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THE SOVEREIGN'S INVISIBLE GRASP: *KATZIN V. UNITED STATES* AND THE CASE FOR NONPOSSESSORY PHYSICAL TAKINGS

*James Kemp**

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I. INTRODUCTION

SINCE *Pennsylvania Coal Co. v. Mahon*, the law has recognized that the government need not physically occupy property or exercise its power of eminent domain to take private property under the Fifth Amendment, instead recognizing that the government takes property if it "goes too far."[1] In *Katzin v. United States*, the plaintiffs argued that the government could go "too far" with its *non*-regulatory action, thus constituting a "non-possessory physical taking."[2] The Federal Circuit rejected this argument, holding that the Government did not take private property by misrepresenting to a purchaser of real estate that the seller did not own the property even though this representation rendered the property unsalable.[3] The Federal Circuit's holding is incorrect because it misinterprets Supreme Court and Federal Circuit precedent, fails to consider the purpose of the Takings Clause, and is counter to the underlying reasoning in *Pennsylvania Coal*.

II. FACTUAL BACKGROUND

Plaintiffs Dr. and Ms. Katzin owned a 50% interest in an oceanfront parcel on the island of Culebra.[4] The remaining 50% interest was owned

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1. Pa. Coal Co. v. Mahon, 260 U.S. 393, 415 (1922).
2. Katzin v. United States, 908 F.3d 1350, 1361 (Fed. Cir. 2018).
3. *Id.*
4. *Id.* at 1353–54.

by plaintiff Winters.[5] In 1903, the plaintiffs' predecessor in interest signed a deed of sale which transferred a 2.25 acre tract to the U.S. Navy for use as a gun mount.[6] The parties also entered a contemporaneous "Agreement of Sale."[7] While the deed describes the gun mount site as being outside of the parcel which the plaintiffs owned, the Agreement of Sale placed the gun mount site somewhere within the plaintiffs' parcel.[8] Further complicating matters, some historical surveys of the plaintiffs' land included a 10.01 acre peninsula near the purported site of the gun mount within the parcel, while others omitted the peninsula entirely.[9]

In 2006, the plaintiffs entered into a contract to sell their parcel for $4 million.[10] While the property was under contract, the U.S. Fish and Wildlife Service (as successors in interest to the U.S. Navy) sent a fax to the purchaser asserting government ownership over the 2.25 acre gun mount site and the 10.01 acre peninsula.[11] As a result, the purchaser refused to close, and the plaintiffs have since been unable to sell the property.[12]

The Katzins brought a takings claim against the Government in the Court of Federal Claims pursuant to the Tucker Act.[13] After a nine day trial on the merits, the Court of Federal Claims held that (1) the plaintiffs were the true owners of the entire parcel, including the peninsula where the gun mount site was located;[14] and (2) the Government effected a non-possessory physical taking when it claimed ownership of the parcel, depriving the plaintiffs of their right to dispose of the property.[15] After the Government's appeal, a divided panel on the Federal Circuit reversed the Court of Federal Claims and rendered judgment for the Government.[16]

III. THE FEDERAL CIRCUIT'S OPINION

The Federal Circuit analyzed the case as only presenting a taking if the Government's action fit into one of three buckets: (1) physical, (2) regulatory, or (3) per se regulatory takings; ultimately, it concluded that the Government's action did not amount to a taking because it could not fit the facts into one of the buckets.[17] Though the facts of the case could have been analyzed as a taking under *Penn Central Transportation Co. v. City of New York*, the court declined to do so because of a deficiency in the plaintiffs' pleadings; it instead considered only whether the case was a

5. *Id.* at 1353.
6. *Id.*
7. *Id.*
8. *Id.*
9. Katzin v. United States, 127 Fed. Cl. 440, 451–56 (2016).
10. *Katzin*, 908 F.3d at 1356.
11. *Id.* at 1357.
12. *Id.*
13. *See* Tucker Act, 28 U.S.C. § 1491 (2020).
14. *Katzin*, 127 Fed. Cl. at 478–79.
15. *Id.* at 482.
16. *Katzin*, 908 F.3d at 1363.
17. *Id.* at 1361.

physical or per se regulatory taking.[18] The opinion's formalistic insistence on categorization created uncertainty in the law for cases where property owners are deprived of sticks in their bundle of rights but cannot easily fit into a category.

The majority first analyzed the Government's action through the prism of per se regulatory takings.[19] As such, the majority analyzed the facts of the case and determined that neither a *Lucas v. South Carolina Coastal Council* nor a *Loretto v. Teleprompter Manhattan CATV Corp*. per se regulatory taking occurred because the plaintiffs were not totally deprived of the property's use and did not suffer a permanent physical invasion.[20] The court then analyzed the plaintiffs' physical takings claim, citing only two physical takings cases.[21] One of the cases, *Washoe County v. United States*, was a water rights case arising out of the denial of government access to build a pipeline and bore no factual similarity to *Katzin*.[22] As such, it warrants no analysis in this article (or apparently in the court's opinion).[23]

The only factually analogous case cited by the court, *Yuba Goldfields, Inc. v. United States*, was reinterpreted as a *regulatory* takings case.[24] The majority's analysis of *Yuba Goldfields* is crucial since the Court of Federal Claims relied heavily on the case and the case is factually similar to *Katzin*.[25] In that case, the Government sent a letter to a mining company claiming the company had no rights to the minerals it was mining.[26] That same letter claimed that the Government held title to the mineral interests, forbade the company from extracting the minerals, and threatened enforcement if the company continued mining.[27] The *Katzin* court first distinguished *Yuba Goldfields* by pointing out that the *Yuba Goldfields* court relied on *Penn Central* to reach the result, making it a regulatory takings case.[28] Second, the majority noted that the letter in *Yuba Gold-*

18. *Id.*; *see also* Penn Cent. Transp. Co. v. City of New York, 438 U.S. 104, 124 (1978). Since the court did not analyze the Government's action as a *Penn Central* regulatory taking, this article will not consider if a taking occurred under that framework.

19. *Katzin*, 908 F.3d at 1360–63. Although plaintiffs pled a per se regulatory taking, that was not the basis of the Court of Federal Claims's decision, and the trial court opinion devoted no analysis to that claim. *Katzin*, 127 Fed. Cl. at 479–80.

20. *Katzin*, 908 F.3d at 1362; *see also* Lucas v. S.C. Coastal Council, 505 U.S. 1003, 1014 (1992); Loretto v. Teleprompter Manhattan CATV Corp., 458 U.S. 419, 435, 437 (1982).

21. *Katzin*, 908 F.3d at 1361–62 (citing Washoe County v. United States, 319 F.3d 1320, 1326 (Fed. Cir. 2003)); *see also* Kirby Forest Indus., Inc. v. United States, 467 U.S. 1, 15 (1984).

22. *See Washoe County*, 319 F.3d at 1322–23.

23. *See Katzin*, 908 F.3d at 1361.

24. *See id.* at 1362–63 (discussing generally Yuba Goldfields, Inc. v. United States, 723 F.2d 884 (Fed. Cir. 1983)).

25. *See id.*

26. *Yuba Goldfields*, 723 F.2d at 885.

27. *Id.* at 885–86.

28. *Katzin*, 908 F.3d at 1363. However, a close reading of *Yuba Goldfields* reveals that the court only cited *Penn Central* for the proposition that physical restraint is unnecessary for a taking and nowhere in its opinion applied the *Penn Central* factors. *Yuba Goldfields*, 723 F.2d at 887–88.

fields contained threats of coercion, while the fax in *Katzin* contained no such threats.[29] Instead, the fax "[a]t most . . . disseminated information about the government's claims, and the market incorporated that information into its valuation of the property."[30]

The court then applied *Kirby Forest Industries, Inc. v. United States* (the second physical takings case) and *Dimare Fresh, Inc. v. United States* (a regulatory case) for the rule that government sharing of information which lowers the property value is not a taking, absent a deprivation of the legal right of disposition.[31] Because the court construed the fax as mere sharing of information which the market incorporated, the court found no physical taking.[32]

Judge Newman dissented because she would have found a taking under the facts of the case (whether a regulatory or physical taking is unclear).[33] As an initial matter, her dissent noted that the relevant inquiry in a takings case is "whether the governmental action at issue constituted a taking of [a] 'stick' [in the bundle of property rights]."[34] Newman identified the primary "stick" at risk in *Katzin* as the right of disposition.[35] She then argued the degree of interference with that stick is substantial because the Government action removed "all economic value from the property."[36] Her dissent also indicated that the uncontroverted evidence demonstrated that the plaintiffs were unable to dispose of their property because the Government clouded the plaintiffs' title.[37]

Having thus identified the "stick" at issue and described the degree of interference with that stick, Newman relied on *Kirby Forest*, in which the Supreme Court stated in dicta that "a radical curtailment of a landowner's freedom to make use of or ability to derive income from his land may give rise to a taking . . . even if the Government has not physically intruded upon the premises . . . ."[38] Newman's dissent also noted that the Supreme Court specifically reserved the question of "whether abrogation of an owner's right to sell real property, combined with a sufficiently sub-

29. *Katzin*, 908 F.3d at 1363.

30. *Id.* at 1362.

31. *See id.* (citing Kirby Forest Indus., Inc. v. United States, 467 U.S. 1, 15 (1984); Dimare Fresh, Inc. v. United States, 808 F.3d 1301, 1310 (Fed. Cir. 2015)).

32. *Katzin*, 908 F.3d at 1363.

33. *Id.* at 1364, 1369 (Newman, J., dissenting). Much of Judge Newman's analysis focuses on the majority's refusal to consider the question of title to the disputed parcel. The question of whether a court can decide if property has been taken without first determining title to the property is beyond the scope of this article. However, Newman's position that title must be determined as a predicate to a takings analysis finds support in case law. *See* Huntleigh USA Corp. v. United States, 525 F.3d 1370, 1377 (Fed. Cir. 2008) ("[A]s a threshold matter, the court must determine whether the claimant has established a property interest for purposes of the Fifth Amendment.").

34. *Katzin*, 908 F.3d at 1364 (quoting Boise Cascade Corp. v. United States, 296 F.3d 1339, 1343 (Fed. Cir. 2002)).

35. *Id.* at 1367.

36. *Id.*

37. *Id.*

38. *Id.* at 1368 (quoting Kirby Forest Indus., Inc. v. United States, 467 U.S. 1, 14 (1984)).

stantial diminution of its utility to the owner, would give rise to a taking," but recognized that interference with the right of disposal can give rise to a taking.[39] Newman then leapt to the conclusion that the Government had taken the property because it totally deprived the plaintiffs of the ability to sell the property and substantially impaired the property's value.[40]

Though Newman reached a more palatable conclusion, the way she came to that conclusion is unsatisfying. Her opinion cited dicta in *Kirby Forest*, which left open the question before the court, but does not explain why the particular facts in *Katzin* should amount to a taking.[41] To do so, she would need to explain why the Government's action was a burden "which, in all fairness and justice, should be borne by the public as a whole."[42]

IV. THE COURT'S PITFALLS AND HOW TO AVOID THEM

In *Katzin*, the court made three major errors in its legal analysis. First, in its effort to untangle the Gordian knot of modern takings jurisprudence,[43] it misinterpreted relevant precedent—adding another dangerous kink to the mess. Second, the court never once considered whether its conclusion was consistent with the purpose of the Takings Clause. Third, the court ignored the underlying rationale of *Pennsylvania Coal*, that the government can take property without physically possessing it.[44] In the future, as other circuits address nonpossessory physical takings, they can avoid the pitfalls of *Katzin* by clearly identifying the property right at issue, determining the impact of the government's actions on that right, and considering whether that burden should in fairness be borne by the owner alone or by the community as a whole. This approach cuts to the heart of the issue without relying on formalistic categories of takings.

The first major error made by the majority was to interpret *Tahoe-Sierra Preservation Council, Inc. v. Tahoe Regional Planning Agency* and *Kirby Forest* too broadly.[45] The majority interpreted *Tahoe-Sierra* to impose a "bright line" between regulatory and physical takings[46] and that "precedent from one form of taking cannot support the other."[47] However, *Tahoe-Sierra* stands only for the narrower principal that cases from

39. *Id.* (quoting *Kirby Forest*, 467 U.S. at 15 & n.25).

40. *Id.* at 1369.

41. *See id.* at 1368–69.

42. Armstrong v. United States, 364 U.S. 40, 49 (1960).

43. For a good summary of takings jurisprudence, see generally D.O. Malagrinò, *Among Justice John Paul Stevens's Landmark Legacies:* Tahoe-Sierra Preservation Council, Inc. v. Tahoe Regional Planning Agency, 53 CREIGHTON L. REV. 77 (2019).

44. *See* Pa. Coal Co. v. Mahon, 260 U.S. 393, 414–15 (1922).

45. *See Katzin*, 908 F.3d at 1361, 1362 (majority opinion) (citing Tahoe-Sierra Pres. Council, Inc. v. Tahoe Reg'l Planning Agency, 535 U.S. 302, 323–24 (2002); Kirby Forest Indus., Inc. v. United States, 467 U.S. 1, 15 (1984)).

46. *Id.* at 1361.

47. *Id.* at 1363 (citing *Tahoe-Sierra*, 535 U.S. at 323).

other categories are not "*controlling* precedents."[48] If a physical takings case is factually analogous to a regulatory takings case, *Tahoe-Sierra* does not bar the court from examining the case and deciding whether the reasoning is convincing.[49]

The majority's misreading of *Tahoe-Sierra* forced it to ignore the factually analogous *Yuba Goldfields* case. The *Yuba Goldfields* court, like the *Katzin* court, was faced with a fact pattern that does not easily fit into either the physical or regulatory categories.[50] Instead of heavily relying on categorization, it viewed the Government's action as a "[n]on-possessional [t]aking" and inquired as to the degree the Government's action deprived the mining company of its property rights.[51] However, because the *Katzin* majority read *Tahoe-Sierra* to create a bright line between the two categories, the majority reinterpreted *Yuba Goldfields* as a regulatory takings case.[52]

The majority also misapplied *Kirby Forest* because it failed to recognize that case's meaningful factual distinctions and refused to consider whether the facts of *Katzin* fit into the exception created by the Supreme Court.[53] At issue in *Kirby Forest* was whether a taking occurred in a straight-condemnation proceeding when a notice of lis pendens was filed or on the date of judicial condemnation.[54] As the Supreme Court explained, the notice of lis pendens only had the effect of "notifying the public of the institution of the condemnation proceeding."[55] But the fax at issue in *Katzin* was a bare assertion of title.[56] With the notice of lis pendens, there is an identifiable future event which will vest title in the government, while the fax in *Katzin* constituted an immediate claim of right to the property. Further, as the dissent points out, *Kirby Forest* specifically declined to extend its holding to a situation where the owner is unable to sell her land and the value thereof is substantially diminished.[57]

The majority committed its second major error by ignoring the purpose of the Takings Clause. In *Armstrong v. United States*, Justice Black describes the purpose of the clause: "The Fifth Amendment's guarantee that private property shall not be taken for a public use without just compensation was designed to bar Government from forcing some people alone to bear public burdens which, in all fairness and justice, should be

48. *Tahoe-Sierra*, 535 U.S. at 323 (emphasis added).

49. This should particularly be the case with nonpossessory physical takings because, like most regulatory takings, the government does not actually occupy the property.

50. *See* Yuba Goldfields, Inc. v. United States, 723 F.2d 884, 885–86 (Fed. Cir. 1983).

51. *Id.* at 887–88.

52. *Katzin*, 908 F.3d at 1363.

53. *See id.* at 1362.

54. Kirby Forest Indus., Inc. v. United States, 467 U.S. 1, 9 (1984).

55. *Id.* at 7; *see also Lis Pendens*, BLACK'S LAW DICTIONARY (11th ed. 2019) ("A notice, recorded in the chain of title to real property, required or permitted in some jurisdictions to warn all persons that certain property is the subject matter of litigation, and that any interests acquired during the pendency of the suit are subject to its outcome.").

56. *Katzin*, 908 F.3d at 1364–65 (Newman, J., dissenting).

57. *Id.* at 1368 (citing *Kirby Forest*, 467 U.S. at 15 n.25).

borne by the public as a whole."[58] This purpose should not vary between regulatory and physical takings. The majority failed to consider if the burden of the Government's claim to the plaintiffs' land should be borne by the public or by the plaintiffs alone.

In *Katzin*, the burden can be articulated as follows: the Government formed a mistaken belief that it held title to certain lands on the island of Culebra;[59] this mistaken belief was formed based on its own negligent record-keeping;[60] and this mistaken belief was communicated to the public by a government official who did not properly verify the Government's claim.[61] In *Katzin*, the court implicitly found it just and efficient for the plaintiffs to bear this burden.[62] But placing the burden on the public is fair and socially efficient. Charging the public for the government's maladministration and negligence incentivizes the public to enact reforms and demand higher standards of public officials. On the other hand, forcing the plaintiffs to bear the burden offers no hope of remedy for future conduct.

But to determine whether "in all fairness and justice" the public or the individual should bear the burden requires more than an examination of efficient administration.[63] Fundamentally, such an analysis must obligate the courts to consider the equities of the case before it. Here, the inequity of the Government's victory is unconscionable. At best, the Government made negligent misrepresentations and tortiously interfered with a contract; at worst, the Government committed fraud and forgery.[64] The plaintiffs suffered ruinous injury, and that injury was a direct and proximate result of the Government's infringement on their property rights. While the Fifth Amendment does not forbid the government from depriving individuals of their private property, it does place "a condition on the exercise of that power."[65] That condition is the payment of "just compensation."[66] The Federal Circuit allowed the Government to rob the plaintiffs of their right of disposition, cloud their title, and devastate the value of their property without the payment of "just compensation" be-

58. Armstrong v. United States, 364 U.S. 40, 49 (1960).

59. *Katzin*, 908 F.3d at 1357 (majority opinion).

60. Katzin v. United States, 127 Fed. Cl. 440, 451–56 (2016).

61. *Katzin*, 908 F.3d at 1365 (Newman, J., dissenting) (pointing out that the official who sent the fax could not find paperwork transferring title to the Fish and Wildlife Service).

62. *See id.* at 1357 (majority opinion).

63. *Armstrong*, 364 U.S. at 49.

64. Though the appellate decision declines to go into detail as to how the Government acquired title to the gun mount site, the Court of Federal Claims found that the grantors of the gun mount site were a blind woman and an illiterate man who spoke no English. *Katzin*, 127 Fed. Cl. at 449. The trial court also found no evidence that a translator explained the contents of the Agreement of Sale to the grantor. *Id.* at 450. Although the grantor's signature appeared on the deed, the court found insufficient evidence that the grantor actually signed the Agreement of Sale placing the gun mount site inside the parcel at issue in the case, raising the specter of forgery. *Id.* at 479.

65. Lingle v. Chevron U.S.A. Inc., 544 U.S. 528, 536 (2005).

66. U.S. CONST. amend. V.

cause the majority insisted on formalistic takings categories which were ill-suited for analyzing the facts of *Katzin*.

The majority's third major error was its dogmatic reliance on categorization that ignored the fundamental rationale of *Pennsylvania Coal*. That landmark decision marked the genesis of regulatory takings cases by refusing to focus on the mechanism of the taking and instead focusing on the effect of the government action.[67] It was by focusing on the effect of government action that the Court found that regulation could go "too far."[68] The effect of the Government's action in *Katzin* was to vastly reduce the value of the property, place a cloud on the plaintiffs' title, and abrogate the plaintiffs' right to sell the property.[69] Focusing on if the taking was physical or per se regulatory prevented the court from reaching results consistent with the Takings Clause's purpose, especially where the government action fell in between physical occupation and regulation.

For future litigants, *Katzin* injects uncertainty into this area of takings law. Though the opinion purports to uphold *Yuba Goldfields*, it radically reinterprets the case. The court interprets *Yuba Goldfields* as a regulatory takings case, but that case did not consider any of the *Penn Central* factors.[70] This makes it an open question whether the case is a traditional regulatory takings case or if the Federal Circuit now recognizes a third category of per se regulatory takings on the facts of *Yuba Goldfields*.

Further, the court's dogmatic insistence on categorization forces litigants to fight over characterization of government action, rather than the impact of that action. As the law stands, litigants are out of luck if they have fact patterns that do not easily fit into either category of takings because the government can cite to *Katzin* that government actions are never takings if they do not fit into narrow categories.[71]

Courts can cleave the Gordian knot. The first step to solving the nonpossessory physical taking problem is clearly identifying the property right at issue. Clarifying the stick in the bundle of property rights is necessary to assess the importance and scope of the right in question. Second, courts should determine the impact of the government's actions on that right. As *Pennsylvania Coal* states, government action is a taking when it goes "too far."[72] Whether government action goes "too far" is dependent on the impact of the action rather than if the action is regulatory or physical in character. Finally, courts should inquire whether that burden should, in fairness, be borne by the owner alone or by the community as a whole. This step requires analysis of both the efficiencies and equities of

67. Pa. Coal Co. v. Mahon, 260 U.S. 393, 414–15 (1922).

68. *Id.* at 415.

69. Katzin v. United States, 908 F.3d 1350, 1368 (Fed. Cir. 2018) (Newman, J., dissenting).

70. *See id.* at 1361 n.3 (majority opinion); Yuba Goldfields, Inc. v. United States, 723 F.2d 884, 887–88 (Fed. Cir. 1983).

71. *See* Mangal v. City of Pascagoula, No. 1:19CV232-LG-RHW, 2019 WL 3413850, at *3–5 (S.D. Miss. July 29, 2019).

72. *Pa. Coal*, 260 U.S. at 414–15.

allocating the burden. This approach cuts to the heart of the issue without relying on formalistic categories of takings.

The Federal Circuit's formalistic reliance on hermetically sealed categories of takings leads to an unjust result for the Katzins and Ms. Winters. By refusing to acknowledge that courts must consider fact patterns which are not so easily categorized, the Federal Circuit dooms property owners like the Katzins and Ms. Winters to live in limbo.[73] Considered through the lens of the purpose of the Takings Clause and prior case law, this cannot be the correct result.

73. The plaintiffs' petition for certiorari indicates that the Government continues to claim ownership of the parcel, blocking its sale, even though the Court of Federal Claims found the Government's claims invalid and the Federal Circuit did not review the findings of fact. *See* Petition for Writ of Certiorari at 8, *Katzin*, 908 F.3d 1350 (No. 19-258) (U.S. petition for cert. filed Aug. 23, 2019).