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A. **TAKINGS**: Palazzolo v. Rhode Island, 121 S.Ct. 2448 (June 28, 2001)

Facts: In 1959, petitioner and his fellow corporate associates purchased a waterfront parcel of land in Rhode Island that was primarily a salt marsh plagued by tidal flooding. Over a period of many years, the corporation filed several petitions seeking to develop the land with various government agencies and was consistently denied. In 1971, Rhode Island promulgated regulations designating salt marshes, such as petitioner's, as protected coastal wetlands. In 1978, petitioner became the corporation's sole shareholder and received title for the land. In the 1980's, he applied to the state to fill in his marshland and was rejected based on the restrictions of the 1971 regulations. Petitioner then sued under *Lucas v. South Carolina Coastal Council* for compensation of $3.15 million, which was an appraiser's estimate of the value of a 74-lot subdivision.[1]

Palazzolo argued that his payment of taxes on land that he was denied use and value of constituted a taking under the 5th Amendment. He argued that if Rhode Island wanted his property in order to preserve the marshes, than it should have condemned the acreage and paid him for it. Rhode Island argued that Palazzalo knew the condition of his land upon original purchase and later transfer of title and did not have a 5th Amendment right to compensation.

Issue: (1) Whether petitioner's takings claim was ripe; (2) Whether petitioner had a right to challenge regulations predating 1978, the time at which he succeeded to legal ownership of the property; and (3) Whether petitioner's claim of being deprived of all economically beneficial use (needed for a *Lucas* argument) was contradicted by undisputed evidence that an upland parcel of his property was worth $200,000.

Holding: The Court ruled 5-4: J. Kennedy wrote the opinion of the Court in which C.J. Rehnquist, J. O'Connor, J. Scalia, and J. Thomas joined. J. Ginsberg, J. Souter, and J. Breyer dissented. J. Stevens joined the ripeness claim and dissented on (2), the notice claim. The Court reversed the first two claims and remanded the third for consideration under *Penn Central Transp. Co. v. New York City*. With regard to the first issue, the Court found that the claim was ripe. It reasoned that takings claims that challenge applications of land-use regulations are not ripe unless the agency charged with implementing the regulations has reached a final decision regarding their application to the property at issue. In this case, the state agency made two final decisions rejecting petitioner's applications for development in the 1980's. On this point, J. Ginsberg pointed out that Palazzolo should not be allowed to engage in a "bait-and-switch ploy." She argued that the claim was not ripe since he never applied for permission to build the residential subdivision upon which his compensatory claim was based.

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[1] *Lucas v. SC*, 50 U.S. 1003 (1992).

Secondly, the Court allowed "post-enactment purchasers" to challenge a regulation under the Takings Clause because "[t]he state may not put so potent a Hobbesian stick into the Lockean bundle." J. Kennedy stated that although a landowner's right to improve his property is subject to the "reasonable exercise of state authority," the Takings Clause, in some circumstances, "allows a landowner to assert that a particular exercise of the States regulatory power is so unreasonable or onerous as to compel compensation." Mainly, the Court relied upon *Penn Central Transp. Co. v. New York City*, 438 U.S. 104 (1978) in finding that Palazzolo's claim was not barred by the fact that the title was acquired after the effective date of the state-imposed restriction.

J. Kennedy spent much of the decision making a "slippery-slope argument" regarding the post-enactment transfer of title. He stated that if the plaintiff in this case is not compensated, States' obligations to "defend any action restricting land use, no matter how extreme or unreasonable," would be removed. "A State would be allowed, in effect, to put an expiration date on the Takings Clause." J. Kennedy also stated that if the plaintiff did not prevail in the case, the result would be a "critical alteration to the nature of property, as the newly regulated landowner is stripped of his ability to transfer the interest which was possessed prior to the regulation."

In her concurrence, J. O'Connor noted that when assessing a property owner's reasonable investment-backed expectations, the state of regulatory affairs at the time the property was acquired, is a factor to be considered but not a dispositive one. J. Scalia, noting that he disagreed with J. O'Connor's analysis, explained that the existence of a restriction on property when it is acquired "should have no bearing upon the determination of whether the restriction is so substantial as to constitute a taking."

Implications: Both sides in the case claimed a victory – and some commentators have said that, ultimately, the decision will not significantly impact takings law. Glenn Sugamelli of the NWF said that the Court did not alter the manner in which it traditionally evaluates takings cases. Although the notice decision was cut back upon slightly, all of the same factors will continue to apply. It may be more expensive, he said, for state and local regulators to resist takings claims, but environmental protection and public health goals will still be considered in determining whether investment-backed expectations are reasonable. John Echeverria, of the Environmental Policy Project at Georgetown Univ. Law Center, commented that the Court had essentially reaffirmed traditional rules for resolving takings claims, but that the Court seems to be moving to a more fact-based analysis of particular cases, giving it more flexibility in making its decisions. Because of this, the outcome of a takings case becomes far more difficult to predict.

B. **ENVIRONMENTAL JUSTICE**: Alexander v. Sandoval, 532 U.S. 275 (April 24, 2001)

Facts: Martha Sandoval, a driver's license applicant in Alabama, brought an action under Title VI of the Civil Rights Act of 1964 alleging that the Alabama Department of Public Safety's official policy of administering its driver's license examination solely in English resulted in a discriminatory effect and was protected by Title VI.

Issue: Whether there exists a private right of action to enforce disparate impact regulations promulgated under Title VI of the Civil Rights Act of 1964.

Holding: Ruling 5-4, the Court held that a private right of action under Section 602 of Title VI does not exist. J. Scalia, writing for the majority, noted that although the Court often addressed Title VI claims, none of its prior decisions has held that a private right of action exists to enforce disparate impact regulations. He stated that the past rulings only established that private individuals can sue to enforce Section 601, which deals with intentional discrimination. J. Stevens, in dissent, disagreed with J. Scalia's interpretation of past cases and whether a private right of action was recognized by the Court. He focused on three main cases, *Lau v. Nichols,*[2] *Cannon v. University of Chicago,*[3] and *Guardians Assn. v. Civil Serv. Comm'n of New York City.*[4] He stated that the Court made 3 distinct errors: (1) it provided a "muddled account of both the reasoning and breadth of our prior decisions endorsing a private right of action under Title VI, thereby obscuring the conflict between those opinions and today's decision"; (2) "offers a flawed and unconvincing analysis of the relationship between Sections 601 and 602 . . . ignoring more plausible and persuasive explanations detailed in our prior opinions"; (3) "badly misconstrues *Cannon.*"

Implications:

Fourteenth Amendment Challenges

Constitutional challenges under the Fourteenth Amendment[5] have not been successful for plaintiffs who assert environmental discrimination. Applying the highest standard of strict scrutiny to race-based classifications, the Supreme Court has established that a discriminatory purpose or intent must be proven when examining facially-neutral statutes and agency policies.[6] Although the Court in *Washington v. Davis* acknowledged that disparate impact can be used as a factor in determining discriminatory intent, it held that a finding of disparate impact alone was not sufficient to prove a violation of the equal protection clause.[7]

In *Village of Arlington Heights v. Metropolitan Housing Development Corp.*,[8] the Court identified five factors which would determine whether an action was motivated by intentional discrimination.[9] Additionally, the Court allowed the government to rebut evidence of purposeful discrimination by showing that "the same decision would have resulted even had the impermissible purpose not been considered."[10]

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[2] *Lau v. Nichols*, 414 U.S. 563 (1974).
[3] *Cannon v. Univ. Chic.*, 441 U.S. 677 (1979).
[4] *Guardians Assn. v Civil Serv. Comm'n of NYC*, 463 U.S. 582 (1983).
[5] *See* U.S. CONST. amend. XIV, § 1 (stating "No state shall . . . deny to any person within its jurisdiction the equal protection of the laws").
[6] *See Washington v. Davis*, 426 U.S. 229, 242 (1977) (*citing McLaughlin v. Florida*, 379 U.S. 184, 190-91 (1964)).
[7] *See id.* (holding that "absent compelling justification," a statute will not be found to be invalid if it is facially neutral and yet in practice "benefits or burdens one race more than another"); *see also Personnel Administrator of Mass. v. Feeney*, 422 U.S. 256, 272 (1979) (stating that if facially-neutral laws have "a disproportionate adverse effect upon a racial minority, it is unconstitutional . . . only if that impact can be traced to a discriminatory purpose.")
[8] 429 U.S. 252 (1977).
[9] *See id.* at 266-68 (including the following factors: (1) whether the effect of an action was disproportionate; (2) the historical background of the decision; (3) the sequence of events leading up to the decision; (4) any differences in standard procedure; and (5) the administrative history of the decision).
[10] *See id.* at 270-71 n.2.

Environmental Justice & Title VI

The protections of Title VI apply to the state and local recipients of about $900 billion of Federal assistance, which is distributed each year by over twenty-five Federal agencies.[11] Many agencies, such as the EPA, have promulgated regulations that deal specifically with Title VI.[12] Many of these regulations only require a showing of discriminatory effect or disparate impact upon minority communities.

Title VI complaints normally arise in the areas of public works and sewerage systems and in employment practices.[13] Because of the difficulty of showing discriminatory intent under the Fourteenth Amendment, Title VI was seen as a more viable alternative. Coined by environmental justice advocates, its use (before *Sandoval*) was cleverly characterized as "the 800-pound gorilla outside the door."[14]

The implications of *Sandoval* are many – lawsuits based on allegations of disparate impact were dealt a very "severe blow" according to some commentators. Section 602 of Title VI was looked upon as the best statutory vehicle by which to sue for environmental inequalities that were the result of state permitting decisions. As noted above, like equal protection claims under the Fourteenth Amendment, Section 601 requires a showing of intentional discrimination, which is extremely difficult. Section 602 of Title VI used to be a means by which a plaintiff could use statistical evidence to support claims of de facto discrimination. As an alternative to Title VI, commentators have suggested the use of other statutes such as Title VIII of the Civil Rights Act of 1968 and 42 U.S.C. § 1983. The recent amendments to Title VII of the Civil Rights Act of 1991 may be another potential vehicle.

The first successful Title VI case, *South Camden Citizens in Action v. New Jersey*, D.N.J., No. 01-702, had its April 19, 2001 ruling invalidated by the Supreme Court decision. In that case, the St. Lawrence Cement Company was enjoined from operating a slag-processing facility because it did not consider the disparate environmental impact to the residents of Waterfront South, where several other large industrial facilities already operate. (The neighborhood is predominantly low-income African-American and Hispanic, and its residents suffer from disproportionately high rates of asthma and other respiratory diseases.) On May 10, the U.S. District Court for the District of New Jersey ruled that, despite *Sandoval*, the plaintiffs in Camden, NJ could continue to assert their disparate impact claims against the New Jersey regulators who issued St. Lawrence's air pollution permit. The court found, as J. Stevens suggested in his dissent, that §1983 would be an appropriate vehicle for private individuals to enforce regulations federal agencies issued to implement Title VI.

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[11] *See* U.S. Environmental Protection Agency, *Draft Title VI Guidance for EPA Assistance Recipients Administering Environmental Permitting Programs and Draft Revised Guidance for Investigating Title VI Administrative Complaints Challenging Permits*, 65 Fed. Reg. 39650, 39668, *available at* 2000 WL 81659.

[12] *See generally* 28 C.F.R. § 42.104 (1998) (Department of Justice); 49 C.F.R. § 21.5 (1997) (Department of Transportation); 10 C.F.R. § 4.12 (1998) (Nuclear Regulatory Commission); 10 C.F.R. § 1040.13 (1998) (Department of Energy); 24 C.F.R. §1.4 (1998) (Department of Housing and Urban Development).

[13] *See* U.S. Environmental Protection Agency, Office of Enforcement and Compliance Assurance, *Interim Guidance for Investigating Title VI Administrative Complaints Challenging Permits* 1 (Feb. 1998), <http://www.es.epa.gov/oeca/oej/titlevi.html> (Visited Oct. 10, 2001) (explaining the guidance was created to update EPA's "procedural and policy framework" relating to environmental permitting).

[14] *See* Catherine Bridge, *Communities Seek 'Environmental Justice' With New Use of 1964 Law*, THE RECORDER, Nov. 24, 1999, at 1.