nuisance against the public authority responsible for the public work. This type of limitation does not necessarily hold in other countries.

Michael Purdue explains the gross disparity that had prevailed in the past between landowners who were "lucky" to have part of their property taken and landowners adjacent to the same public infrastructure whose land was not taken. Only the former were eligible for compensation for "injurious affection." This anomaly was remedied in part by a 1973 statute that provides compensation rights for depreciations caused by adjacent public infrastructure. However, the statute only addresses injuries resulting from noise, vibration, smell, and artificial lighting. Other losses of amenity such as privacy or loss of view are not compensated, nor is intensification of an existing use.[109] Purdue expresses criticism that the rights of landowners adjacent to public works still remain lesser than the rights of those whose property had been severed.

Indirect Takings: Cluster 2 Countries

Austria and the United States. Among this cluster's three countries, the laws of Austria and the United States do not offer compensation rights for indirect injuries. Thomas Roberts notes that with some exceptions, U.S. courts have not developed a significant body of law on this aspect of regulatory takings.[110] The few

state statutes on regulatory takings do not address this type of injury.

Finland.

In Finland, there is a disparity between direct and indirect takings. The law on indirect injuries grants more generous compensation rights than on some types of direct partial takings. When land designation for public infrastructure causes value depreciation of adjacent land, Finnish landowners may have more than one legal avenue for making a claim. Landowners adjacent to public roads have special compensation rights. As Nuuja and Viitanen explain, the idea is that the rights of landowners indirectly affected by highways should be the same as the rights of landowners whose property had been partially taken and who, therefore, are assured to receive compensation for injurious affection. There is no threshold level in these cases. Indeed, Finnish landowners adjacent to public roads are regularly compensated in practice by the highway authorities.[111] Another compensation avenue is based on eminent-domain law. Landowners indirectly affected by a physical taking for a public purpose—not only for highways—have the right to be treated similarly to those whose property had been physically taken. In this cause of action, there are threshold conditions: The damage must be significant; it must be compensable in a physical-taking situation; and it is reasonable to grant compensation under the circumstances.[112]

A third avenue for claiming compensation from public bodies is Finland's Act on Compensation for Environmental Damage. This statute is partly in the realm of public law and partly in private law. It gives landowners specific causes of action for claiming compensation for land-use–related damages. The law encompasses both public-to-private and private-to-private injuries. The bodies that directly benefit from a specific land use designation are the ones responsible for paying compensation. The definition of *environmental damages* includes a rather broad range of negative externalities. The law sets a threshold of tolerance: "Compensation shall be paid . . . only if toleration of the nuisance is deemed unreasonable . . . [under] local circumstances, the situation resulting in the occurrence of the nuisance, and the regularity of the nuisance elsewhere in similar circumstances." The Environmental Damage Act has made it possible for landowners to claim compensation more easily than under the general law of damages. Compensation rights under the act may be important as backdrops to negotiations between landowners and public agencies in charge of infrastructure projects.

Indirect Takings: Cluster 3 Countries

The discussion has reached the cluster of countries with a doctrine highly favoring

compensation rights. Yet only two of the five countries—Israel and the Netherlands—grant the same broad compensation rights for indirect injuries as for direct takings, while the laws of Poland, Germany, and Sweden offer lesser— and different—rights for indirect injuries.

Poland.

Polish law on indirect injuries is inconsistent. On the one hand, there are no compensation rights for "injurious affection" stemming from infrastructure—not even in cases of severance. As Miroslaw Gdesz explains, this is currently a very contentious issue in Poland because the government is developing a network of highways to make up for decades of neglect by the communist regime and thousands of landowners are suffering injuries. On the other hand, Polish planning law does grant compensation rights for indirect injuries, but these hold only for "conditions of development" decisions (ad hoc development permits where there are no statutory plans). However, this right still is dormant because few landowners are aware of it.

In addition, Poland, like Finland (and Sweden), has enacted an Environmental Protection Law. It entitles landowners to compensation for land use decisions about adjacent properties. But unlike the laws of Finland and Sweden, Polish law grants this right only when the government declares a Limited Use Zone for projects with significant impacts on the environment. Only a few such zones have been declared to date.

Germany. In Germany, there are no general compensation rights for indirect injuries caused by land use planning decisions, but there are special regulations regarding public infrastructure. Claims for indirect injuries can be made either through the civil courts or, where public bodies are concerned, through the administrative courts. In contrast with its law on direct partial takings, German law on indirect takings leaves much to discretion. The general principle is that landowners should tolerate adjacent public uses, but once the adverse effects go beyond what is regarded as "unacceptable," landowners have the right to demand either compensation or transfer of title. What is regarded as unacceptable varies according to the land use in question: The tolerance level for housing adjacent to highways is likely to be lower than for other uses.[113] In Germany, as in Finland (and Sweden to follow), the legal right serves as an important backdrop to negotiated compensation. Airports are a special case. A law that forbids construction of new housing near airports grants specific compensation rights.

Sweden. Moving on to Sweden, one finds that the similarity encountered so far between Swedish and German law no longer holds. The Swedish planning statute, like Germany's, does not grant compensation rights for indirect injuries

from planning decisions, except in a few very special situations.[114] But Sweden, like Finland, has enacted a special statute, called the Environmental Code, which establishes a cause of action to claim compensation for damages related to land use decisions, for both direct and indirect injuries. The Swedish Code, too, is partly in the realm of public law and partly in private law. The Environmental Code sets two interesting threshold criteria similar to its Finnish counterpart. First, the new or more intensive land use (including higher density) must not be a *common occurrence* in that type of locality. Second, the depreciation in market value must be *of some significance*. As members of society, landowners are expected to tolerate some damage. But Thomas Kalbro reports that this threshold is interpreted in practice as between 2 percent to 5 percent (I would add "only"). Injuries from major highways and similar public infrastructure often are regarded as compensable and landowners are routinely compensated[115] whether by submitting an official claim or by negotiating with the highway agencies and similar utilities.

Israel and the Netherlands. Now to the final set of countries discussed in this chapter. As already noted, Israel and the Netherlands are the only two countries in this book—possibly in the world—where the law grants broad compensation rights for both direct and indirect injuries and where these are routinely exercised.

There are six major similarities but also some differences between the laws of the two countries. First, in both, the same basic eligibility criteria hold for direct and indirect injuries. Second, in both countries (and unlike many others), the laws do not draw a distinction between injuries stemming from public or private land uses. It thus makes no difference whether a property's value declines due to a neighboring plot that is rezoned for a new highway or for high-density housing. Third, as illogical as it may seem, in both countries, claims are to be submitted to the government body that approved the rezoning and not to the public or private entity that benefits from the rezoning. Fourth, in both countries the magnitude of injury that qualifies for compensation is similar to the thresholds magnitude for direct injuries (but on this point there is a minor difference, to be discussed shortly). Fifth, in both, claims for indirect injuries account for a significant portion of the total claims and have become a financial burden, and so in both countries, initiatives for statutory revision have emerged since 2005.

Finally, in both countries, an informal "bypass mechanism" emerged bottom-up. This mechanism attempts to resolve the inherent paradox surrounding indirect takings of the private-to-private type: the expectation that the public purse would pay compensation for injuries that arise because a private entity wanted to benefit from an "upzoning." To avoid this anomaly, local governments in both countries gradually developed a practice of transferring the burden of

compensation to the party that benefits from the rezoning. The mechanism is an indemnification contract that local governments increasingly impose on developers before they approve an amendment to a plan or a similar planning decision. The Dutch Supreme Court ruled that this practice is illegal unless it is explicitly grounded in a statute. This led to a 2005 revision of the Dutch legislation. In Israel, the few Supreme Court decisions that touched on this practice have not (yet?) voided it. This is a topic that will likely need legislative authority in Israel, too (unless compensation rights for private-to-private injuries are totally abolished).

There are also two points of divergence between the two countries. Although minor, these differences provide a prism for understanding some underlying differences.

While in both countries the right to compensation for indirect injuries is explicitly anchored in the planning statute, this right has different origins. In the Netherlands, the right to compensation for indirect injuries is based on explicit text in the statute. In Israel, the original statute was silent on the question of whether indirect injuries also are covered. Compensation rights for indirect injuries were born from a 1979 Supreme Court decision that interpreted the statute's silence as encompassing indirect injuries. The decision did not set any geographic boundaries. Fearing a tsunami of claims, the Knesset revised the statute in 1983, striking a compromise position. As a result, the laws of the two countries recognize differing geographic distance. Dutch law is the same as the Israeli Supreme Court decision: There are no geographic limits. The Israeli statute limits the geographic scope to properties *bordering the boundaries* of the injurious plan. The term *bordering* still is ambiguous. A 2005 Israel Supreme Court decision ruled that in most cases the term should refer to abutting properties, but left room for exceptions such as a narrow road or path. The court thus left leeway for different interpretations and for uncertainty.

The second divergence pertains to the threshold value. Until a 2008 revision of the Dutch statute, the laws of both countries had identical threshold criteria for both direct and indirect injuries. Israeli law still does. But the increasing number of claims for indirect injuries led the Dutch government to prepare a bill for a new planning statute. The bill proposed that both direct and indirect injuries would have to exceed a threshold to be compensable, to reflect the share that landowners should carry as members of society. As already noted, the Parliament objected to the proposal to impose a threshold on direct takings because it feared this might be regarded as an infringement of constitutional property protection in the ECHR. The threshold level proposed by the government was 5 percent (I would add, "only 5 percent"). However, as Hobma explains, the Dutch Parliament thought

that 5 percent was too high and lowered it to 2 percent. The revised law is very new, so there is neither case law nor systematic administrative information on how local governments are using it.[116] Dutch government officials estimate that the threshold, though low, has had an immediate tempering effect on the number of claims for indirect injuries because many claims for indirect injuries are of small magnitude.[117]

The bill drafted by the Israeli government goes much further than the Dutch statutory revision does. The bill proposes to abolish most grounds for compensation for indirect injuries (plus changes regarding direct takings, already discussed previously). Despite its importance, the bill has not captured public attention (perhaps because the Israeli public has a plateful of other issues). The Association of Land Appraisers is lobbying to quash the bill. A more serious issue is whether a bill that removes existing compensation rights will survive constitutional scrutiny. My assessment is that it will, with the help of the evidence from the comparative analysis offered in this book.

The conclusions from the comparative analysis are presented in chapter 3.

Notes

1. This book, and this chapter, focus on the downward effect on property values. The other side of the coin deserves a separate analysis. Some comments about this relationship were presented in chapter 1. I showed that the commonly held assumption that the two sides of the economic effects are strongly linked does not hold in fact in most countries.
2. The potential usefulness of comparative research for planning policy is analyzed in Paul Kantor & Hank V. Savitch *How to Study Comparative Urban Development Politics: A Research Note*, 29 INT'L J. URB. & REGIONAL RES. 135 (2005); and C. G. Pickvance, *Four Varieties of Comparative Analysis*, 16 J. HOUS. & BUILT ENV'T 7 (2001).
3. A distinction should also be made between the descriptive legal analysis in the country chapters and prescriptive-critical views made by some of the authors (encouraged by my guidelines). The latter views may not reflect a consensual view in a particulate country.
4. *See, e.g.*, chapter 11 *infra*; DAVID L. CALLIES, ROBERT H. FREILICH & THOMAS E. ROBERTS, CASES AND MATERIAL ON LAND USE 334 (4th ed. 2004).
5. 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).
6. *See* Raymond E. Young, *Canadian Law of Constructive Expropriation,* 68 SASKATCHEWAN L. REV. 345 (2005).
7. The Canadian Supreme Court has also used the term "de facto expropriation." Canadian Pacific Railway Co. v. Vancouver (City), [2006] 1 S.C.R. 227, *available at* http:// scc.lexum.umontreal.ca/en/2006/2006scc5/2006scc5.pdf.
8. *See* Enrico Riva, *Regulatory Takings in American Law and "Material Expropriation" in Swiss Law—A Comparison of the Applicable Standard, in* COMPARATIVE URBAN PLANNING LAW 167–73 (James A. Kushner ed., 2003).
9. 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* chapter 11 *infra;* 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,* 52(7) LAND USE L. & ZONING DIGEST 3 (2000).
10. GREGORY S. ALEXANDER, THE GLOBAL DEBATE OVER CONSTITUTIONAL PROPERTY: LESSONS FOR AMERICAN TAKINGS JURISPRUDENCE (2006); 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).
11. For an analysis of regulatory takings in international law, see Jon A. Stanley, *Comment: Keeping Big Brother Out of Our Backyard: Regulatory Takings as Defined in International Law and Compared to American Fifth Amendment Jurisprudence,* 15 EMORY INT'L L. REV. 349 (2001).
12. ALEXANDER, *supra* note 10.
13. The full text of the ECHR is available at http://www.echr.coe.int/nr/rdonlyres/d5cc24a7-dc13-4318-b457-5c9014916d7a/0/englishanglais.pdf.

14. Mary Ann Glenden, Paolo G. Carozza & Colin B. Picker , comparative legal traditions: text, materials and cases of western law ch. 14 (2007).
15. Article 13 of the Convention for the Protection of Human Rights and Fundamental Freedoms. *Id.*

16. Protocol 1 to the Convention for the Protection of Human Rights and Fundamental Freedoms as amended by Protocol No. 11, art. 1, Mar. 20, 1952, Europe. T.S. No. 9, *available at* http://conventions.coe.int/treaty/en/Treaties/Html/009.htm.

17. A detailed analysis of this body of jurisprudence is beyond the scope of the present paper. For a summary of ECHR decisions pertaining to the right to property, see AIDA GRGIÆ, ZVONIMIR MATAGA, MATIJA LONGAR & ANA VILFAN, THE COUNCIL OF EUROPE HUMAN RIGHTS HANDBOOKS SERIES, No. 10 (2007), *available at* http://hrls.echr.coe.int/uhtbin/cgisirsi.exe/ TzQterbVHc/COURTLIB/216390020/9. For an analysis of the tests developed by ECHR jurisprudence regarding property protection, see Hendrik D. Ploeger & Danielle A. Groetelaers, *The Importance of the Fundamental Right to Property for the Practice of Planning: An Introduction to the Case Law of the European Court of Human Rights on Article 1, Protocol 1,* 15 EUR. PLAN. STUDS. 1423 (2007).
18. Sporrong and Lönnroth v. Sweden, 7151/75, 7152/75 [1982] ECHR 5 (Sept. 23, 1982).
19. *See also* Young, *supra* note 6; David Schneiderman, *NAFTA's Takings Rule: American Constitutionalism Comes to Canada*, 46 U. TORONTO L.J. 499, 501 (1996) (cited in Russell Brown, *Legal Incoherence and the Extra-Constitutional Law of Regulatory Takings: The Canadian Experience* (February 2008) (unpublished paper presented at the Second Annual Conference of the International Academic Association of Planning, Law and Property Rights, Warsaw)).
20. In addition to the authors of chapter 4 *infra*, this point is also noted by Christie, *supra* note 10; Philip W. Augustine, *Protection of the Right to Property under the Canadian Charter of Rights and Freedoms*, 18 OTTAWA L. REV. 55, 67 (1986); Richard W. Bauman, *Property Rights in the Canadian Constitutional Context*, 8 S. AFR. J. HUM. RTS. 344 (1992); and Jean McLean, *The Implications of Entrenching Property Rights in Section 7 of the Charter of Rights*, 26 ALBERTA L. REV. 547 (1988).
21. Brown, *supra* note 19.
22. An Act to Constitute the Commonwealth of Australia, 1900, *available at* http:// www.aph.gov.au/SEnate/general/constitution/par5cha1.htm.
23. In her comparative study of Australia, Canada and the United States, Donna Christie says about the Australian Constitution's protection of property that: "Australia's constitution . . . contains no bill of rights, only constitutional authorization to acquire property on just terms, buried deep in a long list of areas subject to federal government jurisdiction and regulation, and generally intended to empower government within certain limits." Christie, *supra* note 10, at 374.
24. *See also* Murray J. Raff, *Planning Law and Compulsory Acquisition in Australia, in* TAKING LAND: COMPULSORY PURCHASE AND REGULATION IN ASIAN-PACIFIC COUNTRIES 27–74 (Tsuyoshi Kotaka & David L. Callies eds., 2002).

25. S*ee, e.g.*,VICTOR MOORE, A PRACTICAL APPROACHTO PLANNING LAW 1–7 (2005); MALCOLM GRANT, URBAN PLANNING LAW 643–47 (1982).
26. Malcolm Grant, *Compensation and Betterment, in* BRITISH PLANNING 62–76 (Barry Cullingworth ed., 1999); RACHELLE ALTERMAN, LAND VALUE RECAPTURE: DESIGN AND EVALUATION OF ALTERNATIVE POLICIES (Occasional Paper No. 26, Center for Human Settlements, University of British Columbia, 1982).
27. Grant, *supra* note 26.
28. This translation from the French is taken from http://www.hrcr.org/docs/frenchdec.html. The original French text is: "Le but de toute association politique est la conservation des droits naturels et imprescriptibles de l'homme. Ces droits sont la liberté, la propriété, la sûreté et la résistance à l'oppression." http://admi.net/ddhc.txt.

29. *See, e.g.*, LORD IRVINE OF LAIRG, HUMAN RIGHTS, CONSTITUTIONAL LAW AND THE DEVELOPMENT OF THE ENGLISH LEGAL SYSTEM: SELECTED ESSAYS 280 (2003). There the author explains the role of the courts in the English system compared with the French; for full texts in English, see JOHN BELL, FRENCH CONSTITUTIONAL LAW (1995).
30. The major decision in this direction, delivered in 1998, is based not on French constitutional law but on the ECHR.
31. Article L 160-5 of the Code d'urbanisme as translated by Vincent Renard, the author of chapter 7. For the French Code, see http://www.droit.org/jo/copdf/Urbanisme.pdf.
32. 1975 Syntagma [SYN] [Constitution] 17 (Greece) as revised by the parliamentary resolution of April 6th 2001 of the VIIth Revisionary Parliament. For an English translation of the Constitution, see http://www.parliament.gr/english/politeuma/syntagma.pdf.
33. Suomen perustuslaki [SP] [Constitution] (731/1999) § 15 (Fin.).
34. The authors of chapter 9 report that currently there are two pending cases.
35. For an in-depth analysis of this doctrine, see ALEXANDER, *supra* note 10, ch. 3; Hanoch Dagan, *The Social Responsibility of Ownership*, 92 CORNELL L. REV. 1255 (2007).
36. PETER W. SALSICH JR. & TIMOTHY J. TRYNIECKI, LAND USE REGULATION 1 (2003).
37. Among the many who make this point, see DONALD L. ELLIOT A BETTER WAY TO ZONE: THE PRINCIPLES TO CREATE MORE LIVABLE CITIES 111(2008).
38. A similar point is also made in ALEXANDER, *supra* note 10, in the analysis of the constitutions of the United States, South Africa, Germany, and, to a lesser extent, Canada.
39. Coffey, *supra* note 9; White, *supra* note 9.
40. Many American authors make a similar point regarding insufficient clarity and inconsistencies. *See, e.g.*, CALLIES, FREILICH & ROBERTS, *supra* note 4. *See also* Edward J. Sullivan & Kelly D. Connor, *Making the Continent Safe for Investors—NAFTA and the Takings Clause of the Fifth Amendment, in* CURRENT TRENDS AND PRACTICAL STRATEGIES IN LAND USE LAW AND ZONING ch. 4 (Patricia E. Salkin ed., 2004); at p. 67 the authors argue that the degree of certainty and uniformity intended by the federal Constitution has not been accomplished in the field of takings law.
41. KONSTYTUCJA RZECZYPOSPOLITEJ POLSKIEJ [KRP] [CONSTITUTION OF THE REPUBLIC OF POLAND] Dz. U. of 1997, No. 78, item 483 (adopted Apr. 2, 1997)

(amended Apr. 4, 2001).
42. For an in-depth discussion of this doctrine, see ALEXANDER, *supra* note 10, ch. 3.
43. Grundgesetz für die Bundesrepublik Deutschland [GG] [Basic Law] May 23, 1949, Bundesgesetzblatt, Teil I [BGBl. I] at 1, as amended, art. 14 (F.R.G.).
44. Regeringsformen [RF] [Constitution] 2:18 (Swed.)
45. An English translation can be found at http://www.knesset.gov.il/laws/special/eng/basic3_eng.htm.
46. Although most of the land in Israel is publicly owned, long-term leasehold tenure is defined by most laws, including planning and tax laws, as equivalent to private ownership. Leaseholders are eligible for compensation rights for regulatory takings on exactly the same terms as freehold. For more on Israel's public leasehold regime, see Rachelle Alterman, *The Land of Leaseholds: Israel's Extensive Public Land-Ownership in an Era of Privatization, in* LEASING PUBLIC LAND: POLICY DEBATES AND INTERNATIONAL EXPERIENCES ch. 6 (Steven C. Burassa & Yu Hung Hong eds., 2003).
47. Grondwet voor het Koninkrijk der Nederlanden [GW.] [Constitution of the Kingdom of the Netherlands] art. 14, para. 3 (2002), *available at* http://www.minbzk.nl/contents/pages/6156/grondwet_UK_6-02.pdf.
48. This is true for other countries not included in this book. *See* Kyung-Hwan Kim, *Compensation for Regulatory Takings in the Virtual Absence of Constitutional Provision: TheCase of Korea,* 11 J. HOUS. ECON. 108 (2002). *See also* TAKING LAND: COMPULSORY PURCHASE AND REGULATION IN ASIAN-PACIFIC COUNTRIES (Tsuyoshi Kotaka & David L. Callies eds., 2002).

49. Kyung-Hwan, *supra* note 48.
50. See page 26 above for discussion of the ECHR. For basic information, see http://www.echr.coe.int/echr/.
51. See for example the discussion of this term in CALLIES, FREILICH & ROBERTS, *supra* note 4, at 295. See also its broad usage in ALEXANDER, *supra* note 10, at 121.
52. Young, *supra* note 6.
53. Canadian Pacific Railway Co. v. Vancouver (City), [2006] 1 S.C.R. 227, 2006 SCC 5.
54. Subject to the tests in the CPR decision, *id.*
55. Local Government Act, R.S.B.C. 1996, c. 323, s. 914(2).
56. Municipal Government Act, R.S.A. 2000, c. M-26, s. 644.
57. Re Nepean Restricted Area By-law 73-76 (1978), 9 O.M.B.R. 36; Russell v. Toronto (City) (1997), 36 O.M.B.R. 169.
58. *See also* Raff, *supra* note 24, at 41.
59. In chapter 7 Renard also notes that French law provides a more effective protection for landowners when a landowner can show that a public authority has zoned land for a low-value use and later takes the land. If the landowner can show "intentional injury" then there may be a right to compensation. This remedy has been quite effective in reducing the misuse of zoning powers.
60. Although easement-type exactions are not the direct focus of this book, American readers who follow U.S. case law on beach access may find it interesting that in France (unlike

some other countries in the set) pedestrian passage rights along coastlines are compensable.

61. This type of right exists in Cyprus as well. My personal knowledge, based on several interviews with Cypriot planners during visits to Cyprus, and on a graduate thesis by a Cypriot student that I supervised (unpublished).

62. This language, and similar criteria in the laws of other countries, may remind American readers of the "goes too far" criterion in the formative U.S. Supreme Court decision of Pennsylvania Coal v. Mahon, 260 U.S. 393 (1922).

63. The international corruption scale is one such indicator. Finland was ranked among the countries with the lowers level of corruption in the world. This reflects strong trust in government. See http://www.transparency.org/news_room/in_focus/2008/cpi2008/cpi_2008_table

64. Vorarlberg law too grants the same grounds for compensation claims, but also the more common grounds where an injury is measured in absolute terms.

65. *See* chapter 11 *infra*. See also the discussion on "investment backed expectations" in BARLOW BURKE, UNDERSTANDING THE LAW OF ZONING AND LAND USE CONTROLS 45 (2002).

66. In Vorarlberg alone, reimbursement rights extend to areas originally classified as "expected" development.

67. The rationale is that if a landowner did not utilize the development rights for a long time before the rezoning, then he or she would lose the right to compensation. This type of rationale is central to German and Swedish law, as will be discussed later.

68. The few U.S. states where there are special state laws about regulatory takings—Florida, Texas, and Oregon—are much larger than Austrian states, providing the same regulatory regime for millions of landowners and developers rather than differentiating among small distances and population numbers.

69. *See* chapter 11 *infra*. *See also* DANIEL R. MANDELKER, JOHN M. PAYNE, PETER W SALSICH, JR. & NANCY E. STROUD, PLANNING AND CONTROL OF LAND DEVELOPMENT: CASES AND MATERIALS 140 (2005).

70. Poland: Land Planning Act of 2003, Dz. U. of 2003, No. 43, item 296, art. 36(1) (Pol.).

71. 7151/75;7152/75 [1982] ECHR 5 (Sept. 23, 1982).

72. This point and the following discussion are not highlighted in chapter 15. Rather, they are based on my further communication with the chapter author, Sept. 28, 2008.

73. This point and the following discussion are not highlighted in chapter 17. They are based on my further conversations with the chapter author, Sept. 2–3, 2008.

74. Although land banking practice is reduced today, it is still a major tradition. *See* Barrie Needham, *One Hundred Years of Public Land Leasing in the Netherlands, in* LEASING PUBLIC LAND: POLICY DEBATES AND INTERNATIONAL EXPERIENCES 61–82 (Steven C. Bourassa & Yu-Hung Hong eds., 2003). *See also* EDWIN BUITELAAR, THE COST OF LAND USE DECISIONS: APPLYING TRANSACTION COST ECONOMICS TO PLANNING AND DEVELOPMENT 65–67 (2007).

75. For more detail about the various ways in which Israeli local governments try to "square the circle" and secure land for public services, see Alterman, *supra* note 46.

76. In chapter 16 I discuss some of the consequences of the absence of a personal-notice obligation.
77. PHILIP BOOTH , PLANNING BY CONSENT: THE ORIGINS AND NATURE OF BRITISH DEVELOPMENT CONTROL (2003); MOORE, *supra* note 25.

78. *See* Rachelle Alterman, *A View from the Outside: The Role of Cross-National Learning in Land-Use Law Reform in the United States, in* PLANNING REFORM IN THE NEW CENTURY 309– 20 (Daniel R. Mandelker ed., 2005).
79. Austria is an exception, but there all nine states have statutory law on regulatory takings.

80. *See also* DOUGLAS T. KENDALL, TIMOTHY J. DOWLING & ANDREW W. SCHWARTZ, TAKINGS LITIGATION HANDBOOK: DEFENDING TAKINGS CHALLENGE TO LAND USE REGULATIONS 209–19 (2000).
81. The laws of most of the other countries in this book also view due process questions as belonging to judicial review. In a few countries, however, substantive due process is one of the considerations for determining whether compensation is due for a partial taking. For example, recent Supreme Court decision in Israel introduced the possibility of a "balancing test" as an additional consideration beyond the now relatively-clear quantitative threshold. However, the court was split and it is not clear from the decision whether the majority of the judges joined this rationale or whether it was an *obiter dictum* and was not necessarily part of the majority's decisions.
82. Edward J. Sullivan, *Year Zero: The Aftermath of Measure* 37, 36 ENVTL. L. 131 (2006).
83. Furthermore, once a claim is submitted, the municipality no longer has the power to take title to the property. This type of rule is not found in other countries in this book. Its rationale is, probably, to remove a possible deterrent to landowners' compensation rights.
84. Sonia Hirt, *The Devil Is in the Definitions: Contrasting American and German Approaches to Zoning* 73 J. AM. PLAN. ASS'N 436 (Autumn 2007).
85. This rule is not derived directly from the statute but from a 1999 decision by the German Federal Court of Justice.
86. If adequate infrastructure is not yet available to permit development, the date is postponed accordingly.
87. The German statute does provide an ostensible threshold, stating the condition that the value depreciation be "not insignificant." However, as Gerd Schmidt-Eichstaedt explains in chapter 14 *infra*, in effect this means full compensation because the term "not insignificant" is interpreted in practice as exempting only *de minimis* claims; there has not been any case law to the contrary. Such claims are rarely submitted anyhow because the transaction costs may be higher than the sum awarded and the long proceedings. *See also* Katharina Richter, *Compensable Regulation in the Federal Republic of Germany, in* COMPARATIVE URBAN PLANNING LAW 185–89 (James A. Kushner ed., 2003).

88. If the amending plan permits less than already built up, the municipality must pay full

compensate for the balance of the built-up rights.
89. The only option open to government if it wishes to terminate existing use is to take the title (and pay compensation).
90. *See* Richter, *supra* note 87.
91. *See* chapter 11.
92. Historic preservation is not discussed in chapter 14. This statement is based on my further communication with the chapter author, Gerd Schmidt-Eichstaedt, who wrote: "There are specific rules in the German state law (because monument protection is a matter of the States). The State laws say that the owner of a historic building has to tolerate specific binding regulations, basically without compensation, because the special quality of a historic building justifies special restrictions. But if the economic consequences of a restriction are unreasonable (*unzumutbar*), the owner has the right to get some compensation (not full compensation) or to give the plot to the public at the market price (which is low—due to the special regulations)." Electronic communication, Nov. 12, 2008.
93. In two of the four types of claims for refusal to grant permits, the thresholds are to be deducted from the amount of compensation. For details, see chapter 15.
94. Although this statute predates the State of Israel, upon the State's founding in 1948, this legislation, along with most others enacted under the British Mandate, was recognized as Israeli legislation
95. The original term in the 1936 legislation was "injuriously affects". This terminology is typical of British legislation of the time and is still to be found in the statutes of former British colonies.
96. Uncompensated decisions include an imposition of area-wide conditions on the issuance of building permits (for a limited period); a declaration of a "nonconforming use"; a subdivision plat; refusals to grant variances; or regulations enacted by the Minister in charge.
97. Pennsylvania Coal v. Mahon, *supra* note 62. *See* chapter 11 *infra*.
98. RACHELLE ALTERMAN & ORLI NAIM, COMPENSATION FOR DECLINE IN LAND VALUES DUE TO PLANNING CONTROLS (1992) (in Hebrew).
99. It is still not clear whether Israel's "goes too far" measure is only quantitative, or whether the public purpose or distributive justice considerations should also be taken in account (as other Supreme Court judges have suggested). See chapter 16.
100. Some of the claims load is due to indirect injuries discussed in the following section.
101. Wet ruimtelijke ordening 2006 [Spatial Planning Act] art. 6.1 (Neth.). As of December 2008 there was no official translation of the 2008 Dutch Spatial Planning Act. Fred Hobma and I are relying on an informal translation provided by the Dutch government. On file with Rachelle Alterman.
102. D. B. NEEDHAM, B. KRUIJT & P. LOENDERS. URBAN LAND AND PROPERTY MARKETS IN THE NETHERLANDS 72 (1993).
103. This point, not highlighted in chapter 17, is based on conversations I have had with another Dutch leading authority, Prof. Dick Lubach, in December 2005 and October 2008, in the Netherlands.
104. United States law does not limit the types of decisions because it is largely based directly on constitutional rights. However, the grounds for compensation claims for partial takings in the United States are more limited in other ways than in the Netherlands.
105. The Israeli Supreme Court has recently clarified this point, interpreting the silence of

the statute on compensation of income, as indication that there is no legal right to this type of compensation. However, the Court left a small opening for special cases where there is a special dependence on the previous land use plan, such as where altered road access has caused a direct loss.

106. Wet ruimtelijke ordening 2006 [Spatial Planning Act] art. 6.2 (Neth.) As of December 2008 there was no official translation of the 2008 Dutch Spatial Planning Act. Fred Hobma and I are relying on an informal translation provided by the Dutch government.

107. This term has various meanings. In a context related to eminent domain it has this meaning. For a discussion of the various usages of the term "injurious affection," see *Compensation for Injurious Affection*: Discussion paper (Land Reform Commission of Western Australia, Government of Western Australia, October 2007). *See also* Raff, *supra* note 24.

108. I did ask the authors to touch upon this issue and most have done so, in brief.

109. This limitation was narrowly interpreted by the Court of Appeals in a 2005 decision.

110. An interesting exception is Colorado constitutional takings law. The Supreme Court of Colorado has interpreted the difference between the language of the state takings clause and that of the Fifth Amendment—the addition of the word "damages" in the phrase "taken or damaged for public use"—as denoting broader compensation rights. PETER W. SALSICH & TIMOTHY J.TRYNIECKI, LAND USE REGULATION: A LEGAL ANALYSIS AND PRACTICAL APPLICATION OF LAND USE LAW 13 (2d ed. 2003), citing Animal Valley Sand and Gravel, Inc. v. Bd. of County Comm'rs, 38 P.3d 59 (Colo. 2001). The court interpreted this broadening to refer to "situation in which the damage is caused by governmental activity in areas adjacent to the landowner's land." 38 P.3d at 63.

111. Based on conversations with Finnish academics and practitioners, most recently an interview with Prof. Ari Ekroos of the School of Law, Helsinki University of Technology, during a meeting in Belgium in October 2008.

112. In addition, the law grants landowners the right to compensation whenever the value of their property has declined because a public agency has altered the access to that property from a road or public open space.

113. Based on further communication with author of chapter 14, Gerd Schmidt-Eichstaedt, by phone and e-mail.

114. Swedish law grants landowner the right to compensation whenever the value of their property has declined because a public agency has altered the access to that property from a road or public open space.

115. Based on conversations I have had with the author of chapter 15, Thomas Kalbro, and with various other Swedish practitioners and academics.

116. My conjecture is that the administrative bodies and the courts will not often diverge from the threshold specified in the statute.

117. Conversations with officials of the Dutch Ministry of Housing, Spatial Planning and the Environment conducted in October 2008. The new statute came into force in July 2008.

CHAPTER 3

Conclusions: The U.S. Property Rights Debate Viewed through Cross-National Lenses

Rachelle Alterman

A cross-national comparative perspective on law and public policy can help to create a sense of scale and proportionality that conventional domestic legal analysis cannot offer. In chapter 2, I presented a comparative analysis of several key aspects of regulatory takings law in a sample of 13 democratic countries with advanced economies,[1] located in various parts of the world. This is the first comparative research of this expanse on regulatory takings, intended to enable readers everywhere to find new perspectives for viewing their countries' laws and policies. Here are some thoughts about what American readers may be able to take away from the comparative research.

A View of U.S. Regulatory Takings Law through Comparative Lenses

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 U.S. property rights debate and the factual positioning of U.S. takings law midway along the scale of degree of compensation rights for regulatory takings. The comparative perspective can offer both sides in the debate a way of thinking outside the box. Both the proponents and the opponents of property rights may

gain by looking at U.S. takings law from the outside. Both sides also can look to other countries, either for alternative models to support their own positions (with appropriate adjustments) or for middle-of-the road approaches that may contribute to a rapprochement in this long-raging contest. Alongside its moderate degree of protection of property rights, U.S. law on regulatory takings exhibits some unique characteristics that place the United States apart from other countries.

Perhaps the most prominent feature is the intensity of the property rights debate itself.[2] In no other country in the sample, and at no time in recent decades, has the issue of regulatory takings occupied a similarly prominent position in public opinion and action as in the United States. 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 its quick demise within only three years. Interestingly, the relatively docile status of the takings issue in most other countries exists regardless of the position occupied by that country's takings laws on the compensation rights scale: whether the country is on the very restrictive side regarding compensation rights (Canada, Australia, the UK, France, or Greece); or whether the country is on the side that offers broad rights (Poland, Germany, Sweden, the Netherland, and Israel).

Another key difference between the United States and the other countries is the extremely prominent role played by constitutional law. In most other jurisdictions in this study, statutory law (whether on the national or subnational levels) is a key player in takings law. Only in the United States is takings law decided largely by direct application of the U.S. Constitution (in most states where there are regulatory takings statutes, these laws do not add substantive causes of action beyond constitutional law).[3]

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.[4] 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.[5] 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 few claims and no jurisprudence to interpret the language of the statute. American society is much more litigious. The unique feature of U.S. takings law is that high legal uncertainty persists despite a large body of Supreme Court jurisprudence extending over almost nine decades, alongside many decisions by the lower courts.

The combination of intensive public debate, a constitutional focus, and considerable legal uncertainty has produced what is by far the largest body of scholarly research and publications on regulatory takings anywhere in the world. As noted in chapter 1, the LexisNexis search I conducted using the terms *regulatory takings* together with *land use* yielded a number of items beyond what the display would carry. Likely, thousands of scholarly papers and hundreds of books discuss the takings issue. Every new Supreme Court decision generates scores, sometimes hundreds, of scholarly publications. Yet this huge body of knowledge—which, I hypothesize, is several times larger than all the scholarly writing on the topic in all other countries and languages combined—has not produced greater convergence on the property rights debate. The Oregon turbulence of 2004–2007, which left no side satisfied, is unlikely to be the last time legislative initiatives are brought up.

In academic or professional discussions—and even in some academic publications—one sometimes encounters Americans who refer to the "European approach" to regulatory takings, as contrasted with the "American approach." The image is that Europe has a unitary approach that offers less protection of property rights than does the United States. There seems to be an image that European countries as a group do not recognize the concept of regulatory takings or do not regard these as entailing compensation by the public purse. On the opposite side, one encounters non-American practitioners and scholars—even from English-speaking countries—whose image of U.S. takings law is that it offers landowners extensive protection from downzoning and generous compensation rights.[6] This view is part of a broader image of the United States as offering extensive protection of property in general.

The evidence from the 13-country study shows that both images are far from correct. There is no European approach to regulatory takings. The nine European countries in this book exhibit the full scale of legal (and public policy) approaches to regulatory takings, almost to the very extremes. This is so even though all European countries are bound by the European Convention on Human Rights and Fundamental Freedoms (ECHR). Article 1 of the First Protocol of ECHR provides for property protection, but qualifies it "with the general interest."[7] Furthermore, all European countries in this book also are members of the EU. Yet 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.

The canopy of the ECHR has to date shown high tolerance for the variety of interpretations of both property rights and the public interest. The effect of ECHR jurisprudence so far has been modest: It has pared down only the extremities on the noncompensation side, but has not influenced the countries whose laws fall on the other side of the scale with extensive compensation rights. The European countries at the very extreme edges of the scale are France and the Netherlands. On the one extreme is France, where the planning statute says explicitly that land use regulation is not to be compensated, and at the other extreme is the Netherlands, whose law grants compensation even for regulatory takings of minute degree and of indirect effect. The other seven European countries—each with a different set of laws on regulatory takings— fall in between on the scale: Some are closer to France (the UK and Greece), others are closer to the Netherlands (Poland, Germany, and Sweden), and two have unclear positions (Finland and Austria). In total, four of the nine European states offer landowners higher degrees of protection of property than does U.S. law (though not uniformly in all factual situations); two offer lesser rights; and regarding the last two, there is not enough jurisprudence to know.

The comparative findings also show that there is no unitary British-legacy approach to contrast with the U.S. approach. The four countries with British law in their background in the past century—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, not many similarities exist among these countries' laws on takings.

U.S. takings law holds a middle seat both on major takings (called "categorical" in the United States) and on partial takings. On major takings, U.S. law is in line with the majority of countries in this book (with a few exceptions to be noted below): It recognizes a taking when the economic value of a property has been totally or almost totally extinguished. But to win a categorical-taking challenge, U.S. jurisprudence has set a number of conditions that are difficult for landowners to satisfy. On partial takings, too, U.S. law is midscale. It joins half of the set of countries where partial injuries are compensable. But unlike its image overseas, U.S. law (except for some state law exceptions) places a rather high quantitative threshold as well as various preconditions that make it difficult for American landowners to win challenges for partial takings. The third type of taking, indirect injuries, are not recognized in U.S. law, thus placing U.S. law among the laws of the majority of countries; only a few countries grant extensive compensation rights for such injuries.

At the same time, the comparative analysis also indicates that on two

important counts, U.S. regulatory takings law is more generous to landowners than the laws of most other countries in the set. First, in all the other countries in the set, takings claims only can be made when a government body *changes* an existing regulation to a *more restrictive* category. Owners of farmland or even vacant land that generates no income usually do not have the right to expect a rezoning. The United States is the only country among the set where *refusals to upzone* or to grant development permission can conceivably serve as grounds for a taking challenge.[8] Although a challenge on these grounds is difficult to win, the threat of facing one lurks in the background when U.S. policy makers decide on farmland and other environmental protection regulations. Second, in most countries (with few exceptions), regulatory takings— especially partial takings—are not an open-ended concept; a statute usually defines a limited set of government decisions that 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 decisions are necessarily included). For example, some environmental regulations may not be compensable.

Oregon's Measure 37 Viewed from the Outside

The hyperactive rise and demise of Oregon's Measure 37 is a tale with no counterparts anywhere else. 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.[9] It soon turned out to be so unworkable that it was replaced in 2007 by Measure 49. The latter, too, has no international counterparts in takings law—neither in length nor in complexity. The assortment of remedies enabled by Measure 49— many of them in kind rather than financial—has no visible 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 compensation for partial takings. The comparative analysis shows that there are legal regimes where some types of partial takings are compensable. These regimes do seem to work reasonably and are sustainable for decades, so 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 a need for some legislative revision to cool down excessive claims, but nowhere does one encounter a dramatic turnabout such as in Oregon.

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. 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 that 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 of at least de minimis percentage points or a qualitative threshold to represent "reasonableness," "social contribution," or "justice." Third, the legislators went out of their way to remove most legal-administrative burdens and costs from the landowners. Thus, even transaction costs— effective in some jurisdictions in cooling down claims fever—were ineffective in Measure 37, placing the costs of processing claims largely on the taxpayers. In contrast, the other countries where the number of claims became burdensome, Israel and the Netherlands, both imposed a fee on claimants. Fourth, the statute defined any regulatory decision, on any land use subject, up to the state level, as compensable. 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 down 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.[10] Sixth, Measure 37 did not require that 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 were restricted, the landowners could ask the taxpayers to compensate them for their loss. This open-check policy is out of line even with three of the four countries with the most generous compensation rights— Germany, Sweden, and the Netherlands—where landowners are expected to share the risks. Only Israeli law is similar to Oregon's on this point, and it has proved to be unworkable. Finally, the fatal difference between Measure 37 and all other countries' laws was Measure 37's about-turn clause. It enabled the authorities to grant an exception to those who submit a claim, instead of paying compensation.[11] No other statute discussed in this book authorizes a government

agency that encounters a compensation claim to routinely pull back from the regulation. On the contrary, in many jurisdictions, such juggling would be regarded as legally dubious for it would shed doubt on the substantive merit of the initial decision. The effect of this clause was that almost no claims actually were paid out, while a large number of development proposals previously restrained were allowed to proceed.

To an outsider looking at the saga of Measure 37, it is not surprising that this statute didn't survive infancy and had to be followed by a spare-parts sibling.

Possible Statutory Models for Further Study

Few believe that Measure 37 was the last time that proponents of property rights in the United States would propose takings statutes. At the same time, opponents of the property rights movement may wish to consider state statutory initiatives of their own with the purpose of helping to reduce some of the high degree of uncertainty that characterizes current American takings jurisprudence, so long as constitutional law is unmediated by statutory law. In the United States, there is much more room for experimentation among 50 states than in unitary countries.[12]

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 country models have operated in real life—for better or for worse—and can be studied and evaluated. Of course, unmediated transplantations of laws or policies into other legal-administrative and sociocultural contexts are not recommended. The survey of a large variety of laws could, however, help to stimulate new ideas that may be worthy of more in-depth scrutiny.

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. France and Greece, however, probably would not be suitable models. Greece is unsuitable because its law on regulatory takings lacks internal consistency, and poor administrative practices have made them dysfunctional. France may be unsuitable because its no-compensation ideology is too extreme to withstand U.S. constitutional challenges (the French planning statute disallows payment of compensation for any land use regulation).

Canada, next door, presents at the federal level another extreme no-compensation doctrine that is much at odds with U.S. constitutional protection of property. However, some of the Canadian provinces have enacted more moderate statutes or administrative practices (not directly discussed in this book). These

may well merit further evaluation. Australia is somewhat less extreme in its no-compensation doctrine. Unlike Canada's provinces, the Australian state statutes are more consistent in granting compensation rights for major ("categorical") takings. Especially interesting would be to look at the differences among the states and evaluate their legal and public impacts. In 2007– 2008, some Australian states[13] began a reassessment of their regulatory takings laws and the outcomes are worthy of follow-up.

In my view, on the no-compensation side, the UK is the most interesting model (see also Professor Daniel Mandelker's afterword). UK law is the most coherent on the no-compensation side, where the pieces fit together in 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 that 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.[14] From then on, statutory plans—equivalent to U.S. zoning—no longer would grant development rights and, thus, there could not be a downzoning. Land use plans retained their importance, but would have an advisory role. The right to develop (called "planning permission") would be granted case by case on a discretionary basis and would be valid for five years only.[15] If planning permission is withdrawn 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-pocket costs. In practice, revocations are made only when there is an overwhelming public consideration for a policy change. This is extremely rare because under the UK system, the timing of the development permission is very close to the development initiative and government has little uncertainty about its future policies. Decades of practice show that the UK system works without overburdening the public purse.

Where major ("categorical") takings are concerned, UK law provides more certainty for landowners than does U.S. law. Recognizing that property values might be diminished when land use plans—though advisory—designate land for some types of uses, UK law gives landowners two optional causes of action for making inverse-condemnation claims. One procedure, called "planning blight," is available when a local plan designates private land for a public use. The plan does

not have to be officially approved and may even be diagrammatic. The property still may 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 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 owner's request for planning permission had been refused. Planning authorities try to avoid blighting property, so the number of claims for major takings is very small.

Now to the other side of the debate. What can proponents of property rights take from this study? They should first heed the lessons from the Measure 37 experience, as previously detailed. If new statutes are proposed, they must contain adequate internal checks and balances. Proponents of such statutes have much to learn from the international experience. The survey showed 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, and Israel). 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 uncertainty to be useful (although the great assortment of laws offered by the nine Austrian states may stimulate some ideas). Among the five remaining countries, the Netherlands and Israel are models that can help to foresee what mistakes to avoid. These countries, too though to a lesser extent than Measure 37—have overburdened the public purse with a disproportionate number of claims. Poland's law still is 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. Both laws draw a clear distinction between major and partial takings and provide high certainty on both. When property is designated for a public use (one that falls among a long predefined 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.

In cases of partial takings, too, there are rights to full compensation (beyond a de minimis level), but 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 15 years in Sweden (usually closer to 15). These time frames are counted from the time the development rights were initially granted, not from the date of approval of the injurious amendment (so this should not be confused with a regular statute of termination, which is additional). 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, thus leaving considerable uncertainty for both sides and more need for litigation.

By means of the implementation period, the concept of reliance on government decisions—a notion that underlies the regulatory takings laws of most countries, including the United States—becomes transparent to both sides. Unlike UK planning law, the German and Swedish laws do recognize development rights and do grant compensation rights when government changes its mind and downzones. However, the German and Swedish models are based on the rationale that the public purse is not a timelessly open ended insurance policy against a change in public decisions. 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 is over. 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 to either 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 thus can 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 must be determined at the time of each plan-approval decision that grants development rights. Indeed, while in Germany the implementation period generally is not used as a growth-management instrument, in Sweden there is an increasing (though still small-scale) use to incentivize commercial developers in urban redevelopment

projects.[16]

Can the Differences Be Explained?

The findings show major differences among the regulatory takings laws of most of the countries in the sample. There are also no signs of transfer of legal knowledge between countries, except between Germany and Sweden whose laws do share some distinct concepts. Based on the set of countries analyzed here, one cannot point out either trends of divergence or of convergence; each country's law on regulatory takings seems to follow its own track. The only trend of convergence is the greater propensity observed in all the countries in this book for government authorities to rely on negotiated solutions to solve or mitigate some of the adverse effects of regulations on land values. However, this trend is part of a broader tendency toward more private-public partnerships and is not specifically related to regulatory takings law.

The only modest trend of legal convergence, discernible with a magnifying glass, is found among European countries and is because of their legal connection with the ECHR and their affiliation with the EU (though this latter affiliation is not of direct legal relevance). But this convergence is not toward the middle of the scale of compensation rights but affects only one side of the scale—the extreme noncompensation doctrine. In other words, the mild convergence in Europe works to some degree to enhance property protection.

The intuitive question to ask is: How can one explain these differences? In chapter 1, I described the rationale for choosing the 13 countries in the sample. I noted that in the absence of enough prior comparative research on regulatory takings or a relevant theory from which to derive criteria or hypotheses to guide the selection of countries, I relied on common-knowledge variables: affiliation with one of the two major Western legal families, institutional structure (federal or unitary states), geographic region, and language-cultural affinity. The findings show that the differences among the countries cannot be explained according to any of these variables because there are significant differences within each grouping.

Belonging to the same legal family has not led to a convergence of the law on regulatory takings. Eight of the nine European countries—all but the UK— are civil law countries. As I have shown, this group of countries exhibits both extremes on the property rights scale. The slight push toward convergence noted previously is due not to the fact that the eight countries belong to the civil-law family, but to the impact of the jurisprudence of the ECHR, a supranational institution that belongs to neither family. The same picture holds for the five

countries in the common law group—the UK, the United States, Canada, Australia, and Israel.[17] These countries had links with British law at some point back in their legal histories. The comparative findings show that there is no British approach. These five countries also span the two extremes on the scale: Canada on one side (extremely restrictive) and Israel on the other (unworkably excessive). The United States is somewhere in the middle. Whatever these countries' histories, today there are few legal similarities.

Nor will knowing whether a specific country is unitary or federal be of much help in predicting the country's stand on regulatory takings law. The eight unitary states exhibit almost the full range of degrees of compensation rights for regulatory takings: France on the one extreme and the Netherlands and Israel on the other extreme. The five federal jurisdictions also encompass a broad range: Canada takes the most extreme no-compensation stand among the countries in this book with Australia a close next, while Germany is among the group of countries with generous compensation rights (though not so extreme as Israel or the Netherlands). The two remaining federal countries, the United States and Austria, take midway positions.

What about geographic proximity? One would have assumed that knowledge transfer would occur at least among closely located countries, particularly those with similar languages or culture. This assumption, too, is not supported by the findings of this study. Germany and Sweden are the only cases in which there is evidence of a transfer of a legal approach (from Germany to Sweden). These countries do have a language affiliation and they are not too distant geographically, but they are the only such pair. There are countries closer to Germany with no signs of knowledge transfer. Most striking are Germany and Austria, which not only are geographically close, they also share the same language and many cultural elements; yet their laws on regulatory takings bear little similarity. There are also major differences between other pairs of neighbors: Netherlands and Germany, Netherlands and Flemish Belgium (the latter is not covered here, but I can comment that its laws on regulatory takings bear no resemblance[18]), Netherlands and France (geographically quite close), the UK and France or the Netherlands across the Channel, Sweden and Finland, or Canada and the United States. Ironically, another couple of countries with strong similarities on takings law is the Netherlands and Israel, despite the absence of geographic proximity, language or cultural affinity, shared legal history, or any evidence of knowledge transfer. The similarities are caused by pure chance.

Could there be some other explanatory variables outside the legal system, such as population density, urban patterns, or pulse of development? Based on the present set of countries, I do not see evidence for such conjectures, but perhaps

further research may prove otherwise.

So, as counterintuitive as this may seem, there is no escape from concluding that considering the current state of knowledge, there are no apparent explanations based on the usual assumptions about legal families, institutional structure, or transfer of knowledge among proximate or culturally similar countries. This conclusion brings me back to the starting point for this book: The problem at hand may be universally shared by all countries with land use regulations, yet each country has adopted a legal solution largely insulated from the experiences of other countries. The explanation for why a particular legal approach on regulatory takings emerged in a particular country at a particular time is a question for historians or political scientists. This may reflect the views held by an individual who was a decision maker (legislator or judge) at a particular point in time when there was an opportunity to mold the law (whether through legislation or through an important court decision). Alternatively, the emergence of a particular legal approach may reflect the influence of an effective political lobby. These questions may be worthy of further research, but its contribution will be more in the realm of political science than law.

More than external factors, the availability of comparative knowledge may in itself contribute to legal changes. The publication of this book and further comparative research may become a factor in the exchange of legal knowledge and, thus, may affect the future evolution of regulatory takings law in various parts of the world.

An Example of How Comparative Research May Bring About Legislative Revision

The nexus between land use decisions and property values is inherent to planning regulation everywhere in the world where such regulations operate. At times, government decisions must impact property values negatively. In the final analysis, the question is how such impact should be shared. This is a normative or ideological question that this book does not aim to answer. Its modest purpose is to provide a platform for enriched discussion through cross-national exchange.

The comparative study on which this book is based has helped me to contribute to policy making in my own country, Israel. By looking at Israeli law through the cross-national lenses, I have learned that the broad extent of compensation rights under Israeli law on regulatory takings had gone “off the chart” compared with most other countries. In the absence of prior systematic comparative research in the international state of the art, Israeli legislators and

judges reached their decisions insulated from knowledge of what range of laws and practices exists internationally. Like their counterparts elsewhere in the world, they did not have the opportunity of gaining a sense of what is proportionate compared with the international spectrum of laws and practices. Through incremental interpretation of the language of the statute and the constitutional property-protection clause, compensation rights were expanded gradually. Because landowners' awareness of the opportunities to submit claims lagged somewhat in time, the practical consequences of the court decisions were not apparent in real time. Once claims accumulated, they became a huge budgetary burden and, to some extent (not so significant as resulted from Oregon's Measure 37), they also began to affect land use planning policy.

The findings of the comparative research are now the foundation for a government-initiated bill to be placed before the Knesset (Parliament). The bill will continue to recognize compensation rights for partial takings, but will pare down the more extreme expressions of these rights. Because Israel currently has constitutional protection of property, the mission of the research findings will be to convince the legislators and the courts that the more moderate degree of compensation rights fulfills the "proportionality" criterion in the constitutional law because the degree of compensation rights that will be ensured under the new bill still will be well within the international scale, and on the more property-friendly side. The legal rationale I propose is that because the question of what are the appropriate compensation rights is a universal one, the assessment of proportionality according to Israel's constitutional law can well be informed by the international scale of compensation rights, and, thus, the proposals in the new bill accord with the property-protection clause.

My hope is that both sides to the property-rights debate in the United States—and similar groups in other countries—may be able to gain new perspectives from the wide assortment of legal structures and doctrines offered by the 13 countries. Some will seek support for the views they currently hold. Others who seek a way of reaching convergence will look for legal models that create an acceptable balance between property rights and unencumbered planning and environmental policies. With the help of the initial platform of comparative knowledge provided by the current study, scholars who are interested in either side in the debate may wish to pursue further research to go into greater depth on selected topics or to expand the range of countries investigated. Hopefully, the comparative analysis presented here will stimulate new thinking both for policy makers and for further research.

Notes

1. Poland's economy is still regarded as "emerging," but on a fast track compared with other post-communist countries.
2. For a discussion of the debate and literature sources, *see* chapter 1.
3. 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*, 52(7) LAND USE L. & ZONING DIGEST 3 (2000); Hannah Jacobs, *Searching for Balance in the Aftermath of the 2006 Takings Initiatives*, 116 YALE L.J. 1518 (2007); and JOHN D. ECHEVERRIA & THEKLA HANSEN-YOUNG, THE TRACK RECORD ON TAKINGS LEGISLATION: LESSONS FROM DEMOCRACY'S LABORATORIES 1–2 (Georgetown Public Law Research Paper No. 1138017, 2008), *available at* http://papers.ssrn.com/sol3/papers.cfm?abstract_id= 1138017. Regarding Florida, *see* Joni Armstrong Coffey, *High Hopes, Hollow Harvest: State Remedies for Partial Regulatory Takings*, 39 URB. LAW. 619 (2007).
4. *See* chapter 11.
5. ManyAmerican authors make a similar point regarding insufficient clarity and inconsistencies. *See, e.g.*, DAVID L. CALLIES, ROBERT H. FREILICH & THOMAS E. ROBERTS, CASES AND MATERIAL ON LAND USE 380 (4th ed. 2004). *See also* Edward J. Sullivan & Kelly D. Connor, *Making the Continent Safe for Investors—NAFTA and the Takings Clause of the Fifth Amendment*, *in* CURRENT TRENDS AND PRACTICAL STRATEGIES IN LAND USE LAW AND ZONING, ch. 4 (Patricia E. Salkin ed., 2004); at p. 67 the authors argue that the degree of certainty and uniformity intended by the federal Constitution has not been accomplished in the field of takings law.
6. Thomas Roberts, the author of chapter 11, is well aware of this false image and points it out.
7. *See also* the discussion in chapter 2 *supra*. 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, 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 1 to the Convention for the Protection of Human Rights and Fundamental Freedoms as amended by Protocol No. 11, art. 1, Mar. 20, 1952, Europe. T.S. No. 9, *available at* http://conventions.coe.int/treaty/en/Treaties/Html/009.htm.

8. *See* Tahoe-Sierra Preservation Council, Inc. v. Tahoe Regional Planning Agency, 535 U.S. 302 (2002).

9. None of the other statutes were born of direct citizen ballot initiatives, but this is because in most countries there is no such procedure.
10. The point about genealogists is credited to Edward J. Sullivan, *Year Zero: The Aftermath of Measure* 37, 36 ENVTL. L. 131 (2006).
11. See Jaeger's interesting analysis of the property-values implications of this clause. William K. Jaeger, *The Effects of Land-Use Regulations on Property Values*, 36 ENVTL. L. 105 (2006).
12. Although Germany too is federal, the basics of planning law are a national-level competence.
13. *See, e.g.*, Land Reform Commission of Western Australia, *Compensation for Injurious Affection* (October 2007). The state of Victoria also commenced on a reform track in 2008–09. Communication with Rebecca Leshinsky, Manager, Planning Legislation Review, Office of Planning, Heritage & Urban Design, Department of Planning and Community Development, Government of Victoria, Australia, November 2008.
14. Malcolm Grant, *Compensation and Betterment, in* BRITISH PLANNING 62–76 (Barry Cullingworth ed., 1999).
15. PHILIP BOOTH, PLANNING BY CONSENT: THE ORIGINS AND NATURE OF BRITISH DEVELOPMENT CONTROL (2003); VICTOR MOORE, A PRACTICAL APPROACH TO PLANNING LAW (2005).
16. In Sweden, too, the implementation period is not viewed as primarily a growth management instrument, but in recent years the time frame is being increasingly used for this purpose. 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 (based on a conversation with Thomas Kalbro, the author of chapter 15, December 2008).
17. 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 OF WESTERN LAW (2007), at 948 (mixed jurisdictions in general) and at 976–82 (Israel). In the field of planning law, the British influence dates back to the British Mandate on Palestine from 1921 to 1948. The current planning law is a direct derivative of legislation enacted during that time.
18. The Flemish planning law recognizes compensation rights only in rare circumstances, whereas Dutch law grants the broadest compensation rights among all the countries in this book (as explained in chapter 2 *supra*). For Flemish Belgium law, *see* Articles 84–86 of the Flemish Decree of 18 May 1999, Providing for the Organization of Town and Country Planning, *Moniteur Belge/Belgisch Staatsblad*, June 8, 1999 (in Flemish).