Ripeness for the Taking Clause: Finality and Exhaustion in *Williamson County Regional Planning Commission v. Hamilton Bank of Johnson City*

105 S. Ct. 3108 (1985)

INTRODUCTION

During the 1984-85 term, the United States Supreme Court handed down the latest in a series of "inverse condemnation" decisions that have employed procedural doctrine to avoid a substantive fifth amendment "taking" issue. On the ground that the case was not ripe for review, the Court refused to decide whether the application of subdivision regulations in *Williamson County Regional Planning Commission v. Hamilton Bank of Johnson City* constituted a taking without just compensation. This holding disappointed some observers who had hoped that the Court might provide guidance on several issues of fifth amendment doctrine.

Environmental and land use lawyers, however, will still find

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1. "Inverse condemnation" is the phrase generally used to denote the effect of a government regulation that deprives a person of substantially all of the use of his or her property. The impact of the regulation thus approaches the encroachment posed by the exercise of eminent domain. *See* 3 A. Rathkopf, *The Law of Zoning and Planning* § 46.03, at 46-17 (4th ed. 1986).


4. *Id.* at 3117.


6. Several commentators have noted the confusing character of the just compensation doctrine. *See* Sterk, *Government Liability for Unconstitutional Land Use Regulation,* 60 IND. L.J. 113 (1985); Oakes, "Property Rights" in Constitutional Analysis Today, 56 WASH. L. REV. 583 (1981). *Williamson* presented at least four major just compensation clause issues for decision: (1) whether a regulation that "goes too far" violates the just compensation or the due process clause, (2) what the appropriate standard is for determining whether a regulation goes too far, (3) how to identify the property interest injured by a regulation, and (4) what the appropriate remedy should be for a regulatory taking. The majority and the two concurrences both discussed these issues, but in contrast to the concurrences of Justice Brennan and Justice
Williamson significant despite the fact that the opinion did not answer many pressing fifth amendment questions. The Court's opinion extends the just compensation clause ripeness doctrine articulated in prior decisions and poses new obstacles for those seeking relief from a regulatory taking under section 1983. This Note examines the Williamson holding in light of prior federal case law on the doctrines of just compensation, ripeness, and exhaustion of administrative remedies.

Stevens, Justice Blackmun's majority opinion did not express a conclusive view on any of these issues.

Whether the first issue was resolved by the Court's holding in Ruckelshaus v. Monsanto Co. is arguable. See Monsanto, 467 U.S. 986 (1984) (federal regulatory disclosure of trade secrets is not a taking unless expectation of confidentiality is reasonable and no compensation is available through FIFRA arbitration). The second issue involves a morass of cumulative tests, but the economic impact of the challenged regulation and its "interference with reasonable investment-backed expectations" seems to be the test most commonly employed in recent Court discussions. Kaiser Aetna v. United States, 444 U.S. 164, 175 (1979); see also Monsanto, supra, at 1005; Hodel v. Virginia Surface Mining and Reclamation Ass'n, 452 U.S. 264, 295 (1981); Penn Cent. Transp. Co. v. New York City, 438 U.S. 104, 124 (1978). The third issue of how to define which property interest is implicated by a particular regulation dates back to the Court's discussion of subsurface mining rights in Pennsylvania Coal Co. v. Mahon, 260 U.S. 393, 419 (Brandeis, J., dissenting). This question is specifically at issue here, where, as the Court recognizes, the right could either be the interest in use and enjoyment of the land parcel or the "vested right" under state law to develop after a certain level of government approval has been obtained. Williamson, 105 S. Ct. at 3119 n.12.

As for the appropriate remedy, the Court has repeatedly split over the issue of whether a plaintiff suing under the fifth amendment for damages from a regulatory taking may receive compensation for the period between the time the regulation was applied and the time the regulation was declared unconstitutional. This is the interim damages issue that the Court declined to reach in both Agins v. City of Tiburon, 447 U.S. 255 (1980), and San Diego Gas & Elec. Co. v. City of San Diego, 450 U.S. 621 (1981). The Court decided in Williamson to again leave this question "for another day." 105 S. Ct. at 3116.

The Court followed this attitude of restraint in a more recent decision that also presented the interim damages issue. In MacDonald, Sommer & Frates v. Yolo County, 106 S. Ct. 2561 (1986), reh'g denied, 107 S. Ct. 22 (1986), the Court upheld the County of Yolo's demurrer to a complaint alleging that the denial of a proposed subdivision for 159 residential units constituted a taking. Justice Stevens, writing for a five member majority in MacDonald, followed the reasoning of Justice Blackmun's Williamson opinion in holding that the plaintiff's taking claim was premature. Justice Stevens reasoned that the denial did not appear to preclude other less intense development proposals, and thus the factual record was not sufficiently developed to allow application of the federal taking standard. Id. at 4785.


Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress. For the purposes of this section, any Act of Congress applicable exclusively to the District of Columbia shall be considered to be a statute of the District of Columbia.
I

FACTUAL AND PROCEDURAL BACKGROUND

A. Background Facts

Williamson involved a dispute between the Williamson County Regional Planning Commission and the Hamilton Bank of Johnson City over the application of the County’s subdivision regulations to the development of the Bank’s property, a parcel of land in the Temple Hills Country Club Estates luxury housing development located in Williamson County, Tennessee. The Bank’s predecessor-in-interest, a developer, first submitted a preliminary subdivision plat for the proposed Temple Hills Estates residential development cluster to the Planning Commission for approval in 1973.

A preliminary plat is typically a two-dimensional plan for a proposed development showing the location of lot lines, roads, and public improvements such as utilities and open space. Approval of both preliminary and final subdivision plats is usually required before property may be subdivided and developed for housing.

B. The Regulatory Scheme

Under the Hamilton County subdivision regulations in effect in 1973, a developer seeking permission to subdivide was required to submit a preliminary plat “indicating . . . the boundaries and acreage of the site, the number of dwelling units and their basic design, the location of existing and proposed roads, structures, lots, utility layouts and open space, and the contour of the land.” Approval of the preliminary plat did not constitute approval of the final plat, and the preliminary approval lapsed if a final plat was not submitted within one year.

The County’s cluster development zoning ordinance allowed a residential density of 1.089 units per acre multiplied by the gross acreage of

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8. 105 S. Ct. at 3112. Under “cluster” zoning, dwelling units are concentrated in clusters to preserve common open space. This contrasts with traditional subdivision tract housing in which the entire site is divided into lots of roughly equal size and open space is subdivided by inclusion in lots as individually-owned yards. R. ELICKSON & A. TARLOCK, LAND-USE CONTROLS 253-60 (1981). The plats for the Temple Hills site showed a modified cluster plan, with several clusters of houses scattered throughout the site. 3 Joint Appendix on Writ of Certiorari at 422-27, Williamson.

9. 4 A. RATHKOPF, supra note 1, § 71.01, at 71-34.

10. Portions of property larger than the typical lot may be sold without subdivision approval. See id. § 71-4, at 71-20. Where submission of the preliminary plat is required by statute, the approval of the final plat may be considered a ministerial act if the subdivider has complied with conditions imposed as part of the preliminary plat approval. See 7 P. ROHAN, ZONING AND LAND USE CONTROLS § 45.02[5] (6th ed. 1986). The Court’s opinion does not clarify whether this rule applies under Tennessee law.

11. 105 S. Ct. at 3112.

12. Id.
The gross acreage was determined by subtracting from the total site area fifty percent of the acreage lying in a flood plain and fifty percent of the area lying at or above a slope gradient of twenty-five percent. In the 1973 and subsequent approvals of the plat, these deductions for flood plain and slope gradient acreage were not made. Thus, the developer's calculation of 736 allowable units failed to account for the deductions required by the ordinance.

C. Sequence of Development Approvals and Denials

In 1973, the Commission approved the developer's preliminary plat, which showed lot lines for 469 dwelling units on 676 total acres, including a 260-acre golf course. Several notations were made on the plat during its review. One notation was located in the area in which the remaining units (those other than the 469 for which lot lines were drawn) were to be developed. This notation stated that "this parcel [was] not to be developed until approved by the planning commission." Another notation stated that the "parcels with note this parcel not to be developed until approved by the planning commission' [were] not a part of this plat and not included in gross areas." A third notation stated that there were 736 allowable dwelling units for total development.

After the Commission approved the preliminary plat, the developer conveyed a permanent open space easement to the County covering the area proposed as a golf course and began developing the golf course and building roads and sewers. By 1979, the developer had spent three million dollars on the golf course and a half-million dollars on sewer and water lines. The developer sought and was granted renewed approval of the preliminary plat four times between 1973 and 1980. Each time housing construction was ready to begin on a particular section of the development, the developer submitted a final plat of that section for approval. By 1979, the Planning Commission had approved several

13. Id. Thus, the density of 736 allowable dwelling units for the Temple Hills development represents the 676 acres times 1.089 allowable units per acre.
14. Id.
15. Id. at 3112-13.
16. Id. at 3112.
17. Id.
18. The Court does not indicate whether the Commission staff or the developer made these notations. Regardless of who made them, the notations were given implied legal effect from their presence on the preliminary plat approved by the Commission.
19. 105 S. Ct. at 3112.
20. Id.
21. Id.
22. Id. at 3113.
23. Id.
24. Id.
25. Id.
sections totaling 212 units.\textsuperscript{26} In 1977, the County legislative body amended its zoning ordinance, decreasing the allowable density from 1.089 to one unit per acre and adding the requirement that ten percent of the total acreage be deducted from density calculations to account for roads and utilities.\textsuperscript{27} If applied to the developer's plat for Temple Hills, these changes would have required a twenty-nine percent reduction in the total number of allowable units, from 763 to 548.\textsuperscript{28} Despite this amendment, the Commission continued to apply the 1973 regulations to the Temple Hills development, reapproving the preliminary plat in 1978.\textsuperscript{29} In 1979, however, the Commission reversed its position and decided that all preliminary plat renewals should be evaluated under the 1977 amendments.\textsuperscript{30} Nevertheless, the Commission renewed the same plat under the 1977 zoning ordinance amendments and subdivision regulations.\textsuperscript{31}

In early 1980, the Commission requested that the developer submit a revised preliminary plat before submitting any more final section plats.\textsuperscript{32} The Commission appointed a special Temple Hills Committee to work with the developer in revising the plat.\textsuperscript{33} The Temple Hills Committee subsequently reported to the Commission that the plat failed to conform to the 1977 zoning ordinance amendments and the current subdivision regulations on seven separate grounds, but recommended that the Commission grant variances from three of the seven problem areas.\textsuperscript{34} The Commission, however, without addressing the suggestion that those three requirements be waived, denied approval of the plat on the ground that the plat did not comply with the density requirements of the 1977 amendments.\textsuperscript{35} The developer then appealed to the Board of Zoning Appeals. The Board determined that the Commission should apply the 1973 regulations and ordinance.\textsuperscript{36}

\begin{itemize}
\item \textsuperscript{26} Id.
\item \textsuperscript{27} Id.
\item \textsuperscript{28} The reduction would have been less if the slope and flood plain deductions had been made from the calculation of gross acreage when the preliminary plat was evaluated under the 1973 regulations.
\item \textsuperscript{29} 105 S. Ct. at 3113.
\item \textsuperscript{30} Id.
\item \textsuperscript{31} Id.
\item \textsuperscript{32} Id.
\item \textsuperscript{33} Id.
\item \textsuperscript{34} The seven problem areas included: excessive density, cul-de-sacs that were too long, roads with grades exceeding the maximum allowed by county regulations, inadequate fire protection services and recreational open spaces, and road frontages below the minimum required. Id.
\item \textsuperscript{35} The Commission found that the developer had not made any deductions from the gross acreage for land taken by the state for a parkway, for 10% of the acreage attributable to roads, or for 50% of the land on slopes of a gradient greater than 25%. The Commission also found that lots were placed on slopes with a grade greater than 25%. Id. at 3113-14.
\item \textsuperscript{36} Id.
\end{itemize}
Shortly after the Board’s decision, Hamilton Bank acquired the undeveloped property in the Temple Hills development through foreclosure. The Bank subsequently submitted two plats to the Commission, the developer’s 1973 plat and another that was similar to the plat the developer submitted in 1980. The newer plat proposed 688 units instead of the original 736, still in excess of the 548 units the Commission’s staff would allow. On the ground that the Board lacked jurisdiction to hear appeals from the Commission, the Commission declined to follow the ruling of the Board of Zoning Appeals that the Commission should apply the 1973 regulations and ordinance, and it denied the Bank’s plat because the inadequacies identified by the Temple Hills Committee had not been corrected.

D. The District Court Holding and Jury Verdicts

Hamilton Bank then filed suit in the District Court for the Middle District of Tennessee under 42 U.S.C. section 1983 alleging that (1) the Commission’s decision to deny preliminary plat approval was a taking of the Bank’s property without just compensation, (2) the Commission should be estopped under state law from denying the plat approval, and (3) the Commission’s denial violated equal protection and substantive and procedural due process. The district court granted the Commission’s motion for a directed verdict on the substantive due process and equal protection claims. In response to special interrogatories on the remaining three theories of recovery, the jury found that the Commission had not violated procedural due process, but that it should nevertheless be estopped under the state doctrine of equitable estoppel from applying post-1973 law to the development. The jury also found that the

37. Id. at 3114. The Bank had participated in the development of the property since the first preliminary plat was submitted in 1973. In 1980 the Bank foreclosed on the portion of the land for which lot lines were omitted—the land scheduled for future development—in the preliminary plats approved during the 1970’s. See Brief for the United States as Amicus Curiae Supporting Petitioner on Writ of Certiorari at 6 n.4.

38. 105 S. Ct. at 3114.

39. Id. at 3113. This calculation emerged from the joint review of the developer’s revised plat by the Temple Hills Committee and the Commission staff.

40. Id. at 3114.

41. Id.

42. See supra note 7.


44. Id. at n.4.

45. The doctrine of equitable estoppel in the context of land use is described in 4 A. Rathkopf, supra note 1, § 50.04, at 50-41, 50-42. In Williamson, the Commission was estopped from applying post-1973 law to the development because the jury found that the developer’s expenditures were made in reliance on the prior preliminary plat approvals, and thus a quasi-contractual obligation that the Commission would not subsequently change the applicable rules was created. See Williamson, 729 F.2d at 404.

46. 729 F.2d at 404.
Commission's action in denying the 1981 proposed plat constituted a taking because it denied any viable economic use of the subject property. Consequently, the jury awarded the Bank $350,000 in damages for the period between the disapproval of the plat and the time of trial.

After receiving the jury's verdicts, the district court issued a permanent injunction, requiring the Commission to apply 1973 law, to approve the 1981 revised preliminary plat submitted by the Bank, and to comply with several specific requirements in its future actions regarding the development. The Commission then moved for judgment notwithstanding the verdict on the taking issue. The district court granted the motion, holding that the state law estoppel verdict had extinguished the prospective taking claim and that the temporary period of denial could not constitute a taking compensable under the Fifth Amendment. The district court also modified its preliminary injunction to require only that the Commission apply 1973 law to any subsequent actions concerning Temple Hills.

E. The Court of Appeals Decision

The Bank appealed from the district court's grant of judgment notwithstanding the verdict and requested reinstatement of the jury's damage award. A divided panel of the Sixth Circuit Court of Appeals reversed the district court. The majority held that (1) as a matter of law, damages could be awarded for a temporary regulatory taking; (2) the appropriate standard for determining whether a taking had occurred

47. Id.
48. Id.
49. Id.
50. The term "prospective taking claim" refers to whether the governmental body will be able to apply the regulation without just compensation after judgment. The jury's verdict extinguished the Bank's prospective taking claim because that claim was based on the application of post-1973 law to the development. The jury's verdict also estopped the Commission from applying the post-1973 regulations. See supra note 45.
51. Memorandum Opinion of the District Court, 1 Joint Appendix on Writ of Certiorari at 27a.
52. Judgment of Permanent Injunction, 1 Joint Appendix on Writ of Certiorari at 29a.
53. 729 F.2d at 404.
54. Judge Kennedy's opinion was joined by Judge Keith. Judge Wellford's lengthy and detailed dissent argued against the majority's interim damages rule and their conclusion that evidence presented at trial by the Commission was outweighed by the appraiser's estimation of the effect of the denial. Judge Wellford concluded that the evidence undermined the jury's verdict and supported the district court's grant of judgment notwithstanding the verdict. 729 F.2d at 4110 (Wellford, J., dissenting).
55. To support this holding, Judge Kennedy relied almost entirely on Justice Brennan's dissent and Justice Rehnquist's concurrence in San Diego Gas & Elec. Co. v. City of San Diego, 450 U.S. 621, 633-661 (1980). See Williamson, 729 F.2d at 408. The Fifth Circuit appears to be the only other court of appeals to approve the award of damages under section 1983 for an invalidated regulatory taking. See Wheeler v. City of Pleasant Grove, 664 F.2d 99 (5th Cir. 1981); Hernandez v. City of Lafayette, 643 F.2d 1188 (5th Cir. 1981).
was whether there remained any economically viable use of the property after the application of the regulation;\(^5\) (3) there was substantial evidence to support the jury’s finding of a taking because no viable economic use remained;\(^7\) and (4) the damage award should be reinstated.\(^8\)

The court of appeals defined the property in question as only the parcel on which the Bank had foreclosed.\(^9\) The majority relied heavily on the testimony of the Bank’s appraiser in its analysis of whether substantial evidence justified the jury’s verdict.\(^6\) The appraiser had testified that the land in question was not suitable for any use other than residential development and that the Bank would sustain a net loss of over one million dollars if allowed to develop only the sixty-seven units the Bank claimed the Commission would permit.\(^61\)

II
THE RIPENESS ISSUE

The United States Supreme Court granted certiorari to decide whether the Commission should pay damages for a temporary regulatory taking.\(^62\) The Court ultimately refused, however, to decide the question on the ground that the Bank’s claim was not sufficiently ripe to present an adjudicable constitutional question.\(^63\) The Court held that the Bank’s claim was premature for two reasons. First, the Bank had failed to obtain a final administrative decision from the Commission and the Board of Zoning Appeals by neglecting to apply for variances. Second, the Bank had failed to pursue just compensation in the Tennessee state courts or to show why such an action would have been futile.\(^64\)

A. The Failure To Obtain a Final Decision

Justice Blackmun, writing for the majority,\(^65\) concluded that the County could have granted variances to relieve the Bank of five of the

\(^5\) 729 F.2d at 405.
\(^6\) Id. at 407.
\(^7\) Id. at 409.
\(^8\) Id. at 406. An alternative definition might have been to recognize the Bank's long-term secured interest in the entire project, see supra note 37, and to define the property as the entire area covered by the 1973 preliminary plat.
\(^9\) 729 F.2d at 406.
\(^61\) This seems to be an odd role for an appraiser, who is generally regarded as competent to testify to land value rather than to suitability for particular uses. See California Continuing Education of the Bar, California Condemnation Practice and Procedure § 3.2 (1973).
\(^62\) 105 S. Ct. at 3116. The Court left open the question of whether a regulation that deprives a landowner of any reasonable use violates the due process or the just compensation clause. Id. at 3123.
\(^63\) Id. at 3117.
\(^64\) Id.
\(^65\) The decision was seven to one. Justices Brennan and Stevens issued separate concurring opinions; Justice White dissented; Justice Powell did not participate in the decision.
eight requirements that its 1980 revised plat failed to satisfy and that formed the basis of the Commission’s disapproval of the plat. The Bank, however, not only failed to apply for any variances, but it expressly refused to apply until after the Commission approved the revised plat. The Bank’s position struck the Court as particularly unreasonable because the 1980 subdivision regulations required the Commission to deny any plat containing a condition that would require a variance. Thus, the disapproval was not a final decision to deny development because the Commission was bound to deny the plat and because the Bank retained the option of seeking variances. The Court declined to reach the merits of the inverse condemnation question because it was impossible to measure the impact on reasonable investment-backed expectations until a final decision on the variances was reached. The Court’s holding was supported by its longstanding policy against exercising its judicial powers until an agency’s action is complete, the issues in dispute are clearly presented, and the facts are sufficiently developed.

The Court relied on three prior decisions as precedent for the general proposition that a regulatory taking claim is not ripe until the government entity charged with implementing the regulation has reached a final decision regarding the application of the regulation to the property at issue. In Agins v. City of Tiburon, the plaintiff landowners sued to invalidate a zoning ordinance that reduced the allowable density for development of their property. The Court held that their claim was not ripe because they had failed to submit any specific development proposal prior to suit, and thus it was impossible to determine the impact of the challenged regulation. Unlike the Agins plaintiffs, however, Hamilton Bank had submitted a specific development proposal that the Commission had rejected. As the Court noted, the Bank had “passed the Agins


66. 105 S. Ct. at 3117-18.
67. Id. at 3119.
68. Id.
69. The Court noted that regardless of whether the most salient factor was “interference with reasonable investment-backed expectations” or deprivation of any “economically viable use,” the inadequate factual development of the case precluded any meaningful application of the taking standard because the extent of the interference or deprivation could not be measured adequately until the agency’s action was complete. See id. at 3120 n.12. The agency’s action was not complete until a final decision regarding variances was rendered. The Court noted that the Bank should have applied for variances from all eight requirements, and indicated that even the Bank applied only for the five most likely to be granted, the case would not be ripe because of the failure to apply for the other three. See id. at 3118 n.11.
70. Id. at 3119.
72. 105 S. Ct. at 3117-18.
74. Id. at 260.
75. Id.
threshold."\textsuperscript{76}

The Court also based its ripeness holding on Justice Brennan's opinion in \textit{Penn Central Transportation Co. v. New York City.}\textsuperscript{77} In \textit{Penn Central}, the terminal property owners sued to invalidate as confiscatory the New York Landmarks Preservation Law\textsuperscript{78} after their proposal to develop a fifty-five story office tower above the terminal was denied on architectural preservation grounds.\textsuperscript{79} While \textit{Penn Central} has generally been interpreted in subsequent decisions as a ruling on the substantive taking question,\textsuperscript{80} in \textit{Williamson} Justice Blackmun construed \textit{Penn Central} also to hold that the taking claim was not ripe because the owners had failed to submit any alternative proposal after their initial denial, and consequently they had not resolved "whether the Commission would deny approval for all uses that would enable the plaintiffs to derive economic benefit from the property."\textsuperscript{81} Thus, the Court interpreted \textit{Penn Central} as presenting an incomplete factual record that, like the record in \textit{Williamson}, precluded appropriate application of the federal taking standard.

Justice Blackmun relied most heavily on \textit{Hodel v. Virginia Surface Mining and Reclamation Association}\textsuperscript{82} for the requirement that a plaintiff must seek a variance before her taking claim is ripe. In \textit{Hodel}, the district court found that two provisions of the Surface Mining Control and Reclamation Act\textsuperscript{83} violated the just compensation clause.\textsuperscript{84} The Supreme Court reversed and upheld the statute on the ground that it permitted beneficial use of coal-bearing lands.\textsuperscript{85} The Court also held that the Association's challenge to the application of the statute was not ripe because the Association had failed to identify any property taken by the statute in which it had an interest, and the members of the Association had failed to apply for a variance or waiver from the challenged regulations.\textsuperscript{86} The Court stated that the availability of administrative relief

\begin{footnotes}
\item 76. 105 S. Ct. at 3117.
\item 77. 438 U.S. 104 (1978).
\item 78. Landmarks Preservation Law of 1965, N.Y.C. ADMIN. CODE ch. 8-A, § 205-1.0 (1976).
\item 79. 438 U.S. at 119.
\item 81. 105 S. Ct. at 3117. Several writers have expressed surprise at this interpretation of \textit{Penn Central}. See Baumann, \textit{Hamilton Bank: Supreme Court Says Don't Make a Federal Case Out of Zoning Compensation}, 8 ZONING & PLANNING LAW REP. 137 (1985); Dennis, \textit{Williamson County Regional Planning Commission: Supreme Court Reverses Sixth Circuit Opinion and Remands Case}, NATIONAL TRUST FOR HISTORIC PRESERVATION (June 28, 1985).
\item 82. 452 U.S. 264 (1981).
\item 84. 452 U.S. at 293.
\item 85. \textit{Id.} at 295-96.
\item 86. \textit{Id.} at 297.
\end{footnotes}
obviated the need for consideration of the constitutional question and rendered the case unripe for decision.\textsuperscript{87}

Justice Blackmun's opinion essentially adopts the rationale of \textit{Hodel}, but extends the rationale to a different remedial context. In \textit{Hodel}, the plaintiff Association sued the federal government for a violation of the United States Constitution. In \textit{Williamson}, the plaintiff sued a local governmental body under section 1983. Although this difference appears analytically significant because the remedial context determines whether exhaustion of administrative remedies is required, it turns out to have little practical significance here because the Court explains why seeking a variance raises only the issue of finality and not exhaustion.

Prior to \textit{Williamson}, the Court had developed an exception in section 1983 actions to the common law requirement of exhausting administrative remedies. In \textit{Patsy v. Florida Board of Regents},\textsuperscript{88} the plaintiff sued under section 1983, alleging that Florida International University had denied her employment opportunities on the basis of gender.\textsuperscript{89} The Regents moved to dismiss on the ground that Patsy had failed to exhaust available administrative remedies. Based on the legislative history of sections 1983 and 1997(e),\textsuperscript{90} the Supreme Court held that Congress did not intend to require a section 1983 plaintiff to exhaust administrative remedies.\textsuperscript{91} Thus, to harmonize the Court's holding in \textit{Williamson} with that in \textit{Patsy}, Justice Blackmun distinguished the final decision requirement from the exhaustion rule.\textsuperscript{92}

Justice Blackmun distinguished \textit{Patsy} by characterizing the Bank's failure to seek variances as a failure to obtain a final determination that the Commission would deny its plat.\textsuperscript{93} Because a final determination ensures an "actual, concrete injury,"\textsuperscript{94} seeking a variance did not amount to seeking a remedy because no remediable injury had occurred until after the variance was denied.

Justice Blackmun contrasted the variance procedure with an action for a declaratory judgment.\textsuperscript{95} He characterized a declaratory judgment action as the kind of procedure a taking claimant would not be required to exhaust because a declaratory action was remedial in nature and

\textsuperscript{87} Id.
\textsuperscript{88} 457 U.S. 496 (1982).
\textsuperscript{89} 457 U.S. at 498.
\textsuperscript{90} 42 U.S.C. § 1997(e) (1982). Section 1997(e) provides the procedure for exhausting administrative remedies and resolving grievances of adults confined in any jail, prison, or other correctional facility.
\textsuperscript{92} 105 S. Ct. at 3120.
\textsuperscript{93} Id.
\textsuperscript{94} Id.
\textsuperscript{95} Id.
would result in a judgment as to whether the claimant's rights had been violated.

This narrow distinction deserves closer analysis because a variance appears to fall along with declaratory judgments into the category of administrative remedies. A significant difference between a variance and a declaratory judgment, however, lies in the extent to which the legitimacy of the initial denial is called into question. A successful declaratory judgment action results in a finding that as a matter of law the administrative denial was illegal because it violated or misinterpreted the terms of the governing regulation, statute, or constitution. Receiving a variance, by contrast, does not in any way undermine the legitimacy of the original decision but makes use of a collateral procedure which is primarily based on equitable considerations for determining the application of a regulation in a specific situation.96

In *Williamson*, the Bank could have avoided a confrontation by seeking variances which, if granted, would have eased considerably its burden of meeting the Commission's remaining standards. The Planning Commission and the Board of Zoning Appeals both had the power to grant variances under the laws in effect in 1981. The Court indicated that, based on the record, the Bank would likely have received some, if not all, of the possible variances. Thus, the controversy was not ripe.

The Court's ripeness holding provides clear direction for lower courts. Before alleging a valid cause of action under section 1983, plaintiffs asserting a fifth amendment claim based on the application of a land use regulation either must have been denied a variance or must show that seeking a variance would be futile.

B. The Failure To Seek Post-Deprivation Compensation from the State

The Supreme Court also concluded that the Bank's taking claim was unripe for adjudication because the Bank had failed to utilize Tennessee's procedure for obtaining compensation for inverse condemnation.97 Under contemporary statutes and case law, Tennessee courts recognize an action for damages due to inverse condemnation from land use regulation that does not involve a physical invasion of the complainant's land.98 Thus, the Bank could have sued for compensation in state court. The Court held that the Bank's failure to bring a state court action for inverse condemnation was a failure to establish that the state had deprived the Bank of the use of its property without providing just compensation.99 Because such a showing is the prerequisite for stating a cause of action

96. See 5 N. Williams & J. Taylor, American Land Planning § 142.06 (1985).
97. 105 S. Ct. at 3121.
98. Id. at 3121-22.
99. Id. at 3122.
under section 1983, the Bank’s claim was not ripe.100

1. A Special Exhaustion Rule for Taking Claims

The Court cited *Ruckelshaus v. Monsanto Co.*101 and *Parratt v. Taylor*102 as support for its conclusion on the state compensation issue.103 In *Monsanto*, the Court held that the district court had erred in granting injunctive relief for a taking by government disclosure of the company’s trade secrets, because Monsanto had failed to seek compensation under the Federal Insecticide, Fungicide, and Rodenticide Act’s104 arbitration clause.105 Monsanto’s taking claim was not ripe because it could not show a failure of just compensation until it had pursued the procedure provided by the federal government for obtaining compensation.106

Justice Blackmun’s use of *Monsanto* to support the Court’s holding in *Williamson* is analogous to his use of *Hodel*.107 *Hodel* and *Monsanto* each involved a constitutional claim against the federal government brought under the fifth amendment for an injury from the operation of a federal statute. In using *Monsanto* and *Hodel*, Justice Blackmun extended rules developed in the context of suits against the federal government to a suit against a local governmental body under section 1983. Unlike Justice Blackmun’s use of *Hodel*, his application of *Monsanto* is problematic because the Court’s discretion to apply the exhaustion requirement in *Williamson* should be limited by its prior holding in *Patsy*,108 i.e., that exhaustion of state administrative remedies is not required in suits brought under section 1983. At a minimum, the Court should have distinguished these cases on a reasonable basis. One might conclude from this lack of reconciliation that the Court saw no contradiction in requiring exhaustion of a state judicial remedy under a statute that the Court had already held not to require exhaustion of a state administrative remedy. This distinction, however, is contradicted by language in *Patsy*109 and *Monroe v. Pape*110 stating that the federal remedy provided by section 1983 was intended to be supplemental and not subse-

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100. *Id.* at 3121 n.13.
103. 105 S. Ct. at 3121.
105. 467 U.S. at 1019.
106. *Id.* at 1020.
107. *See supra* notes 82-88 and accompanying text.
109. Justice Marshall’s opinion identifies the dual forum rule as a major theme in the debates on the 1871 Civil Rights Act: “A third feature of the debates relevant to the exhaustion question is the fact that many legislators interpreted the bill to provide dual or concurrent forums in the state and federal system, enabling the plaintiff to choose the forum in which to seek relief.” 457 U.S. at 506.
quent to state judicial remedies.\textsuperscript{111}

The Court attempts to avoid this problem by redefining when a fifth amendment injury due to a regulatory taking by a local governmental entity occurs.\textsuperscript{112} The constitutional injury no longer occurs when the local governmental body, acting under powers conferred by the state's express or implied authority, deprives a landowner of any use of her property. Instead, the constitutional injury (which gives the plaintiff grounds on which to seek a remedy) is complete only when the \textit{state courts deny compensation} for the injury inflicted by the local government.\textsuperscript{113} According to the Court's logic, it then follows that no exhaustion is required. This implies that exhaustion is not required because the plaintiff's cause of action under section 1983 does not arise until the state court denies compensation.\textsuperscript{114}

This rationale, however, merely describes the new rule rather than explaining why such a rule is justified.\textsuperscript{115} The argument is circular: a constitutional claim is not ripe until the state courts have denied compensation because the Court does not recognize a constitutional injury until after the claimant has exhausted his state court compensation remedy. The Court does not answer why it is appropriate to regard the state action as "incomplete" until after the state courts have ruled on compensation. Such a superficial treatment of state action directly conflicts with some of the policies supporting the Court's interpretation of section 1983 in \textit{Patsy}, especially the notion that Congress intended to "throw open the doors of the United States courts" to suits alleging deprivation by states


\textsuperscript{112} The Court does not clearly declare or redefine the moment at which a fifth amendment injury occurs. Justice Brennan's dissent in \textit{San Diego Gas} seems to assert that the injury occurs when the local entity applies the unconstitutional regulation to the property in question: "As soon as private property has been taken, whether through formal condemnation proceedings, occupancy, physical invasion, or regulation, the landowner has already suffered constitutional violation, and the self-executing character of the constitutional provision with respect to compensation... is triggered." 450 U.S. 621, 654 (1981) (Brennan, J., dissenting) (emphasis in original). The recent decision by the Fifth Circuit Court of Appeals in Hernandez v. City of Lafayette, 643 F.2d 1188 (1981), \textit{cert. denied}, 455 U.S. 907 (1982), while differing with Justice Brennan on this point, still places the moment of constitutional injury well before the exhaustion of state judicial remedies.

\textsuperscript{113} 105 S. Ct. at 3121-22.

\textsuperscript{114} Although the opinion is unclear, the state's highest court probably would have to deny the compensation remedy before the constitutional injury occurs.

\textsuperscript{115} Justice Blackmun asserts that language from the fifth amendment supports his interpretation of when a constitutional violation is complete. 105 S. Ct. at 3121. He offers no explanation, however, why the phrase "without just compensation" should mean after the courts have denied compensation rather than meaning after the local government has refused compensation. Such a rule serves mainly to restrict access to federal courts and to conserve federal judicial resources. If this is the impetus for the interpretation, then this conflicts directly with the \textit{Patsy} rule of no-exhaustion that is predicated on direct access to federal courts for section 1983 plaintiffs.
of a federal right.\textsuperscript{116}

The Court's use of \textit{Parratt v. Taylor}\textsuperscript{117} to support its holding is equally unilluminating because that decision employed similarly circular reasoning.\textsuperscript{118} Justice Rehnquist, writing for the majority in \textit{Parratt}, held that a section 1983 action for damages from negligent deprivation of due process may not be brought until the state common law remedy for damages has been exhausted; the state's deprivation action is not "complete" until the state courts have denied damages.\textsuperscript{119}

\textit{Parratt} was a prisoner's suit claiming damages under section 1983 for deprivation of property without due process.\textsuperscript{120} The damage occurred when a prison guard negligently destroyed plaintiff's hobby kit valued at $23.50. The Supreme Court held that post-deprivation remedies provided by the state satisfy the requirements of due process when the deprivation occurred as a result of negligence.\textsuperscript{121} The Court also held that the denial of due process was not complete until the state court system had denied compensation in tort.\textsuperscript{122} The Court thus concluded that the state common law remedy was the procedure due to negligently injured individuals under the federal Constitution. This extremely narrow view of due process as a guarantee of little more than "procedural regularity" was criticized by Justice Blackmun in his concurring opinion in \textit{Parratt}.\textsuperscript{123} Nevertheless, Justice Blackmun applied \textit{Parratt} in \textit{Williamson} to reinforce his reading of \textit{Monsanto} that a violation of the fifth amendment does not occur until just compensation from the state is not available.\textsuperscript{124}

2. The Rationale for Different Exhaustion Rules in Suits Under Section 1983

Justice Blackmun's willingness to use \textit{Parratt} can be traced to the distinction in his \textit{Parratt} concurrence between deprivations of life and liberty on one hand and property on the other.\textsuperscript{125} Thus, Justice Blackmun appears to be willing to apply a double standard between property

\textsuperscript{116} Patsy, 457 U.S. at 504.
\textsuperscript{117} 451 U.S. 527 (1981).
\textsuperscript{118} Justice Blackmun's opinion notes that the "analogy to Parratt is imperfect" because of the intentional character of the action involved here. 105 S. Ct. at 3122 n.14.
\textsuperscript{119} 451 U.S. at 544.
\textsuperscript{120} Id. at 529.
\textsuperscript{121} Id. at 541.
\textsuperscript{122} Id. at 542.
\textsuperscript{123} Id. at 545.
\textsuperscript{124} 105 S. Ct. at 3121.
\textsuperscript{125} 451 U.S. at 545. As pointed out in a footnote, Justice Blackmun's reliance on \textit{Parratt} also extends its reach to an injury that is the result of intentional rather than negligent action. The critical aspect of \textit{Parratt} that supports the holding in \textit{Williamson}, however, was the lack of any requirement that the state provide compensation prior to the deprivation. \textit{See Williamson}, 105 S. Ct. at 3122 n.14.
and civil rights even when there is an intentionally inflicted significant monetary loss of the type claimed in *Williamson*.\(^{126}\) Justice Blackmun advances no rationale for this distinction nor for its operation in the context of a section 1983 suit. There is, though, at least one rationale for the newly imposed requirement of exhaustion of state compensation remedies. The broad no-exhaustion rule may be inapplicable in the context of a taking claim because requiring exhaustion would not violate the congressional intent underlying the Civil Rights Act of 1871,\(^{127}\) i.e., to provide direct access to the federal courts for redress of injuries to minority group members whose interests were systematically underrepresented in state institutions.

The Civil Rights Act was passed during the Reconstruction Period after the Civil War. The Act responded to significant incidents of Ku Klux Klan-sponsored violence against Blacks.\(^{128}\) Congress passed the Act to provide Blacks living in the South with a judicial procedure for enforcing constitutional rights and statutory law, and with a judicial remedy when such rights were violated.\(^{129}\) Many members of Congress perceived a systematic bias on the part of state legislatures and courts against Blacks,\(^{130}\) and thus thought that the federal remedy was necessary. This perception was grounded on the states' inaction in the face of Klan attacks.\(^{131}\)

Thus, immediate access to federal courts was justified as a supplemental remedy when the claimants' class was systematically underrepresented in the state legislature and there was significant evidence of bias in the operation of state institutions. This reading of the Act's purpose preserves the application of the *Patsy* no-exhaustion rule for groups such as racial and ethnic minorities, women, prisoners, and victims of police brutality, who are systematically underrepresented in state legislatures and administrative and judicial institutions. It also provides a principled distinction between these groups and others—that normally are not part of an underrepresented minority. No comparable systematic bias against property owners pervades state legislatures and judicial institutions.\(^{132}\) On this basis, the Court


\(^{129}\) See Witt, supra note 128, at 27.


\(^{131}\) Id. at 1154.

\(^{132}\) See generally M. HORWITZ, THE TRANSFORMATION OF AMERICAN LAW, 1780-1860 (1977) for a detailed study of the relationship between legal institutions and the rise of American capitalism. Horwitz argues, in part, that historically these institutions have systematically favored property rights.
could justify a distinction between the rule of exhaustion in *Williamson*
and the rule of no-exhaustion in *Patsy.*

The practical implications of the *Williamson* ripeness holding are quite broad. In states that recognize a cause of action for damages from inverse condemnation, a plaintiff seeking to challenge a regulatory taking must pursue her claim in state court before she can bring a fifth amendment cause of action. If the plaintiff pleads both state and federal causes of action, under *Williamson* a state court may be obliged to dismiss the federal taking claim. Only if the plaintiff loses on the state law claim or if the state awards inadequate compensation can the plaintiff then proceed to federal court. Once in federal court, however, a plaintiff who lost in state court may be confronted with a defense based on issue preclusion. As a consequence, the Court's holding in *Williamson* may radically restrict the access of taking claimants to section 1983 in states that provide inverse condemnation damages.

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133. The facts of *Parratt* present a closer case because the person injured was part of an underrepresented minority, but the injury was to his property. The dollar amount of his loss was misleading: it is difficult to value his injury because his imprisoned status may have increased the detrimental effect of state negligence.


135. Consider the following example. Assume that the plaintiff, *P*, sues in Tennessee state court alleging a regulatory taking under state and federal law and claiming damages under state law and section 1983. Because Tennessee courts recognize a cause of action for damages from inverse condemnation, *P* must go to state court. If she went to federal court, the federal claim would be dismissed under *Williamson* as not ripe for failure to pursue the state compensation remedy; the state claim, assuming no diversity, would be dismissed for lack of pendent jurisdiction.

The defendant, *D*, could then move to dismiss the federal claim in state court under *Williamson*, and it should prevail because the federal claim would not be ripe. *P*'s appeal of the dismissal to the United States Supreme Court would fail if the Court followed *Williamson*.

*P* would then litigate the state claim in state court. If *P* won, the suit would be over unless the damages did not amount to just compensation. In that case, *P* would go to federal court and litigate for just compensation—the difference between federal and state damages.

If *P* lost at all levels of the state court, there would be no federal appellate jurisdiction because there would be no federal question. *P* would then proceed to federal district court and refile a suit under the fifth amendment and section 1983. Under *Williamson*, the federal injury would just be completed. Thus, the federal claim would not be precluded. Issues of fact, however, may have been precluded. If the state's taking test were similar to the federal test, the issues of fact could not be relitigated in federal court. Preclusion would arguably be compelled by (1) the full faith and credit clause of the Constitution, (2) a federal statute (42 U.S.C. § 1738 (1982)) that provides that federal courts must accord the same full faith and credit to a judgment from state court as that accorded by the courts in the state where the judgment was rendered, and (3) recent Supreme Court cases holding that section 1738 preclusion applies in suits brought under section 1983. See Migra v. Warren School Dist. Bd. of Educ., 465 U.S. 75, 82-83 (1984); Allen v. McCurry, 449 U.S. 90, 96 (1983). Because the issues of fact were decided against *P* in state court, *P* would lose on issue preclusion and the complaint would probably be dismissed.
CONCLUSION

The Court's decision in *Williamson* is significant because it extends the rule requiring that a claimant seek a variance and exhaust available state compensation procedures from the context of suits against the federal government under the United States Constitution to the context of suits against a local government under section 1983. In so doing, the Court follows a line of fifth amendment cases indicating its preference for avoiding constitutional questions in cases the Court views as not ripe for review.136

Because the Court characterizes its analysis in taking cases as "essentially ad-hoc, factual inquiry,"137 the variance rule is consistent with the Court's requirement that plaintiffs completely develop the facts before seeking judicial assessment of the effect of the challenged regulation. The rule requiring exhaustion of a state compensation remedy may be an appropriate treatment of fifth amendment claims, but it conflicts with prior doctrine regarding exhaustion of state remedies in cases brought under section 1983. A systematic explication of Congress's purposes in enacting the section 1983 remedy and an analysis distinguishing its application to fifth amendment injuries due to land use regulation would provide a better basis for formulating consistent and sensible exhaustion rules.

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